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Editor's Address:

The Law Policy Strategy Agency, Ministry of Law of the Republic of Indonesia
Jl. HR. Rasuna Said Kav. 4-5, 7th Floor, Kuningan, Jakarta Selatan
Telephone: (021) 2525015, Facsimile: (021) 2526438

Email:

ejournaldejure@gmail.com

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ADVERTORIAL

Thanks to Allah SWT, the De Jure Legal Research Journal published by the Legal Policy Strategy Agency of the Ministry of Law of the Republic of Indonesia in collaboration with the Indonesian Legal Research Association can be republished Volume 25 Number 3 November 2025.

The publication of the De Jure Legal Research Journal Volume 25 Number 3 November 2025 contains 11 (eleven) articles from various research institutions in Indonesia or academic community. To improve the legal and legislative system, significant improvements to government strategic policies are needed. In connection with this, the editor of the De Jure Research Journal Volume 25 Number 3 November 2025 raised articles including An Integrated Policy Model For Supervisory Punishment Under Indonesia's New Criminal Code; Conflict Between Public Transportation And Local Community Rights in The Sea; The Role of International Humanitarian Law in the Conflict with the West Papua Liberation Army; When Consent Becomes Contested : Comparative Reconstruction of Marital Rape in Indonesian Criminal Law And Islamic Law; Unsecured Loans: Regulatory Inconsistencies and The Path Towards Hybrid Guarantees; Deep Seabed Mining Dilemma: Stipulation Under ISA, the Precautionary Principle, and BBNJ Agreement Challenges; Power Dispersion as a Barrier to Autocratization: The Paradox of Indonesia's Compromised Democracy; The Government Policy as an Effort to Provide Protection for Foreign Refugees; Abandoning the Precautionary Principle in Environmental Licensing: a Comparison of Indonesia with Three Other Countries and a New Evidentiary Mechanism; Illegally Obtained Evidence in Indonesia's Draft Criminal Procedure Code (RUU KUHAP): Exclusionary Rules and the Due Process of Law; Formulation of a Just Land Dispute Resolution Model: Derrida's Deconstruction Approach to the Former Dumai Concession Case. Through these writings, they can contribute ideas that can become reference material in fulfilling the sense of justice and legal protection in society.

We would like to express our thanks to the authors who have trusted the De Jure Legal Research Journal to publish their work. We would also like to express our thanks to peer reviewers who was willing to help, research and correct the author's writings in this publication.

Finally, we would like to express our gratitude to the Head of the Legal Policy Strategy Agency, Ministry of Law of the Republic of Indonesia, and the Association of Indonesian Legal Researchers who have agreed to publish this De Jure Legal Research Journal.

Editor:
Jakarta, November 2025

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Rohmat, Milda Istiqomah, Nurini Aprilianda

An Integrated Policy Model For Supervisory Punishment Under Indonesia's New Criminal Code

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, Page 151-170

The inclusion of supervisory sanctions in Indonesia's new Criminal Code signifies a shift toward non-custodial and rehabilitative forms of punishment, reflecting a broader transition from retributive to corrective and restorative justice. Despite their formal adoption, the regulatory frameworks necessary for their implementation remain underdeveloped. This study examines the normative and philosophical foundations of supervisory sanctions and proposes an integrated legal policy model for their effective application. Employing a normative juridical method supported by statutory, comparative, and conceptual approaches, the research is analyzed within a prescriptive framework. The findings indicate that these sanctions are intended to provide offenders with a second chance through structured oversight and individualized rehabilitation, thereby avoiding incarceration. This study offers a novel insight by presenting an integrated policy model for supervisory sanctions, an approach that has not previously been developed within Indonesia's legal system. The proposed model outlines mechanisms for enforcement, supervision duration, and reintegration programs. By addressing a critical gap in Indonesia's penal system, this research contributes original perspectives and a practical framework for the operationalization of community-based criminal sanctions.

Keywords: Supervisory Sentencing; Non-Custodial Punishment; Integrated Supervision Model Indonesian Penal Code (KUHP); Restorative Justice

Conflict Between Public Transportation And Local Community Rights in The Sea

Rizal Muchtasar, Heriyanti, Sahrina Safiuddin, La Ode Muhammad Taufiq Afoeli

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, Page 171-188

This study aims to analyze the conflict between public access rights and the rights of local communities on Cempedak Island in managing marine areas. The method used is socio-legal, through an analytical approach to national legal frameworks, doctrines, and case studies. The study results show that this conflict creates a dilemma between the interests of local communities and public access rights. The 1945 Constitution and related regulations provide a legal basis for public access rights, but local communities also have rights set out in policies and regulations. This paper critically presents a model of conflict resolution, regulatory, and resource processes that often ignore local community participation. Evaluations of previous Government policy procedures show a lack of consultation and involvement of local communities and public access in policy processes that can result in gaps and prolonged conflicts. This research emphasizes the need for a participatory-collaborative approach. Innovation is the gradual application of the need for community identification to implement comprehensive methods that integrate positive legal analysis with the social and local communities' cultural realities. Conflict techniques on Cempedak Island actively involve communities in decision-making to encourage sustainability, protection, community interests, and public access rights, ultimately creating new policies and rules.

Keywords: Conflict; Transportation; Community; Rights; Sea

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Muhammad Uchida Sudirman

The Role of International Humanitarian Law in the Conflict with the West Papua Liberation Army

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, Page 189-200

This research examines the application of International Humanitarian Law (IHL) in the conflict between the Indonesian National Armed Forces (Tentara Nasional Indonesia, or “TNI”) and the West Papua National Liberation Army (TPNPB). The main focus is to assess the legal status of TPNPB as a non-state armed actor and examine the extent to which the TNI’s authority in military operations has been in accordance with the principles of proportionality, distinction, and precaution. Using qualitative legal research and conceptual, statutory, and historical approaches, the findings indicate that the conflict in Papua has fulfilled the elements of a non-international armed conflict (NIAC), although it has not been officially recognized by the Indonesian government. In addition, the implementation of TNI’s authority in Military Operations Other Than War (OMSP) is considered to have the potential to violate IHL principles because of its impact on civilians. This research recommends a more consistent application of IHL to ensure the effective protection of civilians in domestic conflicts.

Keywords: Humanitarian; Law; TPNPB; NIAC; TNI.

Mimin Mintarsih, Lukman Mahdami, Ahyar Ari Gayo, Ratna Galuh Manika Trisista
When Consent Becomes Contested : Comparative Reconstruction of Marital Rape in Indonesian Criminal Law And Islamic Law

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, Page 201-218

Marital rape is an issue that generates contestation over the concept of consent within marital relations. In Indonesian criminal law, rape is generally understood as a crime that occurs outside marriage, whereas in Islamic law, sexual relations are viewed as part of mutual rights and obligations between husband and wife. This difference in paradigm creates conceptual tension regarding the boundaries between duty, rights, and consent within marriage. This study arises from a literature gap, as previous research has not comprehensively examined the interrelation between the concept of consent in Indonesian criminal law and the concept of *riḍā* in Islamic law. Existing studies tend to separate the two frameworks without exploring their potential normative and moral intersections as a foundation for legal development. The study aims to comparatively reconstruct the meaning of consent in the context of sexual coercion within marriage according to Indonesian criminal law and Islamic law. The research employs a normative juridical method with statutory, conceptual, and comparative approaches, analyzing the Old and New Criminal Codes, the Law on Sexual Violence Crimes, the Law on the Elimination of Domestic Violence, as well as *fiqh* principles and *maqāṣid al-syarī‘ah*. The findings reveal that both legal systems reject sexual coercion, yet differ in their normative foundations, moral objectives, and forms of legal recognition. A comparative reconstruction is therefore required through the reinterpretation of the concept of *riḍā* in Islamic law and the affirmation of equality principles within national criminal law, in order to strengthen the recognition of consent in marital relations. These findings demonstrate a substantive convergence between positive law and Islamic principles in upholding justice, consent, and individual dignity, while opening pathways for the development of a more responsive legal framework regarding marital rape in Indonesia.

Keywords: Consent; Marital Rape; Comparative Reconstruction; Criminal Law; Islamic Law.

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Leny Megawati, T. Subarsyah, Tuti Rastuti

Unsecured Loans: Regulatory Inconsistencies and The Path Towards Hybrid Guarantees

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, 219-232

This study was motivated by the discrepancy between the norm stating that People's Business Credit (KUR) with a ceiling of up to IDR100 million does not require additional collateral, and the operational policy that still requires collateral at a number of Bank BRI units. This discrepancy causes disharmony and inconsistency, which has the potential to lead to disputes and hinder access to financing for MSMEs. The approach used is socio-legal research that combines normative-legal and socio-empirical research techniques. Based on these findings, this study examines the implications of applying additional collateral in the People's Business Credit (KUR) program at Bank BRI, particularly for micro-entrepreneurs with limited assets, where consumer protection norms and fairness in banking relationships do not explicitly accommodate credit insurance as a valid and standardized alternative guarantee, resulting in excessive dependence on physical collateral such as land, buildings, or vehicles, which actually hinders access to credit for MSMEs with minimal asset structures and creates discriminatory risks and legal uncertainty in the financing distribution process, threatening the consistency of the principles of fairness and openness that form the legal basis for consumer-bank relationships.

Keywords: Collateral; KUR; UMKM.

Adrian Nugraha, Nashriana, Ridwan

Deep Seabed Mining Dilemma: Stipulation Under ISA, the Precautionary Principle, and BBNJ Agreement Challenges

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, 233-248

This article examines the role of the International Seabed Authority (ISA) in the governance of deep seabed mining, highlighting the legal and environmental implications arising from the adoption of the Biodiversity Beyond National Jurisdiction (BBNJ) Agreement in 2023. The research employs a normative juridical method through an extensive review of international legal instruments, doctrines, jurisprudence, and scholarly literature related to the United Nations Convention on the Law of the Sea (UNCLOS) 1982, the precautionary principle, and global environmental agreements. The analysis reveals that the ISA's mandate to manage seabed resources as the common heritage of mankind faces significant pressure due to growing scientific evidence of the ecological risks associated with deep-sea mining. Potential jurisdictional and normative conflicts also arise between the ISA and BBNJ regimes, particularly concerning marine protected areas, environmental impact assessments, and access to marine genetic resources. In the context of scientific uncertainty, mineral exploitation may violate the precautionary principle, erga omnes obligations, and the commitments of Sustainable Development Goal 14. Accordingly, this study recommends a moratorium on mining activities, the harmonization of ISA–BBNJ legal frameworks, and the strengthening of implementation of the precautionary principle to ensure the sustainability of deep-sea ecosystems.

Keywords: international seabed authority, deep seabed mining, BBNJ Agreement, precautionary principle, UNCLOS

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Muhammad Mutawalli Mukhlis, Muhammad Saleh Tajuddin, Wiranti

Power Dispersion as a Barrier to Autocratization: The Paradox of Indonesia's Compromised Democracy

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, 249-266

This article examines the persistence of Indonesia's democratic system as a constitutional state (*negara hukum*), where popular sovereignty operates within the limits of the 1945 Constitution (UUD 1945). Although recent tendencies, such as the expansion of executive authority, electoral narrowing, media consolidation, and suppression of dissent, have weakened democratic quality, these developments have occurred within Indonesia's distinctive constitutional framework, which combines democratic principles with Pancasila-based constitutional supremacy rather than liberal-constitutional doctrines. . Using a qualitative approach with descriptive-comparative analysis, this study draws on primary sources such as government policy documents and secondary materials, including academic journals and books, covering developments from 1999 to 2024. The analysis highlights two primary factors limiting autocratization: the redefinition of power distribution through the mechanisms of checks and balances and decentralization following the post-1998 constitutional reforms, and the continuous elite competition that prevents monopolization. Indonesian elites, while undermining democratic institutions to protect their privileges, remain committed to limited democracy as a framework for regulating elite rivalries. The constitutional design with term limits, separation of powers, and decentralization creates structural barriers against executive dominance. Furthermore, elite self-interest in maintaining political competition outweighs incentives for autocratic consolidation. Although civil society and public opinion contribute to resistance against backsliding, elite calculations are decisive. Thus, Indonesia's experience demonstrates that elite-driven democracies can endure gradual democratic decline without collapsing into authoritarianism, provided that competition remains institutionally guaranteed and power remains dispersed. This dynamic ensures a stable yet compromised democratic system, shaped more by pragmatic elite interests than by normative democratic commitments.

Keywords: autocratization; constitutional democracy; democratic backsliding; elite competition; power dispersal

Zainuddin, Ismail Koto

The Government Policy as an Effort to Provide Protection for Foreign Refugees

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, 267-276

As part of its responsibility to address refugee-related issues, Indonesia enacted Presidential Regulation No. 125 of 2016 concerning the Handling of Refugees from Abroad. This study is more in-depth than previous studies because it focuses on more specific legal regulations at the presidential regulation level. This provides the legal basis for the protection of foreign refugees in Indonesia and serves as the official guideline for managing asylum seekers and international refugees. This regulation is more operational, for example, shelter mechanisms such as shelter, accommodation and health and education, as well as basic services, and coordination with UNHCR/IOM, but does not provide formal legal status for refugees. One implementation is the relocation of asylum seekers from Immigration Detention Centers (Rudenim) to temporary shelters, thus enabling the provision of basic needs, which is facilitated and funded by the International Organization for Migration (IOM). The main differences between the international obligations of ratifying conventions and domestic authority through Presidential Regulations lie in their source, binding nature, and implications for the legal status and rights of refugees specifically. This regulation is seen as an alternative to ratifying the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, which Indonesia has not yet ratified. Presidential Regulation Number 125 of 2016 outlines several important provisions, including key definitions, detention mechanisms, shelter procedures, and protection measures for asylum seekers and refugees. This regulation consists of 45 articles detailing the coordination mechanism between government agencies in managing refugees. Based on Article 2 paragraph (1), the handling of asylum seekers and refugees is carried out through cooperation between the central government and the United Nations (UN).

Keywords: Policy; Government; Refugees; Foreign Nationals.

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Ajie Ramdan

Abandoning the Precautionary Principle in Environmental Licensing: a Comparison of Indonesia with Three Other Countries and a New Evidentiary Mechanism

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, 277-290

Law Number 6 of 2023 concerning Job Creation revises Law Number 32 of 2009 by decriminalising Article 102 and merging it with Article 109. They have been changed from conduct offences to result-based offences. This study uses a normative legal research method combined with a comparative study using a statute research approach, which is used to analyse, explore, and review changes to Article 109. The findings of this study explain that because of revision of those articles, criminal sanctions cannot be imposed if someone or entities do not have environmental permits until environmental damage has already occurred. A study of the UK, the Netherlands, and Sweden shows those countries apply the precautionary principle by penalising the actions of entities that do not have environmental permits as conduct criminal offences. A comparison will be made between this and the environmental laws of Indonesia. Currently, to enforce Article 109 of Law Number 32 of 2009, prosecutors will need to employ the same proof method as that used for criminal offences as stipulated in Articles 98, 99, and 100. The novelty of this research is that the change from conduct offences to result-based offences have the potential to damage Indonesia's environment. This will be scientifically proven in this article. The decriminalisation of Article 102 and the amendment of Article 109 of Law Number 32 of 2009 not only change the system of proof in cases of environmental permit violations, namely through scientific evidence, but also constitute a disregard for the precautionary principle.

Keywords: the precautionary principle, environmental permits, comparison, scientific proof

Nazhif Ali Murtadho

Illegally Obtained Evidence in Indonesia's Draft Criminal Procedure Code (RUU KUHAP): Exclusionary Rules and the Due Process of Law

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, 291-308

Ketiadaan ketentuan eksplisit mengenai *exclusionary rules* dalam RUU KUHAP berisiko mengakibatkan pemanfaatan bukti yang diperoleh secara melawan hukum, merusak *due process*, mencederai praduga tak bersalah, dan menurunkan legitimasi peradilan; penelitian ini bertujuan menganalisis integrasi prinsip *due process* dan konsep "*unlawful legal evidence*" ke dalam RUU KUHAP serta merumuskan redaksional dan mekanisme operasional yang aplikatif. Metode yang digunakan adalah penelitian yuridis doktrinal dengan pendekatan perundang-undangan, konseptual, komparatif, dan kasus; bahan primer dan sekunder dianalisis tekstual, komparatif, dan deduktif dengan inventarisasi bahan hukum. Temuan menunjukkan penerapan *exclusionary rules* di Indonesia masih sporadis karena kekosongan norma dan perbedaan istilah antara "alat bukti" dan "barang bukti", mekanisme praperadilan belum mampu uji substantif, enam elemen *due process* belum diatur secara eksplisit, dan bukti elektronik memerlukan kepastian prosedural pasca-Putusan MK 20/PUU-XIV/2016. Kesimpulannya, RUU KUHAP harus memuat klausul *exclusionary rules*, definisi "*unlawful legal evidence*" dan konsep 'batal demi hukum', memperkuat kewenangan Praperadilan/Hakim Pemeriksa Pendahuluan, mensyaratkan *chain of custody* dan sertifikasi forensik digital, serta menetapkan sanksi dan kompensasi; rekomendasi meliputi harmonisasi redaksional, pedoman yudisial, pelatihan aparat, dan pengawasan independen untuk mengembalikan integritas pembuktian dan menjamin perlindungan HAM.

Keywords: Batal Demi Hukum; Chain of Custody; Due Process; Electronic Evidence; Exclusionary Rules.

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Husendro

Formulation of a Just Land Dispute Resolution Model: Derrida's Deconstruction Approach to the Former Dumai Concession Case

The De Jure Legal Research Journal Volume 25, Number 3, November 2025, 309-326

Dumai City is an area with land concession permits for oil and gas companies, including PT. Chevron Pacific Indonesia. These extensive and long-term land concession permits often conflict with local (indigenous) communities, urban development, and population growth. Although the company's concession period has expired and the land must be returned to the government, land claims, disputes, and conflicts remain unresolved. Therefore, a just, holistic, and human rights-based resolution will be a fundamental element of this resolution. The research method used is a normative empirical one with data sources obtained from field observations and interviews with various stakeholders, including the government and local communities. This paper will focus on how Jacques Derrida's concept deconstructs the settlement of the former Dumai concession case by dissecting the dominant legal narrative that supports ownership, concession claims, revealing the contradictions and power structures inherent in the land tenure system. This paper proposes alternative dispute resolution models, such as conciliation, based on different principles, future justice, and openness to plural legal subjects. Through Derrida's deconstruction and conciliation efforts, various alternative justice-based concession land solutions will be formulated for corporations (PT. CPI), local (indigenous) communities, citizens, local governments, vertical agencies, business actors, including law enforcement options.

Keywords: participatory action research, land policy reform, human rights-based approach, deconstruction, land concession oil and gas, agrarian law

An Integrated Policy Model For Supervisory Punishment Under Indonesia's New Criminal Code

Rohmat¹, Milda Istiqomah², Nurini Aprilianda³

¹²³Faculty of Law, Universitas Brawijaya, Jakarta, Indonesia

Article Information

Corresponding Author. Email:

rohmat@student.ub.ac.id

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Abstract

The inclusion of supervisory sanctions in Indonesia's new Criminal Code signifies a shift toward non-custodial and rehabilitative forms of punishment, reflecting a broader transition from retributive to corrective and restorative justice. Despite their formal adoption, the regulatory frameworks necessary for their implementation remain underdeveloped. This study examines the normative and philosophical foundations of supervisory sanctions and proposes an integrated legal policy model for their effective application. Employing a normative juridical method supported by statutory, comparative, and conceptual approaches, the research is analyzed within a prescriptive framework. The findings indicate that these sanctions are intended to provide offenders with a second chance through structured oversight and individualized rehabilitation, thereby avoiding incarceration. This study offers a novel insight by presenting an integrated policy model for supervisory sanctions, an approach that has not previously been developed within Indonesia's legal system. The proposed model outlines mechanisms for enforcement, supervision duration, and reintegration programs. By addressing a critical gap in Indonesia's penal system, this research contributes original perspectives and a practical framework for the operationalization of community-based criminal sanctions.

1. Introduction

The current Indonesian (formerly Dutch East Indies) Criminal Code (hereinafter referred to as KUHP) is a legacy of the Dutch government. The enactment of these criminal law provisions in the Dutch East Indies was based on the application of the principle of concordance. This principle is the basis that the provisions of Dutch law that were in force at that time, also apply to the Dutch East Indies which became its colony.¹ The validity of the legacy Criminal Code until now is based on the provisions of the Transitional Rules of the 1945 Constitution of the Republic of Indonesia by not enforcing norms that are contrary to the values of Indonesian society. Since Indonesia became an independent country, there has been a fundamental change in the instrument of imprisonment.

Imprisonment during the colonial period was intended by the Dutch to subdue the indigenous population not only as a place of detention but also as an instrument of social control.² This social control instrument was

- 1 Nafi Mubarak, "Sejarah Perkembangan Hukum Pidana Di Indonesia: Menyongsong Kehadiran KUHP 2023 Dengan Memahami Dari Aspek Kesejarahan," *Al-Qānūn: Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 27, no. 1 (2024): 15–31, <https://doi.org/https://doi.org/10.15642/alqanun.2024.27.1.15-31>.
- 2 Noveria Devy Irmawanti and Barda Nawawi Arief, "Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana," *Jurnal Pembangunan Hukum Indonesia* 3, no. 2 (May 28,

intended for indigenous people who were considered to have committed political resistance and violated the laws of the colonial government at that time. After Indonesian independence, the instrument of imprisonment changed in line with the identity of an independent nation. The concept of deprivation of a person's freedom through imprisonment is no longer intended as a form of physical punishment to a person, but rather a place that focuses on moral rehabilitation and guidance for convicts with the aim of reintegration into society.³ However, the spirit of punishment in the Criminal Code is still nuanced by the colonial era as a form of retaliation.

The purpose of punishment is theoretically divided into modern (combined) theory, relative theory, and absolute theory.⁴ The absolute theory emphasizes that the punishment imposed on the convict is a form of retaliation for the crime committed. Meanwhile, the relative theory assumes that the punishment imposed on the convict is not as a retaliation, but rather provides benefits to society as a goal. Meanwhile, according to the combined theory, it leads to punishment as a form of retaliation as well as a form of action to achieve benefits for society. The three theories of punishment above will bring justice that is envisioned from a criminal provision.

A criminal law provision that places the deprivation of a person's freedom as a form of punishment shows that the applicable law adheres to the goal of absolute punishment. The adherence to the objective of absolute punishment will lead to the paradigm of retributive justice that places prison as a place to provide misery for the perpetrators of criminal acts.⁵ Article 10 of the Criminal Code regulates the types of punishment, one of which is imprisonment as the main criminal stelsel which is specifically formulated for most of the criminal acts spread in various regulations in Indonesia. This is evident in the current criminal law policy as reflected in the Criminal Code, which contains provisions for the death penalty (10 articles), imprisonment (485 articles), fines (123 articles), and confinement (37 articles). These figures suggest that imprisonment remains the most rational penal approach to crime prevention.⁶

According to data from the Directorate General of Corrections (2024), a total of 499 correctional institutions, including prisons and detention centers, are operating across Indonesia, with a combined capacity of 140,424 inmates. However, the actual inmate population has reached 274,176, resulting in an overcrowding rate of approximately 95%. This situation reflects a significant structural imbalance within Indonesia's penal system and highlights the urgent need to implement non-custodial sentencing alternatives.⁷ The imprisonment punishment system is in line with the development of the purpose of punishment with the main focus on providing suffering to the perpetrators of criminal acts, but has produced a humane solution to make the perpetrators of criminal acts realize social integration in the community. Therefore, imprisonment has received a lot of criticism and is considered no longer relevant or in accordance with the purpose of punishment by socializing criminal offenders.⁸

In his book "Bunga Rampai Kebijakan Hukum Pidana", Barda Nawawi Arief conveyed a criticism of imprisonment that came from the international world, apart from individual legal scholars.⁹ Geneva was the venue of the United Nations Congress in 1975, which resulted in the Prevention of Crime and the Treatment of Offenders mentioned that many countries experienced an emergency of confidence in the effectiveness and tendency of correctional institutions in fostering criminals.¹⁰

If it is associated with the assumption that imprisonment is a form of punishment that is appropriate for

2021): 217–27, <https://doi.org/10.14710/jphi.v3i2.217-227>.

3 Genoveva Alicia K.S. Maya et al., *Alternatives to Imprisonment: Provision, Implementation, and Projection of Alternatives to Imprisonment in Indonesia* (Jakarta: Institute for Criminal Justice Reform, 2019), https://icjr.or.id/wp-content/uploads/2020/03/Alternatives-to-Imprisonment_Indonesia.pdf.

4 Syarif Saddam Rivanie et al., "Perkembangan Teori-Teori Tujuan Pemidanaan," *Halu Oleo Law Review* 6, no. 2 (September 28, 2022): 176–88, <https://doi.org/10.33561/holrev.v6i2.4>.

5 Brilian Capera, "Keadilan Restoratif Sebagai Paradigma Pemidanaan Di Indonesia," *Lex Renaissance* 6, no. 2 (2021): 225–34, <https://doi.org/https://doi.org/10.20885/JLR.vol6.iss2.art1>.

6 Moh. Fadhil, "Kebijakan Kriminal Dalam Mengatasi Kelebihan Kapasitas (Overcrowded) Di Lembaga Pemasyarakatan," *Al Daulah : Jurnal Hukum Pidana Dan Ketatanegaraan* 9, no. 2 (February 6, 2020): 167–86, <https://doi.org/10.24252/ad.v9i2.15996>.

7 Nabila Ulva Andarista, "Overstaying Di Lapas Dan Rutan, Perlukah Kita Khawatir?," accessed August 4, 2025, <https://kemenimipas.go.id/publikasi-2/kolom-opini/overstaying-di-lapas-dan-rutan-perlukah-kita-khawatir#:~:text=Berdasarkan%20data%20dari%20Direktorat%20Jenderal,sehingga%20mengalami%20overcrowding%20sebesar%2095%25>.

8 Henky Fernando, "The Failure of Prisons in Fostering and Re-Socializing Prisoners," *Indonesian Journal of Criminal Law and Criminology* 4, no. 3 (2023): 137, <https://doi.org/10.18196/ijclc.v4i3.19116>.

9 Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru, Edisi Kedua* (Jakarta: Prenamedia Group, 2016).

10 Fernando, "The Failure of Prisons in Fostering and Re-Socializing Prisoners."

criminal offenders in causing deterrence, inversely to this, the United Nation through the International Bar Association (IBA) and the Office of the High Commissioner for Human Rights (OHCHR) considers that the existence of imprisonment will have a counterproductive effect in rehabilitating and reintegrating criminal offenders into society.¹¹ Muladi regarding the same thing in his view said that the search for alternative punishment from deprivation of one's freedom to non-institutional needs to be improved.¹²

In the report of the United Nations Office on Drugs and Crime,¹³ several comparative studies show between imprisonment and non-imprisonment which shows that the imposition of punishment on criminal offenders in the form of imprisonment will cause criminal offenders to be in a condition that is not ideal to be accepted back into society and has a vulnerability to repeat criminal acts. Thus, it can be said that if the cycle of socialization from criminal offenders to society with good behavior is not achieved, then the essence of the purpose of criminal law is not achieved.

If the imposition of imprisonment brings benefits to a person after leaving prison, criminal law is said to have run as its purpose and function. Conversely, if a person who is released from prison has a negative impact, criminal law cannot be said to have run as its purpose and function. Therefore, Prof. Moeljatno said that it cannot be judged how effective or successful criminal law is based on the number of people imprisoned or the number of people imprisoned, but how the criminal system can shape the offender's personality to be good.¹⁴ If it is associated with the inherent retributive justice paradigm, then the goal of retributive justice is achieved, but it does not pay attention to the condition of the criminal offender after carrying out the law and the condition of the community.

Along with the development of the paradigm of justice, there has been a shift in the goal of justice to be achieved from retributive justice, which views that retaliatory punishment must be received by the perpetrator for the crime committed, to restorative justice, which views that justice will be achieved by an approach that places the perpetrator, victim, and community in case resolution based on the principle of balance.¹⁵ The change in perspective in the Indonesian criminal law system is reflected in the reform stated in Article 65 paragraph (1) of Law Number 1 of 2023 on Criminal Code. In this regulation, punishment is no longer only focused on imprisonment, but also includes other alternatives such as supervision punishment and social work as forms of non-prison principal punishment.

Article 75 to Article 77 of the National Criminal Code regulates supervision punishment. Supervision punishment is formulated as the main punishment in the National Criminal Code. However, specifically threatened in a criminal provision is not a characteristic of supervision punishment, but an alternative concept to the implementation of imprisonment.¹⁶ The provision of supervision punishment is only intended for criminal offenses that meet the requirements and are not serious criminal offenses. Meanwhile, the KUHP also regulates the same thing through the provision of conditional punishment.

The Criminal Code recognizes conditional punishment and the National Criminal Code with its supervision punishment which have different characteristics although they look similar. Conditional punishment in the KUHP is not one of the main punishments system, but as a form of imprisonment that is suspended to be executed.¹⁷ Barda Nawawi Arief stated that in overcoming the rigid nature of imperative imprisonment, conditional punishment is less able to overcome such condition. This is because conditional punishment is a *strafmodus* or a way of implementing a punishment and not as the main punishment of the choice of punishment (*strafsoort*).¹⁸ Meanwhile,

11 Omboto John Onyango, "Curse or Blessing in Reformation of Convicts? An Analysis of Imprisonment as a Form of Punishment," *London Journal of Research in Humanities and Social Sciences* 23, no. 3 (2023): 9–18, <http://ir-library.ku.ac.ke/handle/123456789/24953>.

12 Muladi and Barda Nawawi Arief, *Bunga Rampai Hukum Pidana* (Bandung: Alumni, 2005).

13 UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment Criminal Justice Handbook Series* (New York: UNODC Publication, 2007), https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf.

14 Afdhal Ananda Tomakati, "Konsepsi Teori Hukum Pidana Dalam Perkembangan Ilmu Hukum," *Jurnal Hukum Pidana Dan Kriminologi* 4, no. 1 (April 30, 2023): 49–56, <https://doi.org/10.51370/jhpk.v4i1.99>.

15 Yayan Muhammad Royani, *Relevansi Asas Keseimbangan Dalam KUHP Baru Dan Hukum Pidana Islam*, ed. Dian Herdiana (Bandung: Widina Media Utama, 2024).

16 Hajairin et al., "Kebijakan Pidana Pengawasan Dalam Pembaharuan Hukum Pidana Indonesia," *IBLAM Law Review* 2, no. 2 (August 1, 2022): 165–74, <https://doi.org/https://doi.org/10.52249/ilr.v2i2.81>.

17 Adul Halim Kaongo, "Pengawasan Vonis Pidana Bersyarat Sebagai Alternatif Pemidanaan," *Dinamika Hukum* 13, no. 3 (2022): 1–25, https://ejurnal.unisri.ac.id/index.php/Dinamika_Hukum/article/view/8455.

18 Barda Nawawi Arief, *Reformasi Sistem Peradilan Pidana* (Semarang: Badan Penerbit Universitas Diponegoro, 2015).

the main punishment of supervision can be used as an alternative to the implementation of imprisonment as determined by the judge.

The existence of supervision punishment norm in the National Criminal Code is also in line with the content of Tokyo Rules which introduces a type of punishment known as probation and judicial supervision.¹⁹ Muladi, in his view, stated that supervision punishment can be interpreted as a system that intends to carry out recovery of criminal offenders by returning them to the community during the supervision period.²⁰ Supervision punishment in the National Criminal Code has been formulated, but until now further provisions governing the implementation of supervision punishment have not been formulated.

One of the consequences of the ongoing legal uncertainty surrounding the implementation of criminal supervision can be seen in Decision Number 121/Pid.Sus/2022/PN Yyk from the Yogyakarta District Court. In this case, the defendant was involved in a minor offense, had no prior criminal record, and came from a disadvantaged socio-economic background. Based on the nature of the offense and the circumstances of the defendant, criminal supervision would have been an appropriate and proportional punishment under Law Number 1 of 2023 on the Criminal Code.²¹ However, due to the absence of clear procedural guidelines and designated institutions responsible for executing criminal supervision, the judge ultimately imposed a conditional prison sentence instead. This decision reflects a broader issue, although criminal supervision is now formally recognized in the new Criminal Code, its practical application remains uncertain. The lack of an operational framework undermines its potential as a restorative and non-custodial alternative to imprisonment, thereby contributing to prison overcrowding and limiting rehabilitative justice.

The rationale of this paper is based on the continuation of a previously published article in *Jurnal Lex Renaissance* entitled “Pembaruan Hukum Pidana di Indonesia: Analisis tentang Pidana Pengawasan dan Asas Keseimbangan” by Afif Firdaus and Indra Yugha Koswara.²² The article discusses the reform of criminal supervision penalties in the new Indonesian Criminal Code (National Criminal Code), while also suggesting the need for an effective framework for the enforcement of criminal supervision law. Additionally, an article published in *Badamai Law Journal* by Norwafa Rahmawati titled “Pidana Pengawasan dalam Kebijakan Pembaharuan Hukum Pidana di Indonesia”²³ addresses future regulations on criminal supervision aligned with the goals of integrative punishment. Another relevant work is by Rifqi Arif Maulana, Nafiatul Ismiah, and Septiani Tri Ambarwati, entitled “Penjatuhan Pidana Pengawasan Perspektif Penologi (Studi UU No. 1 Tahun 2023)”, published in *Journal Justiciabellen*.²⁴ This article examines a new type of principal punishment in the form of non-custodial sentencing, intended to provide restoration for victims, offenders, and society. However, it also emphasizes the need for the continued development of a comprehensive regulatory framework. Furthermore, an article by Fazal Akmal Musyarri and Gina Sabrian, published in *Jurnal Yudisial* and titled “The Urgency of Implementing Criminal Supervision in Law Number 1 of 2023 on the Criminal Code: An Analysis of Decision Number 121/Pid.Sus/2022/PN Yyk”,²⁵ highlights a case that, based on the new Criminal Code, meets the requirements for the imposition of criminal supervision. Nevertheless, it underscores the necessity for judges to comprehensively consider the implications of their rulings. More over, the article “Implementation of Criminal Supervision by the Prosecutor’s Office Based on Legal Certainty” by Vidya Khairunnisa and Andri Winjaya Laksana, published in the *Ratio Legis Journal*,²⁶ explores the implementation of criminal supervision by prosecutors as executors of criminal verdicts.

19 Genoveva Alicia K.S. Maya et al., *Alternatives to Imprisonment: Provision, Implementation, and Projection of Alternatives to Imprisonment in Indonesia*.

20 Teriyanti Btr, Arika Palapa, and Iksan Saifudin, “Pidana Pengawasan Dalam Perspektif Pembaharuan Hukum Pidana Di Indonesia.”, *Syntax Idea* 6, no. 7 (July 12, 2024): 3131–44, <https://doi.org/10.46799/syntax-idea.v6i7.4069>.

21 Fazal Akmal Musyarri and Gina Sabrina, “The Urgency of Implementing Criminal Supervision in Law Number 1 of 2023 on the Criminal Code,” *Jurnal Yudisial* 16, no. 1 (2023): 65–82, <https://doi.org/10.29123/jy/v16i1.586>.

22 Afifah Firdaus and Indra Yugha Koswara, “Pembaharuan Hukum Pidana Di Indonesia: Analisis Tentang Pidana Pengawasan Dan Asas Keseimbangan,” *Lex Renaissance* 9, no. 1 (June 28, 2024): 1–22, <https://doi.org/10.20885/JLR.vol9.iss1.art1>.

23 Norwafa Rahmawati, “Pidana Pengawasan Dalam Kebijakan Pembaharuan Hukum Pidana Di Indonesia,” *Badamai Law Journal* 9, no. 1 (January 1, 2024), <https://doi.org/10.20885/jlr.vol4.iss1.art3>.

24 Rifqi Arif Maulana, Nafiatul Ismiah, and Septiani Tri Ambarwati, “Penjatuhan Pidana Pengawasan Berdasarkan Perspektif Penologi (Studi UU No. 1 Tahun 2023),” *Journal Justiciabellen* 3, no. 02 (July 31, 2023): 80–90, <https://doi.org/10.35194/jj.v3i02.3080>.

25 Musyarri and Sabrina, “The Urgency of Implementing Criminal Supervision in Law Number 1 of 2023 on the Criminal Code.”

26 Vidya Khairunnisa and Andri Winjaya Laksana, “Implementation of Criminal Supervision by the Prosecutor’s Office Rohmat, Milda Istiqomah, Nurini Aprilianda

However, the article notes that the procedures for effective implementation of criminal supervision have not yet been regulated, and thus need to be formulated from an early stage.

The novelty of this research, compared to previous studies, lies in its focus on the policy, procedures, and mechanisms for implementing criminal supervision as a new principal punishment under the National Criminal Code. Previously, criminal supervision was primarily recognized within the juvenile justice system, however the new Criminal Code has formally incorporated it as one of the principal forms of punishment. This study aims to examine and analyze the ratio legis behind the establishment of criminal supervision in the National Criminal Code. Moreover, the Code also formulates sentencing objectives and guidelines intended to ensure that the imposition and execution of criminal supervision by judges are aligned with the overall purposes of sentencing. Furthermore, the current legal framework does not yet regulate the specific mechanisms for implementation nor identify the responsible institution for carrying out criminal supervision. The absence of clear procedures for implementing supervisory punishment creates uncertainty for law enforcement officials in executing court decisions. Therefore, this study addresses these issues and conducts a comparative analysis with the Netherlands in order to formulate an effective policy for the implementation of criminal supervision.

The formulation of supervision punishment as the main punishment cell does not rule out the possibility that the implementation of this supervision punishment does not run in accordance with the objectives. The tendency of the implementation of supervision punishment, which can be reduced by the proposed reduction of the supervision period by the prosecutor with the consideration of the social counselor, provides an opportunity to create a perception that this supervision punishment policy becomes transactional. This research is urgently needed in anticipation of the enactment of the National Criminal Code in 2026, particularly in the context of implementing supervisory punishment. It offers a comprehensive model for the implementation of supervisory punishment, grounded in philosophical and normative analysis. At the practical level, this research can serve as a policy reference within the framework of legal reform. Academically, it contributes to the development of the field of criminal law implementation.

2. Method

Type of Research

This research employs a normative juridical method, as formulated by Peter Mahmud Marzuki²⁷ who defines it as a process of identifying legal principles, provisions, or doctrines to answer specific legal issues. This method, also known as doctrinal legal research, involves the conceptualization and identification of legal norms as binding rules that apply within a particular legal system and time frame. In this context, the normative system becomes the primary object of study, encompassing legal principles and norms that reflect how human behavior ought to be regulated.²⁸

Research Approach

The formulation of the research problem in this study is studied using a statutory approach, a comparative legal approach, and a conceptual approach. Research with a normative juridical method uses a statute approach or statutory approach because the focus of study in the problem to be studied is on legal issues at the level of norms.²⁹ The approach in this research will examine various laws and regulations that are relevant to the legal issues to be studied, including Law Number 1 of 2023 on the Criminal Code, Academic Paper on the formation of Law Number 1 of 2023 on the Criminal Code, and Minutes of the formation of Law Number 1 of 2023 on the Criminal Code. The legislative text is interpreted through grammatical interpretation, which aims to ascertain the meaning of statutory terms in accordance with established rules of language and syntax. Additionally, a systematic interpretation is applied to derive the meaning of a provision by situating it within the broader context of the legal system, rather than treating it as an isolated or self-contained norm. This research will also be conducted

Based on Legal Certainty,” *Ratio Legis Journal* 2, no. 3 (2023): 1346–66, <https://doi.org/http://dx.doi.org/10.30659/rlj.2.3.%25p>.

27 Agung Hidayat, “Critical Review Buku ‘Penelitian Hukum’ Peter Mahmud Marzuki Penelitian Hukum Ad Quem Tentang Norma,” *Yustisia Merdeka: Jurnal Imiah Hukum* 7, no. 2 (2021): 117–25, <https://doi.org/https://doi.org/10.33319/yume.v7i2.109>.

28 Peter Mahmud Marzuki, *Penelitian Hukum*, Edisi Revisi (Jakarta: Kencana, 2017).

29 Kornelius Benuf and Muhamad Azhar, “Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer,” *Gema Keadilan* 7, no. 1 (April 1, 2020): 20–33, <https://doi.org/10.14710/gk.2020.7504>.

with a comparative approach by conducting a study of Dutch legislation regarding supervision punishment and methods of implementing supervision punishment in accordance with the objectives of punishment. Furthermore, this study employs a comparative legal approach using a functional comparison framework, which focuses on analyzing how different legal systems address similar legal functions or objectives. The Dutch legal system is chosen as the primary comparator due to its shared civil law tradition with Indonesia and its early adoption of, as well as well-established framework for, supervisory punishment—beginning with Staatsblad 1915 No. 33. The Netherlands serves as a relevant and instructive model, as it clearly regulates both the institutional responsibilities and the implementation mechanisms of supervisory sanctions. A comparative law approach can offer well-founded policy recommendations in realizing Indonesian criminal law policy regarding the implementation of supervision punishment as a new main punishment in the Criminal Code 2023. Meanwhile, concept approach is used to examine the concept of supervision punishment.

Types of Legal Materials and Techniques for Analyzing Legal Materials

This research utilizes both primary and secondary legal materials. The analysis is conducted using a prescriptive analytical method, which aims not only to describe existing legal norms but also to formulate normative recommendations. This method enables the construction of sound legal arguments, theoretical frameworks, and policy proposals. It also provides a comparative evaluation of the regulation of criminal supervision in Indonesia and the Netherlands, with the aim of promoting reform and strengthening the function of supervision punishment as a mechanism for social reintegration.

3. Findings and Discussion

3.1. Legis Ratio of Criminal Supervision Arrangement in Law Number 1 of 2023 on Criminal Code

A state has the authority to punish its citizens for acts that violate the law. One way the government can impose sanctions is through criminal punishment. Simons is one of the experts who defined punishment as suffering given to guilty individuals and regulated by criminal law.³⁰ In addition, Terance found that the general purpose of imposing criminal punishment is to restore the balance of power relations in the social order and eliminate threats to that social order.³¹ It was thought that these punishments would serve to defend ideas and beliefs, render people incapacitated, and frighten those who might consider committing a crime. This is in line with the purpose of punishment set out in the current Criminal Code, which is still retaliation-oriented.

In the theory of punishment, several theories are known, among others, the absolute theory which views that punishment functions as a deterrent action for offenses committed by the perpetrator.³² Then according to the relative theory, the beneficial purpose of punishment becomes the other side of this theory in addition to being used to deter offenders, and according to the combined theory, punishment has a plural purpose. Both theories combine utilitarian and retributivist perspectives. The National Criminal Code has stated that the objectives of punishment include:³³

- a. preventing crime by applying rules to protect and guide society;
- b. integrating convicts into society by training and rehabilitating them to become productive and useful citizens;

30 Aldi Firmansyah et al., “Penjatuhan Sanksi Pidana Kepada Pelaku Penggandaan Hak Cipta Buku Sebagai Upaya Pemberantasan Penggandaan Buku Di Indonesia,” *Jurnal Esensi Hukum* 4, no. 2 (December 2022): 185–97, <https://doi.org/10.35586/esh.v4i2.170>.

31 Miethe, Terance, and Hang Lu, *Punishment—A Comparative Historical Perspective* (New York USA: Cambridge University Press, 2005), <https://doi.org/http://dx.doi.org/10.1017/CBO9780511813801>.

32 Muhammad Ramadhan and Dwi Oktafia Ariyanti, “Tujuan Pemidanaan Dalam Kebijakan Pada Pembaharuan Hukum Pidana Indonesia,” *Jurnal Rechten: Riset Hukum Dan Hak Asasi Manusia* 5, no. 1 (March 30, 2023): 1–6, <https://doi.org/10.52005/rechten.v5i1.114>.

33 Michael Adyhaksa Padang, Billi J. Siregar, and Rosmalinda, “Keberpihakan Pemidanaan Dalam Undang-Undang Nomor 1 Tahun 2023,” *Locus: Jurnal Konsep Ilmu Hukum* 4, no. 2 (September 2024): 64–71, <https://doi.org/10.56128/jkih.v4i2.348>.

- c. solving crime-related problems, fostering a sense of security and harmony in society, and restoring balance; and
- d. giving convicts a sense of remorse and guilt.

These provisions indicate that Indonesian penal policy is neither exclusively retributive nor purely utilitarian, but rather adopts an integrated approach aligned with the combined theory. The articulation of restorative aims, such as reintegration and social harmony, reflects a deliberate shift toward a modern penal philosophy that prioritizes correction over mere retribution. Consequently, the incorporation of supervisory punishment within this framework is consistent with the broader normative orientation of the Criminal Code.

The National Criminal Code adopts one of the non-imprisonment punishments, namely supervision punishment. Supervision punishment first appeared in the punishment system in mainland Europe in 1891 in France and in Belgium in 1888, which is known in the form of postponement of conditional punishment.³⁴ This punishment system is different from the probation system, where supervision punishment emphasizes on the postponement of the implementation of imprisonment and not the postponement of the imposition of punishment. Non-imprisonment punishment regulated in the National Criminal Code refers to the basic provisions of the Tokyo Rules, which provide minimum standards for the state in imposing non-imprisonment punishment. Tokyo Rules is of the view that individualizing sentencing approach pays attention to the needs of each person so that it becomes an advantage in the application of punishment, because it is considered proven to be more effective in providing guidance to convicts and able to return convicts to society again in a state that is acceptable to society.³⁵ Tokyo Rules encourages every country to understand and apply non-imprisonment punishment to every offender. The purpose of the Tokyo Rules is to unravel the imprisonment of deprivation of liberty and its impact.³⁶

One of the considerations of the National Criminal Code in formulating non-imprisonment punishment in Indonesia is taking into account the provisions of the Tokyo Rules. The National Criminal Code always upholds human dignity, because the existence of punishment is not to degrade the dignity of a person. Therefore, the National Criminal Code stipulates a new basic punishment, namely supervision and social work punishment. The National Criminal Code includes supervision punishment and social work as the main criminal structures, but they are not considered separate criminal structures. This is because supervision punishment and social work punishment function as alternatives to imprisonment.³⁷

Articles 75 to 77 of the National Criminal Code regulate the provision of criminal supervision. By considering the purpose and guideline of punishment, a criminal offense punishable by a maximum of 5 (five) years committed by the defendant may be decided by supervision punishment. Furthermore, according to Article 76, supervision punishment may be imposed for a maximum period equivalent to imprisonment under the provisions of the article, but not more than 3 (three) years. This means that supervision punishment may be imposed for criminal offenses that meet the requirements stipulated in Article 75.

Such formulation is that only perpetrators of criminal offenses are punishable by imprisonment for a maximum of 5 (five) years and, in its implementation, can be executed with supervised punishment. The purpose of this formulation is to determine an objective measure of what criminal offenses can be imposed with supervision punishment, in other words, the criminal offenses imposed with supervision punishment are not serious criminal offenses, such as premeditated murder.³⁸ The norm formulated in the provision of Article 75 of the National Criminal Code considers that the judge has not imposed a definite imprisonment, because it is at the limit of the punishment imposed. Thus, the first filter that must be met for a person to be sentenced to supervision is that the person must have committed a crime punishable by 5 (five) years of imprisonment and not look at the punishment

34 Rahmawati, "Pidana Pengawasan Dalam Kebijakan Pembaharuan Hukum Pidana Di Indonesia."

35 Marta Turnip Mega, Kurnia Mahendra Putra, and Rika Erawaty, "Penanganan Terbaik Pada Kelebihan Kapasitas Lembaga Permayarakatan Di Beberapa Negara," *Jurnal Risalah Hukum* 19, no. 1 (2023): 11–20, <https://doi.org/https://doi.org/10.30872/risalah.v19i1.1015>.

36 United Nation, "United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)" (Tokyo, 1990), <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf>.

37 Maria Ulfah, "Pidana Kerja Sosial, Tokyo Rules, Serta Tantangannya Di Masa Mendatang," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 3 (September 30, 2021): 517–35, <https://doi.org/10.24843/JMHU.2021.v10.i03.p07>.

38 National Legal Development Agency, *Academic Manuscript of Draft Law Number 1 of 2023 on the Criminal Code* (Jakarta: Ministry of Law and Human Rights, 2015).

imposed by the judge.³⁹ The implication of this norm is the existence of supervision punishment as an alternative to the implementation of imprisonment or postponement of the implementation of imprisonment and not as a form of postponement of the implementation of the decision.

Article 76, paragraph (1) stipulates that supervision punishment shall be imposed for a maximum time equal to the imprisonment imposed, which is not more than 3 (three) years. The formulation of the norm is inseparable from the direction of punishment in the new Indonesian National Criminal Code, which leads to rehabilitative justice or restorative justice.⁴⁰ The National Criminal Code 2023 no longer relies on retaliation as the atmosphere of the norms formed. Still, it is more aimed at the recovery and protection of each individual, both victims, perpetrators, and the community. This is in line with what was discussed by Barda Nawawi Arief, one of the formulators of the 2023 Criminal Code, who stated that the purpose of punishment contains two main aspects that must be considered, including the first aspect of protecting the community against criminal acts.⁴¹ This aspect aims to prevent, reduce, and control criminal offenses and restore the balance of society, the realization of which is often expressed in various manifestations, including resolving conflicts, bringing a sense of security, restoring the situation due to criminal acts committed, and reinforcing the values that live in society. Meanwhile, the second aspect aims to improve the perpetrators of crime, which is often expressed in various ways, including rehabilitation, re-socializing the perpetrators, and protecting the perpetrators from punishment that is not with the law.⁴²

The formulation of supervision punishment to be imposed for a maximum period equal to the punishment imposed with no more than three years, is based on the opinion of Howard Jones, who stated that “probation orders may be made for any period from one to three years...” (the implementation of supervision punishment may be made for a certain period within a period of one to three years).⁴³ It is then compared with Portugal, which provides that persons sentenced to supervision are subject to rehabilitation under supervision for a period of one to three years.⁴⁴

The consideration of the formulation of the National Criminal Code as above shows the embodiment of criminal law that pays attention to the interests of the victim, the perpetrator, and society. This then makes the principle of balance one of the bases for the formulation of non-punishment punishment norms in the National Criminal Code.⁴⁵ Efforts and objectives are given to each individual as an effort to rehabilitate, reeducate, reintegrate, and eliminate guilt in the perpetrators so that they can become individuals who can be accepted back in society. From the community aspect, it aims to provide protection and a sense of security for victims and the community from a criminal offense.⁴⁶

In addition to the stipulated period some conditions must be met by the defendant to be sentenced to supervision. Every person sentenced during the supervision period must meet basic and specific requirements. In general, Article 76, paragraph (2) of the National Criminal Code states that the convicted individual cannot commit another crime. Paragraph 3 also stipulates some restrictions, such as the obligation of the convicted person to compensate the loss caused by the crime they committed within a shorter period than the supervision period; or

39 Allison Dara Dharmawan and Nadira Karisma Ramadanti, “Pidana Alternatif Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana Dan Kaitannya Dengan Tujuan Pemidanaan,” *Presidensial: Jurnal Hukum, Administrasi Negara, Dan Kebijakan Publik* 1, no. 4 (October 15, 2024): 85–92, <https://doi.org/10.62383/presidensial.v1i4.197>.

40 National Legal Development Agency, *Academic Manuscript of Draft Law Number 1 of 2023 on the Criminal Code*.

41 Marfuatul Latifah and Prianter Jaya Hairi, “Pengaturan Pedoman Pemidanaan KUHP Baru Dan Implikasinya Pada Putusan Hakim,” *Jurnal Negara Hukum* 15, no. 2 (November 2024): 25, <https://doi.org/http://dx.doi.org/10.22212/jnh.v15i2.4573>.

42 Muchlas Rastra Samara Muksin, “Tujuan Pemidanaan Dalam Pembaharuan Hukum Pidana Indonesia,” *Sapientia Et Virtus* 8, no. 1 (July 10, 2023): 225–47, <https://doi.org/10.37477/sev.v8i1.465>.

43 Rathna N. Koman and Matthew Soo Yee, “Reading between the Bars: Evaluating Probation, Remodelling Offenders, and Reducing Recidivism,” *British Journal of Community Justice* 17, no. 2 (September 23, 2021): 134–49, <https://doi.org/10.48411/t9x2-sv17>.

44 António Pedro Does, Nuno Pontes, and Ricardo Loureiro, *Alternatives to Prison in Europe Portugal* (Roma: Associazione Antigone Onlus, 2015).

45 Firdaus and Koswara, “Pembaharuan Hukum Pidana Di Indonesia: Analisis Tentang Pidana Pengawasan Dan Asas Keseimbangan.”

46 Maulana, Ismiah, and Ambarwati, “Penjatuhan Pidana Pengawasan Berdasarkan Perspektif Penologi (Studi UU No. 1 Tahun 2023).”

the obligation of the convicted person to do or avoid doing something prohibited by the prison sentence.⁴⁷

During the supervision period, convicted persons must not violate any of the general or specific criteria mentioned above. If they violate the general requirements, the convicted person must serve a prison sentence that does not exceed the maximum term for the offense. Meanwhile, suppose the convicted person violates the stipulated conditions without sufficient reason. In that case, the Prosecutor recommends to the Judge to increase the stipulated supervision period, which cannot be longer than the previous supervision sentence, or impose a prison sentence.⁴⁸

The general conditions stipulated in the norms of criminal supervision are intended as an effort to prevent convicts from committing a criminal offense or repeating a criminal offense and, at the same time, as a form of general prevention that the convict will serve imprisonment if the general conditions that have been determined are violated. Meanwhile, special conditions are formulated to provide positive and constructive effects for the perpetrators of crime so that they can become independent thinkers who violate the predetermined conditions. This aligns with the philosophical view of punishment as a means of rehabilitating offenders and guiding them toward socially acceptable behavior and be able to return to society to become individuals who have and comply with community norms and legal norms. The special conditions given are intended so that the benefits of supervision punishment are not only enjoyed by the perpetrators of criminal acts but also by the community.⁴⁹ This can be seen from the reimbursement of losses arising from the criminal offense committed, which can have a positive effect on the convict himself and on the community itself as a form of realization of the principle of balance.

The provision of norms regarding general and special conditions in the imposition of supervision punishment as stipulated in Article 76, paragraph (2) and paragraph (3) of the National Criminal Code shows that the National Criminal Code has adopted the purpose of punishment, which not only provides benefits to individuals, both perpetrators and victims, but also provides benefits to society. The protection of individuals provides rehabilitation and reintegration efforts to the perpetrators of criminal acts in carrying out any prescribed guidance. Meanwhile, the protection of the community is intended to provide protection both at the level of prevention and at the level of restoring the balance of the harm caused by the criminal offense committed.⁵⁰ The general and special requirements are important in the implementation of supervision punishment in providing guidance to criminal offenders and protecting the interests of victims and society. Therefore, such provisions are formulated imperatively and not facultatively. This is to show the essence of supervision punishment to implement effective supervision and guidance of criminal offenders so that it can run as the inherent philosophical basis.

Although Article 76, paragraphs (2) and (3) of the National Criminal Code explicitly adopt a punishment objective that is oriented toward the protection of both individuals and society, several enforcement gaps remain that require further examination. These provisions are formulated in an imperative manner but are not supported by adequate technical mechanisms to ensure their effective implementation in practice. In the absence of detailed operational guidelines, such normative provisions risk becoming ineffective. Moreover, the regulation concerning the simultaneous protection of both offenders and victims lacks balancing mechanisms that can prevent potential conflicts of interest between the two parties. The absence of clear evaluative indicators also impedes the ability to assess the effectiveness of the guidance and supervision provided to offenders. Additionally, although community and victim participation is acknowledged as a normative objective within the provisions, there are no accompanying regulations that ensure their active involvement in the criminal justice process. These gaps indicate that, while Article 76 is philosophically aligned with a progressive approach to criminal justice, without concrete improvements in implementation, the effectiveness of criminal supervision is unlikely to be fully realized.

The norm that is then formulated for supervision punishment is regarding the policy of reducing the supervision period. According to the Community Supervisor, the Prosecutor may request the Judge to reduce the time spent in the supervision period if the convicted person shows exemplary behavior during the supervision period. According to Article 77 of the National Criminal Code,⁵¹ If a convicted offender commits a crime while on supervision and is sentenced to a sentence other than death or imprisonment, the supervision sentence will be

47 Republic of Indonesia, "Law Number 1 of 2023 on the Criminal Code" (Jakarta: State Secretariat, 2023).

48 Republic of Indonesia.

49 Musyarri and Sabrina, "The Urgency of Implementing Criminal Supervision in Law Number 1 of 2023 on the Criminal Code."

50 Mohamad Ali Syaifudin, Ali Imron, and Rahmida Erliyani, "Analisis Efektivitas Penerapan Hukum Pidana Dalam Pengawasan Tindak Pidana Di Indonesia," *UNES Law Review* 6, no. 4 (2024): 12369–76, <https://doi.org/10.31933/unesrev.v6i4>.

51 Republic of Indonesia, "Law Number 1 of 2023 on the Criminal Code."

carried out. However, if the offender is sentenced to imprisonment for a crime committed during the supervision period, the supervision sentence will be postponed and executed first. Nevertheless, the National Criminal Code does not provide clear guidance regarding the party responsible for implementing supervisory punishment, whether it falls under the sole authority of the Prosecutor as the executor of the judgment, or under the Correctional Center.

Based on the description above, the policymakers tried to formulate that supervision punishment is imposed on the convict by placing the convict in supervision and guidance outside the institution with the provision of general and special conditions. The provisions on general and special requirements are intended. However, as a primary non-custodial sanction, supervision punishment may incentivize behavioral reform, not to repeat criminal acts, and restore the balance of values in society and victims by performing actions that can restore or repair the consequences of the criminal offense committed.⁵²

Supervision punishment, as discussed in its formulation, regulates that supervision punishment is not a way of executing punishment or *strafmodus*, but rather the selection of punishment type or transport. Supervision punishment is an alternative to imprisonment. Indonesia is not the first country to adopt non-imprisonment punishment; several countries have accommodated supervision punishment in their criminal justice system, which aims to achieve guidance, rehabilitation, and prevention of criminal acts in the community. In the supervision criminal system, criminal offenders will be included in a supervision program that aims to supervise and monitor their behavior, as well as provide opportunities for criminal offenders to improve themselves without having to be imprisoned first.

The philosophical foundation behind the inclusion of supervision punishment as the main punishment in the Indonesian criminal justice system is to provide a second chance for criminal offenders to improve their attitude and behavior so that they can become individuals who the community can accept. This supervision punishment system is implemented by policymakers so that with careful supervision and appropriate rehabilitation programs, criminal offenders who are placed outside the institution can be rehabilitated and prevented from committing criminal acts again in the future.⁵³ However, regarding how this supervision can be carried out carefully, what kind of rehabilitation program can improve the behavior of criminal offenders, and how any institution carries out supervision punishment has not been further regulated, so there is a void of norms in such circumstances.

3.1. Model of Supervision Criminal Implementation as Beneficial Non-Prison Punishment in the Future

Indonesia and the Netherlands have a strong relationship. This is inseparable from the history of the Indonesian state. Which the Netherlands initially colonized. With Dutch colonialism in Indonesia, the applicable law in Indonesia is a form of legal equality in the Netherlands based on the principle of concordance.⁵⁴ The current legal system is the result of the strong Dutch influence in Indonesia, which has made Indonesia embrace the Civil Law System or Continental European legal system. Like other Continental European legal systems, civil law prioritizes the written legal system, and this also applies to Indonesia.

The Netherlands was selected as the comparative country in this study because it shares a legal system similar to that of Indonesia, namely a civil law system derived from Roman-Germanic traditions. This similarity provides a strong methodological foundation for both normative and structural comparisons. Moreover, the Netherlands is among the earliest countries to regulate and implement probationary supervision, beginning in 1915 through Staatsblad 1915 No. 33. This regulation not only recognizes probation as an alternative sanction to imprisonment but also contains detailed provisions regarding the institutional and technical aspects of its implementation, including the competent supervisory authorities, methods of enforcement, duration of supervision, and social rehabilitation programs for offenders.

According to Mahmud MD, Indonesia used civil law or the Continental European legal system globally during its development. However, after the 1945 Constitution of the Republic of Indonesia changes, according to him, Indonesia is more appropriate to use the Pancasila legal system.⁵⁵ This concept takes the best part of two

52 Joko Sriwidodo, *Politik Hukum Pidana Dalam Pendekatan UU No. 1 Tahun 2023 Tentang KUHP*, Cetakan Pertama (Yogyakarta: Penerbit Kepel Press, 2023).

53 Sriwidodo.

54 Akhmad Khalimy, "Makna Aturan Peralihan Sebagai Politik Hukum RUU KUHP (Transformasi Dari Hukum Kolonial Ke Hukum Nasional)," *Jurnal Hukum Progresif* 8, no. 2 (October 2020): 121–36, <https://doi.org/10.1016/j.landusepol.2020.104869>.

55 Praise Junta W.S. Siregar, "Perbandingan Sistem Hukum Civil Law Dan Common Law Dalam Penerapan Yurisprudensi Rohmat, Milda Istiqomah, Nurini Aprilianda

conflicting ideas between the rule of law and *Rechtsstaat*. Then, it is taken as an independent system so that it can bind with the values of Indonesian society and with the development of society.

Meanwhile, the Dutch civil law system is heavily influenced by French law, leading Rene David to classify Dutch law as the Romano-Germaic Legal Family.⁵⁶ In its development, the Dutch civil law system has authorized judges or courts to create a general principle of civil law, when at that time civil law when, at that time, the written civil law does not accommodate it to be applied in a case.

The legal systems of Indonesia and the Netherlands have similarities with the adoption of civil law. The Criminal Code currently applicable in Indonesia was previously derived from the criminal law applicable in the Netherlands with the spirit of retaliation. However, until now, the Netherlands has recognized non-imprisonment punishment. Meanwhile, Indonesia has just implemented non-imprisonment punishment in the National Criminal Code.

In the Tokyo Rules, “non-custodial measures” is a norm referring to powers taken by competent authorities at various stages of the criminal justice process that require a person accused or convicted of a crime to fulfill certain obligations that do not necessarily involve imprisonment.⁵⁷ This expansion of the concept of non-custodial measures has existed to allow for the duplication of bail to convicted persons that would normally be granted while serving a prison sentence.

The idea of non-imprisonment punishment arises due to the metamorphosis of crime and affects the punishment. The main source of the emergence of the concept of non-imprisonment punishment is due to the concurrent discussion on the concept of rehabilitation. This concept is contrary to the classical concept, which considers that every criminal offender must be punished with imprisonment.⁵⁸ However, along with the development of punishment, it is considered that imprisonment has negative characteristics. In contrast, the concept of non-imprisonment punishment does not achieve these negative characteristics in reintegrating convicts into society.

Non-prison criminal sanctions have two main characteristics, namely prevention to prevent criminal acts and the purpose of punishing the perpetrators of criminal acts.⁵⁹ The main objective is to eradicate criminal offenses without the need for imprisonment or punishment that deprives a person of freedom. Non-imprisonment punishment in the Indonesian criminal justice system will allow flexibility with the origin and type of offense, the history of the offender, protection of the community, and unnecessary detention. In addition, non-imprisonment punishment should be offered from the pre-adjudication process to the adjudication process.

In the development of modern punishment, Indonesia adopted non-prison punishment, which consist of supervision punishment and social word punishment, as described in the previous sub-discussion.⁶⁰ According to the explanation in Article 75 of the National Criminal Code, supervision punishment is one of the main types of punishment. However, since it is an alternative to imprisonment, it is not explicitly stated in a separate phrase as a punishment stelsel. According to the current KUHP, supervision punishment is similar to conditional imprisonment. Supervision is carried out outside the institution or outside imprisonment. Supervision punishment is an alternative to imprisonment and is not intended for serious criminal offenses.

The Netherlands recognizes several non-imprisonment punishments, such as conditional punishment, community service, electronic monitoring, and fines. Dutch Law of November 25, 2015, Stb. 2015, 460 on Long-Term Supervision, Behavioral Influence, and Freedom Restrictions, the Dutch Criminal Code, and the Penitentiare Maatregel (Dutch Imprisonment Regulations) regulate the electronic surveillance punishment applicable in the

Ditinjau Dari Politik Hukum,” *DHARMASISYA: Jurnal Program Magister Hukum Fakultas Hukum Universitas Indonesia* 2, no. 2 (June 2022): 1027–36, <https://scholarhub.ui.ac.id/dharmasisya/vol2/iss2/37>.

56 Jan M. Smits, “Law in the Netherlands: A Very Concise Overview,” *SSRN Electronic Journal*, 2022, 1–8, <https://doi.org/10.2139/ssrn.4196156>.

57 United Nations, “United Nation Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules Adopted by General Assembly Resolution),” Pub. L. No. 40/33 (1985), <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-administration-juvenile>.

58 Patricia Gray and Julie M Parsons, “The Harms of Imprisonment and Envisioning a Desistance-Supporting ‘Good Society,’” *The Journal of Criminal Law* 88, no. 4 (August 21, 2024): 282–301, <https://doi.org/10.1177/00220183241265188>.

59 Madya Cinta Kholdaa and Pujiyono Pujiyono, “Social Work Crime as an Alternative to Resolving Overcrowding in Correctional Institutions,” *Justisi Journal* 10, no. 3 (September 2024): 806–16, <https://doi.org/http://dx.doi.org/10.33506/js.v10i3.3491>.

60 Pratiwi, “Urgensi Alternatif Pemidanaan Pengganti Pidana Penjara Demi Tercapainya Tujuan Pemidanaan Dalam Menanggulangi Kejahatan,” *Jurnal Pendidikan Dan Konseling* 4, no. 6 (2022): 7098–7112, <https://doi.org/https://doi.org/10.31004/jpdk.v4i6.9473>.

Netherlands.⁶¹

This is in contrast to the provision of supervision punishment in Indonesia, which the judge imposes after the verdict on the criminal justice process. In addition, there is no further provision regulating the mechanism of supervision punishment in Indonesia. However, electronic supervision punishment has been used in the Netherlands since the beginning of the criminal justice process and can be carried out in 6 (six) types, namely:⁶²

- 1) As a condition for detention pending trial. Prosecutors or judges (Chamber of Council) may request electronic surveillance.
- 2) As a means of deferring sentence. Probation Service, prosecutors, and judges may apply. The home address of the convicted person will be inspected first, provided that the person living together in the house agrees to the supervision and the inspection is carried out by the Probation Service. To receive this sentence, the convicted person must also give consent.
- 3) With the requirements of the correctional program. In the final stage of the prison term, a correctional program can be applied. The selection officer receives advice from the correctional counselor and advice from the Prosecutor and Probation Service. Then, the selection officer makes the final decision. During the first third of the program, electronic supervision is usually used. However, if there are underlying reasons for the convict's behavior, the supervision may be extended or readjusted. The convicted person and his/her family members must consent to the application of electronic supervision.
- 4) Regarding parole, although the law does not mention electronic surveillance explicitly, it is an increasingly popular condition for release from correctional institutions. Selection officers make decisions about inmates' eligibility for release from prison and the conditions they must fulfill. For electronic monitoring to fulfill parole requirements, Global Positioning System (GPS) technology is required. This is the only one where the Probation Service function is not always included.
- 5) Conditions of parole include restrictions in certain areas. Parole can be granted to the offender for one year of the prison sentence already served. The Central Provision for Provisional Enforcement (CVVI) will apply exceptional conditions if the prisoner fulfills the conditions for parole. The Probation Service informs CVVI of the conditions to be met and determines whether the prisoner's home is suitable for electronic surveillance.
- 6) Termination of Terbeschikkingstelling (TBS) relies on individuals who have committed crimes and are placed in special institutions due to their inability to take responsibility for their actions.

A person may be electronically monitored for up to 10 (ten) years, and there is no upper limit on this type of monitoring. Electronic surveillance may be able to continue indefinitely, with the Dutch Law of November 25, 2015, Stb. 2015, 460 on Long-Term Supervision, Behavioral Influence, and Freedom Restrictions. Electronic device-based supervision is almost always used for probation monitoring. While supervisors talk to inmates about the conditions of supervision, officers from the Ministry of Justice and Security establish a technological link. Connecting electronic supervision equipment allows supervisors and inmates to interact regularly and indicates the time of the start of supervision. Supervisors and inmates have the option to meet with local governments, inmates' employers, or treatment facilities in addition to the required conversations.

An inmate's degree of freedom determines the time that can be spent on daily tasks, by degree:⁶³

- a) Twelve hours a week and four hours on weekends is the bare minimum of freedom;
- b) Eight hours on weekends and fourteen hours during the week for moderate levels of freedom; and
- c) Seventeen hours a day for the ultimate level of freedom.
- d) Inmates are allowed two hours of free time per day if they have no activities throughout the day. However, convicts must attend a weekly program of at least 26 hours to be able to participate in the correctional program.

Supervision punishment in the Netherlands is implemented by Reclassering (Probation Service) as an independent institution funded by the Dutch Ministry of Justice and Security as stipulated in the

61 Arjan de Groot, "De Relevantie van Beccaria Voor Het Nederlandse Strafrecht: Het Beïnvloedingsprincipe," *Netherlands Journal of Legal Philosophy* 53, no. 1 (November 2024): 179–202, <https://doi.org/10.5553/NJLP.000117>.

62 Miranda Boone, Matthijs van der Kooij, and Stephanie Rap, "The Highly Reintegrative Approach of Electronic Monitoring in the Netherlands," *European Journal of Probation* 9, no. 1 (April 18, 2017): 46–61, <https://doi.org/10.1177/2066220317697660>.

63 Boone, van der Kooij, and Rap.

Reclasseringsregeling (Staatsblaad 199 No. 875). Reclassering's main duties include:⁶⁴ a) executing and supervising the implementation of community service and special conditions in conditional sentences; b) providing considerations to the Prosecutor and Judges regarding the actions and penalties that need to be carried out against suspects and or defendants; and c) supervising convicts who receive conditional release. If observed, the duties of Reclassering have similarities with those of the Correctional Center in Indonesia, which is under the Ministry of Law and Human Rights. This similarity can be seen in the duties of the Indonesian Correctional Center, which also plays a role in conducting social work criminal guidance and providing consideration to the prosecutor about the implementation of supervision punishment to the judge. Meanwhile, the regulation on which institution will implement supervision punishment in Indonesia has not been further regulated, whether the prosecutor implements the supervision punishment as the executor of the judge's decision or the supervision punishment is implemented by the Correctional Center as done by Reclassering in the Netherlands.

Reclassering as an independent institution funded by the Dutch Ministry of Justice and Security must ensure that supervision sentences imposed on criminal offenders can be implemented properly. Reclassering carries out this task in the following stages:⁶⁵

- 1) The first conversation. At this stage, the offender will receive an invitation to have an initial conversation with an officer from Reclassering. At this stage, the offender who is sentenced to supervision will receive an explanation of how supervision works. In addition, at this stage, the Reclassering Officer will also ask questions related to the special conditions imposed on the criminal offender. This stage aims to ensure the identity and identity of the criminal offender.
- 2) Supervision plan and rehabilitation program. This stage aims to determine a supervision plan and rehabilitation program appropriate to the offender's characteristic. This includes finding out about their daily activities, occupations, and problems encountered, such as those related to work, social life, addiction, or financial problems.
- 3) End of Supervision Period. This stage ensures that the supervision period imposed by the judge on the criminal offender has been completed without violating the general and special conditions that have been determined. In addition, at this stage, the offender will receive a letter stating that the supervision period has ended.

Supervision punishment, which the Netherlands has known, makes the Netherlands one of the countries that are qualified to implement supervision punishment and achieve the philosophical basis of giving a second chance to criminal offenders to improve themselves and maintain a balance with society, as previously explained. Referring to the provision of Article 76, paragraph (6) of the National Criminal Code, the prosecutor may propose a reduction of the supervision period to the judge if, during the supervision, the convict shows good behavior based on the consideration of the community supervisor. This shows that there is a close relationship between the prosecutor and community counselor in the implementation of supervision punishment. Meanwhile, Article 1, point 6 of Law Number 8 of 1981 on Criminal Procedure stipulates that the prosecutor is the executor of court decisions that have permanent legal force. Community Counselor in Law Number 22 of 2022 on Corrections stipulates that. Community Counselors are Correctional Officers who carry out Litmas, assistance, guidance, and supervision of Clients, both inside and outside the criminal justice process organized by the Correctional Center. Then, Article 56, paragraph (1) states that the implementation of community guidance includes mentoring, guidance, and supervision. Then, it is reaffirmed in Article 57.⁶⁶

The provisions in the Correctional Act, which regulates the position of Community Supervisor and Correctional Center, show that the criminal law policy in the law leads to the implementation of social work punishment and supervision punishment organized by the Probation & Parole Office.⁶⁷ When compared to the duties and functions carried out by the independent Reclassering institution in the Netherlands, both have similar duties and functions in supervising criminal offenders during the supervision period and providing rehabilitation programs. However, Article 270 of the Criminal Procedure Code and Article 54 of Law No. 48/2009 on Judicial

64 Dika Agusta, Abdul Madjid, and Nurini Aprilianda, "Reforming Indonesian Criminal Law: Integrating Supervision, Punishment, and Rehabilitation for Restorative Justice," *International Journal of Islamic Education, Research and Multiculturalism* 7, no. 1 (2025): 54–68, <https://doi.org/https://doi.org/10.47006/ijierm.v7i1.434>.

65 Muhammad Arif Agus and Ari Susanto, "The Optimization of the Role of Correctional Centers in the Indonesian Criminal Justice System," *Jurnal Penelitian Hukum De Jure* 21, no. 3 (September 2021): 369–84, <https://doi.org/10.30641/dejure.2021.v21.369-384>.

66 Republic of Indonesia, *Law Number 22 of 2022 Concerning Corrections* (Jakarta: State Secretariat, 2022).

67 Republic of Indonesia.

Power stipulate that the executor of court decisions in criminal cases is the Prosecutor. Furthermore, Article 30 paragraph (1) letter c of Law Number 11 of 2021, as an amendment to Law Number 16 of 2014 concerning the Prosecutor's Office of the Republic of Indonesia, regulates that the prosecutor's office has the duty and responsibility to supervise the implementation of conditional criminal decisions, supervision criminal decisions, and conditional release decisions.⁶⁸ Criminal law policy formulators need to pay attention to the provisions on how supervision punishment can be implemented.

Criminal law policy according to A. Mulder is used to determine the following policy lines:⁶⁹ a) in what cases the existing criminal provisions should be revised (*in welk opzicht de bestaande strafbepalingen hersien dien te worden*); b) what can be done to prevent criminal behavior (*wat gedaan kan worden om strafrechtelijk gedrag te voorkomen*); and c) the formulation of procedures for the implementation of investigation, prosecution, trial, and criminal execution (*hoe de opsporing, vervolging, berechting en tenuitvoerlegging van straffen dien te verlopen*). Based on this, one of the criminal law policies is regarding the implementation of the punishment itself, in this case is the supervision punishment.

In formulating the implementation policy of supervision punishment as a new main punishment in the Indonesian criminal justice system, it cannot be separated from the theory of punishment and the theory of legal expediency. The important issue of punishment in Roeslan Saleh's⁷⁰ view is how the criminal law can be applied. The relationship between society and the state is concretely regulated in regulatory provisions called law. State tools will work to process accountability for anyone who commits an offense. How criminal offenders are treated fairly and well is an important issue that needs to be considered in the application of criminal law. Along with the development of the theory of punishment as a means to reform society and as a form of crime prevention, there has also been a theory to achieve the goals of punishment that takes into account the perpetrators, victims, and society, including the theory of balanced punishment. The theory is motivated by the purpose of punishment now, which still focuses on the interests of the criminal and the interests of society only. In his view, Roeslan Saleh argues that punishment must be able to accommodate the interests of victims, society, and also the perpetrators.⁷¹ It is not only the interests of the perpetrator that are accommodated by the punishment, but it is also necessary to pay attention to the interests of the victim or his family and the community. The current criminalization still only focuses on the interests of the perpetrator. Therefore, from the perspective of Roeslan Saleh's balance theory, it is conveyed that punishment needs to pay attention to the interests of victims, society, and criminal offenders.

Based on Roeslan Saleh's view above, in formulating a criminal law policy, it must be applicable and aim not only to focus on the perpetrators of criminal acts but also on the victims and society.⁷² This research utilizes a comparative law method to formulate the concept of implementation of supervision punishment in Indonesia. Legal comparison is used to find similarities and differences in a legal system. However, more than that, comparative law has the aim of helping provide advice in shaping the law in a country to be better in accordance with the basic objectives set by the country. The goal of this legal comparison can be said to be an input test material in compiling legal provisions from a country as well as a comparative study material between legal systems.

Specifically, this paper uses the Netherlands as a comparative country to find out the mechanism of implementation of supervision punishment. The Netherlands is chosen as a comparative country because the Netherlands has the first recognized supervision punishment, and historically, the Indonesian legal system has a close relationship with the Netherlands. Below is a model of an integrated implementation of supervision punishment offered by the author:

68 Republic of Indonesia, *Law Number 11 of 2021 as an Amendment to Law Number 16 of 2014 Concerning the Attorney General's Office of the Republic of Indonesia* (Jakarta: State Secretariat, 2021).

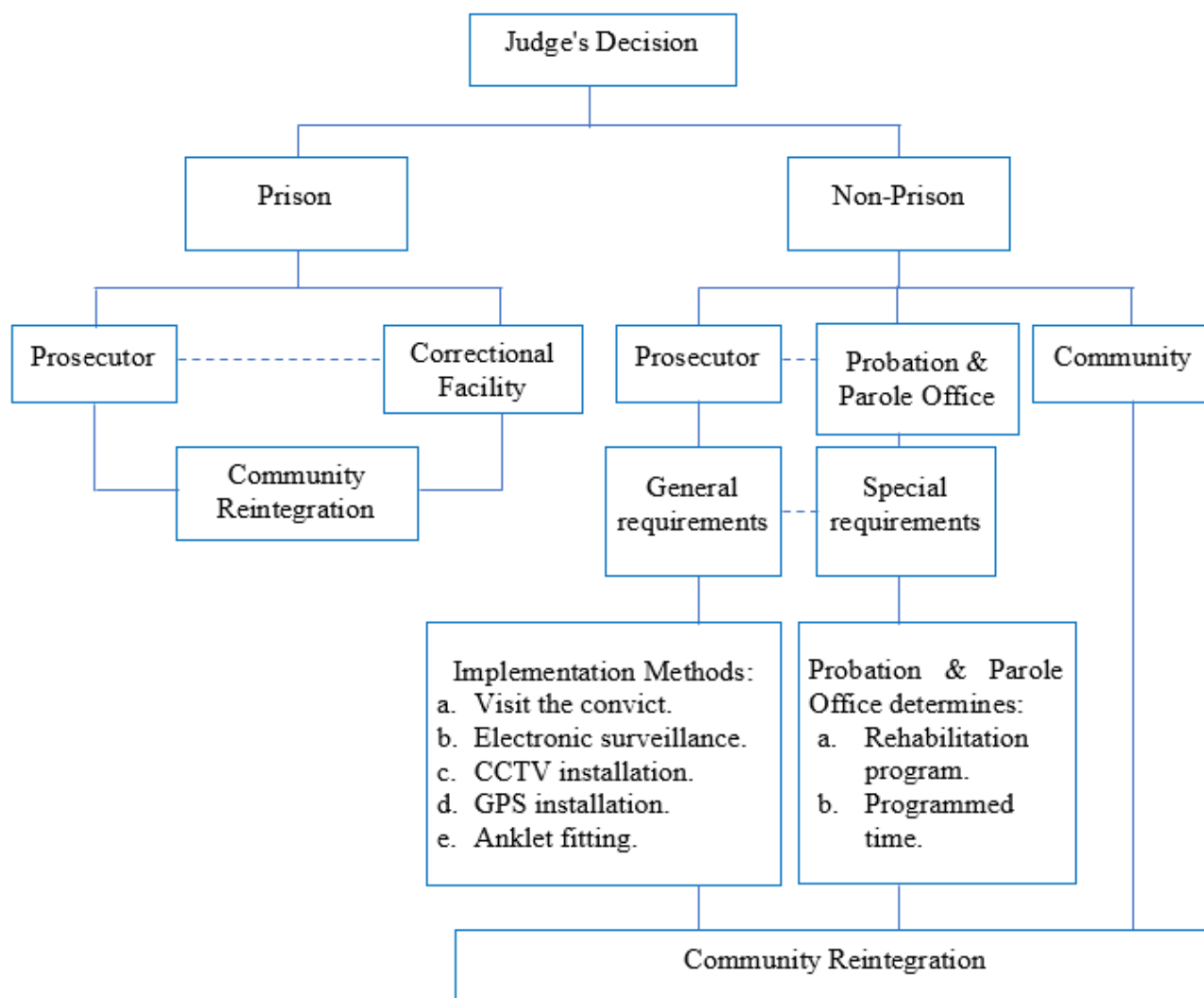
69 Irmawanti and Arief, "Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana."

70 Rivanie et al., "Perkembangan Teori-Teori Tujuan Pemidanaan."

71 Ramadhan and Ariyanti, "Tujuan Pemidanaan Dalam Kebijakan Pada Pembaharuan Hukum Pidana Indonesia."

72 Bagus Satrio Utomo Prawiraharjo, "Implementasi Ide Keseimbangan Monodualistik Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana," *Jurnal Hukum Progresif* 11, no. 2 (2023): 159–71, <https://doi.org/https://doi.org/10.14710/jhp.11.2.159-171>.

Figure 1: Integrated Criminal Supervision Implementation Model



Source: Primary and secondary legal sources processed by the author by making comparisons with the Netherlands

The implementation model of integrated supervision punishment, as referred to above, is carried out by the Prosecutor, Probation & Parole Office, and the community. This is slightly different from the implementation of supervision punishment in the Netherlands, where the Probation Service carries out supervision punishment in the Netherlands as an independent institution. The author's consideration in determining the institution of supervision punishment implementation is at least based on several reasons. The first reason is that in the model offered, supervision punishment is carried out by the prosecutor because, based on Article 1 point 6 of Law Number 8 of 1981 on Criminal Procedure, the prosecutor is the executor of the judge's decision with permanent legal force. Supervision punishment is a unique non-imprisonment punishment because, in its imposition, it must be accompanied by general conditions and special conditions as specified in Article 76, paragraphs (2) and (3) of Law Number 1 of 2023 on the Criminal Code. In addition to the general condition not to commit another criminal offense, the law also determines that they can be subject to special conditions in the form of restoring the condition due to the criminal offense or doing or not doing something. By adopting the implementation of supervision punishment in the Netherlands by providing a rehabilitation program to return to an acceptable society, the author formulates that the special condition of doing something given to convicts can be in the form of the implementation of rehabilitation programs provided by the Probation & Parole Office as stipulated in Law Number 22 of 2022 on Corrections.

In determining the rehabilitation program for convicts, the Probation & Parole Office has an important role in identifying the convict and the crime committed so that a relevant rehabilitation program can be formulated. This is also applied by the Netherlands, where before the supervision punishment is carried out, reclassifying

interviews with the convict are used to formulate a program and implement supervision punishment that is relevant to the convict and the crime committed. The implementation of general requirements that are the responsibility of the Prosecutor and the implementation of special requirements that are the responsibility of the Probation & Parole Office can realize an integrated implementation of supervision punishment. Therefore, coordination between the two institutions is important. In addition, considering that supervision punishment is a form of non-imprisonment punishment, which means that the convicts still mingle with the community. Therefore, in formulating the implementation of supervision punishment, the author adds the participation of the community in realizing successful supervision. The community is a party that directly interacts with and can conduct supervision and observation on a convict's basis. The community that the author considers to be included are the head of the local RT, the neighbors of the convict, and the family of the convict. The selection of these community components is based on an arrangement that is not interrelated so that it can produce a supervision report that can be accounted for.

Supervision punishment imposed on convicts will be considered successful if, during the supervision period, the convicts can improve themselves and become better individuals and can be accepted back by the community as the philosophical basis for the establishment of supervision punishment to provide a second chance to convicts to improve themselves without having to be imprisoned.⁷³ Therefore, the method of supervision is also an important thing that can determine the success or failure of the imposed supervision punishment. The method of implementation of supervision punishment offered by the author is adopted from the implementation of supervision punishment in the Netherlands with modification of the degree of supervision period imposed as follows:

- a. Supervision period 0 months to 10 months: convicted visit and electronic surveillance.
- b. Supervision period: 11 months to 22 months: convict visitation and electronic surveillance, or surveillance with CCTV installation,
- c. Supervision period: 23 months to 36 months: visitation of convicts, electronic surveillance, surveillance by CCTV installation, and installation of GPS and ankle bracelet.

Meanwhile, the Prosecutor and the Probation & Parole Office also need to pay attention to the condition of the convict, whether he is actively working or not. Considering this situation, by referring to the purpose of criminalization development from Roeslan Saleh, the imposition of punishment is not only aimed at providing a deterrent effect and rehabilitation for the convict but also to benefit the community. Therefore, in its implementation, supervision punishment also needs to pay attention to the degree of time the convict has to carry out daily activities. The degree of time that can be applied in the implementation of integrated supervision punishment by adopting the Dutch supervision punishment system with modifications based on Roeslan Saleh's theory of punishment objectives can be determined as follows:

- a. Supervision period 0 months to 10 months: fifteen hours a week are given the freedom to carry out activities outside the rehabilitation program set by the Probation & Parole Office.
- b. Supervision period of 11 months to 22 months: Thirteen hours a week are given the freedom to carry out activities outside the rehabilitation program set by the Probation & Parole Office.
- c. Supervision period of 23 months to 36 months: ten hours a week are given the freedom to carry out activities outside the rehabilitation program set by the Probation & Parole Office.

The degree of freedom time must be considered by the Prosecutor and the Probation & Parole Office, and for convicts who have no activities or have not worked, the provision of freedom time for two hours a day and are required to attend the Probation & Parole Office rehabilitation program for a minimum of twenty-four hours a week.

The integrated criminal supervision policy model proposed in this article still faces several challenges in terms of implementation. Institutional readiness, human resource capacity, infrastructure, and legal feasibility are critical factors that have not yet been fully addressed within the framework of Indonesia's current positive law. Therefore, although this model has been formulated normatively as an ideal representation of a progressive criminal justice system, its implementation requires further study that considers actual conditions on the ground, including institutional constraints and the ongoing development of relevant regulations.

73 Gina Sabrina and Fazal Akmal Musyarri, "Urgensi Penerapan Pidana Pengawasan Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang KUHP," *Jurnal Yudisial* 16, no. 1 (December 24, 2023): 65–82, <https://doi.org/10.29123/jy.v16i1.586>.

The realization of supervision punishment that runs in accordance with the purpose of its establishment will strengthen the new paradigm built in Law Number 1 of 2023 on the Criminal Code, namely the paradigm shift from retributive to corrective, restorative, and rehabilitative paradigm. The non-imprisonment approach will be able to realize substantive justice not only for the perpetrators of criminal acts but also for the victims and the community. The model of implementation of integrated supervision punishment that the author offers as a model policy formulation is a rational effort to formulate problems effectively through legal policies that an agency can later determine. The policy model of integrated supervision criminal implementation that the author offers will bring the formulation of supervision criminal law policy that is in line with the culture and legal values of the aspired society.

3. Conclusion

Supervision punishment under the National Criminal Code constitutes a principal non-custodial sentence designed to provide offenders with opportunities for rehabilitation, maintain public order, and protect both victims and society. Reflecting the principles of restorative justice, this form of punishment prioritizes reintegration and seeks to minimize the negative effects of incarceration, in accordance with the theory of legal utility. The legislative ratio legis behind supervision punishment is to offer offenders a second chance to become productive members of society. The effectiveness of this approach depends on well-implemented supervision mechanisms and structured rehabilitation programs that can prevent future criminal behavior.

The Integrated Criminal Supervision Implementation Model proposed in this study is adapted from the Dutch criminal supervision system through a comparative legal approach. However, not all elements of the Dutch model are directly transferable to the Indonesian context. Key aspects such as the involvement of independent supervisory institutions and specific monitoring methods require careful modification due to institutional and cultural differences. In the Netherlands, supervision is typically carried out by established independent agencies supported by long-standing institutional frameworks. In contrast, Indonesia currently lacks such infrastructure. Consequently, the Dutch model cannot be adopted wholesale; instead, its components must be selectively adapted to align with Indonesia's legal framework, administrative capacity, and societal conditions.

This study identifies three essential components of the integrated model: (1) implementation methods, with clearly assigned institutional responsibilities; (2) the degree and duration of supervision based on risk assessment of the offender; and (3) a structured rehabilitation program. These elements must be integrated into a coherent policy framework aligned with the objectives of punishment and the utilitarian value of law. Despite its conceptual strength, supervision punishment in Indonesia still faces significant implementation challenges, including institutional readiness, availability of qualified personnel, infrastructure limitations, legal feasibility, and the absence of effective inter-agency coordination. Therefore, a realistic policy roadmap, coupled with post-enactment empirical research, is essential to evaluate its social impact and overcome operational obstacles. By adopting a more pragmatic and context-sensitive approach, the model can serve as a normative framework that supports Indonesia's transition toward a restorative and utilitarian system of criminal justice, while remaining responsive to the country's socio-legal realities.

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Conflict Between Public Transportation And Local Community Rights in The Sea

Rizal Muchtasar¹, Heriyanti², Sahrina Safiuddin³, La Ode Muhammad Taufiq Afoeli⁴

¹²³⁴Faculty of Law, University of Halu Oleo, Southeast Sulawesi, Indonesia

Article Information

Corresponding Author. Email:
rizal.muchtasar78@gmail.com

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Abstract

This study aims to analyze the conflict between public access rights and the rights of local communities on Cempedak Island in managing marine areas. The method used is socio-legal, through an analytical approach to national legal frameworks, doctrines, and case studies. The study results show that this conflict creates a dilemma between the interests of local communities and public access rights. The 1945 Constitution and related regulations provide a legal basis for public access rights, but local communities also have rights set out in policies and regulations. This paper critically presents a model of conflict resolution, regulatory, and resource processes that often ignore local community participation. Evaluations of previous Government policy procedures show a lack of consultation and involvement of local communities and public access in policy processes that can result in gaps and prolonged conflicts. This research emphasizes the need for a participatory-collaborative approach. Innovation is the gradual application of the need for community identification to implement comprehensive methods that integrate positive legal analysis with the social and local communities' cultural realities. Conflict techniques on Cempedak Island actively involve communities in decision-making to encourage sustainability, protection, community interests, and public access rights, ultimately creating new policies and rules.

1. Introduction

Article 25A of the 1945 Constitution (1945 Constitution) emphasizes that Indonesia is an archipelagic country. As an archipelagic country, Indonesia must focus on managing its stunning marine resources to realize a sovereign maritime state¹. Maritime sovereignty supports the national economy and plays an important role in maintaining important political and national defense and security stability². However, behind this potential, various challenges can threaten Indonesia's maritime sovereignty, both from Indonesia's actors related to threats to national defense and security³ and internal factors involving economic, political, and socio-cultural complexities that, if not addressed immediately, have the potential to trigger conflicts that can lead to the disintegration of the nation⁴. Therefore, new

¹ (Ayunita et al., 2020).

² (Sereda et al., 2021).

³ P. (eds.) D. Caverley, J., & Dombrowski, "Security Studies in a New Era of Maritime Competition (1st ed.)," in Global Development, Law, Politics & International Relations, ed. Peter Dombrowski Jonathan D. Caverley, 1st ed. (London, 2023), 230, <https://doi.org/https://doi.org/10.4324/9781003390121>.

⁴ Sabeth Häublein et al., "Disintegration and Discourse: Cross-Sectoral Storylines in the German Water and Forest Debate," Environmental Science

policies are needed to reduce conflicts that benefit the community on Cempedak Island and not ignore public access rights.

Regarding the topic of previous research that has been researched by several authors, including Keisha Angeli Saputra, who focuses on this research, aims to find out the role of human rights (HAM) in distributing transportation facilities with a focus on justice. Justice in transportation access is a basic right that affects every individual's life. The article states that an individual's life is tied to the equitable distribution of transportation facilities. The article also analyzes the legal framework that governs access to transportation and efforts to ensure that the distribution of means of transportation correlates with human rights. This study uses normative juridical research methods in the literature.⁵ The next authors are Egidia Saviri and Azhar Abbas, who focus on the analysis using the dimension of public service quality, where accessibility connects how people obtain sea transportation services by looking at the dimensions of service quality, namely: 1) Reliability, to provide appropriately and correctly, the type of service that the community has promised. 2) Responsiveness, awareness, or desire to help and provide fast service to the community, or willingness to help customers and carry out services sincerely. 3) Certainty, knowledge or insight, politeness, governance, respect for the community, and ethical and moral attention in providing services. 4) Empathy, the government's willingness to approach and try to find out the wants and needs of the community, is characterized by the willingness to know the wants and needs of consumers. 5) Form, physical appearance means that the services provided manifest in physical appearance, such as buildings, equipment, and other facilities⁶. Similarly, the next author is Putu Bayu Aji Krisna et al., who focus on understanding spatial conflict and its implications for using coastal areas on Gili Trawangan. This research began by identifying interest groups using the Gili Trawangan coastal area⁷. Then the next researcher is Mohammad Mahrus Ali et.al, who focuses on juridical and sociological aspects related to protecting the constitutional rights of coastal communities after the Constitutional Court decision Number 3/PUU-VIII/2010⁸. The final authors are Esti Pramestiari et al., who focus on describing the complex history of economic growth, cultural diversity, and social conflict on the island. In the context of economic development conflicts, the Rempang Eco City project has become a source of tension, especially related to the land ownership rights of indigenous peoples.

However, in contrast to previous research, the author will focus on the public interest in this case, which is related to the socio-economic rights of the Cempedak island community and the right of public access, which must obtain the same protection rights. Thus, the interests and rights of the local community and the right of public access should not be harmed⁹. The conflict between public access rights and the rights of local communities in using marine resources is a crucial issue in managing coastal areas in Indonesia. This case also occurred in Southeast Sulawesi. Practically, this situation creates a dilemma, caused by public passenger ships that want to pass through the path of local people living on the coast of Cempedak Island. This statement means that communities refuse to be crossed and passed by public passenger ships because they interfere with the livelihoods of local communities that depend on marine products, cultural practices, or economic activities such as fishing.

On the other hand, if the public passenger ship does not pass and cross Cempedak Island, then the public

and Policy 156, no. April (2024), <https://doi.org/10.1016/j.envsci.2024.103743>.and deemed beneficial especially in face of cross-cutting issues. As there is little research addressing the ideational integration of two sectors, we introduce a new framework to discursively analyze horizontal policy integration (HPI

5 Keisha Angeli Saputra, "Justice & Transportation: Discussing Human Rights in the Distribution of Transportation Facilities," *JOURNAL OF LAW, POLITICS AND SOCIAL SCIENCES* 2, no. 4 (October 2023): 216–22, <https://doi.org/10.55606/jhps.v2i4.2683>.

6 Egidia Savitri and Azhar Abbas, "Accessibility of Sea Transportation Services for the Rural Community of Batam City (Case Study in Bulang District)," *Scientia Journal* 1, no. 2 (2019).interviews, and documentation. Interviews were conducted to Head UPT Transportation Service, Private Boat Owner in the Bulang sub-district. This study was analyzed using the Dimension quality of public services, where accessibility is connecting how people obtain service marine transportation by seeing of service quality dimensions, are: 1

7 Ida Bagus Gde Wirawibawa Putu Bayu Aji Krisna, Syamsul Alam Paturusi, "Spatial Conflict in the Coastal Region of Gili Trawangan, Lombok, West Nusa Tenggara," *Journal of Architecture and Planning* 4 (2021).

8 Mohammad Mahrus Ali, Zaka Firma Aditya, and Abdul Basid Fuadi, "Protection of Constitutional Rights of Coastal Communities: The Urgency of Harmonization of Integrated Coastal Management Regulations," *Constitutional Journal* 17, no. 4 (January 2021): 799–827, <https://doi.org/10.31078/jk1745>.

9 Wendy Ayu Melati Esti Pramestiari, Jefry Khasogi, Kahfi Permana, Rangga Arif Mahadeli, "Legal Certainty and Environmental Protection on Rempang Island: The Dilemma between Economic Development and Conservation," *IKAMAKUM* 3, no. 2 (2023): 273–83.

passenger ship must rotate further. Such conditions, of course, result in and require longer journeys and fuel losses for general passenger ships. This conflict is increasingly occurring on the island of Cempedak, which has an ecosystem that depends on the local wisdom of its people. Meanwhile, the interests of public passenger ship rights must also be accommodated.

The gap in this is that there has not been a model for conflict resolution that exists by analyzing in depth on Cempedak Island. The socio-legal approach is used to bridge the gap between the needs of the coastal community of Cempedak Island related to resources and livelihoods, as well as the access rights of public passenger ships passing through the community area. Thus, this study seeks to identify the root of the problem, the dynamics of community needs and passenger ship access rights, and potential solutions aligned with collaborative participation and sustainability principles.

The main objective of this study is to create critical policy procedures in the form of applicable rules and resources, focusing on the extent of local community participation and the interests of general passenger vessels, including the interests of third parties. This analysis will resolve conflicts that can result in gaps and prolonged conflicts, as well as formulate more inclusive policy recommendations through the Forum Group Discussion, starting from identifying local communities in stages, multi-story, which accommodates the needs of hamlets, villages, and sub-districts on Cempedak Island. Conflict resolution between the Cempedak community and public passenger ships uses participatory-collaborative methods through bottom-up-top-down approaches and is oriented towards community empowerment. Then, the meeting results were used to draft concrete rules for the Southeast Sulawesi Government.

The resolution of conflicts in the future can be minimized because Southeast Sulawesi Province consists of several islands that connect one district to another. Almost 50% of these routes and access are passed by sea. The routes and public access rights that must be put forward, both land and sea, are prone to conflicts between local communities and users, including sea transportation routes. Therefore, policies and rules must be made in the form of Regional Regulations to minimize conflicts by applying the participatory-collaborative doctrine and ultimately the importance of the Southeast Sulawesi Regional Government.

2. Methods

The study adopts a qualitative research design as outlined by John Creswell, combining doctrinal and socio-legal approaches. The selection of Cempedak Island is based on the intensity of the conflict as reported in several verified media sources between April and May 2024. This case study is based on several strategic considerations relevant to the objective that Cempedak Island represents a miniature of the complexity of conflict resolution issues, where there is a clash of interests between public access rights driven by economic interests and the traditional rights of local communities dependent on marine resources. Cempedak is a clear example of how the policy process often ignores the participation of local communities, potentially leading to prolonged conflicts. The legal texts analyzed include the 1945 Constitution as the basis of the constitution and sectoral laws and regulations through interpretation carried out by socio-legal methods with participatory-collaborative doctrines that combine bottom-up and top-down. This study distinguishes between normative legal obligations and socio-legal realities experienced by coastal communities.

3. Findings and Discussion

3.1. Marine Public Transport Rights

Public access rights in the sea area is rooted in Article 33, paragraph (3) of the 1945 Constitution, which affirms that “*The land, water, and natural resources con*” aimed therein are controlled by the state and used for the greatest prosperity of the people.” This provision shows that the state has a” obligation to manage and utilize natural resources, including marine areas, for the public interest ¹⁰ In legal considerations Decision No. 001-021-022/PUU-I/2003 related to the Testing of Law No. 20 of 2002 concerning Electricity, the Constitutional Court (MK) interpreted that the phrase “controlled by the state” includes the sovereignty of the Indonesia” people over all resources ¹¹ So that the management and utilization of natural resources must be carried out based on the principle of public ownership by the people collectively ¹² Returning to the case of the Cempedak Residents

¹⁰ (Puluhulawa & Harun, 2017).

¹¹ (Harvelian et al., 2023).

¹² (Soedomo, 2020).

Dispute to prohibit passenger ships, it gives birth to a paradox at the level of legal problems, especially in terms of balancing the proportionality of legal recognition of public access rights to marine areas and the need to maintain the quality of the marine regions by local communities. On the other hand, local communities also have the right to preserve traditions and environmental sustainability based on customary rights recognized by the state. If examined carefully, there is a conflict between the community and the ship passengers who want to go to Kendari¹³. Therefore, the right to use the sea has not been realized in terms of efficiency. These rights include public access to marine resources and using the ocean as a means of transportation. Research shows that using the ocean must be carried out using humanitarian and sustainability principles so that people can enjoy the benefits without damaging the marine ecosystem.

Conflicts between the people on Cempedak Island and the government often arise due to dissatisfaction with policies implemented without involving the voices of the local community. The government must openly dialogue with the public to address this problem. Through inclusive meetings, all parties can express their opinions and concerns. By listening to input from the public, the government can understand their needs and expectations, so that the policies taken can be more appropriate and fairer. In addition, involving the community in the decision-making process is essential to create a sense of belonging and responsibility. The government needs to ensure that the policies implemented benefit one party and consider the local community's interests. By providing appropriate dispute resolution mechanisms and monitoring policy implementation, it is hoped that the relationship between the community and the government can be improved, resulting in harmonious and mutually beneficial cooperation.

In this case, the Indonesian people, through the 1945 Constitution, give a mandate to the state to carry out policy formulation (*beleid*), carry out management actions (*bestuursdaad*), regulations (*regelendaad*), management (*beheersdaad*), and supervision (*toezichthoudendaad*). All these actions aim to ensure that the use of natural resources is carried out for the prosperity of the people. In short, control by the state is not intended as ownership by a particular individual or group, but as collective ownership intended for the public good¹⁴.

In addition to the provisions in the 1945 Constitution, regulations regarding public access rights in the sea area are also regulated in various laws and regulations. Although the term "public access rights" is not explicitly mentioned, the principle" is reflected in rules on the use and management of marine space¹⁵. This regulation is spread across various organic regulations, among others, Law Number 26 of 2007 concerning Spatial Planning (Law 26/2007), Law Number 27 of 2007 concerning the Management of Coastal Areas and Small Islands (Law 27/2007), Law Number 6 of 1996 concerning Indonesian Waters (Law 6/1996), Law Number 17 of 2008 concerning Shipping (Law 17/2008), and Law Number 32 of 2014 concerning Marine Affairs (Law 32/2014).

Furthermore, the derivative regulation of the law also strengthens the regulation of public access rights in marine areas. For example, Government Regulation Number 32 of 2019 concerning Marine Spatial Planning (PP 32/2019), Regulation of the Minister of Maritime Affairs and Fisheries Number 28 of 2021 concerning the Implementation of Marine Spatial Planning (Permen KP 28/2021), and Regulation of the Minister of Maritime Affairs and Fisheries Number 54/Permen-Kp/2020 concerning Location Permits, Management Permits, and Location Permits at Sea (Permen KP 54/2020), as well as Presidential Regulation Number 16 of 2017 concerning Indonesian Marine Policy (Presidential Regulation 16/2017). All these regulations, explicitly and implicitly, govern how public access rights in marine areas should be accommodated in managing aquatic resources¹⁶.

13 La Welendo et al., "Analysis of Passenger Characteristics of Sea Transportation at Kendari Nusantara Port," GSC Advanced Engineering and Technology 1, no. 2 (August 30, 2021): 042–048, <https://doi.org/10.30574/gsaet.2021.1.2.0038>. which is an archipelagic country consisting of islands, sea transportation is an absolute necessity for those living in the archipelago. The port terminal is a tool for the process of moving goods and passengers to transfer modes of movement either through sea transportation or land transportation. The purpose of this study was to determine the characteristics of sea transportation users at the Kendari Nusantara port terminal. The method in this study uses a qualitative descriptive by distributing questionnaires to users of the Nusantara Kendari port terminal who want to travel between islands. The results of the study based on the characteristics of sea transportation users through the Kendari Archipelago port were obtained based on the characteristics of sea transportation users (passengers

14 (Disyon & Sibarani, 2023).

15 (Pratama et al., 2024).

16 Expanded Type and Title Package, "At-Risk-Marine-Biodiversity-Face-Extensive-Expanding-and-Intensifying-Human-Impacts_2021_American-Associations-for-Advanced-Science," 2022; Guilherme Baggio, Manzoor Qadir, and Vladimir Smakhtin, "The Status of Nationwide Freshwater Availability for Human and Ecosystem Needs," Total Environmental Science 792 (2021): 148230, <https://doi.org/10.1016/j.scitotenv.2021.148230>; Tianan Deng, Kwok Wing Chau, and Huan Feng Duan, "Machine Learning-Based Seawater Quality Prediction for Coastal Hydro-Environmental

The concept of public access rights in the context of regulating the use and management of marine space is intended to avoid *the tragedy of common property* in the management of natural resources¹⁷ As is known, in the field of environmental law, the doctrine of *common ownership*¹⁸ of the Sea as common *property* or common resources is rooted in the principle that certain individuals or groups do not own natural resources including the sea, but by the community collectively¹⁹ This principle is in line with Article 33 paragraph (3) of the 1945 Constitution which emphasizes that natural resources are controlled by the state and used for the greatest possible prosperity of the people²⁰.

In this context, the sea is considered a common property whose benefits must be enjoyed by all, and the state acts as a manager to ensure that its use does not only benefit some parties²¹. In economic theory, the Sea as a *common property* is vulnerable to overexploitation if it is not well-regulated²². Therefore, the role of the Government of Southeast Sulawesi is very important to ensure a fair and sustainable arrangement so that the sea and its resources can be utilized without harming the public interest or the marine ecosystem itself²³. Relevant laws and regulations, as mentioned above, have provided restrictions to regulate the use of marine space. Through these various arrangements, the state is expected to maintain a balance between economic utilization and preserving marine ecosystems and respect the rights of people who depend on the sea as a source of life²⁴. In this view, public access to the ocean is not only about the right of individuals to use or access the sea, but also about maintaining the sustainability of these resources for future generations. Every citizen has the right to benefit from the sea, but they must respect the limits and rules set by the state for the ocean to remain a sustainable resource for all people²⁵.

In foreign literature, many countries have explicitly regulated the concept of the right of public access or *Ease of Public Access* as a legal instrument to protect people's right to access coastal and marine areas. For example, countries like the United States have clear public access rights regulations²⁶. In the United States, the right of public access to the coast and marine area is regulated through *the Doctrine of Public Trust* in the state constitution (²⁷the concept of the Public Trust Doctrine (PTD) has strong relevance in controlling public access rights in marine and coastal areas. One example of the implementation of PTD occurred in the case of *Lucas v. South Carolina*, where the government did not allow Lucas to erect buildings on coastal land he owned²⁸. In the United States, the right of public access to the coast and marine area is regulated through *the Doctrine of Public*

Management," *Journal of Environmental Management* 284, no. December 2020 (2021): 112051, <https://doi.org/10.1016/j.jenvman.2021.112051>.

17 (Govella, 2023).

18 (Amaransinghe, 2020b).

19 (Muin & Rapower, 2023).

20 (Utomo & Heliaantoro, 2024).

21 (H. Ö. et al, 2023).

22 K. Benabderrazik et al., "Climate Resilience and Human-Water Dynamics. The Case of Tomato Production in Morocco," *Environmental Science Total* 849, no. February (2022): 157597, <https://doi.org/10.1016/j.scitotenv.2022.157597>; Shaima Malik and Sabir Bin Muzaffar, "Determination of Biologically Accumulated Potentially Toxic Elements in Commercially Important Pelagic Fish Spanish Narrow-barred Fish (*Scomberomorus Commerson*)," *Marine Pollution Bulletin* 201, no. January (2024): 116281, <https://doi.org/10.1016/j.marpolbul.2024.116281>.

23 (Muthmainna et al., 2024).

24 Georgina G. Gurney et al., "Equity in Environmental Governance: Perceived Justice from Principles of Distribution Justice in Marine Joint Management," *Environmental Science and Policy* 124, no. May (2021): 23–32, <https://doi.org/10.1016/j.envsci.2021.05.022>; Mark R. Payne et al., "Skillful Decadal Scale Predictions of Fish Habitats and Distribution Shifts," *Nature Communications* 13, no. 1 (2022), <https://doi.org/10.1038/s41467-022-30280-0>; Robert Y. Fidler et al., "Participation, Not Penalties: Community Engagement and Equitable Governance Contribute to More Effective Multipurpose Protected Areas," *Science Advances* 8, no. 18 (2022), <https://doi.org/10.1126/sciadv.abl8929>.

25 Pamela M. Buchan et al., "Ocean Citizenship: The Right to Participate in the Transformation of Human-Sea Relations for Sustainability," *PLoS ONE* 18, no. 3 March (2023): 1–23, <https://doi.org/10.1371/journal.pone.0280518>.

26 Barbara Cobo, Claudia Cruz, and Paulo C. Dick, "Gender and Racial Inequality in Brazilian Access and Use of Healthcare," *Ciencia e Saude Coletiva* 26, no. 9 (2021): 4021–32, <https://doi.org/10.1590/1413-81232021269.05732021>; Margit Endler et al., "How the 2019 Coronavirus Disease Pandemic Affected Sexual and Reproductive Health and Rights and Responses: Results from a Global Survey of Providers, Researchers, and Policymakers," *Acta Obstetrica et Gynecologica Scandinavica* 100, no. 4 (2021): 571–78, <https://doi.org/10.1111/aogs.14043>.

27 Lyness, 2024),

28 hak (Callies, 2023).

Trust in the state constitution²⁹(the concept of the Public Trust Doctrine (PTD) has strong relevance in controlling public access rights in marine and coastal areas. One example of the implementation of PTD occurred in the case of *Lucas v. South Carolina*, where the government did not allow Lucas to erect buildings on coastal land he owned³⁰.

In such cases, the government prohibits development in coastal areas because of environmental impacts, such as the risk of abrasion, which can damage coastal ecosystems. Lucas sued, arguing that the government had taken over his property without compensation. As a result, the court ruled that even if the purpose of environmental protection based on PTD was justified, the government's takeover of land should still be accompanied by appropriate compensation. Further, in this case, the Court affirmed that PTD can conventionally be applied to rivers, land, sea, and public open spaces, aiming to protect the right of communities to access and maintain the sustainability of ecosystems in the area³¹.

The application of this doctrine is important in the context of the management of marine areas as *shared property*. In this case, the state not only acts as a manager who ensures the use of resources in the public interest, but also as a party responsible for maintaining a balance between environmental protection and economic utilization³². The rights of local communities in the sea area are groups of people who traditionally live in an area and have socio-economic relations with the surrounding environment, including the sea area. Meanwhile³³, indigenous peoples are part of local communities that have customary laws and value systems and norms that are passed down from generation to generation, which are specifically recognized by the state³⁴. In Indonesia, the recognition of indigenous peoples is explicitly regulated in Article 18B paragraph (2) of the 1945 Constitution, while local communities are recognized in various more general laws, such as Law No. 27 of 2007 concerning the Management of Coastal Areas and Small Islands³⁵. In the context of customary rights, indigenous peoples have rights to the marine areas that they traditionally manage and use based on their customary laws³⁶. The rights of indigenous peoples are often more strongly recognized because they are related to the identity and customary law recognized by the state. However, local communities, especially those dependent on marine resources for their livelihoods, like traditional fishermen, also have the right to manage the area under more general legal³⁷ arrangements. Customary rights are not only limited to land areas but also include sea areas. The basis for recognizing customary rights of the sea lies in the traditional concept of customary rights, which consists of all territories managed by indigenous peoples, both land and water.^{38 39} Article 3 of the Basic Agrarian Law (UUPA) Number 5 of 1960, although it does not explicitly mention maritime customary rights, implicitly provides space

29 Lyness, 2024),

30 hak (Callies, 2023).

31 (Rahmawan & Cetera, 2020).

32 (Litvinenko et al., 2023).

33 (Katiandagho, 2020).

34 (Ilmu et al., 2024).

35 (Arisandi & Pareke, 2024).

36 Aleksander Panjek, "The Land Will Tear Us Apart: The Family Farming Division and the Real Estate Market in Slovenia (Sixteenth to Eighteenth Centuries)," *Family History* 27, no. 1 (2022): 54–81, <https://doi.org/10.1080/1081602X.2021.2005654>; Chao Wang, Jing Ning, and Xiaohan Zhang, "International Investment and the Environment of Indigenous Peoples: A Case Survey of ISDS from 2000 to 2020," *International Journal of Environmental Research and Public Health* 18, no. 15 (2021), <https://doi.org/10.3390/ijerph18157798>; Jae Joseph Russell B. Rodriguez et al., "Ethical Challenges in Genetic Research among Indigenous Peoples of the Philippines: Insights from Fieldwork in Zamboanga and the Sulu Islands," *Frontiers in Genetics* 13, no. October (2022): 1–13, <https://doi.org/10.3389/fgene.2022.901515>.

37 Maya Riantini et al., "Vulnerability to Household Livelihoods of Household Fishers Due to Climate Change in Lampung Province, Indonesia," *PLoS ONE* 19, no. 12 (2024): 1–20, <https://doi.org/10.1371/journal.pone.0315051>; Lázaro Dias Alves et al., "Meteorological Forecasting and Artisanal Fishing: Filling the Knowledge Gap for Safety at Sea," *Environmental Science and Policy* 124, no. June (2021): 217–25, <https://doi.org/10.1016/j.envsci.2021.06.020>; Aniruddha Ghose et al., "Survey on Sea Snake Bites and Related Morbidity and Mortality among Bangladeshi Fishermen in Bay of Bengal: A Pilot Study," *Toxicon* 234, no. August (2023): 107273, <https://doi.org/10.1016/j.toxicon.2023.107273>.

38 (Prasetio, 2024).

39 Elisabeth Miltenburg, Hannah Tait Neufeld, and Kim Anderson, "Relationality, Responsibility, and Reciprocity: Fostering Indigenous Food Sovereignty in Urban Environments," *Nutrition* 14, no. 9 (2022): 1–16, <https://doi.org/10.3390/nu14091737>; Mojtaba Shafiee et al., "The Food Security Status of Indigenous Peoples in Canada According to the 4 Pillars of Food Security: A Scoping Review," *Nutrition Advances* 13, no. 6 (2022): 2537–58, <https://doi.org/10.1093/advances/nmac081>.

for recognizing customary rights if they are alive and by the development of society, and do not contradict the national interest⁴⁰.

Furthermore, Boedi Harsono argued that although the UUPA does not regulate customary rights in detail, these rights cover all areas used by indigenous peoples, including waters (⁴¹ Thus, if customary land rights are recognized, then water areas such as the sea must also be recognized automatically, considering the importance of the sea for the life and local wisdom of the community ⁴²custom. In some regions, such as Maluku, customary rights in the sea are recognized through the system, where indigenous peoples have the authority to manage their marine areas from generation to generation. Therefore ⁴³, recognizing maritime customary rights is an integral part of indigenous rights, and naval territories should be considered part of the living space of indigenous peoples recognized by law, even though they have not been explicitly regulated in the UUPA. In the context of marine area management, local communities, especially coastal communities that live as traditional fishermen, also have the privilege of utilizing the natural resources in the area. Regulations regarding these rights can be found in Law Number 27 of 2007 concerning the Management of Coastal Areas and Small Islands (Law 27/2007), which was later amended by Law Number 1 of 2014. The law recognizes the right of indigenous peoples to manage coastal and marine resources they have exploited for generations, but also protects broader local communities, including traditional fishermen. ⁴⁴

In addition, local communities, especially those directly related to the sea, are entitled to the protection and preservation of the culture and environment related to the sea. They not only utilize the sea as a source of livelihood, but also maintain the balance of marine ecosystems through local wisdom passed down from generation to generation ⁴⁵ The rights of local communities in marine areas are also linked to their right to be involved in decision-making that affects their lives, especially in terms of permitting the use of aquatic resources by parties ⁴⁶ third, Government Regulation Number 32 of 2019 concerning Marine Spatial Planning (PP 32/2019) emphasizes the importance of community participation in the preparation of marine spatial plans that cover the traditional areas they manage⁴⁷. Not only within the scope of national law, the rights of indigenous peoples are also recognized in international legal instruments, such as *the United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which emphasizes the right of indigenous peoples to manage their natural resources and maintain spiritual, cultural, and economic ties with their territories including territories ⁴⁸sea. The implementation of the recognition of these rights in Indonesia is part of a broader effort to protect the rights of indigenous peoples, who are often marginalized in the process of economic development⁴⁹. However, in practice, the rights of local communities and indigenous peoples in marine areas usually face various challenges, especially when commercial interests or large-scale development enter areas traditionally managed by them. Conflicts between the rights of

40 (Sherly Meilintan Surya Nia Kurniati & Priyanta, 2024).

41 Lakburlawal & Matuankotta, 2023).

42 Teshia G. Arambula Solomon et al., "The Generational Impact of Racism on Health: Voices from the American Indian Community," *Health Affairs* 41, no. 2 (2022): 281–88, <https://doi.org/10.1377/hlthaff.2021.01419>; Autumn Nesdoly, Douglas Gleddie, and Tara Leigh F. McHugh, "Exploring Indigenous Peoples' Physical Literacy Perspectives," *Sports, Education, and Society* 26, no. 3 (2021): 295–308, <https://doi.org/10.1080/13573322.2020.1731793>.

43 (Soselisa et al., 2024).

44 Yong Sun et al., "How Can Governments and Fishers Collaborate to Participate in Fishing Prohibitions for Ecological Restoration?," *Journal of Environmental Management* 360, no. September 2023 (2024): 120958, <https://doi.org/10.1016/j.jenvman.2024.120958>; Stefania Coppa et al., "Fisheries Management in Marine Protected Areas with Compliance Gaps: Socio-Economic and Biological Insights as a First Step on the Sustainability Path," *Journal of Environmental Management* 280, no. June 2020 (2021): 111754, <https://doi.org/10.1016/j.jenvman.2020.111754>.

45 (Azaria et al., 2024).

46 (Radovich, 2023).

47 Jordan Gacutan et al., "Continental Patterns in Marine Debris Revealed by a Decade of Citizen Science," *Environmental Science Total* 807 (2022): 150742, <https://doi.org/10.1016/j.scitotenv.2021.150742>; Charles Loiseau et al., "Cumulative Impact Assessment Highlights the Benefits of Integrating Land-Based Management with Marine Spatial Planning," *Environmental Science Total* 787 (2021): 147339, <https://doi.org/10.1016/j.scitotenv.2021.147339>.

48 Stephanie Russo Carroll et al., "Using Indigenous Standards to Apply CARE Principles: Setting Expectations through Tribal Research Codes," *Frontiers in Genetics* 13, no. March (2022): 1–10, <https://doi.org/10.3389/fgene.2022.823309>; Laura Matson et al., "Transforming Research and Relationships through Tribe-University Collaborative Partnerships in Manoomin (Wild Rice)," *Environmental Science and Policy* 115, no. May 2020 (2021): 108–15, <https://doi.org/10.1016/j.envsci.2020.10.010>.

49 (JB et al, 2019).

local communities and indigenous peoples and development projects, such as mining or tourism, often arise and require a fair legal settlement and recognition of their traditional rights⁵⁰. Through its legal apparatus, the state must protect local communities and indigenous peoples by maintaining a balance between development interests and the protection⁵¹ of indigenous rights.⁵²

Thus, the rights of indigenous and local peoples in marine areas should be seen as an integral part of sustainable aquatic resource management policies. Recognizing these rights protects people's lives and helps maintain people's ability to manage marine ecosystems through management practices based on local wisdom that have been proven effective for centuries.

3.2. Socio-Economic Impact of Marine Access Conflict

This study assesses the real economic losses arising from the conflict of sea access, as well as its impact on the lives of the people of Cempedak Island on public transportation routes and the livelihoods of the local community. Restrictions on traditional fishing areas, for example, directly result in a loss of income for communities, potentially worsening livelihoods. At the same time, this study assesses the impact of public transportation routes when faced with the interests of the community, the increase in the operational costs of public passenger ships due to detours or modified routes, and the potential damage to local community facilities and infrastructure due to unresolved disputes. Ultimately, this analysis aims to solve the problems inherent in ocean access conflicts. This statement seeks to determine whether the claimed economic benefits of increased public transport outweigh the financial costs imposed on local communities through losses suffered by local communities and disruptions to traditional economic activities. By providing a clear assessment of the interests of the local community of Cempedak Island and the resulting public access rights, this study seeks to apply a participatory collaborative model in a more equitable and sustainable decision-making process that minimizes the impact of disparities and maximizes shared sustainability in coastal areas.

Tensions arise when large waves generated by general passenger ships disrupt coastal ecosystems and pose a safety risk to people around the waters. The local community felt that the preservation of the environment and their lives were threatened. At the same time, legally, the ocean is a public domain that cannot be restricted to the benefit of only a few groups. The Southeast Sulawesi Regional Government resolved the conflict between the Cempedak community and public passenger ships by using a participatory collaborative method through a bottom-up concept oriented towards community empowerment. Then, the meeting results were used to draft concrete rules for the Southeast Sulawesi Government.

To assess the economic impact of ocean access conflicts, the first step that needs to be taken is to conduct a thorough analysis of all stakeholders involved. This statement includes local communities, fishermen, tourism entrepreneurs, and governments. Through open dialogue, all parties can express their views and interests. In this way, the government can understand the community's needs, formulate more inclusive policies that benefit all parties, and consider the well-being of local communities that depend on marine resources. Additionally, it is important to develop clear and transparent regulations regarding the use of marine space. These regulations should include clear restrictions on the right of access and utilization of marine resources, thereby reducing the uncertainty that is often a source of conflict. Strict enforcement of laws against violations is also needed to protect local communities' rights and maintain the sustainability of marine ecosystems. With reasonable regulations, it is hoped that a balance can be created between economic needs and environmental protection. Finally, governments and communities must work together to implement sustainable resource management practices. These points include setting quotas for sustainable fishing and monitoring activities that damage the environment. Through this approach, it is hoped that the economic impact of marine access conflicts can be minimized, and local communities can continue to benefit from marine resources without sacrificing ecosystem sustainability.

As stipulated in Article 33, paragraph (3) of the 1945 Constitution, the state controls natural resources, including the sea, for the greatest possible prosperity of the people. The concept emphasizes that the state has a

50 Marcela Castro Garrido and Ana María Alarcón, "Commoditization of Ecosystems in the Mapuche Region of Chile: Violations of the Human Rights to Health," *Health and Human Rights* 25, no. 1 (2023): 95 – 103; Roger Merino and Maria Therese Gustafsson, "Localizing Indigenous Environmental Stewardship Norms: Conservation and Territorial Rights Making in Peru," *Environmental Science and Policy* 124, no. May 2020 (2021): 627–34, <https://doi.org/10.1016/j.envsci.2021.07.005>.

51 Garrido and Alarcón, "Commoditization of Ecosystems in the Mapuche Region of Chile: Human Rights Violations of Health."

52 (Nugroho, 2022).

role to ensure public access to the sea within the framework of shared welfare. Related laws and regulations, such as Law No. 17 of 2008 concerning Shipping, also regulate the importance of sea routes as public transportation that the wider community must access to support economic, tourism, and trade activities in coastal areas, as well as being an important pillar in Indonesia's maritime economic development. However, the policy of granting public access rights to the sea is a key cornerstone in national development oriented towards the financial well-being of many people. The concept of “*shared tragedy*” reminds us of the risk of “overexploitation” of marine resources if public access is not properly regulated⁵³. In the context of Cempedak Island, the conflict arises due to the clash between the principle of public access rights controlled by the state and the rights of local communities traditionally associated with marine areas. Through its laws and regulations, the state supports using the ocean for public interest and access. However, in this case, the fast boat route that crosses the waters of Cempedak has caused serious disruption to the lives of coastal communities. The resulting waves damage coastal infrastructure and disrupt local communities' comfort and safety. However, the right of local communities to defend their territory and traditions also intersects with the public interest to maintain public access in the marine area. If local communities restrict public access, it could create a precedent leading to similar conflicts in other coastal regions⁵⁴.

Given the complexity of the conflict between public access rights and the rights of local communities on Cempedak Island, an approach is needed to accommodate these two interests in a balanced manner. The principle of proportionality is a relevant solution in dealing with this problem.⁵⁵ Kai Möller, a lecturer in law at the London School of Economics and Political Science, came up with the idea of systematizing the application of the doctrine of proportionality. According to him, this principle is a doctrine that can resolve conflicts between conflicting rights or interests, focusing on the balance between the two. The application of the principle of proportionality must consider four indicators, namely the existence of a *legitimate legal objective*, rational achievement, need, and⁵⁶

In a case analysis of the conflict between the right of public access and the rights of local communities on Cempedak Island, the application of the four proportionality indicators by Kai Möller above can help understand how these two interests can be better accommodated. The analysis is as follows:

a) Legitimate Legal Purposes

First, it is necessary to establish the legitimate legal objectives of the policy governing public access to the sea. In the context of Cempedak Island, the goal is not only to facilitate transportation and community mobility but also to consider the protection and welfare of local communities that depend on marine resources. The state must ensure that the policies set benefit all communities, including fishermen and seaweed farmers in the region. By identifying more comprehensive objectives, policies can be formulated to balance better the public interest and the rights of local communities.

b) Rational Achievement

Furthermore, the actions taken must be able to achieve these goals rationally. In this case, the government needs to conduct an in-depth impact study related to fast shipping routes, including an analysis of the impact of large waves produced on coastal ecosystems and local community activities. Policies must be based on clear data and evidence to provide effective solutions to reduce disruption to the community without eliminating the necessary public access. For example, reviewing shipping routes or setting fast ship sailing times can be a rational step to balance public access and local communities' survival.

53 Govella, “Avoiding and Exploiting the Tragedy of the Commons: Fishing, Crime, and Conflict in the South China Sea.”

54 Yulai Wan, Leonardo J. Basso, and Anming Zhang, “Strategic Investments in Accessibility under Port Competition and Inter-Regional Coordination,” *Transportation Research Part B: Methodological* 93 (2016): 102–25, <https://doi.org/10.1016/j.trb.2016.07.011>.

55 Faiq Tobroni, ‘The Principle of Proportionality as a Moderation of the View of Diometric Law’, *Judicial Journal*, 11.3 (2018), 307–25 <https://doi.org/10.29123/jy.v11i3.313>.

56 equilibrium (Möller, 2012).

c) Necessity

Third, the principle of necessity demands that the action taken is the most appropriate step to achieve the desired goal, considering lighter alternatives. In this context, the government should explore other options to minimize negative impacts without sacrificing public access. For example, implementing stricter regulations on fast shipping, such as speed restrictions or using vessels with more environmentally friendly designs, could be a better alternative. This point requires carefully evaluating existing policies and ensuring that every step taken is the most effective and does not harm the relevant parties.

d) Balance

Finally, balancing is a key component in applying the principle of proportionality. Where the negative impact of an action must be proportional to the expected benefit. In the conflict on Cempedak Island, the parties need to assess the extent to which public access to the sea can be done without damaging the lives of local communities. The government should facilitate dialogue between local communities and stakeholders to find mutually beneficial solutions. For example, the implementation of compensation mechanisms that compensate local communities for the losses they suffer due to public access, while maintaining the right of communities to use the sea. Such an approach will help to ensure that the decisions made comply with legal norms and respect and protect local communities' rights.

Considering the four proportionality indicators above, it is hoped that the conflict between public access rights and the rights of local communities on Cempedak Island can be better managed to ensure that all parties can contribute and benefit from existing marine resources. Applying the principle of proportionality is beneficial in resolving such conflicts and provides a foundation for more responsible and sustainable management of natural resources.

Based on the results of this study, it is empirically revealed that the conflict between public access rights and the rights of local communities on Cempedak Island is manifested in several concrete forms. First, there is a restriction on public access rights due to the local community's rejection of the public passenger route that passes through Cempedak Island. Second, it was found that there was damage to community infrastructure due to public passenger ship transportation routes that threatened the sustainability of people's livelihoods. Third, existing policymakers have not been able to balance the interests of local communities and public access rights.

The conflict resolution model proposed in this study is based on a participatory-collaborative model that integrates positive legal analysis with local communities' social and cultural realities. This approach emphasizes the importance of identifying community needs gradually, starting from the hamlet, village, to sub-district levels, including shipping companies as a third party. By actively involving local communities in the decision-making process, it is hoped that policies and regulations can be created that are more inclusive, sustainable, and fair, alleviate conflicts, and improve community welfare. Therefore, this study offers a model for conflict resolution by applying a top-down, bottom-up approach whose goal is to create new policies and regulations in the form of Southeast Sulawesi Regional Regulations.

Several countries have successfully resolved conflicts between coastal communities and public access rights through a participatory and collaborative approach. For example, in Norway, the government implements a marine resource management model involving local communities in decision-making⁵⁷. Through regular consultation forums, fishermen and coastal communities can voice their opinions on fisheries policy and marine management⁵⁸. This approach reduces conflict and improves the sustainability of resources, as the decisions taken reflect local needs and knowledge⁵⁹. In addition, coastal land management programs involving indigenous peoples in

57 Jahn Petter Johnsen and Bjørn Hersoug, "Local Empowerment through the Creation of Coastal Space?," *Ecology and Society* 19, no. 2 (2014): art60, <https://doi.org/10.5751/ES-06465-190260>.

58 Sierra Ison et al., "Participatory Research in Complex Marine Conservation Settings: A Review of Recent Trends and Lessons for the Future," *Ocean & Coastal Management* 253 (July 2024): 107053, <https://doi.org/10.1016/j.ocecoaman.2024.107053>.

59 Ana Carolina Esteves Dias et al., "Participatory Monitoring of Small-Scale Coastal Fisheries in South America: Use of Fishers' Knowledge and Factors Affecting Participation," *Reviews in Fish Biology and Fisheries* 30, no. 2 (June 2, 2020): 313–33, <https://doi.org/10.1007/s11160-020-09602-2>; Kimberly Baldwin and Hazel A. Oxenford, "A Participatory Approach to Marine Habitat Mapping in the Grenadine Islands," *Coastal Management* 42, no. 1 (January 28, 2014): 36–58, <https://doi.org/10.1080/08920753.2013.863725>.

Australia have shown positive results⁶⁰. The government has successfully created a balance between public access rights and local interests by recognizing indigenous peoples' rights to land and sea and peoples' empowerment in resource management⁶¹. This model provides space for communities to actively participate in decision-making actively, thus creating a sense of ownership and responsibility for the resources they manage⁶². These successes show that collaboration between the government and local communities can effectively resolve conflicts in coastal areas. In the Philippines, conflict resolution between coastal communities and public access rights often involves a community-based approach that gives local fishers a voice⁶³. Programs such as "Co-Management Agreements" allow local communities to participate in managing marine resources. Cooperation between local governments and fishing communities can minimize conflicts by building an understanding of boundaries and access rights⁶⁴. In addition, education and training for the community on sustainable fisheries practices also raise awareness of the importance of protecting marine ecosystems, thereby reducing tensions between public and local interests. Similarly, in Vanuatu, traditional approaches that prioritize local wisdom play an important role in resolving conflicts related to marine resource management. Through a system of "customary law," indigenous peoples have the right to regulate access to and use of marine resources in their territories⁶⁵. The local government supports this initiative by providing legal recognition of the rights of indigenous peoples, thereby creating cooperation between customary law and national law. A similar approach is seen in merging environmental policy and local communities' rights in the Netherlands and Australia⁶⁶. In Australia, for example, recognition of the rights of indigenous peoples in coastal land management has been successful in creating harmonious cooperation, reducing conflict, and improving resource sustainability⁶⁷.

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- 60 Chelsey A. Crandall et al., "Meaningful Action Gives Satisfaction: Stakeholder Perspectives on Participation in the Management of Marine Recreational Fisheries," *Ocean & Coastal Management* 179 (September 2019): 104872, <https://doi.org/10.1016/j.ocecoaman.2019.104872>.
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- 62 Hampus Eriksson et al., "An Ecosystem Approach to Small-Scale Fisheries through Participatory Diagnosis in Four Tropical Countries," *Global Environmental Change* 36 (January 2016): 56–66, <https://doi.org/10.1016/j.gloenvcha.2015.11.005>.
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Conclusion

The conclusion of this study shows that the conflict between public access rights and the rights of local communities on Cempedak Island is a complex issue and requires serious attention. The analysis results indicate that while existing policies and regulations provide a legal basis for public access rights, the rights of local communities are often neglected in managing marine areas. Lack of consultation and involvement of local communities in decision-making creates long-standing gaps and conflicts, potentially disrupting the sustainability of marine resource management. Based on the analysis conducted in this study, it is suggested that the marine area management policy on Cempedak Island adopts a participatory-collaborative approach by implementing a top-down, bottom-up approach that actively involves local communities in each decision-making stage. This decision is important to ensure that the rights of local communities are recognized and protected, while public access rights are maintained. The Southeast Sulawesi Government needs to build an effective consultation mechanism called the Coastal Community Forum, so that the community's voice can be heard and considered in policymaking, leading to the Southeast Sulawesi Regional Regulation. In this way, it is hoped that a balance can be created between the interests of local communities and public access, reduce the potential for conflict, and support the sustainability of fair and inclusive management of marine resources.

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THE ROLE OF INTERNATIONAL HUMANITARIAN LAW IN THE CONFLICT WITH THE WEST PAPUA LIBERATION ARMY

Muhammad Uchida Sudirman

Faculty of Law, Universitas Pembangunan Nasional "Veteran" Jakarta, Indonesia

Article Information

Corresponding Author. Email:
2110611250@mahasiswa.upnvj.ac.id

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Abstract

This research examines the application of International Humanitarian Law (IHL) in the conflict between the Indonesian National Armed Forces (Tentara Nasional Indonesia, or "TNI") and the West Papua National Liberation Army (TPNPB). The main focus is to assess the legal status of TPNPB as a non-state armed actor and examine the extent to which the TNI's authority in military operations has been in accordance with the principles of proportionality, distinction, and precaution. Using qualitative legal research and conceptual, statutory, and historical approaches, the findings indicate that the conflict in Papua has fulfilled the elements of a non-international armed conflict (NIAC), although it has not been officially recognized by the Indonesian government. In addition, the implementation of TNI's authority in Military Operations Other Than War (OMSP) is considered to have the potential to violate IHL principles because of its impact on civilians. This research recommends a more consistent application of IHL to ensure the effective protection of civilians in domestic conflicts.

1. Introduction

Rebellion and separatism have historically emerged as responses to political, social, or economic dissatisfaction within a state. Under international law, conflicts involving non-state actors such as separatist movements are categorized as non-international armed conflicts (NIAC).¹ The 1949 Geneva Conventions—particularly Common Article 3—and the 1977 Additional Protocol II provide the legal framework for regulating conduct in such conflicts. A NIAC is defined as a confrontation between the armed forces of a state and organized armed groups that control part of the state's territory and are capable of conducting sustained military operations.² International Humanitarian Law (IHL) aims to limit the effects of armed conflict on non-combatant individuals through principles of distinction, proportionality, and individual protection. However, the application of IHL becomes complex in conflicts involving non-state actors such as the Free Papua Movement (Organisasi Papua Merdeka, OPM), due to ongoing debates surrounding their legal status and the nature of the conflict itself.³

The Free Papua Movement (OPM) emerged as a movement advocating for the independence of Papua from Indonesia. This conflict has deep historical roots, beginning with the integration of Papua into Indonesian territory through the 1969 Act of Free Choice (Pepera), the legitimacy of

- 1 Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols," *Recueil des Cours* 163 (1979): 131–156.
- 2 Umar Suryadi Bakry, *Hukum Humaniter Internasional: Sebuah Pengantar* (Jakarta: Prenada Media, 2019), 45.
- 3 Danial, "Revitalisasi Prinsip Pembedaan (Distinction Principle) sebagai Upaya Perlindungan Korban Konflik dalam Konflik Bersenjata Modern," *Jurnal Media Hukum* 23, no. 2 (2016): 200–208.

this which remains contested both in terms of process and outcome. In response to demands for independence, the Indonesian government has adopted a militaristic approach aimed at suppressing the movement.⁴ However, OPM is not a singular entity; it comprises diverse factions employing different strategies. On one hand, there are groups engaged in diplomacy and advocacy, such as the United Liberation Movement for West Papua (ULMWP) and the West Papua National Committee (KNPB), which focus on political struggle and garnering international support. On the other hand, there are armed groups engaging in military activity, notably the West Papua National Liberation Army (TPNPB).

The West Papua National Liberation Army (Tentara Pembebasan Nasional Papua Barat/TPNPB) serves as the military wing of the OPM, operating under a structured chain of command and actively conducts armed attacks targeting Indonesian infrastructure and security forces. TPNPB claims to exercise control over certain territories and possesses the capacity to carry out sustained military operations, thereby escalating violence over the past decades. Prior to 2018, their activities were concentrated in areas such as Puncak Jaya, Lanny Jaya, and Mimika; however, since 2020, their operations have expanded into other regions, including a temporary occupation of an airfield in Ilaga.⁵

This conflict has had a profound impact on the civilian population, including mass displacement, human rights violations, and damage to public infrastructure. According to reports by Human Rights Monitor and Kodam Cendrawasih, TPNPB actions were responsible for 38 civilian deaths between 2021 and 2022, with total casualties rising reaching 32 civilian and 29 military and police fatalities by 2024. Additionally, military and security operations conducted by the Indonesian National Armed Forces (TNI) and the National Police (Polri) have also resulted in significant civilian harm. Between 2018 and 2021, more than a hundred casualties were recorded from 58 incidents, with TNI operations accounting for the highest number of fatalities.⁶ These media-reported incidents are consistent with findings by the UN Human Rights Experts, which documented displacement of thousands of civilians and reported credible allegations of excessive use of force by Indonesian security forces in the Papua region during military operations.⁷

These data indicate that military operations have not adhered to core principles of International Humanitarian Law (IHL), such as distinction and proportionality, thereby endangering civilian safety. IHL requires a clear distinction between combatants—who may lawfully be targeted—and civilians, who must be protected from direct attacks. The principle of proportionality ensures that any anticipated civilian harm must not exceed the concrete and direct military advantage expected from an attack. Furthermore, IHL strictly prohibits inhumane treatment, including torture and cruel or degrading actions. However, the application of these principles depends on the recognition that the conflict meets the legal threshold of a non-international armed conflict (NIAC), along with the compliance of all parties involved. In the context of Papua, a key challenge lies in determining whether the confrontation between the Indonesian government and TPNPB qualifies as a NIAC or remains classified merely as a domestic security issue.

However, the Indonesian government's persistent refusal to classify the conflict as a NIAC is not merely a matter of political labeling, but also reflects specific legal and strategic considerations. The Indonesian government classifies TPNPB as an armed criminal group rather than a lawful belligerent party, a stance that from a legal standpoint avoids recognizing TPNPB as an organized armed group with rights and obligations under IHL, and thereby limits exposure to international scrutiny or intervention.⁸ Strategically, framing TPNPB as a "terrorist" or "armed criminal group" enables the state to operate within a domestic law enforcement paradigm, sidestepping the political consequences of granting quasi-combatant status. Similar state practices can be observed in countries such as Turkey in its confrontation with the PKK, or Colombia in earlier stages of its conflict with the FARC,

4 YLBHI, "Hentikan Operasi Tempur di Papua, Presiden Harus Penuhi Janji Laksanakan Dialog," April 18, 2023, <https://ylbhi.or.id/informasi/siaran-pers/hentikan-operasi-tempur-di-papua-presiden-harus-penuhi-janji-laksanakan-dialog/>.

5 Institute for Policy Analysis of Conflict, *Escalating Armed Conflict and a New Security Approach in Papua* (2022), <https://understandingconflict.sgpl.digitaloceanspaces.com/dashboard/bee931a2f167212f094a76778c93c4ab.pdf>.

6 Anugrah Andriansyah, "Amnesty International: 95 Warga Sipil di Papua Jadi Korban Pembunuhan di Luar Hukum," *VOA Indonesia*, March 21, 2022, <https://www.voaindonesia.com/a/amnesty-international-95-warga-sipil-di-papua-jadi-korban-pembunuhan-di-luar-hukum-/6494380.html>; Abraham Utama, "Wawancara Khusus Egianus Kogoya," *BBC News Indonesia*, October 8, 2024, <https://www.bbc.com/indonesia/articles/cly3z71x4vdo>.

7 OHCHR, "Indonesia: UN Experts Sound Alarm on Serious Papua Abuses, Call for Urgent Aid," 2022. <https://www.ohchr.org/en/press-releases/2022/03/indonesia-un-experts-sound-alarm-serious-papua-abuses-call-urgent-aid>.

8 Riska Nur Azizah, Syamsuddin Muhammad Noor, and Zulkifli Aspan, "Pengakuan Eksistensi Belligerent dalam Hukum Internasional (Studi Kasus OPM)," *PETITUM* 9, no. 2 (2021): 151–160.

where governments deliberately avoided NIAC recognition to maintain internal sovereignty narratives.⁹ This approach directly influences the applicability of IHL, as recognition of belligerent status would necessitate stricter adherence to international legal norms. Consequently, the state tends to rely more heavily on a human rights-based framework, which emphasizes individual protection from arbitrary state action but is less suited for regulating armed conflict conduct, particularly the operationalization of distinction and proportionality principles, and may therefore be insufficient to ensure civilian protection or restrain the use of force in military operations.

Several relevant studies have previously discussed the Papua conflict within the framework of international law. In *Status Organisasi Papua Merdeka dalam Subjek Hukum Internasional setelah Keluarnya Undang-Undang No. 5 Tahun 2018*, Gulo (2023) examined the implications of labeling the Free Papua Movement (OPM) as a terrorist organization under Indonesian law.¹⁰ The study concluded that although OPM had shifted in status nationally, it still does not meet the criteria for recognition as a subject of international law (belligerent). Similarly, in *Pengakuan Eksistensi Belligerent dalam Hukum Internasional (Studi Kasus OPM)*, Azizah, Noor, and Aspan (2021) concluded that OPM lacks the qualifications—such as territorial control and structured command—to be recognized as a belligerent party under international humanitarian law.¹¹

From an operational standpoint, the article *Tanggung Jawab Kelompok Bersenjata Non-Negara dalam Kerangka Hukum Humaniter Internasional* by Yulindo et al. (2025) similarly examines the military operations conducted by the Indonesian National Armed Forces (TNI) against non-state armed groups, asserting that such operations must comply not only with national security mandates but also with international humanitarian law standards, especially in protecting civilians and maintaining proportionality.¹² Meanwhile, Sudarso (2022), in *Perlindungan terhadap Internally Displaced Person Nduga di Wamena, Papua Barat dalam Perspektif Hukum Humaniter Internasional*, highlighted the lack of protection for internally displaced persons as a consequence of ongoing military operations, emphasizing the humanitarian costs of the conflict.¹³

While these studies provide valuable insight, they generally treat OPM as a monolithic actor and do not distinguish between its armed and non-armed factions. The current study addresses this gap by focusing specifically on the *Tentara Pembebasan Nasional Papua Barat* (TPNPB), the armed wing of OPM, analyzing its legal status under international humanitarian law. Moreover, this research evaluates the proportionality of military responses conducted by TNI, with a particular focus on operations that impact civilian populations. By integrating international legal instruments such as the 1949 Geneva Conventions and the 1977 Additional Protocol II with Indonesia's domestic laws—especially Law No. 34 of 2004 on the Armed Forces—this paper provides a more targeted and comprehensive analysis. This focus on the legality of armed engagements and proportional use of force represents the main novelty and scientific contribution of the study.

While previous studies have examined the broader legal frameworks applicable to internal conflicts in Indonesia, there remains a lack of specific legal analysis regarding the application of International Humanitarian Law (IHL) to the armed conflict involving the West Papua National Liberation Army (TPNPB). This study aims to address that gap by analyzing two main legal questions: First, what is the legal status of the armed conflict involving TPNPB under International Humanitarian Law, and to what extent can TPNPB be considered a party to a Non-International Armed Conflict (NIAC)? Second, how proportional is the Indonesian National Armed Forces' (TNI) use of force in responding to the conflict with TPNPB, in light of IHL principles such as proportionality, distinction, and precaution? Through these inquiries, the study seeks to evaluate the alignment of Indonesia's military policies with IHL standards and contribute to a clearer legal foundation for conflict resolution in Papua.

9 Kurtuluş, Şehmus. "Characterization of the Violence between Türkiye and the PKK." *Leiden Journal of International Law* 37, no. 1 (2024): 274–93. <https://doi.org/10.1017/S0922156523000456>; Farley, Benjamin R., and Alka Pradhan. "Establishing a Practical Test for the End of Non-International Armed Conflict." *International Review of the Red Cross* 106, no. 927 (2024): 1157–81. <https://doi.org/10.1017/S1816383124000201>.

10 Elshaddai Beryl Fanotona Gulo, "Status Organisasi Papua Merdeka dalam Subjek Hukum Internasional setelah Keluarnya Undang-Undang No. 5 Tahun 2018," *Jurnal Ilmu Hukum: ALETHEA* 6, no. 2 (2023): 136–152.

11 Riska Nur Azizah, Syamsuddin Muhammad Noor, and Zulkifli Aspan, "Pengakuan Eksistensi Belligerent dalam Hukum Internasional (Studi Kasus OPM)," *PETITUM* 9, no. 2 (2021): 151–160.

12 Yulindo, Yulindo, et al. "TANGGUNG JAWAB KELOMPOK BERSENJATA NON-NEGARA DALAM KERANGKA HUKUM HUMANITER INTERNASIONAL." *JOURNAL OF LAW AND NATION* 4.2 (2025): 512-519.

13 Sudarso, Thomas. "Perlindungan Terhadap Internally Displaced Person Nduga Di Wamena, Papua Barat Dalam Perspektif Hukum Humaniter Internasional." *BELLI AC PACIS (Jurnal Hukum Internasional)* 8.2 (2022): 120-126.

2. Method

This research employs qualitative legal research by interpreting the processed legal materials supported by several analytical approaches.¹⁴ A conceptual approach is used to examine theoretical frameworks of international humanitarian law concerning the status of combatants, unlawful belligerents, as well as the principles of proportionality and distinction in non-international armed conflicts (NIAC). A statutory (legislative) approach is applied to analyze international legal instruments such as the 1949 Geneva Conventions and the 1977 Additional Protocol II, in conjunction with national regulations including Law No. 34 of 2004 concerning the Indonesian National Armed Forces (TNI). Additionally, a historical approach is employed to trace the development of the Papua conflict and the emergence of TPNPB as an armed actor, thereby providing a socio-legal context for the analysis. These combined approaches form the analytical foundation for assessing the legal status of TPNPB and the scope of TNI's authority from the perspective of International Humanitarian Law.

3. Findings and Discussion

3.1. The Legal Status of Armed Conflict Conducted by the West Papua National Liberation Army (TPNPB) in the Perspective of International Humanitarian Law

The West Papua National Liberation Army (TPNPB), affiliated with the Free Papua Movement (OPM), is the primary military faction demanding Papua's independence, carrying out a series of attacks against security forces and vital infrastructure.¹⁵ TPNPB was officially formed on March 26, 1973, following the Proclamation of the Independence of West Papua on July 1, 1971. Goliath Tabuni is one of TPNPB's highest-ranking commanders, widely known for his actions against the Indonesian military. The armed conflict between TPNPB and Indonesian security forces has escalated significantly in recent years. TPNPB has carried out numerous attacks on TNI/Police posts, airports, and public facilities perceived as symbols of Indonesian authority in Papua. Areas such as Puncak Jaya, Lanny Jaya, and Mimika have become major conflict zones, where TPNPB frequently launches surprise attacks before retreating to remote regions that are difficult to access.¹⁶ One of the most prominent incidents was the attack and hostage-taking of a foreign airline pilot in 2023, which drew international attention to the situation in Papua.¹⁷

The armed conflict involving the West Papua National Liberation Army (TPNPB) can be examined through the lens of International Humanitarian Law (IHL). IHL distinguishes between two primary types of armed conflict: international armed conflict (IAC), which occurs between two or more states, and non-international armed conflict (NIAC), which takes place within the territory of a single state between government forces and non-state armed groups. The definition and criteria of NIAC are established in Common Article 3 of the 1949 Geneva Conventions and further clarified in Additional Protocol II of 1977, which aims to regulate minimum standards of protection for individuals affected by conflict.¹⁸

Common Article 3 of the Geneva Conventions provides the basic legal framework for non-international armed conflicts, although it does not explicitly list the criteria for determining their existence. This article underscores that, even in conflicts not of an international character, all parties involved are still bound to adhere to fundamental IHL principles, including the prohibition of murder, torture, cruel treatment, and sentencing without due legal process for individuals not directly participating in hostilities. Meanwhile, Additional Protocol II of 1977 offers a more specific definition, stating that a conflict may be classified as a NIAC if it meets two core criteria: the presence of an organized armed group, and a sufficient level of intensity in the hostilities.

14 H. Salim HS and Erlies Septiana Nurbaini, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi* (Jakarta: Raja Grafindo Persada, 2013), 19.

15 Sebastian Strangio, "In Papua Fighting, Indonesian Forces Claim Rebel Commander Killed," *The Diplomat*, May 14, 2021, <https://thediplomat.com/2021/05/in-papua-fighting-indonesian-forces-claim-rebel-commander-killed/>.

16 Ihsan Reliubun, "TPNPB Nyatakan 8 Daerah di Papua Ini Wilayah Perang, Minta Masyarakat Pergi," *Tempo*, May 9, 2024, <https://www.tempo.co/hukum/tpnpb-nyatakan-8-daerah-di-papua-ini-wilayah-perang-minta-masyarakat-pergi-60642>.

17 Tempo, "Ini Kronologi Penyanderaan sampai Pembebasan Pilot Susi Air Philip Mark Mehrstens," *Tempo*, September 21, 2024, <https://www.tempo.co/ekonomi/ini-kronologi-penyanderaan-sampai-pembebasan-pilot-susi-air-philip-mark-mehrtens-7293>.

18 Medyline Agnes Elias and Agustinus Supriyanto, "Tanggung Jawab Non-State Armed Groups dalam Non-International Armed Conflict Berdasarkan Hukum Humaniter Internasional," *Tumou Tou Law Review* (2024): 23–30.

Armed groups that fall within the criteria of a NIAC must possess a clear command structure with units capable of operating in a coordinated and sustained manner. Additionally, they must have the capacity to plan and conduct military operations, including carrying out attacks with strategic impacts on the opposing side. Such armed groups must also have internal regulations that enable adherence to the fundamental principles of IHL, including the prohibition of attacks on civilians.¹⁹

The intensity of violence in the conflict must be sufficiently high to meet the NIAC threshold. It must go beyond ordinary security disturbances, such as riots or armed criminal acts. Indicators of violence intensity include the frequency and scale of attacks, the use of military-grade weapons, the number of casualties, the involvement of state forces in large-scale military operations, and the overall impact of the conflict on national stability. Additionally, reports from international organizations and governments are often used as a basis to determine whether a conflict has reached the intensity level required for NIAC classification.²⁰

TPNPB has a command structure identifiable through a centralized leadership that is decentralized across various regions. According to TPNPB spokesperson Sebyy Sambom, their national command structure includes the Supreme Commander, General Goliath Tabuni; Deputy Commander, Lieutenant General Gabriel M. Awom; Chief of General Staff, Major General Terryanus Satto; and Commander of War Operations, Major General Lekagak Telengen. Furthermore, TPNPB operates 29 Regional Defense Commands (Kodap) throughout West Papua, each led by a regional commander.²¹

The attacks carried out by TPNPB indicate potential violations of the laws of war, particularly concerning assaults on civilian workers and infrastructure. For instance, in December 2018, TPNPB, under the command of Egianus Kogoya, Commander of Kodap III Ndugama, was allegedly responsible for an attack that killed several workers involved in the Trans Papua road project in Nduga Regency. This incident demonstrates TPNPB's capability to conduct coordinated and sustained military operations. However, targeting non-combatants and civilian infrastructure raises serious concerns regarding their compliance with the laws of armed conflict. Such actions not only violate the principle of distinction under International Humanitarian Law (IHL) but may also constitute war crimes.

Additional Protocol II Article 1 further states that a NIAC occurs between the armed forces of a state and organized armed groups that control part of its territory in a manner that enables them to carry out sustained and concerted military operations. Nevertheless, territorial control is not an absolute requirement, as long as the intensity of the conflict and the organization of the armed group meet the thresholds established by customary international law.²²

TPNPB claims to exercise control over certain areas in West Papua. They have established an organized command structure, including the division of territory into Regional Defense Commands (Kodap). For example, in May 2024, TPNPB announced plans for a joint military operation in three regions: Kodap VIII Intan Jaya, Kodap XIII Paniai, and Kodap XVIII Puncak Ilaga. However, TPNPB's control over these areas appears to be temporary and unstable.²³ In January 2024, Indonesian military forces succeeded in capturing a TPNPB headquarters in Dusun Sagu, Aifat Timur Jauh, Maybrat Regency, after a week-long operation.²⁴ Additionally, in March 2023, three TPNPB members from the Sorong Selatan region surrendered to Indonesian authorities, indicating internal fragmentation and weakened control over certain territories.²⁵

19 Bakry, *Hukum Humaniter Internasional*, 41.

20 Ibid., 47.

21 Audrey Santoso, "Tepis Polri, Jubir TPNPB-OPM Sebyy Sambom Ungkap Struktur Organisasi," *Detiknews*, December 14, 2018, <https://news.detik.com/berita/d-4343395/tepis-polri-jubir-tpnpb-opm-sebyy-sambom-ungkap-struktur-organisasi>.

22 Martha M. Bradley, "Classifying Non-International Armed Conflicts," *Journal of International Humanitarian Legal Studies* 11, no. 2 (2020): 349–384, <https://doi.org/10.1163/18781527-bja10011>.

23 Ihsan Reliubun, "TPNPB-OPM Umumkan Perang Akan Berlangsung di Tiga Wilayah," *Tempo*, May 26, 2024, <https://www.tempo.co/hukum/tpnpb-opm-umumkan-perang-akan-berlangsung-di-tiga-wilayah--55440>.

24 Advist Khoirunikmah, "Markas di Maybrat Hancur Akibat Serangan Militer, TPNPB-OPM Klaim Tembak Mati 1 Anggota TNI," *Tempo*, January 29, 2024, <https://www.tempo.co/hukum/markas-di-maybrat-hancur-akibat-serangan-militer-tpnpb-opm-klaim-tembak-mati-1-anggota-tni--92838>.

25 Andi Hartik, "3 Anggota TPNPB Wilayah Sorong Selatan Kembali ke Pangkuan NKRI," *Kompas.com*, March 13, 2023, <https://regional.kompas.com/read/2023/03/13/230132078/3-anggota-tpnpb-wilayah-sorong-selatan-kembali-ke-pangkuan-nkri>.

Based on the foregoing, it can be concluded that although the West Papua National Liberation Army (TPNPB) possesses an organized command structure and claims territorial control, the extent of their control appears insufficient when assessed against the legal threshold for “significant” territorial control under NIAC standards. In *Prosecutor v. Haradinaj* (ICTY, Judgement, 3 April 2008, para. 49), the Tribunal held that an armed group must exercise control over territory “of such a degree as to enable it to carry out sustained and concerted military operations and to implement (IHL obligations),” with stability sufficient to freely deploy forces, maintain logistics, regulate civilian life, and repel state forces over a meaningful period.²⁶ Temporary or intermittent control, which is rapidly reversed by government operations, will not normally satisfy this requirement. Applying this standard, TPNPB’s territorial control is often concentrated in remote districts, is subject to rapid displacement by Indonesian security forces, and lacks sustained governance over civilian life. These factors collectively place it below the *Haradinaj* benchmark. While their organizational cohesion and operational capacity may fulfill certain NIAC criteria, the inability to maintain prolonged, stable control over a defined area undermines full qualification under this specific element of the NIAC test.

The determination of the rights and obligations of the parties can also be assessed by examining the classification of non-state armed groups. Under IHL, non-state armed groups are typically categorized into two groups: *belligerents* and *insurgents*. The classification of such groups has significant implications for their legal standing and responsibilities in armed conflict. In the case of TPNPB, the group is more appropriately classified as an insurgent rather than a belligerent. To be recognized as a belligerent under international humanitarian law, a group must meet several specific criteria, including possessing an organized system of government or authority, exercising effective control over a defined territory, ensuring that its members wear uniforms with distinctive insignia and are equipped with adequate military equipment, and enjoying the support of the population within the occupied territory. Meeting these criteria may entitle a group to recognition as a belligerent and therefore confer status as a subject of international law.²⁷

TPNPB, however, is more accurately considered an insurgent group. Although they maintain an organized command structure and have conducted sustained military operations, they have not yet met the threshold required for belligerent status. Their territorial control remains limited and impermanent, and their operations are not widely supported by the civilian population of Papua—many of whom reject TPNPB’s acts of violence and intimidation.²⁸ According to Common Article 3 of the Geneva Conventions, all parties to a non-international armed conflict, including insurgent groups, are nonetheless obliged to uphold the minimum standards of humanitarian protection, including the prohibition of murder, torture, and cruel treatment against individuals who are not directly participating in hostilities.

Furthermore, the status of an insurgent also influences the degree of international recognition afforded to a conflict. International Humanitarian Law (IHL) does not automatically confer legal recognition on parties involved in a Non-International Armed Conflict (NIAC) unless they meet the strict criteria required for belligerent status. As an insurgent group, the West Papua National Liberation Army (TPNPB) does not possess the same rights and obligations as a belligerent under IHL. It is not recognized as a subject of international law and does not enjoy the legal entitlements granted to parties to an armed conflict. As a result, the actions of TPNPB are considered an internal matter by the Indonesian government and are addressed under domestic law. Moreover, insurgent groups such as TPNPB are not entitled to the protections afforded to lawful combatants, such as prisoner-of-war status, and may be treated as criminals under national legislation. Accordingly, the insurgent status of TPNPB restricts its rights and responsibilities within the framework of IHL, and its actions are governed predominantly by Indonesian domestic law rather than international legal norms.²⁹

The Indonesian government does not recognize the situation in Papua as a NIAC, but rather classifies TPNPB as an Armed Criminal Group (Kelompok Kriminal Bersenjata/KKB) or even a terrorist organization under Government Regulation in Lieu of Law (Perppu) No. 1 of 2002 concerning the Eradication of Criminal

26 *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Judgement, April 3, 2008, para. 49, International Criminal Tribunal for the former Yugoslavia (ICTY)

27 Sefriani, *Hukum Internasional: Suatu Pengantar* (Jakarta: Rajagrafindo Persada, 2021), 151.

28 Meisya Tantri Girsang and Helga Yohana Simatupang, “Tinjauan Aspek Hukum Internasional terhadap Tindakan Kelompok Pemberontakan dalam Konteks Negara (Studi Kasus: Kelompok Kriminal Bersenjata Papua),” *Journal of Global Perspective* 2, no. 1 (2024): 29–41.

29 Elshaddai Beryl Fanotona Gulo, “Status Organisasi Papua Merdeka dalam Subjek Hukum Internasional setelah Keluarnya Undang-Undang No. 5 Tahun 2018,” *Jurnal Ilmu Hukum: ALETHEA* 6, no. 2 (2023): 136–152.

Acts of Terrorism.³⁰ Under this framework, the state relies more heavily on national law and human rights law to address the conflict, rather than invoking IHL provisions applicable to armed conflicts. However, if the government were to acknowledge that the situation constitutes a NIAC, it would be legally obligated to apply international humanitarian protocols, including the differentiated treatment of TPNPB members, who in the context of a NIAC may be entitled to legal protections as parties to an armed conflict.

Nevertheless, even though the Indonesian government has not formally recognized the conflict in Papua as a NIAC, field realities suggest that the state's response resembles the conduct of armed conflict rather than ordinary law enforcement operations. Indonesia regularly deploys the military (TNI) in large-scale operations in Papua, including aerial bombardments and the mobilization of significant troop numbers—activities that are characteristic of state involvement in armed conflict. In several public statements, state officials have referred to these operations as a “war” against TPNPB, further reinforcing the notion that the situation bears the hallmarks of a NIAC.

Based on the legal analysis presented, it may be concluded that the armed conflict between Indonesia and TPNPB satisfies most of the elements required to qualify as a NIAC under international humanitarian law. TPNPB's organizational structure, sustained military operations, and the high level of violence all support this classification. While the group's territorial control is unstable and the Indonesian government refuses to acknowledge its legitimacy, the prevailing legal arguments suggest that the conflict should nonetheless be regarded as a NIAC. The Indonesian government's decision to classify TPNPB as a “terrorist organization” rather than a party to an armed conflict carries significant legal consequences: under domestic counterterrorism law (e.g., Perppu No. 1 of 2002), TPNPB members are prosecuted as criminals, denying them combatant immunity or prisoner-of-war status under IHL. This approach enables the state to frame its military operations as law enforcement measures, thereby limiting the formal applicability of NIAC provisions and avoiding any implication of political recognition. In state practice, similar strategies have been observed in Turkey's designation of the PKK and Colombia's designation of the FARC, where governments relied on counterterrorism frameworks to justify force while rejecting NIAC classification to maintain sovereignty narratives and prevent external mediation. Such choices also reflect elements of *opinio juris*, as states often justify these classifications in legal and diplomatic forums to affirm that the conflict remains a domestic security matter rather than an armed conflict governed by IHL. Therefore, despite challenges in formally applying the NIAC classification, the principles of IHL remain relevant to ensure that both state and non-state actors adhere to minimum humanitarian standards.

3.2. The Proportionality of the Indonesian National Armed Forces Authority in Responding to Armed Conflict with the West Papua National Liberation Army (TPNPB) from the Perspective of International Humanitarian Law

In every military operation, the principle of proportionality is a fundamental aspect of International Humanitarian Law (IHL) to ensure that the use of force is not excessive and remains within legally acceptable limits. This principle dictates that an attack carried out by a party in an armed conflict must strike a balance between the anticipated military advantage and the potential harm to civilians and civilian objects. In the context of the conflict in Papua, the involvement of the Indonesian National Armed Forces (TNI) in confronting the West Papua National Liberation Army (TPNPB) has raised debates over the extent to which the military actions taken align with the principle of proportionality as stipulated in Additional Protocol I to the 1977 Geneva Conventions, Article 51(5)(b) and Article 57.

The principle of proportionality is one of the main pillars of International Humanitarian Law (IHL), aimed at limiting the impact of armed conflict on those not involved in hostilities. This principle refers to the balance between the expected military advantage from an attack and the potential harm to civilians and civilian objects. In this context, attacks that result in civilian casualties or damage to infrastructure that is disproportionate to the military advantage gained are considered violations of humanitarian law.

The principle of proportionality is regulated in various international legal instruments, particularly in Additional Protocol I of the 1977 Geneva Conventions (AP I), which governs international armed conflicts (IAC), as well as Additional Protocol II (AP II), which applies to non-international armed conflicts (NIAC). Article 51(5)(b) of AP I defines proportionality as a prohibition against attacks that may be expected to cause “(b) incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” This means that although humanitarian law

30 Sri Yunanto and Angel Damayanti, “The Politics of Labeling TNPPB-OPM as Terrorist: Explanation, Process, and Implications,” *Asian Journal of Comparative Politics* (2024): 1–20.

acknowledges that civilian casualties in armed conflict may not be entirely avoidable, the extent of such harm must remain within reasonable limits in accordance with legitimate military objectives. Meanwhile, Article 57 of AP I stipulates that states and parties to a conflict must take precautionary measures when planning and executing attacks to minimize risks to civilians and civilian objects. This includes the obligation to assess proportionality before launching an attack and to select methods that pose the least danger to the civilian population.

The principle of proportionality cannot be separated from the principles of distinction and precautionary measures. In International Humanitarian Law (IHL), proportionality is inherently linked to the principle of distinction, as explicitly stated in Article 48 of Additional Protocol I to the 1977 Geneva Conventions. This article affirms that, to ensure protection for civilians and civilian objects, parties to a conflict must always distinguish between civilians and combatants, as well as between civilian objects and military targets. Consequently, all military operations must be directed solely at legitimate military objectives. This provision sets a clear boundary that prohibits the arbitrary use of military force or targeting groups not directly involved in the conflict.

Furthermore, the principle of precaution is clearly outlined in Article 58 of Additional Protocol I. This article obliges states and parties to a conflict to take, to the maximum extent feasible, precautionary measures to protect civilians and civilian objects from the dangers resulting from military operations. These obligations include three key components: first, efforts to remove civilians and civilian objects from the vicinity of military objectives that may become targets of attack; second, avoiding the placement of military objectives within or near densely populated areas; and third, taking other necessary precautions to safeguard civilians and civilian objects under their control. These obligations demonstrate that civilian protection is not limited to refraining from direct attacks, but also entails a proactive duty by the state to prevent harm to civilians from lawful military attacks.

For non-international armed conflicts, Additional Protocol II does not explicitly regulate the principles of proportionality, distinction, and precaution as comprehensively as Additional Protocol I. However, these principles are still recognized as part of customary international law. Violations of the principle of proportionality almost always stem from a failure to adequately apply the principles of distinction and precaution during the planning and execution of military operations. Therefore, it is essential to understand how these principles complement one another and function simultaneously to provide legal protection for civilians and civilian objects during armed conflict, particularly in the context of non-international armed conflicts.

In addressing non-international armed conflicts, the Indonesian National Armed Forces (Tentara Nasional Indonesia, or TNI) operate under the authority provided by Law Number 34 of 2004 concerning the Indonesian National Armed Forces (UU TNI), specifically under the framework of Military Operations Other Than War (Operasi Militer Selain Perang, OMSP), which includes combating armed separatist or insurgent movements as stipulated in Article 7 paragraph 2 letter (b). The implementation of OMSP can only proceed with a political decision agreed upon between the Government and the House of Representatives (DPR). When conducting OMSP domestically, TNI personnel remain bound by the provisions of ratified international law and customary international law, including International Humanitarian Law, as stated in the explanatory section of Article 2 letter (d) of the UU TNI. The execution of OMSP is permissible only when conventional or functional methods of conflict resolution are deemed ineffective or are likely to result in high civilian casualties and severe damage to infrastructure and property.³¹

In conducting Military Operations Other Than War (OMSP), particularly those targeting armed groups such as the West Papua National Liberation Army (TPNPB), the Indonesian National Armed Forces (TNI) are obligated to uphold the principle of precaution to ensure that military actions do not exceed the bounds of proportionality as mandated by International Humanitarian Law (IHL). One of the critical instruments for maintaining accountability and compliance in every military operation is the application of Rules of Engagement (ROE).³² ROE serve as normative guidelines that regulate when, where, against whom, and to what extent military force may be used. They are designed to ensure that every act of force conforms to both national and international law, as well as the principles of IHL.

The form of ROE within the TNI can be traced through military doctrinal documents, one of which is the Kartika Eka Paksi Doctrine of the Indonesian Army. This doctrine implicitly incorporates operational principles and limitations on the use of force in the execution of duties. It emphasizes the importance of moral

31 Nur Pratama, D., I. . Safira, S. . Wicaksono Adi, and I. Triadi. "Analisis Yuridis Terkait Peran Tni Sebagai Pertahanan Dan Bela Negara Dalam Menghadapi Organisasi Papua Merdeka (OPM)". *Journal Evidence Of Law*, vol. 3, no. 2, May 2024, pp. 156-63, doi:10.59066/jel.v3i2.638.

32 Kristin Bergtora Sandvik, "Regulating War in the Shadow of Law: Toward a Re-Articulation of ROE," *Journal of Military Ethics* 13, no. 2 (2014): 118–136.

and legal adherence in every deployment of TNI personnel in the field, including within the context of Military Operations Other Than War (OMSP). In this framework, soldiers are required to consistently uphold the values of professionalism and comply with legal boundaries defined by both national and international law—particularly International Humanitarian Law (IHL), which has been incorporated into Indonesia’s national legal system.³³

Although the Indonesian National Armed Forces (TNI) are normatively equipped with adequate legal and ethical frameworks for conducting Military Operations Other Than War (OMSP), the reality on the ground often reveals deviations. Various reports indicate that TNI operations in the armed conflict in Papua, particularly against the West Papua National Liberation Army (TPNPB), frequently result in adverse impacts on civilians, including displacement, damage to civilian infrastructure, and even civilian casualties, as exemplified by the incident in the Oksop District. Civilians from villages such as Bumbakon, Mimin, Oksop, Alutbakon, Oktumi, Atenor, and Ngangom in Oksop District, Pegunungan Bintang Regency, Highland Papua Province, fled their homes and sought refuge in forests and neighboring districts starting 8 December 2024. These displaced persons were reported to be struggling to obtain food and clean drinking water. This wave of displacement was triggered by fear following a sudden military deployment on 4 December 2024.³⁴ From an IHL perspective, the proportionality principle under Articles 51(5)(b) and 57 of Additional Protocol I requires that the expected military advantage—such as neutralizing TPNPB positions—must not be outweighed by incidental civilian harm.³⁵ In this case, available information does not indicate that the Oksop deployment targeted a specific military objective whose anticipated gain justified the mass displacement of civilians and disruption of essential services. If the operation lacked concrete intelligence on an immediate threat, or if alternative means with less civilian impact were feasible, the scale of civilian harm could be deemed excessive and thus contrary to the proportionality requirement. Moreover, the absence of effective evacuation measures and the use of tactics that foreseeably endangered civilian populations raise additional concerns regarding compliance with the precautionary obligations in Article 58 of Additional Protocol I.

The placement of military facilities or posts near civilian areas, such as schools or residential neighborhoods, is another recurring issue. In several cases, TNI posts located near educational facilities have become targets of TPNPB attacks, as these locations are perceived to represent disguised or infiltrated military presence—as was the case with SD YPK Anggruk in Yahukimo. According to TPNPB-OPM spokesperson Sebby Sambom, individuals targeted in these attacks were deemed by the group to be agents or collaborators of the state operating in Papua.³⁶ Moreover, many TNI personnel have been involved in civil assistance roles, such as teaching in elementary schools in remote areas of Papua as part of a territorial approach strategy. While this may appear socially beneficial, in the context of conflict, it creates a humanitarian dilemma as civilians and children in schools become vulnerable to armed violence due to TPNPB’s perception that the schools have been militarized.³⁷ Attacks on schools staffed by military-affiliated teachers have occurred and resulted in casualties among both students and educators, who should be protected under the laws of war. The placement of military objects near civilian objects poses a serious risk of violating the principle of distinction under IHL, which mandates a clear separation between military and civilian targets, as regulated in Articles 48 and 58 of Additional Protocol I.

Within the framework of International Humanitarian Law (IHL), such situations not only reflect potential violations of the principle of distinction but also raise serious concerns regarding compliance with the principle of precaution, as stipulated in Article 58 of Additional Protocol I. This principle obliges parties to a conflict, to the maximum extent feasible, to avoid locating military objectives within or near densely populated areas and to take active measures to protect civilians from the dangers resulting from military operations. In the context of Papua, the deployment of TNI soldiers in civilian functions such as teachers or medical personnel—although carried out with good intentions—indirectly places civilians in vulnerable positions, particularly when perceived

33 *Keputusan Panglima Tentara Nasional Indonesia Nomor Kep/1024/XII/2020 tentang Doktrin Tentara Nasional Indonesia Angkatan Darat Kartika Eka Paksi.*

34 Institute for Policy Analysis of Conflict (IPAC), *Escalating Armed Conflict and a New Security Approach in Papua*, IPAC Report No. 77, 13 July 2022.

35 International Committee of the Red Cross (ICRC), *Additional Protocol I to the Geneva Conventions*, Articles 51(5)(b) and 57 (1977).

36 Dewi Agustina, “TPNPB-OPM Akui Serang SD YPK Anggruk Yahukimo Papua Pegunungan, Eksekusi 6 Guru & Nakes,” *Tribunnews*, March 23, 2025, <https://www.tribunnews.com/regional/2025/03/23/tpnpb-opm-akui-serang-sd-ypk-anggruk-yahukimo-papua-pegunungan-eksekusi-6-guru-nakes>.

37 Dani Aswara, “Gedung Sekolah Jadi Pos Penjagaan, Warga Yuguru Papua Trauma Kehadiran TNI,” *Tempo*, April 22, 2025, <https://www.tempo.co/politik/gedung-sekolah-jadi-pos-penjagaan-warga-yuguru-papua-trauma-kehadiran-tni-1234369>.

by non-state armed groups like the TPNPB as a form of covert military operation. As a result, civilian objects such as schools, which are supposed to remain neutral and protected, instead become potential targets of attack. This demonstrates that military approaches that fail to account for perception and on-the-ground risks may ultimately lead to situations that contradict the spirit of IHL, which seeks to limit unnecessary suffering and ensure the protection of civilian populations during armed conflict.

Thus, it can be concluded that although the Indonesian National Armed Forces (TNI) possess a normative foundation in regulating Rules of Engagement (ROE) and conducting Military Operations Other Than War (MOOTW), the implementation of these policies still presents serious issues concerning compliance with the principle of proportionality. The imbalance between military objectives and the resulting impact on civilians has become a central concern in evaluating the legitimacy of TNI's military operations in Papua. To ensure that military authority is not misused, a comprehensive evaluation of field practices is necessary, alongside the strengthening of oversight mechanisms and the harmonization of national military doctrines with the norms of International Humanitarian Law.

Looking ahead, the legal and policy framework governing the Papua conflict would benefit from greater clarity and transparency. From a legal standpoint, Indonesia could consider adopting clearer operational guidelines that integrate IHL principles into counterinsurgency and counterterrorism operations, thereby reducing ambiguity in the treatment of non-state armed groups. Strengthening internal accountability mechanisms, such as revising the Rules of Engagement (ROE) for the Indonesian National Armed Forces (TNI) to include detailed proportionality and precaution standards, could enhance civilian protection and compliance with international norms. On the policy side, sustained dialogue between the Indonesian government, humanitarian organizations, and affected communities may help address the humanitarian consequences of protracted conflict while preserving state sovereignty. Future research should examine comparative case studies of states that have navigated the tension between NIAC classification and domestic security concerns, to identify best practices for balancing humanitarian obligations with national security imperatives.

4. Conclusion

Based on the analysis, the conflict between the West Papua National Liberation Army (TPNPB) and the Indonesian National Armed Forces (TNI) meets the criteria of a non-international armed conflict (NIAC) under Common Article 3 of the Geneva Conventions and Additional Protocol II of 1977, given TPNPB's command structure, operational capacity, and consistent armed attacks, despite unstable territorial control. Nevertheless, the Indonesian government has not officially recognized this status and continues to classify TPNPB as a criminal or terrorist group. This approach results in the application of national legal and human rights frameworks, which are insufficient in addressing the complexities of an armed conflict, thus hindering the implementation of key International Humanitarian Law (IHL) principles such as distinction, proportionality, and precaution.

In terms of TNI's authority, while Law No. 34 of 2004 provides the legal basis for Military Operations Other Than War (MOOTW), field implementation often shows discrepancies with IHL principles. Several TNI operations have reportedly caused damage to civilian objects, displaced populations, and resulted in non-combatant casualties, raising serious concerns about compliance with the principles of proportionality and distinction. Military doctrines such as *Kartika Eka Paksi* indeed incorporate values of caution and professionalism; however, instruments like the Rules of Engagement (ROE) have not yet been systematically or explicitly enforced. Additionally, the deployment of TNI personnel in civilian areas such as schools has increased the risk of militarization of civilian infrastructure and the likelihood of retaliatory attacks from TPNPB, as evidenced by the school attack in Yahukimo.

In light of these findings, concrete policy measures are necessary to enhance compliance with IHL in the Papua context. The Indonesian government should consider revising and operationalizing the TNI's Rules of Engagement to ensure explicit alignment with the principles of distinction, proportionality, and precaution, accompanied by regular IHL training and independent monitoring mechanisms. Civilian infrastructure, particularly schools and healthcare facilities, should be designated and enforced as demilitarized zones to prevent their use in military operations. Furthermore, avenues for dialogue between state authorities and local communities should be expanded to reduce hostilities and foster trust. From a scholarly perspective, future research could explore the intersection between counterterrorism frameworks and NIAC classification in Southeast Asia, as well as empirical studies on the humanitarian impact of military operations in Papua to inform both national policy and international legal discourse.

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Kontestasi Konsep Persetujuan : Rekonstruksi Komparatif Perkosaan dalam Perkawinan Berdasarkan Hukum Pidana Indonesia dan Hukum Islam

When Consent Becomes Contested : Comparative Reconstruction of Marital Rape in Indonesian Criminal Law And Islamic Law

Mimin Mintarsih¹, Lukman Mahdami², Ahyar Ari Gayo³,
Ratna Galuh Manika Trisista⁴

^{1,2,4} Faculty of Law, Universitas Islam Jakarta, Jakarta, Indonesia

³ Pusat Riset Hukum, Badan Riset dan Inovasi Nasional (BRIN), Jakarta, Indonesia

Article Information

Corresponding Author.Email:
miensh66@gmail.com

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Abstract

*Marital rape is an issue that generates contestation over the concept of consent within marital relations. In Indonesian criminal law, rape is generally understood as a crime that occurs outside marriage, whereas in Islamic law, sexual relations are viewed as part of mutual rights and obligations between husband and wife. This difference in paradigm creates conceptual tension regarding the boundaries between duty, rights, and consent within marriage. This study arises from a literature gap, as previous research has not comprehensively examined the interrelation between the concept of consent in Indonesian criminal law and the concept of *ridā* in Islamic law. Existing studies tend to separate the two frameworks without exploring their potential normative and moral intersections as a foundation for legal development. The study aims to comparatively reconstruct the meaning of consent in the context of sexual coercion within marriage according to Indonesian criminal law and Islamic law. The research employs a normative juridical method with statutory, conceptual, and comparative approaches, analyzing the Old and New Criminal Codes, the Law on Sexual Violence Crimes, the Law on the Elimination of Domestic Violence, as well as *fiqh* principles and *maqāṣid al-syarī'ah*. The findings reveal that both legal systems reject sexual coercion, yet differ in their normative foundations, moral objectives, and forms of legal recognition. A comparative reconstruction is therefore required through the reinterpretation of the concept of *ridā* in Islamic law and the affirmation of equality principles within national criminal law, in order to strengthen the recognition of consent in marital relations. These findings demonstrate a substantive convergence between positive law and Islamic principles in upholding justice, consent, and individual dignity, while opening pathways for the development of a more responsive legal framework regarding marital rape in Indonesia.*

Abstrak

Pemerkosaan dalam perkawinan merupakan isu yang memunculkan kontestasi terhadap konsep persetujuan dalam hubungan suami-istri. Dalam hukum pidana Indonesia, pemerkosaan umumnya dipahami sebagai tindak pidana yang terjadi di luar perkawinan, sedangkan dalam hukum Islam, hubungan seksual dipandang sebagai bagian dari hak dan kewajiban timbal balik. Perbedaan paradigma ini menimbulkan ketegangan konseptual mengenai batas antara kewajiban, hak, dan persetujuan dalam relasi perkawinan. Penelitian ini berangkat dari kekosongan literatur yang belum secara komprehensif mengkaji keterkaitan antara konsep persetujuan dalam hukum pidana Indonesia dan konsep *ridā* dalam hukum Islam. Kajian yang ada cenderung memisahkan keduanya tanpa menelaah potensi titik temu normatif dan moral yang dapat dijadikan dasar pembentukan hukum. Penelitian ini bertujuan untuk merekonstruksi secara komparatif pemaknaan konsep persetujuan dalam konteks pemaksaan seksual dalam perkawinan menurut hukum pidana Indonesia dan hukum Islam. Metode

yang digunakan adalah yuridis normatif dengan pendekatan perundang-undangan, konseptual, dan komparatif, melalui analisis terhadap KUHP Lama, KUHP Baru, UU Tindak Pidana Kekerasan Seksual, UU Penghapusan Kekerasan Dalam Rumah Tangga, serta prinsip *fiqh* dan *maqāṣid al-syarī'ah*. Hasil penelitian menunjukkan bahwa kedua sistem hukum menolak pemaksaan seksual, tetapi berbeda dalam dasar normatif, tujuan moral, dan bentuk perlindungannya. Rekonstruksi komparatif diperlukan melalui reinterpretasi konsep *Ridha* dalam hukum Islam dan penegasan asas kesetaraan dalam hukum pidana nasional, guna memperkuat perlindungan perempuan dalam perkawinan. Temuan ini menegaskan adanya titik temu substantif antara hukum positif dan prinsip Islam dalam menegakkan keadilan, persetujuan, dan martabat individu, sekaligus membuka ruang bagi pengembangan norma hukum yang lebih responsif terhadap korban pemerkosaan dalam perkawinan.

Pendahuluan

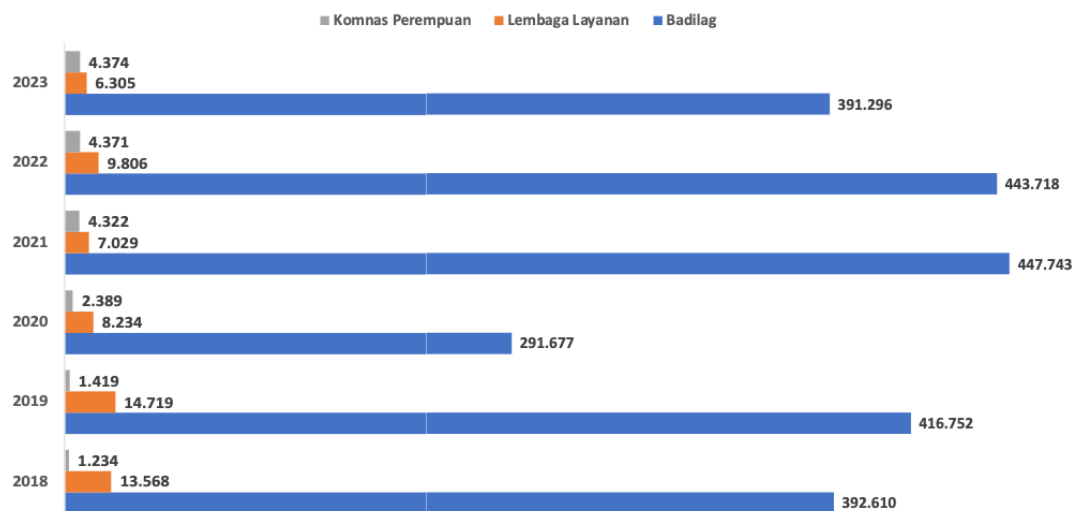
Perkawinan sebagai institusi sosial dan hukum diharapkan menjadi fondasi terbentuknya kehidupan keluarga yang harmonis, saling menghargai, serta didasarkan pada prinsip kasih sayang dan tanggung jawab.¹ Dalam hubungan perkawinan, setiap pasangan terdapat hak dan kewajiban yang melekat dan perlu dijalankan secara proporsional dan adil. Salah satu aspek yang menjadi bagian dari hubungan suami istri adalah hubungan seksual, yang secara normatif dimaknai sebagai bentuk pemenuhan kebutuhan biologis dan emosional yang dilakukan atas dasar persetujuan bersama.² Namun, dalam kenyataannya, tidak semua hubungan seksual dalam perkawinan berlangsung atas dasar kerelaan terkadang terdapat unsur paksaan yang berakibat pada kekerasan seksual.

Kekerasan seksual dalam rumah tangga mencakup berbagai tindakan yang melanggar hak dan martabat pasangan, seperti pemaksaan hubungan seksual tanpa adanya persetujuan (*consent*)³, merendahkan martabat atau menyebabkan rasa sakit secara fisik maupun psikis, serta tindakan pelecehan seksual yang dilakukan secara verbal.⁴ Selain itu, kekerasan seksual dalam rumah tangga juga mencakup pengendalian atau pembatasan hak-hak seksual pasangan, misalnya melarang pasangan untuk menolak berhubungan seksual meskipun dalam kondisi sakit, lelah, atau tidak nyaman, serta memaksa pasangan untuk terlibat dalam aktivitas seksual demi keuntungan pihak ketiga.

Di Indonesia masih banyak terjadinya tindak pidana kekerasan seksual, baik yang terjadi di luar maupun di dalam ikatan pernikahan. Komnas Perempuan mencatat pada rentang enam tahun dari tahun 2018 sampai tahun 2023 yang dilaporkan melalui Badan Peradilan Agama (BADILAG), Komnas Perempuan dan Lembaga Pelayanan. Berikut tingkat kekerasan pada kurun waktu enam tahun :

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- 1 Rudi Adi Rudi, "Peran Kafa'ah Dalam Pembentukan Keluarga Masalah: Pendekatan Berbasis Solusi Untuk Tantangan Aktual Hukum Keluarga Islam," *El-Bait: Jurnal Hukum Keluarga Islam* 3, no. 2 (2025), <https://doi.org/10.53515/ebjhki.v3i2.118>.
 - 2 Azmi Ro'yal Aeni and Maulana Ni'ma Alhizbi, "Hak Istri Dalam Hubungan Seksual Menurut Hukum Keluarga Islam," *Usroh: Jurnal Hukum Keluarga Islam* 7, no. 1 (2023): 27–40, <https://doi.org/10.19109/ujhki.v7i1.17743>.
 - 3 "Domestic Violence," in *Encyclopedia of Forensic Sciences, Third Edition*, by Lauren Wilson (Elsevier, 2023), <https://doi.org/10.1016/b978-0-12-823677-2.00205-1>.
 - 4 Didar Singh Walia et al., "Trends of Sexual Assault Cases," *Journal of Forensic Medicine and Toxicology* 38, no. 1 (2021): 112–15, <https://doi.org/10.5958/0974-4568.2021.00022.3>.

Gambar 1. Rincian Data Umum Pengaduan Kekerasan Berbasis Gender Tahun 2018-2023



Sumber : CATAHU 2023 (<https://komnasperempuan.go.id/catatan-tahunan-detail/catahu-2023-peluang-penguatan-sistem-penyikapan-di-tengah-peningkatan-kompleksitas-kekerasan-terhadap-perempuan>) 7 Maret 2024

Stabilnya jumlah pengaduan yang diterima pada tahun 2023, dibandingkan dengan tahun sebelumnya, menunjukkan bahwa beban kerja Komnas Perempuan belum mengalami penurunan yang signifikan. Selama 263 hari kerja pada tahun tersebut, rata-rata terdapat 17 kasus harian yang harus direspons, meskipun lembaga ini menghadapi keterbatasan sumber daya. Jika dibandingkan dengan tahun 2020, angka tersebut hampir dua kali lebih tinggi, mengingat pada saat itu jumlah kasus yang ditangani per hari hanya berkisar sembilan. Kondisi ini menggambarkan bahwa tingkat kepercayaan dan ekspektasi masyarakat terhadap kinerja Komnas Perempuan dalam menangani laporan kekerasan berbasis gender terhadap perempuan tetap tinggi.

Dalam sistem hukum pidana Indonesia, Kitab Undang-Undang Hukum Pidana (KUHP) Lama tidak mengakomodasi konsep perkosaan dalam perkawinan (*marital rape*) karena definisinya secara tegas membatasi perkosaan hanya pada tindakan laki-laki terhadap perempuan yang bukan istrinya. Namun demikian, kemajuan hukum melalui Undang-Undang Nomor 23 Tahun 2004 tentang Penghapusan Kekerasan dalam Rumah Tangga (UU PKDRT) memberikan landasan hukum yang mengakui adanya kekerasan seksual di dalam perkawinan, termasuk tindakan perkosaan yang dilakukan oleh suami terhadap istri.

Di sisi lain, dalam perspektif hukum Islam, hubungan suami istri diatur secara mendalam dalam ajaran fikih, dengan penekanan pada prinsip musyawarah, kebaikan (*mu'asyarah bi al-ma'ruf*), serta penghormatan terhadap hak dan kewajiban kedua belah pihak.⁵ Hukum Islam memandang bahwa hubungan seksual adalah hak bersama antara suami dan istri yang harus dilandasi oleh keikhlasan dan kasih sayang.⁶ Selain itu, terdapat juga pandangan yang menempatkan istri dalam posisi kewajiban mutlak untuk melayani suami dalam aspek seksual, yang bila ditolak dianggap sebagai *nusyuz* atau pembangkangan. Namun demikian, sejumlah pemikir Islam kontemporer menawarkan pembacaan baru terhadap pandangan tersebut, dengan mengedepankan prinsip persetujuan serta larangan terhadap segala bentuk pemaksaan atau tindakan yang dapat merendahkan martabat pasangan.⁷ Perkembangan ini menunjukkan adanya dinamika penafsiran hukum Islam yang dapat menjadi pijakan dalam mengkaji isu pemaksaan seksual dalam perkawinan dalam konteks modern, sejalan dengan tujuan-

5 Allawi Sahib Hilal Al-Murshidi, "The Verse Ayah 'Affection and Mercy' and Its Legal Effects on the Spouses," *Revista de Gestão Social e Ambiental* 18, no. 9 (2024): e06659, <https://doi.org/10.24857/rgsa.v18n9-095>.

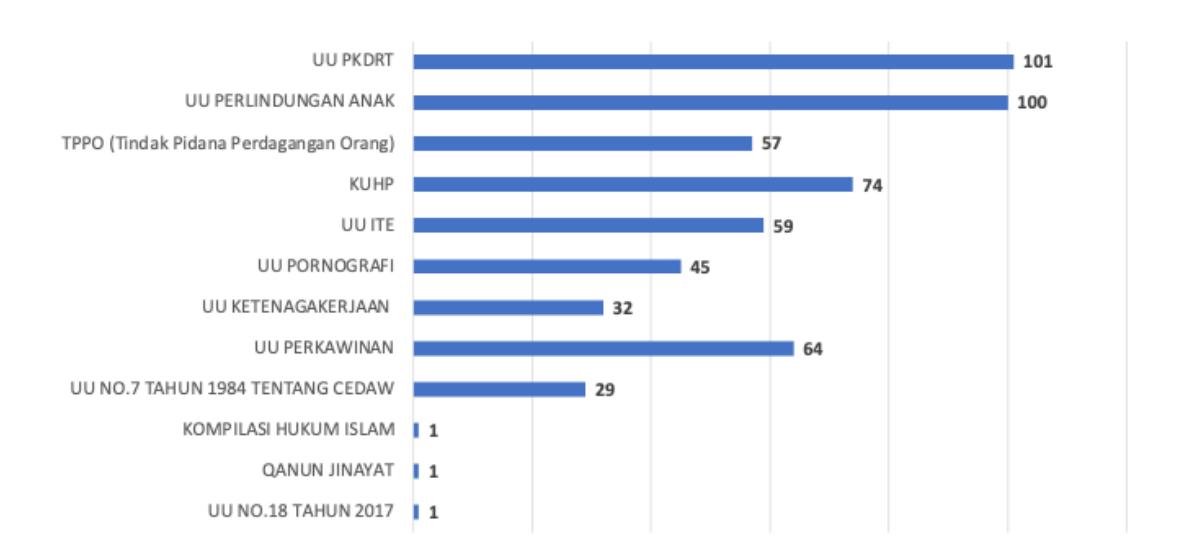
6 Sifa Mulya Nurani, "Relasi Hak Dan Kewajiban Suami Istri Dalam Perspektif Hukum Islam (Studi Analitis Relevansi Hak Dan Kewajiban Suami Istri Berdasarkan Tafsir Ahkam Dan Hadits Ahkam)," *Al-Syakhsiyyah: Journal of Law & Family Studies* 3, no. 1 (2021): 98–116, <https://doi.org/10.21154/syakhsiyyah.v3i1.2719>.

7 Suud Sarim Karimullah, "Reinterpretasi Terhadap Kedudukan Perempuan Dalam Islam Melalui Takwil Gender KH. Husein Muhammad," *Abdurrauf Journal of Islamic Studies (ARJIS)* 1, no. 2 (2024): 115–33, <https://doi.org/10.58824/arjis.v1i2.57>.

tujuan *maqāṣid al-syarī'ah* dalam melindungi kehormatan, jiwa, dan keturunan manusia.⁸

Perbedaan pendekatan antara hukum pidana nasional dan hukum Islam dalam memandang perkosaan dalam perkawinan menimbulkan tantangan dalam implementasi perlindungan hukum bagi korban.⁹ Dalam praktik peradilan, aparat penegak hukum sering kali mengalami dilema antara menerapkan norma hukum positif dan mempertimbangkan nilai-nilai keagamaan atau budaya yang berlaku di masyarakat. Hal ini menyebabkan banyak kasus perkosaan dalam perkawinan yang tidak dilaporkan atau tidak diproses secara hukum karena korban mengalami tekanan sosial, stigma, dan kesulitan pembuktian.

Gambar 2. Regulasi Atau Perundang-Undangan Yang Digunakan Dalam Proses Penyelesaian Tindak Pidana Kekerasan Dalam Rumah Tangga



Sumber : *Catahu 2020 Komnas Perempuan* (<https://komnasperempuan.go.id/catatan-tahunan-detail/catahu-2020-kekerasan-terhadap-perempuan-meningkat-kebijakan-penghapusan-kekerasan-seksual-menciptakan-ruang-aman-bagi-perempuan-dan-anak-perempuan-catatan-kekerasan-terhadap-perempuan-tahun-2019>) 6 Maret 2020

Dalam Gambar 2 dapat diketahui bahwa dalam proses litigasi di tahun 2020 peraturan atau perundang-undangan yang digunakan hukum positif, yaitu dengan menggunakan UU PKDRT dibandingkan dengan hukum Islam. Gambar 2 menunjukkan bahwa instrumen hukum yang dirancang untuk menjamin serta melindungi hak-hak perempuan telah diberlakukan secara formal. Meskipun demikian, efektivitas implementasi regulasi tersebut sangat bergantung pada kinerja aparat penegak hukum, khususnya dalam memahami dan menafsirkan substansi peraturan yang berlaku. Pemahaman ini tidak terlepas dari konstruksi perspektif individu aparat, pengalaman subjektif yang dimiliki, serta pengaruh norma budaya yang berkembang di masyarakat, yang kerap kali turut melanggengkan praktik diskriminatif terhadap perempuan.

Sejumlah penelitian terdahulu telah menyoroti isu perkosaan dalam perkawinan dari perspektif hukum pidana dan hukum Islam. Jamilya Susantin dan Farhan Fadli (2023) menganalisis kebijakan advokasi dalam konteks hubungan seksual paksa antara suami dan istri sebagai bentuk tindak pidana perkosaan, terutama setelah diaturnya Pasal 473 KUHP baru dalam Undang-Undang Nomor 1 Tahun 2023, yang mulai mengakui relasi suami istri dalam ranah pembedaan.¹⁰ Penelitian Bani Syarif Maula dan Vivi Ariyanti (2021) juga membandingkan pendekatan hukum pidana nasional dan hukum Islam terhadap isu kriminalisasi perkosaan dalam perkawinan,

8 Muhamad Mas'ud, "Maqashid Al-Syariah Dalam Pertimbangan Kajian Hukum Islam (Islamic Jurisprudence)," *ISLAMIKA* 11, no. 2 (2020), <https://doi.org/10.33592/islamika.v11i2.431>.

9 Ika Agustini et al., "Perlindungan Hukum Terhadap Korban Kekerasan Seksual: Kajian Kebijakan Hukum Pidana Indonesia Dan Hukum Pidana Islam," *Rechtenstudent* 2, no. 3 (2021): 342–55, <https://doi.org/10.35719/rch.v2i3.89>.

10 Jamilya Susantin and Farhan Fadli, "Analisis Advokasi Kebijakan Berhubungan Seks Suami Istri Secara Paksa Termasuk Kategori Tindak Pidana Pemerkosaan Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang KUHP," *Qanuni : Journal of Indonesian Islamic Family Law* 1, no. 1 (2023): 46–56, <https://doi.org/10.31102/qanuni.2023.1.1.45-56>.

serta menyoroti ketidaksinkronan antara nilai-nilai keagamaan dan instrumen hukum positif dalam perlindungan korban.¹¹ Penelitian Asnawi Abdullah dan Karimuddin Abdullah Lawang (2023) menelusuri konsep *nusyuz* dalam hukum Islam, dan mengaitkannya dengan larangan pemaksaan hubungan seksual dalam perspektif etika Islam kontemporer, menunjukkan adanya pergeseran makna dari kewajiban mutlak menjadi relasi yang lebih setara dan manusiawi.¹² Sementara itu, penelitian Hayati dan Ali (2021) menekankan perlindungan terhadap istri korban kekerasan seksual dari perspektif hukum Islam dan hukum negara, tetapi belum menelaah secara kritis peran institusi penegak hukum, termasuk pengadilan agama, dalam respons terhadap laporan kekerasan seksual.¹³ Adapun penelitian Sipahutar (2022) menyoroti bentuk-bentuk perlindungan hukum terhadap perempuan korban KDRT, namun fokus utamanya lebih kepada aspek legal formal ketimbang dinamika interpretasi hukum yang berkembang dalam Masyarakat.¹⁴ Namun, penelitian-penelitian terdahulu tersebut belum secara komprehensif membahas rekonstruksi komparatif antara hukum pidana dan hukum Islam dengan menempatkan konsep persetujuan sebagai inti analisis. Penelitian ini menempati posisi kritis untuk mengisi kekosongan tersebut, dengan menelaah titik temu antara kedua sistem hukum.

Dengan demikian, berbeda dengan penelitian-penelitian sebelumnya tersebut, kebaruan (*novelty*) dari artikel ini terletak pada pendekatannya yang tidak hanya normatif, tetapi juga kritis-reflektif didukung kajian komparatif antara hukum pidana nasional dan hukum Islam. Sehingga artikel ini memperkaya *state of the art* dalam kajian hukum keluarga dan pidana melalui pendekatan integratif yang mempertimbangkan keadilan substantif dan potensi harmonisasi hukum yang berperspektif korban. Penelitian ini diharapkan mampu mendorong pembaruan hukum yang lebih responsif terhadap isu kekerasan seksual dalam ranah domestik serta mendorong perubahan sosial yang lebih adil gender di tengah masyarakat Indonesia yang plural dan religius.

Artikel ini disusun dalam tiga bagian utama: *pertama*, difokuskan pada perkosaan dalam perkawinan (*marital rape*) dari sudut pandang hukum pidana; *kedua*, membahas perkosaan dalam perkawinan (*marital rape*) berdasarkan perspektif hukum Islam; *ketiga*, rekonstruksi komparatif perkosaan dalam perkawinan (*marital rape*) dalam hukum pidana dan hukum Islam.

Metode

Penelitian ini menggunakan metode penelitian yuridis normatif karena penelitian berfokus pada analisis norma hukum tertulis dan prinsip hukum Islam sebagai dasar rekonstruksi teoretis, bukan pada data empiris. Fokus utama kajian terletak pada analisis terhadap norma hukum yang tertulis dan konsep-konsep yuridis yang mengatur relasi suami istri dalam konteks pemaksaan seksual dalam perkawinan. Metode ini dipilih untuk menelaah keselarasan dan perbedaan antara hukum positif Indonesia dan hukum Islam berdasarkan bahan hukum primer, seperti KUHP, UU No. 12/2012 tentang Tindak Pidana Kekerasan Seksual (UU TPKS), dan sumber-sumber fikih klasik maupun kontemporer, serta bahan hukum sekunder berupa literatur akademik dan hasil penelitian terdahulu. Bahan hukum primer meliputi KUHP Baru Pasal 473, UU PKDRT Pasal 8 huruf a dan b, serta UU TPKS Pasal 4 Ayat (1) dan Pasal 5 mengenai tindak pidana kekerasan seksual. Selain itu, Kompilasi Hukum Islam Pasal 77–84 digunakan untuk menelaah prinsip hak dan kewajiban suami istri dalam konteks *ridha* dan *mu'asyarah bil ma'ruf*. Adapun bahan hukum sekunder yang digunakan mencakup fatwa dari para ulama, referensi fikih baik yang bersumber dari pemikiran klasik maupun kontemporer, karya ilmiah, serta pandangan para ahli di bidang hukum. Untuk mengolah dan menafsirkan keseluruhan bahan hukum yang telah dikumpulkan, penelitian ini menerapkan metode analisis data secara kualitatif, yang disusun dan disajikan dalam bentuk uraian deskriptif yakni dengan menjabarkan dua perspektif sumber hukum; hukum pidana dengan hukum Islam terkait

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- 11 Bani Syarif Maula and Vivi Ariyanti, “Kriminalisasi Perkosaan Dalam Perkawinan Menurut Hukum Pidana Nasional Dan Hukum Islam,” *Equalita* 3, no. 2 (2021), <http://www.syekhnurjati.ac.id/jurnal%20/index.php/equalita/article/view/9842>.”plainCitation”:”Bani Syarif Maula and Vivi Ariyanti, “Kriminalisasi Perkosaan Dalam Perkawinan Menurut Hukum Pidana Nasional Dan Hukum Islam,” *Equalita* 3, no. 2 (2021)
 - 12 Asnawi Abdullah and Karimuddin Abdullah Lawang, “Nusyuz Dan Hubungannya Dengan Larangan Pemaksaan Hubungan Seksual,” *Jurnal Al-Mizan* 10, no. 2 (2023): 135–49, <https://doi.org/10.54621/jiam.v10i2.681>.
 - 13 Mulida Hayati and Nuraliah Ali, “Husband’s Sexual Violence: Protection Rights for Wives in Terms of Islamic and Indonesian State Law,” *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 21, no. 1 (2021): 65–81, <https://doi.org/10.30631/alrisalah.v21i1.662>.
 - 14 Bernad Arif Sipahutar, “Perlindungan Hukum Terhadap Perempuan Yang Menjadi Korban Tindak Pidana Kekerasan Dalam Rumah Tangga,” *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 4, no. 1 (2022): 8–12, <https://doi.org/10.52005/rechten.v4i1.70>.

dengan perkosaan dalam perkawinan yang nantinya akan diperbandingkan dengan dua sumber hukum tersebut.

Mengacu pada jenis penelitian yang bersifat yuridis normatif, tulisan ini menggunakan dua pendekatan utama, yakni pendekatan perundang-undangan (*statute approach*), pendekatan konseptual (*conceptual approach*) dan pendekatan komparatif (*comparative approach*).¹⁵ Pendekatan perundang-undangan digunakan dengan cara menelaah berbagai ketentuan yang termuat dalam peraturan hukum positif. Sementara itu, pendekatan konseptual dijalankan melalui pemahaman terhadap gagasan-gagasan serta doktrin yang berkembang dalam ilmu hukum, yang berfungsi sebagai landasan dalam menganalisis isu yang dibahas. Pendekatan konsep digunakan untuk memahami konsep-konsep mengenai prinsip-prinsip hak istri sebagai korban pemerkosaan dalam rumah tangga, sehingga diharapkan penormaanannya dalam aturan hukum, tidak lagi memungkinkan adanya pemahaman yang ambigu dan kabur. Sementara itu, pendekatan komparatif digunakan untuk menganalisis titik temu dan perbedaan antara hukum pidana dan hukum Islam dalam menafsirkan pemaksaan hubungan seksual dalam perkawinan. Melalui ketiga pendekatan ini, penelitian ini berupaya merekonstruksi norma hukum secara integratif, dengan menegaskan pentingnya prinsip persetujuan dan kesetaraan sebagai dasar pembaruan hukum yang lebih adil dan berpihak pada korban kekerasan seksual dalam perkawinan. Hasil dari pendekatan ini diharapkan dapat mendorong pembentukan atau pembaruan regulasi hukum yang lebih adil, jelas, dan berpihak pada korban.

Temuan dan Diskusi

A. Perkosaan Dalam Perkawinan (*Marital Rape*) Berdasarkan Perspektif Hukum Pidana

Meskipun dalam sistem hukum positif Indonesia telah diatur prinsip bahwa suami dan istri memiliki kedudukan yang setara dalam menjalankan kehidupan berumah tangga, pada tataran praktik masih terdapat ketimpangan relasi kuasa yang berdampak pada pelanggaran hak-hak perempuan dalam pernikahan.¹⁶ Salah satu bentuk pelanggaran tersebut adalah kekerasan seksual yang dilakukan oleh suami terhadap istri, khususnya dalam bentuk pemaksaan hubungan seksual tanpa persetujuan. Tindakan ini, yang dalam literatur hukum dikenal sebagai perkosaan dalam perkawinan (*marital rape*), merupakan isu yang kompleks karena terjadi dalam ruang privat yang kerap kali dianggap tidak dapat dijangkau oleh hukum pidana.

Secara sosiokultural, pandangan tradisional yang menempatkan istri sebagai pihak yang wajib melayani suami secara mutlak sering kali menjadi justifikasi terhadap tindakan pemaksaan hubungan seksual dalam pernikahan. Hal ini memperkuat stigma bahwa hubungan seksual dalam pernikahan merupakan kewajiban sepihak istri, bukan hasil kesepakatan bersama.¹⁷ Padahal, Prinsip-prinsip hak asasi manusia menegaskan bahwa setiap orang memiliki hak yang melekat secara universal dan tidak dapat dicabut, termasuk dalam konteks relasi suami istri, memiliki hak atas integritas tubuh dan kebebasan dari perlakuan yang merendahkan martabat.

Secara historis, sistem hukum pidana Indonesia yang berlandaskan pada KUHP Lama warisan kolonial Belanda tidak memberikan pengakuan terhadap kemungkinan terjadinya tindak pidana perkosaan dalam konteks hubungan perkawinan yang sah.¹⁸ Dalam KUHP Lama (*Wetboek van Strafrecht*, WvS), tindak pidana perkosaan diatur dalam Pasal 285, yang berbunyi:

“Barang siapa dengan kekerasan atau ancaman kekerasan memaksa seorang perempuan yang bukan istrinya untuk bersetubuh dengan dia, diancam karena melakukan perkosaan dengan pidana penjara paling lama dua belas tahun.”

Rumusan tersebut secara eksplisit menyebut frasa “yang bukan istrinya”, yang berarti bahwa hubungan seksual antara suami dan istri tidak mungkin dipidana sebagai perkosaan. Ketentuan ini mencerminkan pandangan hukum kolonial bahwa perkawinan memberikan “izin permanen” bagi hubungan seksual, sehingga unsur *consent* dianggap melekat pada ikatan perkawinan. Pandangan tersebut bersifat patriarkal dan meniadakan perlindungan terhadap istri sebagai subjek hukum yang memiliki hak atas integritas tubuhnya.

15 Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana, 2021).

16 Rohmadi Rohmadi, “Polygamy in Indonesia: A Critical Interpretation through the Lens of Mubadalah Theory,” *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 11, no. 2 (2024)

17 Trianah Sofiani et al., “Violence Against Women in Pre-Marital Relationships: The Ngemblok Tradition among the Muslim Community in Rembang,” *Journal of Islamic Law* 5, no. 2 (2024): 147–69, <https://doi.org/10.24260/jil.v5i2.2680>.

18 Iva Kasuma et al., “Another Second Chance: Rehabilitation of Marital Rape Offender for the Victim’s Recovery,” *The Indonesian Journal of Socio-Legal Studies* 1, no. 2 (2022), <https://doi.org/10.54828/ijsls.2021v1n2.4.k>

Ketentuan tersebut merefleksikan konstruksi sosial dan hukum tradisional yang menempatkan perempuan dalam posisi subordinat dalam struktur rumah tangga. Dalam paradigma hukum masa itu, setelah terjadinya pernikahan, perempuan dianggap telah memberikan “izin menyeluruh” atas tubuhnya kepada suami, sehingga tindakan suami untuk melakukan hubungan seksual dengan istri, meskipun tanpa persetujuan atau disertai kekerasan, tidak dianggap sebagai bentuk pelanggaran hukum. Dengan demikian, institusi perkawinan dianggap sebagai ruang privat yang kebal terhadap intervensi hukum pidana, termasuk dalam hal terjadinya kekerasan seksual.¹⁹

Akibat dari sudut pandang tersebut, korban kekerasan seksual dalam rumah tangga, khususnya istri yang mengalami pemaksaan hubungan seksual oleh suami, tidak memiliki akses terhadap keadilan melalui mekanisme hukum pidana.²⁰ Penegakan hukum menjadi terbatas karena KUHP tidak menyediakan norma hukum yang secara eksplisit mengakui bahwa perkosaan dapat terjadi dalam ikatan pernikahan. Hal ini menyebabkan kekosongan hukum (*legal gap*) dan ketidakadilan bagi korban yang mengalami penderitaan fisik maupun psikis akibat perlakuan suaminya.²¹

Ketiadaan pengakuan terhadap *marital rape* dalam KUHP Lama juga memperkuat dominasi budaya patriarkis dalam penegakan hukum, di mana peran dan hak perempuan dalam perkawinan tidak mendapat perlindungan yang memadai.²² Oleh karena itu, pendekatan hukum pidana yang hanya melihat hubungan seksual dalam pernikahan sebagai kewajiban sepihak istri tanpa mempertimbangkan unsur persetujuan (*consent*) menjadi tidak relevan dalam konteks perlindungan hak asasi manusia dan prinsip keadilan yang inklusif. Namun, pendekatan ini mulai berubah dengan hadirnya UU PKDRT. Undang-undang ini secara eksplisit memasukkan kekerasan seksual sebagai salah satu bentuk kekerasan dalam rumah tangga.

UU PKDRT memberikan dasar hukum penting melalui Pasal 8 huruf a dan b yang menyatakan bahwa: “Kekerasan seksual meliputi:

- a. pemaksaan hubungan seksual yang dilakukan terhadap orang yang menetap dalam lingkup rumah tangga tersebut; dan
- b. pemaksaan hubungan seksual terhadap salah seorang dalam lingkup rumah tangga untuk tujuan komersial atau tujuan tertentu.”

Rumusan ini menegaskan bahwa pemaksaan hubungan seksual antara suami dan istri merupakan bentuk kekerasan dalam rumah tangga yang dapat dipidana, meskipun belum secara eksplisit disebut sebagai “perkosaan”. Dengan adanya ketentuan ini, UU PKDRT menjadi jembatan transisi antara paradigma lama yang tidak mengakui *marital rape* dan paradigma baru yang menempatkan persetujuan (*consent*) sebagai unsur esensial. Dengan demikian, dari perspektif hukum pidana, kekerasan seksual dalam rumah tangga, termasuk pemaksaan hubungan seksual oleh suami terhadap istri, merupakan bentuk pelanggaran hukum yang harus dikenai sanksi.²³

Perkembangan regulasi nasional menunjukkan komitmen negara dalam memperkuat perlindungan terhadap korban kekerasan seksual, termasuk dalam ruang lingkup rumah tangga. Salah satu tonggak penting dalam hal ini adalah disahkannya UU TPKS. Undang-undang ini memperluas cakupan hukum pidana dalam menangani berbagai bentuk kekerasan seksual dengan lebih holistik dan berperspektif korban. UU TPKS memperkuat dasar hukum perlindungan korban. Pasal 4 Ayat (1) menyebut berbagai bentuk kekerasan seksual, termasuk pemaksaan hubungan seksual dan tindak pidana berbasis relasi kuasa, sementara Pasal 5 mempertegas bahwa setiap tindakan seksual yang dilakukan tanpa persetujuan korban merupakan tindak pidana. UU ini memperluas ruang perlindungan bagi perempuan dalam hubungan perkawinan dan menegaskan kembali bahwa status suami tidak dapat menjadi dasar pembenaran untuk melakukan pemaksaan seksual.

Meskipun secara redaksional UU TPKS tidak secara eksplisit menggunakan istilah “perkosaan dalam perkawinan” atau *marital rape*, namun norma-norma yang terkandung di dalamnya mencakup pula tindakan kekerasan seksual yang dilakukan dalam hubungan perkawinan, sejauh memenuhi unsur kekerasan, paksaan,

19 Siane Richardson, “Marriage: A Get Out of Jail Free Card?,” *International Journal of Law, Policy and the Family* 34, no. 2 (2020): 168–90, <https://doi.org/10.1093/lawfam/ebaa004>

20 Gervin A. Apatinga and Eric Y. Tenkorang, “Barriers to Help-Seeking for Sexual Violence Among Married or Cohabiting Women in Ghana,” *Violence Against Women* 28, nos. 15–16 (2022): 3844–64, <https://doi.org/10.1177/10778012211060861>.

21 Kasuma et al., “Another Second Chance”

22 Kasuma et al., “Another Second Chance.”

23 Richardson, “Marriage”; Lisa Featherstone, “Rape Law Reform in the 1970s and 1980s,” in *Sexual Violence in Australia, 1970s–1980s*, by Lisa Featherstone, *World Histories of Crime, Culture and Violence* (Springer International Publishing, 2021), https://doi.org/10.1007/978-3-030-73310-0_6.

ancaman, atau tanpa adanya persetujuan (*consent*) dari pihak korban.

Selain itu, pembaruan hukum pidana Indonesia melalui KUHP Baru turut mencerminkan pergeseran paradigma menuju pendekatan yang lebih berorientasi pada perlindungan korban. Dalam KUHP Baru, beberapa ketentuan telah dirancang untuk mengakomodasi dinamika relasi kekuasaan yang timpang dalam rumah tangga. Terutama pada Pasal 473 Ayat (1) KUHP Baru yang menyatakan:

“Setiap orang yang melakukan persetubuhan dengan kekerasan atau ancaman kekerasan terhadap orang lain tanpa persetujuannya dipidana karena perkosaan.”

Pasal ini tidak lagi memuat frasa “yang bukan istrinya”, sehingga membuka pengakuan terhadap kemungkinan terjadinya perkosaan dalam perkawinan (*marital rape*). Lebih lanjut, Pasal 473 menegaskan bahwa pemaksaan hubungan seksual terhadap pasangan dalam perkawinan termasuk dalam kategori tindak pidana kekerasan seksual, yang dapat diperberat apabila menimbulkan luka atau trauma. Dengan demikian, KUHP Baru mengakui prinsip persetujuan (*consent*) sebagai unsur utama dalam hubungan seksual, tanpa memandang status perkawinan pelaku dan korban. Ketentuan tersebut dibentuk dengan memperhatikan prinsip-prinsip keadilan substantif, perlindungan terhadap korban kekerasan, serta penghormatan terhadap harkat dan martabat manusia sebagai landasan utama penegakan hukum pidana.

Negara, melalui keberadaan UU TPKS dan KUHP Baru, memiliki tanggung jawab konstitusional dan moral untuk memastikan bahwa hak-hak perempuan sebagai subjek hukum dilindungi secara nyata, dan bahwa setiap bentuk kekerasan dalam rumah tangga dapat ditindak secara adil dan proporsional. Oleh karena itu, pengakuan terhadap perkosaan dalam perkawinan sebagai bentuk kejahatan merupakan bagian integral dari upaya membangun sistem hukum yang inklusif, berkeadilan gender, dan menghormati hak asasi manusia.

B. Perkosaan Dalam Perkawinan (*Marital Rape*) Berdasarkan Perspektif Hukum Islam

Hukum Islam merupakan sistem hukum dengan ajaran moral yang menempatkan relasi suami istri dalam bingkai kasih sayang (*mawaddah wa rahmah*), keadilan, serta penghormatan terhadap hak dan martabat masing-masing pasangan.²⁴ Prinsip-prinsip ini ditegaskan dalam berbagai sumber hukum Islam, baik Al-Qur'an maupun Hadis, yang mengatur agar hubungan dalam rumah tangga dijalankan secara harmonis dan manusiawi. Islam secara tegas melarang segala bentuk kekerasan, baik fisik, psikis, maupun seksual, karena kekerasan dianggap sebagai tindakan *zulm* (kezaliman) yang merendahkan martabat manusia dan bertentangan dengan nilai-nilai kemanusiaan yang dijunjung tinggi dalam syariat. Dalam konteks hubungan suami istri, sekalipun terdapat hak dan kewajiban masing-masing pihak, pelaksanaannya harus dilandasi dengan rasa hormat, tanpa adanya pemaksaan atau penindasan.

Dalam kerangka perkawinan, Islam memandang hubungan suami istri sebagai sebuah ikatan sakral (*mitsaqan ghalizha*) yang berdasarkan prinsip kasih sayang (*mawaddah wa rahmah*) dan saling menghormati²⁵. Hal ini menandakan bahwa pernikahan dalam Islam tidak hanya dilihat sebagai sebuah ikatan legal, tetapi juga sebagai suatu bentuk keharmonisan yang diutamakan dalam kehidupan berkeluarga. Namun, ketika membahas isu perkosaan dalam perkawinan (*marital rape*), muncul tantangan besar dalam menyeimbangkan antara hak seksual istri dan kewajiban suami. Hal ini disebabkan oleh banyak tafsir tradisional yang menganggap bahwa istri memiliki kewajiban mutlak untuk memenuhi kebutuhan biologis suami tanpa syarat.²⁶ Pemahaman ini, yang sering kali merujuk pada norma-norma fiqh klasik, menganggap bahwa dalam perkawinan, hak suami atas istri dalam hubungan seksual tidak dapat ditolak. Kemudian, dalam ajaran Islam dikatakan bahwa terdapat istilah *al-ightisab* yang diartikan sebagai perkosaan. Ahli fiqh klasik mengatakan bahwa istilah *al-ightisab* disebut sebagai *al-ikhrāh 'ala zina* atau pemaksaan untuk berzina, terdapat dua unsur yang memaknai istilah tersebut yaitu pemaksaan dan zina.²⁷ Para ahli fiqh klasik juga sepakat bahwa zina merupakan unsur penting dari istilah *al-ightisab*.²⁸ Zina itu sendiri dapat dimaknai dengan adanya hubungan biologis yang dilakukan oleh laki-laki

24 Nurani, “Relasi Hak Dan Kewajiban Suami Istri Dalam Perspektif Hukum Islam (Studi Analitis Relevansi Hak Dan Kewajiban Suami Istri Berdasarkan Tafsir Ahkam Dan Hadits Ahkam).”

25 Walia et al., “Trends of Sexual Assault Cases.”

26 Nurani, “Relasi Hak Dan Kewajiban Suami Istri Dalam Perspektif Hukum Islam (Studi Analitis Relevansi Hak Dan Kewajiban Suami Istri Berdasarkan Tafsir Ahkam Dan Hadits Ahkam).”

27 Muhammad Khoirul Anwar et al., “Perspektif Islam Terhadap Pemerkosaan Dalam Pernikahan,” *Al-Burhan* 21, no. 2 (2021): 255–66, <https://journal.ptiq.ac.id/index.php/alburhan/article/view/114>.

28 Melanie Rae Perez, “Rape under Islamic Law: The Confusing Classification of Zina and Limitations in Getting Justice,” *The International Journal of Religion and Spirituality in Society* 15, no. 1 (2024): 43–56, <https://doi.org/10.18848/2154->

dan perempuan diluar dari ikatan pernikahan.²⁹ Maka dari itu, jika melihat kepada hubungan pernikahan menurut agama islam maka tidak akan ada unsur zina didalamnya. Sedangkan dalam konsep *al-ighṭisab* harus mencakup kedua konsep antara pemaksaan dan zina.³⁰

Dalam kitab-kitab fiqh islam klasik dijelaskan bahwa hubungan rumah tangga, mewajibkan seorang istri untuk mengatur urusan domestik, seperti salah satunya ialah memberikan pelayanan kepada suami dengan segala bentuknya. Hal tersebut, menjadikan istilah perkosaan dalam perkawinan menjadi semakin sulit untuk dijadikan sebagai sebuah tindak pidana. Dalam ³¹hukum Islam, meskipun tidak menggunakan istilah “perkosaan dalam perkawinan” secara eksplisit, prinsip-prinsipnya memberikan landasan moral dan normatif yang kuat untuk melarang segala bentuk kekerasan, termasuk kekerasan seksual dalam pernikahan.

Namun, dalam konteks modern, pemahaman tersebut harus dievaluasi kembali dengan mempertimbangkan nilai-nilai keadilan, persetujuan (*consent*), dan martabat manusia. Nilai-nilai ini, yang secara tegas dijunjung tinggi dalam *maqashid al-syari'ah* dengan tujuan syariat Islam yang mengutamakan perlindungan terhadap jiwa, kehormatan, dan hak-hak individu, menuntut agar hubungan suami istri dijalankan dengan saling pengertian dan kerelaan, bukan dengan paksaan.³² Prinsip tersebut sejalan dengan ajaran Al-Qur'an dalam QS. Ar-Rūm [30]:21 yang menegaskan bahwa perkawinan diciptakan agar manusia “mendapatkan ketenangan (*sakinah*) serta diliputi kasih sayang (*mawaddah wa rahmah*)”, sehingga hubungan suami istri semestinya didasarkan pada kasih sayang dan bukan pemaksaan. Demikian pula QS. An-Nisā' [4]:19 memerintahkan agar suami memperlakukan istri dengan baik (*wa 'āsyirūhunna bil ma'rūf*), yang oleh para mufassir seperti al-Ṭabarī dan al-Qurṭubī diartikan sebagai perintah moral untuk memperlakukan istri dengan lemah lembut, penuh penghormatan, dan tanpa kekerasan. Prinsip *mu'āsharah bil ma'rūf* (bergaul secara baik) yang ditegaskan dalam QS. An-Nisā' [4]:19, mewajibkan suami memperlakukan istri dengan penuh rasa hormat, kasih sayang, dan tanpa kekerasan. Dalam konteks ini, pemaksaan hubungan seksual yang menyakiti atau merendahkan martabat istri dipandang sebagai bentuk *zulm* (kezaliman), yang bertentangan dengan *maqāṣid al-syarī'ah*, yaitu tujuan-tujuan syariat dalam melindungi jiwa, akal, dan kehormatan.³³ Kedua ayat ini menunjukkan bahwa Al-Qur'an menolak segala bentuk hubungan yang meniadakan *ridha* dan keadilan dalam rumah tangga. Oleh karena itu, pemaksaan hubungan seksual dalam perkawinan tidak hanya melanggar prinsip keadilan dan kasih sayang yang diajarkan Islam, tetapi juga bertentangan dengan tujuan syariat untuk menjaga martabat dan kehormatan manusia.

Secara fiqh klasik, memang terdapat pandangan bahwa istri memiliki kewajiban untuk melayani suami dalam hal seksual, namun kewajiban tersebut tidak bersifat mutlak dan tidak dapat dijadikan pembenaran bagi tindakan pemaksaan atau kekerasan seksual.³⁴ Prinsip *mu'āsharah bil ma'ruf* (bergaul dengan cara yang baik) mengharuskan suami memperlakukan istrinya secara manusiawi, termasuk dalam hal hubungan seksual yang seharusnya dilakukan dengan persetujuan dan tanpa paksaan. Dalam perspektif ulama kontemporer, pemaksaan hubungan seksual dalam rumah tangga dikategorikan sebagai bentuk kezaliman dan pelanggaran terhadap prinsip keadilan serta martabat perempuan³⁵.

8633/CGP/v15i01/43-56.

29 Nur Aina Abdulah, “Kekeliruan Antara Jenayah Zina Dan Rogol Statutori Di Malaysia: Keperluan Kepada Penjelasan Fatwa: The Confusion between Crimes of Zina and Statutory Rape in Malaysia: The Needs for Fatwa Clarification,” *Journal of Fatwa Management and Research* 27, no. 4 (2022): 152–61, <https://doi.org/10.33102/jfatwa.vol27no4.472>.

30 Anwar et al., “Perspektif Islam Terhadap Pemerkosaan Dalam Pernikahan”; Perez, “Rape under Islamic Law”; Azman Mohd Noor, “Rape: A Problem of Crime Classification in Islamic Law,” *Arab Law Quarterly* 24, no. 4 (2010): 417–38, <https://doi.org/10.1163/157302510X526724>.

31 Masdar F. Mas'udi, *Islam Dan Hak-Hak Reproduksi Perempuan: Dialog Fiqih Pemberdayaan* (Mizan, 1995); dalam Maula and Ariyanti, “Kriminalisasi Perkosaan Dalam Perkawinan Menurut Hukum Pidana Nasional Dan Hukum Islam.”

32 Ajla Čustović, “Equal Before God but Not Equal Before His Law? Sharia Law and Women's Right to Interpretation in the Light of the Human Rights Debate,” *Religions* 16, no. 3 (2025): 362, <https://doi.org/10.3390/rel16030362>; Victor Tadros, “Consent to Sex in an Unjust World,” *Ethics* 131, no. 2 (2021): 293–318, <https://doi.org/10.1086/711210>.

33 Juz V Abū 'Abd Allāh Muḥammad ibn Aḥmad Al-Qurṭubī, *Al-Jāmi' Li Ahkām al-Qur'ān* (Dār al-Kutub al-'Ilmiyyah, 2003), 127–128.

34 Abdullah and Abdullah Lawang, “Nusyuz Dan Hubungannya Dengan Larangan Pemaksaan Hubungan Seksual.”

35 Hayati and Ali, “Husband's Sexual Violence.”

Dari sudut pandang *maqashid al-syari'ah*, tindakan tersebut bertentangan dengan tujuan syariat dalam menjaga jiwa (*hifz al-nafs*), kehormatan (*hifz al-'irdh*), dan martabat manusia³⁶. Pertama, *hifz al-nafs* menuntut perlindungan terhadap keselamatan fisik dan psikis individu; pemaksaan hubungan seksual dapat menyebabkan luka fisik, trauma psikologis, bahkan risiko kematian, sehingga bertentangan langsung dengan prinsip perlindungan jiwa sebagaimana ditegaskan oleh al-Shāṭibī bahwa setiap bentuk tindakan yang membahayakan eksistensi manusia harus dicegah (*dar'u al-mafāsid muqaddam 'alā jalb al-maṣāliḥ*).³⁷ Kedua, *hifz al-'ird* mengharuskan penghormatan terhadap kehormatan seksual dan kesucian relasi pernikahan; tindakan pemaksaan seksual merupakan bentuk penodaan terhadap kehormatan istri dan pelanggaran terhadap hak otonomi tubuh yang dijunjung tinggi dalam Islam.³⁸ Ketiga, pelanggaran terhadap martabat manusia (*karāmah al-insān*) menyalahi prinsip keadilan dan kesetaraan yang menjadi landasan moral syariat, sebagaimana ditegaskan oleh Ibn 'Āshūr bahwa syariat bertujuan menegakkan keadilan sosial dan menjaga nilai kemanusiaan universal.³⁹ Dengan demikian, *marital rape* bukan hanya melanggar norma etik Islam, tetapi juga menyalahi struktur tujuan hukum Islam yang secara substansial berorientasi pada perlindungan kemanusiaan dan kesejahteraan individu.

Dalam tulisannya yang berjudul “Adakah Penjelasan Tentang *Marital Rape* Dalam Islam”, Musta'in Romli mengemukakan bahwa tidak ditemukan penjelasan secara eksplisit mengenai konsep *marital rape* dalam Al-Qur'an, hadis, maupun dalam pandangan para ulama klasik. Meski demikian, para ulama menegaskan dua prinsip penting yang tidak dapat dipisahkan, yaitu kewajiban istri untuk menaati suami serta pentingnya menjaga relasi yang harmonis antara suami dan istri, termasuk dalam konteks hubungan seksual, yang seharusnya tidak menimbulkan bahaya bagi salah satu pihak maupun mengganggu pelaksanaan kewajiban-kewajiban lain yang sedang dijalankan⁴⁰.

C. Rekonstruksi Komparatif Perkosaan dalam Perkawinan (*Marital Rape*) Dalam Hukum Pidana dan Hukum Islam

Kekerasan seksual bukan hanya sebuah kejahatan biasa, melainkan juga pelanggaran berat terhadap hak asasi manusia yang fundamental. Perbuatan tersebut menghilangkan kehormatan dan nilai kemanusiaan korban secara menyeluruh, serta mencerminkan adanya ketimpangan kuasa yang berakar pada budaya patriarki dan diskriminasi gender.⁴¹ Hukum pidana dan hukum Islam pada dasarnya memiliki tujuan yang sama, yaitu melindungi harkat dan martabat manusia, namun berbeda dalam pendekatan normatif dan landasan filosofisnya. Hukum pidana Indonesia, khususnya melalui KUHP Baru dan UU TPKS, menekankan aspek *consent* sebagai unsur utama dalam menentukan ada atau tidaknya tindak pidana, sedangkan hukum Islam menempatkan prinsip *ridha* dan *mu'āsyarah bil ma'rūf* sebagai dasar moral dan etik dalam hubungan suami istri.

Dalam hukum positif Indonesia, pengakuan terhadap perkosaan dalam perkawinan sebagai tindak pidana mulai diterapkan, khususnya melalui Undang-Undang Nomor 12 Tahun 2022 tentang UU TPKS dan KUHP yang baru. Kedua instrumen hukum ini menegaskan bahwa perkosaan dalam perkawinan, yang dilakukan tanpa persetujuan salah satu pihak, khususnya istri, harus dipandang sebagai pelanggaran hak asasi manusia dan pelanggaran hukum yang serius.⁴² Dalam Pasal 4 Ayat (2) UU TPKS, terdapat pengaturan yang lebih komprehensif terkait kekerasan seksual dalam relasi rumah tangga, yang tidak hanya meliputi kekerasan fisik, tetapi juga kekerasan seksual yang terjadi dalam hubungan suami istri.⁴³

36 Faishal Agil Al Munawar, “‘Abd Al-Majīd Al-Najjār’s Perspective On Maqāṣid Al-Sharī’ah,” *JURIS (Jurnal Ilmiah Syariah)* 20, no. 2 (2021): 209, <https://doi.org/10.31958/juris.v20i2.4281>.

37 Abū Ishāq Al-Shāṭibī, *Al-Muwāfaqāt Fī Uṣūl al-Syarī'ah* (Dār al-Kutub al-'Ilmiyyah, 1997).

38 Abū Hāmid Al-Ghazālī, *Al-Mustasfā Min 'Ilm al-Uṣūl* (Al-Maktabah al-Tijāriyyah al-Kubrā, 2009).

39 Muḥammad al-Ṭāhir Ibn 'Āshūr, *Maqāṣid Al-Syarī'ah al-Islāmiyyah* (Dār al-Nafā'is, 2006).

40 Mustain Romli, *Adakah Penjelasan Tentang Marital Rape Dalam Islam, Bincang Syariah* (2020).

41 Eko Nurisman, “Risalah Tantangan Penegakan Hukum Tindak Pidana Kekerasan Seksual Pasca Lahirnya Undang-Undang Nomor 12 Tahun 2022,” *Jurnal Pembangunan Hukum Indonesia* 4, no. 2 (2022): 170–96, <https://doi.org/10.14710/jphi.v4i2.170-196>.

42 Nurisman, “Risalah Tantangan Penegakan Hukum Tindak Pidana Kekerasan Seksual Pasca Lahirnya Undang-Undang Nomor 12 Tahun 2022.”

43 M. Chaerul Risal, “Perlindungan Hukum Terhadap Korban Kekerasan Seksual Pasca Pengesahan Undang-Undang Tindak Pidana Kekerasan Seksual : Penerapan Dan Efektivitas,” *Al Daulah : Jurnal Hukum Pidana Dan Ketatanegaraan*, Universitas Islam Negeri Alauddin Makassar, June 23, 2022, 75–93, <https://doi.org/10.24252/ad.v1i2.34207>.

Ketentuan tersebut menegaskan bahwa hubungan seksual dalam pernikahan tidak boleh didasarkan pada paksaan, melainkan harus berlandaskan pada persetujuan bersama dari kedua belah pihak.⁴⁴ Pandangan ini mencerminkan adanya penghormatan terhadap hak atas integritas tubuh dan otonomi pribadi, bahkan dalam ikatan pernikahan.⁴⁵ Dengan menempatkan persetujuan sebagai prinsip utama, maka perlindungan terhadap perempuan dalam lingkungan domestik menjadi lebih kuat. Prinsip ini juga menunjukkan komitmen terhadap penghormatan terhadap hak asasi manusia serta perlunya kesetaraan dalam relasi rumah tangga, sehingga pernikahan tidak menjadi ruang yang membenarkan dominasi atau pemaksaan dalam bentuk apa pun.⁴⁶

Jika dibandingkan dengan negara maju, baik Amerika Serikat maupun Inggris telah menghapus doktrin kekebalan suami dalam perkara perkosaan. Di Amerika Serikat, putusan *People v. Liberta* (1984) menyatakan bahwa “a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity”⁴⁷, sehingga *marital exemption* dinyatakan inkonstitusional. Sejak itu, seluruh negara bagian mengakui *marital rape* sebagai tindak pidana. Demikian pula di Inggris melalui perkara *R v R* (1991), House of Lords menegaskan bahwa “marriage is in modern times regarded as a partnership of equals, and no longer one in which a wife is deemed to have given irrevocable consent to sexual intercourse”.⁴⁸ Kedua putusan tersebut menandai pengakuan penuh negara maju terhadap prinsip *consent* dalam hubungan seksual perkawinan.

Sebaliknya, di negara berkembang pengaturan masih menghadapi keterbatasan. Di India, Section 375 Indian Penal Code secara eksplisit menyebut: “Sexual intercourse by a man with his own wife, the wife not being under eighteen years of age, is not rape”.⁴⁹ Hal ini menunjukkan bahwa hubungan seksual dalam perkawinan masih dikecualikan dari kategori perkosaan selama istri berusia di atas delapan belas tahun. Di Indonesia, meskipun UU PKDRT Pasal 8 huruf a dan b sudah memasukkan unsur paksaan dalam relasi seksual rumah tangga, penguatan baru terjadi dengan lahirnya UU TPKS dan KUHP Baru yang menegaskan bahwa perkosaan adalah persetubuhan yang dilakukan “tanpa persetujuan korban”.

Adapun perbandingan Hukum Pidana dan Hukum Islam terkait perkosaan dalam perkawinan yang berlaku di Indonesia adalah sebagai berikut.

Tabel 1. Perbandingan Hukum Pidana dan Hukum Islam Terkait Perkosaan Dalam Perkawinan

Aspek	Perspektif Hukum Pidana	Perspektif Hukum Islam
Pengakuan kejahatan	Diakui secara legal dalam UU TPKS.	Diakui secara eksplisit.
Pemeriksaan	Diakui sebagai tindak pidana kekerasan seksual dalam UU TPKS Pasal 4 huruf b, yang mencakup “pemaksaan hubungan seksual dalam rumah tangga”. Juga diatur dalam UU PKDRT Pasal 8 huruf a.	Diakui secara eksplisit dalam hukum Islam sebagai <i>zina bil-jabr</i> (zina dengan paksaan) yang termasuk kategori jarimah hudud karena melanggar kehormatan dan kemuliaan manusia. Berdasarkan QS. An-Nur [24]:2 dan hadis Nabi SAW: “Tidak halal bagi seorang laki-laki menyakiti istrinya” (HR. Ibnu Majah).

44 Society for Adolescent Health and Medicine, “Promoting Sexual Consent Principles in the Sexual and Reproductive Health Care of Adolescents and Young Adults,” *Journal of Adolescent Health* 73, no. 1 (2023): 205–9, <https://doi.org/10.1016/j.jadohealth.2023.04.002>.

45 Candice Moral Pétiniot, “Aspects juridiques du consentement en matière de sexualité,” *Sages-Femmes* 21, no. 3 (2022): 16–20, <https://doi.org/10.1016/j.sagf.2022.03.004>.

46 Arif Sipahutar, “Perlindungan Hukum Terhadap Perempuan Yang Menjadi Korban Tindak Pidana Kekerasan Dalam Rumah Tangga.”

47 The People of the State of New York, Respondent, v. Mario Liberta, Appellant No. 597 (Court of Appeals of New York December 20, 1984), <https://www.law.cornell.edu/sites/www.law.cornell.edu/files/women-and-justice/People-V-Liberta-1.pdf>.

48 R v R [1991] UKHL 12, [1992] 1 AC 599 (House of Lords (HL) October 23, 1991).

49 Indian Penal Code, Section 375 and Exception 2 (as Amended by Criminal Law (Amendment) Act, 2013).

Tujuan hukum	Melindungi hak asasi manusia.	Menjaga keharmonisan rumah tangga.
	Melindungi hak asasi manusia terutama hak perempuan atas tubuh dan martabatnya (Pasal 4 UU TPKS).	Menjaga maqāsid al-syarī'ah, khususnya <i>hifz al-nasl</i> (perlindungan keturunan) dan <i>hifz al-'ird</i> (perlindungan kehormatan) serta menjaga kehormatan dan keharmonisan rumah tangga.
Hubungan suami istri	Berdasarkan atas persetujuan kedua belah pihak.	Menjadi sebuah hak dan kewajiban, tanpa adanya paksaan.
	Berdasarkan persetujuan kedua belah pihak, sebagaimana ditegaskan dalam UU TPKS dan adanya prinsip persetujuan (<i>consent</i>). Paksaan seksual termasuk tindak pidana.	Hubungan suami-istri adalah hak dan kewajiban timbal balik (QS. Ar-Rum [30]: 21), tetapi tidak boleh disertai paksaan.
Sanksi	Pidana	Moral atau nasihat agama.
	Dikenai pidana penjara dan/atau denda, sesuai Pasal 46–48 UU TPKS dan Pasal 44–49 UU PKDRT.	Dikenai sanksi moral dan hukum agama, seperti <i>ta'zīr</i> (hukuman yang ditentukan oleh hakim) sesuai tingkat pelanggaran, serta nasihat agama atau mediasi keluarga jika belum mencapai tingkat jarimah.

Sumber: hasil olah data penulis.

Dalam KUHP Baru, konsep pemaksaan hubungan seksual dalam rumah tangga mulai diakui secara eksplisit sebagai bentuk tindak pidana kekerasan seksual. KUHP Baru menekankan bahwa persetujuan (*consent*) merupakan unsur utama dalam hubungan seksual, termasuk dalam konteks pernikahan. Dengan demikian, apabila seorang suami memaksakan hubungan seksual terhadap istrinya tanpa persetujuan, hal tersebut dapat dikategorikan sebagai tindak pidana. Pendekatan ini berangkat dari nilai-nilai hak asasi manusia (HAM), integritas tubuh, dan perlindungan terhadap martabat perempuan, sebagaimana juga ditegaskan dalam UU TPKS.

Pengakuan eksplisit terhadap pemaksaan hubungan seksual dalam rumah tangga sebagai tindak pidana dalam KUHP Baru mencerminkan perubahan penting dalam sistem hukum pidana Indonesia, yang sebelumnya sangat dipengaruhi oleh nilai-nilai patriarkal dan dominasi relasi kuasa dalam institusi perkawinan.⁵⁰ Ketentuan baru ini tidak hanya memiliki implikasi hukum, tetapi juga berdampak sosial dan kultural, dengan mengoreksi anggapan keliru bahwa istri wajib tunduk mutlak pada kehendak suami. Dengan menjadikan persetujuan sebagai elemen kunci, hukum menegaskan bahwa hubungan seksual harus berdasar kesetaraan dan kerelaan bersama, bukan paksaan atau intimidasi.

Selain memberikan dasar hukum yang lebih kuat bagi korban untuk melapor dan memperoleh keadilan⁵¹, pendekatan ini juga membuka ruang bagi pembentukan norma sosial baru yang menghormati otonomi pribadi dan integritas tubuh perempuan, termasuk dalam konteks pernikahan⁵². Selanjutnya, sinkronisasi antara KUHP Baru dan UU TPKS menjadi langkah strategis negara dalam memastikan bahwa perlindungan terhadap perempuan bukan hanya deklaratif, tetapi benar-benar operasional dalam sistem peradilan pidana. Keberadaan pasal-pasal ini diharapkan dapat mendorong aparat penegak hukum, termasuk penyidik, jaksa, dan hakim, untuk lebih peka terhadap dinamika kekerasan seksual dalam rumah tangga, serta mendorong terciptanya mekanisme hukum yang berpihak pada korban.⁵³

50 Susantin and Fadli, “Analisis Advokasi Kebijakan Berhubungan Seks Suami Istri Secara Paksa Termasuk Kategori Tindak Pidana Pemerkosaan Dalam Undang-Undang Nomor 1 Tahun 2023 Tentang KUHP.”

51 Ardhina Shafa Sipayung and Mualimin Mochammad Sahid, “Awakening Women’s Agency Through Organizations: Legal Attitude of Muslim Women Victims of Marital Rape,” *Al-Ahwal: Jurnal Hukum Keluarga Islam* 15, no. 2 (2022): 257–74, <https://doi.org/10.14421/ahwal.2022.15206>.

52 Nizla Rohaya et al., “Unraveling the Legal Labyrinth: An In-Depth Review of Domestic Violence Regulation in Indonesia,” *Nurani: Jurnal Kajian Syari’ah Dan Masyarakat* 24, no. 1 (2024): 77–90, <https://doi.org/10.19109/nurani.v24i1.20011>.

53 Zuraidah et al., “Sinkronisasi Aturan Dalam KUHP Baru (Undang-Undang Nomor 1 Tahun 2023) Dan Undang-Undang No 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual Dalam Rangka Melindungi Korban Tindak Pidana Kekerasan Seksual,” *Proceedings Series on Social Sciences & Humanities* 23 (June 2025): 134–40, <https://doi.org/10.30595/pssh.v23i.1558>.

Perspektif ini sejalan dengan pendekatan *maqashid al-syari'ah* dalam Islam, yang mengutamakan perlindungan terhadap martabat dan keselamatan perempuan, serta menghormati hak-hak individu dalam hubungan rumah tangga⁵⁴. Dalam konteks ini, Islam tidak hanya menekankan kewajiban suami terhadap istri, tetapi juga hak istri untuk diperlakukan secara manusiawi, termasuk hak atas integritas tubuh dan kehormatan. Oleh karena itu, baik dalam hukum positif Indonesia maupun dalam kerangka *maqashidiyah* Islam, perkosaan dalam perkawinan dianggap sebagai bentuk kekerasan yang melanggar hak-hak perempuan dan harus diatasi melalui penegakan hukum yang adil dan melindungi martabat perempuan.

Meskipun hukum Islam dan hukum positif Indonesia berasal dari kerangka normatif yang berbeda yang satu bersumber dari wahyu dan *ijma'*, dan yang lain dari perundang-undangan sekuler yang berbasis konstitusi dan HAM—keduanya menunjukkan titik temu yang esensial dalam hal perlindungan terhadap korban kekerasan dalam rumah tangga. Baik dalam pendekatan hukum positif, seperti yang tercermin dalam UU TPKS dan KUHP baru, maupun dalam prinsip-prinsip syariat Islam, terdapat kesamaan dalam mengutuk tindakan kekerasan seksual serta menegaskan pentingnya persetujuan, keadilan, dan martabat manusia. Keduanya mengakui bahwa kekerasan seksual dalam rumah tangga tidak boleh dianggap sebagai persoalan privat, melainkan sebagai pelanggaran hak asasi manusia yang memerlukan penanganan hukum dan perlindungan terhadap korban. Keduanya menolak pemaksaan seksual dalam pernikahan, dan menekankan pentingnya penghormatan terhadap persetujuan, keadilan, dan martabat dalam hubungan suami istri. Perbedaan terletak pada bahasa hukum dan dasar legitimasi, namun keduanya sama-sama mendukung upaya pencegahan dan penegakan hukum terhadap kekerasan seksual dalam rumah tangga. Dengan demikian, sinergi antara hukum Islam dan hukum positif dapat menjadi landasan yang kuat dalam mencegah kekerasan seksual dalam rumah tangga serta menjamin keadilan dan keselamatan bagi setiap individu dalam institusi keluarga.

Kesamaan konsep substansial antara KUHP Baru dan hukum Islam dalam menolak pemaksaan seksual dalam pernikahan menunjukkan bahwa nilai-nilai dasar kemanusiaan seperti keadilan, martabat, dan perlindungan terhadap korban kekerasan seksual bersifat universal dan melintasi batas sistem hukum. Meskipun KUHP Baru bersandar pada prinsip-prinsip hukum positif dan hak asasi manusia, sementara hukum Islam berakar pada nilai-nilai syariat dan etika wahyu, keduanya sama-sama menegaskan bahwa relasi suami istri harus dibangun atas dasar saling menghormati, bukan dominasi atau paksaan. Hal ini menunjukkan adanya titik temu antara norma-norma sekuler dan religius dalam memperjuangkan perlindungan terhadap perempuan, khususnya dalam konteks rumah tangga. Kedua sistem hukum tersebut juga mengedepankan pentingnya konsensualitas (*consent*) sebagai landasan sahnya hubungan seksual, serta mengutuk setiap bentuk kekerasan yang melanggar integritas fisik dan psikologis pasangan.

Dari uraian komparatif tersebut, dapat diketahui bahwa terdapat persamaan dan perbedaan antara hukum pidana Indonesia dan hukum Islam terkait pemerkosaan dalam perkawinan (*marital rape*), sebagai berikut:

1. Persamaan mendasar terletak pada penolakan terhadap segala bentuk pemaksaan seksual dalam hubungan perkawinan. Keduanya berpijak pada nilai kemanusiaan yang menjunjung tinggi keadilan, kehormatan, dan persetujuan dalam relasi suami-istri. Persetujuan (*consent*) dalam hukum pidana Indonesia dan *ridā* dalam hukum Islam sama-sama menjadi prinsip moral dan normatif yang menentukan sah atau tidaknya hubungan seksual dalam pernikahan. Meskipun berbeda dalam landasan filosofis dan sumber legitimasi, di mana hukum pidana bersumber dari prinsip hak asasi manusia dan konstitusionalisme, sedangkan hukum Islam berakar pada wahyu dan *maqāsid al-syari'ah*—keduanya memiliki orientasi yang serupa dalam melindungi martabat manusia dan menolak dominasi atau kekerasan dalam rumah tangga.
2. Perbedaannya terletak pada pendekatan dan bentuk sanksi. Hukum pidana Indonesia menegaskan pemidanaan sebagai bentuk perlindungan hukum melalui instrumen formal seperti KUHP Baru dan UU TPKS, sedangkan hukum Islam mengedepankan pendekatan moral, etik, dan sosial melalui nasihat, mediasi, serta penerapan sanksi *ta'zīr* sesuai kadar pelanggaran. Namun demikian, kedua sistem hukum ini dapat saling melengkapi, hukum pidana memperkuat aspek *legal-formal*, sementara hukum Islam memperkaya dimensi etika dan spiritual dari keadilan itu sendiri.

Dengan demikian, sinergi antara keduanya menjadi penting untuk membangun sistem hukum yang tidak hanya represif terhadap pelaku, tetapi juga transformatif bagi tatanan sosial dan moral masyarakat dalam mencegah kekerasan seksual dalam perkawinan.

54 Taufiqurohman Taufiqurohman and Nelli Fauziah, "The Evaluation of Maqāsid Asy-Syari'ah on Discourses of the Islamic Family Law," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 1 (2023): 81, <https://doi.org/10.22373/ujhk.v6i1.13035>.

Kesimpulan

Hukum pidana Indonesia maupun hukum Islam pada dasarnya menolak tindakan pemaksaan seksual, tetapi memiliki perbedaan mendasar dalam fondasi normatif dan cara memaknai persetujuan. Hukum pidana Indonesia menegaskan persetujuan sebagai unsur legal yang membedakan hubungan seksual sah dan tindak pidana, sebagaimana tercermin dalam Pasal 473 KUHP Baru dan UU TPKS. Sebaliknya, hukum Islam menempatkan konsep *ridā* dalam kerangka moral dan spiritual yang menuntut adanya kehendak timbal balik tanpa paksaan. Melalui rekonstruksi komparatif, penelitian ini menemukan titik temu normatif antara prinsip *ridā* dalam hukum Islam dan asas kesetaraan dalam hukum pidana Indonesia, yang keduanya menegaskan pentingnya persetujuan dan penghormatan terhadap martabat individu. Kontribusi penelitian ini terletak pada upaya membangun kerangka konseptual baru untuk memahami hubungan suami-istri secara lebih setara, sehingga hukum positif dan hukum Islam dapat saling melengkapi dalam menegakkan keadilan dan kemanusiaan.

Secara praktis, hasil penelitian ini dapat menjadi acuan bagi perumus kebijakan dan lembaga keagamaan untuk merancang pedoman yang lebih sensitif terhadap isu kekerasan seksual dalam perkawinan. Namun, penelitian ini masih terbatas pada kajian normatif dan belum mengkaji dimensi empiris, seperti implementasi di lapangan atau persepsi masyarakat. Penelitian selanjutnya disarankan untuk memperluas analisis ke arah sosiologis dan psikologis guna menilai sejauh mana rekonstruksi konsep persetujuan ini dapat diterapkan secara efektif dalam sistem hukum dan kehidupan sosial di Indonesia.

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Agunan KUR Tanpa Agunan: Inkonsistensi Regulasi dan Jalan Menuju Penjaminan *Hybrid*

Unsecured Loans: Regulatory Inconsistencies and The Path Towards Hybrid Guarantees

¹Leny Megawati, ²T. Subarsyah, ³Tuti Rastuti

^{1,2,3}Universitas Pasundan, Bandung, Indonesia

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Corresponding Author.Email:
lenymegawati@unsur.ac.id

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Abstract

This study was motivated by the discrepancy between the norm stating that People's Business Credit (KUR) with a ceiling of up to IDR100 million does not require additional collateral, and the operational policy that still requires collateral at a number of Bank BRI units. This discrepancy causes disharmony and inconsistency, which has the potential to lead to disputes and hinder access to financing for MSMEs. The approach used is socio-legal research that combines normative-legal and socio-empirical research techniques. Based on these findings, this study examines the implications of applying additional collateral in the People's Business Credit (KUR) program at Bank BRI, particularly for micro-entrepreneurs with limited assets, where consumer protection norms and fairness in banking relationships do not explicitly accommodate credit insurance as a valid and standardized alternative guarantee, resulting in excessive dependence on physical collateral such as land, buildings, or vehicles, which actually hinders access to credit for MSMEs with minimal asset structures and creates discriminatory risks and legal uncertainty in the financing distribution process, threatening the consistency of the principles of fairness and openness that form the legal basis for consumer-bank relationships.

Abstrak

Penelitian ini dilatarbelakangi oleh adanya ketidaksesuaian antara norma yang menyatakan bahwa kredit Usaha Rakyat (KUR) dengan plafon hingga Rp 100 juta tidak memerlukan agunan tambahan, dengan kebijakan operasional yang masih mensyaratkan agunan pada Bank BRI. Ketidaksesuaian ini menimbulkan disharmoni dan inkonsistensi yang berpotensi menimbulkan sengketa serta menghambat akses pembiayaan bagi UMKM. Pendekatan yang digunakan bersifat *socio-legal research* yang memadukan teknik-teknik penelitian normatif-yuridis dan sosial-empiris. Berdasarkan temuan tersebut, Penelitian ini mengkaji implikasi penerapan agunan tambahan dalam program Kredit Usaha Rakyat (KUR) di Bank BRI, khususnya terhadap pelaku usaha mikro yang memiliki aset terbatas, di mana norma perlindungan konsumen dan keadilan dalam hubungan perbankan belum secara eksplisit mengakomodasi asuransi kredit sebagai jaminan alternatif yang sah dan terstandarisasi, sehingga menimbulkan ketergantungan berlebihan pada agunan fisik seperti tanah, bangunan, atau kendaraan yang justru menyulitkan akses kredit bagi UMKM dengan struktur aset minim dan menimbulkan risiko diskriminatif serta ketidakpastian hukum dalam proses penyaluran pembiayaan, mengancam konsistensi prinsip keadilan dan keterbukaan yang menjadi landasan hukum dalam hubungan konsumen-bank.

Pendahuluan

Kredit Usaha Rakyat (KUR) merupakan program pemerintah yang dirancang untuk menyediakan akses pembiayaan bagi pelaku Usaha Mikro Kecil dan Menengah (UMKM) dengan persyaratan yang ringan, termasuk keringanan dalam hal agunan.¹ Namun, kenyataan di lapangan menunjukkan bahwa Bank BRI, menerapkan kebijakan jaminan tambahan yang bertentangan dengan prinsip dasar KUR tersebut. Situasi ini menimbulkan permasalahan hukum yang penting untuk dikaji, khususnya menyangkut legalitas dan implikasi penerapan jaminan tambahan dalam konteks hukum perbankan Indonesia.

Dalam pelaksanaan program KUR terjadi ketidaksesuaian antara norma hukum positif dan praktik operasional di lapangan, yang mencerminkan ketidakterkaitan dalam pengaturan objek hukum terkait agunan tambahan. Secara normatif, Peraturan Menteri Koordinator (Permenko) No. 1 Tahun 2023 menetapkan bahwa kredit dengan plafon hingga Rp100 juta tidak memerlukan agunan tambahan, sedangkan untuk plafon di atas Rp100 juta, agunan tambahan diwajibkan berdasarkan penilaian objektif oleh lembaga penyalur. Namun, dalam praktiknya, sejumlah lembaga keuangan, termasuk Bank BRI, mengimplementasikan persyaratan agunan tambahan bahkan untuk kredit di bawah Rp100 juta, suatu tindakan yang melampaui batas ruang normatif yang telah ditentukan. Ketidaksesuaian ini mengindikasikan ketidakharmonisan dalam penjabaran norma hukum, bukan karena adanya “tumpang tindih” antar peraturan, melainkan karena perbedaan interpretasi atau pelaksanaan yang tidak konsisten terhadap ruang kebijakan yang sama. Ketidakkonsistenan ini menimbulkan ketidakpastian hukum dan mengancam prinsip inklusivitas yang menjadi inti dari KUR program yang dirancang untuk membantu pelaku usaha mikro dan kecil yang seringkali tidak memiliki aset berharga sebagai agunan.

Berdasarkan hal tersebut di atas, dalam tulisan ini, ada dua permasalahan yang dikaji secara ilmiah, yaitu pertama, bagaimana implikasi penerapan agunan tambahan KUR Bank BRI, dan kedua, bagaimana konsep ideal penyaluran KUR. Berdasarkan identifikasi masalah yang telah dikemukakan di atas, maka tujuan yang hendak dicapai dalam penelitian ini adalah pertama untuk menganalisis implikasi hukum dari penerapan agunan tambahan KUR Bank BRI. Kedua, untuk menemukan konsep ideal penyaluran KUR yang berkeadilan sosial.

Kajian mengenai agunan tambahan dalam skema KUR telah dilakukan oleh sejumlah peneliti sebelumnya dengan beragam fokus. Gunawan meneliti faktor-faktor yang memengaruhi penyaluran KUR di Bank BNI,² dan menemukan bahwa meskipun KUR dijamin pemerintah, keberadaan agunan tambahan tetap dipandang signifikan oleh bank dalam pengambilan keputusan kredit. Temuan ini memperlihatkan adanya kesenjangan antara desain regulasi KUR yang semestinya berbasis pada penjaminan negara, dengan praktik perbankan yang masih menjadikan agunan tambahan sebagai pertimbangan penting dalam penyaluran kredit.³ Rachman menekankan praktik di lapangan melalui studi kasus pada BRI Syariah KCP Soreang. Penelitiannya menunjukkan bahwa agunan pokok KUR adalah usaha yang dibiayai, sementara agunan tambahan tidak bersifat wajib. Bahkan ketika debitur menyerahkan agunan tambahan, bank tidak mengikatnya dengan jaminan kebendaan (seperti fidusia atau hak tanggungan), melainkan hanya melalui berita serah terima. Hal ini mengindikasikan adanya fleksibilitas pada praktik di BRI, khususnya pada produk KUR mikro, yang secara normatif memang tidak mensyaratkan agunan tambahan.

Temuan serupa dikemukakan dalam penelitian Pamulang *Law Review* oleh Kartono, Mareti dan Ary, yang menyoroti ketidakpastian hukum penggunaan BPKB sebagai agunan tambahan KUR mikro.⁴ Penelitian ini menilai praktik tersebut bertentangan dengan Permenko Perekonomian No. 6 Tahun 2019 yang tidak mengharuskan agunan tambahan pada KUR mikro. Bahkan, perlakuan bank yang seolah-olah menjadikan BPKB sebagai jaminan fidusia tanpa proses pengikatan formal dianggap berpotensi melanggar asas publisitas dan dapat dikualifikasi sebagai perbuatan melawan hukum. Sementara itu, Trisakti, oleh Jihan Noor dan Sri Bakti yang mengkaji penyelesaian

- 1 HalimatunSakdiyah Purba, Iriansyah, and Yetti, “Implementasi Asas Pruden Pada Pemberian Kredit Usaha Rakyat (KUR) Oleh BRI Kantor Cabang Duri,” *Teraju: Jurnal Syariah Dan Hukum* 7, no. 1 (2025): 18–31, <https://doi.org/DOI:https://doi.org/10.35961/teraju.v7i01.1877>.
- 2 Gunawan Ary Fajar, “Pengaruh Penjaminan Kredit, Agunan Tambahan, PMK No. 135/2008, Dan Suku Bunga Terhadap Penyaluran KUR (Studi Kasus BNI)” (Universitas Gajah Mada, 2009).
- 3 Mochamad Haikal Rachman, Sofyan Al-Hakim, and Cucu Susilawati, “Penerapan Jaminan Tambahan Pada Pembiayaan Kur Dengan Akad Murabahah Bil Wakalah Di Bank BRI Syariah KCP Soreang,” *Al-Muamalat: Jurnal Ekonomi Syariah* 8, no. 1 (2021): 38–46, <https://doi.org/10.15575/am.v7i1>.
- 4 Mareti Waruwu Kartono and Ary Oktaviyanti, “Kepastian Hukum Agunan Tambahan Berupa Buku Pemilik Kendaraan Bermotor Atas Penyaluran Kredit Usaha Rakyat Mikro Perseorangan Ditinjau Dari Peraturan Menteri Koordinator Bidang Perekonomian Nomor 6 Tahun 2019 Dan Undang-Undang Nomor 42 Tahun 1999 Tentang,” *Palrev|Journal of Law* 6, no. 1 (2023): 96–103.

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KUR macet di BNI Sentra Kredit Kecil Pecenongan⁵ dan menemukan bahwa agunan tambahan tetap berperan penting pada segmen KUR kecil, khususnya ketika debitur wanprestasi. Penelitian ini menegaskan perbedaan segmentasi KUR (mikro, kecil, maupun super mikro) menentukan relevansi hukum dari agunan tambahan dalam praktik perbankan.

Namun demikian, penelitian-penelitian di atas belum cukup untuk menetapkan agunan KUR tanpa agunan: inkonsistensi regulasi dan jalan menuju penjaminan *hybrid*. Selain itu, penelitian terdahulu lebih banyak memberikan gambaran parsial mengenai aspek normatif maupun praktik lapangan, tetapi masih terbatas dalam menjelaskan bagaimana penerapan agunan tambahan di Bank BRI, terutama terkait kepastian hukum,⁶ perlindungan debitur, dan kesesuaian dengan prinsip hukum jaminan.

Artikel ini bertujuan untuk menunjukkan bahwa implikasi penerapan agunan tambahan dalam program KUR di Bank BRI, khususnya terhadap pelaku usaha mikro yang memiliki aset terbatas, di mana norma perlindungan konsumen dan keadilan dalam hubungan perbankan belum secara eksplisit mengakomodasi asuransi kredit sebagai jaminan alternatif yang sah dan terstandarisasi, sehingga menimbulkan ketergantungan berlebihan pada agunan fisik seperti tanah, bangunan, atau kendaraan yang justru menyulitkan akses kredit bagi UMKM dengan struktur aset minim dan menimbulkan risiko diskriminatif serta ketidakpastian hukum dalam proses penyaluran pembiayaan, mengancam konsistensi prinsip keadilan dan keterbukaan yang menjadi landasan hukum dalam hubungan konsumen-bank.

Artikel ini disusun menjadi beberapa bagian. Setelah pendahuluan dan metode penelitian. Bagian pertama dari pembahasan artikel ini akan menjelaskan implikasi penerapan agunan tambahan KUR Bank BRI. Bagian ini akan dibahas secara komprehensif menjelaskan implikasi penerapan agunan tambahan dalam KUR Bank BRI dan bagaimana hal ini mempengaruhi akses pembiayaan bagi pelaku UMKM. Fokus utamanya adalah pada konflik antara kebutuhan bank dalam manajemen risiko melalui agunan tambahan dengan prinsip keadilan dan keterbukaan hukum yang harus menjamin perlindungan hak konsumen UMKM. Selain itu, uraian juga menyoroti peran strategis Otoritas Jasa Keuangan (OJK) dalam mengawasi, mengatur, dan menegakkan kepatuhan regulasi agunan agar praktik tersebut tidak memberatkan atau merugikan UMKM serta tetap mendukung tujuan sosial ekonomi KUR. Bagian kedua dari pembahasan artikel ini akan memberikan gambaran secara komprehensif rangkaian usulan perubahan regulasi yang ditujukan untuk mengatasi hambatan-hambatan struktural dalam program KUR. Usulan-usulan ini berlandaskan pada tiga pilar utama: integrasi asuransi sebagai agunan, penjaminan ganda (*double-insurance*), dan mekanisme penyelesaian sengketa alternatif. Keseluruhan kerangka regulasi yang diusulkan diharapkan mampu menciptakan ekosistem hukum yang lebih progresif, adil, dan efisien bagi UMKM.

Metode Penelitian

Penelitian ini menggunakan pendekatan *socio-legal research* (kajian sosiologi hukum) dengan tujuan mengkaji interaksi antara norma hukum yang tertuang dalam Permenko No. 1/2023 tentang KUR dan praktik operasional di lapangan, khususnya penerapan agunan tambahan oleh Bank BRI. Pendekatan interdisipliner ini memungkinkan peneliti tidak hanya melakukan analisis normatif terhadap peraturan, tetapi juga menelusuri dinamika sosial-ekonomi yang memengaruhi pelaksanaan kebijakan, sehingga dapat mengidentifikasi penyebab disharmoni serta merumuskan solusi yang lebih inklusif.

Penelitian bersifat kualitatif dan menggunakan studi kasus pada Bank BRI yang menerapkan KUR, dengan fokus pada nasabah mikro yang kreditnya berada di bawah plafon Rp100 juta. Data dikumpulkan dari dua sumber utama. Data sekunder meliputi: (a) regulasi perundang-undangan terkait KUR, termasuk Permenko No. 1/2023, peraturan OJK, dan peraturan Bank Indonesia; (b) dokumen internal bank (ketentuan agunan tambahan, prosedur penilaian kredit, formulir pengajuan, dan catatan keputusan kredit); (c) serta publikasi ilmiah yang membahas KUR, penjaminan kredit, dan hukum perbankan. Data primer diperoleh melalui wawancara mendalam (*in depth interview*) dengan manajer kredit bank, nasabah KUR yang mengalami penolakan atau penuntutan agunan tambahan. Selain itu, peneliti melakukan observasi partisipatif di Bank BRI untuk melihat secara langsung proses

5 Jihan Noor Fakhira and Sri Bakti Yunari, "Analisis Yuridis Penyelesaian Kredit Usaha Rakyat (KUR) Macet Untuk Usaha Mikro Kecil Dan Menengah (UMKM) Pada PT. Bank Negara Indonesia (Persero) Tbk, Sentra Kredit Kecil Pecenongan," *Jurnal Penelitian Dan Karya Ilmiah Lembaga Penelitian Universitas Trisakti* 6, no. 1 (2021): 34–43, <https://doi.org/https://doi.org/10.25105/pdk.v6i1.8628>.

6 Siti Halilah and Mhd. Fakhurrahman Arif, "Asas Kepastian Hukum Menurut Para Ahli," *Siyasah: Jurnal Hukum Tata Negara* 4, no. 2 (2021): 56–65.

pengajuan KUR serta penilaian agunan oleh petugas kredit. Teknik *purposive sampling* diterapkan dengan kriteria: (i) debitur dengan plafon kredit $\leq$ Rp100 juta; (ii) pernah mengalami penolakan atau permintaan agunan tambahan yang tidak sesuai regulasi; serta (iii) petugas yang berperan dalam keputusan kredit.

Analisis data mengikuti tahapan dalam *socio-legal research*. Pertama, dilakukan deskripsi normatif dengan menguraikan isi Permenko No. 1/2023 serta peraturan terkait. Kedua, identifikasi disharmoni dilakukan dengan membandingkan norma hukum dengan praktik yang terungkap dari dokumen internal dan hasil wawancara. Ketiga, melalui penafsiran sosial, peneliti menggali faktor-faktor yang melatarbelakangi perbedaan tersebut, seperti tekanan risiko kredit, budaya perbankan tradisional, atau ketidakjelasan kebijakan OJK. Keempat, interpretasi hukum menilai apakah praktik bank melanggar prinsip kepastian hukum, keadilan, dan perlindungan konsumen. Kelima, peneliti menyusun rekonstruksi ideal berupa model penyaluran KUR yang mengedepankan tanpa agunan tambahan bagi kredit $\leq$ Rp100 juta dan mekanisme penjaminan *hybrid* (asuransi atau penjaminan lain) bagi kredit di atas plafon tersebut. Analisis tematik (*thematic analysis*) diterapkan dengan *tahapan open, axial*, dan *selective coding* untuk mengekstrak tema utama seperti “ketidakadilan akses”, “ketergantungan pada agunan fisik”, dan “peran asuransi kredit sebagai solusi *hybrid*”.

Dengan metodologi ini, penelitian diharapkan dapat menghasilkan gambaran komprehensif tentang bagaimana regulasi KUR berinteraksi dengan praktik perbankan, mengidentifikasi akar masalah disharmoni, serta menawarkan rekomendasi kebijakan yang selaras dengan prinsip inklusivitas, kepastian hukum, dan keterjangkauan kredit bagi usaha mikro.

Pembahasan

A. Implikasi Penerapan Agunan Tambahan Kredit Usaha Rakyat (KUR) Bank BRI

Prasyarat dalam pemberian KUR membawa dampak hukum yang kompleks terkait dengan akses pembiayaan UMKM.⁷ Secara hukum, agunan tambahan berfungsi sebagai jaminan yang meningkatkan keamanan kredit bagi bank, tetapi sekaligus dapat menjadi hambatan yang signifikan bagi UMKM dalam hal:

Tabel. 4 Aspek Regulasi dan Pengawasan Agunan Tambahan KUR BRI

No.	Aspek	Uraian	Dasar Hukum / Lembaga Terkait
1	Keseimbangan Hak dan Kewajiban	Regulasi mengatur agar agunan tidak memberatkan debitur secara tidak proporsional.	- Pasal 3 & 18 UU No. 8 Tahun 1999 (Perlindungan Konsumen) - Pasal 23 UU No. 10 Tahun 1998 (Perbankan) - POJK No. 1 Tahun 2013
2	Ketidakpastian Hukum	Ketidakjelasan syarat agunan atau pelanggaran regulasi menimbulkan ketidakpastian hukum dan potensi praktik tidak adil bagi UMKM. ⁸	Umum (perlu kepatuhan terhadap regulasi agunan)
3	Prinsip Keadilan dan Keterbukaan	Regulasi dan praktik agunan wajib adil, tidak diskriminatif, dan transparan untuk memperkuat akses pembiayaan UMKM.	- POJK - Prinsip umum hukum perlindungan konsumen
4	Peran OJK dalam Pengawasan	OJK menetapkan regulasi, mengawasi, dan memastikan kepatuhan lembaga keuangan terhadap praktik agunan.	- POJK - Kewenangan pengawasan dan penegakan OJK

7 Olivia Yohana Moku, Johny Montolalu, and Dantje Keles, “Pemanfaatan Fasilitas Kredit Usaha Rakyat (KUR) Terhadap Peningkatan Usaha Mikro Kecil Dan Menengah (UMKM) (Studi Kasus Bank Mandiri Kantor Kas Manado Paal Dua),” *Jurnal Administrasi Bisni* 6, no. 1 (2018).

8 Budi Wijayanto and Listyowati Sumanto, “Perlindungan Hak Kekayaan Intelektual Dalam Hukum Persaingan Usaha: Perspektif Komisi Pengawas Persaingan Usaha,” *Jurnal Riset Multidisiplin Dan Inovasi Teknologi* 3, no. 1 (2025): 83–97, <https://doi.org/http://dx.doi.org/10.59653/jimat.v3i01.1349>.

5	Perlindungan Konsumen & Penyelesaian Sengketa	OJK menyediakan mekanisme pengaduan, mediasi, dan penyelesaian sengketa terkait agunan tambahan. ⁹	- POJK - Regulasi penyelesaian sengketa OJK
6	Peran Preventif OJK	Menjaga agar penerapan agunan tidak disalahgunakan dan tetap sesuai prinsip kehati-hatian, tanpa mengorbankan akses UMKM terhadap kredit. ¹⁰	- POJK - Fungsi pengawasan sistem keuangan

Sumber: Hasil Analisis Penulis

Penerapan agunan tambahan secara sepihak oleh Bank BRI menunjukkan pergeseran kedudukan hukum (*recht*) antara norma regulasi dan kebijakan internal lembaga, yang seharusnya tidak boleh menggeser kewenangan atau batasan yang telah ditetapkan dalam peraturan perundang-undangan. Dengan demikian, harmonisasi hukum yang sebenarnya tidak berada pada penggabungan atau penempatan aturan secara bersamaan, tetapi pada konsistensi interpretasi dan penerapan norma hukum dalam ruang yang telah ditentukan secara eksplisit oleh Permenko No. 1 Tahun 2023. Oleh karena itu, perlu dipastikan bahwa kebijakan di lapangan tidak hanya konsisten dalam pengertian teknis, tetapi juga dalam batas-batas kewenangan yang telah ditetapkan, agar tidak melampaui ranah normatif dan merusak prinsip kesetaraan hukum bagi para penerima manfaat program. Pengawasan dari OJK sangat krusial dalam menjamin penerapan agunan dilakukan sesuai peraturan yang berlaku serta menjaga keseimbangan kepentingan antara penyedia dan penerima kredit.¹¹ Penerapan agunan tambahan harus disesuaikan dengan tujuan sosial ekonomi KUR, yakni mendorong inklusi keuangan dan pemberdayaan UMKM tanpa memberatkan konsumen secara hukum.

B. Konsep Ideal Penyaluran Kredit Usaha Rakyat (KUR)

Konsep ideal penyaluran KUR selaras dengan prinsip negara hukum kesejahteraan, di mana negara tidak hanya menjamin kepastian dan perlindungan hukum, tetapi juga bertanggung jawab menciptakan kondisi ekonomi yang inklusif dan merata.¹² Teori hukum progresif dari Satjipto Rahardjo menegaskan bahwa, hukum itu secara makro harus mendekati keadaan ideal, yaitu mensejahterakan dan membahagiakan rakyatnya.¹³ Hukum hendaknya mampu mengikuti perkembangan zaman, mampu menjawab perubahan zaman dengan segala dasar di dalamnya, serta mampu melayani kepentingan masyarakat dengan menyandarkan pada aspek moralitas dari sumber daya manusia penegak hukum itu sendiri,¹⁴ sehingga adagiumnya “hukum untuk manusia dan bukan sebaliknya. Relevansi konsep ideal penyaluran KUR dengan Teori Hukum Progresif Satjipto Rahardjo bahwa, hukum tidak dapat dipandang sebagai teks normatif yang kaku, melainkan sebagai sarana untuk mencapai tujuan sosial, yakni kesejahteraan masyarakat. Oleh karena itu perlindungan hukum yang ideal bagi bank dan usaha rakyat tidak hanya dipahami sebatas memperkuat posisi jaminan tambahan secara normatif-dogmatis, melainkan juga melalui terobosan regulasi serta kebijakan perbankan yang lebih responsif. Bentuk perlindungan tersebut dapat diwujudkan, antara lain dengan: (1) menghadirkan mekanisme penerapan jaminan yang lebih praktis, sehingga bank memperoleh kepastian hukum ; (2) menyusun regulasi yang lebih adaptif, misalnya melalui ketentuan khusus dalam Peraturan OJK ataupun klausul pemberian KUR yang memberikan kedudukan agunan yang lebih fleksibel dalam penyaluran kredit produktif; (3) mengatur pembagian risiko secara proporsional antara *triple helix*, yaitu pemerintah, perbankan, dan masyarakat pelaku usaha penerima KUR, sehingga tidak ada pihak yang

9 Raymas Putro, “Alur Penyelesaian Sengketa Jasa Keuangan Melalui LAPS SJK,” Hukum Online, 2023.

10 Sidik Sunaryo and Jatmiko Wahyu Utomo, “Perlindungan Hukum Preventif Oleh Ojk Dalam Mencegah Kebocoran Data Pribadi Konsumen Pinjaman Online Berdasarkan Peraturan Ojk Nomor 06/Pojk.07/2022 Tentang Perlindungan Konsumen Dan Masyarakat Di Sektor Jasa Keuangan,” *Civilia: Jurnal Kajian Hukum Dan Pendidikan Kewarganegaraan* 2, no. 3 (2023), <https://doi.org/https://doi.org/10.572349/civilia.v3i2.538>.

11 Surti Yustiantia, “Kewenangan Pengaturan Dan Pengawasan Perbankan Oleh Bank Indonesia Dan Otoritas Jasa Keuangan (OJK),” *Jurnal Hukum Kenotariatan Dan Ke-PPAT-An* 1, no. 1 (2017).

12 Nurhotia Harahap, “Aspek Hukum Dalam Penyaluran Kredit Usaha Rakyat (KUR),” *Yurisprudientia* 4, no. 1 (2018), <https://doi.org/http://dx.doi.org/10.24952/yurisprudientia.v4i1.1498>.

13 M. Zulfa Aulia, “Hukum Progresif Dari Satjipto Rahardjo : Riwayat, Urgensi, Dan Relevansi,” *Jurnal Hukum* 1, no. 1 (2018): 165.

14 Satjipto Raharjo, *Membedah Hukum Progresif*, Kompas, Jakarta, 2006, hlm. IX.

menanggung beban risiko secara berlebihan; serta (4) menyediakan perlindungan hukum yang bersifat preventif melalui regulasi yang tegas, dan represif melalui mekanisme penyelesaian sengketa yang sederhana, cepat, dan efisien, dengan memanfaatkan keberadaan lembaga penyelesai alternatif sengketa di OJK. KUR merupakan salah satu manifestasi program negara dalam memenuhi kewajiban sosialnya untuk memberdayakan UMKM sebagai bagian dari kesejahteraan bersama.

Selain teori progresif, teori ekonomi Posner menjadi landasan bagi penyaluran KUR yang ideal dapat diwujudkan melalui penggunaan asuransi kredit sebagai pengganti agunan tambahan. Posner berpendapat bahwa hukum harus dirancang sedemikian rupa agar dapat menciptakan insentif yang tepat bagi perilaku ekonomi yang efisien.¹⁵ Penerapan teori Richard Posner dalam pengembangan hukum perbankan sebagai bagian dari hukum ekonomi di Indonesia menjanjikan sebuah kerangka kerja yang lebih modern dan adaptif, yang mampu menjawab tantangan globalisasi dan perubahan ekonomi yang cepat. Hukum ekonomi yang dikembangkan berdasarkan prinsip efisiensi dan kesejahteraan dapat berperan lebih efektif dalam mendukung pertumbuhan ekonomi yang berkelanjutan serta peningkatan kesejahteraan masyarakat Indonesia secara keseluruhan.¹⁶ Munculnya penggunaan asuransi kredit sebagai pengganti agunan tambahan menjadi jawaban atas tantangan globalisasi dan perubahan ekonomi yang cepat, sehingga dibutuhkan instrumen hukum mengenai pengaturan mitigasi risiko kredit macet, sehingga bank tetap berada pada kepatuhan terhadap prinsip kehati-hatian (*prudential banking*). Demikian pula kegiatan ekonomi sektor usaha rakyat dapat berjalan optimal.

Apabila ditinjau dari teori Posner, kondisi ini menunjukkan perlunya pembaruan hukum agar pemberian KUR dapat berfungsi lebih efektif melalui instrumen jaminan asuransi kredit. Mekanisme hukum yang lebih sederhana dalam mengatasi jaminan kepastian hukum. Selain itu, pengaturan pembagian risiko menjadi proporsional antara bank, pemerintah, dan usaha rakyat. Konsep penyaluran KUR yang ideal dapat diwujudkan melalui penggunaan asuransi kredit sebagai pengganti agunan tambahan bagi UMKM,¹⁷ Kebijakan ini merupakan langkah yang sesuai dengan gagasan efisiensi hukum ekonomi, yang bukan hanya memberikan kepastian hukum, tetapi juga menghadirkan efisiensi dan manfaat ekonomi yang lebih luas, sehingga program pemberian KUR dapat berjalan optimal dan berkelanjutan.

Dalam pembahasan mengenai regulasi penyaluran KUR, Permenko Nomor 1 Tahun 2023 menjadi salah satu acuan utama yang mengatur prosedur dan mekanisme pelaksanaan KUR. Meski demikian, analisis mendalam terhadap ketentuan dalam Permenko ini mengungkap adanya beberapa celah hukum yang perlu mendapat perhatian dan perbaikan agar penyaluran KUR lebih efektif dan berkeadilan.

Pertama, Permenko masih belum secara eksplisit mengatur penggunaan asuransi kredit sebagai alternatif atau pelengkap agunan fisik dalam penyaluran KUR. Hal ini menyebabkan bank penyedia KUR cenderung memerlukan agunan konvensional yang dapat membebani pelaku UMKM, sehingga pada praktiknya menurunkan tingkat aksesibilitas pelaku usaha terhadap pembiayaan. Kondisi ini menimbulkan kebutuhan untuk memasukkan ketentuan yang lebih fleksibel terkait mekanisme agunan, khususnya untuk memberikan ruang bagi penerapan model asuransi sebagai jaminan non-fisik yang inovatif dan responsif terhadap dinamika pasar dan kebutuhan UMKM.

Kedua, pembagian risiko antara pemerintah, lembaga penjamin (seperti Askrindo dan Jamkrindo), dan pihak asuransi swasta belum diatur secara komprehensif dalam Permenko. Ketidakjelasan ini menimbulkan ketidakpastian hukum dan risiko distribusi beban yang tidak proporsional, sehingga memerlukan model pembagian risiko yang jelas dan transparan. Konsep ideal yang dapat diusulkan adalah model *hybrid double-insurance* yang membagi tanggung jawab secara seimbang, dengan prinsip kontribusi sebagaimana diatur dalam Pasal 278 KUHD, sehingga dapat mengurangi beban premi bagi UMKM dan meningkatkan kepastian hukum bagi semua pihak terkait.

Selanjutnya, mekanisme penyelesaian sengketa KUR dalam Permenko saat ini masih terbatas dan cenderung konvensional, yang berpotensi memperlama proses penyelesaian dan meningkatkan biaya bagi pelaku usaha. Oleh karena itu, diperlukan integrasi klausul alternatif penyelesaian sengketa seperti mediasi atau penyelesaian sengketa alternatif (ADR) yang difasilitasi oleh otoritas yang berwenang seperti OJK. Pendekatan ini sekaligus meningkatkan kepercayaan pelaku usaha terhadap program KUR dan mendorong penyelesaian sengketa yang

15 I Wayan Sudira, Hasannudin Hidayat, M. Ali Fauzi, 2024, Analisis Relevansi Teori Richard Posner Dalam Pengembangan Hukum Ekonomi Di Indonesia : Studi Kasus Pada Kontrak Bisnis Di Sektor Keuangan, *Jurnal Fakultas Hukum UNIPAS*, Volume 12, Nomor 1, hlm. 1-2

16 *Ibid*, hlm. 6.

17 Ganefi, Siti Hatikasari, and Wafiya, "Regulasi Perbankan Dalam Penyaluran Kredit Usaha Rakyat Terhadap UMKM Di Masa Pandemi Di Kota Bengkulu," *ADIL: Jurnal Hukum* 12, no. 2 (2021): 39–57.

cepat dan efektif tanpa harus melalui proses litigasi yang mahal dan lama.

Dari perspektif hukum progresif dan ekonomi hukum, revisi atau penyempurnaan Permenko tidak hanya bersifat administratif semata, tetapi juga mengusung prinsip keadilan sosial dan kesejahteraan ekonomi. Regulasi harus adaptif dan responsif terhadap perubahan kebutuhan sosial-ekonomi, memastikan bahwa hukum menjadi instrumen yang menggerakkan kemakmuran bersama, bukan sebagai penghambat. Dengan demikian, penyisipan konsep-konsep tersebut dalam revisi Permenko akan memperkuat landasan hukum penyaluran KUR sehingga lebih inklusif, transparan, dan efisien. Secara konkrit, revisi Permenko dapat memasukkan pasal-pasal yang secara eksplisit mengatur penggunaan asuransi kredit sebagai alternatif agunan, menetapkan mekanisme pembagian risiko *hybrid* yang proporsional serta mendorong penerapan penyelesaian sengketa alternatif berbasis mediasi. Langkah ini akan menutup celah hukum yang ada sekaligus menjembatani kesenjangan antara teori hukum progresif dan praktik pelaksanaan kebijakan KUR, sehingga menciptakan sistem pembiayaan yang berkeadilan dan berkelanjutan.

Penyaluran KUR yang ideal tidak hanya ditentukan oleh jumlah dana yang disalurkan, namun juga oleh kelembagaan hukum yang mendukung keberlangsungan, keadilan, dan efisiensi program tersebut. Oleh karena itu, diperlukan perubahan mendasar dalam kerangka regulasi, khususnya pada Permenko, untuk mengintegrasikan konsep ideal penyaluran KUR yang telah dikemukakan sebelumnya, yaitu berbasis pada asuransi sebagai agunan, penjaminan ganda (*double-insurance*), serta mekanisme penyelesaian sengketa alternatif. Pembentukan regulasi ini penting untuk mengatasi celah hukum yang saat ini masih ada, khususnya terkait ketergantungan berlebihan pada agunan fisik, beban risiko yang tidak merata, serta proses penyelesaian sengketa yang masih cenderung litigatif dan lambat. Melalui revisi Permenko, pemerintah dapat membangun ekosistem hukum yang lebih progresif, yang tidak hanya menjamin pemenuhan kewajiban finansial, tetapi juga melindungi eksistensi UMKM sebagai pelaku ekonomi utama. Dalam konteks ini, usulan revisi mengusulkan penerapan Pasal 3 yang secara eksplisit mengakui asuransi kredit sebagai agunan utama, dengan nilai jaminan minimal 80% dari pinjaman, serta memastikan verifikasi lewat sistem terintegrasi OJK agar transparansi dan keamanan data terjaga. Selain itu, Pasal 4 mengusulkan skema penjaminan ganda, yang membagi risiko secara proporsional antara Lembaga penjamin pemerintah (Askrindo/Jamkrindo) (70%), dan perusahaan asuransi swasta (30%), sehingga mengurangi beban fiskal negara dan mendorong peran sektor swasta dalam mitigasi risiko. Kombinasi ini tidak hanya sesuai dengan prinsip hukum progresif yang menekankan keseimbangan antara kepentingan publik dan privasi, tetapi juga memiliki dasar hukum dalam Kitab Undang-Undang Hukum Dagang (KUHD) Pasal 278 mengenai kontribusi risiko asuransi. Lebih lanjut, Pasal 6 mengusulkan mekanisme penyelesaian sengketa melalui mediasi OJK dan arbitrase BANI sebagai solusi alternatif yang cepat, hemat biaya, dan tetap menghormati kehendak para pihak, yang jelas merupakan langkah yang relevan dalam mewujudkan pendekatan hukum yang adaptif terhadap kebutuhan masyarakat yang dinamis. Dengan demikian, revisi Permenko bukan sekadar perbaikan teknis, namun representasi konkritnya dari keberanian hukum untuk menutup celah dan mendorong transformasi sistemik dalam pemberian kredit bagi rakyat. Usulan pasal-pasal tersebut harus diuji melalui proses konsultasi publik dengan pihak-pihak terkait seperti OJK, Bank Indonesia, lembaga penjamin, asuransi, dan asosiasi UMKM, agar kebijakan yang dihasilkan benar-benar responsif terhadap realitas lapangan.

Penerapan jaminan asuransi pada KUR menggunakan prinsip asuransi kontribusi (*contribution*). KUHD mengatur mengenai prinsip kontribusi pada Pasal 278 yaitu sebagai berikut: “Bilamana dalam polis yang sama oleh berbagai penanggung, meskipun pada hari-hari yang berlainan, dipertanggungkan untuk lebih daripada harganya, maka mereka menandatangani, hanya memikul harga sesungguhnya yang dipertanggungkan. Ketentuan yang sama berlaku bilamana pada hari yang sama, mengenai benda yang sama, di dalam pertanggungkan-pertanggungkan yang berlainan.”

Prinsip kontribusi berlaku pada *double insurance*, yaitu apabila tertanggung menutup asuransi untuk benda yang sama terhadap resiko yang sama kepada lebih dari seorang penanggung dalam polis yang berlainan. Dalam terjadi *double insurance*, maka hanya berlaku dalam hal-hal sebagai berikut: 1) Beberapa polis diadakan untuk persamaan resiko yang menimbulkan kerugian itu; dan 2) Beberapa polis menutup kepentingan yang sama, dari tertanggung yang sama dan terhadap benda yang sama pula.

Model hybrid penjaminan KUR atau *double insurance* merupakan konsep kolaborasi antara lembaga penjamin pemerintah (seperti Askrindo/Jamkrindo) dengan asuransi swasta untuk menciptakan mekanisme penjaminan yang lebih komprehensif dalam penyaluran KUR. Model ini menggabungkan keandalan jaminan pemerintah dengan inovasi dan efisiensi pasar asuransi swasta. Dalam ranah inovasi/ novelty, suatu konsep dapat dikategorikan sebagai *invention* (penemuan baru), *improvement* (peningkatan/penyempurnaan), atau *refutation* (penolakan/tantangan terhadap teori/praktik lama). *Model hybrid* penyaluran KUR atau *double insurance*, sebagaimana dikonsepsikan, bukanlah penemuan baru secara mutlak, karena lembaga penjamin pemerintah

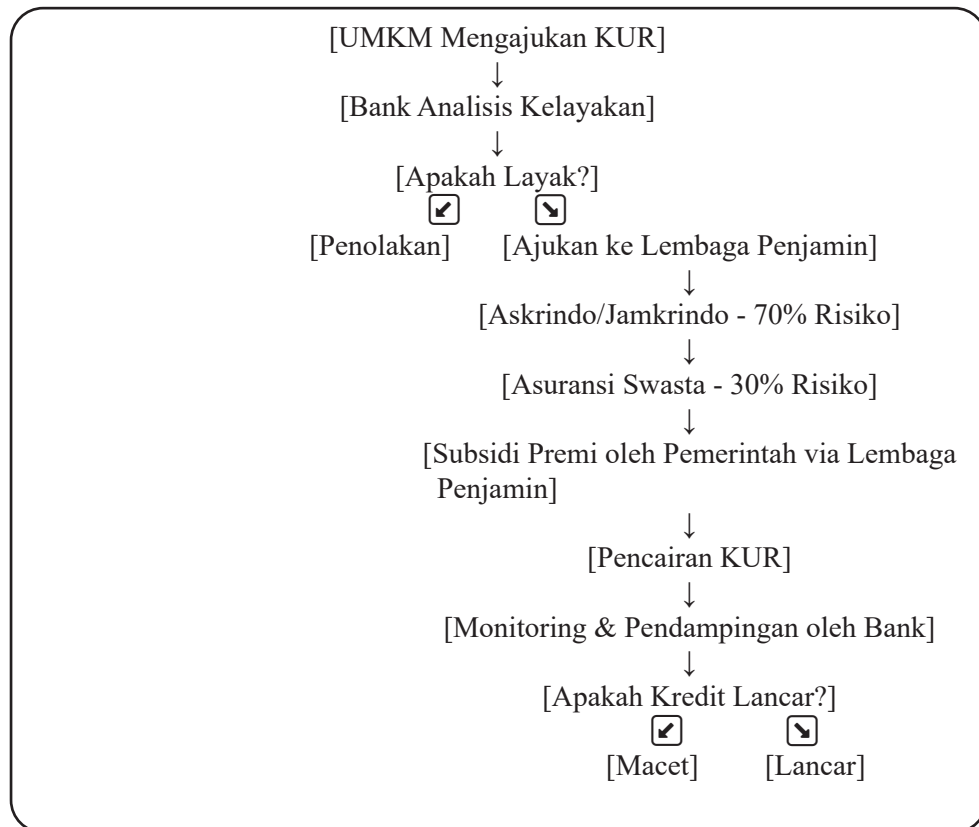
dan asuransi swasta sudah berjalan secara terpisah dalam menyediakan jaminan kredit. Namun, konsep ini dikategorikan sebagai *improvement* (peningkatan/penyempurnaan), dimana melakukan perbaikan signifikan dengan menggabungkan kedua lembaga tersebut dalam satu mekanisme kolaboratif yang tidak hanya membagi risiko secara proporsional (70% oleh lembaga penjamin pemerintah dan 30% oleh asuransi swasta) tetapi juga mengintegrasikan subsidi premi melalui lembaga penjamin. Hal ini meningkatkan efektivitas perlindungan, efisiensi biaya, dan aksesibilitas kredit bagi UMKM.

Rincian Langkah-langkah utama *Model Hybrid* atau *double insurance*:

- a. UMKM Mengajukan KUR ke Bank
UMKM sebagai pemohon kredit mengajukan permohonan KUR ke bank penyedia kredit.
- b. Bank Melakukan Analisis Kelayakan Kredit
Bank menganalisis kemampuan dan risiko kredit dari UMKM sesuai standar kredit. Keputusan: Jika tidak layak → Tolak permohonan; jika layak → lanjut ke langkah berikutnya.
- c. Bank Mengajukan ke Lembaga Penjamin Pemerintah
Data dan pengajuan risiko dikirimkan ke lembaga penjamin (Askrindo/Jamkrindo).
- d. Lembaga Penjamin Menanggung Risiko Utama (70%)
Lembaga penjamin melakukan evaluasi dan menanggung risiko utama (70%) kredit tersebut. Fasilitas penjaminan ini memberikan jaminan kredit kepada bank sehingga risiko bank dapat terbagi.
- e. Asuransi Swasta Menanggung Risiko Tambahan (30%)
Sebagai penguat dari *model hybrid*, asuransi swasta ikut menanggung risiko tambahan sebesar 30%. Ini memberikan diversifikasi risiko dan mengintegrasikan pengalaman serta produk asuransi swasta.
- f. Subsidi Premi dari Pemerintah melalui Lembaga Penjamin
Premi asuransi yang harus dibayar oleh UMKM disubsidi oleh pemerintah dengan mekanisme pembayaran melalui lembaga penjamin. Ini mendorong akses UMKM terhadap proteksi kredit dengan biaya yang lebih terjangkau.
- g. Pencairan KUR oleh Bank ke UMKM
Setelah mekanisme jaminan dan asuransi terpasang, kredit KUR dicairkan kepada UMKM.
- h. Monitoring dan Pendampingan UMKM oleh Bank
Bank melakukan monitoring atas penggunaan kredit dan membimbing UMKM.
- i. Evaluasi Pembayaran Kredit
Bank memantau kelancaran pembayaran kredit. Jika lancar, kasus selesai. Jika macet, dilakukan klaim.
- j. Klaim Asuransi dan Penyelesaian Kasus
Klaim klaim asuransi diselesaikan antara lembaga penjamin dan asuransi swasta sesuai porsi tanggung risiko. Penyelesaian klaim ini membantu bank dan UMKM menutup risiko kredit macet secara efisien.

Untuk memberikan kejelasan yang lebih komprehensif mengenai konsep tersebut, berikut peneliti sajikan dalam bagan alur (*flowchart*) yang merinci langkah-langkah utama dalam penerapan *Model Hybrid* Penjaminan KUR, sebagaimana berikut:

Bagan 1. Alur Penerapan *Model Hybrid* Penjaminan KUR



Sumber: Hasil Analisis Penulis

Kesimpulan

Penelitian ini mengkaji implikasi penerapan agunan tambahan dalam program KUR di Bank BRI, dengan fokus pada keseimbangan antara manajemen risiko perbankan dan aksesibilitas pembiayaan bagi UMKM. Analisis menunjukkan bahwa Permenko Nomor 1 Tahun 2023 belum secara eksplisit mengatur penggunaan asuransi kredit sebagai alternatif agunan, menyebabkan kecenderungan penerapan agunan fisik yang berpotensi memberatkan debitur. Keberadaan celah hukum ini menimbulkan ketidakpastian hukum, pelanggaran prinsip keadilan, dan risiko diskriminatif, terutama terhadap pelaku usaha mikro yang minim aset. Penelitian mengusulkan solusi jangka pendek berupa penambahan pasal spesifik dalam Permenko yang mengakomodasi asuransi kredit dan mengatur mekanisme verifikasi agunan secara terstandarisasi. Untuk jangka panjang, dikemukakan integrasi teori hukum progresif Satjipto Rahardjo yang menekankan keadilan sosial dengan prinsip efisiensi insentif dari Richard Posner, dalam kerangka *triple-helix* (pemerintah–bank–UMKM). Penggunaan asuransi kredit sebagai jaminan alternatif diharapkan meningkatkan kepastian hukum dan efisiensi sistem, sementara mekanisme penyelesaian sengketa berbasis ADR yang dipantau OJK akan mewujudkan perlindungan hukum yang preventif dan responsif. Hasil penelitian menunjukkan bahwa revisi regulasi bukan hanya memperkuat keadilan hukum bagi debitur, tetapi juga mendukung stabilitas sistem keuangan dan pencapaian tujuan sosial ekonomi KUR secara berkelanjutan.

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Dilema Penambangan Dasar Laut: Pengaturan Dalam ISA, Prinsip Kehati-Hatian dan Tantangan Implementasi Perjanjian BBNJ

Deep Seabed Mining Dilemma: Stipulation Under ISA, the Precautionary Principle, and BBNJ Agreement Challenges

Adrian Nugraha¹, Nashriana², Ridwan³

¹²³Fakultas Hukum, Universitas Sriwijaya, Palembang, Sumatera Selatan, Indonesia

Article Information

Corresponding Author.Email:

adriannugraha@fh.unsri.ac.id

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Abstract

This article examines the role of the International Seabed Authority (ISA) in the governance of deep seabed mining, highlighting the legal and environmental implications arising from the adoption of the Biodiversity Beyond National Jurisdiction (BBNJ) Agreement in 2023. The research employs a normative juridical method through an extensive review of international legal instruments, doctrines, jurisprudence, and scholarly literature related to the United Nations Convention on the Law of the Sea (UNCLOS) 1982, the precautionary principle, and global environmental agreements. The analysis reveals that the ISA's mandate to manage seabed resources as the common heritage of mankind faces significant pressure due to growing scientific evidence of the ecological risks associated with deep-sea mining. Potential jurisdictional and normative conflicts also arise between the ISA and BBNJ regimes, particularly concerning marine protected areas, environmental impact assessments, and access to marine genetic resources. In the context of scientific uncertainty, mineral exploitation may violate the precautionary principle, erga omnes obligations, and the commitments of Sustainable Development Goal 14. Accordingly, this study recommends a moratorium on mining activities, the harmonization of ISA–BBNJ legal frameworks, and the strengthening of implementation of the precautionary principle to ensure the sustainability of deep-sea ecosystems.

Abstrak

Artikel ini mengkaji peran Otoritas Dasar Laut Internasional (International Seabed Authority/ISA) dalam tata kelola penambangan dasar laut, dengan menyoroti implikasi hukum dan lingkungan pasca-adopsi *Biodiversity Beyond National Jurisdiction Agreement* (BBNJ) tahun 2023. Penelitian ini menggunakan metode yuridis normatif melalui telaah terhadap instrumen hukum internasional, doktrin, yurisprudensi, dan literatur ilmiah terkait *United Nations Convention on the Law of the Sea* (UNCLOS) 1982, prinsip kehati-hatian, serta perjanjian lingkungan global. Hasil analisis menunjukkan bahwa mandat ISA untuk mengelola sumber daya sebagai *common heritage of mankind* menghadapi tekanan signifikan akibat meningkatnya bukti ilmiah mengenai risiko ekologis penambangan dasar laut. Potensi konflik yurisdiksi dan norma antara rezim ISA dan BBNJ juga muncul, khususnya terkait kawasan konservasi, penilaian dampak lingkungan, dan akses sumber daya genetik laut. Dalam konteks ketidakpastian ilmiah, eksploitasi mineral berpotensi melanggar prinsip kehati-hatian, kewajiban *erga omnes*, dan komitmen *Sustainable Development Goal* 14. Oleh karena itu, penelitian ini merekomendasikan moratorium penambangan, harmonisasi rezim hukum ISA–BBNJ, serta penguatan implementasi prinsip kehati-hatian demi keberlanjutan ekosistem laut dalam.

Pendahuluan

Penambangan dasar laut telah menjadi salah satu isu krusial dalam dinamika tata kelola lingkungan laut internasional. **Penambangan dasar laut** (*deep seabed mining*) di definisikan sebagai setiap kegiatan eksplorasi dan eksploitasi sumber daya mineral padat yang berada di dasar laut dan tanah di bawahnya di luar batas yurisdiksi nasional suatu negara, yang dikenal sebagai *Area*.¹ Sejak pengesahan Konvensi Perserikatan Bangsa-Bangsa tentang Hukum Laut (*United Nations Convention on the Law of the Sea/ UNCLOS*) pada tahun 1982,² kawasan dasar laut internasional (*The Area/ Kawasan*) beserta mineral yang terkandung di dalamnya secara hukum telah ditetapkan sebagai warisan bersama umat manusia (*common heritage of mankind*). Berdasarkan kerangka ini, segala aktivitas eksplorasi dan eksploitasi sumber daya mineral di Area dikoordinasikan oleh Otoritas Dasar Laut Internasional (*International Seabed Authority/ISA*). Otoritas ini bertugas mengelola sumber daya alam di laut lepas secara adil dan berkelanjutan serta memastikan perlindungan lingkungan laut dari dampak merugikan penambangan. Namun, seiring berkembangnya bukti ilmiah mengenai keanekaragaman hayati dasar laut dan risikonya terhadap aktivitas industri ekstraktif, dilema global terhadap penambangan dasar laut semakin mengemuka.³

Dilema semakin tajam karena terdapat desakan untuk mempercepat eksploitasi mineral dasar laut, seperti yang dilakukan oleh Nauru pada tahun 2021 melalui mekanisme aturan dua tahun dalam ISA.⁴ Aturan dua tahun (*two-year rule*) adalah ketentuan dalam Perjanjian Implementasi Tahun 1994 atas UNCLOS yang memberikan hak kepada negara sponsor, seperti Nauru, untuk meminta Dewan ISA menyelesaikan dan mengesahkan peraturan eksploitasi mineral dasar laut dalam jangka waktu dua tahun, setelah itu permohonan eksploitasi dapat dipertimbangkan meskipun aturan tersebut belum sepenuhnya disahkan. Hal ini menimbulkan pertanyaan fundamental mengenai kesiapan rezim hukum internasional dalam menjawab ancaman lingkungan yang belum sepenuhnya dipahami. Berbagai negara, ilmuwan, kelompok masyarakat adat, dan organisasi lingkungan telah menyerukan moratorium global penambangan dasar laut hingga risiko ekologisnya dapat dikaji secara komprehensif.⁵ Prinsip kehati-hatian menjadi salah satu pendekatan yang dianggap krusial dalam mengatur aktivitas ini, sebagaimana tercermin dalam kewajiban negara-negara berdasarkan Pasal 192, 194, dan 197 UNCLOS, serta berbagai kerangka kerja lingkungan internasional lainnya, seperti Konvensi Keanekaragaman Hayati (*Convention on Biological Diversity/ CBD* 1992),⁶ Perjanjian Stok Ikan, dan Kerangka Keanekaragaman Hayati Global Kunming–Montreal.

Adanya tumpang tindih yurisdiksi antara ISA dan mandat Perjanjian Keanekaragaman Hayati di Luar Yurisdiksi Nasional (*Biodiversity Beyond National Jurisdiction Agreement* (BBNJ Agreement) 2023) menciptakan tantangan koordinasi hukum internasional. Meski Perjanjian BBNJ menegaskan tidak akan melemahkan rezim yang sudah ada, pertanyaannya tetap muncul: bagaimana negara dapat secara bersamaan mematuhi prinsip perlindungan dasar laut BBNJ dan mendukung eksploitasi mineral oleh ISA? Ketegangan ini menjadi semakin rumit mengingat potensi konflik antara penambangan dasar laut dengan pemanfaatan lain seperti bioprospeksi genetik laut yang diatur dalam BBNJ, serta kemungkinan litigasi domestik jika negara dianggap gagal memenuhi kewajiban perlindungan lingkungan laut yang telah terinkorporasi dalam hukum nasional.

Penelitian-penelitian terdahulu telah menganalisis aspek regulasi dan lingkungan dari aktivitas penambangan bawah laut, seperti studi Lisa A. Levin et al⁷ yang membahas mengenai kesesuaian industri penambangan dasar

- 1 Diva J. Amon et al., “Assessment of Scientific Gaps Related to the Effective Environmental Management of Deep-Seabed Mining,” *Marine Policy* 138, no. 1 (2022): 1–22, <https://doi.org/10.1016/j.marpol.2022.105006>.
- 2 United Nations Convention on the Law of the Sea (1982), https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
- 3 Kathryn A. Miller et al., “An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps,” *Frontiers in Marine Science* 4, no. 1 (2018): 1–24, <https://doi.org/10.3389/fmars.2017.00418>.
- 4 Riley Traut, “Stuck Between a Polymetallic Nodule and a Hard Place: Harmonizing Deep-Sea Mineral Exploitation and Prevention of Harm to the Marine Environment Under the United Nations Convention on the Law of the Sea,” *Columbia Journal of Transnational Law* 62, no. 1 (2023): 159–214.
- 5 Sandra Cassotta and Michael Goodsite, “Deep-Seabed Mining: An Environmental Concern and a Holistic Social Environmental Justice Issue,” *Frontiers in Ocean Sustainability* 2, no. 1 (2024): 1–16, <https://doi.org/10.3389/focus.2024.1355965>.
- 6 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction,” UN Doc. A/77/L.82 (2023), <https://www.un.org/bbnjagreement/en>.
- 7 Lisa A. Levin, Diva J. Amon, and Hannah Lily, “Challenges to the Sustainability of Deep-Seabed Mining,” *Nature Sustainability* 3, no. 10 (2020): 784–94, <https://doi.org/10.1038/s41893-020-0558-x>.

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laut dengan agenda pembangunan berkelanjutan, yang mencakup tantangan di bidang lingkungan, hukum, dan sosial, dengan menekankan manfaat ekonomi sirkular dan penundaan eksploitasi. Kemudian, kajian Ardron⁸ membahas tata kelola lingkungan penambangan dasar laut di luar yurisdiksi nasional dengan menyoroti kurangnya transparansi dan pemantauan statistik di ISA, yang mana studi ini merekomendasikan peningkatan keterbukaan data dan metode ilmiah yang lebih kuat. Selanjutnya, Virginie Tilot et al.⁹ membahas bagaimana pengetahuan tradisional dan nilai budaya masyarakat Kepulauan Pasifik berperan penting dalam menjaga keseimbangan antara kepentingan ekonomi, ekologi, dan sosial dalam pengelolaan sumber daya laut, serta merekomendasikan agar praktik dan kebijakan lokal dijadikan model untuk tata kelola penambangan dasar laut yang berkelanjutan dan berkeadilan. Namun, penelitian-penelitian tersebut belum membahas problematika penambangan dasar laut dengan implementasi BBNJ Agreement yang diadopsi tahun 2023. BBNJ merupakan instrumen hukum internasional baru yang bertujuan meningkatkan konservasi dan penggunaan berkelanjutan keanekaragaman hayati laut di luar yurisdiksi nasional. Konteks artikel ini membuka area kajian yang baru dan kompleks mengenai hubungan antara kewenangan ISA dan kewajiban negara-negara pihak terhadap perjanjian BBNJ, terutama dalam hal perlindungan kawasan konservasi laut, penilaian dampak lingkungan, serta akses terhadap sumber daya genetik laut.

Berdasarkan latar belakang tersebut, artikel ini bertujuan untuk menjawab pertanyaan-pertanyaan kunci terkait peran Otoritas Dasar Laut Internasional (ISA) dalam mengatur penambangan dasar laut. Selain itu, artikel ini juga mengkaji bagaimana prinsip kehati-hatian dan kerangka hukum lingkungan laut internasional merespons tantangan serta risiko yang ditimbulkan oleh aktivitas tersebut. Di sisi lain, artikel ini menelaah sejauh mana penambangan dasar laut dapat memengaruhi implementasi Perjanjian BBNJ dan menguji komitmen negara-negara terhadap perlindungan keanekaragaman hayati di luar yurisdiksi nasional.

Tujuan utama dari penulisan artikel ini adalah untuk menganalisis secara kritis relasi antara tata kelola ISA, prinsip kehati-hatian, dan relevansi Perjanjian BBNJ dalam konteks regulasi penambangan dasar laut. Artikel ini bertujuan mengisi kekosongan akademik dengan menyatukan perspektif hukum lingkungan laut internasional dan hukum kelembagaan ISA dalam kerangka kontemporer yang kompleks. Unsur kebaruan (*novelty*) dari artikel ini terletak pada pendekatan integratif yang belum banyak dibahas secara komprehensif dalam literatur sebelumnya, yaitu hubungan interdependen antara mandat ISA dan kewajiban negara dalam kerangka BBNJ. Artikel ini juga menyajikan analisis baru terhadap doktrin hukum internasional seperti kewajiban *erga omnes* dalam konteks penambangan dasar laut, serta kemungkinan implikasi politik dan hukum dari keputusan yang diambil oleh negara-negara anggota ISA.

Untuk menjawab ketiga rumusan masalah tersebut, struktur artikel ini dibagi ke dalam beberapa bagian utama. Bagian pertama membahas peran ISA dalam regulasi penambangan dasar laut berdasarkan UNCLOS. Bagian kedua mengeksplorasi prinsip kehati-hatian dan berbagai kewajiban hukum internasional yang terkait dengan tata kelola lingkungan laut. Bagian ketiga mengulas dampak penambangan dasar laut terhadap implementasi Perjanjian BBNJ, serta potensi konflik yurisdiksi antara ISA dan perjanjian multilateral tersebut. Akhirnya, artikel ini menawarkan rekomendasi kebijakan dan langkah hukum yang dapat diambil untuk menyelaraskan kepentingan eksplorasi dengan perlindungan lingkungan global.

Metode

Penelitian ini merupakan penelitian hukum yuridis normatif, yaitu suatu metode penelitian hukum yang dilakukan melalui studi kepustakaan untuk menelaah dan menganalisis norma-norma hukum positif yang berlaku, prinsip-prinsip hukum serta doktrin-doktrin hukum yang relevan. Jenis penelitian ini dipilih karena permasalahan yang dianalisis berupa penerapan dan keterkaitan norma-norma hukum internasional seperti UNCLOS 1982, *Mining Code*, prinsip kehati-hatian, serta komitmen internasional dalam perjanjian-perjanjian lingkungan hidup dan keanekaragaman hayati. Penelitian yuridis normatif bertujuan untuk menelaah konsistensi, keselarasan, dan implikasi hukum dari norma-norma tersebut terhadap kewenangan ISA, kewajiban negara anggota, dan perlindungan lingkungan laut.

Sumber data dalam penelitian ini meliputi bahan hukum primer dan sekunder. Bahan hukum primer terdiri atas instrumen-instrumen hukum internasional seperti UNCLOS 1982, *Convention on Biological Diversity* 1992, dan *Biodiversity Beyond National Jurisdiction Agreement* 2023, resolusi-resolusi Dewan ISA, serta dokumen

8 Jeffrey Allan Ardron, "Good Governance of Deep-Seabed Mining: Transparency and the Monitoring of Environmental Harm" (University of Southampton, 2020).

9 Virginie Tilot et al., "Traditional Dimensions of Seabed Resource Management in the Context of Deep Sea Mining in the Pacific: Learning From the Socio-Ecological Interconnectivity Between Island Communities and the Ocean Realm," *Frontiers in Marine Science* 8, no. 1 (2021): 1–27, <https://doi.org/10.3389/fmars.2021.637938>.

kontrak eksplorasi mineral yang telah disahkan oleh ISA. Bahan hukum sekunder mencakup literatur ilmiah berupa buku, artikel jurnal internasional, laporan lembaga internasional, dan pendapat para ahli hukum internasional yang relevan dengan tema penelitian. Teknik pengumpulan bahan hukum dilakukan melalui studi pustaka (*library research*) dengan menelusuri dokumen resmi lembaga internasional, basis data jurnal akademik bereputasi, serta arsip publikasi kebijakan publik terkait.

Analisis bahan hukum dilakukan secara kualitatif dengan pendekatan interpretasi hukum. Penulis menggunakan teknik penafsiran gramatikal, sistematis, dan teleologis terhadap ketentuan-ketentuan UNCLOS, *Mining Code*, dan instrumen hukum lain untuk memahami secara komprehensif hak dan kewajiban para pihak serta prinsip-prinsip yang mendasari pengaturan penambangan dasar laut. Analisis hukum juga dilakukan secara komparatif untuk melihat sejauh mana kebijakan ISA selaras dengan prinsip kehati-hatian, prinsip keadilan, serta tujuan pembangunan berkelanjutan. Seluruh hasil analisis diuraikan secara sistematis, argumentatif, dan kritis guna memberikan gambaran utuh mengenai peran ISA dalam mengatur penambangan dasar laut dan implikasi hukumnya bagi negara anggota serta lingkungan laut secara global.

Pembahasan

A. Peran Otoritas Dasar Laut Internasional Dalam Mengatur Penambangan Dasar Laut

Area/ Kawasan dan mineral-mineral yang terdapat di dalamnya telah ditetapkan secara hukum sebagai warisan bersama umat manusia berdasarkan Pasal 136 Konvensi PBB tentang Hukum Laut 1982/ UNCLOS. Semua kegiatan eksplorasi dan eksploitasi mineral di Kawasan diatur serta dikendalikan oleh Otoritas Dasar Laut Internasional, yang memiliki mandat untuk mengambil semua langkah yang diperlukan guna memastikan perlindungan lingkungan laut secara efektif dari segala dampak buruk yang ditimbulkan oleh penambangan. Berdasarkan Pasal 140(1) UNCLOS, Otoritas Dasar Laut Internasional bertanggung jawab untuk bertindak atas nama umat manusia, dan setiap kegiatan eksplorasi serta eksploitasi yang diizinkan harus dilakukan ‘demi kepentingan seluruh umat manusia’.

Negosiasi mengenai rezim penambangan dasar laut dari tahun 1970-an hingga 1990-an dilakukan dalam kondisi ketidaktahuan yang nyata terhadap dampak lingkungan serta perkiraan yang berlebihan mengenai potensi ekonomi penambangan dasar laut.¹⁰ Negosiasi tersebut ditambahkan janji bahwa penambangan dasar laut akan memberikan keuntungan yang signifikan bagi umat manusia, yang kini tampaknya sulit untuk terwujud. Demikian pula, ketika Konvensi PBB tentang Hukum Laut/ UNCLOS diadopsi pada tahun 1982, dasar laut masih kurang dipahami secara ilmiah, setelah sebelumnya diyakini tidak memiliki kehidupan sepanjang sejarah manusia.¹¹ Dalam empat puluh tiga tahun terakhir, para ilmuwan telah membuktikan sebaliknya dengan mengidentifikasi adanya wilayah yang kaya akan keanekaragaman hayati serta berbagai layanan ekosistem yang diperoleh dari dasar laut.¹² Selain itu, hukum internasional semakin menyadari signifikansi budaya dasar laut yang telah lama ada. Saat ini, bukti ilmiah secara meyakinkan menunjukkan bahwa penambangan dasar laut menimbulkan risiko lingkungan yang signifikan dan tidak dapat diubah, serta memperburuk ketidakadilan dengan menyalurkan keuntungan finansial kepada sekelompok kecil operator penambangan, sementara masyarakat luas harus menanggung bebannya.¹³

Negara-negara anggota Otoritas Dasar Laut Internasional/ ISA memiliki kesempatan untuk menghindari risiko tersebut melalui pengaturan pertambangan mineral. Konvensi PBB tentang Hukum Laut/ UNCLOS menetapkan sejumlah persyaratan bagi negara-negara anggota Otoritas Dasar Laut Internasional, termasuk penerapan prinsip warisan bersama umat manusia, memastikan distribusi manfaat yang adil bagi seluruh umat manusia, mengembangkan mekanisme yang adil untuk pembagian keuntungan, mengambil langkah-langkah yang diperlukan untuk melindungi lingkungan laut dari dampak buruk pertambangan, memastikan kepatuhan, serta melakukan tindakan penegakan hukum. Negara-negara anggota ISA terikat oleh prinsip-prinsip khusus yang

10 Michele Tedeschi, “Unclosure: The International Law of Seabed Mining and the Systemic Cycles of Capital Accumulation,” *London Review of International Law* 10, no. 2 (2022): 265–292, <https://doi.org/10.1093/lril/lrac016>.

11 Christiana Ochoa, “Article Contracts on the Seabed,” *Yale Journal of International Law* 46, no. 1 (2021): 103–53.

12 Monica Montefalcone, Carla Morri, and Carlo Nike Bianchi, “Scientists’ Warning on Sustainability: The Ecologist Point of View, With Examples from Marine Ecosystems,” *Discover Sustainability* 6, no. 2879 (2025): 1–24, <https://doi.org/10.1007/s43621-025-01038-7>.

13 Susan Reid, “Ocean Justice: Reckoning with Material Vulnerability,” *Cultural Politics* 19, no. 1 (2023): 107–27, <https://doi.org/10.1215/17432197-10232516>.

mengatur kawasan ini, dan UNCLOS mewajibkan mereka untuk melaksanakan tanggung jawab kolektif melalui pemberlakuan Aturan Pertambangan/ *Mining Code*.¹⁴

Selain kewajiban berdasarkan Bagian XI UNCLOS, negara-negara anggota juga terikat oleh ketentuan lain dalam UNCLOS, termasuk tanggung jawab untuk melindungi dan melestarikan lingkungan laut berdasarkan Pasal 192. Kewajiban ini bersifat *erga omnes*, yaitu kewajiban yang dimiliki negara-negara dan pemenuhannya menjadi kepentingan hukum semua negara karena pokok bahasannya penting bagi masyarakat internasional.¹⁵ Negara-negara juga terikat oleh kewajiban untuk tidak menyebabkan kerusakan, yakni mengurangi dampak negatif dari aktivitas di laut serta mencegah pencemaran lingkungan pada lintas batas negara, sebagaimana diatur dalam Pasal 194. Selain itu, mereka berkewajiban bekerja sama dalam perlindungan dan pelestarian lingkungan laut sesuai dengan Pasal 197. Kewajiban-kewajiban ini berlaku di samping kewajiban internasional lain yang relevan dalam hukum hak asasi manusia internasional, serta hukum hak-hak masyarakat adat. Seluruhnya perlu dipertimbangkan dalam proses negosiasi Aturan Pertambangan / *Mining Code* pada Otoritas Dasar Laut Internasional.

Hingga saat ini, Otoritas Dasar Laut Internasional/ ISA telah mengadopsi peraturan terkait eksplorasi mineral dan telah memberikan tiga puluh satu kontrak eksplorasi.¹⁶ Saat ini, negara-negara anggota sedang merundingkan aturan untuk eksploitasi skala komersial. Meskipun eksploitasi umumnya hanya dapat dimulai setelah aturan diadopsi, pada tahun 2021 Nauru menerapkan ketentuan hukum yang tidak jelas yang mengharuskan ISA menyelesaikan peraturan dalam waktu dua tahun. Dengan demikian, Nauru berupaya mempercepat negosiasi agar perusahaan pertambangan yang disponsornya dapat mengajukan hak eksploitasi.¹⁷ Karena batas waktu 9 Juli 2023 tidak terpenuhi, secara teori, setiap perusahaan pertambangan atau negara anggota kini dapat mengajukan kontrak eksploitasi dengan ISA meskipun belum ada peraturan yang ditetapkan. Namun, langkah tersebut berisiko tinggi bagi pemohon dan dianggap tidak diinginkan dari sudut pandang regulator. Akibatnya, Dewan ISA menegaskan bahwa tidak boleh ada penambangan komersial sebelum aturan eksploitasi diadopsi. Sementara itu, sejak penerapan aturan dua tahun tersebut, semakin banyak negara anggota yang menyerukan moratorium atau penundaan penambangan. Negara-negara tersebut antara lain Prancis, Inggris, Meksiko, Jerman, dan Swiss, yang secara resmi menyerukan moratorium atau penundaan penambangan dasar laut komersial berdasarkan ketentuan ISA. Hal ini menunjukkan bahwa negara-negara anggota menjalankan tanggung jawab mereka berdasarkan UNCLOS dengan serius.

Peran Otoritas Dasar Laut Internasional (ISA) dalam mengatur penambangan dasar laut mencerminkan komitmen hukum internasional untuk mewujudkan prinsip *common heritage of mankind* sebagaimana diatur dalam UNCLOS, yang menuntut pengelolaan sumber daya secara adil, berkelanjutan, dan demi kepentingan seluruh umat manusia. Seiring berkembangnya pemahaman ilmiah yang menunjukkan besarnya keanekaragaman hayati dan risiko kerusakan lingkungan yang tidak dapat dipulihkan akibat penambangan dasar laut, kewajiban substantif dan prosedural ISA beserta negara-negara anggotanya harus ditafsirkan secara dinamis untuk memastikan perlindungan lingkungan laut dan terwujudnya pembagian manfaat yang adil bagi seluruh umat manusia. Ketentuan UNCLOS, termasuk kewajiban *erga omnes* untuk melindungi lingkungan laut, mencegah pencemaran lintas batas, menghormati hak asasi manusia dan hak masyarakat adat, memperkuat karakter kolektif dari tanggung jawab negara anggota dalam menyusun *Mining Code* yang transparan, inklusif, berbasis bukti ilmiah, dan berhati-hati. Kontroversi terkait upaya percepatan eksploitasi yang dilakukan oleh negara sponsor seperti Nauru, di tengah belum rampungnya kerangka aturan eksplisit, menunjukkan ketegangan antara kepentingan komersial jangka pendek dan prinsip kehati-hatian yang fundamental dalam hukum laut internasional. Dalam konteks ini, seruan moratorium oleh sebagian besar negara anggota ISA mencerminkan penerapan prinsip kehati-hatian yang konsisten dengan kewajiban internasional mereka untuk menjaga kelestarian lingkungan laut demi kepentingan umat manusia secara keseluruhan, sekaligus memperkuat legitimasi rezim tata kelola dasar laut

14 Alexander W. Read, "Unilateral and Multilateral Deep-Sea Mineral Mining Regulations: Why an Effective Enforcement Mechanism Is Needed in Order to Promote Responsible Mining Practices in the Future," *Ocean and Coastal Law Journal* 27, no. 1 (2022): 187–232, <https://heinonline.org/HOL/Page?handle=hein.journals/occoa27&id=188&div=&collection=>.

15 Yoshifumi Tanaka, "The Legal Consequences of Obligations *Erga Omnes* in International Law," *Netherlands International Law Review* 68, no. 1 (2021): 1–33, <https://doi.org/https://doi.org/10.1007/s40802-021-00184-9>.

16 International Seabed Authority, "Secretary-General Annual Report: Leading Precautionary and Responsible Governance of the Ocean Global Commons Based on Science, Solidarity and Transparency" (Kingston, 2024), <https://www.isa.org.jm/publications/secretary-general-annual-report-2024-leading-precautionary-and-responsible-governance-of-the-ocean-global-commons-based-on-science-solidarity-and-transparency/>.

17 Klaas Willaert, "Under Pressure: The Impact of Invoking the Two Year Rule within the Context of Deep Sea Mining in the Area," *International Journal of Marine and Coastal Law* 36, no. 3 (2021): 505–513, <https://doi.org/https://doi.org/10.1163/15718085-bja10068>.

internasional.

Pembahasan selanjutnya akan menguraikan prinsip kehati-hatian serta berbagai tantangan global yang dihadapi dalam kegiatan penambangan dasar laut.

B. Prinsip Kehati-hatian dan Tantangan Global dalam Penambangan Dasar Laut

Keputusan mengenai apakah akan menambang di dasar laut dan dalam kondisi apa tidak terjadi begitu saja. Sebagaimana disebutkan dalam Preambul UNCLOS: “*interrelated and need to be considered as a whole*” (semua permasalahan kelautan saling terkait dan perlu dipertimbangkan secara keseluruhan). Meskipun tata kelola sumber daya laut saat ini sangat terfragmentasi, sebagian besar dari 168 negara anggota ISA terikat oleh berbagai kewajiban hukum internasional di luar UNCLOS. Kewajiban-kewajiban ini bersifat mengikat dengan sendirinya. Kepentingannya bahkan disebutkan dalam Pasal 237 UNCLOS dalam kaitannya dengan rezim hukum lingkungan lainnya, dan kewajiban-kewajiban tersebut relevan dalam setiap interpretasi terhadap UNCLOS. Pasal 237 tersebut menegaskan bahwa UNCLOS tidak bersifat “eksklusif” atau “menutup” kewajiban internasional lainnya. Sebaliknya, UNCLOS berperan sebagai kerangka umum yang harus diharmoniskan dengan berbagai instrumen hukum internasional lain untuk mencapai perlindungan lingkungan laut yang komprehensif. Negara-negara tetap bebas untuk membuat perjanjian tambahan selama tidak bertentangan dengan prinsip-prinsip UNCLOS. Ketentuan UNCLOS tersebut mempertegas prinsip harmonisasi antara UNCLOS dan perjanjian internasional lain di bidang perlindungan lingkungan laut, sehingga kewajiban-kewajiban negara tidak dapat dilihat secara terpisah atau saling meniadakan.¹⁸ Hal ini menegaskan bahwa negara-negara anggota ISA memiliki tanggung jawab ganda untuk memastikan bahwa semua tindakan eksplorasi dan eksploitasi dasar laut tetap sejalan dengan kerangka hukum internasional yang lebih luas.

Contoh kewajiban yang relevan yakni Konvensi PBB tentang Keanekaragaman Hayati tahun 1992, yang mewajibkan negara-negara untuk melestarikan keanekaragaman hayati dan mencegah kepunahan spesies, serta Perjanjian Stok Ikan, yang mengharuskan negara-negara untuk menjaga keseimbangan ekosistem laut. Baru-baru ini, 196 negara berkomitmen untuk melindungi 30 persen dari seluruh wilayah laut pada tahun 2030 melalui Kerangka Kerja Keanekaragaman Hayati Global Kunming-Montreal/ *the Kunming-Montreal Global Biodiversity Framework*.¹⁹ Penambangan dasar laut berpotensi merusak kewajiban dan komitmen global ini, serta komitmen lingkungan negara-negara anggota ISA yang juga menjadi pihak dalam organisasi tata kelola laut regional atau pengaturan perikanan regional. Penambangan dasar laut dapat membahayakan kepentingan perikanan yang berada di bawah yurisdiksi badan-badan tersebut. Dengan demikian, pelaksanaan penambangan dasar laut tanpa mempertimbangkan kewajiban konservasi keanekaragaman hayati dan komitmen perlindungan kawasan laut berisiko melanggar prinsip kehati-hatian (*precautionary principle*) negara dalam hukum lingkungan internasional. Prinsip kehati-hatian tersebut merupakan kewajiban hukum yang mengharuskan setiap negara untuk mengambil semua langkah pencegahan yang wajar, layak, dan proporsional untuk mencegah, mengurangi, dan mengendalikan kerusakan lingkungan lintas batas atau terhadap kepentingan umum masyarakat internasional, meskipun kerusakan tersebut bukan disebabkan secara langsung oleh negara itu sendiri.²⁰

Banyak dari kewajiban hukum dan komitmen politik ini telah diintegrasikan ke dalam hukum serta kebijakan domestik, dan dalam kasus Uni Eropa, ke dalam kebijakan regional. Pemenuhan kewajiban tersebut akan sulit, apabila penambangan dasar laut dimulai, namun merusak sebagian besar ekosistem laut dunia. Para ilmuwan telah memperingatkan bahwa penambangan dasar laut pasti akan menyebabkan hilangnya keanekaragaman hayati yang signifikan serta kerusakan lingkungan lainnya.²¹ Menyadari kenyataan pahit ini, Konferensi Para Pihak dalam Konvensi Keanekaragaman Hayati telah menyerukan moratorium penambangan dasar laut dan mendorong negara-negara pihaknya untuk mengusulkan moratorium di ISA hingga dampak serta risiko penambangan dasar laut lebih dipahami dan diatur secara komprehensif.²² Seruan serupa juga telah disampaikan oleh negara-negara,

18 Erik Franckx, “A Single Maritime Boundary: From UNCLOS III to Present-Day Developments,” *Marine Policy* 148, no. 1 (2023): 1–10, <https://doi.org/10.1016/j.marpol.2022.105425>.

19 Tim Stephens, “The Kunming–Montreal Global Biodiversity Framework,” *International Legal Materials* 62, no. 5 (2023): 868–87, <https://doi.org/10.1017/ilm.2023.16>.

20 Abbas Poorhashemi, “Principles of International Environmental Law,” *CIFILE Journal of International Law* 4, no. 7 (2023): 80–106, <https://doi.org/https://doi.org/10.30489/cifj.2022.367502.1059>.

21 Klaas Willaert, *Regulating Deep Sea Mining: A Myriad of Legal Frameworks* (Cham: Springer Nature, 2021).

22 Duncan Eric James Currie and Johannes Alexander Müller, “The Governance of Marine Biodiversity Beyond National Jurisdiction: The BBNJ Agreement and the International Seabed Authority,” *Marine Policy* 178, no. 1 (2025): 1–9, <https://doi.org/10.1016/j.marpol.2025.106689>.

ilmuwan, pemimpin masyarakat adat, perusahaan besar, dan kelompok kepentingan di bidang perikanan.²³

Meskipun tingkat risiko ini masih belum sepenuhnya jelas akibat ketidakpastian ilmiah nya, bahaya yang ditimbulkan oleh aktivitas penambangan dasar laut cukup besar, dan oleh karena itu penting untuk menerapkan prinsip kehati-hatian. Prinsip kehati-hatian merupakan norma hukum internasional yang telah diakui luas, termasuk dalam rezim perlindungan lingkungan laut di bawah UNCLOS, yang mengharuskan negara dan ISA untuk mengutamakan pencegahan kerusakan lingkungan meskipun terdapat ketidakpastian ilmiah mengenai besarnya risiko. Penerapan prinsip ini mencerminkan kewajiban negara untuk bertindak secara *hati-hati* dengan menunda atau membatasi kegiatan berisiko tinggi seperti penambangan dasar laut sampai data ilmiah yang memadai tersedia untuk menilai dampak lingkungan secara komprehensif. Prinsip ini memperkuat asas pencegahan dalam hukum lingkungan internasional dan mewajibkan negara serta ISA untuk mengadopsi pendekatan berbasis risiko demi melindungi kepentingan bersama umat manusia atas keanekaragaman hayati dan fungsi ekosistem dasar laut. ISA dan negara-negara anggotanya diwajibkan menerapkan prinsip kehati-hatian, yang mewajibkan mereka untuk bersikap waspada serta meminimalkan atau mencegah maupun menunda suatu aktivitas hingga tersedia informasi dasar yang memadai dan dampaknya dapat dinilai secara menyeluruh. Prinsip kehati-hatian berfungsi sebagai mekanisme normatif penting untuk memastikan perlindungan lingkungan laut dari risiko yang belum sepenuhnya dapat diprediksi. Kewajiban penerapan prinsip kehati-hatian oleh ISA dan negara anggota mempertegas bahwa ketidakpastian ilmiah tidak dapat dijadikan alasan untuk mengabaikan perlindungan lingkungan, melainkan harus mendorong tindakan pencegahan yang proporsional.

Demikian pula, negara-negara juga terikat oleh komitmen politik global mereka terhadap perlindungan laut, sebagaimana dicontohkan dalam the UN Decade for Ocean Science 2021–2030 and the UN Agenda 2030. *Sustainable Development Goal* (SDG) Target 14 yang berjudul “*Life Below Water*”/ Kehidupan di Bawah Air, dalam Agenda 2030, menyebutkan yaitu “*to conserve and sustainably use the oceans*”/ untuk melestarikan dan menggunakan lautan secara berkelanjutan, memerlukan pendekatan terpadu terhadap tata kelola laut. Namun, kemajuan menuju pencapaian Target 14 tersebut masih sangat lambat dan bahkan beberapa ilmuwan menyatakan gagal.²⁴ Mengingat potensi dampak lingkungannya yang serius, penambangan dasar laut justru dapat semakin menghambat upaya pencapaian Target 14 ini.²⁵ Dengan keterbatasan pengetahuan ilmiah saat ini serta kurangnya legitimasi terhadap aktivitas penambangan dasar laut, akan sangat keliru jika menyebutnya sebagai berkelanjutan atau mengklaim bahwa kegiatan tersebut dapat mendukung Agenda 2030 dan SDG Target 14. Penambangan dasar laut yang dilakukan tanpa dasar ilmiah yang memadai dan legitimasi yang kuat berpotensi bertentangan dengan kewajiban negara untuk mencapai komitmen politik global sebagaimana diatur dalam Agenda 2030 dan SDG Target 14. Secara normatif, SDG 14 memperkuat prinsip kehati-hatian dan kewajiban pelestarian lingkungan laut yang telah melekat dalam UNCLOS, sehingga aktivitas yang mengancam keberlanjutan ekosistem laut dapat dianggap sebagai pelanggaran terhadap kewajiban internasional negara.

Salah satu kasus hukum yang relevan terkait pengabaian prinsip kehati-hatian pada penambangan dasar laut yang merusak ekosistem lingkungan laut di Area/ Kawasan adalah Kasus Pengajuan Kontrak Eksplorasi oleh The Metals Company (TMC) melalui Tonga dan Kiribati. The Metals Company (TMC), sebuah perusahaan asal Kanada, telah menjalin kerja sama dengan negara-negara kecil di Pasifik seperti Tonga dan Kiribati untuk mendapatkan kontrak eksplorasi dasar laut yang disetujui oleh Otoritas Dasar Laut Internasional (ISA).²⁶ Dalam beberapa tahun terakhir, TMC diketahui melakukan uji coba ekstraksi nodul polimetalik di wilayah Clarion-Clipperton Zone (CCZ), sebuah area di Samudera Pasifik yang sangat kaya akan mineral logam dasar laut. Isu hukum kasus ini adalah meskipun kegiatan ini dilakukan dalam tahap eksplorasi, sejumlah pengamatan ilmiah menunjukkan bahwa uji coba ini telah menimbulkan gangguan terhadap sedimen laut dan potensi kerusakan terhadap ekosistem dasar laut, seperti hilangnya organisme mikrobial dan perubahan pola arus dasar laut.²⁷ Namun,

23 Eric James Currie and Müller.

24 M. Andriamahafazafy et al., “Sustainable Development Goal 14: To What Degree Have We Achieved the 2020 Targets for Our Oceans?,” *Ocean and Coastal Management* 227, no. 1 (2022): 1–9, <https://doi.org/10.1016/j.ocecoaman.2022.106273>.

25 Pedro Madureira, Dale Squires, and Luísa Pinto Ribeiro, “The International Seabed Authority and the United Nations 2030 Agenda for Sustainable Development,” *Resources Policy* 86, no. 1 (2023): 1–17, <https://doi.org/10.1016/j.resourpol.2023.104166>.

26 Elizabeth Claire Alberts, “Regulator Approves First Deep-Sea Mining Test, Surprising Observers,” Mongabay, 2022, [https://news.mongabay.com/2022/09/regulator-approves-first-deep-sea-mining-test-surprising-observers/#:~:text=It \(the International Seabed Authority \),in a press release dated September 7.](https://news.mongabay.com/2022/09/regulator-approves-first-deep-sea-mining-test-surprising-observers/#:~:text=It%20(the%20International%20Seabed%20Authority),in%20a%20press%20release%20dated%20September%207.)

27 Katja Uhlenkott et al., “A Review of Megafauna Diversity and Abundance in An Exploration Area for Polymetallic Nodules in the Eastern Part of the Clarion Clipperton Fracture Zone (North East Pacific), and Implications for Potential

tidak ada kajian dampak lingkungan yang dipublikasikan secara menyeluruh sebelum dan sesudah pengujian dilakukan.²⁸ Kasus ini menunjukkan potensi pelanggaran terhadap prinsip kehati-hatian sebagaimana diatur dalam Prinsip 15 Deklarasi Rio. Prinsip ini merupakan landasan dari prinsip kehati-hatian (*precautionary principle*) dalam hukum lingkungan internasional, yang menekankan kewajiban untuk bertindak mencegah kerusakan lingkungan meskipun bukti ilmiah tentang besarnya risiko belum sepenuhnya tersedia.²⁹ Prinsip ini kini banyak diterapkan dalam berbagai instrumen hukum lingkungan internasional, termasuk dalam konteks perlindungan lingkungan laut (seperti di bawah UNCLOS dan kebijakan ISA). Selain itu, berdasarkan kasus ini, ada pelanggaran terhadap Pasal 206 UNCLOS yang mengharuskan negara atau entitas untuk melakukan dan mempublikasikan penilaian dampak lingkungan (*environmental impact assessments*) sebelum melakukan aktivitas yang berpotensi membahayakan lingkungan laut. Mengacu pada kasus TMC tersebut, pengabaian kewajiban untuk menyusun dan mempublikasikan penilaian dampak lingkungan sebelum pelaksanaan uji coba eksplorasi merupakan pelanggaran nyata terhadap prinsip kehati-hatian yang telah menjadi norma internasional. Kegagalan untuk memastikan dasar ilmiah yang memadai dan transparansi prosedural tersebut mencerminkan kelalaian dalam memenuhi standar prinsip kehati-hatian sebagaimana diamanatkan oleh UNCLOS dan Deklarasi Rio. Dengan demikian, tindakan tersebut berpotensi menimbulkan tanggung jawab internasional baik bagi negara sponsor maupun bagi ISA atas kerugian ekologis yang ditimbulkan di Kawasan sebagai warisan bersama umat manusia.

Prinsip kehati-hatian dan kewajiban perlindungan lingkungan laut dalam kerangka hukum internasional menuntut bahwa setiap keputusan mengenai penambangan dasar laut harus memperhatikan keterkaitan seluruh instrumen hukum yang relevan, baik berdasarkan UNCLOS maupun perjanjian internasional lain seperti Konvensi Keanekaragaman Hayati, SDG 14, dan berbagai kerangka komitmen politik global. Kewajiban-kewajiban tersebut, yang bersifat *erga omnes* dan didukung prinsip *kehati-hatian*, menegaskan bahwa negara-negara anggota ISA tidak hanya bertanggung jawab untuk menjaga kelestarian ekosistem laut bagi kepentingan nasional mereka, tetapi juga untuk masyarakat internasional secara kolektif. Kasus The Metals Company (TMC), yang melakukan uji eksplorasi di Clarion-Clipperton Zone tanpa penilaian dampak lingkungan yang memadai, memperlihatkan potensi pelanggaran terhadap prinsip kehati-hatian sebagaimana diatur dalam Prinsip 15 Deklarasi Rio dan Pasal 206 UNCLOS, serta bertentangan dengan tujuan perlindungan laut yang diamanatkan dalam SDG 14.

Pembahasan berikutnya akan menguraikan penambangan dasar laut serta tantangan yang ditimbulkannya terhadap penerapan Perjanjian Keanekaragaman Hayati di Luar Wilayah Yurisdiksi Nasional.

C. Penambangan Dasar Laut dan Tantangannya terhadap Implementasi Perjanjian Keanekaragaman Hayati di Luar Yurisdiksi Nasional

Seperti yang diuraikan pada bagian sebelumnya, penambangan dasar laut dapat berdampak negatif terhadap berbagai komitmen hukum dan kebijakan. Hal yang patut mendapat perhatian khusus adalah bagaimana aktivitas ini dapat merusak tujuan dari sebuah perjanjian baru yang penting. Hal ini mengingat perjanjian ini merupakan hasil dari lebih dari dua puluh tahun kerja dan akhirnya diadopsi pada tahun 2023. Setelah mulai berlaku, Perjanjian Keanekaragaman Hayati di Luar Yurisdiksi Nasional (*Biodiversity Beyond National Jurisdiction Agreement/BBNJ Agreement*) bertujuan untuk menaikkan kesehatan lingkungan laut yang telah berlangsung selama beberapa dekade terakhir.³⁰ BBNJ Agreement mengakui perlunya mengatasi hilangnya keanekaragaman hayati dan degradasi ekosistem laut secara koheren dan kolaboratif.³¹ Secara khusus, Perjanjian BBNJ menyediakan kerangka prosedural dan kelembagaan untuk:

Future Deep-Sea Mining in This Area,” *Marine Biodiversity* 53, no. 2 (2023): 1–19, <https://doi.org/10.1007/s12526-022-01326-9>.

28 Uhlenkott et al.

29 Annecoos Wiersema, “The Precautionary Principle in Environmental Governance,” in *Research Handbook on Fundamental Concepts of Environmental Law*, ed. Douglas Fisher (Cheltenham: Edward Elgar Publishing, 2022), 361–380, <https://doi.org/https://doi.org/10.4337/9781839108327.00024>.

30 Jinpeng Wang, “The BBNJ Agreement: Achievements and Prospects,” *Chinese Journal of Environmental Law* 9, no. 1 (2025): 88–106, <https://doi.org/https://doi.org/10.1163/24686042-12340132>. the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (‘BBNJ agreement’)

31 Wang, hal. 90. the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (‘BBNJ agreement’)

1. Menciptakan kawasan konservasi laut serta perangkat manajemen berbasis wilayah lainnya di laut lepas dan Area (Pasal 18);
2. Melakukan penilaian dampak lingkungan terhadap setiap aktivitas yang dapat menyebabkan dampak penting polusi atau perubahan signifikan dan berbahaya bagi lingkungan laut (Pasal 27);
3. Mengatur akses dan pembagian manfaat dari sumber daya genetik laut (Pasal 9); serta
4. Meningkatkan kapasitas dan transfer teknologi (Pasal 43).

Keempat kerangka ini dirancang secara terpadu untuk menjaga dan memulihkan integritas ekosistem di lautan. Dengan demikian, praktik penambangan dasar laut yang dilakukan tanpa memperhatikan prinsip kehati-hatian dan kewajiban perlindungan lingkungan laut berpotensi melemahkan efektivitas implementasi Perjanjian BBNJ. Ketentuan BBNJ tentang penilaian dampak lingkungan, pembentukan kawasan konservasi, dan perlindungan ekosistem laut harus dipandang sebagai kewajiban pelengkap yang memperkuat kerangka hukum internasional yang sudah ada, termasuk UNCLOS dan prinsip-prinsip lingkungan internasional.

Pertanyaannya adalah, bagaimana tujuan ini akan terpengaruh jika ISA memberikan izin bagi penambangan mineral dalam skala industri di Area/ Kawasan tersebut? Mengingat banyaknya peringatan yang telah disampaikan oleh para ilmuwan kelautan, jelas bahwa mengizinkan penambangan dasar laut dengan teknologi dan metode ekstraksi saat ini, sangat mungkin menyebabkan kerusakan lingkungan dan keanekaragaman hayati yang signifikan dan meluas³² dan akan merusak tujuan BBNJ Agreement tersebut. Selain itu, keputusan untuk menambang dasar laut secara tidak langsung dapat mengganggu pemanfaatan lain dari dasar laut, seperti bioprospeksi sumber daya genetik laut yang diatur dalam Pasal 9-16 dari BBNJ Agreement. Sumber daya ini telah terbukti sangat berharga dalam penelitian medis dan pengembangan produk farmasi.³³ Sumber daya genetik laut ditemukan di area yang serupa dengan lokasi beberapa mineral dasar laut, tetapi keberadaannya dapat terancam atau terkena dampak signifikan akibat aktivitas penambangan di habitatnya. Konflik penggunaan atau “perebutan wilayah” semacam ini membawa konsekuensi besar terhadap cara mengelola dasar laut, manfaat yang dapat diperoleh manusia darinya, serta siapa yang berhak memutuskan persoalan-persoalan tersebut.³⁴

Perjanjian BBNJ berlaku untuk laut lepas dan Kawasan/ Area. Dengan demikian, perjanjian ini secara spasial tumpang tindih dengan yurisdiksi ISA. BBNJ Agreement berupaya untuk menggambarkan mandatnya secara hati-hati dalam kaitannya dengan rezim tata kelola yang telah ada. Pasal 5 menyatakan bahwa perjanjian ini “*shall be interpreted and applied in a manner that does not undermine/* harus ditafsirkan dan diterapkan dengan cara yang tidak melemahkan” rezim tata kelola yang ada serta memfasilitasi “*coherence and coordination/* koherensi dan koordinasi” di antara mereka. Meskipun BBNJ Agreement tidak dapat memberlakukan kewajiban langsung terhadap ISA, Pasal 8(2) perjanjian ini mengharuskan negara-negara untuk “*promote, as appropriate, the objectives/* mempromosikan, sebagaimana mestinya, tujuan BBNJ Agreement dalam badan tata kelola lainnya, termasuk ISA. Di sinilah tantangan muncul, yakni penambangan dasar laut dapat secara langsung melemahkan tujuan BBNJ Agreement tersebut. Oleh karena itu, negara-negara anggota ISA secara hukum berkewajiban untuk menginternalisasi tujuan BBNJ Agreement ke dalam proses pengambilan keputusan di ISA guna menghindari konflik normatif dan menjaga legitimasi tata kelola lingkungan laut global.

Meskipun perjanjian ini tidak dapat menetapkan kewajiban langsung bagi ISA, keputusan terkait penambangan dasar laut akan berdampak besar pada kemampuan negara-negara untuk memenuhi kewajiban dan tujuan mereka berdasarkan BBNJ Agreement.³⁵ Selain itu, negara-negara anggota ISA yang juga merupakan pihak dalam Perjanjian BBNJ harus memastikan bahwa tindakan mereka di ISA tidak bertentangan dengan upaya konservasi yang dilakukan berdasarkan Perjanjian BBNJ Agreement. Hal ini telah ditegaskan oleh beberapa delegasi selama negosiasi ISA tahun 2023. Bahkan, Belgia mengusulkan agar penambangan dasar laut tidak diizinkan hingga target perlindungan tiga puluh persen wilayah laut, termasuk di kawasan di luar yurisdiksi

32 Montefalcone, Morri, and Bianchi, “Scientists’ Warning on Sustainability: The Ecologist Point of View, With Examples from Marine Ecosystems.”

33 Zhengkai Mao et al., “Sustainable Development and Utilization of Marine Genetic Resources in Areas Beyond National Jurisdiction: A Chinese Perspective,” *Science Progress* 107, no. 4 (2024): 1–18, <https://doi.org/10.1177/00368504241292449>. driving unprecedented levels of marine resource utilization. Consequently, the immense value of marine genetic resources (MGRs

34 Rozemarijn J. Roland Holst, “Exploiting the Deep Seabed for the Benefit of Humankind: A Universal Ideology for Sustainable Resource Development or a False Necessity?,” *Leiden Journal of International Law* 37, no. 2 (2024): 400–422, <https://doi.org/10.1017/S092215652300064X>.

35 Alba Hernandez, “The Interaction Between the BBNJ Agreement and the ISA Regulatory Regime: A Case Study on the EIA and ABMT” (UiT The Arctic University of Norway, 2024), <https://munin.uit.no/handle/10037/34405>.

nasional telah tercapai.³⁶ Negara-negara pihak BBNJ Agreement memiliki kewajiban hukum untuk bertindak konsisten dengan tujuan perlindungan keanekaragaman hayati laut, termasuk dalam forum ISA, sehingga setiap keputusan yang merugikan upaya konservasi dapat dianggap sebagai pelanggaran terhadap kewajiban internasional mereka sendiri. Asas *good faith* dan asas *pacta sunt servanda* dalam hukum perjanjian internasional memperkuat kewajiban negara untuk tidak mengambil tindakan di ISA yang merusak efektivitas perjanjian lain yang mereka ikuti, seperti BBNJ Agreement.

Untuk memastikan bahwa negara-negara mematuhi kewajiban dan tanggung jawab mereka di bawah kedua rezim tersebut, Perjanjian BBNJ dan rezim ISA dengan Kode Pertambangannya harus ditafsirkan secara harmonis. Salah satu penafsiran tersebut tertuang dalam opini hukum tahun 2023 oleh sekelompok pengacara/ barrister dari Inggris, Samoa dan Selandia Baru yang berpendapat bahwa hukum internasional mengharuskan negara-negara untuk bekerja sama guna memastikan bahwa eksploitasi mineral di Kawasan/ Area tidak dilanjutkan kecuali dapat dilakukan tanpa menimbulkan risiko bahaya yang signifikan terhadap lingkungan laut.³⁷ Para pengacara tersebut menyimpulkan bahwa moratorium penambangan dasar laut tidak hanya sejalan dengan UNCLOS, tetapi sebenarnya diwajibkan olehnya.³⁸ Penting untuk ditegaskan bahwa mengizinkan penambangan melalui ISA, dapat membuat negara-negara anggota menghadapi tanggung jawab bersama. Hal ini mengingat sifat *erga omnes* dari kewajiban untuk melindungi lingkungan laut di wilayah di luar yurisdiksi nasional. Kewajiban *erga omnes* untuk melindungi lingkungan laut di luar yurisdiksi nasional menuntut negara-negara anggota ISA untuk mengedepankan prinsip kehati-hatian dan tidak mengambil keputusan yang berisiko menimbulkan kerusakan signifikan terhadap ekosistem laut.³⁹ Penafsiran harmonis antara rezim BBNJ dan UNCLOS, sebagaimana ditegaskan dalam opini hukum tersebut, memperkuat argumen bahwa moratorium penambangan bukan hanya sah secara hukum tetapi merupakan konsekuensi dari kewajiban pencegahan kolektif. Oleh karena itu, setiap keputusan ISA yang mengabaikan standar kehati-hatian dan mengizinkan eksploitasi yang terburu-buru berpotensi melahirkan tanggung jawab internasional bersama bagi negara-negara anggota atas kerusakan lingkungan yang timbul.

Penafsiran harmonis antara BBNJ Agreement dan UNCLOS perlu diarahkan pada integrasi prinsip kehati-hatian, perlindungan lingkungan laut, dan kewajiban kerja sama internasional sebagai norma yang bersifat mengikat secara kolektif. Bagi negara-negara anggota, termasuk Indonesia, hal ini berarti bahwa implementasi kedua rezim tersebut harus menempatkan konservasi keanekaragaman hayati laut sebagai prasyarat utama bagi setiap kegiatan pemanfaatan sumber daya laut di luar yurisdiksi nasional. Harmonisasi dapat dilakukan melalui penerapan prinsip *systemic integration* sebagaimana tercantum dalam Pasal 31(3)(c) *Vienna Convention on the Law of Treaties*, yang menuntut agar setiap perjanjian internasional ditafsirkan selaras dengan instrumen hukum lain yang relevan.⁴⁰ Dalam praktiknya, negara-negara anggota ISA (termasuk Indonesia) perlu memastikan bahwa kebijakan nasional maupun posisi diplomasi mereka di forum ISA mengacu pada prinsip-prinsip BBNJ, khususnya dalam hal penilaian dampak lingkungan (*EIA*), transparansi pengambilan keputusan, dan penerapan moratorium eksploitasi sampai tersedia bukti ilmiah yang memadai.

Moratorium penambangan dasar laut diperlukan agar negara-negara pihak BBNJ Agreement dapat memenuhi kewajiban dan tanggung jawab mereka berdasarkan hukum lingkungan laut internasional. Selain itu, negara yang mendukung dimulainya penambangan dasar laut waktu dekat dapat menghadapi tantangan hukum di tingkat domestik dengan alasan bahwa kebijakan tersebut tidak sesuai dengan kewajiban hukum mereka berdasarkan hukum lingkungan laut yang telah diadopsi dalam peraturan nasionalnya. Kasus-kasus litigasi iklim yang diajukan oleh masyarakat sipil baru-baru ini, di mana pengadilan telah mewajibkan pemerintah untuk menetapkan target iklim yang lebih ambisius guna memenuhi kewajiban internasional mereka, dapat menjadi preseden bagi kemungkinan litigasi terkait perlindungan laut di masa mendatang. Situasi ini menunjukkan

36 H. Jain et al., "Assessing the Potential Impact of the UN High Seas Treaty Over the Deep Seabed Mining and the Role of ISA," in *Rule of Law in Context: Globalisation and Indian Resonances to Sustainable Development*, ed. Shashikala Gurpur et al. (London: Routledge, 2025), 1–17.

37 Zachary Douglas et al., "In The Matter Of A Proposed Moratorium Or Precautionary Pause On Deep-Sea Mining Beyond National Jurisdiction: Opinion" (Philadelphia, 2023), <https://www.pew.org/-/media/assets/2023/03/deep-sea-mining-moratorium.pdf>.

38 Douglas et al.

39 Cymie R. Payne, "Responsibility to the International Community for Marine Biodiversity Beyond National Jurisdiction," *Cambridge International Law Journal* 11, no. 1 (2022): 24–50, <https://doi.org/10.4337/cilj.2022.01.02>.

40 Sumith Suresh Bhat, "A Study of the Issue of 'Relevant Rules' of International Law for the Purposes of Interpretation of Treaties Under Article 31(3)(c) of the Vienna Convention on the Law of Treaties," *International Community Law Review* 21, no. 2 (2019): 190–219, <https://doi.org/10.1163/18719732-12341398>.

bahwa pemberlakuan moratorium tidak hanya merupakan langkah kebijakan yang bijak, tetapi juga merupakan kewajiban hukum preventif untuk menghindari potensi tanggung jawab internasional maupun domestik negara atas kelalaian dalam melindungi lingkungan laut. Lebih jauh, kecenderungan yurisprudensi internasional dan nasional yang semakin progresif dalam menegakkan kewajiban lingkungan memberi dasar bagi legitimasi gugatan publik terhadap negara yang gagal melaksanakan prinsip kehati-hatian dan kewajiban pelestarian lingkungan laut sebagaimana diatur dalam instrumen hukum internasional dan nasional.

Negara-negara juga dapat menghadapi dampak politik atau kerusakan reputasi jika mendukung penambangan dasar laut, meskipun menyadari risiko lingkungan yang signifikan serta ketidaksesuaiannya dengan kewajiban budaya dan hak asasi manusia berdasarkan hukum internasional.⁴¹ Atas dasar ini, penulis berpendapat bahwa negara-negara sebaiknya menahan diri untuk sementara waktu dari mendukung penambangan dasar laut dan, sebagai gantinya, memprioritaskan pemenuhan kewajiban internasional yang telah ada terkait dengan peningkatan kesehatan lingkungan laut. Pilihan untuk menahan diri dari mendukung penambangan dasar laut sejalan dengan prinsip kehati-hatian yang melekat pada negara dalam rezim hukum lingkungan internasional. Langkah ini juga mencerminkan penghormatan terhadap kewajiban *erga omnes* untuk melindungi lingkungan laut sebagai warisan bersama umat manusia, serta memastikan perlindungan hak-hak masyarakat adat dan hak asasi manusia yang berpotensi terdampak.

Penambangan dasar laut menimbulkan dilema berupa konflik antara upaya eksploitasi mineral di *Area* dengan kewajiban internasional negara untuk melindungi keanekaragaman hayati laut sebagaimana diatur dalam *Biodiversity Beyond National Jurisdiction Agreement* (BBNJ Agreement), UNCLOS, dan prinsip-prinsip kehati-hatian dalam hukum lingkungan internasional. Praktik penambangan yang dilakukan secara tergesa-gesa dengan teknologi saat ini berisiko merusak tujuan BBNJ dalam menjaga kesehatan ekosistem laut, mengganggu pemanfaatan lain seperti bioprospeksi sumber daya genetic dan menimbulkan konflik yurisdiksi dengan rezim konservasi kawasan laut sebagaimana diamanatkan oleh perjanjian tersebut. Dengan demikian, negara-negara anggota ISA yang juga menjadi pihak BBNJ secara hukum berkewajiban menginternalisasi prinsip kehati-hatian, asas *good faith*, dan kewajiban *erga omnes* dalam setiap pengambilan keputusan di ISA, guna menghindari pertanggungjawaban internasional kolektif serta memastikan koherensi dan efektivitas tata kelola lingkungan laut global demi kepentingan generasi sekarang dan yang akan datang.

Mengacu dari analisis dan pembahasan diatas, dapat diketahui bahwa terdapat potensi kontradiksi antara ketentuan tertentu dalam rezim ISA berdasarkan UNCLOS dan ketentuan dalam BBNJ Agreement 2023 yang akan ditampilkan dalam tabel di bawah ini.

Tabel 1. Potensi Kontradiksi antara Ketentuan ISA Dalam UNCLOS dan BBNJ Agreement

Aspek/Subjek	Ketentuan UNCLOS/ISA	Ketentuan BBNJ Agreement	Potensi Kontradiksi/ Substansi Konflik
Tujuan utama pengelolaan Area	Pasal 136 & 140 UNCLOS – Kawasan dasar laut dan sumber dayanya merupakan warisan bersama umat manusia, dikelola oleh ISA untuk kepentingan seluruh umat manusia, termasuk pemanfaatan ekonomi.	Pasal 5 & 18 BBNJ – Menetapkan tujuan utama perlindungan dan konservasi keanekaragaman hayati di laut lepas dan Area melalui kawasan konservasi dan mekanisme manajemen berbasis wilayah.	Pendekatan eksploitasi untuk kepentingan umat manusia (ISA) berpotensi bertentangan dengan konservasi keanekaragaman hayati (BBNJ).
Kegiatan eksploitasi mineral	Pasal 145 UNCLOS – ISA berwenang mengatur eksplorasi dan eksploitasi sumber daya mineral di Area, termasuk penyusunan Mining Code.	Pasal 27 & 28 BBNJ – Setiap aktivitas yang dapat menyebabkan dampak penting terhadap lingkungan laut wajib melalui Environmental Impact Assessment (EIA) yang transparan dan komprehensif.	ISA dapat menyetujui eksploitasi sebelum ada mekanisme EIA BBNJ yang memadai; ini menimbulkan potensi pelanggaran prinsip kehati-hatian dan standar lingkungan global.

41 Read, “Unilateral and Multilateral Deep-Sea Mineral Mining Regulations: Why an Effective Enforcement Mechanism Is Needed in Order to Promote Responsible Mining Practices in the Future.”

Aspek/Subjek	Ketentuan UNCLOS/ISA	Ketentuan BBNJ Agreement	Potensi Kontradiksi/ Substansi Konflik
Penilaian dampak lingkungan (EIA)	Pasal 206 UNCLOS – Negara wajib melakukan penilaian dampak lingkungan atas aktivitas yang dapat menimbulkan kerusakan laut. Pelaksanaannya diserahkan pada negara sponsor dan ISA.	Pasal 27 BBNJ – Mewajibkan prosedur penilaian dampak lingkungan global dengan keterlibatan publik dan badan ilmiah internasional.	Standar EIA ISA lebih lemah dan tertutup dibanding BBNJ; hal ini dapat menyebabkan konflik prosedural dan legitimasi hasil penilaian.
Kawasan konservasi di Area	Tidak ada mekanisme eksplisit dalam UNCLOS/ISA untuk pembentukan Marine Protected Areas (MPA) di Area, hanya pengaturan pencegahan kerusakan.	Pasal 18–22 BBNJ – Mengatur pembentukan area-based management tools (ABMTs) dan marine protected areas (MPAs) di laut lepas dan Area.	BBNJ dapat mengusulkan MPA di wilayah yang sama di mana ISA mengeluarkan izin eksploitasi mineral → tumpang tindih yurisdiksi dan tujuan pengelolaan.
Akses dan pembagian manfaat	Pasal 140(2) & 160 UNCLOS – Pembagian manfaat ekonomi dari penambangan diatur oleh ISA melalui mekanisme keuangan internasional.	Pasal 9–16 BBNJ – Fokus pada pembagian manfaat non-ekonomi dari marine genetic resources (MGRs) seperti data genetik dan pengetahuan ilmiah.	Dua rezim pembagian manfaat yang berbeda: mineral (ISA) vs. genetik (BBNJ), berpotensi menciptakan fragmentasi normatif dan sengketa yurisdiksi.
Kewajiban kehati-hatian	Tidak disebut eksplisit dalam UNCLOS, tetapi diimplikasikan melalui Pasal 194 dan 145 (pencegahan pencemaran).	Prinsip kehati-hatian eksplisit diakui dalam Pasal 5(c) & Pasal 27(4) BBNJ.	ISA dapat dianggap lalai jika tidak menunda eksploitasi sampai bukti ilmiah memadai tersedia; potensi benturan dengan kewajiban kehati-hatian BBNJ.
Koherensi rezim	UNCLOS sebagai kerangka dasar tata kelola laut global; ISA memiliki otonomi fungsional dalam Area.	Pasal 5 BBNJ – Harus ditafsirkan dan diterapkan dengan cara yang tidak melemahkan instrumen dan kerangka hukum yang sudah ada.”	Upaya BBNJ untuk tidak ‘melemahkan’ ISA dapat sulit diterapkan jika aktivitas ISA justru melemahkan tujuan BBNJ.
Kewajiban <i>erga omnes</i> (perlindungan lingkungan global)	Pasal 192 & 194 UNCLOS – Kewajiban melindungi lingkungan laut bersifat <i>erga omnes</i> .	Prinsip umum BBNJ – Perlindungan keanekaragaman hayati laut di luar yurisdiksi nasional sebagai tanggung jawab kolektif umat manusia.	Bila ISA mengizinkan penambangan yang menyebabkan kerusakan besar, negara anggota dapat dianggap melanggar kewajiban <i>erga omnes</i> di bawah kedua rezim.

Sumber: Analisis yang dibuat oleh penulis untuk penelitian ini

Tabel diatas menunjukkan adanya potensi kontradiksi antara mandat ISA di bawah UNCLOS 1982 yang berorientasi pada eksploitasi sumber daya mineral demi kepentingan umat manusia, dan BBNJ 2023 yang menekankan konservasi keanekaragaman hayati laut. Perbedaan tampak pada standar penilaian dampak lingkungan, di mana BBNJ menuntut transparansi dan partisipasi lebih luas dibandingkan mekanisme tertutup ISA, serta potensi tumpang tindih antara kawasan lindung laut dalam BBNJ dan wilayah eksploitasi dalam ISA. Selain itu, ISA menitikberatkan pada distribusi manfaat ekonomi, sementara BBNJ berfokus pada manfaat non-ekonomi sumber daya genetik, yang menimbulkan fragmentasi hukum. Meskipun BBNJ berupaya sejalan dengan UNCLOS, penerapannya dapat melemahkan kewenangan ISA jika eksploitasi terbukti mengancam biodiversitas laut.

Berdasarkan keseluruhan pembahasan dan analisis diatas, berikut ini adalah rekomendasi kebijakan yang perlu dipertimbangkan oleh Otoritas Dasar Laut Internasional (ISA) dan negara-negara anggotanya agar Adrian Nugraha, Nashriana, Ridwan.

penambangan dasar laut tidak bertentangan dengan BBNJ *Agreement* :

1. Menetapkan Moratorium Penambangan Dasar Laut
ISA dan negara-negara anggotanya dianjurkan untuk menerapkan moratorium terhadap eksploitasi mineral dasar laut sampai tersedia bukti ilmiah yang cukup mengenai dampak lingkungannya serta hingga tercapainya target konservasi global seperti 30% perlindungan wilayah laut berdasarkan *Kunming-Montreal Global Biodiversity Framework*. Langkah ini merupakan bentuk nyata dari penerapan prinsip kehati-hatian dan pemenuhan kewajiban *erga omnes*.
2. Mengkonsolidasikan Mandat ISA dengan BBNJ melalui Harmonisasi Regulasi
Negara-negara anggota harus mendorong harmonisasi antara Mining Code ISA dengan ketentuan BBNJ, khususnya dalam aspek penilaian dampak lingkungan, pembentukan kawasan konservasi laut, dan regulasi akses terhadap sumber daya genetik. ISA harus mengintegrasikan prinsip dan tujuan BBNJ sebagai bagian dari proses perumusannya untuk menghindari fragmentasi hukum internasional.
3. Memperkuat Standar Penilaian Dampak Lingkungan
Sebelum menyetujui eksploitasi komersial, ISA harus mensyaratkan standar penilaian dampak lingkungan yang lebih ketat dan sejalan dengan ketentuan BBNJ, termasuk keterlibatan publik, partisipasi ilmuwan independen, serta evaluasi kumulatif dan *transboundary impact*.
4. Melaksanakan Prinsip-prinsip Hukum Internasional secara Konsisten
Negara-negara anggota yang juga menjadi pihak dalam BBNJ *Agreement* berkewajiban untuk memastikan bahwa seluruh keputusan dan kebijakan yang mereka adopsi dalam forum ISA tidak bertentangan dengan kewajiban konservasi dalam BBNJ. Dalam hal terjadi konflik, negara harus mengedepankan prinsip *pacta sunt servanda*, asas *good faith*, dan prinsip kehati-hatian sebagai dasar pembuatan kebijakan.
5. Memfasilitasi Forum Koordinasi Antarlembaga Global
ISA, dengan dukungan negara-negara anggota, perlu menginisiasi dialog kelembagaan dengan Sekretariat BBNJ dan organisasi tata kelola kelautan lainnya untuk mendorong *policy coherence* dan mencegah tumpang tindih normatif. Hal ini guna memastikan bahwa pengelolaan sumber daya dasar laut mendukung, bukan menghambat, konservasi keanekaragaman hayati laut global.
6. Reformasi Tata Kelola ISA dalam Penambangan Dasar Laut
Kasus The Metals Company (TMC) mengungkap lemahnya penerapan prinsip kehati-hatian dan transparansi oleh ISA dalam kegiatan eksplorasi dasar laut. Keterlambatan ISA memastikan penilaian dampak lingkungan yang memadai menunjukkan tantangan kelembagaan dalam menyeimbangkan mandat eksploitasi dan konservasi. Ke depan, ISA perlu memperkuat mekanisme pengawasan ilmiah, transparansi, dan partisipasi publik, termasuk mempertimbangkan moratorium global hingga bukti ilmiah yang cukup tersedia. Negara anggota ISA, seperti Indonesia memiliki posisi strategis untuk mendorong reformasi ini melalui diplomasi biru (*blue diplomacy*), dengan menegaskan prinsip *common heritage of mankind* dan kehati-hatian sebagai dasar tata kelola laut berkelanjutan. Keterlibatan aktif Indonesia di ISA akan memperkuat diplomasi maritim nasional sekaligus memastikan perlindungan ekosistem laut global.

Kesimpulan

Otoritas Dasar Laut Internasional/ ISA, sebagai lembaga yang diberi mandat untuk mengelola Kawasan sebagai *common heritage of mankind*, dihadapkan pada kewajiban ganda untuk memastikan pemanfaatan sumber daya secara adil bagi umat manusia dan melindungi lingkungan laut dari dampak buruk penambangan. Namun, perkembangan ilmu pengetahuan yang mengungkap tingginya nilai ekologis dan kerentanan dasar laut menuntut penerapan prinsip kehati-hatian secara nyata dalam setiap kebijakan dan keputusan ISA. Prinsip ini berfungsi sebagai norma pengaman untuk menunda atau membatasi kegiatan yang berisiko hingga tersedia informasi ilmiah yang cukup, sejalan dengan kewajiban *erga omnes* negara-negara untuk melindungi lingkungan laut.

Tantangan global semakin kompleks dengan berlakunya *BBNJ Agreement* tahun 2023. Perjanjian ini memperkenalkan kerangka konservasi dasar laut dan tata kelola sumber daya genetik laut di luar yurisdiksi nasional. Terdapat potensi konflik yurisdiksi dan norma antara mandat eksploitasi mineral oleh ISA dengan kewajiban konservasi negara-negara pihak BBNJ. Ketegangan ini menimbulkan pertanyaan mendasar mengenai bagaimana negara dapat memenuhi kewajiban konservasi dasar laut sambil tetap mendukung eksploitasi mineral, yang berisiko merusak keanekaragaman hayati laut dan menghambat pencapaian target-target lingkungan internasional seperti SDG 14 dan Kunming–Montreal Framework. Oleh karena itu, harmonisasi hukum antara

rezim ISA dan BBNJ menjadi prasyarat mutlak bagi keberlanjutan tata kelola laut internasional.

Situasi ini memperlihatkan bahwa arah kebijakan hukum penambangan dasar laut harus mempertimbangkan secara seimbang dimensi ekonomi, ekologis, dan kewajiban hukum internasional. Kebijakan hukum penambangan dasar laut yang seimbang perlu diwujudkan melalui pendekatan integratif yang mencakup tiga dimensi utama: ekonomi, ekologi, dan hukum internasional. Secara ekonomi, kebijakan harus menjamin manfaat global melalui mekanisme *benefit-sharing* yang transparan, investasi teknologi ramah lingkungan, dan dukungan bagi negara berkembang sesuai prinsip *common heritage of mankind*. Dari sisi ekologi, penerapan prinsip kehati-hatian wajib ditegakkan melalui *environmental impact assessment* yang berbasis ilmiah serta moratorium sementara hingga data ekologis memadai tersedia. Adapun secara hukum, kebijakan harus mengharmonisasikan ketentuan UNCLOS, regulasi ISA, dan kewajiban konservasi dalam *BBNJ Agreement* melalui koordinasi lintas rezim dan pelaporan kepatuhan lingkungan. Penerapan prinsip kehati-hatian, moratorium eksploitasi komersial, dan penguatan koordinasi antar rezim hukum internasional menjadi jalan yang paling realistis dan sah untuk memastikan pemenuhan kewajiban perlindungan lingkungan laut, keadilan antar-generasi, serta penghormatan terhadap hak-hak masyarakat yang bergantung pada ekosistem laut. Dengan demikian, penegasan tanggung jawab kolektif umat manusia terhadap dasar laut harus tercermin dalam setiap kebijakan ISA dan negara anggotanya.

Untuk kedepannya direkomendasikan untuk diadakan penelitian yang mengkaji mekanisme hukum dan kelembagaan yang memungkinkan harmonisasi mandat ISA dengan kewajiban negara-negara pihak BBNJ, khususnya terkait kawasan konservasi laut dan penilaian dampak lingkungan. Penelitian tersebut diharapkan dapat mendukung tata kelola laut internasional yang adil, berkelanjutan, dan sejalan dengan kepentingan umat manusia secara keseluruhan.

PENGAKUAN

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Power Dispersion as a Barrier to Autocratization: The Paradox of Indonesia's Compromised Democracy

¹Muhammad Mutawalli Mukhlis, ²Muhammad Saleh Tajuddin, ³Wiranti

¹Sekolah Tinggi Agama Islam Negeri Majene, ²Universitas Islam Negeri Alauddin Makassar,

³Universitas Hasanuddin

Article Information

Corresponding Author:

Email: muhammadmutawalli@stainmajene.ac.id

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Abstract

This article examines the persistence of Indonesia's democratic system as a constitutional state (*negara hukum*), where popular sovereignty operates within the limits of the 1945 Constitution (UUD 1945). Although recent tendencies, such as the expansion of executive authority, electoral narrowing, media consolidation, and suppression of dissent, have weakened democratic quality, these developments have occurred within Indonesia's distinctive constitutional framework, which combines democratic principles with Pancasila-based constitutional supremacy rather than liberal-constitutional doctrines. . Using a qualitative approach with descriptive-comparative analysis, this study draws on primary sources such as government policy documents and secondary materials, including academic journals and books, covering developments from 1999 to 2024. The analysis highlights two primary factors limiting autocratization: the redefinition of power distribution through the mechanisms of checks and balances and decentralization following the post-1998 constitutional reforms, and the continuous elite competition that prevents monopolization. Indonesian elites, while undermining democratic institutions to protect their privileges, remain committed to limited democracy as a framework for regulating elite rivalries. The constitutional design with term limits, separation of powers, and decentralization creates structural barriers against executive dominance. Furthermore, elite self-interest in maintaining political competition outweighs incentives for autocratic consolidation. Although civil society and public opinion contribute to resistance against backsliding, elite calculations are decisive. Thus, Indonesia's experience demonstrates that elite-driven democracies can endure gradual democratic decline without collapsing into authoritarianism, provided that competition remains institutionally guaranteed and power remains dispersed. This dynamic ensures a stable yet compromised democratic system, shaped more by pragmatic elite interests than by normative democratic commitments.

1. Introduction

Indonesia has not yet deviated into a constitutional system that violates the principles of popular sovereignty, separation of powers, and constitutional supremacy as enshrined in Article 1 paragraphs (2) and (3) of the 1945 Constitution—raising questions about the triggers of democratic backsliding and the country's resilience in preventing further erosion of these principles. ¹. A growing body of literature has examined the various dimensions of democratic decline in Indonesia in recent years, reflecting a slow but marked decline in Indonesia's democracy scores on various

1 Marcus Mietzner, "The Limits of Autocratization in Indonesia: Power Dispersal and Elite Competition in a Compromised Democracy," *Third World Quarterly* 46, no. 2 (2024): 153–169, <https://doi.org/https://doi.org/10.1080/01436597.2024.2317970>.

international indices². Recent analyses confirm this trend. Likewise, Slater³ points out that the personalization of executive power under Jokowi represents a regional example of “illiberal resilience”. President Joko Widodo’s decision to support his son Gibran’s candidacy for vice president in 2024⁴, and to mobilize state resources to secure his election, raises further concerns about the health of Indonesian democracy⁵. Of course, none of these patterns are unique to Indonesia. However, in this global development, Indonesia’s democratic decline has its own weight.

This paradox echoes broader debates in comparative politics regarding *how democracies erode yet persist*. Levitsky and Way⁶ describe such systems as “competitive authoritarian regimes”, as systems in which formal democratic institutions exist, but incumbents gain unfair advantages through the abuse of state resources and restrictions on opposition. However, applying this framework to the Indonesian context requires careful adjustment, since Indonesia’s political structure remains constitutionally grounded in the 1945 Constitution and its post-1998 amendments. Therefore, rather than labeling Indonesia outright as a “competitive authoritarian regime”, this concept can be used as an analytical lens to examine tendencies or practices that may resemble competitive authoritarian characteristics, while still acknowledging the country’s constitutional and legal framework. Similarly, O’Donnell⁷ conceptualizes *delegative democracy*, where elected leaders claim direct mandates from the people and bypass institutional checks. Indonesia’s partial erosion of oversight and concentration of executive power exemplifies these patterns while still maintaining electoral legitimacy. As Linz and Stepan⁸ emphasize, democracy requires both robust institutions and the “stateness” necessary for effective constraint—conditions that Indonesia partially fulfills through its post-1998 institutional framework. Tilly⁹ further argues that state capacity and trust networks determine resilience during backsliding; Indonesia’s fragmented but enduring power dispersion reflects this equilibrium between constraint and contestation.

In this regard, Tomsa¹⁰ observed that Indonesia’s democratic institutions persist because elite competition remains structured within constitutional boundaries, even if weakened. Mietzner¹¹ further shows that public opinion has served as a partial check, preventing full democratic breakdown. In the same period, unlike many Southeast Asian neighbors that experienced coups or democratic collapse, Indonesia retained democratic institutions. In contrast, Since the constitutional amendments took effect in 2004, Indonesia has experienced relatively stable presidential administrations. Although two presidents have completed their terms without impeachment, this should not be seen as the sole indicator of constitutional stability, as mechanisms for impeachment and constitutional oversight remain available under Articles 7A–7C of the 1945 Constitution¹². Indonesia’s current regime can best be described as a compromised but functionally solid democracy. Given the instability of democracy in the region,

- 2 Radians Krisna Febriandy and Umaimah Wahid, “Kemunduran Demokrasi Di Indonesia: Analisis Laporan Varieties of Democracy (V-Dem) Institute 2024,” *Kaganga: Jurnal Pendidikan Sejarah Dan Riset Sosial Humaniora* 7, no. 2 (2024): 1041–50, <https://doi.org/10.31539/KAGANGA.V7I2.12392>.
- 3 Iqra Anugrah, “The Illiberal Turn in Indonesian Democracy,” *Asia-Pacific Journal* 18, no. 8 (2025), <https://doi.org/https://doi.org/10.1017/S1557466020029691>.
- 4 Muhammad Mutawalli Mukhlis et al., “Limitasi Demokrasi Hak Presiden Dalam Kampanye Politik Sebagai Penguatan Sistem Pemilihan Umum,” *Jurnal Pembangunan Hukum Indonesia* 6, no. 2 (2024): 260–80.
- 5 Nuala Aisharani Kinasih Londo et al., “OLIGARKIDAN EROSI DEMOKRASI: KASUS INTERVENSI PENCALONAN GIBRAN RAKABUMING RAKA DALAM PUTUSAN MK PADA PILPRES 2024,” *CAUSA: Jurnal Hukum Dan Kewarganegaraan* 8, no. 8 (2024), <https://doi.org/doi.org/10.3783/causa.v2i9.2461>.
- 6 Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (Cambridge University Press, 2010).
- 7 Guillermo A. O’Donnell and Journal of Democracy, “Delegative Democracy,” *Journal of Democracy* 5, no. 1 (1994): 55–69, <https://doi.org/10.1353/jod.1994.0010>.
- 8 Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Maryland: The Johns Hopkins University Press, 1996).
- 9 Charles Tilly, *Democracy*, 1st ed. (New York: Cambridge University Press, 2007).
- 10 Ken M. P. Setiawan and Dirk Tomsa, “Defending a Vulnerable yet Resilient Democracy: Civil Society Activism in Jokowi’s Indonesia,” *Journal of Current Southeast Asian Affairs* 42, no. 3 (2023): 350–71, <https://doi.org/https://doi.org/10.1177/18681034231209058>.
- 11 Marcus Mietzner and Jun Honna, “Elite Opposition and Popular Rejection: The Failure of Presidential Term Limit Evasion in Widodo’s Indonesia,” *South East Asia Research* 31, no. 2 (2023): 115–31, <https://doi.org/https://doi.org/10.1080/0967828X.2023.2236542>.
- 12 Asran Jalal, “Sistem Presidensial Indonesia Masa Kepemimpinan Presiden Soesilo Bambang Yudhoyono (2004-2014),” *Populis : Jurnal Sosial Dan Humaniora* 6, no. 2 (2021): 166–84, <https://doi.org/10.47313/pjsh.v6i2.1256>.

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we need to ask not only why democracy is declining in Indonesia – but why democracy persists?

A substantial body of recent literature extensively documents the various dimensions of democratic decline in Indonesia, indicating a gradual yet discernible deterioration in its democracy scores on international indices. Scholars have consistently highlighted trends such as increasing executive power and aggrandizement,¹³ the narrowing of electoral space,¹⁴ intensified pro-government media coverage, and the suppression of dissent.¹⁵ Furthermore, analyses point to a rise in oligarchic influence on democratic processes and significant polarization driven by religious conservatism. These patterns, while observed globally, possess distinct characteristics in Indonesia, rendering its democratic trajectory particularly compelling for study, especially within the Asia-Pacific region and among Muslim-majority democracies grappling with similar challenges.

Indonesia's democratic trajectory has drawn significant scholarly attention because it illustrates both the promise and the fragility of post-authoritarian transitions. Since the fall of Suharto in 1998, the country has maintained multiparty elections and a constitutional framework, yet recent developments reveal worrying trends of democratic backsliding. The paradox is clear: while Indonesia continues to function as an electoral democracy, its institutions and civil liberties show signs of erosion. Yet, understanding why it has not collapsed into full authoritarianism requires examining the actual functioning and effectiveness of its constitutional and legal institutions as mandated by the 1945 Constitution and implementing laws, rather than relying solely on perception-based democracy indices. .

Taken together, these works paint a nuanced picture of Indonesian democracy as both eroding and enduring. However, a critical gap remains: most analyses focus on what has been lost—oversight, liberties, and institutional independence—while few explore how structural features such as the dispersal of power and ongoing elite competition actively prevent full autocratic consolidation. This study addresses that gap by arguing that Indonesia's post-1998 institutional design provides normative and procedural frameworks that, when interacting with elite rivalry and pragmatic calculations, have contributed to sustaining a compromised yet resilient democracy. However, this institutional design should not be understood as a deterministic barrier against autocratization, since its effectiveness depends on how constitutional mechanisms—such as judicial review by the Constitutional Court, impeachment procedures, and legislative oversight—are implemented and enforced in practice. .

Several recent studies shed light on this tension. Mujani and Liddle¹⁶ argue that President Joko Widodo has increasingly sidelined democratic safeguards by consolidating executive authority, weakening legislative oversight, and restricting civil liberties, all while maintaining the façade of regular elections. A considerable body of scholarship has examined Indonesia's democratic decline, focusing on elite behavior, institutional weaknesses, and the persistence of illiberal practices. Complementing this, Asrinaldi¹⁷ argues that even in an era of executive dominance under Jokowi, institutional veto players such as parliament and the Constitutional Court retained significant roles in constraining authoritarian excesses. Taken together, these studies show that while much has been written on executive aggrandizement, oligarchic entrenchment, and weakened civil liberties, none have specifically examined the dispersion of power as a deliberate and sustained mechanism against autocracy within the framework of a “constitutional democracy in the shadow of autocracy.” By addressing this gap, the present study contributes a novel perspective on the resilience of Indonesia's democratic system.

At the party level, research by Kristiyanto, Arinanto, and Ghafur¹⁸ on institutionalization and electoral democracy finds that Indonesia's parties remain resilient in contesting elections but lack programmatic depth, leaving them vulnerable to oligarchic influence while still sustaining competitive arenas. Complementing this, a

13 Asrinaldi, “Government Domination in Policy Making in the House of Representatives during the President Jokowi Era,” *Asian Journal of Comparative Politics* 10, no. 3 (2025): 272–85, <https://doi.org/https://doi.org/10.1177/20578911251326136>.

14 Hasto Kristiyanto, Satya Arinanto, and Hanief Saha Ghafur, “Institutionalization and Party Resilience in Indonesian Electoral Democracy,” *Heliyon* 9, no. 12 (2023), <https://doi.org/https://doi.org/10.1016/j.heliyon.2023.e22919>

15 M Zidny Ilman Nafian, “Evaluasi Sistem Pemilu Dan Ambang Batas Parlemen Di Indonesia,” in *Prosiding Seminar Hukum Aktual Pelaksanaan Pemilu 2024: Evaluasi Dan Gagasan Ke Depan*, vol. 2 (2024), 15–26.

16 Saiful Mujani and R. William Liddle, “Indonesia: Jokowi Sidelines Democracy,” *Journal of Democracy* 32, no. 4 (2021): 72–86, <https://doi.org/10.1353/jod.2021.0053>.

17 Asrinaldi, “Government Domination in Policy Making in the House of Representatives during the President Jokowi Era.”

18 Hasto Kristiyanto, Satya Arinanto, and Hanief Saha Ghafur, “Institutionalization and Party Resilience in Indonesian Electoral Democracy,” *Heliyon* 9, no. 12 (2023), <https://doi.org/https://doi.org/10.1016/j.heliyon.2023.e22919>.

study by Pepinsky¹⁹ on cleavages and institutions shows that dominant presidencies and oversized coalitions have weakened ideological competition and, in the Indonesian case, affected democratic quality. This tendency became evident during the 2024 election cycle, as reflected in the Constitutional Court's 2023 ruling that maintained the open-list proportional system (Decision No. 114/PUU-XX/2022) and in the legislative amendment that adjusted electoral district allocations through Law No. 7 of 2017. These legal and institutional developments illustrate how executive dominance and coalition politics influenced the configuration of electoral competition and the balance among state institutions. .

A recent study by Schäfer and Syam²⁰ traces how the public health emergency accelerated executive encroachment by expanding emergency powers, constraining accountability, and reducing civil liberties in the name of crisis response. However, it remains essential to distinguish between emergency measures that were temporary in nature and those subsequently incorporated into permanent legal frameworks. The study highlights that while some emergency powers lapsed once the crisis subsided, others were institutionalized through new regulations or judicial interpretations, thereby blurring the line between temporary necessity and enduring legal transformation. . The authors find that even though formal electoral and constitutional processes remained in place, indicators of democratic quality dropped more steeply during the pandemic, and that some institutional changes — once introduced in crisis mode — have lingered and reshaped governance beyond the immediate crisis. Yet, a study by Wadipalapa, Nainggolan, and Katharina²¹ on legislative decline after the presidential election reveals how parliament has become increasingly subservient to the executive, weakening oversight while leaving formal structures intact.

A thorough examination of existing scholarship through Google and Google Scholar reveals a significant body of work addressing various autocratic features and democratic decline trends within Indonesia's political landscape. These studies extensively cover aspects such as executive aggrandizement, the narrowing of electoral space, and shifts towards illiberal practices.²² However, this current research identifies a critical gap: while the division of power in Indonesia has been explored,²³ and certain constitutional checks against autocratic tendencies have been discussed,²⁴ there remains a distinct absence of studies that specifically examine the *dynamics of power dispersion as an active mechanism against autocracy* within the nuanced context of Indonesia's constitutional democracy—operating under conditions that exhibit tendencies of centralized or autocratic governance, though not constituting a formal autocratic system in legal terms. This study, therefore, offers an unduplicated and direct contribution by addressing this specific void in the literature.

Unlike most recent works that primarily focus on erosion and decline, this research shifts attention to the stability of compromised democracies, showing how Indonesia's case reflects persistence and resilience rather than inevitable collapse. It provides a new conceptual framework for explaining the sustainability of imperfect but resilient democracies, highlighting how institutional design serves as a formal safeguard within the constitutional structure, while elite bargaining operates as an informal political mechanism that influences the practical outcomes of democratic endurance. By doing so, this study fills a critical gap in the literature, which often adopts an overly pessimistic view of democratic decline, and instead offers a roadmap for sustainability through elite stability strategies.

19 Thomas B. Pepinsky, "Cleavages, Institutions, and Democracy in Indonesia: The 2024 Elections in Comparative Perspective," *Journal of Current Southeast Asian Affairs*, 20205, [https://doi.org/https://doi.org/10.1177/18681034251349467](https://doi.org/10.1177/18681034251349467).

20 Saskia Schäfer and Mutmainna Syam, "Pandemic Politics: The Acceleration of Democratic Erosion and Autocratization in Indonesia during Covid-19," *Zeitschrift Für Vergleichende Politikwissenschaft* 18 (2024): 475–503, [https://doi.org/https://doi.org/10.1007/s12286-025-00634-1](https://doi.org/10.1007/s12286-025-00634-1).

21 Rendy Wadipalapa, Poltak Nainggolan, and Riris Katharina, "Protecting Two Presidents: Legislative Decline in Indonesia's Post-2024 Election Transition," *The Journal of Legislative Studies*, 2024, 1–18, [https://doi.org/https://doi.org/10.1080/13572334.2025.2484488](https://doi.org/10.1080/13572334.2025.2484488).

22 Febrian Mulyadi Angsemin, "Konsolidasi Kekuasaan Dan Tantangan Demokrasi Di Era Kepemimpinan Joko Widodo: Antara Pembangunan Ekonomi Dan Stabilitas Politik," *Jurnal Akademika* 24, no. 1 (2024): 78–88

23 Radians Krisna Febriandy and Umaimah Wahid, "Kemunduran Demokrasi Di Indonesia: Analisis Laporan Varieties of Democracy (V-Dem) Institute 2024," *Kaganga: Jurnal Pendidikan Sejarah Dan Riset Sosial Humaniora* 7, no. 2 (2024): 1041–50

24 Donal Fariz, "Pemerintahan Joko Widodo Dan Serangan Politik Terhadap KPK," *Jurnal Antikorupsi INTEGRITAS* 5, no. 2 (2022): 19–33

A substantial body of literature has meticulously documented various dimensions of democratic decline, often highlighting executive aggrandizement and electoral narrowing. This research deliberately shifts focus from the erosion or potential collapse of democracy to provide a novel perspective on the underlying mechanisms that ensure a form of democratic stability, albeit a compromised one. This reorientation moves beyond a pessimistic outlook on democratic backsliding to explore the conditions that foster democratic persistence, introducing a new conceptual framework to elucidate the continued existence of an "imperfect but resilient democracy" in Indonesia. By analyzing how the institutionalized dispersal of power—a legacy of the post-1998 constitutional reforms—along with persistent inter-elite rivalries, constrains monopolization and full autocratic reversal through the effective functioning of these institutions in accordance with legal norms rather than their mere structural existence, this study addresses a critical gap in the literature, arguing that elite calculations are often decisive and providing a "roadmap for sustainability through elite stability strategies" that challenges overly pessimistic interpretations of democratic decline by demonstrating that elite-driven democracies can endure gradual erosion without succumbing to authoritarianism, provided that competition remains institutionally guaranteed and power remains dispersed.

The novelty of this study lies in its analysis of how the dispersion of power and ongoing elite competition contribute to political resilience, while acknowledging that constitutional endurance ultimately depends on the strength of legal and institutional safeguards rather than elite dynamics alone. .²⁵ This study offers a significant contribution to the existing scholarship on democratic trajectories by emphasizing the *de facto* protective role of power dispersion and sustained elite competition against autocratization in Indonesia.

2. Method

This study uses a qualitative approach with a descriptive-comparative analysis method. This approach is chosen because the research aims to understand how Indonesia's democratic system has evolved through the interaction between institutional design and elite behavior, rather than to test statistical correlations. The descriptive-comparative method enables the author to systematically trace political transformations across two temporal points—post-Reformasi (1999–2004) and the consolidation era (2014–2024)—to identify continuities and ruptures in democratic practice. This temporal comparison allows the analysis to capture changes in executive-legislative relations, decentralization, and elite competition under consistent constitutional frameworks.

The data used in this study consist of primary legal sources and secondary data. The primary legal sources include government policy documents, laws, and regulations relevant to the research topic, while the secondary data consist of academic journals, books, and other scholarly works. The data collection method is carried out through literature studies or library research, which is a data collection technique carried out by tracing various written reference sources related to the research object. Literature study is used to gain a deeper understanding of relevant theories, concepts, and policies. The analysis covers the period from 1999 to 2024, enabling the researcher to trace the evolution of Indonesia's political structure over time. In addition, this study also applies document analysis to local government policies related to the research theme.

Data analysis involved thematic coding of recurring concepts such as 'executive dominance,' 'power dispersion,' and 'elite rivalry.' Each theme was examined across time periods to identify patterns of continuity and change. Triangulation was used by cross-checking findings from government documents, media archives, and scholarly analyses to enhance the validity and credibility of interpretations.

3. Findings and Discussion

3.1. The Paradox of Decline and Resilience in Indonesian Democracy

President Susilo Bambang Yudhoyono (2004–2014), whose first term was marked by sweeping political reforms and even a peaceful resolution of the separatist conflict in Aceh, tended to run a more status quo government in his second term. His successor, Joko Widodo (2014–2024), initially promised more reforms but quickly shifted to managing the status quo. In fact, under his administration, the decline in the quality of democracy that had begun under Yudhoyono accelerated²⁶. According to the V-Dem Liberal Democracy Index, Indonesia's score declined to

25 Ahmad Muhajir and Febriyanti Wulandari, "Demokrasi Oligarkis Dan Resesi Demokrasi Di Indonesia Pasca-Suharto: Sebuah Tinjauan Sejarah Politik," *Warisan: Journal of History and Cultural Heritage* 4, no. 1 (2023): 1–10

26 Taufik, Muhamad M.N Nadzri, and Jamaie Hj. Hamil, "Declining Democracy: Autocratization in Indonesia during the

0.43 in 2020—the lowest since 1999. While this composite indicator reflects a broader comparative assessment of democratic quality, it does not in itself constitute evidence of formal constitutional regression. Rather, it suggests a perceived normative and empirical weakening of liberal democratic practices that should be examined in conjunction with legal and institutional developments. . Freedom House downgraded Indonesia to ‘partly free’ in 2013, and maintained that level throughout Widodo’s presidency. This trend indicates not merely stagnation but a structural recalibration of democratic power. Rather than a linear backslide, Indonesia’s case reveals how power dispersion—across elites, institutions, and regions—has produced what Levitsky and Way²⁷ describe as a form of “competitive authoritarian resilience,” where formal democratic procedures persist while substantive freedoms contract. Recent findings by Taufik, Nadzri, & Hamil²⁸ explain that Indonesia’s democratic decline under Jokowi was fragmented and selective, with strong executive control in law and media but tolerance in other spheres. This selective backsliding helps explain why Indonesia avoided total autocratic collapse. In general, Indonesian democracy has declined from its peak in 2008 gradually and moderately, reducing its qualitative substance but leaving the formal democratic framework in place ^{29 30}.

The democratic backsliding recorded in these indices is manifested in a variety of political and social areas ³¹. In 2019, for example, Widodo worked with parliament to weaken the Corruption Eradication Agency (KPK) that had previously arrested many political leaders and government officials ³². In parliament itself, Widodo created a supermajority during his first term, even though he began his presidency with only minority support. To achieve this supermajority, Widodo appeared to benefit from Indonesia’s regulatory framework governing political parties, which allows the government to legally recognize party leadership through administrative registration under the *Law No. 2 of 2011 on Political Parties*.

In this context, an extraordinary congress (*Kongres Luar Biasa*, KLB) held in Deli Serdang in March 2021—led by Presidential Chief of Staff Moeldoko—attempted to replace the leadership of the Democratic Party and submitted the new board for recognition by the Ministry of Law and Human Rights (*Kemenkumham*)³³. The Ministry rejected the request, and subsequent legal challenges were dismissed by the State Administrative Court of Jakarta (Decision No. 150/G/2021/PTUN.JKT, 23 November 2021) and by the Supreme Court (Decision No. 487 K/TUN/2022, 29 September 2022).

These rulings confirmed that the dispute constituted an internal party conflict subject to internal mechanisms under *Article 32 of the Law on Political Parties*, and there is no legal evidence that the President himself directly exercised any constitutional or regulatory authority to remove opposition leaders. Rather, the episode reflects the political dynamics surrounding party alignment within Indonesia’s coalition system, operating through legally recognized administrative procedures.

. This, in turn, weakened parliament’s oversight function³⁴. Yet, this weakening did not lead to outright authoritarian consolidation. As Mietzner³⁵ argues, Indonesia’s system remains characterized by fragmented

Jokowi Years,” *Otoritas: Jurnal Ilmu Pemerintahan* 13, no. 2 (2023): 6, <https://doi.org/https://doi.org/10.26618/ojip.v13i2.9277>.

27 Steven Levitsky and Lucan A. Way, “Elections Without Democracy: THE RISE OF COMPETITIVE AUTHORITARIANISM,” *Journal of Democracy* 13, no. 2 (2002): 51–65.

28 Taufik, Nadzri, and Hamil, “Declining Democracy: Autocratization in Indonesia during the Jokowi Years.”

29 Mietzner, “The Limits of Autocratisation in Indonesia: Power Dispersal and Elite Competition in a Compromised Democracy.”

30 Ahmad Muhajir and Febriyantika Wulandari, “Demokrasi Oligarkis Dan Resesi Demokrasi Di Indonesia Pasca-Suharto: Sebuah Tinjauan Sejarah Politik,” *Warisan: Journal of History and Cultural Heritage* 4, no. 1 (2023): 1–10, <https://doi.org/10.34007/warisan.v4i1.1876>.

31 Ali Noer Zaman et al., “Kemunduran Demokrasi : Analisis Bibliometrik Atas Data di Indeks Scopus Tahun 2010-2023,” *KAIS Kajian Ilmu Sosial* 5, no. 2 (2024): 59–74.

32 Donal Fariz, “Pemerintahan Joko Widodo Dan Serangan Politik Terhadap KPK,” *Jurnal Antikorupsi INTEGRITAS* 5, no. 2 (2022): 19–33, <https://doi.org/10.32697/integritas.v5i2.468>.

33 CNN Indonesia, “Peta Kisruh Demokrat: Dari KLB Deli Serdang Berujung PK Moeldoko,” CNN Indonesia, 2023, <https://www.cnnindonesia.com/nasional/20230607203253-32-959002/peta-kisruh-demokrat-dari-klb-deli-serdang-berujung-pk-moeldoko>.

34 Asrinaldi, “Government Domination in Policy Making in the House of Representatives during the President Jokowi Era.”

35 Marcus Mietzner, “Sources of Resistance to Democratic Decline: Indonesian Civil Society and Its Trials,” *Democratization* 28, no. 1 (2021): 161–78, <https://doi.org/10.1080/13510347.2020.1796649>.

authority and competing veto players, reflecting a deliberate dispersion of power that limits executive dominance. In his second term, 82% of legislators were members of parties affiliated with the government. Additionally, in 2021, Widodo's chief of staff tried to take over one of the only two remaining opposition parties, and although this attempt ultimately failed, it crippled the party and its oversight role³⁶.

There has also been a significant narrowing of the electoral space. The entry requirements for new electoral parties were significantly tightened between 1999 and 2019, particularly through successive amendments to the Political Party Law and Election Law that introduced higher administrative and parliamentary thresholds. For instance, the parliamentary threshold was first set at 2.5% in 2009, increased to 3.5% in 2014, and raised again to 4% in 2019³⁷. These escalating requirements effectively reduced the number of parties represented in parliament, from 17 in the 1999 election to only 9 in 2019. While such thresholds are often justified as a regulatory measure to promote legislative stability, they also raise constitutional concerns regarding the extent to which they restrict political participation and undermine the representative principle guaranteed under the constitution.³⁸³⁹.

The amendments to the Indonesian constitution in 1999–2002 demonstrated a systematic effort to build a constitutional framework that avoids concentration of power. Changes such as the establishment of the Constitutional Court, strengthening of the DPR, separation of the National Police and the National Armed Forces, and direct presidential elections, legally marked the transition from a semi-authoritarian to a democratic-constitutional system of government. This indicates that the institutional design of the post-Reformasi state formally establishes a structure of checks and balances intended to prevent the dominance of one branch of power over another. However, its effectiveness in practice depends on the consistency of law enforcement, institutional capacity, and political dynamics.

Democratic backsliding is also reflected in the increasing integration of large media empires into the government's support base. In the 2014 election, media corporate support for the presidential candidate was still divided between Widodo and his opponent, Prabowo Subianto. Subsequently, however, Widodo managed to draw most media companies into his orbit through coercion and accommodation. Major media groups have aligned with the president, limiting critical coverage.

The suppression of dissent—evident in the selective use of laws against government critics, including social media users and political opponents—has also contributed to democratic backsliding. Government critics, both at the elite level and among ordinary social media users, have been selectively pursued under Widodo to reduce the intensity of expressing dissenting views (author interview with Usman Hamid, director of Amnesty International Indonesia, Jakarta, 15 August 2023). The main instrument for this has been a 2008 law that allows authorities to criminalize online statements deemed defamatory or offensive to officials. In Yudhoyono's second term (2009–2014), there were 74 such cases; in Widodo's first term (2014–2019), this number rose to 233, with 82 of them directly related to alleged insults to the president. However, other regulations have also been used: Repressive actions were selectively used against critics, creating a climate of self-censorship. These repressive actions ultimately have a negative impact on society: in a September 2020 opinion survey, 69.6% of respondents stated that citizens were 'increasingly' afraid to express their opinions.

We have noted that oligarchs are the main beneficiaries of electoral narrowing, and that media entrepreneurs are increasingly part of the government's support structure. However, this phenomenon is part of a broader trend of political oligarchization. The number of oligarchs – defined here as actors whose primary political resource is the ownership of directly controlled private wealth – in the cabinet and other key political positions peaked in Widodo's second term⁴⁰⁴¹.

36 Febrian Mulyadi Angsemin, "Konsolidasi Kekuasaan Dan Tantangan Demokrasi Di Era Kepemimpinan Joko Widodo: Antara Pembangunan Ekonomi Dan Stabilitas Politik," *JURNAL AKADEMIKA* 24, no. 1 (2024): 78–88.

37 Mietzner, "The Limits of Autocratisation in Indonesia: Power Dispersal and Elite Competition in a Compromised Democracy."

38 Febriandy and Wahid, "Kemunduran Demokrasi Di Indonesia: Analisis Laporan Varieties of Democracy (V-Dem) Institute 2024."

39 Edward Aspinall et al., "Elites, Masses, and Democratic Decline in Indonesia," *Democratization* 27, no. 4 (2020): 505–26, <https://doi.org/10.1080/13510347.2019.1680971>.

40 Mietzner, "The Limits of Autocratisation in Indonesia: Power Dispersal and Elite Competition in a Compromised Democracy."

41 Basten Gokkon, "Indonesia's New Cabinet a 'Marriage of Oligarchs,' Environmentalists Say," Mongabay, 2019, <https://news.mongabay.com/2019/10/indonesia-cabinet-jokowi-widodo-oligarchs-environment>.

Many ministers in charge of key portfolios own companies in business areas directly relevant to their portfolios. Among them are Luhut Pandjaitan, the coordinating minister for maritime affairs and investment; Cabinet positions under Widodo increasingly favored wealthy oligarchs, deepening democratic inequality. This, in turn, further reinforced the already entrenched exclusion of lower-class citizens from political influence. Similar oligarchic entrenchment has been observed in Malaysia and Thailand, yet with differing consequences. In Malaysia, elite pacts have produced a “cartelized democracy”⁴², whereas in Thailand, military intervention repeatedly resets electoral competition. Indonesia’s model thus represents a middle ground where dispersed elite control preserves formal democracy without enabling total autocratic capture.

As in other cases around the world, increasing religious-political polarization is also part of the narrative of democratic decline in Indonesia. In Indonesia, the main divide in this regard is between supporters of religious pluralism on the one hand and supporters of a stronger role for Islam in state organizations on the other. The polarization between the two sides was fueled by the rise in Islamic piety since the opening of democracy in the late 1990s, but first became a political determinant in the 2014 general election. In that election, Widodo represented the pluralist camp and Prabowo represented the Islamist forces⁴³. Widodo won in a bitter contest marked by disinformation and slander, and subsequent elections produced more episodes of polarization. The 2017 Jakarta gubernatorial election, which involved a Christian of ethnic Chinese descent, was one such episode, as was the 2019 rematch between Widodo and Prabowo. In the context of this polarizing contest, Widodo’s administration adopted a firmer stance toward radical Islamist organizations⁴⁴. The government revoked the legal status of two prominent groups in 2017 and 2020, respectively, through administrative and legal instruments under the Law on Mass Organizations (*Undang-Undang Ormas*). These measures were justified by the authorities as law enforcement actions aimed at maintaining national unity and public order, although critics viewed them as politically motivated restrictions on opposition groups⁴⁵. The level of polarization eased somewhat after Prabowo joined Jokowi’s government in 2019, but the events of the previous years have damaged Indonesia’s democratic order⁴⁶. This dynamic reflects what Pierre Rosanvallon⁴⁷ terms democracy’s “self-limiting nature”: a system that must continually regulate its own excesses to survive. Indonesia’s democracy, though weakened, endures precisely because competing elites and dispersed institutions constrain total domination.

In short, there is ample evidence of democratic decline in Indonesia that confirms the assessments of international democracy indices. Febriandy & Wahid⁴⁸ further confirm using V-Dem data that while Indonesia shows regression in accountability and civil liberties, its retention of regular elections and decentralized governance makes it different from neighbors like Thailand or Myanmar that slid fully into authoritarianism. However, the decline in the quality of democracy in Indonesia is not as severe as in other countries, and unlike some of its neighbors, the country has not experienced democratic collapse. On the contrary, Indonesia’s compromised democracy is remarkably stable and continues to function in key aspects of democratic life. Ultimately, despite Indonesia exhibiting clear trends of democratic backsliding across various indicators, this phenomenon has not culminated in total collapse or a full transition to authoritarianism. This paradox—decline without collapse—requires explanation. Comparative studies on hybrid regimes underscore this paradox. Thailand’s 2014 coup and Turkey’s post-2016 centralization illustrate cases where weakened checks enabled autocratization. Indonesia diverges because the post-1998 constitutional reforms established formal mechanisms of both vertical and horizontal power diffusion, which—while not always effectively enforced—have nonetheless shaped the institutional context consistent with theories of “illiberal resilience.”⁴⁹. Thus, understanding Indonesia’s trajectory

42 Andreas Ufen, “Opposition in Transition: Pre-Electoral Coalitions and the 2018 Electoral Breakthrough in Malaysia,” *Democratization* 27, no. 2 (2020): 167–84, <https://doi.org/https://doi.org/10.1080/13510347.2019.1666266>.

43 Ibnu Chaerul Mansyur, “Polarisasi Politik Di Indonesia 2014-2019: Sebuah Kajian Pustaka,” *Jurnal Politik Profetik* 11, no. 1 (2023): 1–22, <https://doi.org/10.24252/profetik.v11i1a1>.

44 Muhammad Mutawalli Mukhlis, Zainal Amin Ayub, and Emmanuel Ibiham Amah, “Polemic on the Dissolution of Ministries: An Overview of the Presidential System in Indonesia,” *Litigasi* 24, no. 2 (2023): 322–54, <https://doi.org/10.23969/litigasi.v24i2.10326>.

45 Anan Bahrul Khoir, “Radikalisme Dan Aparatur Sipil Negara: Faktor Penyebab Dan Upaya Pemerintah Menangani Radikalisme Pada Aparatur Sipil Negara,” *Kebijakan: Jurnal Ilmu Administrasi* 12, no. 2 (2021): 145–62, <https://doi.org/10.23969/kebijakan.v12i2.3938>.

46 Mansyur, “Polarisasi Politik Di Indonesia 2014-2019: Sebuah Kajian Pustaka.”

47 Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge University Press, 2006).

48 Febriandy and Wahid, “Kemunduran Demokrasi Di Indonesia: Analisis Laporan Varieties of Democracy (V-Dem) Institute 2024.”

49 Aurel Croissant and Lars Lott, “Democratic Resilience in the Twenty-First Century: Search for an Analytical Framework and Explorative Analysis,” 2024.

requires viewing democratic erosion as a negotiated institutional equilibrium rather than a linear process of decline. To address this, the following sections examine two mechanisms emphasized in this study: first, the institutional dispersion of power created by post-1998 reforms, and second, the persistence of intra-elite competition structured by Indonesia's constitutional and legal framework. These mechanisms together clarify why Indonesia resists full autocratization despite democratic erosion.

3.2. Institutional Power Dispersion: A Structural Barrier to Autocratic Consolidation

To understand why Indonesian democracy has not yet moved into autocratic territory despite its gradual weakening, let us review each of the areas of democratic decline introduced above. In each case, the ongoing democratic decline has encountered strong constraints that prevent a slide into full-blown authoritarianism. In the area of executive enlargement, for example, neither president has managed to personalize their rule. While Yudhoyono and Widodo were strong presidents due to the constitutional powers granted to them, their ability to extend influence beyond their terms was constrained not only by the political elites allied with them but also by the legal framework of the 1945 Constitution—particularly the two-term limit and the absence of constitutional mechanisms permitting extension of office⁵⁰. The elites' political calculations thus operated within, and were reinforced by, these institutional and legal boundaries⁵¹. Yudhoyono, as his second term neared the end, explored the idea of appointing his wife or sister-in-law as his successor, but the effort was quickly shelved due to little support.

This phenomenon shows the effectiveness of the rule of law and constitutional norms in acting as legal boundaries to autocratic drift. Similarly, while the electoral space has narrowed, elections are far from a foregone conclusion, and having more resources than your competitors does not guarantee victory. While vote buying is rampant in many regional legislative and executive elections, presidential elections involve too many voters for this strategy to be effective – and even in local contexts, the practice has its limits. While the 2024 presidential election illustrates the persistence of electoral competition in Indonesia, its significance must be situated within the broader legal-institutional and substantive context. The framework for competition is shaped by campaign-finance regulation and transparency gaps (e.g., private party funding sources remain insufficiently regulated)⁵². Moreover, the integrity of electoral contests is influenced by informal money-politics practices (such as vote buying) which pose structural constraints to non-oligarchic entry and participation⁵³. In addition, media access, freedom of expression and digital disinformation pose further challenges to equal competitive opportunities⁵⁴. Thus, rather than functioning as definitive proof of sustained non-oligarchic participation, the 2024 contest reflects a complex interplay between formal procedural competition and continuing structural dominance by established elites and systemic barriers. In that election, the matriarch of the Indonesian Democratic Party of Struggle (PDI-P), former president Megawati Sukarnoputri, had to nominate a marginal party figure, Ganjar Pranowo, because his polling numbers were better than those of Megawati's daughter, her top choice. Anies Baswedan, a former university rector, is also a candidate. Even the candidacy of Prabowo Subianto, Suharto's former son-in-law, includes some good news for Indonesian democracy: after failing twice in the 2014 and 2019 campaigns with proposals to return Indonesia to its pre-democratic constitution, he appealed to voters in 2024 with a much softer message that no longer proposed dismantling democracy. Indeed, he now denies that his previous campaigns aimed to do that (author interview with Prabowo Subianto, Jakarta, September 14, 2023).

Meanwhile, the threat of polarization – despite bringing a deep crisis episode for Indonesia – is balanced by the need for all actors to seek compromises in order to access patronage resources. Despite Indonesia's post-1998 reforms, patronage and clientelism remain the central principles of socio-political organization. As a core element of social life since the pre-1998 regime, it has not caused the democratic backsliding that began in the late 2000s, but has been an obstacle to further democratization. However, with regard to polarization, it functions as both a barrier and a neutralizer. As mentioned, Prabowo – after using Islamist forces as his vehicle in the 2014 and

50 Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (United Kingdom: Hart Pub, 2012).

51 Marcus Mietzner, "Indonesia's Democratic Stagnation: Anti-Reformist Elites and Resilient Civil Society," *Democratization* 19, no. 2 (2012): 209–29, <https://doi.org/10.1080/13510347.2011.572620>.

52 Moch Andry Wikra Wardhana Mamonto et al., "Promoting the Principle of Political Equality: Reformulation of Private Funding Source Regulations for Indonesian Political Parties," *Journal of Law and Legal Reform* 5, no. 3 (2024), <https://doi.org/10.15294/jllr.v5i3.14457>.

53 Burhanuddin Muhtadi, "A Kidney for Your Vote: Money Politics in Indonesia's 2024 Elections," *Fulcrum*, 2024, <https://fulcrum.sg/a-kidney-for-your-vote-money-politics-in-indonesias-2024-elections/>.

54 Masduki, "Media Control in the Digital Politics of Indonesia," *Media and Communication* 9, no. 4 (2021): 52–61, <https://doi.org/10.17645/mac.v9i4.4225>.

2019 elections – joined Widodo’s government in 2019. Both Widodo and Prabowo cited their goal of overcoming polarization as the reason for their alliance (author interviews with Joko Widodo, Jakarta, 14 October 2023; and Prabowo Subianto, Jakarta, 14 September 2023). Anies Baswedan, who won the 2017 Jakarta gubernatorial election by siding with Islamists, then ran the capital as a jack-of-all-trades politician. To be sure, the interlude of polarization damaged the quality of Indonesian democracy, fueling intolerance and socio-religious orthodoxy. But after the election, Indonesia’s main actors often prioritized collaboration over continued ideological conflict.

Thus, the institutionalized dispersal of power post-1998, manifested through constitutional and institutional reforms, has erected robust structural barriers against any attempts to autocratically consolidate power. Asrinaldi⁵⁵ pointed out that Joko Widodo’s dominance in parliament has not eliminated all institutional veto players. Despite the executive’s expanding influence, both the Constitutional Court (MK) and some factions in the House of Representatives of the Republic of Indonesia (DPR) continue to act as a check and balance. For example, in Decision Number 91/PUU-XVIII/2020, the Constitutional Court affirmed that Law Number 11 of 2020 concerning Job Creation, formally formulated, contradicts the 1945 Constitution and required legislators to revise it within two years to ensure the law remains legally binding. However, it is also worth noting that regulatory changes—for example, Law Number 7 of 2020 concerning the Third Amendment to the Constitutional Court Law—have raised concerns about the weakening of the Constitutional Court’s independence and the potential erosion of its capacity as a veto player⁵⁶. Thus, although the veto institution formally remains in place, its space and effectiveness are increasingly limited in the institutional balance under Jokowi’s administration.. From a constitutional-law perspective, it is important to distinguish between the institutional structure that provides legal mechanisms of checks and balances, and the actual effectiveness of those institutions in confronting political practices that may erode them. The current fragmentation of authority thus represents a formal safeguard against the excessive concentration of power, though its capacity to prevent authoritarian regression ultimately depends on how these mechanisms function in practice. . Indeed, as I will argue below, the general pattern across these areas is not accidental. Rather, it indicates a deliberate strategy by Indonesia’s leading socio-political forces to undermine the substance of democracy but to allow democracy to survive as an organizational framework. This strategy, in turn, stems from two interrelated structural phenomena: first, the institutionalized diffusion of power after 1998; and, second, the continuing competition among elites for power that, in their view, is better regulated through limited democracy than through autocracy.

3.3. Elite Competition and Pragmatic Commitments: Sustaining a Compromised Democracy

In discussing the reasons for the survival of Indonesian democracy, Slater⁵⁷ argues that this is largely due to ‘the founding mother of Indonesian democracy: its vibrant and critical civil society. It is almost impossible to overstate the importance of popular pressure and urban protest in keeping Indonesia’s comfortable political elites compliant. There is no doubt that civil society remains an influential actor whose political and normative pressure continues to shape the considerations of Indonesian elites in decision-making processes.⁵⁸ However, it is also clear that civil society has become increasingly partisan, especially since the polarizing episodes of the second half of the 2010s⁵⁹. Many civil society groups have taken either pluralist or Islamist sides, leaving only a few groups in the ideological center who continue to fight for civil rights regardless of political orientation⁶⁰. The case of the weakening of the Corruption Eradication Commission (KPK) is illustrative of this: several pluralist non-governmental organizations (NGOs) refused to join its defense because they believed it was infiltrated by Islamists⁶¹. The reasons why Indonesian democracy has survived, despite the increasing partisanship of civil

55 Asrinaldi, “Government Domination in Policy Making in the House of Representatives during the President Jokowi Era.”

56 Farah Syah Rezah and Andi Tenri Sapada, “The Independence and Accountability of the Constitutional Court in the Constitutional System in Indonesia,” *SIGn Jurnal Hukum* 4, no. 2 (2022): 247–60, <https://doi.org/10.37276/sjh.v4i2.166>.

57 Dan Slater, “What Indonesian Democracy Can Teach the World,” *Journal of Democracy* 34, no. 1 (2023): 95–109.

58 Edward Aspinall, “Indonesia: Civil Society and Democratic Breakthrough,” in *Civil Society and Political Change in Asia: Expanding and Contracting Democratic Space*, 1st ed. (Stanford University Press, 2004), 61–96.

59 Seth Soderborg and Burhanuddin Muhtadi, “Resentment and Polarization in Indonesia,” *Journal of East Asian Studies* 23, no. 3 (2023): 439–67, <https://doi.org/10.1017/jea.2023.17>.

60 Edward Aspinall and Marcus Mietzner, “Southeast Asia’s Troubling Elections: Nondemocratic Pluralism in Indonesia,” *Journal of Democracy* 30, no. 4 (2019): 104–18.

61 Abdil Mughis Mudhoffir, “The Limits of Civil Society Activism in Indonesia: The Case of the Weakening of the KPK,” Muhammad Mutawalli Mukhlis, Muhammad Saleh Tajuddin, Wiranti.

society, must be located outside the civil society arena as well.

One of the main obstacles to full autocratization in post-Suharto Indonesia was the establishment of a legal framework for decentralization—through the constitutional amendments and the enactment of Law No. 22 of 1999 on Regional Government—which normatively limited the recentralization of power during the early years of the transition. . This wide distribution of power far exceeded that found in other post-authoritarian states⁶². Habibie's reforms introduced significant decentralization to empower local governments. It is widely accepted that if a Javanese had replaced Suharto, decentralization would not have been pursued with such speed and intensity. Instead, Habibie left a political order in which fiscal resources – themselves the basis for political power – shifted to the local level. In the 2020s, 43% of state revenue was spent by the regions⁶³.

Habibie's decentralization reforms deepened in 2005, when direct elections for governors, mayors, and district heads began. These elections, which replaced voting in regional legislative bodies, gave local government heads a direct political mandate, which increased their standing vis-à-vis the center. In addition to being supported by their increased fiscal power, local government heads became the main political power holders in their regions—whereas they had previously been merely extensions of the Jakarta apparatus before 1999. Attempts to revoke direct local elections were blocked by regional leaders and public opposition. Setiawan & Tomsa⁶⁴ highlight how civil society activism aligned with local elites to resist centralization, showing that elite rivalry combined with societal mobilization can act as a buffer against democratic breakdown. When parliament reconvened, it did not challenge Yudhoyono's decision, and the post-2005 reforms remained in place.

Another important decision made during Habibie's administration that facilitated the wide distribution of power concerned the electoral and party systems. In early 1999, it was decided to retain the proportional representation system in the country's legislative elections. Proportional representation had been used as the basis for elections both in the democratic experiments of the 1950s and during the autocratic regime of Suharto. In 1998, several actors had proposed replacing this system with a district system based on the winner of the most votes. Had this proposal been enacted, Indonesia's political system would have taken a more majoritarian path than it eventually did. Instead, a variety of parties representing different electoral districts managed to enter parliament, and while we note a gradual tightening of party formation and parliamentary threshold rules, the party system remained devoid of a clear center of power. Indeed, the party system flattened over time: Indonesia's multiparty system remained fragmented, preventing dominance by a single party. Thus, the institutional decisions made in the early democratic period illustrate a competitive party system without making it too fragmented.

The structure of Indonesia's party system has not changed significantly even after the introduction of direct presidential elections in 2004, since the system's fragmentation reflects the dynamics of national political representation rather than the decentralization of governmental authority. In some contexts, the shift to direct presidential elections could result in excessive majority influence, but this did not happen in Indonesia, at least not in a regime-changing way. The reason is that despite being equipped with a strong popular mandate, Yudhoyono and Widodo opted for broad power-sharing rather than exclusive rule. Why, then, did the president form such a broad coalition in the first place? In addition to the benefits of accommodating multiple players afforded by a proportional representation electoral system, post-2004 presidents have also learned lessons from Wahid's impeachment in 2001. His removal from office was not simply the result of a mistaken belief that presidential power was absolute, but rather the outcome of a constitutional and political process based on the People's Consultative Assembly Decree (TAP MPR) No. II/MPR/2001 and the House of Representatives' recommendation concerning alleged abuse of authority. Yudhoyono, who served as one of Wahid's ministers at the time, drew from this episode the conclusion that stable governance requires inclusion rather than confrontation or exclusion. . Widodo, who initially promised to challenge Yudhoyono's broad coalition approach, soon discovered its benefits and emulated it.

The 2002 constitutional amendments, which established direct presidential elections, also led to a dispersal of power in other areas. For example, in the judicial sector, the establishment of the Constitutional Court marked a significant development in Indonesia's judicial system. Before its creation through the Third Amendment to the 1945 Constitution, the Supreme Court did not hold a full constitutional judicial authority; it mainly exercised cassation and supervisory functions over general and special courts. The power to review

Critical Asian Studies 55, no. 4 (2022), <https://doi.org/10.1080/14672715.2022.2123019>.

62 Mietzner, "The Limits of Autocratisation in Indonesia: Power Dispersal and Elite Competition in a Compromised Democracy."

63 Setiawan and Tomsa, "Defending a Vulnerable yet Resilient Democracy: Civil Society Activism in Jokowi's Indonesia."

64 Setiawan and Tomsa.

laws against the Constitution was only introduced with the formation of the Constitutional Court. This meant that there were now more judicial checks on executive power, and the Constitutional Court in particular used its powers extensively. The constitutional amendments also gave new powers to the parliament, which implicitly strengthened the multi-party landscape represented therein. From being a mere rubber stamp under the Suharto regime, the parliament then developed into one of the most powerful actors of the post-1998 regime. Furthermore, during the constitutional amendment process, the institutional separation between the military (TNI) and the police (Polri) was formalized — the latter having previously been part of the former since the 1960s. Although this separation is not explicitly stated in the 1945 Constitution, it derives its constitutional legitimacy from subsequent decrees of the People's Consultative Assembly (TAP MPR), particularly those mandating the separation of the TNI and Polri and redefining their respective roles in defense and security. The emancipation of the police thus became another cornerstone in dismantling the previous monopolar political system and shaping a post-Suharto landscape of multiple, competing centers of power. . In short, the rapid post-1998 reforms redistributed power among elite groups in ways that would make it difficult for autocratic efforts at recovery to succeed. As the next section shows, Indonesia's key actors were fiercely protective of this new competitiveness, even though they themselves had an interest in undermining key aspects of democracy. While Mietzner⁶⁵ emphasizes that inter-elite competition can empirically limit authoritarian tendencies, it is important to note that, normatively, the stability of democracy in Indonesia is safeguarded not merely by elite interests but primarily by constitutional structures. The system of checks and balances among state institutions, as enshrined in the 1945 Constitution, ensures that no single actor can monopolize power, thereby preserving democratic governance. In this context, elite competition may contribute to the dynamics of power, but it operates within—and is constrained by—these formal institutional frameworks. . This dynamic ensures the continuation of Indonesia's compromised yet functional democracy, where elites strategically opt for stability through a limited democratic framework rather than the uncertainties of outright authoritarianism.

3.4. Intra-Elite Competition in the Legal Framework of Electoral Democracy

In some analyses of post-Suharto Indonesia, the elite alliance that controls the country has been described as a cartel. This model has been used to describe a constellation in which Indonesian parties have banded together to collectively exploit Indonesia's patronage resources and protect themselves from potentially damaging accountability mechanisms. There is much truth to this depiction. Indeed, Indonesia's major political forces – not just the parties – have banded together on issues that affect their collective interests as the ruling political class. This has included formal legislative efforts, such as the 2019 revision of the KPK Law, which some observers argue weakened the institution. These efforts were carried out through the formal legislative process in the DPR and reflect dynamics of political negotiation and patronage, rather than illegal or personal actions against individual KPK members. . Elite coalitions have weakened accountability, but internal rivalries limit authoritarian consolidation.

However, the cartel model overlooks key aspects of the dynamics within Indonesian elite alliances, particularly the intensity of competition among coalition members. While collective interests play a role, individual actors also strive for political advantage, and this competition shapes how alliances are formed and maintained. The president often plays an important informal role in these dynamics, not as a formal authority with extra-constitutional powers, but as a mediator who manages relationships and balances competing interests to help maintain coalition stability. In some cases, the president may strategically leverage rivalries among elites, but this reflects the informal practices of political negotiation rather than any constitutional mandate. . Crucially, however, the coalition members watch each other jealously so that no single actor among them gains an advantage that could allow the latter to emerge as a new political hegemon. This also includes the president – who places significant constraints on their ability to pursue autocratic ambitions. The cartel approach thus captures the essential dynamics of Indonesia's democratic decline, but it is less effective in explaining why elites have stopped short of abandoning democracy altogether, and why they have remained committed to competition as the organizing logic of their interactions. To understand this phenomenon, we need to look for alternatives.

For many Indonesian elites, their continued support for democratic inter-elite competition is due to the unpleasantness of the opposite: living under restored autocratic rule. Elite support for democracy stems from negative memories of centralized authoritarianism.

65 Mietzner, "The Limits of Autocratisation in Indonesia: Power Dispersal and Elite Competition in a Compromised Democracy."

In the Indonesian constitutional system that adheres to the principle of horizontal (legislative, executive, judiciary) and vertical (central-regional) distribution of power, competition between elites is also facilitated by an open legal and political system. The Election Law, the Political Party Law, and the Regional Government Law provide a legal framework that shapes political competition and delineates the distribution of authority in Indonesia.⁶⁶ It should be noted that not all provisions explicitly reflect the constitutional principles of horizontal and vertical checks and balances. For instance, many regulations in the Election Law primarily address procedural and administrative aspects of elections, while certain provisions in the Political Party Law govern party organization and internal accountability, and the Regional Government Law regulates the division of functions between central and regional authorities. Collectively, these laws contribute to limiting power concentration and enhancing institutional accountability, even if they do not uniformly enshrine constitutional principles in a direct manner. .

In contrast, in elite-controlled democracies, an actor's electoral and social weight typically determines its representation in the cabinet and its role in the distribution of resources. Because these weights can change over time, each actor has a realistic expectation of having one of them elected president someday. Until then, participating in elite alliances based on competitive allocation of positions is a satisfactory outcome for most actors. Importantly, this outcome arises within the formal legal framework of the 1945 Constitution, which explicitly grants the president executive authority, outlines the legislative powers of the DPR, and establishes mechanisms of checks and balances to prevent the concentration of power. Thus, elite negotiations operate alongside—rather than instead of—constitutional mandates and institutional constraints. . Another benefit that flows from this also figures prominently in elite calculations for maintaining low-level democracies: namely, the benefits of democratic legitimacy relative to the inherent instability of regime authority based solely on repression. Public surveys show Indonesians have consistently expressed strong support for democracy. The IFES survey⁶⁷ found 72% preferred democracy to any other form of government. The Pew Research Center reported⁶⁸ 69% satisfaction with democracy in 2017 and 65% in 2018. During the pandemic, SMRC⁶⁹ recorded 67% satisfaction, while the Lowy Institute⁷⁰ found about 60% agreed that democracy is preferable to any other system. More recent Indikator Politik Indonesia⁷¹ surveys reported 70.7% positive ratings for democratic performance in 2024 and 75.8% satisfaction in 2025⁷². The ways in which continuing elite rivalries and ambitions have revolted against potential autocratization campaigns are best embodied in an episode we have already touched on – namely, Widodo's failed attempt to evade term limits. Prabowo, for his part, wants to have one last chance at the presidency himself, so agreeing to Widodo's term extension is detrimental to his career planning. Even the parties that have come under strong pressure from the president's aides to support the extension plan are paying lip service. Nahdlatul Ulama (NU), the country's largest Muslim organization, has also not expressed its support. Although NU's spiritual leader was Widodo's vice president in his second term, NU did not receive special treatment under his administration. While at one point the government restructured certain bureaucratic positions related to NU's engagement with state institutions, these actions were carried out through formal administrative procedures under the Ministry of Religious Affairs. Under Indonesia's constitutional framework, the president does not have personal authority to take over or control religious organizations, and any government involvement with such organizations must follow statutory regulations and administrative law. .

66 Muhammad Mutawalli Mukhlis et al., "Democratization or Extra-Constitutionalism: Ideas for Limiting the Term of Office for Chairmen of Political Parties in Indonesia," *Jambura Law Review* 6, no. 2 (2024): 367–402.

67 IFES, "IFES Survey on Indonesian Political Attitudes Reveals Satisfaction with Democracy, Lack of Political Information," International Foundation for Electoral System, 2010, <https://www.ifes.org/news/ifes-survey-indonesian-political-attitudes-reveals-satisfaction-democracy-lack-political>.

68 Christine Tamir and Abby Budiman, "Indonesians Optimistic about Their Country's Democracy and Economy as Elections near," Pew Research Center, 2019, <https://www.pewresearch.org/short-reads/2019/04/04/indonesians-optimistic-about-their-countrys-democracy-and-economy-as-elections-near/>.

69 Tri Indah Oktavianti, "Public Faith in Democracy Bounces Back after COVID-19 Slump: Survey," The Jakarta Post, 2020, <https://www.thejakartapost.com/news/2020/08/23/public-faith-in-democracy-bounces-back-after-covid-19-slump-survey.html>.

70 Lowy Institute, "Indonesia Poll 2021: Attitudes toward Democracy and Governance," Lowy Institute, 2021, <https://interactives.lowyinstitute.org/features/indonesia-poll-2021/topic/democracy/>.

71 Fakhri Rezy, "Indicator Survey Says 70.7 Percent of People Value the Performance of Indonesian Democracy as Good," VOI, 2024, <https://voi.id/en/news/355699>.

72 Fadhilah Primandari, "Indonesian Democracy Takes Another Hit," East Asia Forum, 2025, <https://eastasiaforum.org/2025/04/22/indonesian-democracy-takes-another-hit/>.

Thus, as Widodo must have realized, Indonesia's elite actors are too ambitious and armed with too many resources by the post-1998 spread of power to accept another autocracy. The prospect of a renewed monopoly of power by the incumbent president does not appeal to them. Presidential term limits in Indonesia are enshrined in Article 7 of the 1945 Constitution (UUD 1945), which formally restricts the president to a maximum of two terms. Introduced through the constitutional amendments beginning in 1999, these limits are a constitutional mechanism to safeguard democratic governance, prevent the concentration of power, and ensure regular leadership turnover. While political elites may consider these limits in their strategic calculations, they cannot be understood merely as tools for elite self-interest, because their primary basis is legal and systemic, aimed at maintaining the integrity of Indonesia's democratic system. . They believe, perhaps correctly, that power will lie in the hands of the new president, not Gibran – who many see as merely a vote-getter for Prabowo, the presidential candidate running in the election.

The power-sharing arrangement established after the fall of Suharto, then, has maintained a level of inter-elite competition that precludes any attempt by incumbents to steer democracy into the realm of personalist autocracy. Any attack by incumbents on existing elite privileges, including their own presidential ambitions, is bound to generate a backlash – or simply a quiet rejection, as in the case of Widodo's attempt to extend his term. Elites support a minimal form of democracy that secures their power while avoiding autocracy. Within the framework of a democratic rule of law (*demokratische rechtsstaat*), the constitution not only regulates the procedure for democratically filling power, but also provides a legal channel that allows elites to compete without threatening the system as a whole. Regulations such as terms of office, presidential nomination thresholds, and the separation of executive, legislative, and judicial institutions are formally legal mechanisms intended to structure government functions and protect the constitutional order for all citizens. While these rules may, in practice, shape the behavior of political elites, this effect is a consequence of political dynamics rather than the formal legal purpose. Distinguishing between the constitutional design (formal law) and political practice (informal use) helps maintain an accurate constitutional analysis. Mukhlis et al.⁷³ explain that these legal frameworks serve as guardrails not only for public accountability but also for elite survival, ensuring no faction can monopolize political institutions for too long. This shows that constitutional regulations are not only a control mechanism against executive authoritarianism, but also against the potential for domination by certain elite coalitions.

4. Conclusion

Indonesia's democratic decline has been driven primarily by political elites seeking to restore control after the expansive reforms of the post-1998 era. However, constitutionally, oversight institutions such as the DPR, the Corruption Eradication Commission (KPK), and the Constitutional Court (Mahkamah Konstitusi) retain formal authority and legal safeguards that limit direct interference by the president or other elites. These institutions are established and protected under the 1945 Constitution, which defines their independence and oversight mandates. Nonetheless, political elites have increasingly exploited legal amendments, appointments, and budgetary controls to influence these bodies indirectly, leading to a gradual erosion of their effectiveness in practice. . Socio-religious conservatism limiting the liberal aspects of democracy, yet most elites resisted full autocratic restoration. Efforts such as Prabowo's campaigns in 2014 and 2019 or Widodo's bid for a third term failed because the elite consensus fractured.

This study shows that Indonesian elites simultaneously erode and preserve democracy: they resist initiatives that threaten their competition while cooperating in measures that entrench privilege, such as weakening the Corruption Eradication Commission or passing the Omnibus Law. Civil society and public opinion remain important but secondary actors, shaping outcomes only when aligned with elite divisions. The persistence of Indonesian democracy thus rests less on popular resistance than on elite calculations within a constitutional order that disperses power. The reforms of 1999–2002 created enduring checks and balances—through decentralization, term limits, and judicial empowerment—that elites cannot fully ignore. These arrangements function as a constitutional immune system, restricting autocratic consolidation while also preventing substantive democratic renewal.

Conceptually, this research advances the study of democratic resilience by illustrating “resilience through elite rivalry”—a mechanism in which competition among elite factions sustains democratic continuity not merely for elite survival, but within the boundaries of constitutional and electoral institutions that regulate power circulation. In this sense, elite rivalry interacts with formal democratic procedures that uphold public rights and

73 Muhammad Mutawalli Mukhlis et al., “Democratic State Governance: The Urgency of Implementing Conventions in Constitutional Practices in Indonesia,” *Fenomena* 23, no. 1 (2024): 1–14.

prevent the monopolization of authority, demonstrating that Indonesia's democracy, while elite-driven, remains institutionally constrained rather than purely symbolic. . This model extends the framework proposed by Croissant and Lott (2024) on illiberal resilience by emphasizing how intra-elite competition can act as a stabilizing, albeit low-quality, form of democratic endurance. Rather than viewing backsliding as a linear decline, Indonesia's experience suggests a cyclical equilibrium between erosion and constraint, shaped by institutionalized power dispersion.

Normatively, the findings highlight the need to strengthen Indonesia's institutional safeguards within the framework established by the 1945 Constitution and post-1998 amendments. These legal reforms were specifically designed to ensure a balance of power and protect the rights of citizens, and not to serve the interests of the elite. Strengthening these safeguards is necessary to maintain the integrity of democratic processes, preventing any potential concentration of power that could undermine these objectives. . Strengthening judicial independence, empowering anti-corruption institutions, and restoring genuine party competition are crucial steps in ensuring that power is not concentrated in the hands of certain groups, and in reviving a democratic commitment based on the principle of justice. This is in keeping with the spirit of the post-1998 laws and amendments designed to create a balance of power, protect citizens' rights, and strengthen the principle of the rule of law. Our Constitution serves not only the interests of the elite but also guarantees the protection of the fundamental rights of every citizen, with the aim of creating a more inclusive and democratic system. . Policies that re-expand civic space and decentralize fiscal power transparently could restore the accountability lost under elite-managed pluralism.

Finally, the Indonesian case offers comparative lessons for other hybrid democracies: resilience does not always equate to the health of a democracy. Elite rivalry may preserve procedural democracy, but it can simultaneously erode its substantive values. In the context of democratic backsliding, this study argues that resilience and erosion can coexist in a precarious balance. This dynamic is referred to as "compromised resilience," a term that aims to capture the tension between formal legal structures and the political realities shaped by elite interests. However, it is crucial to clarify that this concept does not imply that Indonesia's democracy is deliberately maintained at a minimal level for the benefit of the elite. Instead, the analysis highlights the complex role of legal formalities and constitutional institutions, which serve as mechanisms that transcend elite-driven political maneuvering and provide a foundation for democratic stability. This distinction is necessary to avoid oversimplifying the interaction between formal legal frameworks and the political practices that shape them. . Comparative democratization research should therefore move beyond dichotomies of survival or collapse to explore how institutional dispersion and elite pragmatism jointly produce these ambiguous, enduring regimes.

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The Government Policy as an Effort to Provide Protection for Foreign Refugees

Zainuddin¹, Ismail Koto²

^{1,2}Universitas Muhammadiyah Sumatera Utara, Medan, Sumatera Utara, Indonesia

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Corresponding Author. Email:
zainuddin@umsu.ac.id

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Abstract

As part of its responsibility to address refugee-related issues, Indonesia enacted Presidential Regulation No. 125 of 2016 concerning the Handling of Refugees from Abroad. This study is more in-depth than previous studies because it focuses on more specific legal regulations at the presidential regulation level. This provides the legal basis for the protection of foreign refugees in Indonesia and serves as the official guideline for managing asylum seekers and international refugees. This regulation is more operational, for example, shelter mechanisms such as shelter, accommodation and health and education, as well as basic services, and coordination with UNHCR/IOM, but does not provide formal legal status for refugees. One implementation is the relocation of asylum seekers from Immigration Detention Centers (Rudenim) to temporary shelters, thus enabling the provision of basic needs, which is facilitated and funded by the International Organization for Migration (IOM). The main differences between the international obligations of ratifying conventions and domestic authority through Presidential Regulations lie in their source, binding nature, and implications for the legal status and rights of refugees specifically. This regulation is seen as an alternative to ratifying the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, which Indonesia has not yet ratified. Presidential Regulation Number 125 of 2016 outlines several important provisions, including key definitions, detention mechanisms, shelter procedures, and protection measures for asylum seekers and refugees. This regulation consists of 45 articles detailing the coordination mechanism between government agencies in managing refugees. Based on Article 2 paragraph (1), the handling of asylum seekers and refugees is carried out through cooperation between the central government and the United Nations (UN).

1. Introduction

The influx of refugees coming to Indonesia has become a significant issue for decades. As a geographically strategic transit country, Indonesia receives refugees from various countries affected by conflict and violence. Data from 2023 showed a total of 12,295 refugees in Indonesia's territory, dominated by Afghan, Myanmar, and Somali. This number continues to grow. From November 2023 to March 2024, UNHCR recorded an increase of 1,964 Rohingya refugees, dominated by children (45%). This figure does not include refugees from other countries. Their existence requires serious attention from the Indonesian government, especially in the context of protecting human rights.¹

A refugee leaves their home country since they feel the country can no longer provide a sense of security and protection for them. One of the efforts to save themselves is to evacuate to another country that is considered safer and considered to provides a decent living. The legal rules regarding

1 Syeda Naushin Parnini, "The Crisis of the Rohingya as a Muslim Minority in Myanmar and Bilateral Relations with Bangladesh," *Journal of Muslim Minority Affairs* 33, no. 2 (2013): 281.

refugee status are stated in the 1951 Convention on the Status of Refugees. To complement the shortcomings of the 1951 Convention, the 1967 Protocol was formed. This legal instrument is considered a basic norm that mandates the provision of protection for international refugee individuals.² Indonesia adheres to international principles voluntarily, but the legal status of refugees and their handling is regulated by national regulations, particularly Presidential Regulation (Perpres) Number 125 of 2016. Although it has not ratified the 1951 Refugee Convention, Indonesia applies basic principles such as non-refoulement (prohibition of forced eviction) through the Perpres and other mechanisms, which serve as the legal basis for handling refugees domestically.

The 1951 Convention contains minimum standards on the treatment of countries towards asylum seekers and refugees, including their basic rights. As a supporting instrument, the 1967 Protocol contains provisions on granting refugee status to asylum seekers; regulating the rights and obligations of asylum seekers and refugees, as well as rules of cooperation and agreements between countries and institutions or organizations members of the UN, such as UNHCR and IOM.³ Although Indonesia does not have a legal responsibility to fulfill the basic needs of refugees when asylum seekers and refugees are in Indonesian territory, Indonesia still provides assistance to refugees who come to Indonesia for humanitarian reasons.⁴

Asylum seekers and refugees in Indonesia face long waiting times for permanent resettlement in other countries. They have few legal rights, coupled with very limited financial resources and no access to government-provided services. The problem of refugees and population displacement in Indonesia has been faced for a long ago. It is inseparable from the consideration that someone chooses to flee to another place since there are many issues in their home country. The issues include conditions that are unsafe for a person or group of people if they remain in their home territory; for their security and safety, they choose to move from their home country to another safer place for them. This large-scale population displacement was initially only a domestic problem for a country; then it did not attract much attention from others. Then the refugee problem spread to become a problem for countries in a certain region, only and was ultimately considered a common problem for humanity. The refugees who cross national borders and enter a territory that has sovereignty deserve attention because this is a global problem.

International refugee law is part of international law as a new object of study. However, some experts also consider that international refugee law is a derivative subject of Humanitarian Law study, or commonly referred to as International Human Rights.⁵ The emergence of refugees is caused by the worsening political, economic, and social conditions in a country, forcing its people to leave the country and seek safer shelter in another country, on the grounds of seeking protection and saving themselves from physical dangers.

Indonesia is one of the countries that often becomes a transit point for refugees who want to seek asylum in other countries. They not only come to one region but also to several regions, such as Aceh, Medan, Riau, Batam, West Nusa Tenggara, and others. Meanwhile, refugees who transit to Indonesia are usually refugees who go to Australia as their destination. Indonesia as a transit point, inseparable from Indonesia's strategic geographical location that is flanked by two continents, namely the Asian and the Australian/Oceania continent. Indonesia's geographical location is between two oceans, namely the Indian Ocean and the Pacific Ocean. On the other hand, Indonesia's geographical position has the potential to be an illegal trade route and a transit location for refugees or asylum seekers who want to go to Australia. Based on its strategic location and the increasing number of refugees entering, Indonesia is required to provide protection and assistance to these refugees when they have entered Indonesian jurisdiction.⁶

Refugee management in Malaysia is based on humanitarian principles, as the country is not a signatory to the 1951 Refugee Convention and lacks a formal legal framework for refugees. Refugees are registered under the UNHCR and live in legal limbo, although they are generally protected from forced repatriation and can apply for temporary work permits (IMM13). Meanwhile, refugee management in Thailand varies, including shelter in border camps (primarily for Myanmar refugees) and legal status for urban refugees. The refugee status

2 Aryan Torido, "Proses Repatriasi Pengungsi Internasional Global Ke Negara Asal Di Asia Dan Afrika," *Jurnal Media Informasi Penelitian Kesejahteraan Sosial* 39, no. 1 (2015): 92.

3 Adrianus A. V. Ramon, "Demi Kemanusiaan: Pengalaman Indonesia Dalam Menangani Arus Pengungsi Internasional," *Jurnal Hukum Humaniter Dan Ham* 1, no. 1 (2019): 29.

4 Rohmad Adi Yulianto, "Kebijakan Penanganan Pengungsi Di Indonesia Perspektif Maqāṣid Al-Syariah," *Al-ManāHij: Jurnal Kajian Hukum Islam* 13, no. 2 (2019): 70.

5 Iin Karita Sakharina and Kadaruddin, *Hukum Pengungsi Internasional* (Makassar: Pustaka Pena Press, 2016).

6 Riadussyah, "Tanggung Jawab Indonesia Sebagai Negara Transit Bagi Pengungsi Anak Berdasarkan Hukum Internasional," *Jurnal Hukum Ius Quia Iustum* 23, no. 2 (2016): 250.

determination process is conducted with the assistance of the UNHCR, and Thailand has recently implemented its own asylum process and granted legal status to some refugees to work.

The initial handling of asylum seeker and refugee problems in Indonesia refers to Law Number 6 of 2011 concerning Immigration. Because asylum seekers and refugees both come from abroad who enter Indonesian territory, the provisions are the same as other people from abroad who enter Indonesia either legally (tourists, students from abroad) or illegally (human smuggling). Article 83 paragraph (1) letter b of Law Number 6 of 2011 states that immigration officials have the authority to place people from abroad in the Migration Detention Center (Rudenim) if the person from abroad is in Indonesian territory without having valid travel documents. However, the Immigration Law only provides the basis for administrative immigration actions, not refugee protection, the basic rights of refugees in Indonesia depend on Presidential Decree 125/2016 and UNHCR/IOM policies.

For comparison, a previous study that correlates with this research will be described. Herlina Yosepina Sihombing's journal, entitled "Indonesia's Policy on the Protection of Asylum Seekers and Refugees Post-Tony Abbott's Turn Back the Boat Policy," concludes that Indonesia's policy of protecting asylum seekers and refugees is driven by the role of non-state actors. This is evident in the presence of interest groups, such as humanitarian NGOs, that influence Indonesian policy regarding the handling of asylum seekers and refugees in Indonesia. The involvement of regional and international interest groups has an influence on policymakers in addressing asylum seeker and refugee issues. This influence is demonstrated by interest groups through campaign actions, discussion forums, opinion polls, and providing input to policymakers. Although interest groups do not have the legal authority to decide on public policy, the President, as policymaker, considers the important role of interest groups as interest influencers in issuing policies related to the protection of asylum seekers and refugees.

Indonesia does not formally recognize refugee status, but it does have administrative mechanisms and basic protections in place under Presidential Regulation 125/2016. To date, Indonesia has not implemented or created such a policy. Furthermore, Indonesia must strictly implement selective immigration principles for foreigners who use Indonesia solely as a transit/destination country for those claiming to be asylum seekers or refugees. The impact of Indonesia's transit-only status results in limited assistance for basic needs, such as the right to housing, health care, education, and employment for refugees and asylum seekers. Therefore, efforts must be made to provide adequate facilities to accommodate basic needs, including health services. This policy must not overlap with international agreements ratified by the Indonesian government and must not harm the country's sovereignty.

2. Research Method

This study is a normative legal study. It is also called doctrinal legal research. In doctrinal research, law is conceptualized as what is written in laws and regulations. (law in books).⁷ This study is descriptive analysis research. Descriptive research is a research method that attempts to describe and interpret objects as they are, with the aim of providing research data on a condition or fact that exists in society, that will be described clearly so that it can be accepted and understood by the reader, and can describe the research problem.

The approach method in this study used a legislative approach; namely, "a research approach to legal products, where this study will analyze and examine legal products that exist in society".

In accordance with the research method adopted, that is, normative legal research, this study is carried out in response to issues involving the violation of legal norms. The analysis is conducted through the examination and synthesis of relevant legal literature, with the objective of formulating appropriate legal solutions or conclusions to the problem under study. The data utilized in this study are derived from secondary legal sources.

3. Findings And Discussion

3.1. Protection of Refugee Rights Under International Law

The study of international politics focuses on the international system, deterrence, and the behavior of decision makers in conflict situations. The problem of asylum seekers and refugees is a phenomenon that has received special attention from policymakers in international politics. The presence of asylum seekers and refugees from abroad has a significant impact on state policy. The Indonesian government, as a decision maker within the scope of the state, has made various efforts and policies in handling and regulating refugee problems. The President, as the determining party in policy making in Indonesia, is the most determining party at the final

⁷ Amarudin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Rajawali Pers, 2013).

level regarding the policy of protecting asylum seekers and refugees. According to William D. Coplin's thinking, in deciding a policy, a significant role is needed for policy actors.⁸

The Indonesian government's policy of accommodating and protecting asylum seekers and refugees from abroad—despite not having ratified the 1951 Refugee Convention and its 1967 Protocol—is based on specific national considerations and rationales. Indonesia voluntarily adheres to international principles, and refugee protection is implemented through Presidential Regulation No. 125 of 2016, which is national and humanitarian in nature. From a liberalist perspective, Indonesia's decision not to become a party to these international instruments reflects its prioritization of domestic conditions.

Nevertheless, given the existence of international legal frameworks governing refugee protection, and in response to ongoing human rights advocacy—particularly by humanitarian non-governmental organizations (NGOs)—Indonesia has adopted a policy of temporarily receiving and accommodating refugees within its territory. The policy taken by the Indonesian government is also influenced by the role of humanitarian Non-Governmental Organizations (NGOs) through campaign actions, discussion forums, opinion polls, and so on.⁹ There are at least 3 (three) main principles that are directly related to international refugees; namely, the principle of non-refoulement,¹⁰

Every state bears the responsibility to protect all individuals within its territory, including both its own citizens and foreign nationals residing under its sovereignty. One form of such protection is legal protection, whereby the state is obligated to uphold and fulfill the legal rights inherently attached to each legal subject. When a country of origin is no longer capable of safeguarding the fundamental rights of its citizens. The international community undertakes necessary measures to guarantee and ensure that an individual's fundamental rights are protected and respected. Within the framework of international protection.¹¹

The foundation of state responsibility lies in the concept of a state's obligation toward foreigners within its jurisdiction. In the context of modern international law, this responsibility is marked by the recognition and protection of individuals regardless of their nationality. Every person is entitled to a set of fundamental rights that must be upheld wherever they may be. Consequently, states are required to respect core norms of human rights, and violations of these norms may constitute grounds for international legal claims.

In line with this principle, the rights and obligations of foreigners are reflected in Article 22 of the Draft Articles on State Responsibility, which affirms the right of foreign nationals to receive protection from the host state.

The International Human Rights Law approach may serve as a legitimate foundation for justifying legal protection for individuals displaced by environmental changes - commonly referred to as environmental refugees. Legal safeguards for such individuals, when viewed through the lens of human rights, can draw upon key international legal instruments such as the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).

There are principles are broadly concerned with the recognition, respect, and protection of human dignity, and include as following:

1. Principle of inviolability; affirms that every individual has inherent rights to have his soul respected; his integrity, both physical and moral, and all other attributes that cannot be separated from his personality as a human being;
2. Principle of non-discrimination; affirms that every individual has the right to receive equal treatment regardless of differences in gender, race, ethnicity, religion, nation, social status, and others;
3. Principle of Security; affirms that every individual has the right to security and protection, and that no person shall be held accountable for an act they did not commit.;
4. The principle of liberty affirms that everyone has the right to enjoy individual freedom;
5. The principle of social well-being affirms that everyone has the right to enjoy pleasant living conditions according to what they want.

8 Coplin, *Pengantar Politik Internasional: Suatu Telaah Teoritis* (Bandung: Sinar Baru, 1992).

9 Herlina Yosepina Sihombing, "Kebijakan Indonesia Dalam Perlindungan Pencari Suaka Dan Pengungsi Pasca Kebijakan Turn Back the Boat Pemerintahan Tony Abbott," *Journal of International Relations* 5, no. 4 (2019): 599.

10 Iin Karita Sakharin, *Pengantar Hukum Internasional (Perbedaan Istilah Pencari Suaka, Pengungsi Internasional Dan Pengungsi Dalam Negeri)* (Yogyakarta: Deepublish, 2017).

11 Wagiman, *Hukum Pengungsi Internasional* (Jakarta: Sinar Grafika, 2012).

Within the framework of International Refugee Law, the principle of *non-refoulement* serves as a legal foundation for the obligation of states to provide protection to environmental refugees. Article 33 of the 1951 Refugee Convention stipulates:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

In addition, there are four basic principles that must be implemented by the state towards refugees. First, the prohibition on returning refugees to their country of origin. If a return occurs, the state party is considered to have violated the provisions of articles 32 and 33 of the Refugee Convention. Second, the destination country or transit country must be able to provide security protection (security of refugees). Third, the destination country or transit country may not arrest refugees (prohibition against detention of refugees). The arrest of refugees who are in refugee camps is contrary to Article 31 of the Refugee Convention, unless proven to have committed a crime in that country. Fourth, recognition and granting of status (gainful employment of refugees), where granting status to refugees is only an initial stage, so that refugees can obtain other rights.¹² **Presidential Regulation (Perpres) Number 125 of 2016 concerning the Handling of Refugees from Abroad, which is a manifestation of Indonesia’s commitment to implementing international principles at the domestic level, even though Indonesia has not ratified the 1951 Refugee Convention and the 1967 Protocol. This Perpres emphasizes that the handling of refugees must pay attention to generally applicable international provisions, including the principle of non-refoulement (not returning refugees to their country of origin where they face threats).**

The principle of non-refoulement, as stated in this article, is a prohibition against a country from refusing refugees to enter its territory and expelling them back to a country where their lives would be threatened for reasons of race, religion, nationality, membership in a particular social group, or because they have political views that are at odds with the authorities in that country. All UN General Assembly resolutions relating to refugee issues contain this principle. This principle, which is the foundation of international refugee law, prohibits a state from expelling or returning (“refouler”) a refugee to a territory where his or her life or freedom would be threatened for reasons of race, religion, nationality, membership of a particular social group, or political opinion. This principle is widely recognized as part of customary international law and must be observed by all states, regardless of whether they have ratified the 1951 Refugee Convention or the 1967 Protocol that explicitly regulates it. In the UN Convention on Refugees, it is even stated that the article regulating non-refoulement is an article that cannot be reserved as stated in Article 42, namely “At the time of signature, ratification or accession, any state may make reservations to articles of the Convention other than Articles 1,3,4,16 (1), 33,36-46 inclusive.

The application of the non-refoulement principle is generally manageable when the number of refugees entering a country is relatively small. However, significant challenges emerge in situations involving a large-scale influx of refugees, particularly when these individuals seek refuge in states that have not ratified the 1951 Refugee Convention and where the receiving state is simultaneously grappling with severe socio-economic difficulties. In such circumstances, the principle of international solidarity becomes particularly relevant. States are encouraged to provide temporary shelter and cooperate with the United Nations High Commissioner for Refugees (UNHCR), that will process the asylum claims and facilitate the resettlement of refugees in third countries. Under this framework. Such a precedent can be observed in the responses of Malaysia and Hong Kong to the influx of Vietnamese refugees. Nonetheless, states retain the right to prioritize national interests, as explicitly acknowledged in Article 32 of the 1951 Refugee Convention.

Without the proactive role of the state, human rights protection will only be an unrealized ideal. As a duty bearer, the state not only has a moral responsibility but also a firm legal responsibility to carry out three main obligations: to respect, to protect, and to fulfill individual rights. These obligations cannot be viewed as abstract principles; rather, they are a solid foundation that measures the extent to that a state is committed to human rights. Olivier de Schutter, in his book *International Human Rights Law*, explains in detail how each of these obligations must be implemented by the state, emphasizing that a violation of one obligation can damage the entire existing human rights protection system. Thus, the role of the state as a duty bearer is not merely symbolic, but essential to realizing justice and prosperity for every individual under its jurisdiction. The obligation to respect requires the state not to take actions that harm or violate internationally recognized human rights. The state must ensure that the policies, regulations, and actions taken do not violate the basic rights of individuals, such as the right to life, the right to liberty, and the right to be free from torture. In the context of refugees, this obligation means that States must not take actions that directly or indirectly endanger them, such as pushbacks that could result in refugees

12 Wagiman.

returning to places where they face serious threats. Olivier de Schutter associated this obligation with absolute rights, that must be respected in all situations without being subject to restrictions. One of them is related to the prohibition of torture or cruel, inhumane, and degrading treatment. In this case, every state must respect these rights. On the other hand, some rights can be limited based on three factors, namely the legal factor (must be based on legal provisions), the legitimacy factor (must have a legitimate purpose and objective), and the proportional factor (according to need, objective, and not excessive in achieving the intended purpose).

The obligation to protect requires states to take proactive steps to prevent human rights violations by third parties, whether individuals, groups, or other entities. States must enact and enforce laws and policies that protect individuals from the threat of violence, exploitation, and discrimination. In the context of refugees, this includes protection from the threat of violence or abuse, whether by authorities or by local populations or other groups. States must also provide access to an effective justice system for refugees who experience human rights violations. In Henry Sue's dichotomy of obligations, the obligation to protect falls under positive obligations. Unlike the obligation to respect that does not require an active action, positive obligations require states to take specific actions. These actions include steps to prevent violations, intervention if there is an indication that someone's rights are threatened, and providing remedies if violations occur.

Indonesia has demonstrated a strong commitment to protecting human rights by ratifying various international human rights instruments. This ratification is not just a formality, but a firm statement about Indonesia's position on the international stage as a country that respects and protects the fundamental rights of every individual. Among the important instruments that have been ratified are the International Covenant on Civil and Political Rights (ICCPR) through Law Number 12 of 2005, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) through Law Number 11 of 2005.

In addition, various international human rights instruments have been ratified, namely the Convention on the Rights of the Child (CRC) ratified through Presidential Decree Number 36 of 1990, the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified through Law Number 29 of 1999, the Convention on the Rights of All Migrant Workers and Members of Their Families ratified through Law Number 6 of 2012, the Convention on the Rights of Persons with Disabilities (CRPD) ratified through Law Number 19 of 2011, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Human Dignity (ICRC) through Law Number 5 of 1998, and the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) through Law Number 7 of 1984.

The mechanism for protecting refugee rights in Indonesia is based on a combination of the national legal framework and international human rights norms. Indonesia is a party to several international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provide the normative basis for the protection of fundamental rights for all persons within Indonesia, including refugees.

Through this ratification, Indonesia not only declares its willingness to carry out international obligations but also strengthens its commitment to protect human rights within its jurisdiction, including vulnerable groups such as refugees. Although Indonesia has not ratified several important instruments related to refugee protection, such as the 1951 Refugee Convention and the 1967 Protocol, this does not mean that Indonesia is free from the obligation to protect refugees in its territory. On the contrary, as a country that has ratified various human rights instruments, Indonesia remains bound by the basic principles of human rights protection that apply universally.

Handling the influx of Rohingya refugees in Indonesia involves government coordination, humanitarian assistance, and international diplomacy. Local governments (such as in Aceh) have taken measures such as welcoming refugee boats, providing health facilities and temporary shelters, and collaborating with the UNHCR and IOM. Internationally, Indonesia is pushing for a resolution of the root causes of the conflict in Myanmar through diplomacy and utilizing multilateral mechanisms such as the Bali Process.

Indonesia's steps in dealing with the influx of Rohingya include Provision of temporary shelter: Local governments, especially in Aceh, provide temporary shelter and basic facilities such as housing, places of worship, and health facilities, Humanitarian aid: The government and local communities provide direct aid in the form of food, drink and clothing, Multi-actor coordination: The government works with international organizations such as UNHCR and IOM to manage refugees and provide necessary services, and Law enforcement: Law enforcement officers arrested human involved in facilitating the arrival of illegal refugees.

3.2. Government Policy in Providing Protection for Foreign Refugees

As stated in the Great Dictionary of the Indonesian Language, the root word of the term refugee is Ungsi, and the verb is mengungsi, that means to flee (get rid) of danger or save oneself (to a place that provides a sense of security). While refugee is a noun that means a person who flees.¹³ Refugees are people who, due to a well-founded fear of persecution, due to race, religion, nationality, membership of a particular social group, or membership of a particular political party, are outside their country of nationality and do not want protection from that country. In simple terms, it can be interpreted as people who are forced to sever ties with their country of origin due to well-founded fear and experience persecution. Refugees or large-scale population movements were initially only a domestic problem of a country, then because population movements also crossed the borders of one country to another, the refugee problem eventually spread to become a problem for certain countries and was finally considered a common problem for humanity.¹⁴

There were no specific regulations previously to handle the issue of refugees and asylum seekers coming to Indonesia. However, the regulation was equated with illegal immigrants coming to Indonesia, as regulated in the Regulation of the Director General of Immigration Number IMI-1489.UM.08.05 of 2010 concerning Handling of Illegal Immigrants. Indonesia also has no obligation or authority to take international action against refugees and asylum seekers entering Indonesia. Initially, handling problems related to asylum seekers and refugees in Indonesia referred to Law Number 6 of 2011 concerning Immigration. It is because asylum seekers and refugees are foreigners who enter Indonesia's territory, so the provisions are the same as other foreigners who enter Indonesia either legally, such as tourists, foreign students, or illegally, such as people smuggling. Article 83 paragraph (1) letter b of Law Number 6 of 2011 states that immigration officials have the authority to place foreigners in the Migration Detention Center (*Rudenim*) if the foreigner is in Indonesian territory without having valid travel documents. Travel documents are official documents issued by authorized officials of a country, the United Nations, or other international organizations for travel between countries that contain the identity of the holder.

One of the policies made by Indonesia related to refugee protection is Presidential Regulation Number 125 Concerning Handling of Refugees from Abroad. The Presidential Regulation provides a legal basis for the protection of foreign refugees in Indonesia. This Presidential Regulation provides Indonesia with guidelines for handling asylum seekers and refugees from abroad. It can be seen from the fact that after the Presidential Regulation Number 125 of 2016, asylum seekers who were initially placed in the Immigration Detention Center (*Rudenim*) were moved to shelters, so that they could be facilitated and financed by IOM. This Presidential Regulation is considered an alternative to ratifying the 1951 Convention and the 1967 Protocol. A key gap is that the 1951 Refugee Convention establishes internationally binding legal obligations for ratifying states, while Presidential Regulation No. 125/2016 serves only as domestic guidance in Indonesia, which has not ratified the Convention. Therefore, it does not create full obligations and is often limited by derivative regulations that do not fully protect refugee rights. While the Convention guarantees refugee rights such as the right to work and education, Presidential Regulation 125/2016 does not fully cover these rights and even includes derivative regulations that prohibit refugees from working and earning wages.

Presidential Regulation No. 125 of 2016 establishes the key definitions and legal framework governing the detention, accommodation, and protection of asylum seekers and refugees in Indonesia. Comprising 45 articles, the regulation sets out mechanisms for coordination among governmental institutions in the management of refugee affairs. Article 2, paragraph (1) of the Regulation affirms that the handling of asylum seekers and refugees shall be conducted through cooperation between the central government and the United Nations. This cooperation is implemented via the United Nations High Commissioner for Refugees (UNHCR) Indonesia and other international organizations engaged in migration or humanitarian affairs that have formal agreements with the Indonesian government.

In addition to procedural and institutional provisions, the Regulation outlines the rights accorded to asylum seekers and refugees. These include, among others, the freedom of religion, as stipulated in Article 26, paragraph (2), and the right to basic welfare, as set out in Article 26, paragraph (12), that encompasses access to clean water, adequate food and drink, health care, and hygiene. Furthermore, Article 27, paragraph (1) provides that asylum seekers and refugees with special needs may be accommodated outside designated shelters, with facilitation provided by relevant international organizations.

13 W.J.S. Poerwadarminta, *Kamus Umum Bahasa Indonesia* (Jakarta: Balai Pustaka, 1984).

14 Acmad Romsan, *Pengantar Hukum Pengungsi Internasional : Hukum Internasional Dan Prinsip-Prinsip Perlindungan Internasional, UNHCR Perwakilan Regional Jakarta, Republik Indonesia* (Bandung: Sanit Offset, 2003).

In response to Circular Letters of the Minister of Home Affairs No. 300/2307/SJ and No. 300/2308/SJ concerning the establishment of a Task Force for the Handling of Refugees from Abroad, several regions in Indonesia have established such task forces (Satgas PPLN). The primary objective of these regional task forces is to enhance inter-agency coordination and ensure a more integrated and unified approach to managing the presence of foreign refugees within Indonesian territory. The effective implementation of the provisions outlined in Presidential Regulation No. 125 of 2016 is anticipated through the work of these task forces. Given the continuous increase in the number of refugees arriving in Indonesia each year, the possibility of revising the existing regulatory framework to make it more comprehensive and responsive remains open and necessary. It will make the Indonesian Government and UNHCR work more closely, including in the field of joint registration for asylum seekers. Thus, the Indonesian government has played a role in helping to address the problems faced by asylum seekers and refugees.¹⁵

To strengthen refugee protection in the future, domestic legal frameworks need to be improved to ensure basic rights such as education and health are met. Furthermore, increased coordination between central and regional governments and international organizations, as well as economic empowerment of refugees through skills training and cash assistance, can enhance their dignity and independence.

- a. Update regulations: Update and strengthen regulations on refugee management, such as Presidential Decree No. 125 of 2016, to explicitly regulate the fulfillment of basic refugee rights, including the right to education and health.
- b. Consistency in the application of the law: Ensure that international and national laws protecting human rights are applied consistently to all refugees, including those who do not yet have official refugee status.
- c. Understand legal status: Map the number of refugees, their distribution, and the treatment of asylum seekers who do not yet have refugee status or are independent refugees.
- d. Clarify the division of roles: Clarify the division of authority and roles between the central government, regional governments, and international organizations (such as UNHCR and IOM) to avoid overlap.
- e. Safe environment: Manage refugee camps or settlements to be safe environments free from violence and exploitation through effective site management and coordination of community activities.

4. Conclusion

One of the principal policy instruments adopted by the Government of Indonesia concerning the protection of refugees is Presidential Regulation No. 125 of 2016 on the Handling of Refugees from Abroad. This regulation provides a formal legal basis for the protection and management of foreign refugees within the territory of Indonesia, and serves as a comprehensive guideline for addressing the presence of asylum seekers and refugees originating from outside the country. Following the promulgation of this regulation, a significant shift in policy was observed wherein asylum seekers, who were previously placed in Immigration Detention Centers (*Rumah Detensi Imigrasi* or *Rudenim*), were relocated to community shelters. This transition was intended to ensure that their basic needs—such as housing, food, and healthcare. It sets forth key legal definitions and regulates crucial aspects of refugee protection, including detention, accommodation, and inter-agency coordination. Consisting of 45 articles, the regulation mandates coordinated efforts among relevant government agencies in the implementation of refugee-related policies. Notably, Article 2, paragraph (1) stipulates that the management of asylum seekers and refugees shall be carried out through cooperative arrangements between the central government and the United Nations, particularly through the involvement of the United Nations High Commissioner for Refugees (UNHCR) and other international humanitarian and migration-related organizations operating under formal agreements with the Indonesian government.

To strengthen refugee protection in the future, domestic legal frameworks need to be improved to ensure basic rights such as education and health are met. Furthermore, increased coordination between central and regional governments and international organizations, as well as economic empowerment of refugees through skills training and cash assistance, can enhance their dignity and independence.

15 Hasti Wahyuni et al., “Kebijakan Pemerintahan Presiden Joko Widodo Menangani Masalah Pencari Suaka Dan Pengungsi Luar Negeri Di Indonesia,” *Journal of Diplomacy and International Studies* 5, no. 2 (2022): 23–32.

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Abandoning the Precautionary Principle in Environmental Licensing: a Comparison of Indonesia with Three Other Countries and a New Evidentiary Mechanism

Ajie Ramdan

Pusat Studi Kebijakan Kriminal,

Fakultas Hukum Universitas Padjadjaran, Bandung, Jawa Barat, Indonesia

Article Information

Corresponding Author. Email:

ajie.ramdan@unpad.ac.id

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Abstract

Law Number 6 of 2023 concerning Job Creation revises Law Number 32 of 2009 by decriminalising Article 102 and merging it with Article 109. They have been changed from conduct offences to result-based offences. This study uses a normative legal research method combined with a comparative study using a statute research approach, which is used to analyse, explore, and review changes to Article 109. The findings of this study explain that because of revision of those articles, criminal sanctions cannot be imposed if someone or entities do not have environmental permits until environmental damage has already occurred. A study of the UK, the Netherlands, and Sweden shows those countries apply the precautionary principle by penalising the actions of entities that do not have environmental permits as conduct criminal offences. A comparison will be made between this and the environmental laws of Indonesia. Currently, to enforce Article 109 of Law Number 32 of 2009, prosecutors will need to employ the same proof method as that used for criminal offences as stipulated in Articles 98, 99, and 100. The novelty of this research is that the change from conduct offences to result-based offences have the potential to damage Indonesia's environment. This will be scientifically proven in this article. The decriminalisation of Article 102 and the amendment of Article 109 of Law Number 32 of 2009 not only change the system of proof in cases of environmental permit violations, namely through scientific evidence, but also constitute a disregard for the precautionary principle.

1. Introduction

Many countries have enshrined the right to a healthy environment in their constitutions, including Indonesia. This right was constitutionalized in Indonesia in 2000, as stipulated in Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Therefore, Indonesia currently has a green constitution with strong recognition of the right to a healthy environment. To realize this right, Indonesia enacted Law Number 32 of 2009 concerning environmental protection and management.¹ The aforementioned legislation stipulated that entities engaging in commercial activities that result in a negative environmental impact are obligated to obtain an environmental licence. Failure to obtain such a licence is a criminal offence, punishable by imprisonment and substantial fines. This was a conduct offence, criminalised by Articles 102 and 109 Law Number 32 of 2009. However, in 2023, the government and the House of Representatives passed a new law to change this conduct offence to a result-based offence. This policy has the potential to ignore the precautionary principle because Indonesian Law Number 6 of 2023, which relates to Law Number 2 of 2022

¹ Simon Butt and Prayekti Murharjanti, "The Constitutional Right to a Healthy Environment in Indonesia," *Journal of Environmental Law* 33, no. 1 (2021): 34, doi: 10.1093/jel/eqaa031.

concerning Job Creation, has revised Article 102 and Article 109 of Law Number 32 of 2009 to be result-based offences. The purpose of this abolishment is to attract more investment to Indonesia.²

Research on the amendment of these two articles is crucial because they were created to realise the right to a healthy environment, which is a human right.³ Policies to attract investment should not open loopholes for Indonesian development at the expense of the environment. Ironically, as a result of the deletion of Article 102 and its merger with Article 109 by the current Job Creation Law, the lack of an environmental permit is no longer a criminal offence until environmental damage occurs. Thus, Article 109 is currently a result-based offence. It is defined as an offence that is deemed to have been completed by the infliction of the consequences prohibited and threatened with punishment by law.⁴

In comparison to the previous Articles 102 and 109, these articles had been regarded as conduct offences. They were deemed to have been completed by the commission of acts prohibited and threatened with punishment by law.⁵ It is a suffering according to criminal law related to the violation of norms based on a judge's decision.⁶ The precautionary principle posits that decision-makers should adopt precautionary measures to protect human health and the environment, even in the absence of definitive scientific evidence regarding the potential risks. That is to say, the implementation of precautionary restriction mechanisms is imperative to safeguard the well-being of individuals and the environment against the contingent risks posed by hazardous chemicals.⁷ The existence of conduct offence is to follow the precautionary principle, which is absolutely important to protect the environment from the scientific uncertainty.

In accordance with the aforementioned principle, it is incumbent upon Indonesia to ensure the preservation of human health and the environment, notwithstanding the ambiguity surrounding the scientific evidence pertaining to the risk. The precautionary principle has been adopted by Indonesia in the interpretation of Article 2, letter f, Law Number 32 of 2009. This principle asserts that the uncertainty surrounding the consequences of a business or activity, stemming from the limited understanding of science and technology, should not be used as a justification for postponing measures aimed at minimising or averting threats to pollution and environmental degradation. It is important to note that every environmental licence falls under the purview of administrative law. In the event of any violation of this law, the relevant authorities reserve the right to resort to criminal law in order to protect the environment. In the event of criminal liability arising from the infringement of administrative law provisions (whether or not accompanied by additional requirements stipulated in criminal legislation), the criminal behaviour in question is typically discernible *a priori*. Thus, in the event of an administrative violation, the evidence should be straightforward and highly logical without the need for scientific proof, as no environmental permit has been issued.⁸

Article 109 stipulates that any individual conducting commercial activities without the requisite environmental impact assessment (AMDAL), environmental management efforts, and environmental monitoring efforts (UKL-UPL), or without a hazardous and toxic waste management licence, or who engages in the dumping of waste or hazardous and toxic waste shall be subject to criminal prosecution and, upon conviction, shall be sentenced to a minimum of one year's imprisonment and a maximum of three years' imprisonment along with a fine of at least IDR 1,000,000,000.00 (one billion rupiahs) and a maximum of IDR 3,000,000,000.00 (three billion rupiahs). The revision of Article 109 has rendered the task of proving environmental damage more technical and complex. Law enforcement officers such as the police and environmental investigators from the Ministry of the Environment must ascertain whether an individual or company has polluted the environment through laboratory testing of soil and/or water samples. This procedure is now required to prove an environmental crime, given the change in Article 109 which reclassifies such crimes from a conduct offence to a result-based offence.

2 Ajie Ramdan, 'UU Cipta Kerja Melindungi Pengelolaan Limbah B3 Tanpa Izin dari Pemidanaan', *hukumonline.com*, 2023, <https://www.hukumonline.com/berita/a/uu-cipta-kerja-melindungi-pengelolaan-limbah-b3-tanpa-izin-dari-pemidanaan-lt64db257b34ae0/>, (accessed 1st July 2025).

3 Simon Butt and Prayekti Murharjanti, *op.cit.*, 54.

4 Jan Rimmelink, *Hukum Pidana* (Jakarta: PT Gramedia Pustaka Utama, 2003), 70-71.

5 *Ibid*

6 Topo Santoso, *Hukum Pidana Suatu Pengantar* (Depok: Rajawali Pers, 2024), 160.

7 Joonas Alaranta and Mirella Miettinen, "Precautiously Circular: Perspectives on the Application of the Precautionary Principle in European Union Waste and Chemicals Regulation," *European Journal of Risk Regulation* 14 no. 1 (2023): 15-18, <https://doi.org/10.1017/err.2022.37>.

8 Valsamis Mitsilegas et. al, *The Legal Regulation of Environmental Crime* (Leiden: Koninklijke Brill NV, 2022), 126.

The complete abandonment of the link between administrative and environmental criminal law would have the consequence that, in theory, a certain form of pollution could be authorised under an administrative permit. The protection afforded by criminal law is typically enshrined in a single article at the conclusion of an administrative statute. Such an article typically stipulates that any individual who contravenes the stipulations set forth in the act, regulation, or licences issued in accordance with the aforementioned documents shall be subject to a specific penalty. In certain instances, it is explicitly specified that any individual who operates without a licence or contravenes the conditions of a licence shall be held criminally liable in accordance with the specific provision.⁹ Changing the conduct offence to the result-based offence by Indonesian Law Number 6 of 2023 is abandoning the relationship between administrative and environmental criminal law. It, therefore, will not prevent the environmental damage because there is no penalty for an individual or company who does not have environmental licences.

The majority of environmental criminal law is comprised of provisions incorporated in environmental statutes of an administrative nature, the primary function of which is to enforce compliance with administrative obligations. Consequently, a significant proportion of environmental criminal law is not formulated in an independent manner, but rather as an ancillary component of regulatory frameworks. In the context of legal practice, a large proportion of environmental criminal law is constituted of regulatory violations. For instance, the polluter may be prosecuted for discharging certain substances into the environment without the requisite permit, or for violating the conditions of a permit. The revision of Article 109 constitutes a disregard for the relationship between administrative law and criminal law because if a person or company carries out activities that will impact the environment without an environmental permit, it is not a criminal offence until environmental damage occurs. This is because Article 109 contains a phrase that refers to the occurrence of victims/damage to health, safety, and/or the environment. Therefore, in order to enforce Article 109, law enforcement officials cannot simply rely on the absence of an environmental permit. Instead, law enforcement officials must prove that environmental damage has occurred.¹⁰

This study distinguishes itself from previous studies by adopting a comprehensive and novel approach to analysing the consequence of abandoning the precautionary principle in the context of environmental licensing under job creation law and proving that the absence of an environmental permit results in victims/damage to health, safety, and/or the environment. The article with the title: “Ketentuan Pidana Administrasi (Administrative Penal Law) Dalam Penegakan Hukum Lingkungan setelah Diundangkannya UU Cipta Kerja” by Hajriyanti Nuraini, Nadia Astriani and Yulinda Adharani, has focused on analysing the change of the administrative penalty provisions in the Law Number 32 Year 2009 and the importance of administrative criminal provisions in the environmental field. This research targets changes in administrative criminal provisions in the environmental sector after the enactment of the Job Creation Law. In addition, it analyses the changes in the provisions on environmental law enforcement and provides recommendations so that environmental law enforcement in Indonesia can run effectively. In contrast, the focus of the research conducted by Ajie Ramdan concentrates on examining the consequence of abandoning the precautionary principle by revising Article 102 and 109 Law Number 32 Year 2009 and a new evidentiary mechanism in the event that the absence of an environmental permit results in victims/damage to health, safety, and/or the environment. The novelty of this research, compared to a previous study, is in the fact that the change from conduct offences to result-based offences have the potential to damage Indonesia’s environment. This and the damage that can be caused by the absence of environmental permits must be scientifically proven.

This is the first time Indonesia has amended the environmental permit provisions stipulated in Articles 102 and 109 of Law Number 32 of 2009 to remove criminal sanctions as consequences until environmental damage occurs. This constitutes a disregard for the precautionary principle. In comparison, the United Kingdom, the Netherlands and Sweden require environmental permits before starting a business that will have an impact on the environment. If such a permit is not obtained, two sanctions may be imposed: administrative sanctions and criminal sanctions as a result of result-based offences. In addition, the decriminalisation of Article 102 and its incorporation into Article 109 means that incidents of pollution must be proven by scientific evidence, then establish whether an environmental permit had been issued. This study will answer three research questions. First, what is the consequence of disregarding the precautionary principle by decriminalising Article 102 and combining it with the revision of Article 109 of Law Number 2009 by the Job Creation Law? Second, how does the application of the

9 Michael G Faure, “Towards a new model of criminalization of environmental pollution: the case of Indonesia,” in *Environmental Law in Development Lesson from the Indonesian Experience*, ed Michael G Faure & Nicole Niessen (USA: Edward Elgar, 2006), 194-196.

10 Valsamis Mitsilegas et. al, *op.cit.*, 126.

precautionary principle in Indonesia compare with that in the United Kingdom, the Netherlands, and Sweden in regards to environmental licensing? And third, what new scientific evidence mechanisms must be implemented in the event of a violation of Article 109?

2. Method

The method used in this study is normative juridical¹¹ combined with comparative legal studies with the United Kingdom, the Netherlands, and Sweden.¹² These three countries were chosen as comparators because they protect their environment by imposing criminal sanctions in addition to administrative sanctions in the event of environmental permit violations prior to conducting business activities that impact the environment. This is an application of the precautionary principle. The data analysis techniques used are qualitative and descriptive analysis techniques. This research can be broadly categorised into three different classifications: research focused on identifying and addressing problems, research centred on policy formulation, and research aimed at legal reform. It is acknowledged that these categories are not mutually exclusive and are identified in terms of assessing the main focus of the study. The frequent correlation between these two phenomena necessitates consideration for joint analysis.¹³ The approach used is a statute research approach, which is used to examine, explore, and review various environmental laws and regulations. Additionally, a conceptual approach is employed to analyse and critique the concepts within criminal policy in the revision of Articles 102 and 109 of Law Number 32 of 2009, and a philosophical approach to analyse new concepts of evidence in the revision of Articles 102 and 109 of Law Number 32 of 2009 from the perspective of criminal policy philosophy.¹⁴

To ensure the validity of doctrinal data, this study uses triangulation¹⁵ involving the collection and analysis of data from various sources of literature, legislation and court decisions. This study uses two different research methods, namely normative juridical and comparative legal studies. In addition, various theoretical frameworks are used, namely the precautionary principle, the principle of prevention, and the theory of negative proof with scientific methods. Triangulation is used to interpret the data in this study or perspective to confirm findings and overcome weaknesses.

3. Findings and Discussion

3.1 The Consequence of Abandoning the Precautionary Principle in the Context of Environmental Licensing Under Job Creation Law

The precautionary principle, formulated by the tribunal in the Trail Smelter Case and reiterated in the Rio Declaration, as highlighted by Nollkaemper, posits that states have a responsibility to prevent activities within their jurisdiction or control from causing harm to the environment of other states.¹⁶ Principle 15 of the Rio Declaration on Environment and Development in 1992 suggests that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. In addition, the Convention on Biological Diversity (1992),¹⁷ in a seminal moment in environmental politics, concluded in the context of the Rio Conference on Environment and Development. The Convention obliges States to undertake comprehensive and effective national action to halt the destruction of biological species, habitats and ecosystems, while ensuring that sovereignty over natural resources and national jurisdiction and control over their biological resources remains intact. Consequently, the Convention incorporates the precautionary principle.

11 Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenada Media Group, 2005), 29.

12 Ian Curry-Summer *et al.*, *Research Skills Instruction for Lawyers* (Nijmegen: Ars Aequi Libri, 2010), 5.

13 Ian Dobinson and Francis Johns, "Qualitative Legal Research," in *Research Methods for Law*, ed Mike McConville and Wing Hong Chui, (Edinburgh: Edinburgh University Press, 2017), 19-20.

14 Peter Mahmud Marzuki, *op.cit.*, 93.

15 Filip Horák & David Lacko, "Triangulation of Theoretical and Empirical Conceptualizations Related to the Rule of Law," *Hague Journal on the Rule of Law* 15 (2022): 191-213, <https://doi.org/10.1007/s40803-022-00181-x>.

16 Andre Nollkaemper, "Sovereignty and environmental justice in international law" in *Environmental Law and Justice in Context*, ed Jonnas Ebbesson and Phoebe Okowa (London: Cambridge University Press, 2009), 255.

17 Nico J Schrijver, "Role of State Sovereignty in Securing the Planetary Future: Some Reflection," *Environmental Policy and Law* 54 no. 4-6 (2024): 261, <https://uk.sagepub.com/en-gb/eur/journals-permissionsn>.

The precautionary principle is invoked when there is an element of uncertainty surrounding the potential risks. Scientific uncertainty is often caused by our inadequate understanding of the nature of ecosystems (which are complex, resilient and adaptable). For this reason, the application of this substantive principle remains relevant for the future ambitions and challenges of environmental law.¹⁸ Scientific information can be unclear (imprecise) if there is an epistemic debate ongoing in science (competing models or basic assumptions are adopted in different disciplines). Insufficiency may occur in the event of inadequate development of the disciplines involved in the assessment, such that the cause–effect relationship is not satisfactorily explained. Scientific uncertainty thus exists if it is difficult to specify a set of possible consequences of certain actions or to establish an accurate prediction model.¹⁹ Another relevant principle is the prevention principle, which posits an obligation to avert environmental degradation. This principle entails the proactive mitigation of activities with the potential to cause or pose a risk of such damage, in addition to the reduction or control of those activities. The fundamental principle of environmental damage being addressed at its point of origin is closely associated with this prevention-based approach. It is imperative that action is taken at an early stage, ideally before the occurrence of environmental damage. The frequently irreversible nature of the detrimental effects on the environment, in conjunction with the inherent limitations of the mechanisms for redressing this type of damage, underscores the paramount importance of prevention in efficacious environmental policy.²⁰

Indonesian Law Number 6 of 2023, which relates to Law Number 2 of 2022 concerning Job Creation, has abolished Article 102 and revised Article 109 of Law Number 32 of 2009. The government and the house of representatives have changed those articles to result-based offences, instead of conduct offences. This change has weakened environmental damage prevention because law enforcement officials can no longer enforce Article 109 based on the absence of environmental permits such as the requisite environmental impact assessment (AMDAL), environmental management efforts and environmental monitoring efforts (UKL-UPL), a hazardous and toxic waste management licence, and the dumping licence of waste or hazardous and toxic waste, but also based on the resulting harm to health, safety, and/or the environment during their business activities, even if they do not cause loss of life or harm to health, safety, and/or the environment. The existence of conduct offence is to implement the precautionary principle and the prevention principle, which are vital for preventing the damage of the environment due to the obligation of having an environmental licence before conducting business. When the government and the house of representatives decriminalised Article 102 and revised Article 109 of Law Number 32 of 2009 in 2023, it constituted a disregard for the precautionary principle.²¹ This is contrary to Constitutional Court Decision Number 95/PUU-XII/2014, which states that failure to abide by the precautionary principle can be grounds to prosecute for criminal liability for negligence, and an individual could be held liable for not applying the precautionary standard.²²

Most environmental criminal laws consist solely of provisions included in environmental laws that are administrative in nature and have the primary function of enforcing compliance with administrative obligations. The existence of Articles 102 and 109 as conduct offences serves to ensure administrative compliance with environmental licensing, which is the implementation of the precautionary principle.²³ In this case, criminal law punishes administrative non-compliance to prevent environmental damage.²⁴ In practice, it deals with decisions made in situations where the outcome is not clear by not requiring proof that the behaviour caused will lead to environmental harm. The application of the precautionary principle is to require every person or company to have an environmental permit before starting their business that will have an impact on the environment. The consequence of the revision of Articles 102 and 109 to be result-based offences, is that people or companies are unlikely to pay attention to environmental permits that must be obtained before starting a business since there is no punishment for them until they cause harm or damage to health, safety, and/or the environment.²⁵ When people or

18 K. J. de Graaf & S. E. Weishaar, “Introduction to The Future of Environmental Law” in the Future of Environmental Law: Ambition and Reality, ed S. E. Weishaar, & K. J. de Graaf, (Cheltenham: Edward Elgar Publishing, 2023), 5.

19 Joonas Alaranta and Mirella Miettinen, *op.cit.*, 15-18.

20 K. J. de Graaf & S. E. Weishaar, *op.cit.*, 5.

21 Valsamis Mitsilegas et. al, *op.cit.*, 111.

22 Simon Butt and Prayekti Murharjanti, *op.cit.*, 49.

23 Valsamis Mitsilegas et. al, *op.cit.*, 126.

24 Michael G. Faure, “the EU Environmental Crime Directive 2024: A Revolution in EU Environmental Criminal Law ?,” *Journal of Environmental Law* 36 no. 3 (2024): 325-326, <https://doi.org/10.1093/jel/eqae020>.

25 Peter Gailhofer et al, “Corporate Liability for Transboundary Environmental Harm an International and Transnational Perspective,” in *Liability of Private Actors in International Law*, ed Peter Gailhofer and Cara-Sophie Scherf, (Switzerland: Springer, 2023), 107-108.

companies get an environmental licence before going into business, they have already fulfilled the requirements to ensure that they will not damage the environment.

In accordance with Article 24 paragraph (5), Article 34 paragraph (3), Article 59 paragraph (4), Article 20 paragraph (3) letter b and Article 61 paragraph (1), every person who conducts business and/or activities must have the requisite environmental impact assessment (AMDAL), environmental management efforts and environmental monitoring efforts (UKL-UPL), a hazardous and toxic waste management licence, and the dumping licence of waste or hazardous and toxic waste. They are administrative laws and if someone or entities do not have those environmental licences before running a business, not only do they break the administrative law, but they also violate the criminal law. To safeguard the environment, Article 109 should be able to impose criminal sanctions on persons or companies that do not have an environmental permit without having to prove that the business or activity pollutes the environment. Combining Article 102 and Article 109 and turning them into result-based offences means that any suspect accused of environmental crimes must be proven to have caused victims/damage to health, safety, and/or the environment. Currently, Article 109 of Law Number 32 of 2009 allows environmental damage to occur due to the fact that the absence of an environmental permit is no longer a criminal offence until environmental pollution occurs.

Although Law Number 6 of 2023 prioritises the imposition of administrative sanctions before criminal sanctions in accordance with the provisions of Articles 82A and 82B, criminal sanctions should also directly protect Indonesia's environment by placing Article 109 as a conduct criminal offence. Criminal sanctions are essential as an *ultimum remedium* if administrative sanctions cannot address environmental permit violations. This is in line with explanation number 6 of Law Number 32 of 2009, which states that the application of the *ultimum remedium* principle only applies to certain conduct criminal offences, namely the prosecution of violations of wastewater quality standards, emissions, and disturbances. The underlying logic is that if the government is the standard-setter, the role of criminal law is subsequently to enforce these standards and to punish non-compliance. The foundation of criminal law is predicated on the premise that the specific obligations of permit holders are meticulously delineated. In order to comply with the *lex certa* principle, it is necessary to insist on the conditions for criminal liability being specified *ex ante*. It is important to note that the criteria for determining criminal culpability are established by the principles of administrative law.²⁶

Therefore, within the paradigm of environmental harms, criminal law is invoked to address instances of administrative disobedience to protect the environment and prevent environmental degradation. According to the preamble of Law Number 6 of 2023 on Job Creation,²⁷ the purpose of deleting Article 102 and merging it into Article 109 is to attract more investment into Indonesia to create jobs. However, such policies should not open up opportunities for environmental degradation, as economic development must be in line with the environment as a constraint on development.²⁸

In many legal systems, the majority of environmental criminal law is constituted of provisions incorporated in environmental statutes of an administrative nature (for example, the Clean Water Act), the primary function of which is to enforce compliance with administrative obligations. Consequently, a significant proportion of environmental criminal law is not formulated in an independent manner, but rather as an ancillary component of regulatory frameworks. In the context of legal practice, the majority of environmental criminal laws are constituted of regulatory violations. For instance, the polluter may be prosecuted for discharging certain substances into the environment without the requisite permit, or for violating the conditions of a permit. The obligation for every country to criminalise conduct that is 'unlawful' serves to confirm the accessory nature of environmental criminal law. The interrelation between criminal law and administrative legislation can be regarded as both a safeguard of and a risk to the principle of legal certainty.²⁹ The decriminalisation of Article 102 and its incorporation into Article 109, which changes it from a conduct offence to a result-based offence, is now in a form that does not reflect the close relationship between criminal law and administrative law to protect Indonesia's environment. As a result, the criminal law does not directly protect the environment. Research shows that the enforcement of environmental criminal law with scientific evidence takes a long time and is not yet oriented towards environmental restoration.³⁰

26 Michael G. Faure, *op.cit.*, 326.

27 Ajie Ramdan, *op.cit.*, <<https://www.hukumonline.com/berita/a/uu-cipta-kerja-melindungi-pengelolaan-limbah-b3-tanpa-izin-dari-pemidanaan-lt64db257b34ae0/>>.

28 Badan Perencanaan Pembangunan Nasional, Ringkasan RPJMN 2025-2029 (Jakarta: BAPPENAS, 2025), 24.

29 Valsamis Mitsilegas et. al, *op.cit.*, 126.

30 Azam Hawari et al, "Reorientasi Penegakan Hukum Pidana Lingkungan Hidup melalui Perjanjian Penanguhan Penuntutan," Jurnal Hukum Lingkungan Indonesia 6 no. 1 (2020): 72-92, <https://doi.org/10.38011/jhli.v6i1.148>.

The precautionary principle assumes particular significance in the context of ecosystem responses to the limitations of scientific assessment in dealing with complex and uncertain ecological risks. In a world undergoing a transition towards carbon neutrality, innovation will be necessary, and there will inevitably be considerable uncertainty with regard to environmental risks.³¹ The requisite environmental impact assessment (AMDAL), environmental management efforts and environmental monitoring efforts (UKL-UPL), a hazardous and toxic waste management licence, and the dumping licence of waste or hazardous and toxic waste are essential before conducting business that has an environmental impact. Environmental approval policies mandate a comprehensive environmental impact assessment, encompassing not only direct impacts, but also considering the indirect and cumulative environmental consequences. This approach is intended to ensure that systemic and long-term ecological damage can be minimized.³² Environmental permits are detailed expert assessments of the likely environmental impacts and assess the possible technologies that can be used to eliminate or minimise the risks. If the results of the expert assessment state that the proposed activity or business plan is not environmentally feasible, the environmental permit should not be granted.³³

The application of the precautionary principle is applied when an environmental permit for an activity and/or business plan is issued after a study has been produced that concludes that the negative impacts of the activity can be recovered and the technology that will be used can eliminate the negative impacts that may occur.³⁴ The precautionary standards that must be observed to prevent violations of these interests depend on the magnitude of the damage and the level of probability of its occurrence. Therefore, preventive measures are ‘the greater the danger and the greater the likelihood of its occurrence, the more reasonable they are’. The risk of serious damage justifies greater efforts to avoid damage, even if the probability is not very high.³⁵ Therefore, decriminalising Article 102 and incorporating it into Article 109 by changing it from a conduct offence to a result-based offence is a form of disregarding the precautionary principle because this change results in less effort to protect the environment from damage. As a result of this policy, environmental permit violations must be proven by the occurrence of harm/damage to health, safety, and/or the environment.

3.2 The Comparison of the Environmental Licence with England, the Netherlands, and Sweden

The field of criminal law is inextricably linked with the concept of state sovereignty and the exercise of state power. This is due to the fact that nations are reluctant to cede sovereignty and power to a supranational organisation.³⁶ Furthermore, Eddy O.S. Hiarij states that criminal law is defined as the legal rules of a sovereign state, containing prohibited or mandated acts, accompanied by criminal sanctions for those who violate or fail to comply, when and in what circumstances criminal sanctions are imposed, and how the enforcement of such sanctions is compelled by the state.³⁷ The use of criminal sanctions to reinforce compliance with environmental laws in the protection of the environment is also widely accepted by other countries, such as the European Union in its regulation on Environmental Protection through Criminal Law, where the preamble states the rationale for the regulation, namely, “Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.” Thus, for certain environmental violations, criminal law is necessary to demonstrate social disapproval of such violations.³⁸

31 K. J. de Graaf & S. E. Weishaar, “Sustainable Development, Principles of Environmental Law and the Energy Sector,” in *Energy Law, Climate Change and the Environment*, ed M. M. Roggenkamp, K. J. de Graaf, & R. Fleming, (Cheltenham: Edward Elgar Publishing, 2021), 41-51.

32 I Gusti Ayu Ketut Rachmi Handayani, “Reform of Environmental Approval Policy for Renewable Energy in Indonesia,” *Journal of Sustainable Development and Regulatory* 3 no. 2 (2025): 310.

33 Imamulhadi, “Teori Hukum Pembangunan Dalam Kebijakan Izin Lingkungan,” in *Sistem Hukum Lingkungan & Pengelolaan Sumber Daya Alam Yang Berkelanjutan*, ed Nadia Astriani dkk (Bandung: Logoz Publishing, 2018), 222.

34 *Ibid*

35 Peter Gailhofer et al, “National Civil Liability and Transboundary Environmental Damage,” in *Liability of Private Actors in International Law*, ed Peter Gailhofer and Cara-Sophie Scherf, (Switzerland: Springer, 2023), 223.

36 Valsamis Mitsilegas, *EU Criminal Law* (London: HART, 2021), 1.

37 Topo Santoso, *op.cit.*, 12.

38 Hajriyanti Nuraini dkk, “Ketentuan Pidana Administrasi (Administrative Penal Law) Dalam Penegakan Hukum Lingkungan setelah Diundangkannya UU Cipta Kerja,” *Jurnal Magister Hukum Udayana* 11, no. 3 (2022): 588,

The UK protects its environment by criminalising breaches of environmental permits as conduct offences in the regulation of hazardous substances to avoid serious and/or irreversible harm to the environment. Article 38, paragraph 2 of the Environmental Permitting (England and Wales) Regulations 2010 states that it is an offence for a person to fail to comply with or contravene an environmental permit condition. The penalty for contravening this provision, as set forth in Article 39, is a fine not exceeding £50,000 or imprisonment for a term not exceeding 12 months, or both. Alternatively, on conviction on indictment, the individual may be sentenced to a fine or imprisonment for a term not exceeding 5 years, or both.³⁹ The UK also introduced administrative fines subsequent to the recommendations of Macrory in 2008-2009. In England and Wales, the power to impose a greater range of civil (administrative) sanctions was granted to regulatory bodies, including the Environment Agency, by the Regulatory Enforcement and Sanctions Act of 2008. Consequently, the Environment Agency is empowered to impose either a fixed monetary penalty or a variable monetary penalty. The imposition of these administrative fines is intended to address any enforcement gap that may occur in the context of prosecution.⁴⁰

Dutch environmental law is largely influenced by EU law. Criminal environmental activities are penalised by the Economic Offences Act (EOA). This law is obliged to have the all-in-one permit for physical aspects to carry out waste activities. If the facility must have a permit, and it is not obtained, the operator commits a criminal offence and can be penalised fines and up to six years' imprisonment.⁴¹ In the Netherlands, although a variety of different administrative remedies do exist, administrative fines have not been used in environmental law.⁴² In addition, Chapter 29 section 4 the Swedish Environmental Code forbids unauthorized environmental activity; either wilfully or through negligence. The penalty for breaching this provision ranges from fines to imprisonment for up to two years. Chapter 30, Section 2 of the Swedish Environmental Code also regulates environmental sanction charges, which are administrative sanctions in the form of fines for disregarding environmental permits.⁴³

3.3 A New Evidentiary Mechanism in the Event that the Absence of an Environmental Permit Results in Victims/Damage to Health, Safety, and/or the Environment

Indonesian Law Number 6 of 2023, which relates to Law Number 2 of 2022 concerning Job Creation, which revises Article 82 and Article 83 Law Number 32 of 2009 by adding three articles: 82A, 82B, 82C. Article 82B paragraph 1, states that "Any person conducting a business or activity that has the requisite environmental impact assessment (AMDAL), environmental management and monitoring efforts (UKL-UPL), a licence for the management of hazardous and toxic waste, and a licence for the disposal of waste or hazardous and toxic waste that does not comply with the obligations set out in the business licence or approval from the central or regional government, and/or violates the provisions of environmental protection and management laws and regulations, is subject to administrative sanctions." Law Number 6 of 2023 prioritises those penalties before imposing criminal sanctions. In the event that an individual or entity is unable to fulfil the administrative sanctions imposed by the government, criminal sanctions will be imposed upon them if it is proven in court that they have committed a result-based offence that has resulted in victims/damage to health, safety, and/or the environment. This is in accordance with Article 109 of Law Number 6 of 2023. Although these provisions are administrative laws that must be fulfilled and if not complied with will incur criminal sanctions, currently criminal sanctions can only be imposed if there are consequences, namely the emergence of victims/damage to health, safety, and/or the environment. When compared to law number 32 of 2009 before it was revised, an individual or entity found to be in violation of these administrative laws would be subject to legal prosecution without the requirement to demonstrate any casualties, damage to health, safety, or the environment resulting from the infringement. This constitutes a conduct criminal offence.

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- 39 British Academy, 'Consultation Response: Environmental Principles and Governance after the United Kingdom leaves European Union', The British Academy, England, British Academy, 2018, <https://www.thebritishacademy.ac.uk/documents/2519/Environmental-Principles-Governance-after-Brexit.pdf>, (accessed 1st June 2025)
- 40 Yin Law & Michael G Faure, "Environmental Crime," in Elgar Encyclopedia of Crime and Criminal Justice, ed P. Caeiro, S. Gless, V. Mitsilegas, M. J. Costa, J. De Snaijer, & G. Theodorakakou, (Edward Elgar Publishing, 2024): 200, <https://doi.org/10.4337/9781789902990>.
- 41 Jaap Koster et al., Q&A on Environmental Law in The Netherlands (London: Clifford Chance, 2012), 7-9.
- 42 Yin Law & Michael Faure, "Environmental Crime," *op.cit.*, 200.
- 43 Ministry of Climate and Enterprise, 'The Swedish Environmental Code', 2000, <https://www.government.se/legal-documents/2000/08/ds-200061/> (accessed 28th September 2025)

In the Mojokerto District Court decision Number 202/Pid. Sus/2018/PN Mjk, the panel of judges examined, tried, and sentenced the defendant who did not have a permit for the management of hazardous waste, as referred to in Article 102 in conjunction with Article 59 paragraph (4) of Law of the Republic of Indonesia Number 32 of 2009, without the public prosecutor having to prove first that there had been victims/damage to health, safety, and/or the environment, as Article 102, prior to its revision by the Job Creation Law, was a conduct offence. The district court's decision was upheld by the East Java High Court Decision Number 942/PID.SUS-LH/2018/PT SBY and the Supreme Court's cassation decision Number 3073 K/Pid.Sus. LH/2019, sentencing the defendant to 1 (one) year and 6 (six) months' imprisonment and a fine of Rp1,000,000,000.00 (one billion rupiah), with an alternative of 6 (six) months' imprisonment.

Furthermore, in High Court Decision Number 485/PID.SUS.LH/2021/PT SBY, which upheld the decision of the Jombang District Court Number 548/Pid.B/LB/2020/PN.Jbg, the panel of judges examined, tried, and ruled on the appeal filed by the defendant, who did not accept the district court's decision. In its considerations, the High Court panel of judges upheld the District Court's decision because the defendant did not have a permit to manage hazardous waste in the form of dross and aluminium slag based on a letter from the East Java Provincial Environment Agency number: 660/10000/111. 2/2018 dated 5 September 2018, signed by the Head of the East Java Provincial Environment Agency, Dr. Ir. Diah Susilowati, M.T., which stated that UD. Logam Jaya Mandiri did not have an environmental permit. Therefore, the defendant's actions violated Article 102 in conjunction with Article 59 (4) of Law Number 32 of 2009. For his actions, the defendant was sentenced to two years' imprisonment and a fine of Rp1,000,000,000.00 (one billion rupiah), or six months' imprisonment as an alternative.

The following decision differs from the five previous decisions mentioned above, as the Supreme Court's cassation decision Number 6138 K/Pid.Sus-LH/2023 scientifically proves the environmental damage based on expert research, which serves as expert testimony and documentary evidence in accordance with Article 184 of the Criminal Procedure Code (KUHP). The expert research involved taking samples in Kampung Nelayan, Sandana Village, Galang Subdistrict, Tolitoli Regency. Based on the results of vegetation analysis, data was obtained in the form of a decrease in mangrove vegetation density at the tree level in mangrove areas damaged by logging. The vegetation density was 250 (two hundred and fifty) individuals per hectare. The logging and land filling carried out by the defendant for the road resulted in a reduction in mangrove vegetation at the tree level, so that based on standard criteria and guidelines for determining damage, the logging activities caused the death of mangrove trees and had caused damage to the mangrove habitat at that location. Based on the results of this expert research, the Supreme Court cassation panel was convinced that the defendant was guilty of committing a criminal act in the form of damage to the mangrove habitat environment as regulated by Article 98 Paragraph (1) of Law Number 32 of 2009. Therefore, the Supreme Court panel revised the Central Sulawesi High Court Decision Number 82/PID. SUS/2023/PT PAL dated July 18, 2023, which upheld the Tolitoli District Court Decision Number 11/Pid. Sus2023/PN Tli dated May 16, 2023, regarding the criminal punishment imposed on the Defendant to 2 (two) years and a fine of IDR 1,000,000,000.00 (one billion rupiah).

Amendments to Article 109 of Law Number 32 of 2009 through the Job Creation Law have consequences for the burden of proof, which will use scientific evidence in proving environmental damage, such as Cassation Decision Number 6138 K/Pid.Sus-LH/2023. Therefore, it is not only documentary evidence stating the absence of an environmental permit that is required, but also scientific evidence from experts proving that damage/harm to health, safety, and/or the environment has occurred due to the absence of the requisite environmental impact assessment (AMDAL), environmental management efforts and environmental monitoring efforts (UKL-UPL), a hazardous and toxic waste management licence, and the dumping licence of waste or hazardous and toxic waste. Environmental Quality Standards (BMLH) and Environmental Damage Standards (standard damage) as standards for determining the occurrence or absence of pollution must be proven by scientific evidence, which may take the form of direct expert testimony in court or written testimony, as well as the results of accredited laboratory tests.⁴⁴ The proof of Article 109 of Law Number 32 of 2009, which has been changed to a result-based offence, will heavily depend on scientific evidence to find the material truth. According to Article 71 of Supreme Court Regulation (PERMA) Number 1 of 2023, such scientific evidence includes:

- a. witness testimony
- b. expert testimony
- c. documents:

44 Nur Syarifah dkk, *Laporan Kajian Putusan Perkara Lingkungan Hidup* (Jakarta: Lembaga Kajian dan Advokasi Independensi Peradilan (LeIP), 2020), 20.

1. laboratory results, which can be corroborated by experts in court;
 2. records of sample collection, where the samples must be collected in accordance with the scientific procedures in effect at the time and/or in accordance with Indonesian national standards;
 3. interpretations of documents or written materials from satellite images;
 4. official letters, memorandums, or any related documents;
 5. maps;
 6. scientific study documents, including minutes of KLHS meetings, Amdal, UKL-UPL, SPPL.
- d. electronic evidence:
1. electronic information;
 2. electronic documents; and/or
 3. printed copies of electronic information and/or electronic documents.
- e. guidelines
- f. defendant's statement
- g. corporate statements
- h. environmental, forestry, and wildlife forensic results; and/or
- i. other evidence as regulated in the provisions of laws and regulations

Proving whether or not the defendant committed the alleged act is the most important part of Indonesian criminal procedure law, which uses a negative system of evidence according to the law. If a person is proven to have committed a criminal act based on scientific evidence accompanied by the judge's conviction, they will be punished, so scientific evidence is very important in proving the result-based offence threatened by Article 109.⁴⁵ Damage to the environment usually takes the form of pollution. It can be defined as a form of environmental impairment, disturbance, change, or destruction. In fact, the presence of foreign objects in the environment prevents environmental elements from functioning properly. Every human activity adds matter or energy to the environment. If that matter or energy is harmful, or if it depletes resources, either directly or indirectly, it is classified as pollution. Pollution occurs when pollutants are in the wrong place, at the wrong time, and in the wrong amount. Air, water, and food can contain foreign substances, so pollution in this sense can also be considered as an attempt to make a value judgement about the quality or quantity of these foreign substances. Scientifically, pollution also requires scientific standards, which can provide a benchmark for determining whether pollution that threatens the environment is occurring.⁴⁶

Decriminalising Article 102 and revising Article 109 of Law Number 32 of 2009 in 2023 to be result-based offences has consequences for the use of scientific evidence to prove environmental permit violations and environmental damage, as scientific evidence is often necessary and decisive in determining the guilt of the defendant in court. Article 96 of Law Number 32 Year 2009 defines evidence that can be used in court as consisting of witness testimony, expert testimony, letters, clues, testimony of the defendant and other evidence, including evidence regulated in laws and regulations. Article 96 letter f describes 'other evidence' as including information that is spoken, sent, received, or stored electronically, magnetically, optically, and/or similar; and/or data evidence, recordings, or information that can be read, seen, and heard that can be released with and/or without the aid of a means, whether it is written on paper, any physical object other than paper, or recorded electronically, not limited to data, recordings, or information that can be read, seen, and heard that can be released with and/or without the aid of a means, whether it is written on paper, any physical object other than paper, or recorded electronically, not limited to writings, sounds or images, maps, plans, photographs or the like, letters, signs, numbers, symbols, or perforations that have meaning or that can be understood or read.

The system of evidence adopted by Article 183 of the Criminal Procedure Code is a negative proof system of evidence which stipulates that judges may only impose penalties on defendants if the evidence is strictly defined by law and supported by the judge's conviction of the existence of such evidence. The negative proof system of evidence is based on:⁴⁷

45 Febby Mutiara Nelson *et al*, "Finding the Truth in A Virtual Courtroom:Criminal Trials in Indonesia during the COVID-19," *Sriwijaya Law Review* 7 no. 2 (2023): 237, <https://doi.org/10.28946/slrev.Vol7.Iss2.2465.pp228-243>

46 M. Daud Silalahi, *Hukum Lingkungan Dalam Sistem Penegakan Hukum Lingkungan Indonesia* (Bandung: Alumni, 2001), 154-155.

47 Eddy O. S. Hiariej, *Hukum Acara Pidana* (Tangerang Selatan: Universitas Terbuka, 2022), 6.27.

1. procedural and evidentiary procedures in accordance with the evidence as specifically determined by law;
2. the judge's conviction regarding the evidence, both materially and procedurally.

The negative proof system under Article 183 of the Criminal Procedure Code is also adopted by Law Number 32 of 2009 and its revision by Law Number 6 of 2023 as formal criminal law. Since Article 96 and the explanation of Article 96(f) of Law Number 32 of 2009 have limitedly determined the scientific evidence that may be used to prove the occurrence of harm/damage to health, safety, and/or the environment, the negative proof of the occurrence of the result-based offence under Article 109 of Law Number 32 of 2009 must be based on Article 183 of the Criminal Procedure Code, Article 96, and the explanation of Article 96(f) of Law Number 32 of 2009. However, based on the results of the research, environmental court proceedings have weaknesses that can take years until a final and binding decision is reached. The complex nature of proving environmental cases, which are heavily reliant on scientific evidence, especially those involving corporations, and the high costs involved can delay the implementation of environmental restoration.⁴⁸

The decriminalisation of Article 102 and the amendment of Article 109 of Law Number 32 of 2009 change the mechanism of proof in cases where there is no environmental permit when conducting business activities that have an impact on the environment. Prior to the amendments made by Law Number 6 of 2023, the burden of proof focused on the presence or absence of an environmental permit when conducting business activities that impact the environment. However, Article 109 has now become a result-based offence, and the burden of proof must be established if it results in harm or damage to health, safety, and/or the environment, using scientific evidence. Article 72 paragraph 1 of Supreme Court Regulation Number 1 of 2023 stipulates that in examining scientific evidence submitted in environmental court proceedings, the examining judge shall consider the accuracy of the methods and validity of the sampling procedures, taking into account laboratory accreditation and expert opinions from the public prosecutor and/or the defendant. In addition, Article 47 paragraph 1 of Perma Number 1 of 2023 stipulates that the Examining Judge shall apply the precautionary principle, as referred to in Article 2 letter f of Law Number 32 of 2009 concerning Environmental Protection and Management, if there is uncertainty in proving causality and impact in environmental cases, taking into account the three criteria set forth in Article 47(2) of PERMA Number 1 of 2023 concerning Guidelines for Adjudicating Environmental Cases, namely:

- a. there is a serious threat that may be irreversible, whether to the environment or to the health of current and future generations;
- b. there is scientific uncertainty in determining the causal relationship between activities/businesses and their impact on the environment; and
- c. preventive measures to avoid environmental damage are prioritised, even if such preventive measures require higher costs than the initial costs of the planned activities/businesses.

The new mechanism of proof under Article 109 of Law Number 32 of 2009, which uses scientific evidence, will employ the same method of proof as that used for criminal acts regulated by Articles 98, 99, and 100, as Article 109 has been changed to a result-based offence. Therefore, the enforcement of Article 109 is not only based on the lack of an environmental permit. However, it must also prove that environmental damage has occurred using scientific evidence. These four articles prohibit the resulting consequences, in this case, environmental pollution. The decriminalisation of Article 102 and the amendment of Article 109 of Law Number 32 of 2009 not only changes the system of proof in cases of environmental permit violations, namely by means of scientific method, but also constitutes a disregard for the precautionary principle. The existence of conduct offences in Law Number 32 of 2009 are intended to prevent environmental damage, as before undertaking any activity that may impact the environment, every individual or corporation must obtain an environmental permit as a procedure that must be fulfilled to prevent environmental damage. The procedure that must be fulfilled, namely the environmental permit, is part of the implementation of the precautionary principle. However, currently, if there is no environmental impact analysis (AMDAL), environmental management efforts and environmental monitoring efforts (UKL-UPL), as well as permits for the management and disposal of hazardous and toxic waste when conducting activities that impact the environment, such actions are no longer considered criminal offences unless they result in harm or damage to health, safety, and/or the environment.

48 Azam Hawari et al, op.cit., 72-23, <https://doi.org/10.38011/jhli.v6i1.148>.

4. Conclusion

The consequence of disregarding the precautionary principle is the possibility of serious environmental damage that cannot be prevented. Therefore, this action has theoretical implications, namely that it not only violates the precautionary principle, but also violates the prevention principle. In addition, this legal policy has the potential to damage the environment because if a person or corporation does not have an environmental permit, namely an environmental impact assessment (AMDAL), environmental management efforts and environmental monitoring efforts (UKL-UPL), as well as a permit for the management and disposal of hazardous and toxic waste (B3) when conducting activities that impact the environment, the enforcement of criminal sanctions as a substitute for administrative sanctions must wait until damage or harm to health, safety, and/or the environment has occurred.

The United Kingdom, the Netherlands, and Sweden each implement the precautionary principle by criminalising acts committed by individuals or companies when they do not have environmental permits to conduct business that impacts the environment as conduct offences and they have administrative punishments as well. In contrast, Indonesia is the opposite of these three countries, in that it criminalises acts that do not have environmental permits as result-based offences.

The new mechanism of proof based on Article 109, which uses scientific evidence, will employ the principle of premium remedium because Article 109 has now changed from a conduct offence to a result-based offence. The decriminalisation of Article 102, combined with Article 109, not only changes the proof system to a scientific proof method but also constitutes a disregard for the precautionary principle and the prevention principle. Based on previous research, environmental court proceedings have weaknesses that can take years to reach a final and binding decision. The complex nature of proving environmental cases, which is highly dependent on scientific evidence, especially those involving corporations, as well as the high costs involved, can delay the implementation of environmental restoration. Therefore, the policy of decriminalising Article 102 and combining it with Article 109 has the implication of not being able to prevent environmental damage and delaying environmental restoration.

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Bukti Ilegal dalam RUU KUHAP Indonesia: *Exclusionary Rules* dan *Due Process of Law* *Illegally Obtained Evidence in Indonesia's Draft Criminal Procedure Code (RUU KUHAP): Exclusionary Rules and the Due Process of Law*

Nazhif Ali Murtadho

Program Studi Magister Ilmu Hukum, Fakultas Hukum, Universitas Airlangga, Surabaya, Indonesia

Article Information

Corresponding Email. Author:
nazhifalimurtadho2001@gmail.com

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Abstract

The absence of explicit provisions on exclusionary rules in the RUU KUHAP risks enabling the use of unlawfully obtained evidence, undermining due process, violating the presumption of innocence, and eroding the legitimacy of the judiciary. This study aims to analyze the integration of due-process principles and the concept of "unlawful legal evidence" into the RUU KUHAP and to formulate practicable drafting language and operational mechanisms. The method is doctrinal-juridical research employing statutory, conceptual, comparative, and case approaches; primary and secondary materials are analyzed textually, comparatively, and deductively, accompanied by an inventory of legal sources. Findings indicate that the application of exclusionary rules in Indonesia remains sporadic due to a normative vacuum and terminological disparities between "alat bukti" and "barang bukti"; the praperadilan mechanism is not yet capable of substantive review; six elements of due process remain unregulated explicitly; and electronic evidence requires procedural certainty in the aftermath of Putusan MK 20/PUU-XIV/2016. The study concludes that the RUU KUHAP must include an exclusionary-rules clause; define "unlawful legal evidence" and the concept of "batal demi hukum"; strengthen the authority of Praperadilan/Hakim Pemeriksa Pendahuluan; require chain-of-custody procedures and digital forensic certification; and establish sanctions and compensation mechanisms. Recommendations include harmonized drafting, judicial guidelines, training for law-enforcement officers, and independent oversight to restore evidentiary integrity and ensure the protection of human rights.

Abstrak

Ketiadaan ketentuan eksplisit mengenai *exclusionary rules* dalam RUU KUHAP berisiko mengakibatkan pemanfaatan bukti yang diperoleh secara melawan hukum, merusak *due process*, mencederai praduga tak bersalah, dan menurunkan legitimasi peradilan; penelitian ini bertujuan menganalisis integrasi prinsip *due process* dan konsep "*unlawful legal evidence*" ke dalam RUU KUHAP serta merumuskan redaksional dan mekanisme operasional yang aplikatif. Metode yang digunakan adalah penelitian yuridis doktrinal dengan pendekatan perundang-undangan, konseptual, komparatif, dan kasus; bahan primer dan sekunder dianalisis tekstual, komparatif, dan deduktif dengan inventarisasi bahan hukum. Temuan menunjukkan penerapan *exclusionary rules* di Indonesia masih sporadis karena kekosongan norma dan perbedaan istilah antara "alat bukti" dan "barang bukti", mekanisme praperadilan belum mampu uji substantif, enam elemen *due process* belum diatur secara eksplisit, dan bukti elektronik memerlukan kepastian prosedural pasca-Putusan MK 20/PUU-XIV/2016. Kesimpulannya, RUU KUHAP harus memuat klausul *exclusionary rules*, definisi "*unlawful legal evidence*" dan konsep 'batal demi hukum', memperkuat kewenangan Praperadilan/Hakim Pemeriksa Pendahuluan, mensyaratkan *chain of custody* dan sertifikasi forensik digital, serta menetapkan sanksi dan kompensasi; rekomendasi meliputi harmonisasi redaksional, pedoman yudisial, pelatihan aparat, dan pengawasan independen untuk mengembalikan integritas pembuktian dan menjamin perlindungan HAM.

1. Pendahuluan

Dalam kerangka hukum acara pidana, pembuktian memegang peran sentral untuk mencapai kebenaran materiil, yaitu “*materiële waarheid*” yang menjadi tolak ukur putusan hakim.¹ Pembuktian tidak hanya bermakna sebagai sekadar presentasi bukti di persidangan, tetapi juga sebagai mekanisme penjaga keadilan yang menjamin asas praduga tak bersalah dan hak asasi terdakwa tetap terjaga hingga putusan berkekuatan hukum tetap.² Seperti ditegaskan Eddy OS Hiarij, pembuktian berlangsung pada setiap tahapan penegakan hukum mulai penyelidikan, penyidikan, hingga pemeriksaan di persidangan dan setiap penyimpangan proses membahayakan integritas pembuktian ke tingkat selanjutnya.³ Oleh karena itu, perolehan alat bukti harus dilaksanakan secara sah, transparan, dan akuntabel, agar kredibilitas hasil pemeriksaan tidak diragukan. Latar belakang inilah yang mendasari pembahasan prospek penolakan perolehan alat bukti secara melawan hukum dalam Rancangan Kitab Undang-Undang Hukum Acara Pidana (RUU KUHP).

Isu perolehan alat bukti secara melawan hukum semakin menuntut perhatian global melalui prinsip *exclusionary rules of evidence*.⁴ Salah satu tantangan terbesar dalam praktik peradilan pidana di Indonesia adalah perolehan alat bukti yang melanggar prosedur hukum, atau sering disebut sebagai “*unlawfully obtained evidence*”.⁵ Meskipun KUHP mengatur lima jenis alat bukti yang sah dalam Pasal 184; keterangan saksi, keterangan ahli, surat, petunjuk, dan keterangan terdakwa, pengaturan mengenai tata cara perolehan secara eksplisit belum memadai.⁶ Kondisi ini menyebabkan aparat penegak hukum terkadang memprioritaskan kelancaran pengumpulan bukti demi kepentingan penindakan, tanpa cukup memperhatikan hak-hak tersangka yang dijamin oleh konstitusi dan instrumen internasional, seperti ICCPR. Akibatnya, derajat keadilan dapat terganggu apabila alat bukti tercemar oleh praktik penyiksaan, intimidasi, atau penyitaan ilegal. Kondisi ini tidak hanya mengancam hak-hak tersangka atau terdakwa, tetapi juga menurunkan kepercayaan publik pada sistem peradilan. Ketidadaan sanksi tegas atas perolehan bukti yang cacat hukum menjadikan praktik ilegal tersebut berulang, yang pada gilirannya melemahkan perlindungan hak asasi dan prinsip praduga tak bersalah.

Secara normatif, prinsip *exclusionary rules* yang lahir dari doktrin “*fruit of the poisonous tree*” di Amerika Serikat menegaskan bahwa bukti yang diperoleh melalui pelanggaran hak, baik berupa *illegal searches*, penyitaan, maupun interogasi harus dikesampingkan dalam persidangan. Konsep ini pertama kali dirumuskan dalam *Weeks v. United States* (1914) dan mencapai puncaknya melalui putusan *landmark decision* *Mapp v. Ohio* (1961) yang mewajibkan pengadilan menolak bukti hasil penggeledahan tanpa surat perintah yang sah.⁷ Berbagai sistem hukum Barat seperti Jerman, Belanda, dan Perancis mengadopsi doktrin *fruit of the poisonous tree* yang menolak bukti turunan dari bukti ilegal, sementara reformasi di beberapa negara Asia turut menguatkan mekanisme perlindungan HAM ini.⁸ Di samping itu, asas *due process of law* memberi landasan bahwa negara tidak boleh mendapat keuntungan dari kesalahannya sendiri,⁹ sehingga penerapan *exclusionary rules* tidak hanya soal prosedur, melainkan juga institusionalisasi penghormatan HAM.

Praktik penolakan bukti melawan hukum di Indonesia masih sporadis dan bergantung pada kesadaran hakim. Beberapa putusan di Indonesia telah menyingkap wawasan penerapan *exclusionary rules* secara implisit. Misalnya, Putusan Mahkamah Agung No. 545 K/Pid.Sus/2011 membatalkan dakwaan atas dasar Berita Acara

- 1 Delvino Aldy Djiwandono, Felicia Tanalina Ylma, and Diqa Qothrunnada Amanda Nur Sella, “Prinsip Exclusionary Rules of Evidence Dalam Pembuktian Tindak Pidana Narkotika,” *UNES Law Review* 6, no. 4 (2024): 12066–12080, hlm. 12067. <https://doi.org/10.31933/unesrev.v6i4.2064>.
- 2 Franchois Tulkens, “The Paradoxical Relationship between Criminal Law and Human Rights,” *Journal of International Criminal Justice* 9, no. 3 (July 19, 2011): 577–595, hlm. 579. <https://doi.org/10.1093/jicj/mqr028>.
- 3 Marfuatul Latifah, “Perlukah Mengatur Prinsip Exclusionary Rules of Evidence Dalam RUU Hukum Acara Pidana?,” *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 12, no. 1 (2021): 101–122, hlm. 102. <https://doi.org/10.22212/jnh.v12i1.2123>.
- 4 Adam Ilyas, “Praktik Penerapan Exclusionary Rules Di Indonesia,” *Masalah-Masalah Hukum* 50, no. 1 (2021): 49–59, hlm. 50. <https://doi.org/10.14710/mmh.50.1.2021.49-59>.
- 5 Eddy O.S. Hiarij, *Teori & Hukum Pembuktian* (Jakarta: Erlangga, 2012), hlm. 11-12.
- 6 Djiwandono, Ylma, and Sella, “Prinsip Exclusionary Rules of Evidence Dalam Pembuktian Tindak Pidana Narkotika,” hlm. 12067-12068.
- 7 Zul Khaidir Kadir, “Menulis Ulang Keadilan: Bagaimana Doktrin Suppression of Evidence Dalam Preseden Amerika Serikat Menata Kembali Prosedur Peradilan Pidana,” *Jaksa : Jurnal Kajian Ilmu Hukum Dan Politik* 2, no. 4 (2024): 1–18, hlm. 3. <https://doi.org/https://doi.org/10.51903/jaksa.v2i4.2099>.
- 8 Ian Dennis, *The Law of Evidence 6th Ed*, 6th ed. (London: Sweet & Maxwell Ltd, 2017), hlm. 6.
- 9 Adam Ilyas, “Praktik Penerapan Exclusionary Rules Di Indonesia.” hlm. 50.

Pemeriksaan yang tercemar penyiksaan penyidik,¹⁰ hingga pembatalan putusan Pengadilan Negeri Blambangan Umpu No. 105/Pid.B/2013/PN.BU karena cacat prosedural penggeledahan.¹¹ Kasus-kasus tersebut menunjukkan bahwa meski KUHAP belum secara tegas mengatur *exclusionary rules*, hakim telah mengambil sikap melindungi hak tersangka dengan mencoret alat bukti yang diperoleh ilegal. Akan tetapi kasus seperti putusan narkotika MA No.417 K/Pid.Sus/2011 menunjukkan bahwa hakim kerap mengabaikan bukti ilegal meski relevan, sehingga memicu *yudex facti* yang mengabaikan asas *exclusionary rules*.¹² Praktik pengadilan tinggi dan negeri dalam menolak keterangan yang tercemar paksaan hanya terjadi pada kasus tertentu, Dengan adanya tanpa dasar hukum eksplisit dalam KUHAP, penerapan ketentuan tersebut bersifat sporadis dan tidak konsisten.¹³ Sehingga tidak memberikan perlindungan hak asasi yang sistematis bagi tersangka.

Permasalahan lebih lanjut muncul tatkala terdapat perbedaan konseptual antara “alat bukti” dan “barang bukti” baik dalam KUHAP maupun RUU KUHAP. Di Indonesia, barang bukti tidak otomatis tergolong alat bukti sah, berbeda dengan praktik di Amerika di mana bukti fisik termasuk dalam cakupan *exclusionary rules*.¹⁴ Perbedaan terminologi ini menimbulkan ketidakjelasan praktis, sehingga bukti yang jelas-jelas diperoleh dengan cara melanggar hukum sering kali tetap diaplikasikan, hanya “derajat”¹⁵ pembuktiannya diturunkan, bukan dikesampingkan.¹⁶ Hal ini diperparah oleh kekurangan pengaturan upaya paksa dan pengawasan yudikatif yang masih bersifat administratif semata, padahal mekanisme praperadilan seharusnya melakukan uji substantif tindakan penyidik berdasarkan prinsip *due process*.¹⁷ Akibatnya, celah normatif ini mereduksi fungsi perlindungan HAM dan memudahkan aparat untuk mengedepankan hasil penyidikan daripada prosedur yang sah.

Di Amerika Serikat, prinsip *exclusionary rules* berfungsi melindungi individu dari *illegal searches* dan *illegal seizures* melalui doktrin “*fruit of the poisonous tree*,” sehingga bukti turunan dari pelanggaran hak pun dikesampingkan.¹⁸ Di Indonesia, di sisi lain, perolehan barang bukti secara melawan hukum tidak serta merta menggugurkan pemanfaatannya di persidangan; yang terjadi hanyalah penurunan derajat pembuktian. Oleh karena itu kiranya sangat penting dilakukan revisi RUU KUHAP, untuk memperbaiki kekurangan tersebut, yakni dengan memasukkan barang bukti ke dalam kategori alat bukti sah, agar aspek praktis pembuktian tetap terjamin, dari sudut pandang kepentingan praktis sebenarnya jika barang bukti dipandang sebagai alat bukti akan lebih mempermudah pembuktian, sekaligus memperkuat perlindungan hak asasi terdakwa dan memberikan efek jera kepada aparat penegak hukum.

Dalam tinjauan kepustakaan sebelumnya tampak pergeseran fokus kajian tentang *exclusionary rules*. Pertama, penelitian terdahulu umumnya menekankan aspek normatif dan yuridis penerapan *exclusionary rules* dalam praktik pembuktian pidana di Indonesia, dengan studi kasus pada tindak pidana narkotika,¹⁹ praperadilan,²⁰

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- 10 Institute For Criminal Justice Reform, “SS Vs. Negara Republik Indonesia,” *icjr.or.id*, 2011, <https://icjr.or.id/ss-vs-negara-republik-indonesia/>.
 - 11 Hafidz Yanuar Ramadhani and Waluyo, “Implementasi Prinsip Exclusionary Rules of Evidence Dalam Sistem Pembuktian Peradilan Indonesia,” *Kabilah: Journal of Social Community* 9, no. 2 (2024): 318–330, hlm. 328. <https://doi.org/https://doi.org/10.35127/kabillah.v9i2.395>.
 - 12 Faisal Setiyadi, Fitter Trisna Wardana, and Aji Dian Utama, “Tinjauan Yuridis Pengajuan Kasasi Oleh Terdakwa Atas Dasar Yudex Facti Mengabaikan Asas Exclusionary Rules Dalam Perkara Narkotika (Studi Kasus Putusan MA No.417 K/Pid.Sus/2011),” *Verstek* 2, no. 3 (2014): 132–141, hlm. 132. <https://doi.org/https://doi.org/10.20961/jv.v2i3.38935>.
 - 13 Alvin Evrialdo Noerdin, Hajim Lasabuda, and Iip Purwantini Jeane Mamonto, “Normative-Conceptual Analysis of Physical Evidence Recognition under the Sexual Violence Law in Indonesian Criminal Procedure,” *JURIST ACADEMIA* 1, no. 1 (2025): 10–20, hlm. 16. <http://ojs.ylbhbm.or.id/index.php/ja/article/view/2%0A>.
 - 14 Adam Ilyas, “Praktik Penerapan Exclusionary Rules Di Indonesia.” hlm. 50.
 - 15 “derajat pembuktian diturunkan” berarti bukti yang diperoleh secara melawan hukum tidak otomatis dikesampingkan; nilainya dikurangi jadi petunjuk dan pertimbangan hakim, bukan keyakinan penuh. Praktik ini timbul karena kekosongan norma KUHAP.
 - 16 Albert Aries, “Urgensi Pembaruan KUHAP,” *Harian Kompas*, 2024, https://www.kompas.id/artikel/urgensi-pembaruan-kuhap?open_from=Search_Result_Page.
 - 17 Fachrizal Afandi, “Mendesak, Reformasi Hukum Acara Penyidikan,” *Harian Kompas*, 2025, https://www.kompas.id/artikel/mendesak-reformasi-hukum-acara-penyidikan?open_from=Search_Result_Page.
 - 18 Adam Ilyas, “Praktik Penerapan Exclusionary Rules Di Indonesia.” hlm. 49.
 - 19 Djiwandono, Ylma, and Sella, “Prinsip Exclusionary Rules of Evidence Dalam Pembuktian Tindak Pidana Narkotika.” hlm. 12066.
 - 20 Ainun Yati Octavia, Erdianto Effendi, and Ferawati Ferawati, “Pengujian Prinsip Exclusionary Rules Dalam Sidang Praperadilan Di Indonesia,” *Jurnal Hukum Malahayati* 6, no. 1 (2025): 40–54, <https://doi.org/https://doi.org/10.33024/jhm.v6i1.19381>.

serta kajian yurisprudensi;²¹ fokus mereka terbatas pada penafsiran frasa “alat bukti yang sah”, implementasi diskresi hakim, serta ulasan historis doktrin “*fruit of the poisonous tree*”.²² Beberapa kajian komparatif menggambarkan aturan AS (*Mapp v. Ohio*) dan Belanda (Pasal 359a WvSv),²³ namun kurang mengaitkan temuan dengan kebutuhan redaksional dan mekanisme operasional dalam RUU KUHAP. Studi empiris menunjukkan praktik penurunan derajat pembuktian alih-alih pengesampingan bukti dan minimnya sanksi terhadap perolehan bukti ilegal sehingga penerapan di pengadilan bersifat sporadis. Artikel ini membedakan diri dengan menawarkan rumusan redaksional operasional untuk RUU KUHAP serta rancangan mekanisme uji yudisial yang kontekstual dan aplikatif.

Analisis kesenjangan memperlihatkan empat kekurangan terukur: (1) kekosongan redaksional KUHAP terkait pengakuan barang bukti sebagai bagian dari alat bukti sehingga muncul ambiguitas penerimaan bukti; (2) sifat penerapan *exclusionary rules* yang implisit dan sporadis, bergantung pada diskresi hakim tanpa pedoman operasional baku; (3) kelemahan mekanisme pengawasan yudisial seperti praperadilan yang lebih administratif sehingga belum efektif menegakkan uji substantif terhadap tindakan penyidik; dan (4) ketiadaan sanksi administratif, pidana, atau kompensasi yang jelas sehingga efek *deterrence* lemah. Kesenjangan ini memicu distorsi pembuktian, menurunkan legitimasi peradilan, dan membuka peluang penyalahgunaan wewenang. Oleh sebab itu penelitian ini memfokuskan diri mengisi celah tersebut dengan merumuskan definisi operasional, prosedur uji bukti, penguatan kewenangan Praperadilan – Hakim Pemeriksa Pendahuluan, serta paket sanksi dan mekanisme pemulihan hak bagi korban pelanggaran, disertai pedoman implementasi.

Tujuan penelitian ini dirumuskan untuk menutup kesenjangan melalui tujuan ilmiah dan kebijakan yang konkret. Secara khusus penelitian bertujuan: (1) memetakan dan mensintesis konsep *exclusionary rules* serta *due process of law* dalam konteks pembuktian pidana; (2) menganalisis praktik penerimaan bukti ilegal di peradilan Indonesia dengan tradisi *common law system-civil law system*, dan dinamika putusan praperadilan serta MA; (3) merumuskan redaksional pasal RUU KUHAP yang memuat definisi “*unlawful legal evidence*”, prosedur uji alat bukti, pihak penguji, dan aturan pembuktian bukti elektronik; (4) merancang mekanisme sanksi administratif, pidana, dan kompensasi serta pengawasan independen; dan (5) menghasilkan rekomendasi kebijakan aplikatif bagi DPR dan Pemerintah, hakim, dan penegak hukum. Penelitian juga menghasilkan formula klausul model, alur operasional pengujian bukti, *brief* kebijakan, serta agenda pelatihan untuk implementasi secara sistemik terukur dan berkelanjutan.

Penelitian ini menjadi relevan mengingat hingga saat ini belum ada kajian aktual, mencakup kebutuhan mendesak untuk mengharmonisasi ketentuan praktik *exclusionary rules* universal seperti di *Common Law* (Amerika Serikat) dan *Civil Law* (Belanda) serta implikasinya bagi reformasi KUHAP di Indonesia. Lebih jauh, meski beberapa literatur menyentuh eksistensi implisit *exclusionary rules* dalam KUHAP, belum terdapat usulan konkret tentang redaksional dan mekanisme operasionalisasi norma tersebut dalam RUU KUHAP yang tengah digodok. Dengan memperluas perspektif komparatif dan mengidentifikasi celah regulasi, penelitian ini diharapkan menambah khazanah ilmu hukum acara pidana dan menjadi referensi bagi pembuat undang-undang, akademisi, serta praktisi peradilan dan memberikan rekomendasi kebijakan yang kontekstual dan aplikatif. *Novelty* riset ini terletak pada analisis integratif perbandingan dua sistem hukum dan pengusulan formula redaksional pasal RUU KUHAP.

Sebagai penutup, artikel ini akan membahas Konsep *Exclusionary Rules* Universal; termasuk doktrin *fruit of the poisonous tree* dan prinsip *due process of law* dalam reformasi hukum acara pidana Indonesia, serta memetakan konsep “*unlawful legal evidence*” dalam konteks pembaharuan hukum acara pidana di Indonesia. Penelitian ini menawarkan kebaruan (*novelty*) melalui pendekatan komparatif dan perumusan klausul eksplisit *exclusionary rules* dalam RUU KUHAP yang belum pernah dikaji secara aktual. Tujuannya adalah memperkuat payung keilmuan dan praktek sistem peradilan pidana, sehingga RUU KUHAP yang dihasilkan tidak hanya mencerminkan prinsip keadilan substantif, tetapi juga melindungi hak asasi secara menyeluruh dan konsisten dalam menegakkan kebenaran materiil.

21 Ramadhani and Waluyo, “Implementasi Prinsip Exclusionary Rules of Evidence Dalam Sistem Pembuktian Peradilan Indonesia.”

22 Adam Ilyas, “Praktik Penerapan Exclusionary Rules Di Indonesia.”

23 Marfuatul Latifah, “Perlukah Mengatur Prinsip Exclusionary Rules of Evidence Dalam RUU Hukum Acara Pidana?”

2. Metode

Metode penelitian yang digunakan adalah penelitian doktrinal atau penelitian hukum yuridis-normatif dengan orientasi *doctrinal research* yang diperkaya *reform-oriented* dan *theoretical research* untuk merumuskan rekomendasi *ius constituendum* pengaturan bukti ilegal dalam RUU KUHAP.²⁴ Pendekatan statuta menelaah KUHAP (UU No.1/1981) dan Putusan Mahkamah Konstitusi No.20/PUU-XIV/2016 sebagai rujukan interpretatif untuk mengevaluasi konsistensi norma pembuktian dan perlindungan *due process*. Pendekatan konseptual membedah asas, prinsip *exclusionary rules*, doktrin *fruit of the poisonous tree*, serta teori-teori pembuktian yang relevan untuk merumuskan standar normatif. Analisis *doctrinal* mengacu pada definisi Amrit Kharel.²⁵ Prinsip inventarisasi serta penalaran deduktif menurut Peter Mahmud Marzuki menjadi landasan metodologis.²⁶ Pengolahan bahan mengikuti tahapan inventarisasi, klasifikasi, dan sistematisasi menurut Dr. Muhaimin untuk menjaga reliabilitas serta validitas temuan penelitian utama terukur.²⁷

Pendekatan komparatif akan membandingkan penerapan *exclusionary rules* pada sistem *Common Law* dan *Civil Law* untuk menilai kelebihan dan kelemahan model asing serta kemungkinan adaptasi pada tatanan hukum Indonesia.²⁸ Pendekatan kasus menelaah putusan pengadilan berkekuatan hukum tetap yang relevan sebagai bahan empiris yuridis untuk mengkaji *ratio decidendi* hakim. Pengumpulan bahan hukum dibatasi pada studi pustaka dan studi dokumen dengan prosedur inventarisasi, *card system*, klasifikasi sumber primer dan sekunder, serta penelusuran bola salju sebagaimana dijelaskan Dr. Muhaimin.²⁹ Analisis bahan menggunakan interpretasi gramatikal, sistematis, historis, komparatif, dan interpretasi antisipatif atau futuristik khususnya terhadap draf RUU-KUHAP untuk merumuskan rekomendasi normatif.³⁰ Rujukan metodologis merujuk Sudikno Mertokusumo untuk penafsiran historis.³¹ Bruggink dijadikan rujukan untuk interpretasi bahasa.³² Analisis bersifat kualitatif-preskriptif dengan penarikan kesimpulan deduktif dan rekomendasi legislasi.

3. Temuan dan Pembahasan

3.1. Universal Exclusionary Rules

Konsep *exclusionary rules* universal berakar pada doktrin “*fruit of the poisonous tree*” yang pertama kali diaktualisasikan oleh *US Supreme Court* dalam *Weeks v. United States* pada tahun 1914, ketika pengadilan menolak bukti yang diperoleh melalui pengeledahan tanpa surat perintah sebagai pelanggaran Amandemen Ke-4 Konstitusi AS.³³ Doktrin ini berkembang melalui *Silverthorne Lumber Co. v. United States* dan *Nardone v. United States* yang memperluas cakupan penolakan tidak hanya pada bukti primer, melainkan juga turunan (“*fruit of the poisonous tree*”) – segala bukti yang “tumbuh” dari pelanggaran awal harus dikesampingkan.³⁴ Esensi doktrin ini terletak pada upaya mencegah negara meraih keuntungan dari kesalahan sendiri dan menghormati klausul “*unreasonable searches and seizures*” Amandemen Keempat Konstitusi AS.

Karakter universal *exclusionary rules* dapat ditelusuri ke pendekatan normatif dan faktual. Pendekatan normatif menekankan larangan mutlak penggunaan bukti yang diperoleh secara ilegal, sedangkan pendekatan

24 Kevin C. McMunigal, “A Statutory Approach to Criminal Law,” *Saint Louis University School of Law* 48, no. 4 (2004): 1285–1296, hlm. 1290. <https://scholarship.law.slu.edu/lj/vol48/iss4/12/>.

25 Amrit Kharel, “Doctrinal Legal Research,” *SSRN Electronic Journal*, 2018, hlm. 4. https://www.academia.edu/77370267/Doctrinal_Legal_Research.

26 Peter Mahmud Marzuki, *Penelitian Hukum (Edisi Revisi)*, Cet. Ke-13 (Jakarta: Pranadamedia Group, 2017), hlm. 89.

27 Muhaimin, *Metode Penelitian Hukum*, Cet. 1 (Mataram-NTB: Mataram University Press, 2020), hlm. 67.

28 I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*, Cet. Ke-3 (Jakarta Timur: Prenadamedia group, 2019), hlm. 162.

29 Muhaimin, *Metode Penelitian Hukum*, hlm. 64.

30 Tunggul Ansari Setia Negara, “Normative Legal Research in Indonesia: Its Origins and Approaches,” *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (2023): 1–9, hlm. 6. <https://doi.org/https://doi.org/10.22219/aclj.v4i1.24855>.

31 Sudikno Mertokusumo, *Penemuan Hukum : Suatu Pengantar* (Yogyakarta: Cahaya Atma Pustaka, 2014), hlm. 57.

32 Bruggink dalam Philipus M. Hadjon dan Tatiek Sri Djatmiati, *Argumentasi Hukum*, Cet Ke-8 (Yogyakarta: Gadjah Mada University Press, 2017), hlm. 26.

33 Annalisa Reidt, “The Admissibility of Secondary Evidence – Is the US-American Fruit of the Poisonous Tree Doctrine Being Replaced by the Balancing Exercise?,” *FRAUD AND CORRUPTION IN AN INTERNATIONAL CONTEXT* (Wellington, 2024), hlm. 4. <https://ir.wgtn.ac.nz/handle/123456789/32457>.

34 Annalisa Reidt, “The Admissibility of Secondary Evidence – Is the US-American Fruit of the Poisonous Tree Doctrine Being Replaced by the Balancing Exercise?,” hlm. 4.

faktual menekankan efek jera (*deterrence*) agar aparat kepolisian tidak mengulangi pelanggaran konstitusional individu.³⁵ Rationale “*but-for causation*” menjelaskan bahwa jika pelanggaran prosedur tidak terjadi, temuan bukti juga tidak akan ada, sehingga bukti “*fruit*” tersebut tercemar dan tidak sah. Perbandingan dengan hukum perdata mengungkapkan bahwa *civil law* memerlukan keterkaitan kausalitas yang lebih ketat (*proximate cause*), namun tidak menerapkan logika *fruit of the poisonous tree* secara meluas seperti di ranah pidana.³⁶ Dalam sistem *Common Law*, penerapan doktrin ini menegaskan keseimbangan antara pencarian kebenaran materiil dan penghormatan hak asasi, sesuai adagium “lebih baik membebaskan seribu yang bersalah daripada menghukum satu yang tidak bersalah.”

Seiring waktu, implementasi *exclusionary rules* terus dikembangkan melalui putusan-putusan AS yang mengukuhkan pengecualian-pengecualian doktrinal: *independent source* (bukti independen), *inevitable discovery* (penemuan bukti yang tak terelakkan), dan *attenuation of taint* (pelemahan bukti ternodai).³⁷ Ketiga pengecualian ini bertujuan menjaga proporsionalitas antara keadilan prosedural dan efektifitas penegakan hukum dengan memungkinkan bukti yang, meski terkait pelanggaran awal, ditemukan melalui sumber terpisah, pasti ditemukan, atau memiliki keterkaitan yang terlalu lemah untuk dianggap terkontaminasi.³⁸ Meskipun pengecualian ini mereduksi ruang lingkup penerapan prinsip, doktrin *exclusionary rules* tetap menjadi mekanisme penting untuk menjaga integritas proses peradilan dan menghormati hak dasar terdakwa. Secara historis, pengecualian tersebut mencerminkan adaptasi prinsip *exclusionary rules* terhadap dinamika praktik peradilan modern dan penerapan asas *torts* “*proximate cause*” untuk menakar hubungan kausal antara pelanggaran aparat dan bukti.

Pada ranah *Civil Law* dan *Common Law*, seperti di Belgia dan Inggris, penerapan *exclusionary rules* juga mempertimbangkan perbedaan struktur persidangan. Dari perspektif perbandingan, struktur persidangan *common law* yang memisahkan fase eksklusi bukti sebelum persidangan (*ex ante*) kontras dengan sistem *civil law* yang menggunakan struktur unitaris, di mana hakim profesional terpapar seluruh bukti, sah maupun tidak, dan kemudian melakukan pengabaian (*disregard*) terhadap bukti tercemar saat memutuskan perkara.³⁹ Negara-negara Eropa seperti Jerman, Belanda, dan Belgia memiliki sistem hibrida: meski tidak menerapkan eksklusi fisik, pengadilan tetap menuntut *disregards* tertulis dalam putusan apabila bukti diperoleh secara melawan hukum. Pendekatan ini menjamin bahwa hakim, sekalipun telah melihat bukti, harus secara aktif mengecualikannya dalam pertimbangan putusan. Di Belgia, Mahkamah Kasasi konsisten menerapkan doktrin *fruit of the poisonous tree* dengan menolak bukti turunan saat bukti asli dikesampingkan berdasarkan dua dari tiga dasar pengecualian yang diatur dalam Kitab Undang-Undang Hukum Acara Pidana Belgia.⁴⁰ Di Inggris, PACE 76–78 memisahkan perlakuan antara *confession* (pernyataan terdakwa) dan *non-confession evidence*, dengan pengaturan ketat terhadap “*oppression*” dan “*unreliability*,” serta kebijakan diskresi pihak pengadilan atas bukti ilegal.⁴¹

Tabel berikut menyajikan ringkasan perbandingan penerapan *exclusionary rule* di berbagai sistem hukum untuk memberikan gambaran yang lebih jelas.

35 Mark A Lemley, “The Fruit of the Poisonous Tree in IP Law,” *Iowa Law Review* 103, no. 245 (2016): 1–32, hlm. 1. <https://doi.org/http://dx.doi.org/10.2139/ssrn.2867099>.

36 Mark A Lemley, “The Fruit of the Poisonous Tree in IP Law,” hlm. 2.

37 Annalisa Reidt, “The Admissibility of Secondary Evidence – Is the US-American Fruit of the Poisonous Tree Doctrine Being Replaced by the Balancing Exercise?” hlm. 4.

38 Daniel B. Yeager, “A History of Fruit of the Poisonous Tree (1916-1942),” *SSRN Electronic Journal* 67, no. 1 (2023): 51–98, hlm. 53. <https://doi.org/10.2139/ssrn.4385356>.

39 Michele Panzavolta, Elise Maes, and Anna Mosna, “Streamlining the Exclusion of Illegally Obtained Evidence in Criminal Justice,” *Ku Leuven I*, no. 1983 (2022): 1–133, hlm. 44. https://www.fairtrials.org/app/uploads/2022/02/Streamlining_exclusion_KUL.pdf.

40 Michele Panzavolta, Elise Maes, and Anna Mosna, “Streamlining the Exclusion of Illegally Obtained Evidence in Criminal Justice,” hlm. 62.

41 Stephen C. Thaman, “‘Fruits of the Poisonous Tree’ in Comparative Law,” *Southwestern Journal of International Law* 16, no. 257 (2010): 333–384, hlm. 360-361. <https://scholarship.law.slu.edu/faculty/257/>.

Tabel 2.1: Analisis Komparatif Penerapan *Exclusionary Rule* dalam Sistem Hukum Berbeda

Yurisdiksi	Sistem Hukum	Dasar Hukum Utama	Lingkup Penerapan	Justifikasi Utama yang Ditekankan	Relevansi untuk RUU KUHAP
Amerika Serikat	<i>Common Law</i>	Konstitusi (Amandemen IV, V, VI) & Yurisprudensi (Mapp v. Ohio)	Historis kaku, kini uji keseimbangan dengan 4 (empat) pengecualian	Efek Jera terhadap Pelanggaran oleh Polisi	Menyediakan model konstitusional orisinal, namun rigiditas dan kompleksitas pengecualiannya mungkin kurang sesuai.
Inggris (UK)	<i>Common Law</i>	Common Law & Diskresi Yudisial (Uji Keadilan)	Diskresi yudisial, fokus pada fairness (keadilan persidangan) dan reliabilitas, terutama untuk pengakuan	Keadilan Persidangan (<i>Fair Trial</i>) & Reliabilitas Bukti	Menawarkan model common law non-AS yang berfokus pada diskresi hakim dan keadilan, bukan efek jera yang kaku.
Jerman	<i>Civil Law</i>	Undang-Undang Dasar (<i>Grundgesetz</i>), §136a StPO & Uji Keseimbangan Yudisial	Uji Keseimbangan Yudisial (Proporsionalitas)	Perlindungan Martabat Manusia & Proporsionalitas	Menawarkan model analog berbasis keseimbangan konstitusional, relevan dengan konstitusi yang berorientasi pada HAM.
Belanda	<i>Civil Law</i>	KUHAP (Pasal 359a <i>WvSv</i>)	Uji Keseimbangan Berdasarkan Undang-Undang	Keteraturan Prosedural & Peradilan yang Adil (<i>Fair Trial</i>)	Menyediakan model pengaturan dalam kodifikasi <i>civil law</i> , menawarkan templat legislatif yang langsung dapat diadaptasi.
Indonesia (praktik saat ini)	<i>Civil Law</i>	Interpretasi Yudisial terhadap KUHAP (terkait “alat bukti yang sah”)	Diskresioner & Tidak Konsisten	(Tidak ada justifikasi tunggal yang terkodifikasi)	Menyoroti ambiguitas saat ini dan kebutuhan mendesak akan kodifikasi yang jelas dan memberikan kepastian hukum.

Meskipun terdapat perbedaan teknis dalam implementasinya, baik melalui eksklusi *ex ante* di sistem *common law* maupun mekanisme *disregard* oleh hakim di sistem *civil law*, keduanya berakar pada tujuan universal yang sama. Perbedaan pendekatan ini sejatinya merefleksikan cara yang beragam untuk menyeimbangkan dua kepentingan fundamental dalam peradilan pidana: pencarian kebenaran materiel dan perlindungan hak-hak konstitusional individu.⁴² Inti dari setiap mekanisme tersebut adalah untuk memastikan bahwa negara tidak diuntungkan dari perbuatannya yang melanggar hukum, sekaligus menjaga integritas institusi peradilan agar tidak tercemar oleh bukti yang diperoleh secara ilegal.⁴³ Dengan demikian, keragaman metode ini bukanlah cerminan dari perbedaan tujuan, melainkan manifestasi dari komitmen universal yang sama terhadap perlindungan hak

42 Jenia Iontcheva Turner and Thomas Weigend, “The Purposes and Functions of Exclusionary Rules: A Comparative Overview. In: Gless, S., Richter, T. (Eds) Do Exclusionary Rules Ensure a Fair Trial?,” *Ius Gentium: Comparative Perspectives on Law and Justice* 74, no. Springer, Cham (2019): 255–282, https://doi.org/10.1007/978-3-030-12520-2_8.

43 Luye Mou, “The Political Heart of China’s Exclusionary Rule of Illegally Obtained Evidence: A Comparative Study with the International Criminal Court,” *Journal of East Asia and International Law* 14, no. 2 (2021): 319–340, <https://doi.org/10.14330/jeil.2021.14.2.05>.

asasi manusia dan prinsip peradilan yang adil (*fair trial*) dalam kerangka supremasi hukum.⁴⁴

Distingsi antara “*original evidence*” dan “*derivative evidence*” krusial dalam sistem *exclusionary rules*. *Original evidence* mencakup bukti primer yang diperoleh langsung dari pelanggaran hukum, sedangkan *derivative evidence* merupakan hasil turunan dari bukti primer tersebut. Di Belgia, doktrin *fruits of the poisonous tree* diterapkan secara kaku: pengecualian bukti primer secara otomatis mengecualikan semua bukti turunan. Sebaliknya, Inggris membedakan antara *confession* dan *non-confession evidence*; *confession* turunan hanya dikecualikan jika terdapat “*malign influence*” yang masih membayangi, sedangkan *non-confession* turunan masih dapat diterima kecuali hakim menggunakan diskresi berdasarkan section 78 PACE.⁴⁵

Secara konseptual, prinsip *exclusionary rules* universal berakar pada empat justifikasi—prinsip reliabilitas (menghindari risiko bukti yang terkontaminasi menyesatkan hakim), prinsip *deterrence* (memberi efek jera), prinsip remedial atau protektif (memberi ganti rugi lewat eksklusi sebagai remedium pelanggaran hak), serta prinsip integritas (mempertahankan kredibilitas institusi peradilan dan kepercayaan publik).⁴⁶ Di satu pihak, pengecualian bukti ilegal menjaga agar fakta yang dipertimbangkan hakim bebas dari kontaminasi; di sisi lain, pengecualian juga berfungsi mendisiplinkan aparat penegak hukum dan mempertahankan kepercayaan publik terhadap sistem peradilan. Dengan sistematisasi perbedaan aturan di berbagai yuridiksi, prinsip universal ini menegaskan perlunya keseimbangan dinamis antara *truth-seeking*⁴⁷ dan *due process* yang akhirnya memperkuat supremasi hukum di manapun diterapkan. Setiap sistem hukum menyeimbangkan nilai pencarian kebenaran materiil dan penghormatan hak asasi sesuai konteks lokal.⁴⁸ Dengan memahami keragaman pendekatan ini, pembaruan KUHAP dapat dirancang untuk mengadopsi mekanisme eksklusi bukti yang optimal, menghormati *due process*, dan memperkuat kepercayaan publik terhadap penegakan hukum.

3.2. Prinsip *Due Process of Law* dalam Draf Rancangan Kitab Undang-Undang Hukum Acara Pidana

Doktrin *due process of law* menegaskan bahwa setiap peradilan pidana harus menjamin hak individu untuk hadir di hadapan badan peradilan yang memutuskan soal kehidupan, kebebasan, atau harta benda, dengan hak untuk didengar, menghadirkan bukti, mengemukakan pembelaan baik secara lisan maupun bukti tertulis, serta berkesempatan menentang setiap fakta material yang membebani dirinya.⁴⁹ *Due process of law* mengusung prinsip supremasi hukum, artinya tidak ada satu pun bagian materi hukum yang dibenarkan dilanggar oleh dalih penegakan hukum lainnya. Asal-mula doktrin ini tertuang dalam *Magna Charta* 1215 sebagai “*constitutional guaranty ... that no person will be deprived of life, liberty, or property for reasons that are arbitrary*,” sehingga menolak *arbitrary process* menegaskan tidak ada orang yang boleh dirampas kebebasan atau properti tanpa “*constitutional guaranty*” berupa *due process* dan melindungi warga negara dari tindakan sewenang-wenang pemerintah.⁵⁰

Di Inggris dan Amerika, *due process* berkembang menjadi dua dimensi, [prosedural dan substantif], juga mempengaruhi model peradilan pidana ala Packer. *Due process* tidak sekadar prosedural (*fair trial*), tetapi juga substantif (*ordered liberty*) yang melindungi “*fundamental rights*” seperti hak atas kehidupan, kebebasan berpendapat, dan kepemilikan harta.⁵¹ Herbert L. Packer memperkenalkan dua model sistem peradilan: *Crime*

44 Na Jiang, “The Potential to Secure a Fair Trial Through Evidence Exclusion: A Chinese Perspective,” *Ius Gentium: Comparative Perspectives on Law and Justice* 74, no. Springer, Cham (2019): 163–211, https://doi.org/10.1007/978-3-030-12520-2_6.

45 Panzavolta, Maes, and Mosna, hlm. 63.

46 *Ibid*, hlm. 80.

47 Zahri Kurniawan et al., “Exclusionary Rule Principle and Constitutional Rights Protection in Evidence Seeking,” *International Journal of Advanced Research (IJAR)* 10, no. 04 (2022): 864–871, <https://dx.doi.org/10.21474/IJAR01/14623>.

48 Nazhif Ali Murtadho, Muhammad Galuh Pamungkas Wahyu Ramadhan, and Rama H. Adam, “Ratio Legis Istilah Novum Pada Herziening (Peninjauan Kembali) Sebagai Upaya Hukum Luar Biasa Dalam Sistem Hukum Pidana Di Indonesia,” *Al-Jinayah : Jurnal Hukum Pidana Islam* 10, no. 2 (2024): 180–197, hlm. 193. <https://doi.org/https://doi.org/10.15642/aj.2024.10.2.180-197>.

49 Indra Hafit Zahrulswendar, “Praperadilan Dan Hakim Pemeriksa Pendahuluan Sebagai Sarana Kontrol Upaya Paksa Terhadap Tersangka Dalam Perspektif Hak Asasi Manusia” (Tesis: Universitas Islam Indonesia, 2022), hlm. 16-17. <https://dspace.uui.ac.id/bitstream/handle/123456789/40730/20912024.pdf?sequence=1>.

50 Indra Hafit Zahrulswendar, “Praperadilan Dan Hakim Pemeriksa Pendahuluan Sebagai Sarana Kontrol Upaya Paksa Terhadap Tersangka Dalam Perspektif Hak Asasi Manusia” hlm. 17.

51 Zico Junius Fernando, “Due Process of Law Dalam Penanggulangan Tindak Pidana Di Indonesia,” *Majalah Keadilan* Nazhif Ali Murtadho

Control Model yang menekankan efisiensi dan *presumption of guilt*, serta *Due Process Model* yang menekankan kualitas prosedur dan *presumption of innocence*.⁵² *Due Process Model* diibaratkan sebagai “*obstacle course*”, setiap tahap peradilan menjadi hambatan bagi negara agar tidak semena-mena. Model ini menegaskan *presumption of innocence*, hak atas penasihat hukum, dan peran hakim sebagai penengah. RUU KUHAP perlu memadukan nilai adversarial ini agar setiap upaya paksa berada di bawah kendali hukum.

Due Process Model memusatkan pada perlindungan hak asasi terdakwa, memperlambat proses melalui rintangan formal demi mencegah penyalahgunaan wewenang, sedangkan *Crime Control Model* menekankan efisiensi dan penindakan cepat atas dugaan kejahatan.⁵³ Walau saling berlawanan, kedua model ini bukan polarisasi mutlak, melainkan kerangka normatif yang dapat dipadupadankan dalam praktik sistem peradilan pidana.⁵⁴ Pada aspek prosedural (*procedural due process*), prinsip “*fundamental fairness*” menuntut mekanisme surat perintah yang sah, pemberitahuan memadai, akses kepada penasihat hukum, kesempatan menghadirkan saksi, dan ganti rugi bila hak fundamental, seperti hak atas kehidupan, kebebasan, dan kepemilikan.⁵⁵ Sementara *substantive due process* mengawasi agar norma hukum tidak memuat ketentuan sewenang-wenang, logis dan adil bagi warga negara. Keduanya saling melengkapi guna menjaga legitimasi dan moralitas peradilan pidana. Sehingga pembuatan RUU KUHAP harus mencantumkan batas-batas substansial demi menghindari ketidakadilan.

Implementasi doktrin ini di Indonesia masih terhambat kekosongan norma eksplisit di KUHAP dan RUU KUHAP. Tinjauan teoritis *due process of law* memosisikan pemeriksaan pidana sebagai arena di mana hak-hak faktual dan yuridis individu dilindungi secara komprehensif. Konsep “keadilan fundamental” (*fundamental fairness*) mewajibkan proses yang logis, manusiawi, dan patut, termasuk hak untuk didampingi pengacara dan mendapatkan ganti rugi layak bila prosedur terciderei. Penerapan *due process* meniscayakan integrasi *fair trial* yang mencakup pemberitahuan dakwaan, hak pendampingan hukum, pemeriksaan bukti yang adil, serta pengadilan yang independen dan tak memihak ke dalam setiap tahap: praperadilan, penyidikan, penuntutan, hingga pemeriksaan pengadilan.⁵⁶ Belum lazim diakomodasi aspek substantif seperti penolakan penggunaan bukti ilegal (*unlawful evidence*) yang dapat menciderai rasa keadilan.⁵⁷ KUHAP yang sekarang terlalu fokus pada kecepatan dan biaya rendah; pembaharuan RUU KUHAP harus menyeimbangkan *efficiency* dan *fairness*, menegaskan prosedur substansial demi mencapai kebenaran materiil.

Sisi korban sebagai pihak terdampak juga mesti ditempatkan dalam kerangka *due process*. Selama ini, korban kerap hanya berperan sebagai saksi tanpa jaminan perlindungan psikis dan materiil setelah melapor.⁵⁸ Padahal, doktrin *due process* menuntut pemenuhan hak-hak fundamental korban, mulai restitusi hingga akses informasi proses peradilan sebagai bagian dari konsep “*ordered liberty*” dan “*equality before the law*”. Mengabaikan korban melemahkan makna keadilan substantif dalam sistem pidana. Implementasi *due process* di nasional memerlukan modernisasi sistem peradilan pidana, sejalan dengan visi-misi pembaruan hukum pidana Indonesia.⁵⁹ Modernisasi bukan sekadar digitalisasi, tetapi restrukturisasi *legal structure*, *legal substance*, dan *legal culture*. RUU KUHAP perlu memasukkan mekanisme pengawasan independen; seperti hakim pemeriksa pendahuluan atau fokus ke penguatan mekanisme praperadilan untuk menilai hukum acara di setiap tahap. Hal ini menjawab kebutuhan total *enforcement*, *full enforcement*, dan *actual enforcement*, serta mencegah diskresi aparat melampaui prinsip *due process*.

Pengakuan *due process* sebagai *adherence to law* menuntut bahwa setiap penghilangan hak melalui peradilan harus berdasarkan ketentuan positif yang sah.⁶⁰ Historis, dari *Magna Charta* hingga *Murray's Lessee*, “*due process*” selaras dengan *rule of law*: deprivation hanya bisa terjadi sesuai hukum. Amandemen Ke-5 dan Ke-

21, no. 1 (2001): 67–89, hlm. 70. <https://journals.unihaz.ac.id/index.php/keadilan/article/view/2017>.

52 Herbert L. Packer, “Two Models of the Criminal Process,” *University of Pennsylvania Law Review* 113, no. 1 (1964): 1–68, hlm. 1. https://scholarship.law.upenn.edu/penn_law_review/vol113/iss1/1.

53 Eddy O.S. Hiariej, *Teori & Hukum Pembuktian*, hlm. 30.

54 Herbert L. Packer, *The Limits of the Criminal Sanction* (California: Stanford University Press, 1968), hlm. 164-165.

55 Zico Junius Fernando, “Due Process of Law Dalam Penanggulangan Tindak Pidana Di Indonesia.” hlm. 70.

56 Muladi, *Kapita Selektta Sistem Peradilan Pidana* (Semarang: Badan Penerbit Universitas Diponegoro, 2002), hlm. 5.

57 M. Ali Zaidan, *Menuju Pembaruan Hukum Pidana* (Jakarta: Sinar Grafika, 2022), hlm. 115.

58 Zico Junius Fernando, “Due Process of Law Dalam Penanggulangan Tindak Pidana Di Indonesia.” hlm. 78.

59 Kanwil Kemenkum Jogja, “5 Misi Dan Penyamaan Persepsi KUHP Baru Diulas Dalam Kumham Goes To Campus Yogyakarta,” jogja.kemenkum.go.id, 2023, <https://jogja.kemenkum.go.id/berita-utama/5-misi-dan-penyamaan-persepsi-kuhp-baru-diulas-dalam-kumham-goes-to-campus-yogyakarta>.

60 Richard M. Re, “The Due Process Exclusionary Rule,” *Harvard Law Review* 127, no. 7 (2014): 1887–1966, hlm. 1907-1908. <https://harvardlawreview.org/print/vol-127/the-due-process-exclusionary-rule/>.

14 AS memperkuat perlindungan ini. RUU KUHAP harus menegaskan klausul *due process of law*, bahwa setiap tahap penyidikan, penuntutan, hingga persidangan tunduk pada prosedur konstitusional sebagai syarat mutlak sahnya putusan. Merumuskan *due process* dalam RUU KUHAP memerlukan enam elemen: pemberitahuan pantas, surat perintah sah, hak diam, hak penasihat hukum, hak mengajukan saksi, dan jaminan *independence tribunal*.⁶¹ Keenam elemen ini harus diintegrasikan dalam Pasal 175 RUU KUHAP dan peraturan pelaksanaannya. Dengan kejelasan tersebut, setiap upaya paksa dan prosedur pembuktian akan lebih transparan, adil, dan menghormati *ordered liberty*. Implementasi *due process of law* memperkuat kredibilitas peradilan pidana Indonesia di era demokrasi dan globalisasi.

Modernisasi sistem peradilan dan pengaruh globalisasi menuntut pembaruan hukum acaranya agar selaras dengan standar *due process*. Contoh konkret di AS adalah *Miranda Rights*, di mana tersangka wajib diberi tahu hak untuk diam, hak atas penasihat hukum, dan bantuan hukum gratis jika tidak mampu sebelum interogasi.⁶² Ketentuan semacam ini menegakkan *due process* sebagai ketaatan pada prosedur positif. Reformasi RUU KUHAP perlu mengadopsi prinsip serupa guna menjamin proses hukum yang adil, manusiawi, dan bebas dari tindakan sewenang-wenang aparat.

Pasca Putusan Mahkamah Konstitusi Nomor 20/PUU-XIV/2016, implementasi doktrin *Due Process of Law* dan *exclusionary rules* di Indonesia mengharuskan penegak hukum meninjau ulang keabsahan alat bukti elektronik, contoh paling menggelitik adalah status CCTV sebagai alat bukti elektronik dalam persidangan pidana.⁶³ Dalam perkara pembunuhan Jessica Kumala Wongso, rekaman CCTV Kafe Oliver diperdebatkan karena dibuat bukan atas permintaan penyidik.⁶⁴ Mahkamah Konstitusi menegaskan bahwa informasi atau dokumen elektronik [termasuk rekaman CCTV] hanya sah menjadi alat bukti jika diperoleh “dalam rangka penegakan hukum atas permintaan Kepolisian, Kejaksaan, dan/atau institusi penegak hukum lainnya” yang ditetapkan undang-undang.⁶⁵ Artinya, rekaman yang dihasilkan untuk kepentingan swasta atau komersial tanpa izin resmi tidak dapat menjadi bukti sah dalam persidangan (MK 20/PUU-XIV/2016).⁶⁶ Konsep *unlawful legal evidence* tersebut sejalan dengan *exclusionary rules* internasional, yang menolak penggunaan barang bukti yang diperoleh secara ilegal (*due process of law*). Dengan demikian, prinsip *fair trial* menuntut bukti elektronik diperlakukan sama dengan bukti konvensional, yakni sah hanya jika diperoleh melalui proses hukum yang benar.

Implikasi yuridis keputusan tersebut menuntut revisi RUU KUHAP, khususnya Pasal 222 ayat (1) huruf f telah merumuskan bukti elektronik sebagai salah satu alat bukti sah “bukti elektronik”. Ayat ini perlu menegaskan bahwa bukti elektronik hanya dianggap “sah” jika penyadapan, perekaman, atau monitoring publik [seperti CCTV] dilakukan berdasarkan undang-undang. Namun, perumusan tersebut belum memuat syarat *Due Process of Law* pasca Putusan MK 20/PUU-XIV/2016.⁶⁷ Seharusnya, bukti elektronik tidak hanya didefinisikan secara kategorikal, melainkan juga dipersyaratkan diperoleh sesuai prosedur: atas permintaan kepolisian, kejaksaan, atau lembaga hukum lain melalui izin pengadilan. Dengan memasukkan frasa “dilakukan dalam rangka penegakan hukum atas permintaan institusi penegak hukum” ke dalam Pasal 222. Dengan demikian, RUU KUHAP harus memuat norma eksplisit yang mengharmonisasikan ketentuan alat bukti elektronik dalam KUHAP dengan penafsiran MK mengenai *unlawful legal evidence* dan *due process of law*, sehingga tidak dibiarkan bergantung

61 Indra Karianga and Pidel Kastro Hutapea, “Prinsip Miranda Rules ‘The Right To Remain Silent’ Dalam Perspektif Perbandingan Hukum,” *Media Iuris* 2, no. 3 (2020): 393–406, hlm. 394. <https://doi.org/10.20473/mi.v2i3.17375>.

62 Priyo Handoko and Anis Farida, “Konsep Miranda Rule Dalam Hukum Pidana Di Indonesia Perspektif Maqasid Al-Shari’ah,” *Al-Jinayah: Jurnal Hukum Pidana Islam* 7, no. 2 (2021): 386–408, hlm. 389. <https://doi.org/https://doi.org/10.15642/aj.2021.7.2.386-408>.

63 Vidya Prahassacitta, “CCTV Sebagai Alat Bukti Pidana Pasca Putusan MK 20/PUU-XIV/2016,” Business Law Faculty of Humanities Binus University, 2016, <https://business-law.binus.ac.id/2016/11/22/kedudukan-cctv-sebagai-alat-bukti-hukum-pidana-pasca-putusan-mk-2016/>.

64 Eko Priliawito, “Otto: CCTV Kafe Olivier Bukan Lagi Alat Bukti Sah,” *viva.co.id*, 2016, <https://www.viva.co.id/berita/metro/826897-otto-cctv-kafe-olivier-bukan-lagi-alat-bukti-sah?page=all>.

65 M Zhacky Kusumo, “Rekaman CCTV Cafe Olivier Tak Bisa Dijadikan Alat Bukti?,” *Aktual.com*, 2016, <https://aktual.com/rekaman-cctv-cafe-olivier-tak-dijadikan-alat-bukti/>.

66 Mahkamah Konstitusi, “Putusan Mahkamah Konstitusi Nomor 20/PUU-XIV/2016,” 22 Keputusan Mahkamah Konstitusi atas permohonan Pengujian Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik dan UU No. 20 Tahun 2001 tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Koru § (2016), https://www.mkri.id/public/content/persidangan/putusan/22_PUU-XV_2017.pdf.

67 Aria Zurnetti, Fitri Wahyuni, and Siti Rahmah, *Pengantar Hukum Acara Pidana Indonesia*, Ed. 1, Cet (Depok: Rajawali Pers, 2021), hlm. 86.

pada peraturan internal institusi.⁶⁸

Pesan tegas Putusan MK Nomor 20/PUU-XIV/2016 menuntut lahirnya undang-undang khusus penyadapan, yang menjadi pijakan operasional semua institusi. Artinya, penyadapan tidak boleh lagi diatur secara sepihak oleh institusi, misalnya oleh Perkapolri, tetapi harus diwadahi dalam RUU KUHAP sebagai aturan formil umum. Hal ini menjawab kekhawatiran akan “*internal regulation*” institusi [polisi, kejaksaan, KPK] yang selama ini mengatur sendiri tata cara intersepsi. Putusan MK menghendaki RUU KUHAP memuat ketentuan eksplisit: setiap intersepsi atau perekaman suara dan gambar hanya sah jika diizinkan pengadilan dan diajukan melalui prosedur formal KUHAP. Dengan posisi KUHAP sebagai hukum pidana formil, aturan tersebut menjadi panglima operasionalisasi hukum materiil, memastikan setiap langkah penyadapan memenuhi standar legalitas dan menjamin hak hidup, kebebasan, dan properti terdakwa (*due process*).⁶⁹ Dengan demikian, doktrin *exclusionary rules* tidak hanya berlaku untuk pelanggaran hak asasi tersangka, namun juga melindungi privasi individu sekaligus menjamin legalitas alat bukti elektronik.

Secara teoritis, KUHAP diposisikan sebagai aturan pelaksana hukum pidana materiil.⁷⁰ Oleh karenanya, setiap normalisasi penyadapan dalam RUU KUHAP tidak dapat diatur secara parsial atau sektoral; mestilah diintegrasikan dalam KUHAP sebagai hukum pidana formil. Konsep *Due Process Model* (Packer) menekankan batasan kekuasaan negara dan perlindungan hak individu sepanjang proses peradilan. Dengan menanamkan ketentuan penyadapan berbasis izin pengadilan di KUHAP,⁷¹ negara memperlihatkan komitmen supremasi hukum (“*law over men*”) dan menghindari *arbitrary process*. Skema ini memastikan bahwa bukti elektronik kokoh fondasinya: tidak hanya sebagai “perluasan” Pasal 184 KUHAP, tetapi sebagai produk aturan prosedural yang diakui secara konstitusional.⁷² Di luar isu privasi, pembaruan norma juga harus memperjelas peran digital forensik dalam menjustifikasi keaslian dan integritas bukti elektronik. Putusan MK menegaskan bahwa rekaman yang tidak sesuai prosedur mesti dikesampingkan, tetapi tidak membahas mekanisme verifikasi bukti yang masuk sebelum persidangan. RUU KUHAP perlu mengadopsi ketentuan khusus tentang sertifikasi ahli digital forensik sebagai syarat admisibilitas, sehingga praktik *exclusionary rules* dapat dijalankan lebih transparan dan profesional.⁷³

Selain itu, perlu diatur bahwa konstruksi hukum pembuktian pasca-MK memadukan sistem negatif KUHAP (dua alat bukti minimal) dengan *due process* ketat. Dampak yuridis dari penyesuaian RUU KUHAP terhadap Putusan MK adalah meminimalkan potensi penggunaan *unlawful legal evidence*. Rekaman CCTV di ruang publik menjadi sah sebagai alat bukti primer, namun rekaman telepon atau intersepsi pribadi tetap dikategorikan sekunder (“*fruit of the poisonous tree*”) bila tidak mengikuti prosedur. Oleh karena itu, RUU KUHAP pasal 222-228 harus menetapkan rincian: jenis intersepsi apa saja yang diperbolehkan, batas waktu izin, dan mekanisme transparansi, semua selaras dengan *due process guarantees*. Upaya ini akan memperkaya doktrin *exclusionary rules* dalam konteks lokal dan mencegah munculnya preseden negatif pada penggunaan bukti digital.

Secara praktis, penegakan aturan baru memerlukan pelatihan aparat penegak hukum dan terutama di unit forensik digital serta penyelenggara pengadilan [termasuk hakim], agar memahami batasan *unlawful legal evidence* dan prinsip *due process*. Perubahan RUU KUHAP harus didampingi protokol teknis: mekanisme permohonan izin penyadapan, sertifikasi keaslian rekaman, dan prosedur verifikasi *chain of custody* elektronik. RUU KUHAP juga perlu mencantumkan sanksi tegas terhadap aparat yang melakukan penyadapan di luar ranah undang-undang, misalnya pembatalan seluruh barang bukti elektronik terkait dan sanksi disipliner. Dengan memastikan

68 Hanafi and Muhammad Syahril Fitri, “Implikasi Yuridis Kedudukan Alat Bukti Elektronik Dalam Perkara Pidana Pasca Putusan Mahkamah Konstitusi Nomor 20/Puu-Xiv/2016,” *Al-Adl : Jurnal Hukum* 12, no. 1 (2020): 101–115, hlm. 109. <https://doi.org/10.31602/al-adl.v12i1.2639>.

69 Eddy O.S. Hiariej, “Penyadapan Dalam Hukum Pidana,” *Harian Kompas*, 2009, <https://antikorupsi.org/id/article/penyadapan-dalam-hukum-pidana>.

70 Sivana Amanda Diamita Syndo. Safaruddin Harefa, Rifdatul Maziyyah, Nazhif Ali Murtadho, Indy Maffiqo Syatta, “Klitih Analisis Yuridis Tindak Pidana Klitih Dalam Perspektif Hukum Positif Dan Islam,” *Fundamental: Jurnal Ilmiah Hukum* 12, no. 1 (2023): 13–42, hlm. 14. <https://ejurnal.umbima.ac.id/index.php/jurnalhukum/article/view/83>.

71 Eko Saputra, “RUU KUHAP : Dominasi Crime Control System Dan Ancaman Terhadap Prinsip Due Process of Law,” *JIMU: Jurnal Ilmiah Multidisipliner* 3, no. 03 (2025): 1708–1716, hlm. 1713. <https://ojs.smkmerahputih.com/index.php/jimu/article/view/923>.

72 I Nengah Ariana, “Tinjauan Yuridis Terhadap Kedudukan Alat Bukti Elektronik Berdasarkan Putusan Mk Nomor 20/PUU-Xiv/2016,” *UNES Law Review* 5, no. 1 (2022): 1–19, hlm. 6. <https://doi.org/10.31933/unesrev.v5i1.277>.

73 Aldho Galih Pratama, “Analisis Kekuatan Dan Nilai Pembuktian Alat Bukti Elektronik Berwujud CCTV (Closed Circuit Television) Pasca Putusan Mahkamah Konstitusi Nomor 20/PUU-XIV/2016 Dalam Hukum Acara Pidana,” *Jurnal Verstek* 8, no. 3 (2020): 392–400, hlm. 398. <https://jurnal.untidar.ac.id/index.php/literasihukum/article/view/6810>.

setiap tahap pengumpulan dan penyajian bukti elektronik mengikuti *due process of law*, reformasi KUHAP akan menjembatani ketentuan konstitusional, ekspektasi publik atas keadilan, dan kebutuhan efektivitas penindakan pidana. Langkah ini akan menumbuhkan budaya kepatuhan hukum, mencegah penyalahgunaan wewenang, dan memastikan Indonesia memiliki sistem peradilan pidana modern yang menghormati hak asasi sekaligus efektif memberantas kejahatan.⁷⁴

3.3. Memetakan Konsep “*Unlawful Legal Evidence*” dalam Konteks Pembaruan Kitab Undang-Undang Hukum Acara Pidana (KUHAP)

Konsep “*unlawful legal evidence*” merujuk pada paradoks bukti atau barang bukti yang, meski diproses dalam rangkaian formal acara pidana, diperoleh dengan cara-cara yang melanggar ketentuan substantif atau prosedural KUHAP sehingga menimbulkan cacat legitimasi. Dalam praktik penegakan hukum di Indonesia, masih sering ditemukan bukti yang tercemar, mulai dari keterangan didukung penyiksaan hingga penyitaan tanpa kehadiran saksi,⁷⁵ hal ini melanggar ketentuan sebagaimana diatur dalam Pasal 50–68 KUHAP yang kemudian tetap diajukan di persidangan.⁷⁶ Ketidakjelasan perbedaan antara “alat bukti” dan “barang bukti” dalam KUHAP memperparah kondisi ini, sehingga bukti hasil tindakan ilegal kerap diterima sebagai “sah” semata karena masuk dalam kategori Pasal 184 ayat (1) KUHAP, tanpa telaah legalitas perolehan secara mendalam. Artidjo Alkostar menegaskan pentingnya prosedur yang akurat dan *fair trial* untuk *beyond reasonable doubt*, sehingga bukti cacat proses tidak boleh digunakan sebagai penentu nasib terdakwa. Karena itu, RUU KUHAP harus merumuskan definisi *explicit* tentang bukti *legal-illegal* agar pengadilan tidak terbebani doktrin *verbalisant* semata.

Praktik menghadirkan saksi *verbalisant*—penyidik sebagai saksi untuk mempertahankan BAP—menciptakan distorsi fakta di persidangan. Saksi *verbalisant* tidak diatur secara normatif, namun dianggap sah ketika keterangan terdakwa atau saksi berubah di muka sidang karena tekanan.⁷⁷ Mekanisme ini mengaburkan integritas pembuktian dan mendorong penggunaan bukti ilegal. RUU KUHAP perlu memasukkan klausul yang melarang penggunaan saksi *verbalisant* bila keterangan awal diduga di bawah tekanan, dan menggantinya dengan prosedur pra-pemeriksaan independen agar hanya bukti murni dijadikan pertimbangan hakim. Permasalahan mendasar dalam penerapan *exclusionary rules* di Indonesia terletak pada semangat dualisme antara “membongkar kejahatan” dan “perlindungan HAM”.⁷⁸ Meskipun KUHAP mengatur bahwa BAP hanya “pedoman” hakim, mekanisme *verbalisant*—pemanggilan penyidik sebagai saksi kadar berita acara—kian membentengi bukti ilegal dari gugur. Padahal, prinsip *exclusionary rules* menghendaki bukti inkonstitusional tidak sekadar “derajat turun”, melainkan dikesampingkan sepenuhnya.⁷⁹ Ketiadaan norma eksplisit membuat hakim enggan mencabut atau menolak bukti yang diperoleh dengan cara melawan hukum, karena khawatir menabrak asas persidangan sederhana, cepat, dan biaya ringan (Pasal 2 ayat 4 UU No. 48/2009).⁸⁰

Kedudukan barang bukti ilegal dalam paradigma batal demi hukum perlu dipertegas. Studi kasus perolehan barang bukti ilegal pada perkara Rudy Santoso menegaskan urgensi pemetaan konsep ini. Dalam kasus tersebut, tim penyidik melakukan pengeledahan tanpa saksi setempat, tidak melaksanakan test urine wajib, dan membebaskan satu saksi kunci sebelum pemeriksaan formal, sehingga bukti yang dikumpulkan bertentangan dengan Perkapolri No. 14/2012 tentang Manajemen Penyidikan.⁸¹ Menurut pembedaan “batal demi hukum” dan “dapat dibatalkan”, barang bukti yang diperoleh melawan hukum otomatis dianggap tidak pernah eksis (batal

74 Yogi Natanael Christanto, *Kesenjangan Penerapan Pidana Mati Dalam Penegakan Hukum Di Indonesia* (Indramayu: Penerbit Adab, 2023), hlm. 55.

75 Widati Wulandari and Tristam Pascal Moeliono, “Anotasi Putusan Mahkamah Agung Perkara Nomor: No. 665/K/Pid/2014,” *Dictum: Jurnal Kajian Putusan Pengadilan* 16 (2024): 22–47, hlm. 37. <https://leip.or.id/dictum-vol-16-penyiksaan-dalam-peradilan-pidana/>.

76 Marfuatul Latifah, “Perlukah Mengatur Prinsip Exclusionary Rules of Evidence Dalam RUU Hukum Acara Pidana?” hlm. 114.

77 Marfuatul Latifah, hlm. 114.

78 Adam Ilyas, “Praktik Penerapan Exclusionary Rules Di Indonesia.” hlm. 53.

79 Iwan Rasiwan, *Suatu Pengantar Hukum Pembuktian Tindak Pidana*, Cet. Pertama (Bantul: CV. Mitra Edukasi Negeri, 2025), hlm. 23.

80 Lihat Pasal 2 dan Pasal 4 UU Kehakiman dalam Indonesia, “Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman,” Pub. L. No. 48, JDIH BPK-RI 5076 (2009), <https://peraturan.bpk.go.id/Details/38793/uu-no-48-tahun-2009>.

81 A. Zainur Rasyidi Ramadhani, “Kedudukan Barang Bukti Yang Diperoleh Secara Melawan Hukum Dalam Putusan Mahkamah Agung Nomor 1614 K/ Pid.Sus /2012,” *Jurist-Diction* 7, no. 1 (2024): 1–20, hlm. 8. <https://doi.org/10.20473/jd.v7i1.50499>.

demis hukum) tanpa perlu permohonan pembatalan, mengingat syarat obyektif prosedur tidak terpenuhi. Konsep ini penting diakomodasi dalam RUU KUHAP agar bukti semacam ini dikecualikan sejak awal. Dengan begitu, mengadopsi mekanisme batal demis hukum untuk barang bukti ilegal, sehingga hakim menolak otomatis bukti tersebut, menciptakan kepastian hukum dan mencegah tergelincirnya penegakan HAM.

Kekeliruan konseptual serta ketidakjelasan pembagian definisi antara “alat bukti” dan “barang bukti” dalam KUHAP mengaburkan penerapan *exclusionary rules*. Di sistem *Common Law* AS, “*real evidence*” (barang bukti) memiliki bobot tertinggi dan harus memenuhi syarat legal sebelum digunakan, sedangkan di Indonesia, barang bukti tak termasuk dalam Pasal 184 KUHAP.⁸² Ironisnya, barang bukti yang kerap menentukan putusan justru tidak masuk definisi alat bukti sah di KUHAP, sehingga bukti penting hasil *illegal seizure* tetap bisa diterima di persidangan. Kondisi ini menegaskan perlunya memperluas definisi alat bukti dalam RUU KUHAP agar semua “*evidence*” tercakup mekanisme pengecualian. Untuk mengatasi ini RUU KUHAP harus menetapkan definisi kerja yang eksplisit: “*Barang bukti adalah real evidence yang relevan, material, dan autentik, yang hanya admisibel jika diperoleh melalui prosedur yang sah, dibuktikan dengan mata rantai penguasaan (chain of custody) yang tidak terputus, serta bebas dari cacat perolehan yang melanggar hak konstitusional.*” Definisi ini tidak hanya memperluas kategori alat bukti, melainkan juga menegaskan syarat admisibilitas yang mengikat hakim, penyidik, dan penuntut sehingga praktik ‘derajat turun pembuktian’ bergeser ke mekanisme penolakan otomatis terhadap bukti ilegal. Integrasi ketentuan *chain of custody* dan kriteria autentisitas penting untuk mengakomodasi bukti digital dan mencegah *evidence laundering*. Secara normatif, rumusan ini memperkuat *due process*, meningkatkan akuntabilitas aparat, dan memberi kepastian hukum bagi terdakwa serta publik terhadap integritas peradilan, dan mekanisme penegakan terpadu. Revisi KUHAP perlu menyelaraskan definisi ini dengan memasukkan barang bukti sebagai alat bukti sah, memastikan semua jenis bukti tunduk pada *exclusionary rules* universal.

Dalam praktik penyidikan dan persidangan, kesalahan prosedur sejak awal akan berlanjut ke meja hijau karena hakim cenderung menerima keterangan tersangka atau saksi hasil tekanan. Mekanisme *verbalisant*, yang memanggil penyidik sebagai saksi untuk meluruskan BAP, justru melemahkan efektivitas *exclusionary rules*—penyidik hampir pasti menolak mengakui paksaan demi melindungi diri. Akibatnya, bukti yang secara nyata tercemar masih menjadi pijakan dakwaan. Hal ini menandakan bahwa *mapping* “*unlawful legal evidence*” harus memotong rantai logika *verbalisant* dengan norma tegas yang melarang penggunaan bukti tersebut.

RUU KUHAP telah memperkenalkan konsep Hakim Pemeriksa Pendahuluan (HPP) sebagai aktor aktif menguji legalitas perolehan bukti (Pasal 111 ayat (1) RUU KUHAP), sekaligus memutus bukti ilegal tidak dapat dipakai. HPP perlu diberikan kewenangan jelas untuk memeriksa cara perolehan bukti, menolak bukti ilegal, dan menerbitkan rekomendasi administratif atau pidana.⁸³ Standar prosedur pengujian keabsahan bukti dan mekanisme banding atas keputusan HPP harus diatur dalam RUU, menciptakan fase kualifikasi bukti yang independen, efisien, dan menghormati *due process*. Kehadiran HPP ini menjadi ujung tombak pencegahan *unlawful legal evidence* sebelum masuk persidangan, berbeda dengan mekanisme praperadilan pasif di KUHAP. Dengan kewenangan menolak bukti yang terindikasi melawan hukum, HPP menambah lapisan perlindungan HAM serta menegaskan asas legalitas ketat (*strict legality principle*) dalam KUHAP,⁸⁴ sesuai tuntutan penafsiran restriktif atas norma acara pidana.

Konsekuensi penerapan *exclusionary rules* dalam RUU KUHAP harus terstruktur: Pasal 222 ayat (5) dapat berbunyi, “*Alat bukti yang oleh Hakim dinyatakan tidak autentik dan/atau diperoleh secara melawan hukum tidak dapat digunakan sebagai alat bukti pada pemeriksaan di sidang pengadilan dan tidak memiliki kekuatan pembuktian.*”⁸⁵ Selain penolakan bukti, perlu diatur sanksi administratif dan pidana bagi aparat yang melanggar prosedur, serta hak kompensasi bagi terdakwa—pengurangan hukuman atau pembatalan perkara jika bukti ilegal melebihi ambang batas tertentu. Ketentuan ini selaras dengan Pasal 359a *WvSv* di Belanda dan memberi efek jera signifikan.⁸⁶ Implementasi eksplisit *exclusionary rules* dan penguatan mekanisme Praperadilan ataupun HPP tidak hanya melindungi hak terdakwa, tetapi juga meningkatkan kredibilitas peradilan. Dengan peta norma ini, RUU KUHAP akan memperjelas mekanisme pembuktian, mencegah penyalahgunaan wewenang, dan meminimalkan

82 Adam Ilyas, “Praktik Penerapan Exclusionary Rules Di Indonesia.” hlm. 55.

83 Albert Aries, “Mengkritisi Hakim Komisaris Dalam RUU KUHAP,” *Harian Kompas*, 2025, <https://www.kompas.id/artikel/mengkritisi-hakim-komisaris-dalam-ruu-kuhap>.

84 Andi Hamzah, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2008), hlm. 3.

85 Pemerintah Republik Indonesia, “Draf Rancangan Kitab Undang-Undang Hukum Acara Pidana (RUU KUHAP) Per 20 Maret 2025” (2025), <https://icjr.or.id/wp-content/uploads/2025/03/RUU-KUHAP-20-Maret-2025.pdf>.

86 Marfuatul Latifah, “Perlukah Mengatur Prinsip Exclusionary Rules of Evidence Dalam RUU Hukum Acara Pidana?” hlm. 117.

kasus yurisprudensi tak seragam. Standarisasi definisi dan prosedur akan mendorong profesionalisme aparat penegak hukum serta menguatkan kepercayaan publik pada kesetaraan perlakuan di depan hukum.

Untuk meniru mekanisme Belanda yang mengesampingkan bukti ilegal, RUU KUHAP disarankan mengadopsi inti praktik *WvSv*: norma eksplisit yang menyatakan bukti yang diperoleh secara melawan hukum batal demi hukum dan *inadmisibel*; kewenangan hakim untuk mengeksklusi bukti secara otomatis ketika ditemukan cacat perolehan serta alternatif respons proporsional (koreksi administratif, pengurangan hukuman, atau pembatalan perkara); prosedur dokumentasi dan koreksi awal yang mewajibkan pemulihan *chain of custody* serta kesempatan bagi penuntut untuk memperbaiki kekurangan administratif sebelum persidangan. Pasal 359a *WvSv* memberi preseden praktis berupa skala tindakan yang menimbang *causal link* antara pelanggaran dan nilai probatif bukti. Dengan menanamkan kriteria kausalitas, standar autentikasi bukti fisik dan elektronik, serta mekanisme banding atas penetapan eksklusi, RUU KUHAP menjadikan pengecualian bukti tidak semata diskresi hakim melainkan proses prosedural dan transparan, serta memberikan efek jera melalui sanksi administratif, sanksi pidana, dan kompensasi bagi terdakwa ketika bukti ilegal terbukti mempengaruhi putusan.⁸⁷ Instrumen ini harus disertai pedoman teknis, pelatihan penyidik, serta peran pengawas eksternal independen seperti Komnas HAM untuk memastikan implementasi efektif dan akuntabel, serta mekanisme evaluasi berkala yang transparan terukur.

Pembaharuan norma dalam RUU KUHAP perlu memuat rumusan eksplisit: (1) definisi alat bukti sah mencakup cara perolehan; (2) kewenangan Praperadilan ataupun HPP sebagai penguji dan penegasan; dan (3) sanksi atau konsekuensi [misalnya pengurangan hukuman, pengecualian bukti, atau pembatalan perkara] ketika menemukan bukti melawan hukum. Perbandingan dengan Pasal 359a *WvSv* Belanda menunjukkan betapa detailnya sistem *Civil Law* dapat mengatur tahapan perbaikan dakwaan, pengecualian bukti, hingga pembatalan perkara atas perolehan bukti ilegal. RUU KUHAP harus mengadopsi nuansa tersebut agar perlindungan praktis dan keadilan korban serta terdakwa dapat terjamin.

Dengan pemetaan konseptual “*unlawful legal evidence*” yang terintegrasi dalam RUU KUHAP yang menawarkan landasan komprehensif untuk reformasi norma, Indonesia akan menutup celah hukum yang selama ini menjadi ladang pelanggaran HAM dan korupsi bukti.⁸⁸ Pertama, memasukkan definisi batal demi hukum dan *explicit exclusionary rules* dalam batang tubuh RUU. Kedua, mengokohkan peran Praperadilan atau HPP untuk menyaring bukti ilegal sebelum persidangan. Ketiga, mengatur sanksi dan kompensasi yang jelas. Norma tegas akan menciptakan efek jera bagi penyidik yang tergoda cara pintas, memberi kompensasi pada terdakwa melalui pengurangan hukuman atau ganti kerugian, serta memulihkan integritas putusan pengadilan. Langkah ini memerlukan komitmen legislatif dan sosialisasi intensif, namun niscaya menjadikan sistem peradilan pidana lebih adil, akuntabel, dan bermartabat. Dengan demikian, pembaharuan KUHAP tidak hanya sekedar prosedural, melainkan juga substantif, menjamin *due process*, menghormati hak asasi, dan menegakkan kebenaran materiil secara konsisten.

4. Kesimpulan

Doktrin *due process of law* mengharuskan peradilan pidana menjamin hak terdakwa atas didengar, pengajuan bukti, pembelaan, dan menentang fakta, serta mengombinasikan *fair trial* dan *ordered liberty*. Prinsip ini berkembang menjadi *procedural due process*; menjamin *fair trial* melalui surat perintah sah, pemberitahuan, akses penasihat hukum, dan kesempatan menghadirkan saksi, serta *substantive due process*; mencegah norma sewenang-wenang dan melindungi *ordered liberty* seperti hak hidup, kebebasan berpendapat, dan kepemilikan harta. RUU KUHAP wajib mengadopsi *Due Process Model—presumption of innocence* dan *adversarial principles*—dengan pembatasan *unlawful evidence* pasca Putusan MK 20/PUU-XIV/2016, termasuk izin pengadilan untuk bukti elektronik dan sertifikasi forensik digital. Enam elemen *due process*—pemberitahuan pantas, surat perintah sah, hak diam, penasihat hukum, saksi, independensi tribunal—harus diatur eksplisit untuk menyeimbangkan efisiensi dan keadilan.

Pertama, temuan utama menegaskan urgensi memasukkan *exclusionary rules* eksplisit dalam batang tubuh RUU KUHAP: mengharmonisasikan definisi alat bukti dan barang bukti, menetapkan bahwa barang bukti adalah *real evidence* yang relevan, material, dan autentik hanya admisibel jika diperoleh secara sah dengan *chain of custody* utuh, serta mengintegrasikan mekanisme ‘batal demi hukum’ untuk bukti ilegal. *Novelty* artikel ini

87 Fadhilah Anugrah Pascawati, Prija Djatmika, and Milda Istiqomah, “Urgency of Exclusionary Rules Regulation in Indonesian Criminal Justice System,” *Legal Horizons* 22, no. 3 (2024): 20–33, <https://doi.org/10.54477/lh.25192353.2024.3.pp.20-33>.

88 Adam Ilyas, “Praktik Penerapan Exclusionary Rules Di Indonesia.” hlm. 56-57.

terletak pada proposal redaksional operasional dan desain institusional, khususnya kewenangan Praperadilan atau Hakim Pemeriksa Pendahuluan (HPP), standar verifikasi bukti elektronik, dan paket sanksi sebagai solusi untuk menggeser praktik “derajat turun pembuktian” menjadi pengecualian otomatis bukti cacat, sekaligus memperkuat *due process* dan perlindungan HAM tanpa mengorbankan pencarian kebenaran materiil.

Kedua, rekomendasi kebijakan ditujukan praktis: (1) DPR dan Pemerintah mengadopsi klausul *exclusionary rules* dan norma pengakuan barang bukti serta mekanisme banding atas keputusan Praperadilan atau HPP; (2) Kemenkumham menyusun pedoman teknis sertifikasi forensik digital, standar *chain of custody*, dan peraturan pelaksana RUU (pasca disahkan); (3) Mahkamah Agung menerbitkan pedoman yurisprudensial untuk konsistensi penerapan pengecualian bukti; (4) aparat penegak hukum wajib pelatihan, dokumentasi ketat, dan sanksi administratif/pidana; serta (5) pembentukan pengawas independen (mis. Komnas HAM) dan evaluasi berkala untuk memastikan implementasi, efektivitas *deterrence*, dan pemulihan hak korban. Implementasi terukur ini menjamin KUHAP yang modern, adil, dan akuntabel.

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Formulation of a Just Land Dispute Resolution Model: Derrida's Deconstruction Approach to the Former Dumai Concession Case

Husendro

Doctoral Program in Law, University of Indonesia, Depok City, West Java

Article Information

Corresponding Author. Email:
husendro29@gmail.com

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ABSTRACT

Dumai City is an area with land concession permits for oil and gas companies, including PT. Chevron Pacific Indonesia. These extensive and long-term land concession permits often conflict with local (indigenous) communities, urban development, and population growth. Although the company's concession period has expired and the land must be returned to the government, land claims, disputes, and conflicts remain unresolved. Therefore, a just, holistic, and human rights-based resolution will be a fundamental element of this resolution. The research method used is a normative empirical one with data sources obtained from field observations and interviews with various stakeholders, including the government and local communities. This paper will focus on how Jacques Derrida's concept deconstructs the settlement of the former Dumai concession case by dissecting the dominant legal narrative that supports ownership, concession claims, revealing the contradictions and power structures inherent in the land tenure system. This paper proposes alternative dispute resolution models, such as conciliation, based on different principles, future justice, and openness to plural legal subjects. Through Derrida's deconstruction and conciliation efforts, various alternative justice-based concession land solutions will be formulated for corporations (PT. CPI), local (indigenous) communities, citizens, local governments, vertical agencies, business actors, including law enforcement options.

Introduction

Dumai is a city in Riau Province, on the east coast of Sumatra, facing the Strait of Malacca. The sea area of Dumai City is one of the busiest shipping lanes and is a growth triangle area between Indonesia, Malaysia, and Singapore. As an area with a strategic location, Dumai City is a destination for residents from various other regions. Currently, 16 ethnic groups depend on their lives in Dumai City.¹ Dumai City is also known as the oil city. Historically, Standard Oil California (SOCAL) or Caltex Pacific Oil Company (Caltex), currently PT Chevron Pacific Indonesia (CPI), used Dumai as the base for exports.² SOCAL successfully explored its concession area in the Sumatran wilderness in Riau, with Duri and Minas as the main oil fields since 1936. In 1957, Caltex's presence in the Rokan Block triggered the emergence of new settlements, such as Duri and Rumbai, which were previously forested and swampy areas. Likewise, with Minas and Dumai, which developed into residential areas³.

- 1 Dumai City Government, "A Glimpse of Dumai City," [dumaikota.go.id](https://web.dumaikota.go.id/sekilas-dumai), 2021, <https://web.dumaikota.go.id/sekilas-dumai>.
- 2 Agus Setiawan, "The Impact of Mining Existence and Activities of Foreign and National Oil Companies in Dumai during the Reformation Period," in *IOP Conference Series: Earth and Environmental Science*, vol. 716, 2021, 1–7, <https://doi.org/10.1088/1755-1315/716/1/012041>.
- 3 Frido Paulus Simbolon, "From Oil Exploration to City Building: Dumai,

To support the company's operations, on November 30, 1961, PT. CPI obtained a land certificate from the Minister of Agrarian Affairs, based on Decree No. 882/KA, for an area of 4,056.2 Hectares. During the period 1969 to 1975, PT. CPI released 705.54 Ha of land to the Government of the Republic of Indonesia and Pertamina. On October 16, 1975, PT. CPI obtained a certificate renewal for the Dumai land, with the issuance of the Right to Use Certificate (SHP) Number 76/1975, covering a total area of 3,385.46 Hectares, from the Bengkalis Regency Land Office, at eight sub-districts included in the concession land are Bukit Batrem, Jayamukti, Tanjung Palas, Teluk Binjai, Buluh Kasap, Bumiayu, Bagan Besar and Bukit Nanas⁴. Referring to Article 1 number 20 of Law No. 30 of 2014 concerning Government Administration, a concession are as a Decision of an authorized Government Official as a form of approval of an agreement between a Government Agency and/or Official and a non-Government Agency and/or Official in the management of public facilities and/or natural resources in other management areas in accordance with statutory provisions.⁵

PT Pertamina Hulu Rokan (PHR) officially replaced PT CPI as the manager of the Rokan Working Area (WK) in Riau Province on August 9, 2021, at 00.01 WIB. This transfer of management marks the end of Chevron's management, which has been ongoing for 80 years, since the Caltex era in 1941. The transfer of management from PT CPI to PT PHR does not resolve the issue of determining the concession area in Dumai City, which spans 3,344 hectares and conflicts with the community.

Although a formal transfer of concession land has occurred, conflicts persist regarding tenure and legal certainty for the community, including regional government and private assets that have occupied the concession land for decades. The massive utilization and use of PT CPI's concession land by the community, local Government and businesses began in 1989 in Bumi Ayu Village. At that time, Dumai Mayor Zulkifli AS stated that thousands of residents had utilized PT CPI's concession land, particularly in Bumi Ayu, Bukit Batu Rem, Teluk Binjai, Tanjung Palas, Buluh Kasap, and Bintan Sub-districts.⁶

The Dumai City Government has recorded that 1,446 heads of families (KK) in this area reside on concession land. In more detail, there are 42 land rights spread across Bintan Village, 131 land rights spread across Bukit Datuk, Bukit Timah, and Bumi Ayu Villages, and 401 land rights spread across Bukit Batrem, Buluh Kasap, Jaya Mukti, Tanjung Palas, and Teluk Binjai Villages. Meanwhile, in Buluh Kasap Village, East Dumai District, there are 200 land rights and 11 public and social facilities in concession Number 76 of 1975⁷.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) states that land is not just a commodity, but a critical element for realizing the rights of many citizens. Access, use, and control of land directly affect the fulfilment of many aspects of life.⁸ Although corporations contribute to job creation and state revenues, they continue to exploit natural resources. These operations often involve local communities, communal ownership claims, environmental impacts, and threats to human safety.⁹ Land issues always arise and remain current, particularly with the increasing population, development, and access of various parties to basic capital in multiple interests.¹⁰

Caltex Company City 1956-1970s," *Medan Resource Centre* 4, no. 2 (2024): 127–33, <https://doi.org/https://doi.org/10.57251/lhh.v4i2.1429>.

4 Eliwaty, "Deputy Minister of ATR/BPN Wants Settlement of Former PT Chevron Pacific Indonesia (CPI) Land in Dumai City," PAB Riau, 2024, <https://pab-indonesia.co.id/news/detail/24859/wamen-atrbpn-inginkan-penyelesaian-lahan-eks-pt-chevron-pacifik-indonesia-cpi-kota-dumai>.

5 Iwan Erar Joesoef, "Granting of Natural Resources Management Concessions by the Government to Investors on Customary Law Community Land," *Jurnal Hukum Dan Peradilan* 10, no. 3 (2021): 361–79, <https://doi.org/https://doi.org/10.25216/jhp.10.3.2021.361-379>.

6 Friedrich Edward Lumy, "How Come! Thousands of Dumai Residents 'Occupy' Concession Land, 'Many Illegal Buildings,'" GoRiau, 2016, <https://www.goriau.com/berita/baca/kok-bisa-ribuan-warga-dumai-duduki-lahan-konsesi-banyak-bangunan-liar.html>.

7 Redaction, "After Only 3.8 Years of Leading Dumai, the Completion of the Concession Land Is Just a Step Away, What Else Can We Do?," Pantau Riau, 2024, <https://pantauriau.com/news/detail/40103/baru-38-tahun--pimpin-dumai-penyelesaian-lahan-konsesi--tinggal-selangkah-apatah--lagi--dilanjutkan--ya-wak>.

8 Agus Santoro et al., "Reformulation of Agrarian Regulations Within a Human Rights Framework," *The Journal of Southeast Asian Human Rights* 6, no. 2 (2022): 131–52, <https://doi.org/10.19184/jseahr.v6i2.27776>.

9 Agus Suntoro, "Human Rights Approach in Resolving Conflicts with Mining and Oil and Gas Corporations," *Journal HAM XIV*, no. 2 (2018): 71–108, <https://jurnalham.komnasham.go.id/index.php?journal=jurnalasasi>.

10 Irdatul Husna, Ulfia Hasanah, and Rika Lestari, "Settlement of Land Rights Disputes Between the Government and the Community Along Jalan Gatot Subroto, Dumai City," *Jurnal Ilmiah Wahana Pendidikan* 10, no. June (2024): 348–62,

Suppose referring to positivism or normative law, then the PT CPI land concession that ends will automatically be transferred to PT. Pertamina is the state-owned enterprise that replaces it. However, in reality the community has rights that must receive attention from the Government for resolution - at least two legitimate bases, namely (a) Article 3 of Law Number 1 of 1960 concerning Agrarian Principles which guarantees that the implementation of customary rights and similar rights from customary law communities are recognized as long as they still exist and do not violate national interests; and (b) Article 6 paragraph (1) of Law Number 39 of 1999 concerning Human Rights states that in the context of upholding human rights, differences and needs in customary law communities must be considered and protected by law, society, and the Government.

Conciliation is a method that can help resolve concession land disputes by implementing new norms, offering a fair and peaceful agreement, and setting a specific timeframe for resolution.¹¹ This mechanism can be implemented by the National Human Rights Commission, involving the Government, companies, and communities using a human rights approach, including through an interpretation of Derrida, which provides flexibility for just and beneficial resolution. This method is one of the authorities regulated in Article 89 paragraph (4) letter b of Law Number 39 of 1999 concerning Human Rights.¹² Suppose the Government, or through institutions such as the National Human Rights Commission, does not actively facilitate the settlement of PT CPI's concession land, part of which has been used and controlled by the community. In that case, the location of government buildings and business premises will result in not only a clash of formal legal norms to strengthen the claims of each party, but also social conflict within the community.¹³

The urgency of this research is to offer alternative solutions to resolve the former PT CPI land concession, providing a broader perspective with a Derrida approach that is more participatory, flexible, and in line with the concept of human rights, thereby ensuring justice, utility value, and certainty for all parties involved in the PT. CPI concession land problem.

Method

This study uses a descriptive qualitative research method. Descriptive qualitative research describes a social phenomenon by interpreting the situation at the time of the research. Primary data sources were obtained directly from the research location at four villages: Bumi Ayu, Bukit Batrem, Teluk Binjai, and Tanjung Palas. The Dumai City Government has recorded that 1,446 heads of families (KK) in this area reside on concession land. They are the primary data that is important, as well as secondary data collected from other relevant parties, to sharpen the analysis.¹⁴

In this qualitative research method, the concept of Participatory Action Research (PAR), as introduced by De La Cruz (2001), was also employed. This approach critiques previous social research that often fails to empower the human subjects being studied. In contrast, these humans can understand their problems and find solutions. In general, as formulated by McTaggart (1997), the subjects of this research are disadvantaged or less fortunate community groups, minority groups, marginalized groups, special groups such as children who have experienced trauma, or other groups who need help to solve their problems directly.¹⁵

<https://doi.org/https://doi.org/10.5281/zenodo.12527013> p-ISSN:

- 11 American Society and International Law, "Conciliation, Mediation and Dispute Resolution," in *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 90 (Cambridge University Press, 1996), 75–78, <https://www.jstor.org/stable/25659010?seq=1>.
- 12 Government of Indonesia, "Law Number 39 of 1999 Concerning Human Rights" (1999).
- 13 H Mohd Yunus, "Land Conflicts and Their Resolution According to Customary Law in Riau Province," *Menara* 12, no. 1 (2013): 19–40, <https://doi.org/http://dx.doi.org/10.24014/menara.v12i1.408>.
- 14 Ni Putu Evilia Octaviani, Tedi Erviantono, and Putu Eka Purnamaningsih, "Implementation of Governance in the Regional Regulation on Persons with Disabilities in Denpasar City (Case Study of Bali Regional Regulation Number 9 of 2015 Concerning the Protection and Fulfilment of the Rights of Persons with Disabilities)," *Fisipol Univ. Udayana*, 2015, 1–8.
- 15 LIPI, "Research Basis" (Bogor, 2017).

Figure 1: Verification of Community Land in the Concession Area by the Author and Deputy Mayor of Dumai in Bumi Ayu Subdistrict, Dumai City



Source: by the Author

This research is based on field data, including data collection on residential areas and claims regarding PT CPI concession land between the community and the company, as well as the use of public facilities in Dumai City. In addition to field observations, this research employs an interview method, starting with local community members, including village leaders, the Dumai City government, companies, the National Land Agency, the Directorate General of State Assets, and the Ministry of Finance. The strategy for presenting data obtained using qualitative methods is to compile a description of the research results. One of the models used is the successive approximation model, which attempts to compare the concepts or theories used with the research findings (*case approach*)¹⁶. This strategy begins by stating the research question and the idea used, and then describes the findings. Researchers explain whether the data support the concept used. By conceptually abstracting the data used, researchers can also form new ideas.¹⁷ To conduct the analysis, data triangulation was employed by comparing data from local governments, direct meetings with communities, company records, and verifying findings through field visits by researchers. The research method involves identifying data intersections and differences, as well as formulating participatory solution proposals from various stakeholders.

Heryanto et al.'s article, *Tenure Amnesty for the Upstream Oil and Gas Industry in Forest Areas*, focuses on the discussion of aspects of land acquisition for oil and gas companies from the chronic aspects before the New Order, the New Order, reform, and regulations according to Law Number 2 of 2012 concerning Land Acquisition for Public Interest.¹⁸ Meanwhile, Tyson et al.'s article, "Deconstructing the Palm Oil Industry Narrative in Indonesia: Evidence from Riau Province," which is located in the PT CPI concession area, focuses on the development of patrimonialism in the Indonesian context. State power expressed through various discourses and policy coalitions tends to favour palm oil companies by seeking legitimacy through claims of economic benefits.¹⁹ Sahlan's research, "Realising 'Deconstructional' Justice Through Agrarian Civil Law Reform: A Review of Jacques Derrida's Theory," focuses on critical aspects of agrarian law in Indonesia, which recognizes the dualism between national and customary law, colonial legacy law, and agrarian law within the national framework.²⁰ Of the three previous

16 Muhammad Hamzah Al Faruq, "Transplantation of Regulatory Impact Assessment: Repositioning Academic Draft in Lawmaking," *Jurnal Penelitian Hukum De Jure* 24, no. 2 (2024): 175, <https://doi.org/http://dx.doi.org/10.30641/dejure.2024.V24.175-198>.

17 LIPI, "Data Analysis and Interpretation of Social Science Research Results," Centre for Basic Research Education and Training (Bogor, Indonesia, 2017).

18 Suzy Yolanda Gussman, "Strategy of PGPA Department in Efforts to Resolve Problems between PT. Chevron Pacific Indonesia and Communities in the Red Zone," *Commiverse* 3, no. 1 (2017): 1–15, <https://jurnal.univrab.ac.id/index.php/cm/article/view/358>.

19 Adam Tyson, Helena Varkkey, and Shofwan Al Banna Choiruzzad, "Deconstructing the Palm Oil Industry Narrative in Indonesia: Evidence from Riau Province," *Contemporary Southeast Asia* 40, no. 3 (2018): 422–48, <https://doi.org/10.1355/cs40-3d>.

20 Sahlan, Nurul Miqat, and Susi Susilawati, "Realising 'Deconstructional' Justice Through Agrarian Civil Law Reform: A Review of Jacques Derrida's Theory," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 3 (2024): 588–605, <https://doi.org/10.30641/dejure.2024.V24.175-198>.

studies, this research has novelty related to the object and focus of the study - the first previous study focused on the aspect of land acquisition for public interest in the oil and gas industry in Indonesia, including in Riau. The second research highlighted deconstruction in the oil and gas area for the palm oil industry. At the same time, the third is a research project with a focus on Derrida analysis, but on a national object scale, from a conceptual approach that compares national and customary law, as well as colonial law and national law.

Findings and Discussion

The findings and discussion will focus on three aspects, namely (a) the conceptual framework of Jacques Derrida's theory, (b) field findings relating to PT CPI concession land, and (c) a model for settling ex-concession land using the Jacques Derrida mechanism.

A. Deconstruction of Land Dispute Resolution

Questioning the urgency and philosophical meaning is part of the deconstruction popularised by Jacques Derrida. In short, Derrida's thinking begins with the problem of language, specifically the deconstruction of Saussure's structuralism, including the idea of universal peace and justice that originates solely from the Western nation's perspective. Therefore, initially, deconstruction focused more on the method of reading texts, not looking for logical inconsistencies, but rather for elements that philosophically determine or allow the text to become philosophical.²¹ Deconstruction does not offer significant benefits to the structure. Because it is very effective and efficient, regular customers are accepted at the front in this structure. The idea of doing the best [...] to operate from within, the path of all strategies and economic resources in a large structure, a path that they use excessively with the structure, that is, without being able to isolate its elements and atoms²².

In deconstruction theory, Derrida will address whether it is true that the reality of the "text" of truth is a single, unified truth (logocentrism). According to Derrida, truth is not singular but plural, as revealed through the deconstruction of social phenomena in life, which reveals objective phenomena based on collective consciousness. From this argument, it can be said that the phenomenon (text) is not orderly but still needs to be refined here and there (disorder)²³. Referring to Derrida's deconstruction, Noris states that the deconstructive process does not come from the reader/critic but from the text itself; it is already there, namely the tension between what [the text] means and what it is supposed to mean²⁴. Therefore, Hardiman states that Jacques Derrida's deconstruction framework is a form of hermeneutics that seeks to read texts not only as concrete forms, as in documents, books, or cultural artefacts, but rather, deconstruction involves understanding texts as comprehensive representations of reality.²⁵

Citizens highly value land's position and function, as land gives birth to a spirit of self-esteem, prosperity, power, and sacredness. Given this urgency, the State, through the provisions of Article 33 of the 1945 Constitution, mandates the state authorities to regulate the use of resources, including land, for the greatest prosperity of the people.²⁶ The constitutional mandate then gives rise to an obligation for the State to refrain from and protect citizens from forced evictions from homes and land. From the perspective of a rights-based state, everyone has the right to adequate housing as a component of the right to an acceptable standard of living. This right to housing guarantees rights to ownership, privacy, family, and home²⁷.

org/10.29303/ius.v12i3.1559.

21 Mangihut Siregar, "Critique of Derrida's Theory of Deconstruction," *Journal of Urban Sociology* 2, no. 1 (2019): 65, <https://doi.org/10.30742/jus.v2i1.611>.

22 Jacques Derrida, *Sprog Materialitet Bevidstthed* (Exil Biblioteket, Vinten, 1976).

23 Rr. Suhartini, *Anatomy of Jacques Derrida's Deconstruction Theory* (Surabaya, Indonesia: Dakwah Digital Press, 2009), [http://repository.uinsa.ac.id/id/eprint/1147/1/Rr. Suhartini_Anatomi Teori Dekonstruksi Jacques Derrida.pdf](http://repository.uinsa.ac.id/id/eprint/1147/1/Rr._Suhartini_Anatomi_Teori_Dekonstruksi_Jacques_Derrida.pdf).

24 Blackwell Science, "Philosophy Column Deconstruction in a Nutshell," 2004, 274–76.

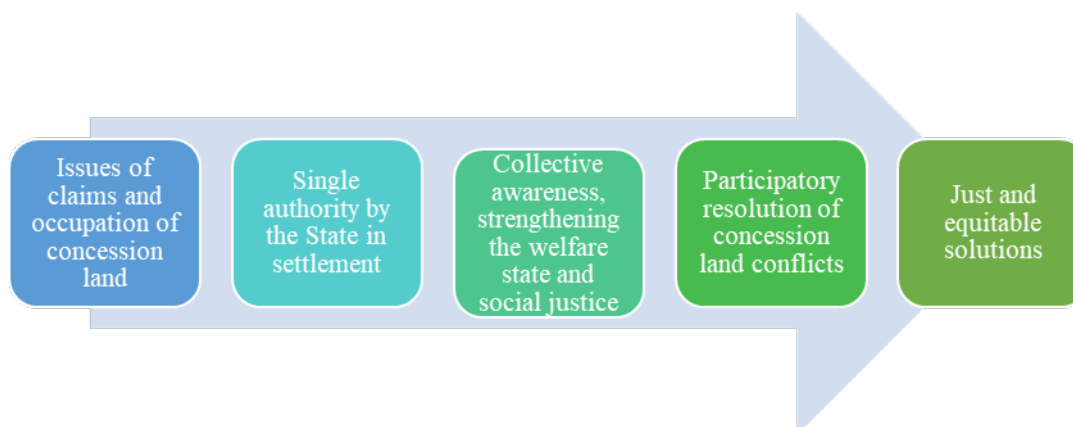
25 Adhimas Alifian Yuwono, "Jacques Derrida's Deconstruction Interpretation of Mining Permit Policy for Religious Community Organisations in Indonesia," *Jurnal Filsafat* 35, no. 1 (2025): 201–27, <https://doi.org/10.22146/jf.97463>.

26 Nurhasan Ismail, "Direction of Land Law Policy and Protection of Land Ownership Rights," *Journal of Rechts Vinding* 1, no. 1 (2012): 375–95, <https://doi.org/10.1523/JNEUROSCI.2580-16.2016>.

27 Mochamad Felani Budi Hartanto, Dian Andi Nur Aziz, and Agus Suntoro, "Characteristics of Eviction Practice in Indonesia : The Importance of Human Rights Intervention Before, During and After Evictions," *Jurnal HAM* 14, no. 2 (2023): 169–84, <https://doi.org/DOI: http://dx.doi.org/10.30641/ham.2023.14.169-184>.

Derrida's deconstruction aligns with the principle of land conflict resolution that encourages active participation and the selection of appropriate strategies from parties who have a drastic impact or change in their lives. Regardless of the legality of land ownership, there is a universal policy that rehabilitation or compensation to people affected by programs or projects, for example, sharecroppers, tenant farmers who have lost their right to use, users who rely on customary land use rights but without formal land ownership rights, temporary migrants, and squatters.²⁸

Figure 2: Derrida's Deconstruction and Application in Land Conflict Resolution



Source: Conceptualized by the Author

Therefore, it can be used as an analytical tool for in-depth study by examining Derrida's deconstruction and linking it to the concept of ownership and the complex, yet controversial, land conflicts. By applying Derrida's deconstruction to land conflicts, we will gain a more fundamental understanding of the dynamics of power and the social structures underlying territorial disputes, resource claims, and identity. This perspective reveals that land conflicts are not simply zero-sum games between competing interests, but rather a complex web of narratives, histories, and cultural values that are closely intertwined, making it difficult to discern a clear or objective truth. According to Derrida, the idea of a single objective truth or a single solution is fundamentally problematic because it is always subject to authorization, the influence of personal bias, cultural norms, and historical context.

In comparison, Malaysia, in resolving concession land, particularly former large-scale plantations, has chosen the concept of relinquishing control to the community through the federal Government (FLDA), focusing on providing 10 hectares of oil palm or rubber plantations to people experiencing poverty. Land allocation and subsidies are carefully implemented, with various requirements and a substantial number of poor people applying for ex-concession land. Allocation for poor people, despite the tendency for local politicians to perpetuate their power through land politics.²⁹

B. Issues of Claims and Occupation of PT CPI Concession Land

PT. CPI is Indonesia's largest oil producer, founded in 1924 by the Standard Oil Company of California (SOCAL). In 1935, SOCAL was offered an area of 600,000 hectares in Central Sumatra by the Dutch East Indies government. Two prominent American companies, SOCAL and TEXAS Company (TEXACO), merged to become the California Texas Petroleum Corporation (CALTEX). During World War II, Caltex's oil exploration and drilling activities in Riau stopped. All Caltex oil fields in the area were occupied and controlled by the Japanese army. Around 1949-1950, President Soekarno issued an order to nationalize oil-producing companies in Indonesia that the Netherlands owned. According to the policy of the Government of the Republic of Indonesia, in 1950, NPPM changed its name to Caltex Pacific Oil Company (CPOC) with an investment exceeding US\$50 million. This investment fund exported Minas oil through Perawang, Duri in Bengkalis, and Petapahan. In the early 1960s, Caltex's name changed to Caltex Pacific Company (CPC). In the 1970s, CPC changed its name again

28 Kazi F Jalal, *Handbook on Resettlement: A Guide to Good Practice*, Journal of Social Development (Manila, Philippines: The Asian Development Bank, 1998), http://adb.org/sites/default/files/pub/1998/Handbook_on_Resettlement.pdf.

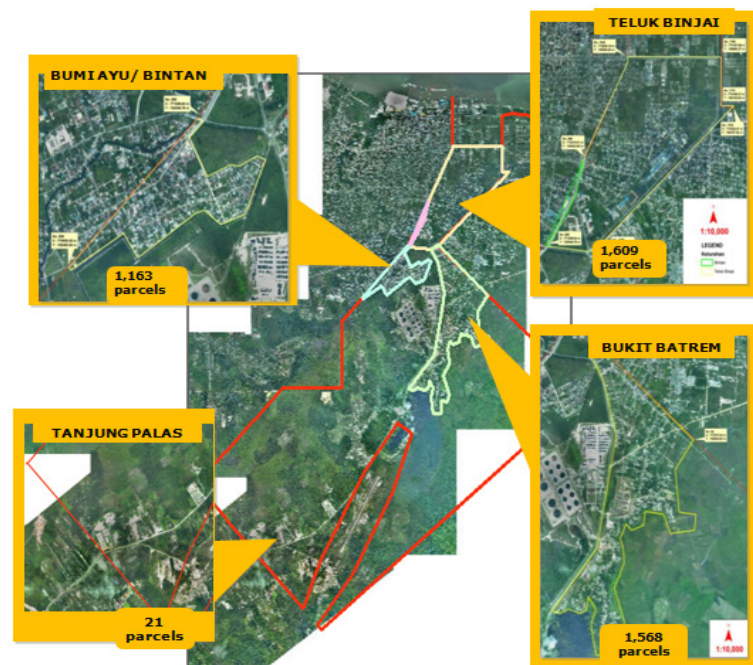
29 Dorothy Guyot, "The Politics of Land : Comparative Development in Two States of Malaysia," *Pacific Affairs Journal* 44, no. 3 (1971): 368–89.

to PT Caltex Pacific Indonesia with an operational area covering almost the entire central Riau region, stretching from Pinang in the north to Minas in the south, from Bangko and Petapahan in the West to Minas and Duri in the East. In the 1970s, CPC changed its name again to PT Caltex Pacific Indonesia, with an operating area covering almost the entire central Riau region, stretching from Pinang in the north to Minas in the south, from Bangko and Petapahan in the West to Minas and Duri in the East.³⁰

The development of Dumai City has been increasingly felt since 1956, when PT. CPI established itself as an export base to various parts of the world. In addition to building oil docks, PT CPI also built oil storage and/or measurement tanks, offices, modern housing complexes, sports fields, and school buildings. In 1958, PT. CPI completed the construction of the Duri-Dumai road, connecting the Pekanbaru-Duri highway that PT had built. CPI previously. In addition to enhancing mobility, this road is primarily intended to support the maintenance of the oil pipeline network that stretches along one side and the electricity network on the other. During its development, the Pekanbaru-Dumai road also served the general public, breaking down isolation and providing easy access to various facilities, including markets, workplaces, schools, and health clinics. Legally, PT CPI obtained a land concession from the Indonesian Government based on the Decree of the Minister of Agrarian Affairs Number SK 882/Ka dated November 30, 1961, specifically for Dumai City, covering an area of 4,055 Ha, located in Dumai Area, Dumai District, Kewedanan, Bengkalis Regency, Central Sumatra Province³¹.

To obtain accurate data on land claims and community occupation, the Dumai City Government then conducted an inventory of the former PT. CPI land is in the Certificate of Use Rights Number 76 of 1975. The total area occupied by the community reached 3,020,088 meters, or the equivalent of 302 hectares, spread across (1) Teluk Binjai, as many as 1609 plots; (2) Bukit Batrem, as many as 1568 plots; (3) Bumi Ayu & Bintan, as many as 1163 plots, and Tanjung Palas, as many as 21 plots³². To formulate various equitable solutions, the Author is also actively involved in verifying, collecting data, offering, and formulating settlement models to the Government, the community, PT CPI, and private companies. The approach offered is based on human rights, prioritizing utility, shared land justice, and national interests. For legal positivists, the dominant interpretation is that anyone who obtains a formal permit acts as the owner, and residents or other parties who utilize the land are considered criminals subject to legal enforcement.

Figure 3. Occupation and claim of PT CPI concession land by residents



Source: Data collection by the Author, Komnas HAM, PT CPI, and the Dumai City Government

30 Chevron, "A Century of Partnership," Chevron, 2025, <https://indonesia.chevron.com/about/chevron-in-indonesia>.

31 Government, "A Glimpse of Dumai City."

32 Komnas HAM, "Resolving Social, Legal and Human Rights Problems Related to Former Right of Use Number 75/1975 A/N. Pt Chevron Pacific Indonesia in Dumai City," 2014, <https://www.komnasham.go.id/index.php/news/2016/5/26/106/penyerahan-laporan-dan-rekomendasi-hasil-pemantauan-penyelesaian-lahan-konsesi-pt-cpi-seluas-3-000-ha.html>.

The concession land of PT CPI in Dumai City has also using by various government institutions, both central and regional, as well as state-owned enterprises with a total of 72 Ha, including the Port Administration Office, Customs and Excise Inspection Office, Immigration Office, Sea Transportation Station Office, Bengkalis Regency Industry Office, Pertamina Unit VI, State Post and Giro Company, Dumai District Attorney's Office, Dumai District Court, Logistics Affairs Agency, Tax Office, Bengkalis Regional Government mess, Dumai Seaport Health Office, and Labourer Housing land. PT CPI then submitted an application for land use rights registration in Dumai City for the remaining concession land, which was granted by the Riau Level I Regional Agrarian Directorate Office with the issuance of Use Rights Certificate Number 76 of 1975, covering an area of 3,385 Hectares with a validity period until August 11, 1989.

Table 1. Categorization of PT CPI Concession Land Users in Dumai

Categorization	Utilization Purposes	Area	Status
Land used by PT CPI	Office and industrial areas, Housing areas, Operational support facility areas, and Areas used for other needs, such as water absorption areas, waste processing, and others	682 Ha	Rights Holder
Land used by the Government	Government office areas and Dumai city government housing; Areas used by the military, police, and other vertical institutions; and areas used for public facilities and social facilities such as schools, places of worship, and others	181 Ha	Land Lending
Land use by the Ministry of Forestry	Dumai River Nature Tourism Park (TWA) through Decree No. 154 of 1990 concerning the Determination of the Dumai River Forest Area	1,238.71 Ha	Overlapping with PT CPI concession land No.76/1975
Land use by the community	In Teluk Binjai, Bukit Batrem, Bumi Ayu, Bintan and Tanjung Palas Sub-districts	302 Ha	Citizens' residential claims
Land use for business and plantations	Data collection by the Dumai City Government revealed that the PT CPI concession location is home to various businesses, including warehousing facilities, truck bases, oil palm plantations, and commercial units such as supermarkets.	The area of occupancy varies for each corporation	Illegal encroachment

Source: Research results processed by the Author

C. A Critical Analysis of the Dominance of State and Corporation Narratives

For companies, control of land by third parties, such as the community and business entities, is referred to as land encroachment, which is the act of occupying an area that is not rightfully theirs in an unlawful manner. The limited number of security personnel is not comparable to the proportion of the operational area of PT CPI in Dumai City, which is one of the factors that trigger land encroachment. The company's security efforts have two dimensions: securing the work area and ensuring the safety of residents living in the company's operational area.³³.

33 Gussman, "Strategy of PGPA Department in Efforts to Resolve Problems between PT. Chevron Pacific Indonesia and Communities in the Red Zone."

Land encroachment by the community and various companies in the PT CPI land concession area, including areas above the pipeline network, poses two risks for residential and business activities. *First* is the security aspect for the oil and gas company entities in Dumai City, both PT CPI and PT Pertamina. The massive community occupying concession land above the pipeline network has the potential to endanger the security of oil and gas commodities directly. *The second aspect* is human safety for all PT CPI workers and the safety of residents who live in vulnerable locations on the company's concession and pipeline land. Chevron Communication Manager Prasasti Asandhimitra explained that the safe distance for building construction around high-voltage power lines is 41 meters from the centerline of the road. For oil and gas pipes, the safe distance for building construction is 29 meters from the road axis to the outside of the pipe. To raise awareness among residents, this socialization and safety campaign activity is carried out annually, particularly in its operational areas, by presenting various materials tailored to each region's specific needs.³⁴

The Director General of State Assets, Ministry of Finance, ensures that the concession land of PT CPI, as per the Certificate of Use Rights Number 76 of 1975, has the status of State Property. The position of the Director General of State Assets to maintain assets and reject claims of community ownership or land legitimacy based on court decisions is based on a narrow interpretation of Article 45 paragraphs (1) and (2) of Law Number 1 of 2004 concerning State Treasury namely *state/regional property required for carrying out state/regional government duties cannot be transferred to any party*.³⁵ and Article 4 paragraph (2) letter h of Government Regulation Number 28 of 2014 concerning Management of State/Regional Property, namely *determining the use, utilization, transfer, destruction, or deletion of state property*.³⁶ However, the regulation through the provisions of Article 46 paragraph (1) of Law 1 of 2004 opens the opportunity for transfer because (a) it is no longer by spatial planning or planning, and (b) in the public interest.

The Dumai City Land Office, through its Head of the Land Acquisition Section, Syahril, stated that the former concession land of PT CPI has the status of state land under the control of the Directorate General of State Assets (DJKN), which is part of the Ministry of Finance. Likewise, some of the land is also under the authority of the Ministry of Forestry, as per the Minister of Forestry's Decree Number SK.903/MENLHK-PKTL/PPKH/PLA.2/2/2023. Therefore, the Dumai City Land Office stated that they would not dare to provide legitimacy of ownership rights to residents on the former PT. CPI concession land³⁷. The policy of not providing legitimacy of ownership to residents was implemented through a letter from the Director General of State Assets to various institutions, including the National Land Agency, the Dumai City Government, and the Court, instructing them not to recognize claims of ownership of the land other than those of the company. Likewise, regarding the decision that has permanent legal force (*inkracht van gewijsde*) in the civil case between Barita Simblon (deceased) against Supri alias Usup et al., who represented residents of RT 13,14,15,16, Bumi Ayu Village at the Dumai District Court, the decision cannot be executed by the Court because it has the status of state land.³⁸

34 Ira Widana, "Chevron Reveals Risks of Living Near Power Lines, Oil and Gas Pipelines," Go Riau, 2016, <https://www.gor Riau.com/berita/baca/chevron-beberkan-resiko-tinggal-di-sekitar-power-line-pipa-minyak-dan-gas.html>.

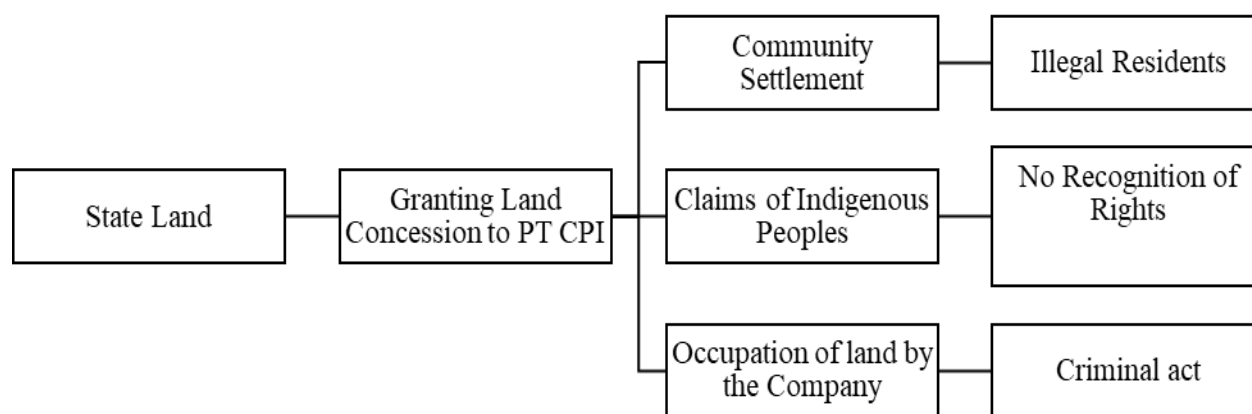
35 DPR, "Law of the Republic of Indonesia Number 1 of 2004 Concerning State Treasury" (2004).

36 Ministry of Finance, "Government Regulation Number 28 of 2020 Concerning Management of State/Regional Property" (2020).

37 S Purba, "Dumai City Land Office Does Not Dare to Process Land Certificates for Former CPI Concessions, State Must Be Present," Tribun Riau, 2019, <https://www.tribunriau.com/bpn-dumai-tak-berani-proses-sertifikat-tanah-ex-konsesi-cpi-negara-harus-hadir/>.

38 Gussman, "Strategy of PGPA Department in Efforts to Resolve Problems between PT. Chevron Pacific Indonesia and Communities in the Red Zone."

Figure 4. The Government Narrative that Concession Land is Entirely State-Owned



Source: Model analysis by the Author

The General Chairperson of the Daily Leadership Council of the Riau Malay Customary Institution, Datuk Seri Syahril Abubakar, confirmed the single narrative that the former state concession land intersects with the customary community's land. Syarrial reminded PT CPI of several unresolved issues still noted by the Riau community, namely, oil-polluted land, Chevron concession land, which is customary land controlled by other parties, and Pancung Alas. Pancung Alas is a tax or compensation for forest products taken by immigrants as a mandatory levy in the form of money due to certain relationships.³⁹

The Indigenous Law Community (MHA) Summit in the Rokan Block Working Area of Riau Province, consisting of four MHAs, submitted a statement of position (Warkah Amaran) regarding customary land and the implementation of the "pancung alas" of their customary land in the Rokan Block working area to the Riau Malay Customary Institution (LAMR). The Indigenous Law Community stated that PT CPI produced approximately 11-12 billion barrels during its concession period and never paid the "pancung alas" to the indigenous community. If the pancung alas was paid to the indigenous people in the amount of just 10 per cent of the net proceeds from oil and gas production, this compensation could be used to develop the community, advance education and develop the Dumai City area⁴⁰. An unresolved issue remains the resolution of locations affected by hazardous waste pollution (oil spills) in Rokan Hilir Regency, Bengkalis Regency, Siak Regency, and Pekanbaru City. The Indonesian Forest Destruction Prevention Institute (LPPHI) claims that 279 locations have not been restored, and PT CPI is considered negligent in carrying out its environmental restoration responsibilities for its Rokan Block management activities before the transfer of management to Pertamina on August 9, 2021⁴¹. One of the victims, Mr Oktowarmi, claimed to have suffered losses from 1981 to 2025 due to B3 waste pollution on his land and was only offered compensation of Rp201 million from PT CPI through the Riau Province Environment and Forestry Service (DLHK)⁴².

39 RLS, "To Chevron Officials, Riau Malay Traditional Institution Reminds of Unfinished Homework," Go Riau, 2021, <https://www.goriau.com/berita/baca/kepada-petinggi-chevron-lamr-ingatkan-pr-yang-belum-selesai.html>.

40 Zul Azhar, "The MHA Unit Urges LAMR to Fight for the Destruction of the Rokan Block Work Area," Lamanriau.com, 2021, <https://lamanriau.com/2021/07/01/simpul-mha-minta-lamr-perjuangkan-pancung-alas-wilayah-kerja-blok-rokan/>.

41 Muhamad Fajar Riyandanu, "Chevron and SKK Migas Sued for Alleged Hazardous Waste Pollution in Riau," Katadata.co.id, 2021, <https://okegas.co.id/detail/1313/masyarakat-minas-akan-gugat-pt-chevron-diduga-lakukan-perbuatan-melawan-hukum-dalam-kasus-pencemaran-limbah>.

42 Lemansyah, "The Minas Community Will Sue PT Chevron for Illegal Acts in a Waste Pollution Case," *Okegas.Co.Id*, 2025, <https://okegas.co.id/detail/1313/masyarakat-minas-akan-gugat-pt-chevron-diduga-lakukan-perbuatan-melawan-hukum-dalam-kasus-pencemaran-limbah>.

D. Deconstruction-Based Land Dispute Resolution Model

The settlement of the claim and concession issue regarding the former PT CPI land, which is 3,385.46 hectares in size, remains stalled. The Government has received the return of land from PT CPI and stated that the land is state-owned. The resolution was quite lengthy, spanning from the proposal by the Dumai City Government in 2010 to the formation of various teams, all the way up to the Central Government, without any clear resolution. Through the Deputy Minister of Agrarian Affairs and Spatial Planning/BPN, Raja Juli Antoni, in 2024, the Government committed to resolving the issue of PT CPI's former concession land - although it has not been realized.⁴³ In 2014, the National Human Rights Commission facilitated the settlement of the former PT CPI concession land by undertaking a series of actions, including collecting field data, absorbing community aspirations, holding multi-stakeholder meetings, and submitting recommendations to the Government. Multi-stakeholders such as the Directorate General of State Assets, the Special Task Force for Upstream Oil and Gas Business Activities, the National Land Agency, the Ministry of Forestry, and even the Corruption Eradication Commission⁴⁴.

Derrida's deconstruction model is based on the concept of participatory action research, which accommodates community aspirations and formulates multiple concepts of resolution based on various laws and regulations. The Government must develop alternative solutions to resolve the former PT CPI land concession. Referring to the participatory action research mechanism and field data collection, there are several models of land occupation, namely (1) company operations; (2) central government institutions or agencies in the regions; (3) regional governments; (4) state-owned and regional enterprises; (5) law enforcement agencies such as the police, prosecutors and courts, (6) national park areas; (7) social and educational institutions; (8) economic or business areas; (9) residential areas; (10) indigenous communities, and (11) plantations or private companies. Through Derrida's deconstruction, the parties offer input, propose solutions, provide interpretations, and offer various formulations for just resolutions. Thus, through this scheme, the solutions formulated are not singular, as is usually the case when the Government's will is dominant.

Referring to the participatory data collection on the occupation of the former PT CPI concession land, as per the Certificate of Use Rights Number 76/1975, the total area reached 1,163 ha, comprising 4,361 plots, plantation areas, and commercial sector businesses. It is predicted that 17,444 people (four people inhabit one plot) will be affected if the Government carries out law enforcement and evictions. Another challenge, if there is no just resolution, is the potential for horizontal conflict between residents who claim ownership, communities with companies or plantations, communities with Indigenous people, and communities with social and educational institutions. These clashes between communities are detrimental to maintaining social order while achieving prosperity. Considering these facts, the active participation of the community and those who have utilized and occupied PT CPI's concession land must be acknowledged and allowed to propose a peaceful resolution. Field verification conducted by the Author and the local Government indicates that the community tends to expect the implementation of the inclave over the concession land—they would even accept the Government's decision if it demanded a fair and just purchase price.⁴⁵

Several legal frameworks will serve as references in formulating alternative solutions and countering the Government's single narrative regarding occupancy, squatters, and criminals. Article 33, paragraph (3) of the 1945 Constitution explicitly states that the earth, water, and natural resources are controlled by the State and used for the greatest prosperity of the people. The Constitutional Court elaborates the Right to Control the State into 5 (five) authorities whose purpose is as much as possible for the prosperity of the people, including: formulate policy (*beleid*), make arrangements (*regelendaad*), implementation (*bestuurdaad*), carry out management (*beheerdaad*), and supervise (*toeichthoudensdaad*)⁴⁶. This provision is the ground norm that underlies various other sectoral regulations, including (a) Law Number 39 of 1999 concerning human rights, which guarantees various rights, namely the right to ownership, the rights of indigenous peoples, the right to welfare, the right to a sense of

43 Redaksi, "Successful Audience, Deputy Minister of Agrarian Affairs and Spatial Planning Committed to Resolving Concession Land Issues in Dumai," Monitor Riau, 2024, <https://monitorriau.com/news/detail/28706/audiensi-sukses-wakil-menteri-agraria-dan-tata-ruang-berkomitmen-selesaikan-masalah-tanah-konsesi-di-dumai>.

44 HAM, "Resolving Social, Legal and Human Rights Problems Related to Former Right of Use Number 75/1975 A/N. Pt Chevron Pacific Indonesia in Dumai City."

45 Husendro, Results of a meeting with representatives of all regional administrators in four sub-districts located within the PT CPI concession area, in Dumai City, 2013.

46 Suparto, "Interpreting The State's Right to Control In the Provisions of Article 33 Paragraph (3), The Constitution of 1945 Republic of Indonesia," *UIR Law Review* 4, no. 2 (2020): 1–8, [https://doi.org/10.25299/uirlrev.2020.vol4\(2\).6889](https://doi.org/10.25299/uirlrev.2020.vol4(2).6889).

security, and others; (b) Law No. 22 of 2011 concerning Oil and Gas. The Oil and Gas Industry cannot arbitrarily use land that belongs to the community for its operational activities without the consent of the landowner; (c) Law No. 40 of 2007 concerning Limited Liability Companies, which burdens companies to guarantee a good and healthy environment, as well as social responsibility; (d) Guiding Principles for Business and Human Rights which provide for corporate responsibility to respect human rights, which means not violating internationally recognized human rights by avoiding, reducing or preventing negative impacts from corporate operations.

Public participation in proposing the granting of rights or purchases at a fair and equal value, in line with the Government's land reform program. According to Article 2 of Decree of the People's Consultative Assembly of the Republic of Indonesia Number IX/MPR/2001, land reform is a continuous process to reorganize the control, ownership, use, and utilization of agrarian resources, to achieve justice and prosperity for all people.⁴⁷ Likewise, in the conciliation process or discussions regarding alternative solutions, the Human Rights Commission or the Government can refer to the Regulation of the Minister of Finance of the Republic of Indonesia Number 165/PMK.06/2021 concerning Amendments to the Regulation of the Minister of Finance Number 111/PMK/2016 concerning Procedures for the Implementation of the Transfer of State Property, the grant option is a worthy choice to consider in resolving the former PT CPI concession land. Based on the provisions of Article 1, number 10, a grant is a transfer of ownership of goods from the Central Government to the Regional Government or from the Central Government to another party without obtaining compensation. Meanwhile, the criteria for grant recipients, as regulated in Article 86 letters a, b, and f, are social institutions, cultural institutions, religious institutions, humanitarian institutions, or non-commercial educational institutions; communities, both individuals and groups; and BUMN in the form of public companies to maintain the stability of food security, or in the context of government assignments.⁴⁸

The Government or a conciliation facilitator, through Derrida's deconstruction, can formulate various settlement options regarding PT CPI's concession land, which is already inhabited by thousands of coconut families, its use for the construction of regional government facilities and vertical agencies, business interests and several plantation businesses, as well as interactions with local (indigenous) communities. The basic framework of deconstruction for policy formulation has four arguments, namely:

First, the usefulness and benefit, based on the implementation of Article 33 of the 1945 Constitution, "*The earth, air and natural resources contained therein are controlled by the state and utilized as much as possible for the prosperity of the people*", which encourages the utilization of all natural resources for the prosperity and improvement of the people's welfare. The existence of Article 33 of the Constitution mandates the State, through the Government in particular, to strive to improve the welfare of society as referred to in the fourth paragraph of the preamble to the Constitution. This extension of Article 33 also has an impact on economic democratization, as the State's efforts involve the role of society and private entities in managing natural resources, while maintaining the regulatory function of the State.⁴⁹

Second, a method for resolving concession land disputes using a participatory approach that involves all interested parties will facilitate the development of settlement options or schemes. Through this method, a legal framework for settlement will be formulated that is beneficial to all parties, including indigenous communities, local communities, the Government, the private sector and corporations. Therefore, although the State has the power to manage and utilize resources, as enshrined in the Constitution's "Right to Control," its implementation must be encouraged to ensure equitable and just land distribution for all parties, especially vulnerable groups.⁵⁰ Referring to the view of Maria S Sumardjono, the interpretation of Article 33 of the Constitution states that natural resources are a collective right that recognizes group rights and individual rights; State authority over natural resources focuses on the function of regulating licensing; and the relationship between the State and the people is not a relationship of subordination, but a relationship of equality because the State obtains the right to control in its position as a representative of all the people. According to the principles of human rights, what is the right of

47 Howard J Tigris, "Kebijakan Dan Pelaksanaan Land Reform Di Masa Pemerintahan Jokowi - JK," *Rechts Vinding* 1 (2016): 1–4, https://rechtsvinding.bphn.go.id/jurnal_online/2016.11.04-kebijakan-dan-pelaksanaan-landreform-di-era-pemerintahan-jokowi-jk.pdf.

48 Ministry of Finance, "The Regulation of the Minister of Finance of the Republic of Indonesia Number 165/Pmk . 06/2021" (2021).

49 Giri Ahmad Taufik, "The Interpretation of Article 33 of the Indonesian Constitution and Its Impact on Independent Regulatory Agencies," *Australian Journal of Asian Law* 20, no. 2 (2020): 313–32.

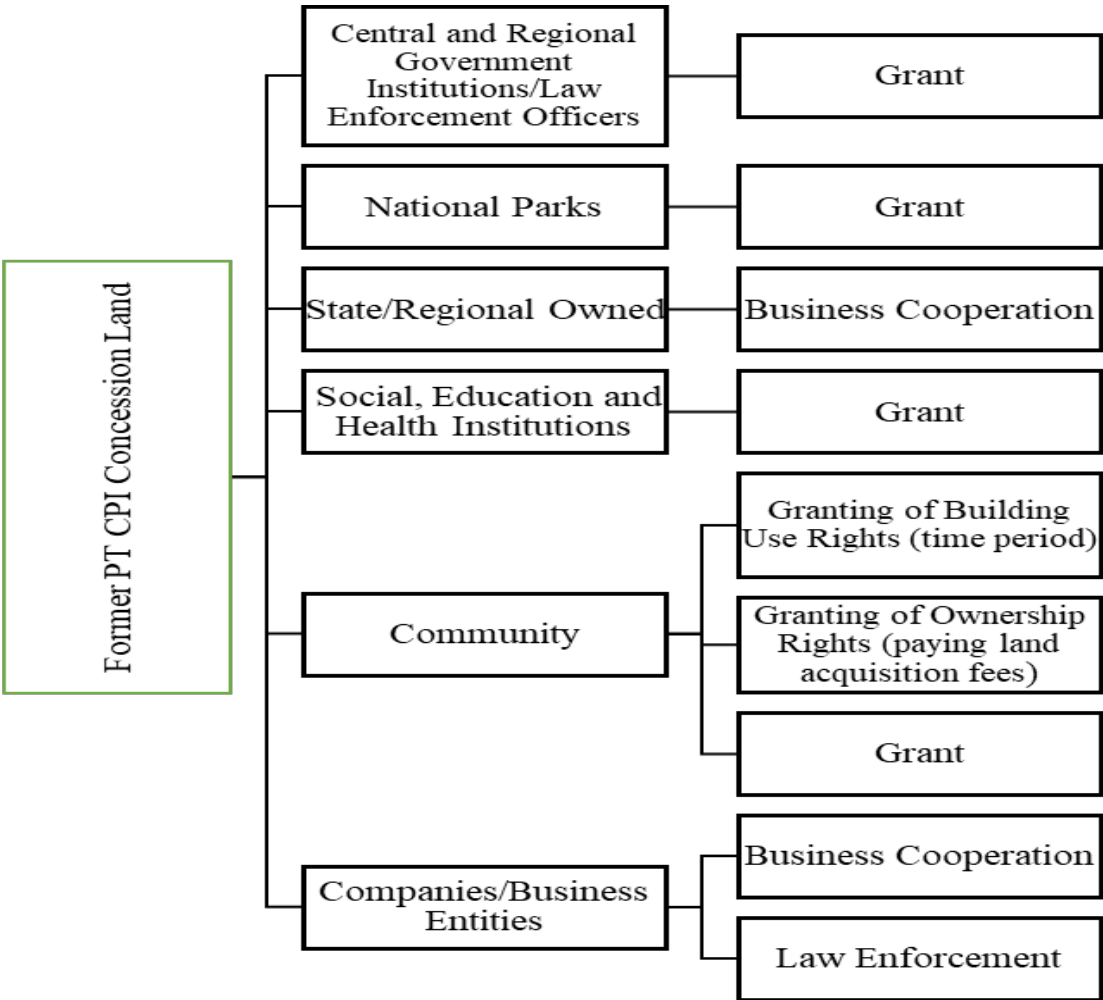
50 Rofi Wahanisa, "Politics of Land Grabbing: The Silent Death of Emancipation in Agrarian Law," *Jurnal Penelitian Hukum De Jure* 25, no. 2 (2025): 403, <https://doi.org/http://dx.doi.org/10.30641/dejure.2025.V25.133-150>.

every person is an obligation for the State to fulfil⁵¹.

Third, resolving conflicting claims over concession land and avoiding occupation that could damage the sustainability of concession land. If not resolved quickly, the potential for social conflict will arise in the future, which will be detrimental to the nation, State, and society.

Fourth, increasing state revenue - currently, concession land is taxed with land and building taxes by oil and gas companies, resulting in approximately Rp. 250 billion per year, including land acquisition fees, sales taxes, profit sharing, and fixed fees on former concession land. However, the lack of clarity regarding the legal subject of land rights, especially land used by the community and private corporations (such as plantations and economic zones) in former concession areas, has caused the State to lose income that would be useful for the continuation of development.

Figure 4. Various options and alternatives for resolving the former PT CPI concession land



Source: Modelling by Author

From the deconstruction, a model for resolving PT CPI’s concession land can be developed that is more humane, just and in line with national interests, namely: (a) for utilization by government agencies, both regional and vertical, a grant option can be implemented so that there is legal certainty in its utilization; (b) for indigenous (local) communities, certainty of land status can be provided which is guaranteed by the Government through the issuance of Communal Rights Certificates by the Land Office; (c) for communities occupying land for residential purposes and not for commercial purposes, the approach is based on the concept of land reform, including the issuance of building use rights certificates to be upgraded to ownership rights and provide income to the State

51 Agus Suntoro, “Study of Law Number 2 of 2012 Concerning Land Acquisition for Development in the Public Interest,” *Komnas HAM RI*, vol. Pertama (Jakarta, 2018).

through land acquisition fees or land and building taxes; (d) for business actors occupying concession land, a business scheme can be imposed to purchase land according to fair value; (e) for areas that violate conservation for palm oil plantations and other businesses that are not in line with spatial planning, law enforcement actions can be taken.

Conclusion

The issue of claims and overlapping concession land of the former PT CPI in Dumai City, Riau Province, has been ongoing for decades. The presence of the oil and gas company, on the one hand, provides excellent benefits for state revenue and equitable development, thanks to the various infrastructures it has built. However, controlling vast land that reaches thousands of hectares also has implications for the limited living space/area available to local communities, customs, community institutions, and government institutions. With the end of the concession, PT CPI returned 3,345 hectares of land to the State, which the Directorate General of State Assets controls.

The Government has always had a single narrative, namely that the former PT CPI concession land has the status of State Property, and the residents (local community and private enterprise) who occupy it are illegal and criminals. Therefore, Derrida guides the Government in identifying all subjects who occupy the former PT CPI land location through deconstruction. By recognizing them and based on a participatory model, variations of the settlement model can be formulated in accordance with various regulatory provisions and State policies, providing alternative or settlement mechanisms. Several variations can be selected and adjusted by considering the costs and benefits, namely grants, cooperation, rental, profit sharing, granting ownership rights and building use rights to the community, business use rights to plantations, and even, if necessary, taking legal action against corporations that are unwilling to follow state policies. Furthermore, we urge the Government to immediately resolve the issue of the former PT CPI concession land peacefully, participatively, fairly, and in accordance with the law.

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AUTHOR'S PROFILE

Rohmat, a master's student in legal studies at the Faculty of Law, Universitas Brawijaya, Indonesia, and a prospective judge at the Purwokerto District Court.

Milda Istiqomah, Lecturer and serves as the Deputy Dean for Academic Affairs at the Faculty of Law, Universitas Brawijaya, Indonesia.

Nurini Aprilianda, Lecturer and serves as the Deputy Dean for General Affairs, Finance, and Resources at the Faculty of Law, Universitas Brawijaya, Indonesia.

Rizal Muchtasar SH., LL.M., born in Kendari on May 6, 1978, currently works as a Lecturer/Researcher/Consultant. His field of expertise is Constitutional Law. Contactable email: rizal.muchtasar78@gmail.com.

Dr. Heryanti, S.H., M.H., born in Raha, July 27, 1975, currently serves as a Senior Lecturer / Lecturer at the Faculty of Law, Halu Oleo University. Her last degree is a doctorate in Law / Agrarian Law; email: heryanti_fh@uho.ac.id and heryanti.kd@gmail.com.

Dr. Sahrina Safiuddin, SH., LL.M., born in Kendari, November 14, 1978, currently serves as Senior Lecturer / Head of Quality Assurance Unit at the Faculty of Law, Halu Oleo University. Her email address is sahrinas78@gmail.com.

La Ode Muhammad Taufiq Afoeli, S.H., M.H., was born in Ujung Pandang on November 17, 1989. The author completed his elementary education at SD Negeri 15 Raha in 2002, then continued his junior high school education at SMP Negeri 2 Raha and graduated in 2005. His senior high school education was taken at SMA Negeri 1 Raha and completed in 2008. After that, the author continued his studies at the Faculty of Law, Universitas Muslim Indonesia (UMI), and obtained a Bachelor of Law (S.H.). The author then continued his education at the Master of Laws (M.H., Indonesia Degree) level at the same university and completed it in 2015. Currently, the author is active as a lecturer at the Faculty of Law, Halu Oleo University, with a concentration in Constitutional Law (HTN) and teaches several courses in that field.

Muhammad Uchida Sudirman, the author, was born on March 25, 2003, in Jakarta. He completed his undergraduate studies at the Faculty of Law, Universitas Pembangunan Nasional "Veteran" Jakarta, with a concentration in International Law. The author has a strong interest in issues related to international humanitarian law and non-international armed conflicts, which serve as the main focus of this paper and are expected to remain his primary area of study in the future. Email: 2110611250@mahasiswa.upnvj.ac.id.

Mimin Mintarsih, S.H., M.H., born in Sumedang, September 7, 1966. The author earned a bachelor's degree in 1991 from the Faculty of Law at Universitas Islam Jakarta and a Master of Laws in 2008 from the Islamic University of Jakarta. Actively writing Scientific Papers with the title: *Nikah Mut'ah Jawaban Status Hukum Perkawinan Di Indonesia* (Jurnal Penelitian Hukum De Jure, 2021), *Problematisa Korban Tindak Pidana Kekerasan Seksual Di Lingkungan Pendidikan* (Book-chapter: *Kekerasan Seksual Ditinjau Dari Berbagai Aspek Bidang Ilmu*, 2023), *Raising The Awareness of Indonesian Migrant Workers in Malaysia on the Crime of Sexual Violence Based on Indonesian Positive Law* (International Journal of Community Care of Humanity (IJCCH, 2024). Email: miensh66@gmail.com. Orchid ID: <https://orcid.org/0009-0001-4103-0826>.

Lukman Mahdami, STh.I., S.H., M.A., M.H., M.Kn., born in Jakarta, March 31, 1977. Education: Bachelor of Theology of Islamic Law at STAIN Surakarta (2002), Bachelor of Law at Islamic University of Batik Surakarta (2012), Master of Religion at the Institute of Al-Quran Sciences Jakarta (2007), Master of Law at the Islamic University of Jakarta (2010), Master of Notary at Jaya Baya University (2016). Email: lukman.luq@gmail.com.

Ahyar Ari Gayo, S.H., M.H., was born in Bale, Central Aceh, on April 21, 1966. Currently, he holds the rank of Senior Administrator for group IV/e and serves as Principal Researcher at the Law Research Center-IPSH, the National Research and Innovation Agency (BRIN). His expertise lies in Islamic Law and Customary Law. The author is domiciled at Jalan Bantar Jati RT. 007/02, No. 57 Setu, Cipayung Sub-District. The last degree obtained is a Master of Laws (S-2), obtained in 2003. Email: ahyararigayo@gmail.com. Orchid ID: <https://orcid.org/0009-0009-8314-642X>.

Ratna Galuh Manika Trisista, S.H., M.H., born in Sumedang, August 11, 1999. The author earned a bachelor's degree in 2020 from the Faculty of Law at Universitas Islam Jakarta and a Master of Laws in 2023 from the same faculty. The author works at the Faculty of Law, Islamic University of Jakarta, and serves as a manager of an accredited law school. Journals. Email: manikatrিসিস্তা@gmail.com. Orchid ID: <https://orcid.org/0009-0005-7641-487X>.

Leny Megawati, a Doctoral student in Legal Studies in the Postgraduate Program and a lecturer at Suryakencana University.

T. Subarsyah, a lecturer who also serves as the Head of the Doctoral Program in Legal Studies at the Postgraduate Program of Pasundan University, Indonesia.

Tuti Rastuti, a lecturer at the Faculty of Law, Pasundan University, Indonesia.

Adrian Nugraha, was born in Yogyakarta on June 16, 1985. He completed his Bachelor of Laws at the Faculty of Law, Universitas Gadjah Mada, Yogyakarta, in 2007, and earned his Master of Laws from the same institution in 2011. He obtained his Ph.D. from the Institute of the Law of the Sea, National Taiwan Ocean University, Taiwan, in 2021. His academic expertise includes international law, the law of the sea, and environmental law. He currently serves as the Head of the Department of International Law at the Faculty of Law, Universitas Sriwijaya, South Sumatra, holding the academic rank of Lektor (Associate Lecturer). Besides teaching several courses—including International Law of the Sea, Human Rights Law, International Economic and Trade Law, and Environmental Protection and Management Law—he is actively engaged in research and community service in maritime, environmental, and human rights law. His scholarly works have been published in accredited national journals and reputable international journals, including *Hasanuddin Law Review*, *Environmental Policy and Law*, *Griffith Law Review*, and the *Australian Journal of Maritime & Ocean Affairs*. A selection of his publications may be accessed via his Google Scholar profile: <https://scholar.google.com/citations?user=BTtG42wAAAAJ&hl=en&oi=ao>. Email: adriannugraha@fh.unsri.ac.id.

Nashriana, was born in Palembang on September 18, 1965. She earned her Bachelor of Laws degree from Universitas Sriwijaya in 1989, followed by a Master of Laws degree from Universitas Diponegoro in 1999. She was awarded a Doctor of Laws degree from Universitas Sriwijaya in 2014. She is a scholar in criminal law and serves as a lecturer at the Faculty of Law, Universitas Sriwijaya. She currently holds the academic rank of Lektor Kepala (Associate Professor) and serves as the Coordinator of the Master of Legal Studies Program at the same institution. She teaches several courses, including Juvenile Criminal Law, Environmental Criminal Law, Criminal Law Policy, Administrative Criminal Law, Criminal Justice System, and Selected Issues in Criminology. In addition to her scholarly research on criminal law and child protection, she is actively involved in community engagement

and legal training. She has published numerous scientific papers in nationally and internationally indexed journals. Her works address various topics, including electronic criminal trials, rehabilitation for narcotics users, and the protection of human rights in criminal sentencing. She is also the author of several books, such as *Perlindungan Hukum Pidana bagi Anak di Indonesia* (2011) and *Hukum Penitensier Indonesia* (2021). Email: nashriana@fh.unsri.ac.id.

Ridwan, was born in Talang Aur on April 12, 1963. He earned his Bachelor of Laws degree from the Faculty of Law, Universitas Sriwijaya in 1988. He obtained his Master of Laws degree from Universitas Airlangga, Surabaya, in 1996, and later completed his Doctor of Laws degree at Universitas Diponegoro, Semarang, in 2012. He is both an academic and a practitioner specializing in Administrative Law, Water Resources Law, State Financial Law, Tax Law, and Public Procurement Law. He is a full-time faculty member in the Faculty of Law at Universitas Sriwijaya, teaching across the undergraduate, master's, doctoral, and Master of Notarial Law programs. He has previously served as Head of the Master of Notarial Law Program (2014–2015) and Vice Dean II of the Faculty of Law, Universitas Sriwijaya (2015–2019, 2019–2023). He has actively contributed as a speaker, public debate panelist, legal training instructor, and expert witness in court proceedings for cases involving administrative, financial, tax, and electoral law. He has also been involved in regional institutional selection committees, including those for the Regional Indonesian Broadcasting Commission (KPID) and the Election Supervisory Committee (Panwaslu). He currently holds the civil service rank of Pembina Tingkat I (IV/b) and serves on the Regional Supervisory Council for Notaries in Ogan Ilir, OKI, and Prabumulih. Email: ridwanrosita25@gmail.com.

Dr. Muhammad Mutawalli Mukhlis, S.H., M.H., was born on February 2, 1995, in Limboro Village, Polewali Mandar Regency, West Sulawesi, Indonesia. He completed his early education at TK Makateks, SDN IKIP I Makassar, SMP Negeri 3 Makassar, and SMA Negeri 2 Makassar. At the higher education level, he earned his Bachelor of Laws (S.H.) degree from the Faculty of Law, Pasundan University Bandung, and his Master of Laws (M.H.) degree from the Graduate Program of the Faculty of Law, Hasanuddin University Makassar. On January 31, 2025, he completed his Doctoral Program in Law at the Faculty of Law, Hasanuddin University, Makassar. His dissertation focused on the regulation of legislative candidate recruitment in light of cadre development within political parties. He graduated with a *Cum Laude* distinction and was awarded the title of Best Graduate of the Doctoral Program in Law at UNHAS after completing his studies in 2.5 years and fulfilling the academic publication requirement through two articles published in Scopus-indexed journals (Q1 and Q4). He currently serves as a full-time civil servant lecturer in the Faculty of Sharia and Islamic Business Economics at Majene State Islamic College (STAIN). Additionally, he is a part-time lecturer at Alauddin State Islamic University (UIN) Makassar, teaching Constitutional Law, Administrative Law, Political Party Law, Election Law, and Legal Drafting. In organizational activities, he is actively involved as a board member of APHTN-HAN for West Sulawesi Province, a member of the Islamic Students Association (HMI), and Head of the Education Division at TPAK Bandung (Anti-Corruption Empowerment Team). He has authored various scholarly works, including books and journal articles published in Sinta 2, 3, and 4 journals, as well as reputable international journals indexed in Scopus Q1, Q2, and Q3. To facilitate access to his academic works, the following links are provided: Google Scholar <https://scholar.google.com/citations?user=1dkIjbYAAAAJ&hl=en> and Scopus Author ID 58203336600.

Prof. Dr. Muhammad Saleh Tajuddin, M.A., Ph.D., Prof. Dr. Muhammad Saleh Tajuddin, M.A., Ph.D., was born in Bulukumba on November 10, 1968. He completed his bachelor's degree (S-1) in Aqidah and Philosophy at IAIN Alauddin Makassar in 1992. His master's degree (S-2) was obtained from the University of Wollongong, Australia, majoring in History and Politics (2001). His first doc-

toral degree (S-3) was earned from UIN Alauddin Makassar in Islamic Thought (2013), and his second doctoral degree (S-3) was completed at Universiti Utara Malaysia in International Studies (2017). Throughout his academic career, he has held several key positions at UIN Alauddin Makassar, including Head of the Department of Aqidah and Philosophy (2009–2010), Head of the Department of Political Science (2010–2013), and Head of the Institute for Research and Community Service (LP2M) (2016–2019). His teaching experience includes the Faculty of Ushuluddin and Philosophy, where he taught Modern Philosophy (1994–2010); the Faculty of Ushuluddin, Philosophy, and Politics, where he continues to teach Political Philosophy (2010–present); and the Postgraduate Program, where he teaches philosophy-based courses (2016–present). His published books include *Dato' Tiro and the Islamization of the Tiro Kingdom in the 17th Century* (2024), *Contestation of Political Power in the Taliban Regime in Afghanistan* (2023), and *Education in Syria: A Social Historical Analysis, 1970–1999* (2021). His journal articles include “Unfamous Beautiful Bonetambu Island in Makassar: Political, Economic, and Educational Perspectives” (Journal of Research and Multidisciplinary 7(1)), “Limitations of Democracy: Presidential Campaign Rights as Strengthening the Electoral System” (Jurnal Pembangunan Hukum Indonesia 6(2)), and “Democratization or Extra-Constitutionalism: Ideas for Limiting the Term of Office for Chairmen of Political Parties in Indonesia.” His research works include “Diaspora and Bugis Political Engagement in the Malay World: A Political Analysis of La-Maddukkelleng in Wajo, Paser (East Kalimantan), and Perak Malaysia” (2023); “Power Relations Between the Patani Kingdom of Thailand and Patani of Takalar, Indonesia: A Comparative Analysis of Politics, Religion, and Culture” (2023); and “Synergy Between Religion and Power: Exploring Local Wisdom of the Gantarang Kingdom in Bulukumba, 2019” (2023). He currently teaches at the Faculty of Ushuluddin, Philosophy, and Politics at UIN Alauddin Makassar. Address: BTN Pao-Pao Permai Block J No. 5–6 Phone: 085822540576 / 082112863316

Wiranti, S.H., M.H., was born in Ajubissue (Sidenreng Rappang) on February 16, 2000. She completed her Bachelor of Laws (S.H.) at the Faculty of Law, Hasanuddin University, and her Master of Laws (M.H.) at the Faculty of Law, Airlangga University. She currently serves as a lecturer in the Faculty of Law at Hasanuddin University. She is actively involved in research, community service, online writing, and book authorship, and serves on the editorial boards and as a reviewer for several academic journals. She also contributes to the drafting teams for the Regional Regulations and the Mayor’s Regulations. During her studies, she actively participated in various organizations, including the Legal and Constitutional Debate Institute (LeDHaK), the Scientific Reasoning and Writing Institute (LP2KI), Forum Lingkar Pena (FLP Unhas Chapter), and Generasi Baru Indonesia (GenBI). She has received numerous awards in academic competitions, including National Debate, Scientific Writing, and Moot Court Competitions, and was recognized as one of the best graduates in the Faculty of Law at Airlangga University. To facilitate access to her academic works, the following links are provided: Google Scholar: <https://scholar.google.com/citations?user=CnPugwwAAAAJ&hl=id> and Scopus Author ID: 59509009700.

Dr. Zainuddin, S.H., M.H., born in Arul Kumer, April 18, 1979. He is a Lecturer at the Faculty of Law and Master of Law, Muhammadiyah University of North Sumatra, and was Secretary of the Law Laboratory of the Faculty of Law, Muhammadiyah University of North Sumatra for the 2009-2011 period, Secretary of the Postgraduate Study Program, Muhammadiyah University of North Sumatra for the 2011-2013 period, Deputy Dean III of the Faculty of Law, Muhammadiyah University of North Sumatra for the 2013-2017 period, Selection Team for the General Election Commission of Serdang Bedagai in 2013, Deputy Dean I of the Faculty of Law, Muhammadiyah University of North Sumatra for the 2021-2025 period. Google Sco Link: <https://scholar.google.com/citations?user=CtiM>

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Ajie Ramdan, S.H., M.H., has been a lecturer in the Faculty of Law at Padjadjaran University, Bandung, since December 2016. He completed his bachelor's degree at the Faculty of Law, Padjadjaran University (2010), and his master's degree at the Faculty of Law, University of Indonesia (2014). He is actively involved in research, particularly in criminal law, criminal procedure, constitutional law, and environmental crime. In addition to being a lecturer, Ramdan is also a legal consultant to the Ministry of Environment and the Ministry of Forestry on environmental and forestry crimes. Ramdan has several international publications, including: in the Padjadjaran Journal of Law in 2018 with the title "The Urgency of Religious-Blasphemy Case Arrangement in the Frame of Diversity towards National Criminal Law Reform", "The Penalty Policy of Criminal Blasphemy in the Plural Society in the Framework of Renewal of Criminal Law" (CRC Press, London, 2020), and "The Influence of Constitutional Court Decision Number 140/PUU-VII/2009 Against Law Enforcement of Blasphemy Law in the Indonesian Context" (Journal of Legal, Ethical and Regulatory Issues, 2021). In 2026, Ramdan will begin his doctoral studies at the University of Liverpool. The author can be contacted via email at ajie.ramdan@unpad.ac.id.

Nazhif Ali Murtadho, S.H., was born in Mojokerto on February 25, 2001. He is currently pursuing a Master of Laws degree at the Faculty of Law, Airlangga University. Previously, he completed his bachelor's degree (S1) in law at the State Islamic University (UIN) Sunan Ampel Surabaya. His interest in law has led him to engage in research, academic writing, and publishing legal opinion pieces in various media outlets. To date, he has produced dozens of scholarly publications in various national law journals. In addition, he has a deep interest in reading and consistently strives to be a productive member of the academic world. The guiding principles he upholds include precision, firmness, simplicity, compassion, responsibility, and hard work and smart work in all aspects of his life and professional conduct.

Husendro, born in Medan on 29 September 1980, is a legal scholar and practitioner with a deep interest in contemporary jurisprudence and theories of legal interpretation. He obtained his Bachelor of Laws (S.H.) degree in 2008 and his Master of Laws (M.H.) degree in 2011 from the Faculty of Law, Universitas Indonesia. Since 2025, he has been pursuing a doctoral program in law at the same institution, with a concentration in constitutional law, particularly in legal theory and philosophy. His academic trajectory has directed his intellectual focus toward postmodern jurisprudence, legal hermeneutics, and deconstructive approaches to legal analysis. Professionally, Husendro began his career as an Investigator of Human Rights Violations at the National Human Rights Commission (Komnas HAM) from 2006 to 2014, subsequently serving as an Expert Staff Member for the House of Representatives (DPR RI), before establishing his own law firm in 2015, which he continues to lead to the present. As an advocate, he is also a certified Legal Auditor and has more than 20 years of experience handling litigation, particularly in criminal, civil, administrative, constitutional, and human rights matters. In addition to his practice, he is an active speaker in various professional legal education programs, including the Special Education for the Advocate Profession (PKPA), as well as seminars and legal training events at multiple universities. He has also served as a guest lecturer at the Faculty of Law, Universitas Indonesia, and contributes scholarly writings to legal media outlets and peer-reviewed journals. His combined academic and professional experience has shaped his critical perspective on how law operates as a discursive structure, particularly regarding legalism, morality, and the dynamics of power within judicial practice. As an active researcher, Husendro is registered with the following ORCID ID: <https://orcid.org/0009-0003-0400-253X>. He can be contacted for academic purposes at husendro51@ui.ac.id and husendro29@gmail.com.

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The method contains the type or nature of research, data sources, data collection techniques and procedures, as well as data analysis. The method is optional, only for original research article. Paragraphs formatted as a special first line 1 cm (11pt Times New Roman, one space).

3. FINDINGS AND DISCUSSION

The discussion aims to answer the research problems and questions, narrate how the findings were obtained, explain the meaning of the research results, how the research results can solve the problems and the possibility of its development. In addition, the discussion must address the issues and research goals.

3.1 Multilevel Subheading

It is permissible to include subheading in the discussion as needed. Heading and subheading should be numbered in multilevel list style as presented in this template.

3.1.1 Subheading level 2

It is permissible to include the subheading level 2 in the discussion as needed.

3.1.2 Heading and Subheading

Heading and subheading should be numbered in multilevel list style as presented in this template.

3.2 Table and Figures

Tables and figures can be used to clarify the verbal presentation of analysis and results and should be commented on or discussed.

3.2.1 Table

For editing purposes, all table should be re-typed in word-editing format, not an image-captured. Each table column must have a header and a source. It should be commented on or discussed. Example:

Table 1. The Citation of Jurnal Balitbang Hukum dan HAM

	All	Since 2017
Quotation	1306	1294
H-index	20	20
i10-index	43	43

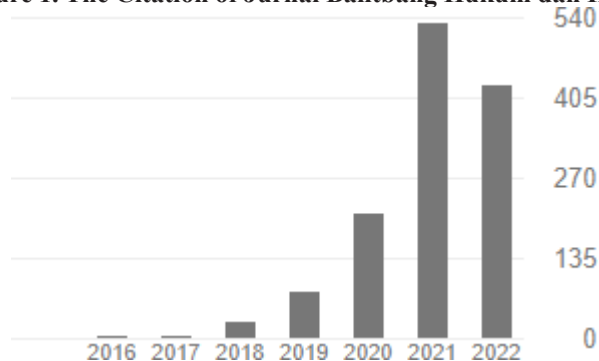
Source: <https://scholar.google.co.id/citations?user=NPbkyZ0AAAAJ&hl=id&authuser=5>, 31 Augustus 2022

Table 1 presented the total number of Jurnal Balitbang Hukum dan HAM's article citation. It is clear that the quantity of citation of Jurnal Balitbang Hukum dan HAM have climbed dramatically in the last five years.

3.2.2 Figure

Each figure must have a header and a source and should be commented on or discussed. Example:

Figure 1. The Citation of Jurnal Balitbang Hukum dan HAM



Source: <https://scholar.google.co.id/citations?user=NPbkyZ0AAAAJ&hl=id&authuser=5>, 31 Augustus 2022

Figure 1 captured the number of times Jurnal Balitbang Hukum dan HAM's paper was cited yearly. The biggest number of citation are in 2021. However, 2022 citation is still under progress and possibly higher. Paragraphs using a special first line 1 cm paragraph format (11pt Times New Roman, one space).

3.2.3 Citation and Reference Style

All citations should be inserted in the form of footnotes in accordance with the Chicago Manual of Style 17th edition (full note) in any citation manager application. This is the example of citation of book⁶, journal article⁷, theses⁸, and website content⁹.

The minimum number of references is 15 (fifteen) references. The minimum number of references from

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- 6 Donny Michael, *Menggapai Harapan Penyandang Disabilitas Menjadi Calon Pegawai Negeri Sipil* (Jakarta: Balitbangkumham Press, 2020), 105.
 - 7 Rodes Ober Adi Guna Pardosi and Yuliana Primawardani, "Perlindungan Hak Pengguna Layanan Pinjaman Online Dalam Perspektif Hak Asasi Manusia," *Jurnal HAM* 11, no. 3 (2020): 353–68.
 - 8 Zainal Abidin, "Perspektif Hak Asasi Manusia Terhadap Perawat Tenaga Kesehatan Sukarela Yang Bekerja Di Instansi Pemerintah" (Tesis, Unika Soegijapranata, 2019), 131–36.
 - 9 Penulis, "Data Lokasi Kasus/Provinsi," Badan Penelitian dan Pengembangan Hukum dan Hak Asasi Manusia, 2018, <http://sipkumham.balitbangham.go.id/petalitkumham/grafik>.

the primer references is 80% of the total number of references. The minimum number of references published in 5 (five) years is 80% of the total number of references.

The bibliography should be hierarchically ordered followed by its concluded year. This is an example of a citation of International Legal Documents¹⁰ Indonesian Constitution¹¹, Laws¹², Government Regulations¹³, and Presidential Decree¹⁴.

4. CONCLUSION

It contains things that state the relationship between the variables studied and suggestions that need to be explained related to the chosen writing theme. Made in paragraph style, not in the form of pointers. Conclusions must answer the problem and research objectives. The conclusion is neither a summary nor a rewrite of the abstract or discussion. The first paragraph is written left aligned, straight with the chapter title. Paragraphs using a special first line 1 cm paragraph format (11pt Times New Roman, 1 space).

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10 "Universal Declaration of Human Rights" (1948), art. 4.

11 "Undang-Undang Dasar Republik Indonesia" (1945), art. 28J.

12 "Undang-Undang Republik Indonesia No. 39 Tahun 1999 Tentang Hak Asasi Manusia," § Lembaran Negara Republik Indonesia Tahun 1999 Nomor 165 (1999), art. 15.

13 "Peraturan Pemerintah Nomor 48 Tahun 2021 Tentang Perubahan Ketiga Atas Peraturan Pemerintah Nomor 31 Tahun 2013 Tentang Peraturan Pelaksanaan Undang-Undang Nomor 6 Tahun 2011 Tentang Keimigrasian," § Lembaran Negara Republik Indonesia Tahun 2021 Nomor 58 (2021), art. 1.

14 "Peraturan Presiden Nomor 62 Tahun 2022 Tentang Otorita Ibu Kota Nusantara," § Lembaran Negara Republik Indonesia Tahun 2022 Nomor 102 (2022), art. 1.

