

# The Significancy of Immediate Enactment of the Draft of Indonesian Criminal Code (RKUHP) to Ensure Judge's Full Compliance with Article 5 (1) of Law No. 48 of 2009 on Judicial Authority

Yuber Lago

Faculty of Law, Universitas Pelita Harapan

\*corresponding author e-mail: [YL80015@uph.student.edu](mailto:YL80015@uph.student.edu)

---

## Article Info

### Keywords:

Indonesian Criminal Code;  
Living law;  
Draft of Indonesian Criminal Code.

### DOI:

<https://doi.org/10.33830/humayafhisip.v2i2.2920>

## Abstract

The Criminal Code that is currently applied in Indonesia is a product of colonialism law which originates from the Dutch *Wetboek van Strafrecht voor Nederlands Indie* and has been adopted since 1918. In its article 1 paragraph (1) stipulates legality principle; that no action can be punished unless with a pre-existing criminal law provision. However, the Article 5 paragraph (1) of the Law No. 48 of 2009 stipulates that a judge must delve, follow, and understand the living legal norms and values that are felt by the society. These living norms and values are not written and most certainly not enacted unlike the written law. However, they are crucial in upholding community's sense of justice, and the Law on Judicial Authority has obliged judge to pay great attention to those values. In the Draft, the living laws are accommodated in its article 2 and article 12(2). This study examines the importance to immediately enact the Draft to help realizing judge's ideal as stipulated in Article 5. The researcher employed a normative juridical method through a statutory approach to study the ratio legis of the laws. Furthermore, the researcher applied qualitative analysis. The result of this study finds out that the Draft accommodates the living law of society better, and therefore the Government shall enact it immediately, with all things considered.

---

## Introduction

The current applicable criminal code in Indonesia, KUHP, is a codified law originating from old colonialism law namely *Wetboek van Strafrecht voor Nederlands Indie* in the era of Dutch Colonialism. The enactment of the law was via *Staatsblad* year 1915 No. 732 and took place since 1 January 1918. After independence, the law is transformed into *Kitab Undang-Undang Hukum Pidana* (KUHP) and enacted by Law No. 1 of 1946 with very few and minor amendments (Hamzah, 2015). This is to execute the command of the transitional provisions of the 1945 Constitution which stipulated that all existing laws and regulations will be enacted so long as there is no new one. This stipulation has become a constitutional ground for the enactment of laws which were applicable in the colonialism era into the independence era, including the KUHP. Therefore, it is sensible to say that the current Indonesian Criminal Code (hereafter: KUHP) is outdated and not up to date to the current features of current crimes, especially with the new *modus operandi*, in line with the rapid development of technology, communication, transportation, and social interaction.

The Article 1 paragraph (1) of KUHP stipulates that no act can be punished unless of the power of pre-existing laws and regulations before the act is committed. In the study of criminal law, this is recognized as legality principle (*legaliteit beginsel*). This principle essentially forbids punishment to be imposed over an act which has not been defined as criminally liable beforehand by law. The

principle is essential in embodying *lex certa*, *lex scripta*, *lex stricta* rules in criminal law, namely that the criminal provisions must be clear (*certa*), written (*scripta*), and free from all analogies (*stricta*). The law must be clear (*lex certa*), also known as *bestimmtheitsgebot* principle underlines the importance of law to be starkly clear, so that by the time of its enactment and promulgation, all people can be held liable under it, regardless of whether they are aware of the law or not. That is also known as *ignorantia juris* or the principle of *presumptio iures de jure*. The formulations of legal provision that are not clear and expressly understandable will inevitably bring up legal uncertainty and also hinder the success of criminal prosecution efforts as people will be able to justify that such provisions are not clear, hence not useful as guidelines for behavior. (Hiariej, 2016).

However, in reality, many social norms and social values that exist and live amongst the society is not written and included in KUHP. Several of them are included in the formulation of the delict (*delictsomschrijving*), yet the KUHP carries different punishment than the one considered fair in society. This is reflected in the various customary laws in Indonesia, understandable from its heterogenous composition of society. The customary laws have often become social reality (*sociale werkelijkheid*), not merely a social phenomenon. For instance, in Aceh, wife who is found out to be cheating her husband, will be killed with a javelin (Sahetapy, 2007). Meanwhile, KUHP punishes such crime with a maximum of nine months imprisonment, evident in the Article 284 paragraph (1) of the Code. There is a discrepancy – a huge one – between the punishment regime in Aceh's local customary law and in national universal criminal code. Despite the formulation of the delict (*delictsomschrijving*) and the qualification of the elements of delict (*delictsbestandellen*) is similar, the punishment is radically different, one is death penalty with a javelin, the other is imprisonment for a maximum of nine months.

In Toraja customary law, the act of incest will be put in a basket made of rattan weighed with stones and then thrown into the sea (Sahetapy, 2007). In KUHP, crime of incest has not been regulated thoroughly. The provision which may intersect is Article 294 paragraph (1) of the Indonesian Criminal Code, however, in that provision it only punishes a lewd act, with a child, stepchild, ward, or underage minor as a victim. In the social reality, incest act often involves consenting adult who commits more than the scope of lewd act, namely sexual intercourse. Therefore, by looking at the formulation of the delict (*delictsomschrijving*) in KUHP, we can learn that KUHP has not perfectly regulated the elements of incest crimes, the subjects of the crime, the criminal sanction as well as handling of the victims have not been regulated precisely. Both examples above are a few of many other examples that demonstrate the inadequacy of the current KUHP in accommodating the local living laws of various regions. In other words, the provisions in the current criminal code most likely have different sanction than it would have in the society's living laws (or customary law), or even more extreme, KUHP falls behind in regulating the social phenomena which happens in the society such as in the case of incest. As the well-known legal motto goes: "*het recht hink achter de feiten aan*" (the statute often lags behind the facts).

Because statute often lags behind the facts, the law is required to follow social development as progressive and adaptive as possible. This adaptiveness and progressiveness are introduced in the Article 5 paragraph (1) of the Law No. 48 of 2009 on Judicial Authority where it obligates (not recommends) the judge (and constitutional judge) to delve, understand, and follow the legal norms, values, and sense of justice which live amongst the society. These values are abstract and normally not written (*ongecodificeerd*) as it lives proportionally with the development in the society. The Article 5, at the same time, has given judges a discretionary power and discretionary will to follow the living laws that emanate from the society's values. However, that discretionary power is strongly limited by the legality principle contained in the Article 1 paragraph (1) of KUHP. Therefore, judges are very limited in its room of movement to interpret and apply the living laws. Imagine if the judges happen to try the case that has different punishment between local customs and provisions in the criminal code (for instance, two examples above), then the judge will have a dilemmatic time carrying

out its obligation under article 5 paragraph (1) of Law on Judicial Authority, where he must demonstrate a solicitous consideration about the living sense of justice, hence the living laws.

This seemingly paradoxical concurrence between legality principle in the Criminal law, and the obligation of a judge to include and consider living laws and living sense of justice in his *ratio decidendi* and consequently decision, has brought a fundamental problem in preserving justice in its fullest form, namely substantive and procedural. The obligation to delve into living laws and living sense of justice set by the Law No. 48 of 2009 emphasizes on the importance of substantive justice, meanwhile legality principle is to offset that substantive justice with procedural justice. Dispute resolution through the courts is a pattern of dispute resolution that occurs between the parties that is resolved by the court and the decision is binding (Muhammad Iqbal, 2021). In the Law No. 48 of 2009 itself, legality principle is recognized in Article 6 and Article 7, and the responsibility for judges who violate legality principle is recognized in Article 9, which stipulates that anyone arrested, detained, prosecuted, and brought before the court without legitimate reasons according to law can ask for compensation on damages.

### Research Method

This research uses normative juridical research, an approach aimed at analyzing written regulations, legislations, legal doctrines, principles, and other relevant legal materials through by means of library research and study of various documents. This normative legal research is carried out to obtain and analyze legal theories and concepts which eventually sum up into guidelines to look at legal issues which help the author form legal opinions. Normative legal research is based on legal theories, literature, as well as statutes that are current positive laws from the highest hierarchy (1945 Constitution) all the way to the lowest hierarchy. The issue in this article will be analyzed from the relevant written legislations and the rule of norms which serve as a benchmark of behavior (Asikin, 2006). Additionally, the Author also employs statutory approach, namely an approach that does not only analyze the form (hierarchy) of the laws, but also the ontological basis, philosophical basis, and the *ratio legis* of the law (Marzuki, 2005). Besides statutory approach, conceptual approach is also employed, an approach which relies greatly on the ability to comprehend the substance of legal science (Marzuki, 2005).

The main focus of this normative research is to conduct research on the legal principle as stipulated in the current Criminal Code (KUHP) and the living law concept introduced in the Law No. 48 of 2009 on Judicial Authority. The primary legal material used in the research is the 1945 Constitution (UUD 1945), Resolution of the People's Consultative Assembly (TAP MPR), the Indonesian Criminal Code, and the Law No. 48 of 2009. The secondary legal material used includes books, and experts of opinion (*ius communis opinion doctorum*). Therefore, the data collection technique used in this research is a literature study carried out by reading, analyzing, and concluding literatures that are related to the issue, meanwhile the data analysis technique utilizes the qualitative method which evaluate the quality of the substance of the norm, in hopes that the issue can be answered systematically.

### Results and Discussion

#### Judge's Role in Upholding Law and Justice

Hugo de Groot, a Dutch jurist, once said "*ubi iudicia deficiunt incipit bellum*" meaning when the decisions are void of justice, armed struggle begins. Judges' decision is significant because not only does it decide on the current matter on which it presides, but it also creates a precedent for the next related cases. In the 1945 Constitution, Article 24 clearly stipulates that judge should uphold not only law, but also justice. Moreover, in TAP MPR VI/MPR/2001 on Ethics of National Life (*Etika Kehidupan Berbangsa*), it explicitly regulates on point 4 on the issue of excellent law enforcement, that all written laws that guarantee the supremacy of law as well as legal certainty must be in line with the efforts to fulfill the sense of justice that lives and develops in society. Judges are obligated

to not only follow the written law, but also to fulfill the sense of justice (*gerechtigheid*) which exists in society (Asshiddiqie, 2015). Therefore, the command in the article 5 of the Law No. 48 of 2009 is clear that the judge must delve, follow, and understand the living law and sense of justice that lives in the society. The order of which the researcher does not quite agree, where the order ideally should be “delve, understand, and follow” as there is a danger in delving and then following without clearly understanding and having great comprehension first in the living laws and the living sense of justice which thrives and takes place in everyday life of society. Following without understanding can lead to misunderstanding which eventually brings to even worse sense of injustice (unjust enforcement of rule of law).

Judges are often faced with dilemmatic role and position in deciding between written laws (law as codified) and living laws (law as felt to be just). Our constitution has expressly and openly stipulated that judge must not be fixated only on the written norms but must prioritize the balance in presenting a sense of justice as well. Creating a sense of justice can't be alienated from delving, understanding, and then following the living laws (unwritten law; *ongecodificeerd recht*) that thrives in society and has become the basic signal of justice to the community. Justice is the mother of law, and justice precedes law (*est autem justa a justitia, sicut a matre sua, ergo prius fruit justitia quam jus*). St Augustine, in the fourth century AD, argues that a law unjust is no law at all (*lex iniusta non est lex*). A thought which was developed by Thomas Aquinas in his work *Summa Theologiae* which argues that a law worth obeying is a law that serves common good (justice), in what later known as a natural law jurisprudence. A law just because it is enacted, does not always imply that it is just, fair, and impartial. Therefore, in the development, the Constitutional Court exists as a negative legislator to deem unconstitutional laws and its norms that are not just and impartial.

The presence and creation of Constitutional Court is a sign that not all positive laws can serve the purpose of justice, despite justice is supposedly why law is made. Because a law created and enacted is not free from the political influence of multi-party interests and any other stakeholder's priorities, and not all of them are single-visioned to achieve justice and impartiality.

A just law must reflect the cultural value that lives in the society which includes the local values such as customary norms in functioning to guard the balance and harmony of all living aspects of local community which are cosmic and magical (Sahetapy, 2007). For instance, in Aceh, a cheating wife will be punished with death penalty because adultery is presumed to have disturbed the balance and harmony of the local community cosmic and magical values. Despite the criminal law applicable nation-wide may not see such action worthy of death penalty, the local living laws (customary norms) which are derived from local values and worldviews see it differently. The judge must consider all living laws as a part of integrating living sense of justice into his decision, in deciding a case. In considering the living laws, judge must be wise to be considerate to resort to local wisdom as it can vary from region to region; not all regions will punish a cheating wife into death, for regions that do not see adultery as much taboo, material compensation may make up for the wrongful acts.

Judge's ability to delve and shape its decision based on the living sense of justice is crucial because it would be a wise precedent for the next judge to inspire them to also find the balance between sticking to written norms at the same time partially detaching from it to steer to justice. This proneness to written norms accentuates the *lex certa, lex scripta* (law must be clear and written) principle, meanwhile partial detachment from it to find justice at its best serves the other two purposes as postulated by Gustav Radbruch namely justice (*gerechtigheid*) and utility (*zweckmassigheid*).

The importance of judge to consider the living laws and living sense of justice is as great as sticking to written norms, therefore judge is often said to have a free yet regulated room of policy in deciding a case (*vrije gebondheid*). However, in carrying out this little free yet regulated room of policy, judge is oftentimes found to be greatly limited by legality principle (*nulla poena sine lege*; no punishment without a law). Therefore, judge may find difficulties in following the sense of justice that exists in the community that has not yet been regulated or that has been regulated differently by the written law as mandated by Article 5 of Law No. 48 of 2009.

### Legality Principle Vis-à-vis Unwritten Law

Legality principle was first introduced by Paul Johan Anselm von Feuerbach, a German jurist and legal scholar, in his work titled *Lehrbuch des penlichen recht* in 1801. In Latin, this novel idea introduced by Feuerbach is known with the maxim: *nulla poena sine lege; nulla poena sine crimine; nullum crimen sine poena legali*. (Hiariej, 2016). The three phrases were combined and converted into a more well-known one, namely: “*nullum delictum, nulla poena sine praevia lege poenali*.” (Rommelink, 2003). Far before this principle was known, in the Roman era, the law was individualistic, and politically, the people’s freedom was suppressed. It can be learnt through the recognition of *crimine extra ordinaria*, namely the acts which are punishable and deemed as crimes despite not being expressly defined by written laws. When the ancient Roman law was accepted into West Europe in the middle age, *crimine extra ordinaria* was utilized by the reigning kings and monarch to arbitrarily execute their own will and personal need (Moeljatno, 2009). At the time, most of the criminal law provisions were not codified, hence the king’s absolute power took over the judiciary governing arbitrarily. The people did not know with certainty which acts are forbidden and which are not, and consequently the court proceedings become unfair because the wrongfulness and the law is determined unilaterally by the sole will of those in power (Poernomo, 1982).

These unfair and unjust practices led to hostility toward king’s absolutism, therefore creates an idea of significance of *wet* (written laws) to be determined in advance listing out acts that contain punishment, so that the people are well-informed of forbidden and unforbidden acts through the provisions of the *wet*. At the same time, jurists such as Montesquieu and Rousseau came up with an idea to limit the king’s power with that written law (*wet*). After French Revolution in the late 18<sup>th</sup> century, a legal-relationship structure between those who govern and those who are governed became more and more defined, between the rulers’ power and individual (David & Brierley, 1985), as evident –for instance – in the Article 8 of *Declaration des Droits de l’Homme et du Citoyen* in 1789 which stipulates that no act is criminally liable, unless determined by a *wet* which has been legally enacted (Moeljatno, 2009). From this *Declaration des Droits de l’Homme et du Citoyen*, legality principle is then transplanted into the Article 4 of French *Code pénal*, under the reign of Napoleon in 1801. From there, the principle was introduced to the Netherlands (at the time was Napoleon’s colony), and subsequently was included in Article 1 of *Wetboek van Strafrecht Nederlands 1881*. This, afterward, by method of *concordantie-beginsel* was adopted into Article 1 *W.v.S Nederlands Indie* in 1918, which becomes the current criminal code (KUHP) we use (Hiariej, 2016).

It can be learnt from the historical account of legality principle that this principle was born from a struggle against the king's injustice to his people which caused a reaction and a desire for a mere justice. Therefore, the reason behind the idea of legality principle is also justice, which at that time is seen as non-existent because of the arbitrary decisions and regulations by the king causing inhumane treatment to its people. In other words, the legality of king’s act is justified only by its power of ruling and not by due process of law which is achieved through clear positivity of norms and strict enforcements as a result of that normative positivity.

The current landscape, specifically in Indonesia, is radically different. Justice is often hindered by the strictness and formality of written laws. Judicial corruption often happens because the law enforcers ‘play’ on the rule of legal formality to weaken the law itself (MD, 2009). The judicial corruption that is caused by legal formality can be in two forms: a.) overly compliant with the formal-legalistic rule and forget the philosophical idea behind the making of the laws, b.) not rare does law have loopholes and weak-points open to be exploited to become unjust, therefore mere formality to it does not solve the problem of injustice.. With strict adherence to written statutes, these two root causes of judicial corruption become unavoidable.

For instance, Article 362 of the Criminal Code (KUHP) sanctions the act of theft with a maximum imprisonment of five years. This provision does not specify about the minimum amount of losses caused by the criminal act, as long as it fulfills the elements of the delict

(*delictsbestandellen*), namely: an attempt to take an object (*enig goed*), which is possessed or partly possessed by other people, there is an intent of ownership, and carried out illegally (*wederrechtelijkheid*) (Hamzah, 2015). That means that there is no distinction between the offender with the pettiest amount of items stolen, and the offender with huge amount of items stolen, the punishment can be similarly heavy. Meanwhile in some local living laws, such as in the region of Nias for instance, a crime of theft that is insignificant can be resolved through material compensation. In some other customary laws, such crime may not even be worthy to consider if the worth of the stolen items is too small. In this example, a judge discretionary power and discretionary will that emanates from the society values plays a significant role in establishing a decision which serves justice to its full extent. If a father steals half a bunch of bananas because his daughter has not eaten in 4 days, then it would be a sin for a judge to punish the father with three years imprisonment, leading to worse starving for his daughter.

### **Justice as Defined by Law No. 48 of 2009 on Judicial Authority**

In the Law No. 48 of 2009, the word justice composes a great deal of attention and is repeated 8 times in Article 1 point 1, Article 2 paragraph (1) and (2), Article 4 paragraph (2), Article 5 paragraph (1), Article 54 paragraph (3), Article 56, and Article 57. This law stipulates the importance of justice to exist in the functioning of court (judiciary function; *rechterlijke functie*) as stipulated in article 2, establishment of the judge's decision as stipulated in article 5, to executions of the decision as stipulated in Article 54 paragraph (3). Therefore, in all three pillars of the judiciary operation, namely: functioning of the court, decision of the judge, and executions or enforcement of the decision, will be carried out based on justice. The justice that is repeatedly mentioned are based on the values (*sila*) of Pancasila, evident in article 2 paragraph (2) which says: "The justice of the state upholds the law and justice based on Pancasila".

As a result, the living laws and living sense of justice stipulated in article 5 paragraph (1) must be understood conditionally, as long as it is not against the values of Pancasila. Therefore, the court must administer the living laws as long as it is not against Pancasila, the *Philosophische grondslag* and *Weltanschauung* of Indonesia (Asshidiqqie, 2015). However, the values of Pancasila as the worldview of the nation are still abstract and its understanding needs to be fostered and concretized (Asshidiqqie, 2015). According to Jimly Asshidiqqie (Asshidiqqie, 2015), the concretization of the values and norms of Pancasila can be seen in Ekaprasetya Pancaskarsa, also known as P4 (*Pedoman Penghayatan dan Pengamalan Pancasila*) which was legalized by TAP MPR No. II/MPR/1978 which was later revoked with TAP MPR No. XVIII/MPR/1998. In the point 36 for instance, further explains the fifth *sila*, namely, to develop and foster the fair character and behavior toward others. This Resolution of People's Consultative Assembly was revoked as the content and implementation was considered to be irrelevant with the development of the national life, such as in point 41 where it forbids ownership over luxurious stuff. Certainly, at today point of time, this is considered as violating personal freedom and personal privacy. Nevertheless, the values contained in it still reflect concretization of the *sila* and how it should be understood. (Asshidiqqie, 2015)

Values of justice that are derived from Pancasila is in line with the universally recognized supreme values such as respect to inherent rights, non-derogable rights, and right to develop. The non-derogable right such as right to live is guaranteed under the second *sila* of Pancasila. The right to freedom of assembly is guaranteed under the fourth *sila* of Pancasila. The right to embrace beliefs and religion under the *first* *sila*, the right to be granted a quality education and healthcare under the *fifth* *sila*. Therefore, Pancasila can also be read as a prismatic doctrine of operation for Indonesia as a state based on law that combines a concept of *rechtstaat* (written rule of law) and rule of law (judge-made law). The prismatic combinations are meant to create justice idealized by the values of Pancasila.

Justice that originates from living laws that are unwritten is often overlooked by judge because of the provisions in our current criminal code (KUHP), in article 1 (1) which says no act is criminally

liable unless of the power of laws that exist before the act is committed. Implicitly, it implies written laws because the only way to show existence of the law before the act, is if it is written and promulgated. Even if it is written, but not yet promulgated, then it would be considered as law but as bill or RUU (*Rancangan Undang-Undang*). Therefore, despite it does not *expressis verbis* mention written laws or written statute, but the implication is clear. From Article 5 of *a quo* law, judge should not be a mere funnel of the law (*bouche de la loi*), but judge should be a funnel of law and justice (rule-reasoned justice). In carrying out its duties and functions, judges shall maintain the independence of the judiciary (Ahmad Firmanto dkk, 2018). The Idealist Judge considers the law in a decision and will only compete in juridical and sociological (Subrata. T, 2022). Again and again, Montesquieu's teaching of *bouche de la loi* is not free from his situation at the time who lives under a monarch regime. Because of experiencing unlimited power of king and rulers, he idealized republic, where he said (Marzuki, 2005) "*Dans l'état républicain il est de la nature de la constitution que les juges suivent la lettre de la loi*" (in a republic country, constitution commands judge to follow the statute exactly), and he despised despotic saying that there is no law in despotic country, the judge himself is law.

### **Draft of Indonesian Criminal Code (RKUHP) as Point of Compromise**

For more than five decades, the Draft of Indonesian Criminal Code (RKUHP) has not been enacted. The content of the Draft underwent many changes and revisions before it was finalized since its first conception in 1963. The Article 2 of the Draft contains a new idea and concept namely to acknowledge the living law (customary law) despite being unwritten. This novel idea has not been recognized in the current criminal code (KUHP) which relies emphatically on the legality principle (*nullum delictum, nulla poena sine praevia lege poenali; een daaraan voorafgegane wettelijke strafbepaling*). The thought of the reforming the criminal code is the right thing, given the changes in people's perceptions and the paradigms of people's thinking also changes according to the habits that live in society (A.Rachmat., dkk., 2021). Moreover, the Article 2 paragraph (2) of the Draft emphasizes that the living laws must be in line with Pancasila, which perfectly matches the idea of justice as laid out in the Law No. 48 of 2009 (see above, in article 2 and 5).

Enacting the Draft (RKUHP) can be a solution to help judge realizing justice to its full extent without being restrained by the stipulation of legality principle. Strict adherence to legality principle is outdated because it was a result of the reaction toward arbitrary kingship (absolutism) in West Europe (France) which influences France's Criminal Code (*Codé Penal*) under Napoleon in 1801, which influences the Netherlands (Moeljatno, 2009). Ironically, Indonesia still adopts that outdated law which is no longer relevant to the latest and recent development of the society. Limitation to legality principle in RKUHP is already in line with the third amendment of the 1945 Constitution, Article 1 paragraph (3) states, "the State of Indonesia is a state based on law." According to Mahfud MD, the formulation of Article 1 paragraph (3) without the additional attribute of '*rechtstaat*', as contained in the elucidation before the amendment, is meant so that the concept of state based on law in Indonesia uses the idea of prismatic (Hiariej, 2016). Prismatic means combining the ideals between two concepts, namely *rechtstaat* (law as written), and rule of law (law as judged) to fulfill justice for every citizen, therefore, an act that is indecent, disgraceful, or inconsistent with the values in society can be punished even though there is no formally written law that prohibits it (Hiariej, 2016).

Lastly, the enactment of RKUHP itself means creating more concrete justice for all Indonesian. With the enactment of RKUHP, we are free from current Criminal Code which has no valid single translation; therefore, its comprehension can also be dubious. There are several versions of translation: Prof Moeljatno, Soesilo and BPHN. Prof. Sahetapy (Sahetapy, 2012) even argues that Indonesians are being put on trial for 66 years (now, 74 years) based on Colonial Law from the Dutch and French without the government from all three branches (House of Representatives, Presidents, and Supreme Court) being aware of it (Sahetapy, 2012). Piepers wrote in Idema: "*Met die Code Penal ging het als een broek die eerst door vader wordt gedragen, dan overgaat op den oudsten en*

*vervolgens met een lap er op, op den tweede zoon*” (With that Code Penal, it is analogous to a pair of trousers, which is first worn by the father, then passed to the eldest, then passed to the second son with a patch on it). In other words, the current criminal code (KUHP) which originates indirectly from the Code Penal, and directly from the *W.v.S* is like an overused trouser with a patch on it that needs changes, even worse all Indonesian has to wear that pair of patched trousers until the Draft is enacted.

## Conclusions

From the study conducted above, it can be concluded that the implication a legality principle in our current criminal code (KUHP) has to judge’s capacity in complying with Article 5 of Law No. 48 of 2009 is as follows:

1. in some extent, hindered, and limited the judge’s capacity to wholeheartedly delve, understand, and follow the living law and living sense of justice in society (Article 5 of Law No. 48 of 2009) because judges are not free to decide based on unwritten law (*ongecodificeerd recht*)
2. The justice cannot be achieved with a mere adherence to legalized positive written law but can be achieved through a balanced consideration of unwritten living laws which speak society’s sense of justice as long as it is in line with the values of Pancasila as the nation *Weltanschauung* and *Rechtbeginsel*.
3. Total freedom and detachment from written norms can create chaos not justice, therefore Judge must be wise in delving, following, and understanding the sense of justice that lives in the society (*rasa keadilan yang hidup dalam masyarakat*). Without a clever approach, judge can be blinded by a desire to detach from written statutes.

Recommendation from this study is that the government and the legislature should prioritize the Draft of Criminal Code (KUHP) and enact it to replace the current criminal code as soon as possible. Despite the new Draft has already been placed in the *Prolegnas 2022* among other 39 laws, it needs to be realized into an enactment and promulgation, so that it becomes positive law replacing the current ones which is called by Piepers as *een broek die eerst door vader op den twerde zoon* (*broeken die werden gedragen en gedragen tot ze gepatcht waren*).

## References

- Asikin, Z., & Amiruddin. (2006). *Pengantar Metode Penelitian Hukum*. Rajagrafindo Persada.
- Asshidiqie, J. (2015). *Peradilan Etik dan Etika Konstitusi: Perspektif Baru tentang ‘Rule of Law dan Rule of Ethics & Constitutional Law dan Constitutional Ethics’*. Sinar Grafika.
- Ahmad Firmanto P & Rakhmat Bowo Suharto. (2018). The Role of Judicial Commission on Supervision of Judge’s Crime in Indonesia. *Jurnal Daulat Hukum*, 1 (4), 895-902. <http://dx.doi.org/10.30659/jdh.v1i4.3931>
- A.Rachmat Wirawan, & Avelyn Pingkan Komuna. (2021). Pengampunan Pidana dalam Mewujudkan Keadilan, Kepastian, dan Kemanfaatan. *HUMAYA Jurnal Hukum Humaniora Masyarakat Dan Budaya*, 1(1), 10–15. <https://doi.org/10.33830/humaya.v1i1.1863.2021>
- David, R. & Brierley, J.E. (1985). *Major Legal Systems in The World Today*. Stevens & Sons.
- Hamzah, A. (2015). *Delik-Delik Tertentu di dalam KUHP*. Sinar Grafika.
- Hiariej, E.O.S. (2016). *Prinsip-Prinsip Hukum Pidana*. Cahaya Atma Pustaka.
- Marzuki, P.M. (2005). *Penelitian Hukum*. Kencana.
- MD, M. (2012). *Konstitusi dan Hukum dalam Kontroversi Isu*. Rajawali Pers.
- Moeljatno (2009). *Asas-Asas Hukum Pidana*. Rineka Cipta.

- Muhammad Iqbal Baiquni. (2022). Arbitrators as a Legal Profession in the Alternative Role of Dispute Resolution in Indonesia. *HUMAYA Jurnal Hukum Humaniora Masyarakat dan Budaya*, 2(1), 12–20. [https://doi.org/10.33830/humaya\\_fhisip.v2i1.3057](https://doi.org/10.33830/humaya_fhisip.v2i1.3057)
- Poernomo, B. (1982). *Asas-Asas Hukum Pidana*. Liberty.
- Sahetapy, J.E. (2007). *Pidana Mati dalam Negara Pancasila*. Citra Aditya Bakti.
- Sahetapy, J.E. (2012). Reformasi Hukum Harus Mengejawantahkan Pancasila. In F, Dinal, F, Elza (Eds.) *Dialektika Pembaruan Sistem Hukum Indonesia* (pp. 117-124). Sekjen KY RI.
- Subrata, T. (2022). “Title” and “Judiciary Power Based on Law Number 48 of 2009”. *Legal Brief*, 11(5), 2875-2881. <https://legal.isha.or.id/index.php/legal/article/view/572>