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Engaged Higher Legal Education: The Role Legal Philosophy in Addressing Injustice

ICLS

PROCEEDING

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Engaged Higher Legal Education: The Role Legal Philosophy In Addressing Injustice

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Preface

This proceeding is a special edition from an exciting collaboration between the "International Conference on Law & Society" (ICLS) with the "Conference of the Indonesian Association for the Philosophy of Law" (Konferensi Asosiasi Filsafat Hukum Indonesia – K-AFHI). The conference was held on 12-13 November 2025, at the Faculty of Law Universitas Jember, and was organized with various partners ranging from civil society organizations to local communities.

The conference centered on the theme "Engaged higher legal education: The role of legal philosophy in addressing injustice". This theme Explores ideas and experiences regarding the contribution of legal philosophy to dismantling social inequality, as well as, deconstructing the legal-education and the (re)production of hierarchy. Despite differing perspectives among the presenters and speakers, there was a shared consensus on the need for a bridge to rearticulate legal concepts into a factual sense of (in)justice.

The organizing committee received more than 100 competitive abstracts which were subsequently distributed into eight panels. With the same token -and also as a form of apology from the committee- the paper selection process took longer than originally anticipated. Also on the behalf of the committee, I would like to congratulate the selected papers.

Finally, we are looking forward to have you at the upcoming ICLS 2026!

Prof. I Gede Widhiana Suarda, S.H., M.Hum., Ph.D.
Dean, Faculty of Law, the University of Jember

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Justice as Rechtsidee: Reclaiming the Philosophical Horizon of Environmental Law

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ABSTRACT: This paper argues that environmental justice remains marginal in contemporary legal scholarship. Studies of justice continue to privilege the framework of positive law - *ius constitutum* and its operation (*ius operatum*) - while the broader *rechtsidee* of justice is rarely pursued. Legal education reinforces this orientation, as students and supervisors alike often rely on dogmatic, normative methodologies that assume harmony and coherence within the legal system already secure justice. When such assumptions prove insufficient in filling the gap in research, inquiry shifts only to institutional performance and law enforcement, assessed through principles of good governance or disparities in adjudication. Yet even these extensions leave environmental justice untouched. What emerges is a form of epistemic complacency: jurists critique structures and claim minor innovations while overlooking the more fundamental question of how law might embody justice beyond its formal boundaries. The paper contends that reclaiming environmental justice as a philosophical horizon is essential if legal scholarship is to transcend its current positivist closure. Reclaiming environmental justice as a philosophical horizon, therefore, is not merely an academic exercise but a necessary reorientation of legal thought toward the moral substance of law itself.

Keywords: Environmental Justice; Legal Research**;** Epistemic Complacency; Reorientation of Legal Thought.

I. INTRODUCTION

This paper argues that the issue of environmental justice remains marginal within contemporary legal scholarship. Such marginality may arise from several factors. First, practical constraints - such as limited time and resources - often discourage legal researchers from engaging in deeper inquiries into the question of justice within environmental law. Second, from an epistemological standpoint, the very concept of justice - including environmental justice - remains contested within the methodological divide between doctrinal and empirical legal research. While doctrinal analysis has been criticized for its "intellectual rigidity" and inward-looking orientation, socio-legal or non-doctrinal approaches are seen as more capable of revealing how law operates in practice through interdisciplinary and empirical engagement.[1] In this sense, sociological perspectives contribute valuable insights into the legislative process and the formation of laws that address real-world legal problems.[2]

Within the framework of doctrinal legal research, justice is not treated as a central analytical variable. The underlying assumption is that the existing positive law inherently embodies justice. This view aligns with the assertion that in doctrinal research, "*justice is out of question,*" meaning that justice is presumed and therefore not subject to scrutiny. Conversely, in empirical legal research, the assumption is quite the opposite: positive law is not presumed to be just and must be examined against social realities. Hence, it may be said that in empirical research, "*justice is out of the question,*" implying that justice is precisely what is questioned - or even absent - in the operation of law.[3]

These two expressions are linguistically and philosophically intriguing, as they reveal a subtle semantic ambiguity. In English, "*out of question*" means *beyond doubt* or *undeniable*, whereas "*out of the question*" means *impossible* or *not to be considered*. This minor linguistic distinction reflects a fundamental epistemological divide between the two approaches: whether justice is assumed to exist within law or must be actively pursued through law.

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1 Mike McConville and Wing Hong Chui (Eds.), *Research Methods for Law: Research Methods for the Arts and Humanities*, (Edinburgh: Edinburgh University Press), 2007, 1-15.

2 An example of such research is one of the mandates of Law Number 12 of 2011 concerning the Establishment of Legislation jo. Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 *a quo*.

3 M. D. A. Freeman, *Llyod's Introduction to Jurisprudence*, 9th Ed., (London: Thomson Reuters, 2014), 688, 873, 1188, 1223, 1371, 1530, 1672, 2380.

Such epistemological ambiguity has significant implications for the formation of a research gap in legal studies. Doctrinal research typically seeks to fill this gap by systematizing and interpreting positive law in order to maintain legal coherence. Empirical legal research, however, seeks to uncover how the absence of justice within the existing legal system contributes to the emergence of such gaps and how law might be reoriented to serve justice. Thus, from the empirical perspective, the goal of legal research extends beyond understanding *law in books* toward ensuring that law truly serves justice.

Another challenge is the increasingly global character of legal life, which is formed based on the easy access to explain and analyze legal systems around the world. Hence, legal researchers should focus on alternative perspectives and consider their relevance to the local situation.[4]

The exploratory nature of this research is capable of seeking new ways that are useful for developing non-doctrinal or socio-legal investigations. Therefore, the application of empirical research aims to identify valid legal issues[5] to produce results that are useful in determining the right tool or the best legal means to form a valid and reliable conceptual reflection model.

1. Bridging the Gap: Dogmatic and Empirical Legal Research

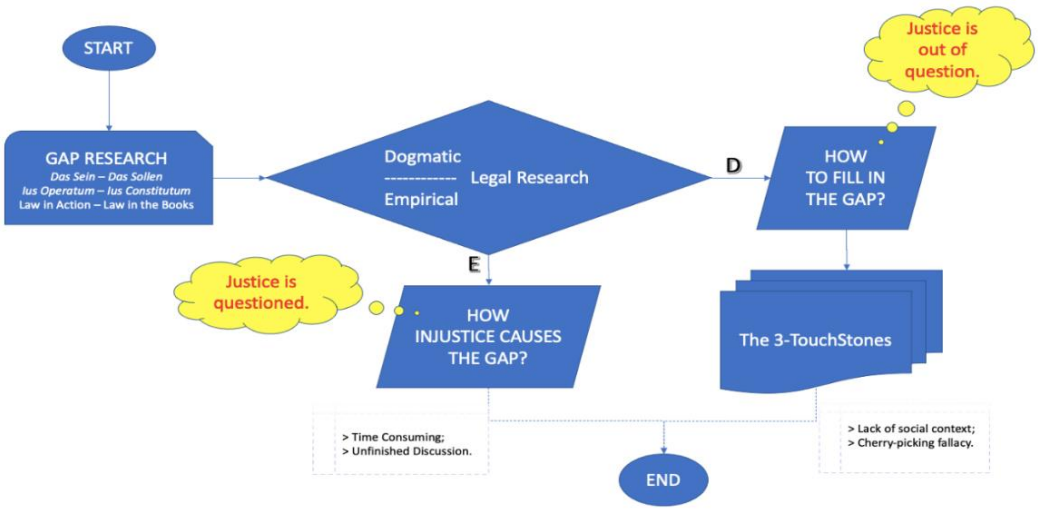


Figure 1: Gap Between Dogmatic and Empirical Legal Research

[4] Mike McConville and Wing Hong Chui (Eds.), *Research Methods for Law: Research Methods for the Arts and Humanities*, (Edinburgh: Edinburgh University Press), 2007, hlm. 1-15.

[5] Mark van Hoecke (Ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline*, (Oxford and Portland, Oregon: Hart Publishing), 2011, v-vi.

The "Bridging the Gap: Dogmatic and Empirical Legal Research" flowchart represents a conceptual reflection on the epistemological distance between *law in the books* and *law in action*. It captures one of the most fundamental tensions in legal scholarship - the divide between *das sollen*, the law as it ought to be, and *das sein*, the law as it actually operates within society. This "gap" is not merely methodological; it is philosophical, normative, and moral in nature, reflecting the persistent disjunction between the ideals of justice and their realization in everyday legal practice. As Epstein and Martin observe, "questions in the everyday part of legal practice also require argument and empirical evidence".[6]

Within this landscape, legal research has long oscillated between two major paradigms: dogmatic and empirical. Each offers its own strengths and weaknesses, yet both, when applied in isolation, are incomplete. The dogmatic approach provides the intellectual structure of law - the logic, hierarchy, and coherence of legal norms - while the empirical approach explores how those norms interact with the complex realities of human behavior, institutions, and power relations. The challenge, therefore, is not to choose between them, but to understand how to bridge them - how to fill the gap.

2. Dogmatic Legal Research: The Realm of Normativity

Dogmatic legal research - often referred to as doctrinal or normative legal research - is mainly concerned with maintaining the internal coherence of the legal system[7]. It studies how legal norms interact within a hierarchical structure of laws, guided by principles of validity, consistency, and legal certainty. Operating within the sphere of *das Sollen* and *ius constitutum*, this approach assumes that the legal system reflects a rational order and that justice is realized through the proper application of existing norms. At its essence, legal doctrine is a practical discipline aimed at clarifying what one ought to do within the boundaries of the law.[8]

However, this very strength often becomes its limitation. By prioritizing internal logic over social reality, dogmatic research tends to exclude the lived experiences of law's subjects. In this sense, as the flowchart illustrates, within the dogmatic

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6 Lee Eipstein and Andrew D. Martin, *An Introduction to Empirical Research* (New York: Oxford University Press, 2014), 1-2.

7 Molina Bustos, Francisco Fabiany. "NORMATIVE AND CULTURAL ANALYSIS OF TITLE XI OF THE CONSTITUTION." *Available at SSRN 5380499* (2025).

8 Anna Ruth Mackor, "Explanatory Non-Normative Legal Doctrine: Taking the Distinction between Theoritical and Practical Reason Seriously" Chapter 3 in *Methodologis of Legal Research: Which King of Method for What Kind of Discipline?* Ed.: Mark van Hoecke (2011), Oxford and Portland, Oregon: Hart Publishing, 69-70.

paradigm "justice is out of question." Justice is presupposed as an abstract quality of the legal system rather than a dynamic outcome of social relations. Consequently, dogmatic analysis risks falling into what can be called the *cherry-picking fallacy* - selecting only those norms or cases that reinforce doctrinal coherence while ignoring social contradictions and institutional failures.

The public is often presented with lengthy debates and unfinished discussions. The parties involved tend to use theories, concepts, and/or doctrines that support their respective arguments, leading to "cherry-picking" fallacies. This fallacy occurs when information is presented in a misleading manner, causing inaccurate analysis and potentially painting a distorted picture of certain results. As Tindale notes, "We may be inclined to engage in personal attacks on those with opposing views".[9]

Damer describes fallacies stemming from missing evidence, which arise not only from unrepresentative data or biased samples, but also from the omission of crucial evidence - essentially, "constructing an argument that fails to include key evidence critical to supporting the conclusion".[10]

3. Empirical Legal Research: The Realm of Reality

In contrast, empirical legal research places emphasis on the social functioning of law - how law is applied, interpreted, and experienced in practice. It shifts the focus from *ius constitutum* to *ius operatum*, from the logical structure of norms to the lived behavior of legal actors. Here, the researcher asks not what the law *ought to be*, but how it *actually works* and *why* it often fails to achieve its stated purposes.[11]

Within this paradigm, justice becomes a question to be examined rather than a presupposed ideal. As the flowchart suggests, "justice is questioned". Empirical research challenges the assumption that justice naturally follows from the existence of law. It investigates whether laws are applied fairly, whether institutions act impartially, and whether marginalized groups receive equitable treatment under the legal system. Yet this approach too faces its own limitations: it is time-consuming, context-dependent, and often leads to unfinished

---

[9] Christopher W. Tindale, *Fallacies and Argument Appraisal* (New York: Cambridge University Press, 2007), 14-15.

[10] T. Edward Damer, *Attacking Faulty Reasoning: A Practical Guide to Fallacy-Free Arguments*, 6th ed. (CA: Wadsworth Cengange Learning, 2019).

[11] Goldsmith, Jack, and Adrian Vermeule. "Empirical Methodology and Legal Scholarship." *The University of Chicago Law Review*, vol. 69, no. 1, 2002, pp. 153–67. *JSTOR*, https://doi.org/10.2307/1600351. Accessed 5 Nov. 2025.

discussions, as the social reality of law is continuously evolving and resists definitive conclusions.

4. How the Gap Emerges and Why It Matters

The flowchart poses two critical and interrelated questions: 1) How to fill in the gap*?* and 2) How injustice causes the gap?

The first question concerns methodology - how legal scholars can integrate normative and empirical reasoning into a single, coherent framework. The second question goes deeper, suggesting that injustice itself is the source of the gap.[12] It is not merely a technical or disciplinary divide, but a symptom of systemic imbalance - where social inequality, institutional bias, and selective enforcement distort the ideal of justice into an instrument of power. Thus, bridging the gap requires not only methodological innovation but also a normative commitment to examining the moral dimensions of legal practice.

5. The 3 Touchstones as a Framework of Integration

The flowchart concludes with the reference to "The 3 Touchstones", indicating a pathway toward integration between the dogmatic and empirical paradigms. These three analytical pillars - *Harmony*, *Consistency*, and *Synchronization* - function as evaluative criteria that reconnect the theoretical and the practical dimensions of law.

a. Harmony ensures that legal norms operate without contradiction, both vertically (across different levels of legislation) and horizontally (across sectors or regions).

b. Consistency demands fidelity to the foundational principles of justice, legal certainty, and fairness.

c. Synchronization emphasizes the need for simultaneity between law-making and implementation, ensuring that legal reforms are accompanied by institutional readiness and policy coherence.

Together, these touchstones provide the methodological bridge that connects the *dogmatic reasoning of law in the books* with the *empirical inquiry of law in action*. They serve as the intellectual foundation for what was later conceptualized as the "3

[12] Cf. Barton and Mendlovitz, *The Experience of Injustice as a Research Problem* (1960) 13 J. Legal Educ. 24.

Touchstones+" framework - a transdisciplinary model that unites normative, historical, comparative, and empirical approaches in a single analytical cycle.

6. Bridging the Divide: From Paradigms to Integration

The "Bridging the Gap" flowchart, when read in conjunction with the "3 Touchstones+" model, reveals a coherent narrative about the evolution of legal research. The movement from dogmatic closure to empirical openness, and finally to methodological integration, reflects a deeper transformation in the philosophy of law itself. It is a recognition that law is not static; it is a living system of norms and institutions that both shapes and is shaped by society.

To bridge the gap is therefore to restore law's dialogue with justice - to bring back into conversation what doctrinal formalism often excludes and what empirical relativism sometimes overlooks. The task of the modern legal scholar is not simply to describe or to criticize but to synthesize - to see law both as an idea and as a practice, both as text and as experience.

In this light, the "Bridging the Gap" flowchart serves as a conceptual foundation for integrative legal methodology. It reminds us that justice is neither fully contained in the written law nor completely captured by empirical observation. Justice, instead, emerges in the space between - in the ongoing effort to understand, critique, and reconcile the distance between *das sollen* and *das sein*.

Based on this description, this research highlights 2 (two) key problems, first, how is the concept of environmental justice positioned and interpreted within contemporary legal scholarship, particularly in distinguishing between doctrinal and empirical approaches to justice in law, and second, how do the differing epistemological assumptions between doctrinal and empirical legal research contribute to the formation of a research gap in environmental law studies, and how might law be reoriented to truly serve justice?

II. METHODOLOGY

This study adopts a qualitative normative-empirical approach that combines doctrinal and empirical legal research. It explores how the concept of environmental justice is situated within both traditions and its implications for developing environmental law in Indonesia.

From the doctrinal side, it analyzes legislation, constitutional provisions, court decisions, and scholarly writings on environmental justice. From the empirical side, it reviews case studies and policy data on how environmental law is implemented, particularly in contexts affecting vulnerable groups.

Using a comparative-interpretative analysis, the study contrasts the epistemological assumptions of both approaches to reveal their methodological divergence and integration potential as a foundation for advancing environmental justice through law.

III. THE POSITION AND INTEPRETATION OF JUSTICE

The use of technology in court has been around for a long time, but with the COVID-19 pandemic, the use of technology in court has increased, for example, virtual court. [13] Digital technology in court can be seen from several technological integrations as aids in the trial process, such as laptops, iPads, court recording, transcription, video/audio conferencing technology to administrative software as a management system, e-filing system, and sentencing support system. This technological device is often referred as courtroom technology. Along with the development and application of technology in the courts, several researchers see that, especially in the United States, the UK, and Wales, this technology has changed the architecture of court technology. [14] There is optimism from various groups who see that the use of digital technology in courts has a significant impact on helping to form transparent, effective, and efficient courts. [15]

This section seeks to demonstrate how the positivist approach in legal scholarship[16], particularly through dogmatic and empirical frameworks, has restricted justice within the confines of formal law, thereby marginalizing environmental justice from an epistemological standpoint. The primary challenge in addressing this issue is achieving objectivity. Diverse perceptions of justice yield

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13 Fredric I Lederer, 'The Evolving Technology-Augmented Courtroom before, during, and after the Pandemic.', *Vanderbilt Journal of Entertainment & Technology Law*, 23.2 (2021).

14 Jane Donoghue, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice', *The Modern Law Review*, 80.6 (2017), 995–1025 <https://doi.org/https://doi.org/10.1111/1468-2230.12300>.

15 Donoghue.

16 F. Budi Hardiman, *Filsafat Modern: Dari Machiavelli sampai Nietzsche* (Jakarta: Gramedia Pustaka Utama, 2004), 204-205.

multiple solutions, which not only spark debates but also risk creating new problems. Legal research should strive for objectivity, mitigating the researcher's subjective influence.[17]

1. Environmental Justice within the Doctrinal Legal Paradigm

Within the doctrinal legal research framework, law is understood as a closed, autonomous, and rational normative system aimed at maintaining order and certainty in society. This paradigm treats law as a *self-contained system*, where the validity of legal norms depends on their hierarchical position and logical coherence within the broader legal structure. Consequently, law is viewed as an internally consistent framework, detached from external influences such as politics, morality, or environmental realities.

In the context of environmental justice, the doctrinal paradigm emphasizes *formal justice* - justice derived from the internal consistency and procedural validity of the legal system.[18] According to this view, as long as a legal norm is enacted through proper authority and conforms to higher legal norms, it is considered just. [19] This position echoes Hans Kelsen's Pure Theory of Law, which asserts that law should be purified from sociological or moral elements to function as an objective normative order.[20]

However, this approach carries epistemological consequences. The doctrinal focus on *legal certainty* often sidelines *substantive justice*. In environmental cases, legal norms may appear just in form yet fail to address actual ecological harm or social inequality.

This tension is evident in Indonesia's legal framework. Article 28H (1) of the 1945 Constitution guarantees the right to a good and healthy environment, while Article 65(1) of Law No. 32 of 2009 on Environmental Protection and Management affirms every citizen's right to a proper living environment. These provisions explicitly acknowledge environmental justice as a fundamental right. Yet, under the doctrinal paradigm, such provisions are often treated as "given values" - self-

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17 P. Ishwara Baht, *Idea and Methods of Legal Research* (New Delhi: Oxford University Press, 2019), 54-59.

18 W. Friedmann, *Legal Theory*, 5th Ed., (New York: Columbia University Press, 1967), 531-532.

19 Hans Kelsen, *Pure Theory of Law*, trans Max Knight (Berkeley: University of California Press, 1967), 45.

20 W. Friedmann, *Legal Theory*, 5th Ed., (New York: Columbia University Press, 1967), 275-291.

evident truths rather than "questioned values" to be empirically examined or ethically debated.

As a result, environmental justice often remains declarative rather than operational. It exists in legal texts but not necessarily in social reality. When law is perceived solely as a formal system, violations of environmental justice may be invisible to the law even when they are evident in lived experience. For instance, an environmentally destructive mining permit may be legally valid yet morally unjust, disproportionately harming indigenous communities and ecosystems.

The doctrinal paradigm thus reinforces law's legitimacy as a rational system while simultaneously creating a cognitive distance between law and social reality. Law becomes an instrument of formal order rather than a medium of moral justice. Consequently, environmental justice risks being reduced to a technical matter of compliance rather than a substantive pursuit of ecological balance and human dignity.

Critical scholars have long challenged this limitation. Boaventura de Sousa Santos argues that modern law's positivist rationality neglects the plural and experiential dimensions of justice. A purely formal system cannot comprehend the lived injustices of marginalized communities facing environmental degradation. Similarly, the doctrinal paradigm tends to overlook the intergenerational dimension of environmental justice, as it focuses narrowly on the present validity of norms while ignoring long-term ecological sustainability.[21]

Therefore, environmental justice under the doctrinal paradigm is best described as procedural and formal rather than substantive. Justice is presumed to exist because it is written into the law, not because it is realized in practice. This approach serves the purpose of legal stability and predictability, but it becomes insufficient in addressing the complex and evolving nature of environmental crises.

The challenge, then, is to contextualize the doctrinal approach without abandoning its normative rigor. Law must be capable of integrating substantive justice into its framework while maintaining internal coherence. Environmental justice requires not only adherence to formal legality but also commitment to moral and ecological responsibility.

[21] Boaventura de Sousa Santos, Toward A New Common Sense: Law, Science, and Politics in The Paradigmatic Transition (London: Routledge, 1995), 71-71.

In other words, the doctrinal paradigm must evolve from being a guardian of order into a servant of justice - a system that upholds not only the certainty of law but also its moral mission to sustain life, protect the vulnerable, and preserve the environment for future generations.

2. Environmental Justice in the Empirical Legal Paradigm

Unlike the dogmatic approach, which treats law as an autonomous system of norms, the empirical legal paradigm begins with the understanding that law is not merely a text but a living social practice that evolves within its context. Within this paradigm, environmental justice is not evaluated by the internal coherence of legal norms, but by how effectively and equitably the law operates in practice - especially for those most affected by environmental degradation.

The empirical approach views law as a phenomenon that can be observed and tested through the behavior of actors, institutions, and communities interacting within the legal system.[22] Consequently, environmental justice becomes an *open-ended* inquiry - constantly questioned, tested, and measured through lived experience. Legal research thus moves beyond "what ought to be" (*das sollen*) to also examine "what is" (*das sein*).

This paradigm enables a more critical examination of the gap between normative law and social reality. For example, although Indonesia's Law No. 32 of 2009 guarantees the right to a good and healthy environment, its implementation often faces challenges such as weak law enforcement, overlapping institutional mandates, and the dominance of economic interests in environmental policymaking. In the empirical perspective, these are not mere deviations but crucial data for understanding how environmental justice actually functions.

Environmental justice in the empirical paradigm also demands active engagement with communities. Legal researchers act as both observers and critics of legal practice, taking into account social, economic, cultural, and political variables.[23] For instance, in cases of pollution or ecological damage, the empirical approach encourages field data collection on who is most affected, how they access legal

[22] Towfigh, Emanuel V. "Empirical arguments in public law doctrine: Should empirical legal studies make a "doctrinal turn"?." *International Journal of Constitutional Law* 12.3 (2014): 670-691.

[23] Reza Banakar & Max Travers, *Theory and Method in Socio-Legal Research*, 1–7, 12–18 (Hart Publishing 2005).

remedies, and whether judicial or administrative decisions contribute to genuine ecological and social restoration.[24]

This view resonates with Roscoe Pound's idea of *law in action*, emphasizing that the effectiveness of law can only be measured by its impact on social behavior.[25] In the context of environmental justice, the empirical paradigm rejects the notion that justice is guaranteed merely by the existence of norms. Instead, justice is seen as the dynamic result of interactions among norms, practices, and social realities.[26]

Hence, environmental justice under the empirical paradigm is *contextual, participatory,* and *evaluative.* It does not end with formal legal claims but requires validation through concrete data and lived, community experience, and distributive outcomes.[27] This approach allows law to play a more transformative role - not merely maintaining order, but fostering sustainability and balance between humans and nature.[28]

In legal scholarship, the empirical paradigm serves as a critical tool to assess how responsive the legal system truly is to issues of ecological justice. While dogmatic research might assert that "justice is out of question," empirical legal inquiry insists that "justice is the question."[29] This is the core value of empirical legal studies - it creates moral, social, and ecological space for law to be questioned and improved.[30]

Therefore, the empirical paradigm not only complements the dogmatic one but also expands the intellectual horizon of legal science. It reminds us that law detached from social reality risks losing relevance, and justice untested by experience remains an empty ideal. In the realm of environmental justice, the empirical

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24 Luke W. Cole & Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement,* 20–29, 151–170 (NYU Press 2001).

25 Roscoe Pound, "Law in Books and Law in Action", 44 *American Law Review* 12, 15–18 (1910).

26 Brian Z. Tamanaha, *A Realistic Theory of Law,* 3–10, 34–45 (Cambridge University Press 2017).

27 David M. Engel & Frank W. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities,* 7–15, 240–247 (University of Chicago Press 2003).

28 Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance,* 37–44, 82–95 (2d ed., Routledge 2016).

29 Elizabeth Fisher, Bettina Lange & Eloise Scotford, *Empirical Environmental Scholarship*, 41 *Ecology Law Quarterly* 337, 360–368 (2013).

30 Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 52–61, 268–276 (2d ed., Butterworths 2002).

approach reaffirms that law must live and act to restore harmony between humanity and nature - not merely regulate relations among humans.[31]

IV. THE 3 TOUCHSTONES PLUS

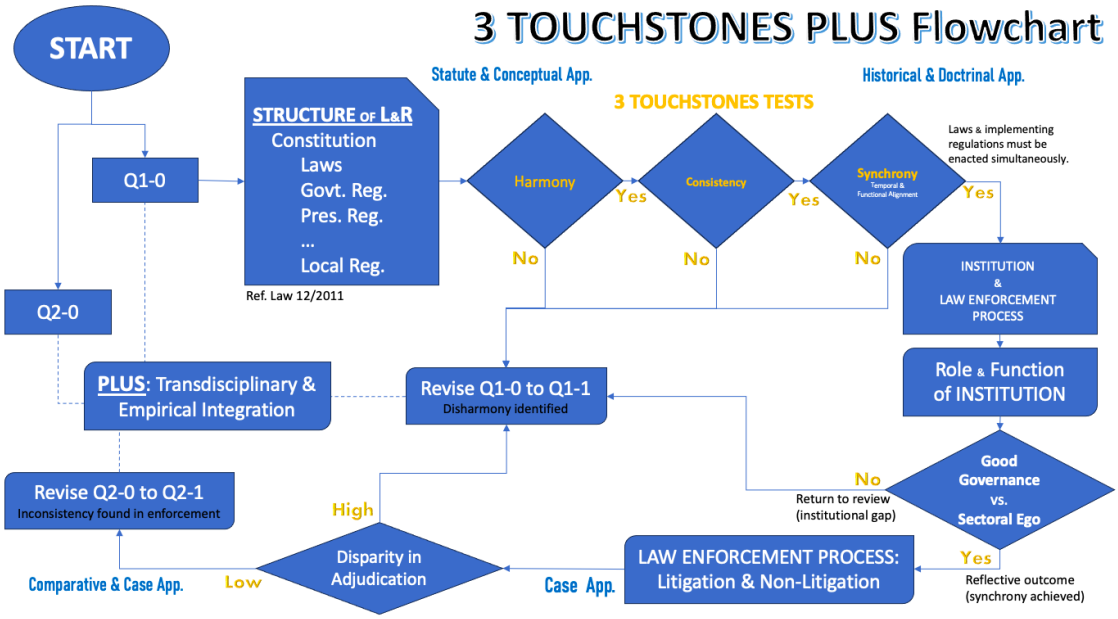


Figure 2: 3 Touchstones Plus Flowchart

1. Intro: The 3 TouchStones+

The development of legal research methodology shows a paradigmatic shift from a closed dogmatic approach to a more open and reflective orientation. In the traditional paradigm, normative or doctrinal legal research focuses on law as a self-contained logical system, seeking internal coherence and legal certainty.[32] As Peter Mahmud Marzuki explains, doctrinal research aims to interpret, systematize, and rationalize positive law in order to maintain consistency and predictability within the legal order.[33]

Yet, such an approach often remains confined within *das sollen* - law as it ought to be - without engaging *das sein*, law as it actually operates in society reality.[34] Soetandyo Wignjosoebroto reminds us that law cannot be fully understood as a

[31] Philippe Sands, Jacqueline Peel, Adriana Fabra & Ruth MacKenzie, *Principles of International Environmental Law*, 28–34, 253–260 (4th ed., Cambridge University Press 2018).
[32] H.L.A. Hart, *The Concept of Law* 94–99, 124–136 (2d ed., Oxford University Press 1994).
[33] Peter Mahmud Marzuki, *Penelitian Hukum* 35–41, 56–62 (Rev. ed., Kencana 2017).
[34] Gustav Radbruch, *Legal Philosophy* 107–110 (trans. Kurt Wilk, Harvard University Press 1950).

mere system of norms; it is also a social phenomenon that lives, evolves, and functions within social structures.[35] A purely dogmatic understanding of law therefore risks abstraction and detachment from lived legal experience.

From this awareness arises the need for a reflective methodological framework - an approach that bridges normative analysis with the empirical reality of law in action. Reflective legal research seeks to overcome the doctrinal–empirical divide by integrating internal legal reasoning with external social observation, thus expanding the epistemological horizon of legal science.[36]

The "3 Touchstones Plus" model offers such a synthesis. It introduces three epistemological pillars - Harmony, Consistency, and Synchrony - followed by a "*Plus*" dimension that expands the analysis toward a transdisciplinary and empirical perspective. This model responds to the contemporary demand for legal research that seeks not only certainty but also justice, social relevance, and functional effectiveness in real-world contexts.[37]

2. Theoretical Foundation: From Dogmatic to Reflective

Doctrinal legal research emphasizes the internal rationality of the legal system, viewing law as an autonomous normative order distinct from its social context.[38] In this framework, validity derives from hierarchy and logical coherence among norms.[39] However, this focus on internal consistency often neglects questions of justice, legitimacy, and social effectiveness, which are treated as external to doctrinal legal reasoning.[40]

Reflective approaches, by contrast, treat law as an open system. Soetandyo Wignjosoebroto refers to this as *law in context*: law must be understood in its interaction with institutions, values, and power relations.[41] Van Hoecke deepens this view by characterizing law as *an argumentative and contextual discipline*, one that

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[35] Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode, dan Dinamika Masalahnya* 67–74, 89–96 (ELSAM & HUMA 2002).

[36] Brian Z. Tamanaha, *A Realistic Theory of Law* 23–31, 52–60 (Cambridge University Press 2017).

[37] Reza Banakar, *Normativity in Legal Sociology: Methodological Reflections* 29–35, 41–48 (Springer 2015).

[38] Hans Kelsen, *Pure Theory of Law* 1–7, 193–198 (Max Knight trans., University of California Press 1967).

[39] H.L.A. Hart, *The Concept of Law* 94–99, 124–136 (2d ed., Oxford University Press 1994).

[40] Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* 6–11, 220–225 (Cambridge University Press 2006).

[41] Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode, dan Dinamika Masalahnya* 67–74, 101–108 (ELSAM & HUMA 2002).

does not exist in isolation but engages in continuous dialogue with social reality and competing normative claims.[42]

Roscoe Pound and Roger Cotterrell, through the school of *sociological jurisprudence*, expand this understanding by emphasizing law's social function - to shape and serve society in pursuit of justice.[43] In this light, the legitimacy of law cannot be assessed solely by formal validity but must also be measured by its capacity to create equitable social order.[44]

The 3 Touchstones Plus framework emerges as a methodological bridge between legal dogmatics and socio-legal reflection. It provides a systematic structure for assessing the legal system through three key dimensions—coherence, principle-based integrity, and synchronic functionality—before integrating these findings with transdisciplinary and empirical insights. This framework responds to contemporary demands for legal research that is not only doctrinally sound but also socially responsive, normatively reflective, and functionally effective.[45]

3. Preliminary Assessment: The Three Touchstones

Before deep legal analysis begins, a preliminary assessment must be conducted to evaluate the legal system through three epistemological tests, or *touchstones*: Harmony, Consistency, and Synchrony. These serve as diagnostic tools to examine whether law maintains internal balance, principle-based consistency, and contextual relevance.

The outcome of this initial assessment guides the revision of the main research questions. For instance, if the analysis reveals disharmony among legal norms, the initial research question (Q1-0) is revised into Q1-1 to explicitly address that lack of harmony. Similarly, if practical inconsistencies are discovered in law enforcement, Q2-0 evolves into Q2-1. This process ensures that legal research does not proceed linearly but reflectively, responding to the real conditions of the legal system.

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42 Mark Van Hoecke, *Law as Communication* 17–25, 51–58 (Hart Publishing 2002).

43 Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 *Harvard Law Review* 591, 593–600 (1911); Roger Cotterrell, *The Sociology of Law: An Introduction* 18–27, 45–52 (2d ed., Oxford University Press 1992).

44 Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* 34–41, 66–72 (Oxford University Press 1995).

45 Reza Banakar, *Normativity in Legal Sociology: Methodological Reflections* 29–35, 41–48 (Springer 2015).

4. Explanation of Each Touchstone

The first touchstone examines harmony within the legal system. Researchers assess whether statutes, doctrines, and institutional frameworks are aligned both vertically (between laws and their implementing regulations) and horizontally (across sectors and agencies).

When disharmony is identified—such as conflicting policies between the energy and environmental sectors—the research question must reflect that finding. For example:

> Q1-0: "How is renewable energy regulated in Indonesia?"
>
> Q1-1: "How does disharmony occur in the regulation of renewable energy between the Ministry of Energy and the Ministry of Environment?"

The analysis proceeds through a normative and conceptual approach, combining: the statute approach, which reviews relevant legal texts; the conceptual approach, which examines underlying principles and theories; and complementary historical, comparative, and case approaches for contextual depth.

Thus, *Touchstone 1* ensures that legal research begins by evaluating the structural coherence of the legal system. The revision from Q1-0 to Q1-1 reflects an epistemological shift - from descriptive interpretation to reflective diagnosis of legal disharmony.

The second touchstone focuses on consistency, which in this framework emphasizes the adherence to legal principles. This means that all elements of the legal system - lawmakers, administrators, and enforcers—must act consistently with the foundational principles that justify the law itself. When this coherence is broken, the legal system betrays its own logic and moral integrity.

This stage of research asks: Do legal actors apply norms in accordance with their guiding principles (such as justice, certainty, and utility)? Are interpretations of law consistent across institutions and jurisdictions? Are judicial and administrative decisions based on uniform reasoning, or do they reveal double standards?

If inconsistencies or violations of principle are found, the question is revised:

> Q2-0: "How is the principle of strict liability applied in environmental law?"

Q2-1: "How does inconsistency in applying the principle of strict liability affect corporate environmental accountability in Indonesia?"

Analysis encompasses both litigation (court proceedings) and non-litigation (mediation, arbitration, administrative remedies). Hence, *Touchstone 2: Consistency* examines the degree of principled coherence within the system. The notion of *"consistency"* functions as a normative and methodological compass, ensuring that legal operations remain faithful to their own principles and values.

The third touchstone concerns synchrony, assessing the alignment of law with time, context, and purpose. Synchrony operates on two interconnected levels:

a. Temporal synchrony, meaning the *timely alignment* between the enactment of new legislation and the issuance of its implementing regulations. In many jurisdictions, *asynchrony* occurs when a law is enacted but its implementing regulations are delayed, rendering the law dormant or inoperative. Therefore, this touchstone requires that legislative and regulatory processes proceed simultaneously to ensure the law's immediate enforceability.

b. Functional synchrony, referring to the *alignment of legal content with its intended social and policy objectives*. Laws must not only exist but function effectively within institutional capacities, socio-economic realities, and public expectations.

Researchers evaluate whether regulatory changes are accompanied by institutional readiness, administrative coordination, and policy coherence. *Touchstone 3* thus serves as both a temporal and functional diagnostic tool, ensuring that law remains relevant, timely, and operationally effective.

5. The "Plus": Transdisciplinary and Empirical Dimension

After the three normative touchstones are examined, legal research extends into the "Plus" dimension - an invitation to integrate transdisciplinary and empirical approaches. This step acknowledges that law is a living system, continuously shaped by its interaction with economics, politics, culture, and ecology.[46]

The "Plus" dimension includes, first incorporating empirical data – such as field studies, interviews, surveys - to validate and critically test normative legal findings

[46] Niklas Luhmann, *Law as a Social System* 77–85, 231–239 (Klaus A. Ziegert trans., Oxford University Press 2004).

against social reality.[47] Second, it entails engagement with interdisciplinary perspectives - sociology, economics, policy studies, environmental science - to illuminate law's broader impact.[48] Third, the "Plus" dimension links legal research outcomes with global frameworks such as the Sustainable Development Goals (SDGs) and environmental justice, thereby situating legal analysis within transnational governance and sustainability agendas.[49]

This dimension bridges the epistemological gap between *das sollen* and *das sein*, transforming legal research from a static interpretation of norms into a reflective inquiry into how law operates and affects society, and whether it contributes to justice and sustainability in practice.[50]

6. Reflective Summary

The 3 Touchstones Plus framework establishes a reflective, adaptive, and context-sensitive model for legal research. It guides researchers through a structured inquiry that moves from internal evaluation to empirical engagement:

Stage	Touchstone	Focus of Assessment	Revision / Orientation
1	**Harmony**	Alignment of norms and legal concepts	Q1-0 → Q1-1 (Statute & Conceptual Application)
2	**Consistency**	Adherence to legal principles - Principled consistency in law enforcement	Q2-0 → Q2-1 (Law Enforcement Process)
3	**Synchrony**	Temporal and functional coherence between law and implementation	Evaluation of legislative-regulatory alignment
+	**Transdisciplinary Plus**	Integration of empirical, social, and ecological contexts	Bridging *das sollen* and *das sein*

[47] Elizabeth Fisher, Bettina Lange & Eloise Scotford, "Empirical Environmental Scholarship", 41 *Ecology Law Quarterly* 337, 349–356, 360–368 (2013).

[48] Shidarta, *Ilmu-ilmu Empiris tentang Hukum: Penerapannya pada Kajian Sosio-Legal*, (Jakarta: Kencana, 2024), 38-42

[49] Mary Menton et al., "Environmental Justice and the SDGs: From Synergies to Gaps and Contradictions", 15 *Sustainability Science* 1621, 1624–1631 (2020).

[50] Brian Z. Tamanaha, *A Realistic Theory of Law* 23–31, 52–60 (Cambridge University Press 2017).

Through this framework, legal research becomes not only an exercise in explaining law but also an effort to heal law - to diagnose disharmony, correct inconsistency, and restore synchrony between normative ideals and social realities.

Epistemologically, *3 Touchstones Plus* represents an Indonesian contribution to reflective legal methodology: rooted in normative tradition yet open to social, empirical, and ecological dimensions of justice.

IV. THE INTERDISCIPLINARY APPROACH TO ENVIRONMENTAL JUSTICE

An interdisciplinary approach to environmental justice recognizes that environmental problems cannot be solved within a single discipline. Law, in this sense, interacts dynamically with social, economic, political, and ecological dimensions. Environmental justice is not only a legal issue but also a moral, scientific, and policy concern. Understanding it fully requires connecting legal studies with the social and natural sciences. While interpreting and organising the law remain central to legal doctrine, they must evolve through more interdisciplinary approaches.[51]

This approach assumes that each discipline offers a unique perspective on the idea of "justice." Law emphasizes normative legitimacy and legal certainty; social sciences highlight power relations, access, and participation; economics focuses on efficiency and resource distribution; and ecology stresses the balance of life systems. Through this dialogue among disciplines, environmental justice emerges as a living concept - dynamic, complex, and continuously open to revaluation.

Despite its growing prominence in policy and governance discourse, environmental justice remains marginal within contemporary legal scholarship. Existing literature suggests that this marginality is not merely normative or political, but deeply epistemological, rooted in the enduring methodological divide between doctrinal and empirical approaches to legal research.

Environmental law scholarship has traditionally been dominated by doctrinal methods, which prioritize internal coherence, textual interpretation, and systemic consistency of legal norms. Fisher, Lange, Scotford, and Sullivan observe that

[51] Mark van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?" Chapter 1 in *Methodologis of Legal Research: Which King of Method for What Kind of Discipline?* Ed.: Mark van Hoecke, 2011, Oxford and Portland, Oregon: Hart Publishing, 17-18.

environmental legal research has long emphasized analytical rigor within formal legal sources, often at the expense of broader normative or distributive concerns unless these are explicitly codified in positive law.[52] From this doctrinal standpoint, justice is typically understood as immanent to law—achieved through fidelity to legal rules—rather than as an external normative benchmark. Consequently, environmental justice tends to be treated as peripheral unless it is firmly anchored in statutory or constitutional text.

At the same time, the expansion of empirical legal research has not resolved this tension. While empirical approaches promise to illuminate law's social effects and distributive outcomes, empirical environmental scholarship remains relatively limited and unevenly integrated into mainstream legal research.[53] Moreover, where empirical methods are employed, they often focus on regulatory effectiveness, compliance, or institutional performance, rather than on substantive questions of justice, inequality, or responsibility. This reinforces a technocratic orientation in environmental law and leaves justice-oriented inquiry epistemologically unstable—recognized as socially relevant but methodologically ambiguous within legal analysis.

The contested status of environmental justice as a legal concept further compounds this problem. Hill's comprehensive account of environmental justice in legal theory and practice demonstrates that, although the concept has gained visibility—particularly in enforcement and procedural contexts—it lacks a stable doctrinal foundation across jurisdictions.[54] Justice is frequently operationalized through procedural mechanisms such as access to information and participation, while substantive distributive and corrective dimensions remain weakly institutionalized. This asymmetry reflects law's preference for manageability and formal equality over redistribution and historical accountability.

Critical environmental justice scholarship reinforces this diagnosis by emphasizing that justice claims often challenge entrenched power structures and dominant political-economic arrangements. Pellow and Brulle argue that environmental justice inherently raises questions of power, inequality, and structural violence,

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52 Elizabeth Fisher, Bettina Lange, Eloise Scotford & Cindy Sullivan, *Maturity and Methodology: Starting a Debate about Environmental Law Scholarship*, 21 *J. Envtl. L.* 213, 215–220 (2009).

53 Elizabeth Fisher, Bettina Lange & Eloise Scotford, *Empirical Environmental Scholarship*, 41 *Ecology L.Q.* 337, 340–346, 360–365 (2013).

54 Barry E. Hill, *Environmental Justice: Legal Theory and Practice*, 1–22, 95–118 (5th ed., Environmental Law Institute 2020).

rendering it resistant to formal legal codification.[55] As a result, environmental justice has developed more robustly within sociology, political ecology, and governance studies than within doctrinal legal analysis.

Recent interdisciplinary reviews further confirm that environmental justice functions as a plural and contested concept, rather than a settled legal principle. Menton et al. demonstrate that within global policy frameworks such as the Sustainable Development Goals, justice is invoked rhetorically but rarely translated into binding obligations or distributive commitments.[56] Similarly, Newell and colleagues show that critical environmental justice scholarship embraces epistemic plurality and normative contestation, which—while analytically productive—sits uneasily with law's demand for determinacy and closure.[57]

Legal theorists have also questioned whether environmental law, as currently structured, is capable of delivering justice in any substantive sense. Scholarship on environmental constitutionalism reveals that constitutional recognition of environmental rights often remains aspirational, with limited transformative effect due to weak enforcement and judicial restraint.[58] Others argue that environmental law is embedded within broader political-economic systems that prioritize stability, sovereignty, and market efficiency over distributive justice, thereby structurally marginalizing justice-oriented claims.[59]

Taken together, this literature supports the argument that environmental justice remains epistemologically contested within legal scholarship. Doctrinal approaches struggle to accommodate justice claims that lack textual anchoring, while empirical approaches often treat justice as a social outcome rather than a legal norm. As a result, environmental justice occupies an "in-between" space—normatively compelling but methodologically unsettled—contributing to its continued marginality within environmental law research.

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55 David N. Pellow & Robert J. Brulle, *Introduction*, in *Power, Justice, and the Environment: A Critical Appraisal of the Environmental Justice Movement* 1, 4–10 (MIT Press 2005).

56 Mary Menton et al., *Environmental Justice and the SDGs: From Synergies to Gaps and Contradictions,* 15 *Sustainability Sci.* 1621, 1624–1630 (2020).

57 Peter Newell et al., *Critical Environmental Justice in Contemporary Scholarship*, 33 *Envtl. Pol.* 1, 3–7, 14–18 (2024).

58 James R. May & Erin Daly, *Environmental Constitutionalism*, 9–15, 85–112, 221–230 (Cambridge Univ. Press 2015).

59 Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene*, 47–55, 102–118, 185–192 (Hart Publishing 2016).

In the Indonesian legal context, the interdisciplinary approach is particularly relevant. For example, policies concerning renewable energy require not only legal clarity and certainty in licensing but also ecological feasibility, social impact assessments, and long-term economic sustainability. Likewise, in cases of environmental degradation or pollution, a purely normative legal analysis is insufficient without integrating scientific evidence and social data regarding affected communities.

The interdisciplinary approach also enables a reinterpretation of *justice* through the lens of *ecological justice*.[60] Here, the subjects of justice are not limited to humans but also include non-human entities - forests, rivers, and ecosystems - which possess intrinsic value.[61] This perspective shifts the focus from *anthropocentric justice* toward *ecocentric justice*, emphasizing fairness and respect for all forms of life within the interconnected ecological system.

For instance, a legal study examining deforestation in Kalimantan gains depth when it incorporates spatial data from geography, carbon analysis from environmental science, and ethnographic insights from local communities. Such an approach not only enriches the legal methodology but also deepens understanding of the empirical context in which law operates. Thus, interdisciplinarity is not merely a methodological strategy but also an epistemological commitment to justice itself - for justice can only be achieved when law genuinely comprehends the complexity of the reality it seeks to regulate.[62]

Furthermore, the interdisciplinary approach aligns with the concept of *transdisciplinary legal research*, integrating knowledge across fields not only in theory but also in practice and policy. In environmental justice, this means developing collaborative policy models involving academia, government, civil society, and local communities. The principle of *co-production of knowledge* becomes central: law is no longer viewed as a unilateral product of state institutions, but as

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[60] Hayden Washington and Helen Kopnina, "Conclusion – A Just World for Life?" Chapter 15 in *Conservation: Integrating Social and Ecological Justice*, Ed. Helen Kopnina & Haydn Washington, 2020, Springer Nature Switzerland AG, 219-227

[61] Dominick A. DellaSala, "Has Anthropocentrism Replaced Ecocentrism in Conservation?" Chapter 7 in *Conservation: Integrating Social and Ecological Justice*, Ed. Helen Kopnina & Haydn Washington, 2020, Springer Nature Switzerland AG, 91-104.

[62] Widodo Dwi Putro, *Filasafat Hukum: Pergulatan Filsafat Barat, Filsafat Timur, Filsafat Islam, Pemikiran Hukum Indonesia hingga Metajuridika di Metaverse* (Jakarta: Kencana, 2024), 350, 358, 369.

the outcome of interaction among multiple actors with diverse forms of knowledge and interests.

In this way, environmental justice within the interdisciplinary paradigm asserts that law must not remain confined to the text but function as a *living instrument* — adaptive, responsive, and reflective of the changing times. This approach reaffirms the moral mission of law: not merely to maintain order, but to restore balance between humanity and nature.

VI. SYNTHESIS: INTEGRATING DOCTRINAL, EMPIRICAL, AND INTERDISCIPLINARY PARADIGMS IN ENVIRONMENTAL LEGAL RESEARCH

The integration of doctrinal, empirical, and interdisciplinary paradigms in environmental legal research represents both an epistemological and strategic necessity. Environmental justice cannot be achieved merely by reinforcing legal norms (doctrinal) or by collecting social data (empirical). It requires a synthesis that unites both within a cross-disciplinary framework of understanding.[63] This synthetic paradigm arises from the recognition that law is not only a system of rules but also a social, political, and moral practice operating amid the complex relationship between humans and nature.[64]

The doctrinal paradigm provides the essential normative foundation - ensuring clarity, hierarchy, and legal certainty as the basis of social order.[65] However, when limited to this level, law tends to become rigid and detached from reality.[66] The empirical paradigm compensates for this by opening the space to test the law's effectiveness, revealing how legal norms function - or fail - in social and ecological contexts. It exposes the performative dimension of law, asking who benefits, who suffers, and how the law is implemented in real situations.[67]

Yet, these two paradigms alone are insufficient without the bridge of interdisciplinarity. The interdisciplinary approach allows law to learn from other sciences - ecology teaches balance, economics measures efficiency and distribution,

63 Mark Van Hoecke, *Methodologies of Legal Research* 3–9, 27–33 (Hart Publishing 2011).
64 Brian Z. Tamanaha, *A Realistic Theory of Law* 1–10, 52–60 (Cambridge University Press 2017).
65 H.L.A. Hart, *The Concept of Law* 94–99, 124–136 (2d ed., Oxford University Press 1994).
66 Duncan Kennedy, "Legal Formalism", 13 *Journal of Legal Studies* 351, 356–360 (1984).
67 Elizabeth Fisher, Bettina Lange & Eloise Scotford, "Empirical Environmental Scholarship", 41 *Ecology Law Quarterly* 337, 360–368 (2013).

sociology examines power relations and resource access, while moral philosophy reminds us that law is, at its core, an instrument of justice.[68] Combining all three paradigms transforms environmental legal research into a reflective and transformative intellectual pursuit: not only to understand law but to improve it.[69]

In this sense, synthesis does not mean randomly blending methods, but positioning each paradigm according to its proper function. The doctrinal approach provides legitimacy, the empirical approach measures effectiveness, and the interdisciplinary approach connects them within a broader vision of ecological justice.

Methodologically, this integration may be operationalized through the *Reflexive Environmental Legal Research* model - an approach that situates the legal researcher as both an observer and participant within social and ecological dynamics. Under this model, the researcher not only analyzes legal texts but also tests their application through field data and then reflects upon the findings within a cross-disciplinary theoretical framework. Law thus becomes not a static dogma but a living system of knowledge evolving through the interaction between norms, facts, and values.[70]

In public policy practice, this synthesis carries significant implications. For example, in renewable energy regulation, the doctrinal approach ensures legal certainty; the empirical approach evaluates social and economic impacts; while the interdisciplinary approach harmonizes both toward a policy design grounded in ecological justice and sustainability.[71] Similarly, in environmental law enforcement, success should not be measured merely by formal compliance but by the extent to which legal processes restore ecological balance and protect affected communities.[72]

Ultimately, the synthesis of doctrinal, empirical, and interdisciplinary paradigms paves the way for an *ecologically responsive law* - a law attuned to ecological values and social equity. Law should no longer be seen merely as a tool to regulate human

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68 Reza Banakar & Max Travers, *Theory and Method in Socio-Legal Research* 12–18, 97–105 (Hart Publishing 2005).

69 Klaus Bosselmann, *The Principle of Sustainability* 37–44, 82–95 (2d ed., Routledge 2016).

70 Niklas Luhmann, *Law as a Social System* 77–85, 231–239 (Oxford University Press 2004).

71 Benjamin K. Sovacool et al., *Energy Justice: Conceptual Insights and Practical Applications*, 142 *Applied Energy* 435, 438–445 (2015).

72 Luke W. Cole & Sheila R. Foster, *From the Ground Up* 151–170, 193–201 (NYU Press 2001).

behavior but as a means to heal the relationship between humanity and nature.[73] In this view, environmental justice is not just a normative goal but also an indicator of the health and success of the legal system itself.[74]

In conclusion, the integration of these three paradigms is not only a matter of research methodology but a vision for the future of legal scholarship - a law that is open, reflective, and grounded in reality; a law that not only *speaks the truth of norms* but also *listens to the truth of nature and society*. Here, environmental justice finds its true meaning - when law becomes a bridge between norm and reality, between text and life, as articulated by Widodo Dwi Putro.[75]

VII. CONCLUSION

This study demonstrates that environmental justice is central to the evolving paradigm of contemporary legal scholarship. The findings reveal that neither the doctrinal nor the empirical approach alone can fulfill the demands of substantive justice. While doctrinal analysis ensures legal certainty and coherence, it often presumes justice within positive law. Conversely, empirical inquiry exposes the gap between law in books and law in action but risks losing normative grounding. Their integration, supported by interdisciplinary reflection, offers a path toward a more responsive and dynamic understanding of justice - one that aligns legal reasoning with social and ecological realities.

In this integrated vision, environmental justice extends beyond the anthropocentric right to a healthy environment toward an ecocentric paradigm that recognizes nature as a subject of justice. Law must therefore evolve into a living, reflective system - open to critique, evidence, and collaboration across disciplines. Such transformation enables law not merely to regulate human conduct but to restore balance within the broader web of life, reaffirming its role as an active and moral instrument for achieving ecological harmony and sustaining the integrity of creation.

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[73] Philippe Sands et al., *Principles of International Environmental Law* 28–34, 253–260 (4th ed., Cambridge University Press 2018).

[74] Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* 47–55, 185–192 (Hart Publishing 2016).

[75] Widodo Dwi Putro, *Filasafat Hukum: Pergulatan Filsafat Barat, Filsafat Timur, Filsafat Islam, Pemikiran Hukum Indonesia hingga Metajuridika di Metaverse* (Jakarta: Kencana, 2024), 352.

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The Role of Advocates as Agents of Justice in Addressing Structural Injustice: The Perspective of Legal Aid for Suspects

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ABSTRACT: Advocates play a strategic role as agents of justice in ensuring the protection of suspects' rights and addressing structural injustices in the Indonesian criminal justice system. Although the right to legal aid is guaranteed in the 1945 Constitution, the Criminal Procedure Code, the Advocates Law, and the Legal Aid Law, its implementation still faces gaps due to limited resources, unequal distribution of advocates, and social stigma against legal aid recipients. This research uses a qualitative approach with a case study at the Jember Legal Aid Office through interviews with advocates and a review of regulations and court decisions. The results show that advocates play a role not only as legal defenders but also as agents of social change who ensure the principle of *access to justice* is fulfilled. Research recommendations include increasing the legal aid budget, equitable distribution of advocates, and utilizing digital technology to expand access to legal services.

Keywords: Advocate, Legal Aid; Suspect's Rights; Access to Justice.

I. INTRODUCTION

Protection of the rights of suspects is a fundamental part of a democratic and just legal system. In the context of a state based on the rule of law (*rechtsstaat*), every individual, including suspects in criminal cases, has the right to fair legal protection and self-defense against the charges against them. Without these guarantees, the criminal justice system will lose its moral and legal legitimacy due to its potential to create systemic injustice and discrimination against certain groups.[1]

In reality, law enforcement practices in Indonesia still face various structural issues that prevent the rights of suspects from being optimally protected. Social inequality, bureaucratic red tape, and limited access to legal aid are the main obstacles to achieving substantive justice for the poor [2]. In many cases, suspects from economically disadvantaged groups do not receive adequate legal assistance, either due to a lack of advocates willing to provide free legal aid or the weak implementation mechanisms of Law Number 16 of 2011 concerning Legal Aid.[3]

Advocates play a strategic role as *a noble profession*, a noble profession that safeguards justice and protects human rights. In the criminal justice system, advocates function not only in litigation but also in ensuring that legal proceedings adhere to the principles of *due process of law* and *fair trial*.[4] Therefore, advocates play a central role as agents of justice in preventing abuse of power by law enforcement officials against suspects.[5]

However, the role of advocates is often hampered by legal structures that do not fully support substantive justice. The uneven distribution of advocates in the regions, limited funding for legal aid institutions (LBH), and the social stigma against defendants' advocates are concrete forms of structural injustice *that* weaken access to justice for vulnerable groups.[6] This condition shows that justice

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1 Muladi, *Human Rights, Politics, and the Criminal Justice System*, Semarang: UNDIP Publishing Agency, 2002, p. 15

2 I. Hadiprayitno, *Defensive Enforcement: Human Rights in Indonesia*, *Human Rights Review*, Vol. 11 No. 3, 2010, p. 373.

3 Law of the Republic of Indonesia Number 16 of 2011 concerning Legal Aid.

4 TM Lubis, *In Search of Human Rights*, Jakarta: Pustaka Sinar Harapan, 2019, p. 121.

5 H. Siallagan, "The Role of Advocates in Ensuring Access to Justice in Indonesia," Journal of Law and Justice, Vol. 9 No. 2, 2020, p. 251.

6 A. Bedner, "Access to Justice in Indonesia," *Leiden Journal of International Law*, Vol. 26 No. 3, 2013, p. 555.

in Indonesia does not fully side with those in need, but rather remains formalistic and procedural.[7]

Within the framework of John Rawls' theory of justice, the state has a moral and political obligation to ensure the principle of *distributive justice*, namely justice that provides greater protection for weak groups so that they have equal opportunities before the law [8]. The application of this principle in the context of legal aid means that the state must guarantee that every suspect, regardless of economic status, receives adequate legal assistance from the investigation stage to trial.[9]

In addition to the theory of justice, the theory of legal protection put forward by Philipus M. Hadjon is also relevant to analyze this issue. Hadjon emphasized that legal protection aims to provide guarantees for citizens' rights so that they are not abused by state power.[10] In this case, advocates become concrete representatives of legal protection because they are tasked with preventing arbitrary actions by officials against suspects and ensuring that their constitutional rights are respected.[11]

Access to legal aid is also closely related to human rights theory. According to Donnelly, the right to legal aid and self-defense is part of *fair trial rights* as stipulated in Article 14 of *the International Covenant on Civil and Political Rights (ICCPR),* which Indonesia has ratified through Law Number 12 of 2005.[12] Therefore, providing legal aid is not merely a social policy, but rather a state obligation to fulfill the human rights of every individual in conflict with the law.[13]

Normatively, regulations regarding the rights of suspects in Indonesia have been regulated in various legal instruments, including Articles 50 to 54 of the Criminal Procedure Code, Article 28D paragraph (1) of the 1945 Constitution, and Law Number 18 of 2003 concerning Advocates. However, the implementation of these regulations is still far from ideal. Many suspects do not receive adequate legal

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7 Butt & Lindsey, *The Constitution of Indonesia: A Contextual Analysis*, Oxford: Hart Publishing, 2012, p. 212.

8 J. Rawls, *A Theory of Justice*, Cambridge: Harvard University Press, 1971, p. 65.

9 UNDP, *Programming for Justice: Access for All*, Bangkok: United Nations Development Programme, 2005, p. 47.

10 Philipus M. Hadjon, *Legal Protection for the People in Indonesia*, Surabaya: PT Bina Ilmu, 1987, p. 25.

11 PM Marzuki, *Legal Research*, Jakarta: Kencana, 2017, p. 85.

12 J. Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca: Cornell University Press, 2013, p. 104.

13 *International Covenant on Civil and Political Rights* (ICCPR), ratified through Law No. 12 of 2005.

access, especially during the investigation stage, where rights violations often occur without effective oversight.[14]

This phenomenon demonstrates that normatively guaranteed procedural justice does not automatically translate into substantive justice. Therefore, it is necessary to strengthen the role of advocates and LBH (legal aid institutions) in providing legal aid to the poor. Increasing institutional capacity, sustainable funding, and synergy between legal institutions are strategic steps to address this gap.[15] Advocates, in this context, serve not only as defenders of suspects but also as agents of social change, upholding the principles of equality and social justice.[16]

Comparisons with other countries such as the United States and the United Kingdom show that the legal aid systems in both countries are well institutionalized. In the United States, the right to legal counsel is guaranteed by *the Sixth Amendment* and reinforced by the *Gideon v. Wainwright (1963) ruling*, which requires the state to provide *a public defender* for indigent defendants.[17] Meanwhile, in the United Kingdom, *the Legal Aid Agency* (LAA) provides free legal aid services under *the Legal Aid, Sentencing and Punishment of Offenders Act (2012).*[18] Both models can serve as references for Indonesia in strengthening its legal aid system to be more inclusive and effective.[19]

Based on the above description, it can be concluded that advocates play a central role as agents of justice in the Indonesian criminal justice system. However, to address the structural injustices that continue to hinder access to justice, a strong political and legal commitment is needed to improve regulations, strengthen the capacity of advocates, and ensure the sustainability of funding for legal aid institutions. Thus, the presence of advocates will not merely be a symbol of legal formality, but a true instrument for protecting human rights and upholding substantive justice in Indonesia.[20]

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14 Criminal Procedure Code, Law Number 8 of 1981 concerning Criminal Procedure Law.

15 Yulianto, "Effectiveness of Legal Aid Institutions in Central Java," *Journal of Legal Studies*, Vol. 5 No. 2, 2017, p. 131.

16 Hiariej, "Inequality of Access to Legal Aid in the Investigation Stage," *Journal of Law and Human Rights*, Vol. 8 No. 1, 2012, p. 42.

17 *Gideon v. Wainwright*, 372 US 335 (1963).

18 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK).

19 Flynn & Hodgson, "Legal Aid and Access to Justice in England," *Oxford Journal of Law*, 2017, p. 202.

20 Siallagan, E., "Advocates and the Supervisory Function in Indonesian Criminal Justice," *Law Review*, Vol. 15 No. 2, 2020, p. 110.

II. METHODOLOGY

This research uses an empirical normative juridical method, namely a combination of a study of written legal norms (*law in books*) and their application in practice (*law in action*). The normative juridical approach is used to examine legal provisions relating to the rights of suspects and the role of advocates, including Law Number 8 of 1981 concerning Criminal Procedure Code (KUHAP), Law Number 18 of 2003 concerning Advocates, Law Number 16 of 2011 concerning Legal Aid, and Supreme Court Regulation Number 1 of 2014 concerning Guidelines for Legal Services for the Underprivileged in Court. Meanwhile, an empirical approach is carried out to understand the implementation of these provisions in practice through in-depth interviews with advocates from the Jember Legal Aid Institute (LBH) who handle criminal cases for the poor, in order to obtain a factual picture of structural barriers and the effectiveness of legal aid. Primary legal materials include laws and regulations, court decisions, and official documents from legal institutions, while secondary legal materials include scientific literature, legal journals, previous research, and the views of experts such as John Rawls, Philipus M. Hadjon, and Jack Donnelly. All data were analyzed qualitatively using a descriptive-analytical approach to illustrate the relationship between legal norms and social realities in the implementation of legal aid for suspects in Indonesia.

III. THE ROLE OF ADVOCATES IN PROVIDING LEGAL ASSISTANCE TO ENSURE THE PROTECTION OF SUSPECTS' RIGHTS IN THE CRIMINAL JUSTICE PROCESS IN INDONESIA

The role of advocates in guaranteeing the protection of suspects' rights is a fundamental part of the principle of *the rule of law*. In the Indonesian criminal justice system, advocates not only function as legal assistants, but also as instruments for protecting human rights so that suspects do not become victims of abuse of power.[21] Based on interviews with advocates in Jember Regency, they agreed that legal aid is a direct manifestation of Article 28D paragraph (1) of the 1945 Constitution, which guarantees the right to recognition, guarantees, protection and fair legal certainty.[22]

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[21] Philipus M. Hadjon, *Legal Protection for the People in Indonesia*, Surabaya: PT Bina Ilmu, 1987, p. 25.

[22] Interview with Supianto, Yuli Winiari Wahyuningtyas, and Jani Takarianto, LBH IKADIN Jember, 2025.

According to Supianto, legal aid is meant to guarantee the basic rights of suspects so that they are not treated arbitrarily by law enforcement officials.[23] Yuli Winiari Wahyuningtyas adding that legal aid is a concrete form of human rights protection, because this right is inherently inherent in every human being without having to wait for special regulations.[24] Meanwhile, Jani Takarianto emphasized that the concept of legal aid is a state instrument in realizing the principle of equality before the law. The views of the three are in line with Philipus M. Hadjon's Theory of Legal Protection, in which the state is obliged to guarantee the rights of citizens from arbitrary actions by the authorities through advocates as legal protectors.[25]

Advocates agree that providing legal aid, especially to the poor, is not only a legal obligation, but also a moral calling of the legal profession. as a *noble officium.*[26] Thus, advocates bear the responsibility to ensure that the values of substantive justice remain alive amidst often rigid and formalistic legal practices. This function illustrates the concept of protection in Hadjon's theory, namely that legal protection is provided to safeguard human dignity and honor from abuse of power by state officials.

At the investigation stage, the three sources emphasized the importance of the involvement of advocates from the start. Supianto explained that advocates must ensure that the examination runs according to legal procedures and prevent physical or psychological pressure on the suspect.[27] Yuli Winiari Wahyuningtyas said that advocates have a role as *watchdogs* who oversee the legality of the determination of suspects, so that state power is not used arbitrarily. Meanwhile, Jani Takarianto emphasized that advocates are obliged to ensure that the examination process respects human rights and is in line with the Criminal Procedure Code and the National Police Chief's Regulation on Investigations.

Hadjon's perspective, the role of advocates in the investigation phase is a form of preventive legal protection, namely an effort to prevent violations of rights before they result in legal consequences. The presence of advocates at this stage symbolizes protection for suspects so they do not experience injustice from the beginning of the legal process. Yuli Winiari Wahyuningtyas emphasized that

[23] Ibid., Supianto.
[24] Ibid., Yuli Winiari Wahyuningtyas
[25] Ibid., Jani Takarianto.
[26] Hadjon, *Legal Protection*, p. 30.
[27] Hadjon, p. 32

advocates are also tasked with protecting the psychological aspects of suspects from pressure, social stigma, and intimidation during the examination process.[28]

At the prosecution stage, the advocate's role shifts from formal supervision to a substantive justice control function. Supianto stated that advocates are required to verify the validity of the investigation report (BAP) and ensure that all documents submitted to the prosecutor's office reflect the actual results of the investigation. Yuli Winiari Wahyuningtyas added that advocates must act as a counterbalance to state power to prevent prosecutors from making charges that exceed the legal facts. Jani Takarianto emphasized the importance of maintaining the integrity of legal documents as part of legal oversight of law enforcement officers' actions.

During the trial stage, advocates act as guardians of procedural justice. Supianto states that advocates have the right to file exceptions if formal or material defects are found in the indictment, present witnesses *a de charge*, and prepare an objective and argumentative plea. According to Hadjon, this is a form of repressive legal protection, namely legal action taken after a violation or potential violation has occurred. In other words, advocates are the last bastion for suspects to obtain substantive justice before the law.

Although the role of advocates is clearly defined in legislation, their implementation in the field still faces structural and regulatory obstacles. Advocates complain about the lack of uniformity in regulations between the police, prosecutors, and courts regarding the mechanism for assisting suspects. Supianto believes that advocates' access to suspects is often limited, while Yuli Winiari Wahyuningtyas This underscores the gap between legal norms and field practice. This situation demonstrates the suboptimal implementation of Hadjon's theory in the legal system, where legal protection remains merely a formality, not a substantive guarantee.

In addition to regulatory barriers, the lack of financial support and human resources poses a major challenge to the effectiveness of legal aid provision. Supianto stated that the legal aid budget allocated by the state remains very limited and disproportionate to community needs. Yuli Winiari Wahyuningtyas emphasized the importance of equitable distribution of legal aid advocates in the regions so that poor communities across the region can access justice. Meanwhile,

[28] Hadjon, p. 35

Jani Takarianto highlighted that legal aid funding is often disproportionate to the professional responsibilities and moral burdens of advocates.

Advocates also revealed that the social stigma against the legal profession is still a serious obstacle. The public often views advocates as defenders of "guilty people," not protectors of citizens' constitutional rights. In Hadjon's view, this condition shows the weak legal awareness of the public, even though advocates function to guarantee the principle of *equality before the law* so that everyone receives fair treatment without discrimination. In practice, Supianto, Yuli Winiari Wahyuningtyas , and Jani Takarianto They assessed that the effectiveness of the role of advocates is often limited to the formalities of the Criminal Procedure Code. However, they emphasized that advocates truly serve as the last line of defense in upholding the constitution, humanitarian values, and substantive justice. Jani Takarianto added that there is a need to improve advocate competence through ongoing training so they can carry out their legal protection function professionally.

Thus, the role of advocates in providing legal assistance to suspects is not only to fulfill professional obligations but also to realize citizens' constitutional rights to justice. Based on interviews with the three advocates, it can be concluded that although the Indonesian legal system has a strong normative foundation, its implementation still requires structural strengthening, resources, and public awareness. In order for Philipus M. Hadjon's ideals to be realized, regarding effective, humanistic and substantive legal protection being truly realized, advocates must be empowered as true protectors of citizens from abuse of power.

IV. FORMS OF STRUCTURAL INJUSTICE HINDER ACCESS TO LEGAL AID FOR SUSPECTS AND ADVOCATES ACT AS AGENTS OF JUSTICE TO ADDRESS

Structural inequities in access to legal aid often manifest themselves in complex administrative procedures, leading to limited human and financial resources, and creating institutional biases that often hinder vulnerable groups such as the poor and lower-class suspects. This prevents communities from effectively accessing legal aid, which should be a basic right guaranteed by the state.

Structural injustice in the legal aid system is a systematic obstacle for justice seekers and suspects. Various forms of structural injustice can be analyzed using the

framework of justice theory and human rights theory in order to understand the problems and their implications for substantive justice.

Some forms of structural injustice, the first injustice lies in economic disparities that create inequality in access to quality legal aid, people or suspects in the poor category often cannot hire competent advocates, this also affects the way cases are handled in court so that many suspects depend on free legal aid that is very little or limited in the amount of quality of professional case handling.[29] In handling free legal aid that is limited in quality, this creates a two-class justice system, where the quality of justice a person obtains is proportional to their financial ability, in the perspective of Rawls' Theory of Justice, this violates the principle of difference which causes social and economic inequality to be regulated in such a way as to provide the greatest benefit to the most disadvantaged members of society.[30]

When the legal system only provides adequate legal assistance to groups who can afford it or are economically and socially well-off, the social structure fails to meet Rawls's principle of distributive justice. Rawls also emphasized that in the original position *behind* the veil *of ignorance*, every rational individual will choose a system that guarantees access to justice for everyone, regardless of their economic status.[31] Marginalized groups also have the right to obtain or enjoy the same freedoms and rights in the legal system, this equality is contrary to fundamental principles. Donnelly stated that the principle of non-discrimination is the foundation of all human rights.[32]

The second form of structural injustice is the geographical disparity in the distribution of legal aid institutions and advocates. Urban areas generally have better access to legal aid services than remote or rural areas, creating geographically based discrimination.[33] The role of advocates in urban areas creates what are called "legal deserts" *in* rural areas, where people must travel great distances or have no access at all to legal aid. Rawls in his theory emphasizes the

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29 Rhode, D. L. *Access to Justice*. Oxford University Press, 2004 p. 3-15

30 Rawls, J. *A Theory of Justice*. Harvard University Press, 1971 p. 75-83.

31 Rawls, J. *A Theory of Justice*. Harvard University Press, 1971 p. 118-123.

32 Donnelly, J. *Universal Human Rights in Theory and Practice* (3rd ed.). Cornell University Press, 2013 p. 10-22.

33 Galanter, M. "*Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change.*" *Law & Society Review, 9(1),* 1974. p. 95-160.

principle of fair equality *of opportunity*, which requires that positions and offices must be open to all under conditions of fair equality of opportunity.[34]

The role of advocates as agents of justice in overcoming structural injustice also plays a crucial role, advocates as agents of justice who must work to overcome these obstacles, this role is multidimensional which includes technical legal functions, empowerment, broader social transformation functions. The context of Rawls' justice and Donnelly's human rights theory Advocates can also be understood as the most important actors in working in the tension between the reality of structural injustice that achieves the normative ideals of justice that must be realized for the community or the accused without looking at economic, social, and geographical conditions.

Advocates play a role as guardians of procedural justice in the legal system, and they also ensure that the suspect's procedural rights are protected from the investigation stage to trial.[35] Rawls has a pure procedural justice framework, *which* requires that fair results can be achieved if fair procedures are followed correctly.[36] In this case, advocates must ensure that legal procedures are carried out in accordance with the principles of justice, there are no violations of rights, and all parties have an equal opportunity to be heard. Rawls also emphasizes the concept of perfect procedural justice. This independent criterion is a fair result and procedures that can be ensured will also produce such results.[37]

The role of justice agents, namely advocates, must also act as a balance and independent monitor in addressing structural injustice. Advocates provide access to legal knowledge, defense strategies, and navigation of the complex justice system for suspects without economic, social, or geographic limitations.[38] This function aligns with Rawls's principle that inequality must be regulated to provide the greatest benefit to those disadvantaged. Advocates are involved in pro bono or structural legal aid, actively working to mitigate the negative impacts of socioeconomic inequality in the legal system.

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34 Rawls, J. *A Theory of Justice*. Harvard University Press, 1971. p. 73.
35 Luban, D. *Lawyers and Justice: An Ethical Study*. Princeton University Press, 1988. p. 58-66.
36 Rawls, J. *A Theory of Justice.* Harvard University Press, 1971 p. 85-86.
37 Ibid.
38 Seron, C., & Munger, F. "Law and Inequality: Race, Gender... and, of Course, Class." *Annual Review of Sociology*, 22, 1996. p. 187-212.

Oversight within this legal system is provided by advocates, who function independently of state and law enforcement officials. They ensure the state does not abuse its power in protecting the rights of suspects from arbitrary action.[39] Advocates' position in this regard is unique because they have a legal system and special capacity to carry out their obligations through various legal strategies in the field of advocacy. Advocates also do not handle individual cases but rather use these cases as a platform to identify systematic patterns of structural injustice to encourage broader policy or legal change. Donnelly also emphasized that the realization of human rights requires not only negative protection from violations but also positive protection to build and change the structures that perpetuate violations.[40] Advocates, through their organizations and through their educational roles, can also transform the culture by increasing public understanding of their rights and how to access them. They can also identify systematic patterns of rights violations. Public legal education is crucial for overcoming obstacles and increasing public understanding across all socio-economic groups. This legal education also serves as a tool for the public to understand and navigate the complex legal system.

While advocates have great potential to act as agents of justice, they also face challenges in addressing structural injustice. They face challenges in developing realistic and effective strategies to strengthen the advocate role. First, advocates face significant structural and systemic limitations. Biased legal systems, lack of institutional support, and economic pressures can limit their effectiveness.[41] Rawls acknowledged that in less-than-ideal societies, achieving full justice may require a non-ideal theory of justice that recognizes practical limitations and transitional strategies.[42] Second, advocates often face complex ethical dilemmas and role conflicts. They must balance obligations to individual clients with responsibilities to systemic justice, and manage the conflict between their roles as partisan advocates and as *officers of the court.*[43] Thirdly, the effectiveness of the role of advocates is highly dependent on the political capacity of the state to support a

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39 Abel, R.L. "What We Talk About When We Talk About Law." In R.L. Abel (Ed.), *The Law and Society Reader*. New York University Press, 1995 p. 1-14.

40 Donnelly, J. *Universal Human Rights in Theory and Practice* (3rd ed.). Cornell University Press, 2013 p. 225-235.

41 Sarat, A., & Scheingold, S. *Cause Lawyers and Social Movements.* Stanford University Press, 2006 p. 3-22.

42 Rawls, J. *A Theory of Justice*. Harvard University Press, 1971 p. 245-248.

43 Simon, WH *The Practice of Justice: A Theory of Lawyers' Ethics.* Harvard University Press, 1998 p. 138-169.

strong legal aid system and the allocation of adequate resources.[44] Donnelly also emphasized that the realization of human rights requires political commitment and adequate resource allocation from the state as *the primary duty bearer.*[45] Without this, even the most dedicated advocates will face systemic barriers that are difficult to overcome. These resource constraints create excessive workloads, inadequate case preparation time, and ultimately compromise the quality of the defense provided to clients. Hence the need to strengthen the role of advocates as agents of justice.

Strengthening the role of advocates as agents of justice requires a comprehensive approach that combines institutional reform, adequate resource allocation, and changes in legal culture. Strengthening legal aid institutions through budget increases, recruitment of qualified advocates, and ongoing training to ensure adequate advocacy quality.[46] Furthermore, it is necessary to simplify procedures, increase transparency, and eliminate structural barriers to access to justice.[47] Donnelly also emphasized that legal and policy reform is a crucial instrument for realizing human rights.[48] Strengthening the legal system also requires the development of innovative models such as legal clinics, technology-based legal aid, and multi-stakeholder collaboration to expand the reach of legal aid services.

In his monumental work A Theory of Justice, Rawls developed the concept of justice as fairness *(Justice as Fairness)* as the most important philosophical foundation in understanding the structure of social justice.[49] Rawls also argued that all just societies must be based on principles that every rational individual would choose under what he called the "original position" *behind* the "veil *of ignorance*."[50] In each original position, each individual is unaware of their social position, wealth, natural abilities, intelligence, or even their conception of the good, this ensures that

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44 Regan, F., Paterson, A., Goriely, T., & Fleming, D. *The Transformation of Legal Aid: Comparative and Historical Studies*. Oxford University Press, 1999 p. 25-48.

45 Donnelly, J. *Universal Human Rights in Theory and Practice* (3rd ed.). Cornell University Press, 2013 p. 49-55.

46 Houseman, AW, & Perle, LE "Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States." *Center for Law and Social Policy*, 2007pp. 1-25.

47 United Nations Development Programme. *Programming for Justice: Access for All*. UNDP, p. 200517-35.

48 Donnelly, J. *Universal Human Rights in Theory and Practice* (3rd ed.). Cornell University Press, 2013 p. 145-155.

49 Rawls, John. *A Theory of Justice* Cambridge, MA: Harvard University Press, 1971, p. 3-4.

50 *Ibid*. pp. 11-17.

the principles of justice chosen will be fair to everyone. Because no one designs principles to benefit their own particular circumstances.[51]

In Rawls' theory there are two principles of justice, namely: the first is the principle of equal liberty and the second is the principle of difference and equality of opportunity. The *principle of equal liberty* is that everyone has the same right to the broadest system of basic liberties and is compatible with similar freedoms for all. These basic liberties include political ones such as the right to vote and hold public office, freedom of speech and assembly, freedom of conscience and thought, personal liberty, the right to own private property, and what is very relevant to this context: freedom from arbitrary arrest and detention as defined by the concept *of the rule of law*.[52]

The second principle of differences and equality of opportunity in this theory is also divided into two parts, namely the principle of fair equality of opportunity, namely that positions and positions must be open to everyone under conditions of fair opportunity, while the principle of differences, namely that social and economic inequality must also be regulated in such a way as to provide great benefits to the whole of society for those who are less fortunate.[53]

Applying structural injustice to access to legal aid, according to Rawls's framework, structural injustice in access to legal aid violates both principles of justice. Suspects from economically disadvantaged groups do not have equal access to legal aid compared to those who can afford an attorney, a frequent violation of equal freedom. Freedom from arbitrary arrest and detention requires the ability to defend oneself effectively in the legal system. Without adequate legal representation, this basic freedom becomes an illusion for the poor.

Donnelly identifies structural injustice as often manifesting in the form of hidden or indirect discrimination.[54] In this context, discrimination often occurs when:

1. A formal system that claims to provide legal aid for all, but in practice is only available in large cities;

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51 *Ibid.* pp. 136-142.
52 *Ibid.* pp. 220-221.
53 *Ibid.,* pp. 83, 302.
54 Donnelly, *Universal Human Rights in Theory and Practice*, p. 27-30.

2. The quality of legal aid provided by the state is far below the standards of paid advocates;

3. Administrative procedures for accessing legal aid are so complex that they hinder the groups who need it most;

4. There is no effective monitoring and accountability mechanism;

Donnelly recognizes poverty as a structural barrier that creates systematic barriers to the realization of human rights.[55] Combining Rawls' and Donnelly's frameworks we can identify several specific forms of structural injustice:

1. The gap in the quality of legal representation where wealthy defendants receive experienced lawyers with adequate research resources, while poor defendants receive only overburdened lawyers with minimal compensation, violates both Rawls's principle of equal liberty and Donnelly's principle of equality before the law.[56]

2. Geographical and infrastructural barriers include the concentration of legal aid services in urban areas, creating injustice for rural and remote communities. This failure is a fundamental part of society, according to Rawls, while Donnelly views it as a violation of the state's obligation to meet human right needs.[57]

3. Procedural complexity as a barrier is the cumbersome bureaucratic procedures for accessing legal aid that disproportionately disadvantage less educated and legally literate groups. This creates procedural injustice that contradicts the principle of equality of opportunity.[58]

4. Systematic underfunding is a grossly inadequate budget allocation for the political legal aid system that violates Rawls' difference principle, thus disadvantaging the least advantaged and failing to fulfill the state's positive obligations within Donnelly's framework.[59]

Rawls's Theory of Justice and Donnelly's Theory of Human Rights provide a powerful theoretical framework for understanding and critiquing structural

[55] *Ibid.,* pp. 220-227.
[56] Rawls, *A Theory of Justice* 1971, p. 224-227
[57] Rawls, *A Theory of Justice* 1971, p. 7-11
[58] Rawls, *A Theory of Justice* 1971, p. 85-86.
[59] Rawls, *A Theory of Justice* 1971, p. 78-81

injustice in access to legal aid. This injustice is not simply a technical issue or budgetary constraint, but rather a fundamental failure in the basic structure of society that violates fundamental principles of justice and human rights.

Advocates, as agents of justice, play a crucial role in bridging the gap between normative ideals and empirical reality. They work both at the individual level to provide legal representation and structural advocacy for systemic reforms to realize justice as fairness and the universality of human rights.

However, true transformation requires a serious political commitment from the state to fulfill its obligations, adequate resource allocation, and comprehensive structural reform of the criminal justice system. Only through the combination of dedicated advocacy and progressive state policies can the ideals of justice and human rights be realized for all citizens, regardless of their economic status.

V. CONCLUSION

Based on the results of interviews with Supianto, Yuli Winiari Wahyuningtyas, and Jani Takarianto and analysis through Philipus M. Hadjon's Legal Protection Theory, it can be concluded that the role of advocates in providing legal assistance to suspects is a vital element in realizing the principles of the rule of law and the protection of human rights. Advocates function not only as individual defenders, but also as instruments of oversight of state power so that the judicial process runs in accordance with the principles of justice, certainty, and legal benefit. Although normatively the role of advocates has been regulated in various laws and regulations, its implementation still faces structural obstacles, limited resources, and low public legal awareness. Therefore, optimizing the role of advocates requires firmer regulatory support, increased professional capacity, and synergy between legal institutions so that effective, humane, and substantively just legal protection can truly be felt by all citizens, especially for suspects from disadvantaged groups.

Structural injustice in access to legal aid is a complex problem rooted in broader economic, geographic, and social inequalities. Using Rawls's theory of justice and Donnelly's theory of human rights, it is clear that this condition violates the fundamental principles of justice and human rights that should be the foundation of a legitimate legal system. Advocates play a vital role as agents of justice who work to address structural injustice through various interrelated functions, from

safeguarding procedural justice, balancing inequality, monitoring state power, to legal education for the community. The effectiveness of their role depends on structural support, institutional reform, and political commitment to realizing access to justice for all citizens without discrimination. Rawls' perspective, a truly just society is one in which the basic structure is designed to ensure that all citizens, regardless of their social or economic position, have equal access to justice, while Donnelly emphasizes that the right to legal aid is not merely a procedural right but a prerequisite for the enjoyment of human rights, therefore addressing structural injustice in access to legal aid and strengthening the role of advocates as agents of justice is not only a legal imperative, but also a fundamental moral imperative to realize a just society and respect for human rights.

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Reconstructing Justice in the Age of Artificial Intelligence: A Legal Philosophy Perspective in Society 5.0

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ABSTRACT: The emergence of Society 5.0 marks a new paradigm in which technology, particularly artificial intelligence, big data, and the Internet of Things, is deeply integrated into human social life. Although AI offers efficiency and innovation, this technology also gives rise to new forms of injustice through algorithmic bias, digital inequality, and dehumanization in legal processes. Traditional concepts of justice rooted in human-centered philosophical foundations, such as Aristotle's virtue ethics and John Rawls' theory of justice, are increasingly being challenged by automated decision-making and data-driven governance practices. This article aims to examine how the concept of justice can be reconstructed to remain relevant and humane in the era of artificial intelligence. Using a normative-philosophical approach, this study analyzes classical and contemporary legal philosophy discourse and reflects on its relevance in the digital society 5.0 ecosystem. This study will explore the tension between technological rationality and moral rationality, as well as emphasize the importance of transparency, accountability, and ethical responsibility in algorithmic systems. The results of the study show that reconstructing justice does not only mean adjusting legal norms to technological changes, but also reaffirming the position of humans as a central value in law. This article offers a human-centered justice model based on legal humanism and ethical inclusiveness to ensure that law remains a moral reference amid the advancement of smart technology. This reflection reaffirms the important role of legal philosophy in responding to new forms of injustice in the digital age.

Keywords: Artificial Intelligence; Justice; Legal Philosophy; Society 5.0; Human-Centered Law

I. INTRODUCTION

The development of digital technology has brought humanity into a new phase of civilization known as Society 5.0. This concept marks the deep integration between the physical and cyber worlds through artificial intelligence, big data, and the internet of things, with a vision of a human-centered society.[1][2] Society 5.0 is projected to be a social order that utilizes technology to improve quality of life and solve social problems more effectively.[3] However, behind this optimistic narrative, the integration of technology into normative spaces has actually given rise to new tensions between technological rationality and human values, especially when technology begins to play a role in moral decision-making.

In the legal field, artificial intelligence is no longer just an administrative tool, but has entered the substantive realm of law enforcement. Algorithm-based systems are used in predictive policing, risk assessment, case selection, and even decision recommendations.[4] In Indonesia, discussions on the use of AI in legal practice and the judiciary point in the same direction, namely a shift towards data-driven and automated legal mechanisms.[5] This change marks a shift from human judgment to algorithmic judgment, where legal considerations increasingly depend on data calculations, efficiency, and statistical predictions. This has the potential to reduce the law to a technocratic system that prioritizes procedural accuracy, but distances itself from the moral reflection that has long been the basis of justice.

Although often perceived as objective and neutral, algorithms are never value-free. O'Neil[6] shows that mathematical models can reproduce bias, amplify inequality, and systematically punish vulnerable groups. Similar findings were reported by

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1 Cabinet Office of Japan, "Chapter 2 Science, Technology and Innovation PolicyToward Realization of Society 5.0" (2019).

2 Agus Wibowo, *Revolusi Industri 4.0 dan Society 5.0* (Semarang: Yayasan Prima Agus Teknik Bekerja sama dengan Universitas Sains & Teknologi Komputer (Universitas STEKOM), 2023).

3 Suryadi Suryadi, "Challenges and Opportunities for Community Empowerment in The Era of Society 5.0" (2022) 2:2 prosperity 74–85.

4 Aleš Završnik, "Algorithmic justice: Algorithms and big data in criminal justice settings" (2021) 18:5 European Journal of Criminology 623–642.

5 Lusi Zafriana, "Integrasi Kecerdasan Buatan Dalam Penegakan Hukum: Peluang Inovasi Dan Tantangan Keadilan Prosedural Di Indonesia" (2025) 5:1 trilogi j penelit ilmu sos dan n.a 24–36; Novera Kristianti & Bryand Rolando, "Pemanfaatan Artificial Intelligence dalam Praktik Hukum: Peluang dan Tantangan Regulasi di Indonesia" (2025) 15:1; Rafli Hukom & Martinus, "The Effectiveness of Artificial Intelligence in Judicial Decision-Making in Indonesia" (2025) 3:1 Hakim 1032–1051.

6 Cathy O'Neil, *Weapons of math destruction: how big data increases inequality and threatens democracy* (New York: Published in the United States by Crown, an imprint of the Crown Publishing Group, a division of Penguin Random House LLC, New York, 2016).

Eubanks[7] which proves that the automation of public policy actually deepens social injustice. In the context of law, this condition gives rise to new forms of injustice, such as digital discrimination, the loss of the right to be understood, and the dehumanization of the legal process. Legal decisions that should arise from human moral considerations are transformed into outputs of a system that lacks ethical awareness. This situation marks the emergence of a crisis of justice in the era of artificial intelligence.[8] This crisis challenges the very foundations of normative law. From the outset, legal philosophy has viewed justice as an expression of moral virtue and ethical relations between humans. Aristotle placed justice as the primary virtue oriented towards balance and proportionality in the life of the polis.[9] Rawls then reconstructs justice as fairness, emphasizing protection for the most vulnerable groups through the principle of rational equality.[10] Both frameworks are based on the assumption that humans are moral subjects capable of judging, deliberating, and taking responsibility. However, when legal decisions are transferred to an automated system, justice is no longer achieved through human ethical deliberation, but rather through non-moral computer logic.

It is in this context that Luciano Floridi's thinking becomes relevant. Through the ideas of ethics of information and digital humanism, Floridi asserts that humans live in the infosphere, a space of existence shaped by information structures, so that technology must remain subject to human values and moral responsibility.[11] Technology, including artificial intelligence, should not be an autonomous source of value, but rather should be positioned as an instrument that serves human dignity. This view emphasizes that law in the era of Society 5.0 should not be dissolved in technological rationality alone, but must continue to function as an ethical instrument.

Therefore, the integration of artificial intelligence into law is not merely a technical or regulatory issue, but rather a philosophical problem concerning the meaning of justice itself. Society 5.0 presents a paradox: on the one hand, it promises efficiency

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7 Virginia Eubanks, *AUTOMATIC INEQUALITY* (New York: St. Martin's Press, 2018).

8 Završnik, "Algorithmic justice", *supra* note 4; Frank Pasquale, "The Black Box Society" (2015).

9 Aristotle, *The Nicomachean Ethics* (London: Harvard University Press, 1956).

10 John Rawls, *A theory of justice*, rev. ed., 5.-6. printing edn (Cambridge, Mass: Belknap Press of Harvard Univ. Press, 2003).

11 With the collaboration of David Bawden, "The Ethics of Information" (2014) 66:6 Aslib Journal of Information Management 697–699; Luciano Floridi, *The logic of information: a theory of philosophy as conceptual design* (Oxford New York (N.Y.): Oxford university press, 2019).

and objectivity, but on the other hand, it has the potential to erode the human dimension of law. This situation calls for philosophical reflection to reconstruct the concept of justice so that it remains relevant in the era of artificial intelligence. Technology must be reconstructed with moral values so that the law remains a humanistic space amid the dominance of algorithms.

Based on this background, this article has two problems: how artificial intelligence challenges the concept of justice in traditional legal philosophy and how to reconstruct a relevant and humanistic concept of justice within the framework of Society 5.0.

II. METHODOLOGY

This article uses normative legal research, meaning that the issues raised, discussed, and explained in this study are focused on applying the rules or norms of positive law. Normative legal research is conducted by examining various types of formal legal rules such as laws and theoretical literature, which are then linked to the issues under discussion.[12] The approach used is a conceptual approach based on the classical thinking of Aristotle and Rawls, modern digital philosophy by Luciano Floridi and Nick Bostrom, and the Society 5.0 policy document by the Cabinet Office of Japan.

III. ARTIFICIAL INTELLIGENCE AND CHALLENGES TO THE CONCEPT OF JUSTICE IN LEGAL PHILOSOPHY

1. The Foundation of Humanistic Justice in Legal Philosophy

Legal philosophy first emerged by viewing justice not merely as the result of formal procedures or institutional mechanisms, but as an expression of moral values inherent in humans as ethical beings. Justice has always been understood as something that arises from the human capacity to judge, consider, and take responsibility. This means that justice is rooted in the existence of humans as moral subjects. It is this foundation that distinguishes law from a mere system of technical rules. Law presupposes an ethical dimension that cannot be separated from humanity.[13]

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[12] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenadamedia Group, 2013).
[13] Rawls, *supra* note 10; *supra* note 9.

Aristotle stated that justice was placed as the primary virtue (virtue par excellence) in the life of the polis.[14] Justice is not merely a matter of distribution or correction, but a form of practical wisdom (phronesis) that enables humans to judge proportionally and contextually what is appropriate for each person.[15] For Aristotle, justice was never mechanical. Justice was always related to the human ability to understand concrete situations, consider social relations, and weigh the moral consequences of an action.[16] Therefore, justice cannot be reduced to a fixed formula or mathematical calculation, because it always involves a dimension of wisdom that only subjects with morals possess.

This idea found its modern form in John Rawls' theory of justice. Through the concept of justice as fairness, Rawls asserted that justice is the result of human rationality placed in a hypothetical fair condition, namely the original position with a veil of ignorance.[17] Justice, in this context, arises from the human ability to imagine oneself in another person's position.[18] This gave rise to principles that protect all parties, especially those who are most vulnerable. Although Rawls used a systematic rational apparatus, justice remains rooted in the capacity of humans as moral beings who are capable of treating others fairly. Rawls' principles of justice are not intended as an automatic algorithm, but rather as normative guidelines for humans in designing fair institutions.

Both Aristotle and Rawls, despite their different contexts and methodologies, share a fundamental point of agreement: justice always presupposes the existence of human beings as the center of value. Justice arises from moral reflection, not from a mechanical process. Justice requires empathy, contextual consideration, and responsibility for the consequences of decisions.[19] Thus, justice in traditional legal philosophy is never neutral, but always rooted in the view of humans as moral beings.

This view is reinforced by Lon L. Fuller through the idea of the inner morality of law. Fuller rejects the notion that law is merely a set of formally valid commands.[20] According to him, a law can only be called a law if it fulfills internal moral principles, such as clarity, consistency, non-retroactivity, and consistency between

14 *Supra* note 9.
15 *Ibid*.
16 *Ibid*.
17 Rawls, *supra* note 10.
18 *Ibid*.
19 *Supra* note 9; Rawls, *supra* note 10.
20 Lon L Fuller, *The Morality of Law* (USA: Yale University Press, 1969).

the rules and their implementation.[21] These principles are not merely technical, but reflect respect for human beings as rational agents who deserve to be treated with dignity.[22] Laws that violate these principles, even if formally valid, lose their moral quality as laws.[23]

Thus, within Fuller's framework, law cannot be separated from views about human beings. The inner morality of law reflects the assumption that humans are subjects capable of understanding norms, planning actions, and adapting themselves rationally. Good law is not only effective, but also respects the capacity of humans as moral beings. Justice in this sense is never ethically neutral. Justice always contains a commitment to human dignity.[24]

This humanistic foundation shows that justice in traditional legal philosophy is not merely the end result of a process, but rather an expression of ethical relations between humans. Justice requires subjects who are capable of understanding meaning, weighing values, and taking responsibility. Therefore, justice is never intended to be an automatic product that can be produced by a non-moral system. It presupposes the presence of humans as the center of consideration.[25]

When justice is understood as virtue,[26] as a result of moral rationality and fairness,[27] and as a manifestation of the internal morality of the law,[28] It is clear that justice is not synonymous with procedural accuracy or technical efficiency. Justice is a normative quality inherent in human actions in social relations. Justice is contextual, relative, and value-laden.

This foundation was then radically tested by the arrival of artificial intelligence in the legal sphere. Artificial intelligence offers a new form of rationality that does not stem from moral experience, empathy, or responsibility, but rather from data calculations and statistical patterns. When legal decisions began to shift from human consideration to automated mechanisms, the basic assumption of legal philosophy regarding justice as a product of moral subjects was called into question. The question is no longer simply whether AI can assist the law, but

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21 *Ibid*.
22 *Ibid*.
23 *Ibid*.
24 *Ibid*.
25 Rawls, *supra* note 10; *supra* note 9.
26 *Supra* note 9.
27 Rawls, *supra* note 10.
28 Fuller, *supra* note 20.

whether justice can still be understood within a humanistic framework when the decision-making process is removed from humans themselves.

This foundation of humanistic justice is the starting point for understanding why the presence of AI does not merely bring technological innovation, but also raises fundamental philosophical issues. If justice is rooted in the capacity of humans as moral subjects, then the use of non-moral systems in the legal sphere is not only a matter of effectiveness, but also a challenge to the very meaning of justice itself. It is here that the tension between humanistic justice and algorithmic rationality begins to appear as a serious conceptual problem in contemporary legal philosophy.

2. Characteristics of Artificial Intelligence as a Non-Moral System: Competence without Understanding

The foundation of justice in traditional legal philosophy rests on the assumption that justice can only be realized by moral subjects. However, this assumption began to be shaken when AI entered the realm of legal decision-making. AI presents a new form of rationality that does not stem from consciousness, empathy, or moral responsibility, but rather from algorithm- and data-based computational processes. This raises a fundamental philosophical question: can a system that lacks moral consciousness produce decisions that can be called "fair"?

John Searle provides a strong ontological basis for answering this question through the Chinese Room Argument.[29] Searle shows that machines can manipulate symbols perfectly according to formal rules, but still do not "understand" the meaning of those symbols.[30] In his thought experiment, the person only follows the rules of syntax. From the outside, he appears to "understand," when in fact he is only processing symbols without semantic understanding.[31] Searle uses this analogy to assert that machine intelligence is syntactic, not semantic.[32] AI can mimic intelligent behavior, but it lacks consciousness, intentionality, or understanding of meaning.

The implications of Searle's argument for law are significant. When AI is used to assess risk, predict criminal behavior, or recommend verdicts, the system does not

[29] John R Searle, "Minds, Brains, and Programs" (1980) 3 The Behavioral And Brain Sciences 417–457.
[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid*.

"understand" the human context behind the data. AI does not know what suffering, injustice, or human dignity are. AI only processes patterns based on statistical correlations. Thus, the decisions produced are not the result of moral considerations, but rather the output of symbolic operations that are entirely subject to the structure of the algorithm.[33]

This ontological difference becomes crucial when AI is placed within legal structures. Justice, as understood in legal philosophy, is not merely a procedurally correct outcome, but a morally accountable decision. Fuller asserts that law has an inner morality, which requires that norms be understood, predicted, and internalized by humans as rational agents.[34] Good law not only works effectively, but also communicates meaningfully with legal subjects. AI, as a non-moral system, lacks the normative capacity to understand or convey such meaning. AI does not "understand" norms, but only executes commands.

This perspective is further explored by Luciano Floridi through the framework of ethics of information. Floridi asserts that humans live in the infosphere, a space of existence shaped by information structures.[35] However, technology should not become an autonomous source of value. In The Logic of Information, Floridi emphasizes that information systems must remain under the horizon of human moral responsibility.[36] When AI is given a substantive role in law, there is a risk that normative decisions will shift from the realm of human reflection to that of information systems that lack ethical orientation. In this situation, the law has the potential to change from an instrument of justice to a mechanism for data management.

Mireille Hildebrant shows that smart technologies are not only changing the way law is applied, but also shifting the fundamental meaning of law itself, including the concepts of responsibility, autonomy, and freedom.[37] When decisions are generated by opaque automated systems, the relationship between legal subjects and norms becomes blurred. Who is responsible for the decisions generated by machines? How can someone understand or challenge a decision that is the product of an opaque statistical model? In these circumstances, the law no longer

33 *Ibid*; Pasquale, *supra* note 8.
34 Fuller, *supra* note 20.
35 Note 11.
36 Floridi, *supra* note 11.
37 Mireille Hildebrandt, *Smart technologies and the end(s) of law: Novel entanglements of law and technology* (Cheltenham, UK Northampton, MA, USA: Edward Elgar Publishing, 2015).

functions as a space for normative dialogue, but rather as a technical mechanism that is difficult to access on a human level.

The illusion of algorithmic objectivity further deepens this problem. This is because AI works with numbers and data. AI is often perceived as more neutral than humans. However, as Pasquale criticizes, algorithms work as black boxes that hide value judgments behind technical claims.[38] Every AI system is built through human decisions: what data to use, what variables to consider important, what goals to optimize, and what risks to consider acceptable. This means that even though AI has no morality, it still carries the values implicitly instilled by its designers. The difference is that AI is unable to reflect on or correct these values.

Humans, as moral subjects, can recognize mistakes, feel injustice, and change decisions. AI does not have that capacity; AI only executes commands. This is where the philosophical danger lies: decisions that directly impact human lives can be generated by systems that do not understand the meaning of those decisions. Justice, which should arise from ethical considerations, risks being reduced to a technical output.

Based on the framework of Searle, Fuller, Floridi, Hildebrandt, and Pasquale, it can be asserted that AI is not a moral subject. AI is a computational system that works without normative understanding. When such systems are placed within the realm of law, an ontological shift occurs: justice is no longer entirely produced by subjects capable of weighing values, but rather by non-moral mechanisms that merely process data.

This situation has serious consequences for the concept of justice. If justice in legal philosophy presupposes the existence of moral subjects, then the use of AI in legal decision-making creates structural tension. Justice is confronted with a system that does not understand the meaning of justice itself. In this situation, justice risks being reduced to merely the "most statistically probable outcome," rather than an expression of moral values that respect human dignity.

3. The Point of Conflicy between Algorithmic Rationally and Humanistic Justice

The algorithmic rationality inherent in AI operates through predictive logic, optimization, and statistical correlation. These systems are designed to find patterns in past data and project them into the future. In the legal context, this

[38] Pasquale, *supra* note 8.

rationality manifests itself in various forms, such as predictive policing, recidivism risk assessment, crime hotspot mapping, and even sentencing recommendations.[39] Legal decisions are no longer based solely on a judge's contextual considerations, but rather on probabilistic calculations regarding the likelihood of a person's behavior. This is where we see a fundamental shift in the way the law defines justice, from moral virtue rooted in human considerations to technical measures based on the accuracy of predictions. Justice is no longer understood as the result of ethical considerations that take into account human dignity, but rather as the result of data optimization.

However, as Cathy O'Neil criticizes, algorithms do not operate in a vacuum of values.[40] In Weapons of Math Destruction, O'Neil shows that data-driven systems often exacerbate social inequality because they are built on historical data that is riddled with bias.[41] Predictive models used in law enforcement, for example, often reproduce discrimination against certain groups because the data used reflects unequal patterns of law enforcement.[42] When poor areas are monitored more frequently, more crime data will be collected from those areas, causing the system to continue prioritizing the same areas.[43] This cycle creates a feedback loop of injustice.

Virginia Eubanks shows a similar pattern in the context of social policy. Automating Inequality shows how automated systems actually deepen the vulnerability of poor groups through data-based classifications that are insensitive to the complexity of human life.[44] Automation does not eliminate bias, but crystallizes it in a technical form that is difficult to challenge. In a legal context, this situation is dangerous because decisions that directly impact human freedom and dignity are made by systems that do not understand the meaning of those consequences.

This point of contention becomes even more acute when linked to Frank Pasquale's criticism of the black box society. Pasquale asserts that modern algorithms work in an opaque and closed manner, so that the subjects affected do not know the basis for the decisions made about them.[45] In law, this condition directly contradicts the

[39] Završnik, "Algorithmic justice", *supra* note 4.
[40] O'Neil, *supra* note 6.
[41] *Ibid*.
[42] *Ibid*.
[43] *Ibid*.
[44] Eubanks, *supra* note 7.
[45] Pasquale, *supra* note 8.

principle of procedural justice. A fair decision must not only be correct, but also understandable and accountable. When a person does not know why they are categorized as high risk or why a decision is recommended by the system, their basic right to be treated as a rational legal subject is reduced.

From a legal philosophy perspective, justice always presupposes a dialogical relationship between norms and subjects. Aristotle viewed justice as practical wisdom born from an understanding of concrete situations.[46] Rawls places justice within the horizon of human rationality, which is capable of positioning oneself fairly towards others.[47] Fuller asserts that laws must be understandable to humans in order to have moral legitimacy.[48] This entire framework presupposes that justice operates within the realm of human understanding, not within the realm of machine calculations.

Algorithmic rationality, on the other hand, ignores this dialogical dimension. It does not operate through an understanding of meaning, but rather through statistical correlation. Humans are reduced to a set of variables: age, address, history, risk score. In this process, individuals lose their existential uniqueness and appear as data entities. Justice, which is personal and contextual in nature, becomes impersonal and generic.

Zavrsnik refers to this condition as algorithmic justice, a situation where legal decisions are shaped by machine logic that lacks moral capacity.[49] There has been a shift from judgment to prediction. In fact, in legal tradition, judging is not merely predicting, but normative assessment. Predictions answer the question "what might happen," while justice answers "what should be done." When the law adopts predictive rationality, normative questions risk being sidelined by probabilistic considerations.

Hildebrandt shows that smart technologies are changing the normative structure of law in subtle but radical ways.[50] The law no longer appears as a space for human reflection on norms, but rather as a risk management system. In this context, legal subjects are no longer treated as moral agents who can explain their actions, but

46 *Supra* note 9.
47 Rawls, *supra* note 10.
48 Fuller, *supra* note 20.
49 Završnik, "Algorithmic justice", *supra* note 4.
50 Hildebrandt, *supra* note 37.

rather as objects of prediction that must be managed. This shift threatens human autonomy as legal subjects.

The point of collision between algorithmic rationality and humanistic justice lies in a fundamental difference in how human beings are perceived. Traditional legal philosophy views the human being as a moral subject deserving of dignified treatment, whereas algorithmic rationality views the human being as a data object that can be classified and predicted. When these two rationalities meet within the legal realm, a conflict of values arises that cannot be resolved through technical adjustments alone.

This conflict shows that the issue of AI in law is not merely about accuracy or efficiency, but about the meaning of justice itself. Justice cannot be reduced to computational results, because it presupposes ethical relations between humans. As long as AI operates in a non-moral horizontal plane, any attempt to hand over legal decisions to AI will leave fundamental normative issues unresolved. This is why the need to reconstruct the concept of justice is becoming increasingly urgent. Justice must be rethought in order to reaffirm the position of humans as the center of value amid the dominance of algorithmic rationality.

4. Normative Implications and Conceptual Crisis of Justice in the Era of Artificial Intelligent

The clash between algorithmic rationality and humanistic justice does not stop at technical or methodological issues, but manifests itself as a conceptual crisis in legal philosophy. When legal decisions increasingly depend on systems that operate without moral awareness, justice risks being reduced to merely the technical output of a computational process. Under these conditions, law no longer appears as a space for human ethical reflection, but as a data-driven risk management mechanism.

This crisis is clearly evident in the shift in the meaning of responsibility. In classical law, responsibility is always placed on subjects who are capable of understanding and accounting for their actions. Judges are responsible for their decisions because they are considered moral agents capable of weighing reasons and consequences. However, when decisions are made by automated systems, the locus of responsibility becomes unclear. Who is responsible for incorrect algorithmic recommendations? The system designer, the user, or the machine itself? Hildebrandt asserts that smart technologies blur the relationship between norms,

subjects, and authority, thereby shifting the basic structure of law.[51] Law, which originally functioned as a space for normative dialogue, has the potential to become a technical system that is difficult to hold accountable in human terms.

In this kind of situation, legal legitimacy is also threatened. Jürgen Habermas places legal validity in communicative rationality, which is the ability of norms to be justified through discourse that can be understood and accepted by the subjects being regulated.[52] Justice in this perspective lies not only in the outcome, but also in the process that enables participation and understanding. When legal decisions are generated by opaque algorithmic systems, the space for discourse narrows. Legal subjects are no longer confronted with debatable arguments, but rather with high values or technical recommendations that are difficult to explain. Under these conditions, the law loses its dialogical character and tends to become a technocratic authority.

Floridi warns that in the infosphere, technology tends to reshape human value structures.[53] If information systems are given negative autonomy, then human values risk being subordinated to the logic of efficiency and optimization. In The Logic of Information, Floridi asserts that technology must remain within the horizon of human moral responsibility.[54] Without a clear ethical framework, AI can function as a de facto source of value, replacing human moral considerations with technical calculations.

This conceptual crisis is also evident in the reduction of humans to objects of prediction. Algorithmic rationality views individuals as a collection of variables that can be classified and managed. This approach directly contradicts the philosophical view of law that places humans as subjects with dignity. Aristotle viewed justice as a policy that respects proportionality in human relations.[55] Meanwhile, Rawls asserts that justice must protect the most vulnerable through the principle of fairness.[56] Both depart from the assumption that humans are not merely objects of regulation, but moral subjects who deserve to be treated as ends, not means.

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51 *Ibid*.

52 Jürgen Habermas, "Contributions to a Discourse Theory of Law and Democracy" in Steven Seidman & Jeffrey C Alexander, eds, *The New Social Theory Reader*, 2nd edn (Routledge, 2020) 34.

53 Note 11.

54 Floridi, *supra* note 11.

55 *Supra* note 9.

56 Rawls, *supra* note 10.

When the law adopts algorithmic rationality without normative correction, human risk being reduced to data entities. O'Neil shows that this kind of reduction results in systems that punish without understanding the context of human life.[57] Eubanks shows how policy automation actually reinforces stigma and vulnerability among certain groups.[58] In a legal context, this reduction means that individuals are no longer treated as unique persons, but as statistical representations of a risk category. Justice, which was originally personal and contextual, becomes impersonal and generic.

This situation marks what can be called a conceptual crisis of justice. Justice is no longer understood as an ethical relationship between humans, but as the result of system optimization. In this situation, the law risks losing its humanistic function and turning into a technology for population management. Pasquale warns that societies that entrust important decisions to algorithms are moving towards a black box society, where authority is hidden behind technical claims that cannot be publicly tested.[59] The law that should guarantee openness and accountability has the potential to become even more closed.

The normative implications of this condition are profound. If justice is left to a non-moral system, then the meaning of justice itself must be questioned. Justice can no longer be understood solely as procedural accuracy or predictive efficiency. Justice must be returned to its humanistic roots as an expression of moral values that respect human dignity. This is where the urgency of reconstructing the concept of justice becomes apparent.

This reconstruction does not mean rejecting technology, but rather placing it within a clear normative framework. AI must be understood as a tool, not as a source of value. Humans must remain at the center of consideration in every legal decision. Principles such as transparency, accountability, and comprehensibility of decision-making are not merely technical requirements, but expressions of respect for humans as moral subjects.[60]

Thus, the crisis caused by AI in law is not only a practical crisis, but also a philosophical crisis regarding who has the right to "adjudicate." As long as justice is understood as a product of moral subjects, any attempt to entrust legal decisions

57 O'Neil, *supra* note 6.
58 Eubanks, *supra* note 7.
59 Pasquale, *supra* note 8.
60 Fuller, *supra* note 20; Habermas, *supra* note 52.

to non-moral systems will always leave unresolved normative issues that cannot be solved by technology alone. Justice in the era of Society 5.0 can only be maintained if the law continues to be based on human values and rejects the reduction of humans to mere data in algorithmic calculations.

IV. RECONSTRUCTION THE CONCEPT OF HUMANISTIC JUSTICE WITHIN THE FRAMEWORK OF SOCIETY 5.0

1. Justice as Human Dignity and Capability

The reconstruction of the concept of justice within the framework of Society 5.0 must start from reaffirming that the ultimate goal of law is not system efficiency, but rather the protection and development of human dignity. In a society that is increasingly guided by technology, there is a tendency to interpret justice as a matter of performance: how fast a system works, how accurately it predicts, and how efficiently it manages risk. This paradigm is dangerous because it shifts the center of justice from humans to systems. Therefore, the reconstruction of humanistic justice requires a change in orientation from system-centered justice to human-centered justice.

Martha C. Nussbaum, through the capabilities approach, provides a highly relevant normative foundation for this purpose. In Frontiers of Justice, Nussbaum criticizes theories of justice that focus solely on social contracts and institutional efficiency. She asserts that justice must be measured by people's actual capabilities to lead dignified lives.[61] Justice is not merely a matter of resource distribution or compliance with procedures, but rather whether humans truly have the opportunity to develop their basic potential as human beings.

Nussbaum formulates a list of central human capabilities, such as a decent life, health, bodily integrity, freedom of thought, social affiliation, and control over one's environment as normative standards of justice.[62] Within this framework, laws and public policies are considered just not because they are efficient, but because they expand or at least do not reduce people's ability to live with dignity. Thus,

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[61] Peter Barham, "Book Review: Frontiers of Justice: Disability, Nationality, Species Membership" (2006) 19:4 History of the Human Sciences 103–106; Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, Belknap Press, 2006) The Tanner Lectures on Human Values.

[62] Nussbaum, *supra* note 61.

justice is always person-centered: oriented towards the concrete lives of people, especially those who are most vulnerable.

This approach is highly relevant in the context of Society 5.0, which is often described as a human-centered technology-based society. However, without a clear normative framework, the slogan "human centered" risks becoming empty rhetoric. Technology can increase efficiency, but at the same time narrow the space for human life through surveillance, classification, and automation. In this situation, the capabilities approach serves as an ethical buffer. Technology can only be called fair to the extent that it expands human capabilities, not merely improves system performance.

Amartya Sen reinforces this line of thinking through the idea of realization-focused justice. In The Idea of Justice, Sen criticizes approaches to justice that are stuck on designing ideal institutions without considering how justice is actually experienced by people in real life.[63] According to Sen, justice cannot be reduced to structural perfection, but must be viewed in terms of its impact on concrete human freedom and welfare. Justice is about reducing real injustice, not just building a system that appears perfect.[64]

In this framework, the main question is not "does the system work well?", but rather "do people live more fairly?". This approach is very important in addressing algorithmic fairness. AI-based systems may appear statistically fair, but if in practice they reinforce discrimination, reduce autonomy, or deny certain groups access to their rights, then such systems cannot be called fair.[65] San argues that focusing on procedural perfection can obscure the real suffering experienced by humans.[66]

Nussbaum and Sen's opinions, when combined, suggest that humanistic justice in Society 5.0 must be understood as a normative orientation that places humans as the goal, not the means. Technology, including AI, should not be the measure of justice, but rather must be measured by justice. The question is not whether AI works faster or more accurately than humans, but whether its use expands or limits human capabilities to live with dignity.

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63 Amartya Sen Sen, *The Idea of Justice* (United States of America: Harvard University Press, 2009).
64 *Ibid*.
65 *Ibid*.
66 *Ibid*.

This reconstruction shapes a change in perspective on the relationship between law, technology, and humans. Law should not merely be a medium for implementing technology; law has the duty to ensure that every technological innovation is subject to a higher normative goal, namely the protection of human dignity. This means that technology must be "judged" by justice.

In this context, Society 5.0 should not be understood as a society controlled by artificial intelligence, but rather as a society that uses technology to expand human living space. Humanistic justice rejects the reduction of humans to data objects or risk variables. Humanistic justice reaffirms that humans are subjects with intrinsic value. Every AI-based policy must be assessed based on its impact on real human lives, especially those who are most vulnerable.

Thus, the reconstruction of the concept of justice within the framework of Society 5.0 must depart from the principle that justice is a matter of human dignity and capability. Nussbaum and San provide clear normative direction: justice should not be reduced to technical efficiency or system perfection. Justice must be measured by the extent to which laws and technology enable humans to live as free, dignified beings who are recognized as ends in themselves, not merely objects of management. This principle is the foundation for the development of a humanistic concept of justice in the era of artificial intelligence.

2. Justice as a Right to Justification

Nussbaum and Sen place justice in human dignity and capabilities, while Rainer Forst provides a sharper normative dimension through the idea of the right to justification. For Forst, the deepest core of justice does not lie primarily in the distribution of resources or the perfection of institutions, but rather in the recognition of humans as normative authorities (subjects who have the right to demand reasons for every norm and decision that binds them).[67]

Forst asserts that before all concrete rights (rights to freedom, equality, or welfare) there is one most fundamental right, namely the right to justification. Fors explicitly states that "before all other rights claims, there is one fundamental right: the right to reasons."[68] This right is fundamental because it touches on the status of humans as moral subjects who should not be treated arbitrarily. According to Forst,

[67] Rainer Forst, "The Basic Right to Justification: Toward a Constructivist Conception of Human Rights" (1999).

[68] *Ibid*.

injustice is not only a matter of inequality of outcomes, but primarily a matter of excluding someone from the space of giving reasons.

A legal system becomes unjust when norms or decisions are applied without justification to those affected. Forst formulates two main principles of justification:[69] reciprocity and generality. A norm is only valid if the underlying reasons are acceptable to all parties concerned, and does not privilege one group at the expense of another.[70] Thus, justice demands that every legal subject has the right to ask "why" and demand a rational and acceptable answer.

This idea shifts the focus of justice from the end result to the normative relationship between authority and subject. Law is no longer understood solely as a formally legitimate system of commands, but as a space where every norm must be accountable to those who are governed. In this perspective, justice is dialogical: it arises from a relationship of reason between subjects who are formally equal.[71]

When the Forst framework is brought into the context of Society 5.0 and the use of AI, normative issues become very clear. AI-based systems, especially those that work opaquely, produce decisions that are not easily explained to the subjects affected. Risk values, automatic classifications, or algorithmic recommendations often appear as "technical results" that seem to stand outside the realm of argumentation. In this context, legal subjects are no longer treated as normative authorities, but rather as objects of decisions that they cannot understand.

According to Fors' perspective, this condition is a fundamental form of injustice. Injustice arises not only when the outcome of a decision is detrimental, but also when a person loses their right to obtain justification. Black box algorithms structurally contradict the principle of justice as the right to justification, because they sever the dialogical relationship between authority and subject.[72] The decision is presented as a technical fact, not as a debatable norm.

Forst emphasizes that humans should not be treated as mere "recipients" of rules. They are subjects who have the right to understand and assess the normative basis of every decision that binds their lives.[73] In this framework, justice is not only about "what" is decided, but also 'how' and "why" the decision is made. The right to

[69] *Ibid*.
[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.

justification ensures that humans remain at the center of the normative process, rather than being sidelined by unquestionable authority.

If humanistic justice in Society 5.0 is to be upheld, then every use of AI in law must adhere to this principle. Decisions generated or assisted by algorithmic systems must remain explainable, debatable, and justifiable to legal subjects as dignified human beings. Technical transparency alone is not enough; what is needed is normative intelligibility (the ability of a decision to be presented as a reason that is humanly understandable).[74]

Thus, Forst provides a very strong normative foundation for the reconstruction of justice in the digital age. Humanistic justice is not only about protecting human dignity and capabilities (as emphasized by Nussbaum and Sen), but also about ensuring that humans remain normative subjects who are entitled to reason. A truly human-centered Society 5.0 is a society where technology does not eliminate the human right to ask "why," but rather strengthens the space for justification.

Within this framework, AI should not become an authority that stands outside the realm of reason. AI must be positioned as a tool that works under the horizon of human justification. Every legal decision, no matter how sophisticated the technology used, must remain accountable to humans as moral subjects. This is the essence of the reconstruction of humanistic justice (returning law to the realm of reason, not merely the realm of calculation).

3. Humanistic Justice in the Framework of Society 5.0

The reconstruction of the concept of humanistic justice within the framework of Society 5.0 must ultimately move from criticism to the formulation of operational norms. If Nussbaum and Sen assert that justice must be oriented towards human dignity and capabilities, and Forst places justice as a right to justification, then the next challenge is to formulate how these principles can live in a social ecosystem that is increasingly dominated by technology, especially AI.

The concept of Society 5.0 normatively promises a human-centered society, namely a society that uses technology as a means to improve the quality of human life. However, without a clear ethical framework, this vision can easily shift to a technology-centered society, where humans adapt themselves to the logic of the system. This is where humanistic justice must function as a normative compass,

[74] *Ibid*.

meaning that technology should not determine values, but must be subject to human values.

Luciano Floridi asserts that humans now live in the infosphere, a space of existence shaped by information structures.[75] In this context, technology is no longer merely an external tool, but rather a normative environment in which humans live and interact. Therefore, Floridi developed the idea of digital humanism, which demands that technology remain under the horizon of human moral responsibility.[76] AI should not be a source of autonomous value, but should be positioned as an instrument that serves human ethical purposes.

This principle is in line with the global normative framework formulated by UNESCO and the OECD. UNESCO's Recommendation on the Ethics of Artificial Intelligence emphasizes that the development and use of AI must be based on human dignity, human rights, social justice, and non-discrimination.[77] Similarly, the OECD AI Principles place human-centered values, fairness, transparency, and accountability as the main foundations of AI governance.[78] Both documents indicate that the normative direction of the international community is moving towards strengthening the position of humans as the center of value in the technology ecosystem.

However, the reconstruction of humanistic justice cannot stop at a declaration of values. It must include normative principles that can guide legal practice in Society 5.0. Based on the synthesis of Nussbaum, Sen, Forst, and Floridi, there are at least three main pillars of humanistic justice in the AI era, namely:

First, the principle of human dignity and capability. Every use of AI in law must be assessed in terms of its impact on real human lives. Does the technology expand or limit people's ability to live with dignity? This principle rejects the notion of justice as mere system efficiency. A fast and accurate system is not automatically fair if it reduces autonomy, reinforces stigma, or narrows the living space of certain groups.[79]

Second, the principle of justification. Every legal decision produced or assisted by AI must remain justifiable to the affected subjects. Decisions should not be

[75] Note 11.
[76] Floridi, *supra* note 11.
[77] UNESCO, *Recommendation on the ethics of artificial intelligence*, 2021.
[78] OECD, *Recommendation of the Council on Artificial Intelligence* (2019).
[79] Nussbaum, *supra* note 61; Sen, *supra* note 63.

presented as "technical facts" that are immune to normative questions. Legal subjects must continue to be treated as normative authorities who have the right to understand and evaluate the basis of decisions that bind them.[80] In practice, this principle requires explainability that is not merely technical, but normative (the reasons for decisions must be humanly understandable).

Third, the principle of the subordination of technology to human values. AI must be positioned as a tool, not as a normative authority. Floridi emphasizes that technology must be subject to human moral responsibility. In a legal context, this means that the final decision remains with humans as moral subjects. AI may provide recommendations, but it cannot replace human ethical considerations.

These three principles form the framework of humanistic justice in Society 5.0. Justice is no longer understood as the result of system optimization, but as a normative process that keeps humans at the center. Technology is not prohibited, but guided. AI is not rejected, but subject to values.

With this framework, Society 5.0 can be understood not as a society "regulated" by artificial intelligence, but as a society that uses technology to expand the space for humanity. The law continues to function as the guardian of values, not merely as a data manager. Justice remains an ethical relationship between humans, not the output of a machine.

This reconstruction confirms that the future of law in the AI era does not lie in replacing humans with machines, but in the ability of humans to subject technology to human values. Humanistic justice in Society 5.0 is justice that: measures success based on real human lives; guarantees everyone's right to obtain reasons; and places technology as a tool, not an authority. Thus, a just Society 5.0 is not the most technologically advanced society, but rather the society that is most capable of maintaining human dignity amid the dominance of technology.

V. CONCLUSION

Artificial Intelligence challenges the concept of justice in traditional legal philosophy, because AI shifts justice from the realm of human moral judgment to the realm of non-moral technical calculations. In the philosophical tradition, justice always presupposes humans as dignified subjects capable of understanding

[80] Forst, *supra* note 67.

meaning, weighing values, and taking responsibility for decisions. In contrast, AI works through predictive logic and statistical correlation without ethical awareness, empathy, or the ability to provide normative reasoning. When legal decisions increasingly depend on opaque algorithmic systems, justice risks being reduced to mere procedural accuracy, while humans are reduced to data objects. This situation creates a conceptual crisis: the law no longer functions as a space for ethical relations between humans, but rather as a technocratic mechanism for managing risk.

The reconstruction of the concept of justice relevant to the Society 5.0 framework must reaffirm justice as humanistic justice. Justice should not be measured by technological sophistication, but by the extent to which law and technology preserve human dignity and expand human capabilities, while guaranteeing the right of every legal subject to obtain reasons for decisions that bind them. Within this framework, AI must be positioned as a tool, not as a normative authority. Any use of AI in law must be subject to the principles of human dignity, the right to justification, and the subordination of technology to human values. Thus, a just Society 5.0 is not the most algorithmically efficient society, but rather a society that ensures that humans remain the center of values and the holders of moral authority in law.

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Reconstruction of Legal Philosophy within the Normative Framework of Sustainable Financing for MSMEs in the Society 5.0 Era

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ABSTRACT: The emergence of the Society 5.0 era marks a transformation in the relationship between law, technology, and humanity, demanding a philosophical reconstruction of the concept of justice. Contemporary legal studies have predominantly focused on regulatory aspects of the digital economy and financial innovation, yet have not comprehensively examined the normative significance of legal philosophy as an evaluative foundation for sustainable financing norms for Micro, Small, and Medium Enterprises (MSMEs). This situation reveals a conceptual gap in understanding substantive justice within the digital era. This study aims to provide normative and prescriptive arguments for integrating the principles of distributive justice and legal ethics into inclusive and sustainable financing policies. Employing a juridical-normative approach grounded in legal philosophy, the study evaluates the normative function of law in constructing a legal framework for MSME financing that aligns with social justice values, environmental sustainability, and technological advancement in financial systems. The findings affirm that legal philosophy serves as both an argumentative foundation and a prescriptive orientation for the formulation of sustainable economic law norms. The novelty of this study lies in strengthening an adaptive paradigm of legal justice within the Society 5.0 context, emphasizing the philosophical significance of law in redefining the sustainable financing system for MSMEs.

Keywords: Justice; Legal philosophy; MSMEs; Sustainable finance; Society 5.0

I. INTRODUCTION

Sustainable financing for micro, small, and medium enterprises (MSMEs) is often praised as a shortcut to financial inclusion in the era of Society 5.0, when eligibility assessments, contracts, and customer services are increasingly data-driven.[1] However, expanding access through digital channels, banking, fintech, and platform-based financing, brings new layers of risk: product information that is not easily understood, disproportionate processing of personal data, and weak recovery mechanisms in the event of disputes.[2] Therefore, the main issue is not simply the "existence or absence" of financing, but whether its normative design ensures fairness (reasonable access), certainty (clear information), and usefulness (products that genuinely help MSMEs grow). Without this foundation, digital financing has the potential to repeat the cycle of vulnerability: unmanaged debt, data misuse, and disruption to business continuity.

This problem is relevant within the current economic context, as MSMEs assume a strategic role in economic development while simultaneously facing structural vulnerabilities in administrative capacity and legal-financial literacy, which limit their ability to navigate the complexity of digital contractual frameworks.[3] At the same time, the acceleration of digitalization has made MSMEs interact more frequently with the data ecosystem: accounts, digital wallets, marketplaces, accounting platforms, and even application-based financing services. In the Society 5.0 configuration, data is not only a means of efficiency, but also an instrument of power; when data is used to filter access, determine prices, or collect payments, the question shifts from technical to normative: who benefits, who loses, and how does the law guarantee a fair process? In other words, the challenge of

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1 Mamun, A. Y., & Várallyai, L. (2025). *Advancing sustainability through financial inclusion and sustainable finance: A systematic literature review*. *Digital Finance*, 7(4), 853–870. https://doi.org/10.1007/s42521-025-00142-7

2 Mandić, A., Marković, B., & Žigo, I. R. (2025). *Risks of the use of FinTech in the financial inclusion of the population: A systematic review of the literature*. *Journal of Risk and Financial Management*, 18(5), 250. https://doi.org/10.3390/jrfm18050250

3 R. Caraka, R. Kurniawan, B. I. Nasution, Jamilatuzzahro Jamilatuzzahro, Prana Ugiana Gio, Mohammad Basyuni and Bens Pardamean. "Micro, Small, and Medium Enterprises' Business Vulnerability Cluster in Indonesia: An Analysis Using Optimized Fuzzy Geodemographic Clustering." *Sustainability* (2021). https://doi.org/10.3390/su13147807.

SME financing is a daily constitutional challenge regarding the protection of dignity in highly asymmetrical transactions.[4]

On the supply side, financial service institutions and platform operators face pressure to channel financing while demonstrating a commitment to sustainability.[5] Sustainable finance regulations encourage the integration of economic, social, and environmental dimensions, but their implementation is often stuck in reporting and narrative.[6] On the other hand, the consumer protection agenda demands transparency, fair treatment, and complaint handling, but is often seen as a separate compliance checklist rather than an integral part of product design. As a result, a space for "normative greenwashing" has emerged: products are marketed as supporting MSMEs and sustainability, but the due diligence process is inadequate—for example, non-standard pre-contract summaries, unexplained payment capacity assessments, or ineffective recovery channels. It is this gap that calls for a reconstruction based on legal philosophy.

This article starts with two questions. First, how can legal philosophy reconstruct a normative framework for sustainable financing for MSMEs in the Society 5.0 era that goes beyond administrative compliance? Second, how can a proportional, sustainable due diligence model be designed to address the information and recovery deficits in digital financing practices? The objective of this research is to formulate an auditable operational model, so that distributive and procedural justice are not just slogans, but work at the process level: from product design, marketing, data processing, to dispute resolution.

To emphasize the urgency of policy, the policy indicator summary below summarizes verifiable public indicators from government agencies and regulators. These indicators show the scale of MSMEs and digitization, as well as systemic risks reflected in the large number of public complaints in the financial services sector and crackdowns on illegal entities.[7] This data is not intended to generalize

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4 Saleh Afroogh, Ali Akbari, Emmie Malone, Mohammadali Kargar and Hananeh Alambeigi. "Trust in AI: progress, challenges, and future directions." *Humanities and Social Sciences Communications,* 11 (2024). https://doi.org/10.1057/s41599-024-04044-8.

5 C. Vergara and L. Agudo, "Fintech and Sustainability: Do They Affect Each Other?," *Sustainability*, 2021, https://doi.org/10.3390/su13137012

6 Hanna Ahlström and David Monciardini, "The Regulatory Dynamics of Sustainable Finance: Paradoxical Success and Limitations of EU Reforms," *Journal of Business Ethics* 177, no. 1 (2021): 193–212, https://doi.org/10.1007/s10551-021-04763-x

7 Binhao Chen, Weifeng Jin and Huajing Lu. "Using a genetic backpropagation neural network model for credit risk assessment in the micro, small and medium-sized enterprises." *Heliyon,* 10 (2024). https://doi.org/10.1016/j.heliyon.2024.e33516.

all financial service providers, but rather to show why the design of norms needs to bind the financing process to easily understandable information standards and traceable recovery mechanisms.

In terms of MSME actors' perspectives on accounting information and financial reporting standards like SAK EMKM, research shows that entrepreneurs perceive accurate presentation of financial statements as an important factor for business management and access to finance.[8] In a market of this scale, transparency is not merely an administrative add-on; it is a practical safeguard that enables MSMEs to make informed choices when dealing with digital products, electronic contracts, and data-consent processes that can be difficult to understand across varying literacy levels.

At the same time, MSMEs contribute only about 0.84% to tax revenue, indicating a persistent gap in formalization and compliance capacity.[9] This context matters for digital financing: expanded access can support growth, but without strong due diligence, it may also conceal fees and create pathways to over-indebtedness. The situation becomes more pressing as roughly 27 million MSMEs have adopted digital technology, increasing their reliance on platform-based services and standardized digital terms.[10] Accordingly, disclosure requirements and data-consent design must be tailored to diverse capabilities, ensuring that key risks and obligations are communicated in plain, usable language.

Financing trends add another layer of urgency. MSME credit growth of about 0.23% (yoy) in October 2025 may signal slowing momentum, which often increases demand for alternative financing channels.[11] In such conditions, governance and recovery mechanisms become decisive so that "inclusion" does not turn into a new form of exclusion through aggressive collection practices or opaque contractual terms. The scale of reported harms—16,343 complaints about illegal online lending alongside the shutdown of 1,556 entities—underscores weak screening and limited

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8 D. Arda, "Perceptions of Micro, Small and Medium Entrepreneurs on the Importance of Fair Presentation of Financial Statements with the Implementation of SAK EMKM as a Moderation Variable," *Journal of Economics and Business* 4, no. 1 (2021): 308–327, https://doi.org/10.31014/aior.1992.04.01.339

9 Ratih Kumala, "Mendorong Kepatuhan Pajak UMKM di Era Digital," *Ikatan Konsultan Pajak Indonesia*, diakses 30 januari 2026, https://ikpi.or.id/en/mendorong-kepatuhan-pajak-umkm-di-era-digital/

10 Suhayati, M. (2023). *Digitalisasi Usaha Mikro, Kecil dan Menengah*. Info Singkat Kajian Singkat terhadap Isu Aktual dan Strategis, 15(2), 16–20.

11 Bank Indonesia. (2025). *Statistik ekonomi dan keuangan Indonesia (SEKI): Kredit UMKM*. Bank Indonesia. https://www.bi.go.id

access to legal information.[12] This calls for digital financing systems that require traceable verification, continuous monitoring, and meaningful remedy obligations for consumers.

The summary in the policy indicator summary below shows two messages. First, the scale of MSMEs and the acceleration of digitalization make electronic contracts[13], data processing, and digital communication prerequisites for access to financing; consequently[14], information standards must be concise, comparable, and appropriate for varying levels of literacy. Second, the high number of complaints related to illegal entities in the digital space indicates a deficit of legal information and weak screening; in this situation, reactive enforcement needs to be complemented by procedural obligations that prevent losses from the outset. Therefore, this article positions proportional continuous due diligence as a bridge between the mandates of sustainability and consumer protection.

The novelty of this article lies in the positioning of sustainability not as a label, but as a logical consequence of procedural justice. In other words, the sustainability of MSME financing can only be achieved if the process is fair: understandable information, proportional data consent, explainable payment capacity assessments, and effective dispute resolution. This article presents the Proportionate Sustainable Due Diligence (PSDD) model as a minimum standard for financial service providers, platforms, and regulators to implement while remaining responsive to MSMEs' capacity constraints.

II. METHODOLOGY

This study uses a normative-doctrinal legal approach with a focus on analyzing legislation, regulatory authority regulations, and policy documents governing: (i)

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[12] Otoritas Jasa Keuangan. (2025). *Siaran pers penanganan pinjaman online ilegal dan perlindungan konsumen*. OJK. https://www.ojk.go.id

[13] E. Aminullah, T. Fizzanty, Nawawi Nawawi, Joko Suryanto, Nika Pranata, Ikbal Maulana, Luthfina Ariyani, Adityo Wicaksono, Ikval Suardi, Nyimas Latifah Letty Azis and Aisah Putri Budiatri. "Interactive Components of Digital MSMEs Ecosystem for Inclusive Digital Economy in Indonesia." *Journal of the Knowledge Economy* (2022): 1 - 31. https://doi.org/10.1007/s13132-022-01086-8.

[14] Nina Ashley O. Dela Cruz, Alyssa Cyrielle B. Villanueva, L. Tolin, Sabrina Disse, R. Lensink and Howard White. "Effects of Interventions to Improve Access to Financial Services for Micro, Small, and Medium-Sized Enterprises in Low- and Middle-Income Countries: An Evidence and Gap Map." *Campbell Systematic Reviews*, 21 (2025). https://doi.org/10.1002/cl2.70061.

consumer protection in the financial services sector; (ii) personal data protection; and (iii) the implementation of sustainable finance. The doctrinal approach was chosen because the article's main objective is to assess the coherence of norms and duty design in addressing information deficits and providing effective remedies, rather than measuring market behavior through primary data. Legal sources include legislation, OJK regulations, authority press releases, and relevant international policy documents for comparison. The policy data used is sourced from official publications of state institutions/authorities and is used with caution to avoid untraceable claims. The analytical framework places norms as an "architecture of obligations" whose compliance can be tested through process design, not just through results. This approach allows for an assessment of the coherence between legal regimes while identifying points of friction that give rise to gray areas of responsibility. To maintain academic integrity, this article does not create new figures, does not alter the meaning of data, and limits empirical references to verifiable sources. Although it does not involve fieldwork, doctrinal analysis remains relevant because many problems arise from the formulation of obligations, definitions, and available enforcement mechanisms.

The analysis technique was carried out in three steps. First, norm mapping to identify key obligations spread across consumer, data, and sustainability regimes. Second, gap analysis to assess weaknesses in regulatory design that cause information deficits and ineffective recovery, especially in the pre-contract, ongoing, and post-contract/billing phases. Third, normative reconstruction to formulate a proportional and sustainable due diligence model along with testable compliance indicators. The limitation of this study is that it does not collect primary data; therefore, the recommendations are directed as a conceptual-operational model that can be tested in further research. The policy data used is sourced from official publications of state institutions/authorities and is used carefully to avoid untraceable claims. The analytical framework places norms as a "duty architecture" whose compliance can be tested through process design, not just through results. This approach allows for an assessment of the coherence between legal regimes while identifying points of friction that give rise to gray areas of responsibility. To maintain academic integrity, this article does not create new figures, does not alter the meaning of data, and limits empirical references to verifiable sources. Although no fieldwork was conducted, doctrinal analysis remains relevant because many problems arise from the formulation of obligations, definitions, and available enforcement mechanisms.

III. THEORETICAL AND CONCEPTUAL FRAMEWORK

The theoretical framework of this article combines three concepts: information justice, proportionality, and sustainability as risk governance (ESG as risk governance). Information justice views information not merely as a formal element of a contract, but as a prerequisite for a fair relationship between business actors and consumers/MSMEs.[15] In financial services, unequal information can result in non-autonomous economic decisions because vulnerable parties are unable to assess costs, risks, and legal consequences.[16] Information fairness, therefore, requires clear disclosure, honest marketing, and a prohibition on misleading practices. Furthermore, information fairness requires explanations for automated decisions that impact economic rights, so that digital processes do not eliminate accountability.[17] Normatively, information justice requires that material information be presented in language that is understandable to the average user, including MSMEs with varying levels of digital literacy. Proportionality also implies risk segmentation: the greater the risk of loss or user vulnerability, the stricter the verification, disclosure, and control obligations. Sustainability, defined as risk management, rejects the separation between 'business risk' and 'social risk', as both influence the stability of financing.[18] Effective remedies act as a 'feedback loop' for product improvement, so that complaints do not end up as statistics but become the basis for system corrections.

The concept of proportionality is used to avoid two extremes: regulations that are too lax and therefore fail to protect vulnerable parties, or regulations that are too heavy and therefore hinder innovation and access to financing.[19] In due diligence, proportionality means that the intensity of verification, information disclosure, risk monitoring, and collection controls must be adjusted to the product's risk profile,

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15 A. Nanda and Ranjan Banerjee. "Consumer's subjective financial well-being: A systematic review and research agenda." *International Journal of Consumer Studies* (2021). https://doi.org/10.1111/ijcs.12668.

16 Mingming Zhang, M. Nazir, Rabia Farooqi and M. Ishfaq. "Moderating Role of Information Asymmetry Between Cognitive Biases and Investment Decisions: A Mediating Effect of Risk Perception." *Frontiers in Psychology*, 13 (2022). https://doi.org/10.3389/fpsyg.2022.828956.

17 Jonas Schuett. "Risk management in the Artificial Intelligence Act." ArXiv, abs/2212.03109 (2022). https://doi.org/10.1017/err.2023.1.

18 F. Ielasi, Paolo Capelli and Angeloantonio Russo. "Forecasting volatility by integrating financial risk with environmental, social, and governance risk." *Corporate Social Responsibility and Environmental Management* (2021). https://doi.org/10.1002/csr.2180.

19 D. Pashentsev. "Constitutional Proportionality in the Post-Non-Classical Scientific Paradigm and Modern Practice." *Herald of the Russian Academy of Sciences,* 91 (2021): 386 - 392. https://doi.org/10.1134/s1019331621030175

the debtor's characteristics, and the potential social impact.[20] For example, short-term consumer loans with high interest rates and vulnerable borrowers require stricter disclosure standards, affordability assessments, and collection controls than productive financing products with longer tenors. This principle is also relevant to data governance: only necessary data should be processed, and security controls must be commensurate with the data's sensitivity.[21] Normatively, information fairness requires that material information be presented in language that is understandable to the average user, including MSMEs with varying levels of digital literacy.[22] Proportionality also implies risk segmentation: the greater the risk of loss or user vulnerability, the stricter the verification, disclosure, and control obligations.[23] Sustainability, defined as risk management, rejects the separation between 'business risk' and 'social risk', as both influence the stability of financing.[24] Consumer complaints function not merely as dispute resolution inputs but also as regulatory feedback mechanisms, as complaint data can reveal gaps in consumer protection frameworks, support corrective supervisory actions, and inform future regulatory design.[25]

The concept of sustainability in this article is not limited to environmental issues, but includes social and governance dimensions (E, S, and G).[26] In digital financing, the "S" (social) dimension includes the prevention of over-indebtedness, fair

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[20] Sebastian G. Fritz-Morgenthal, Bernhard Hein and Jochen Papenbrock. "Financial Risk Management and Explainable, Trustworthy, Responsible AI." *Frontiers in Artificial Intelligence*, 5 (2021). https://doi.org/10.3389/frai.2022.779799.

[21] Luehr, P., & Reilly, B. (2025). Data minimisation: A crucial pillar of cyber security. *Cyber Security: A Peer-Reviewed Journal*. https://doi.org/10.69554/ubki3139.

[22] Budiman, A., Tjandrakirana, R., Daud, R., Ermadiani, E., Delamat, H., Burhanuddin, B., & Ubaidillah, U. (2017). Factors Affecting Understandibility of Micro, Small, and Medium Enterprises in Preparation of Financial Statement Based on SAK ETAP in Palembang. , 1, 311-326. https://doi.org/10.29259/sijdeb.v1i3.37.

[23] Mökander, J., Axente, M., Casolari, F., & Floridi, L. (2021). Conformity Assessments and Post-market Monitoring: A Guide to the Role of Auditing in the Proposed European AI Regulation. *Minds and Machines*, 32, 241 - 268. https://doi.org/10.1007/s11023-021-09577-4.

[24] Settembre-Blundo, D., González-Sánchez, R., Medina-Salgado, S., & García-Muiña, F. (2021). Flexibility and Resilience in Corporate Decision Making: A New Sustainability-Based Risk Management System in Uncertain Times. *Global Journal of Flexible Systems Management*, 22, 107 - 132. https://doi.org/10.1007/s40171-021-00277-7.

[25] OECD, *Consumer Finance Risk Monitor*, OECD Publishing, Paris, 2024, https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/01/consumer-finance-risk-monitor_427721db/047b2ea6-en

[26] Sánchez-Hernández, M., Vázquez-Burguete, J., García-Miguélez, M., & Lanero-Carrizo, A. (2021). Internal Corporate Social Responsibility for Sustainability. *Sustainability*. https://doi.org/10.3390/su13147920.

treatment of debtors, and respect for human dignity in the collection process.[27] The "G" (governance) dimension requires risk management, vendor oversight, and accountability for algorithm-based decisions.[28] From this perspective, the claim of "sustainable financing" cannot be separated from the quality of consumer protection and personal data protection.[29] If a platform channels financing to MSMEs but relies on collection practices that violate dignity or process data excessively, then sustainability becomes nothing more than a label—that is the form of digital greenwashing that must be prevented.[30] Normatively, information fairness requires that material information be presented in language that is understandable to the average user, including MSMEs with varying levels of digital literacy.[31] Proportionality also implies risk segmentation: the higher the risk of loss or vulnerability to users, the stricter the verification, disclosure, and control obligations.[32]Sustainability, defined as risk management, rejects the separation between 'business risk' and 'social risk', as both influence the stability of financing.[33] Effective remedies work as a feedback loop for product improvement, so that complaints do not end as statistics, but become the basis for system correction.

The next key concept is due diligence, which is understood as a process-based duty, not merely an obligation to achieve results. Due diligence requires business actors to identify, prevent, mitigate, and account for risks arising from their operations.[34]

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27 Zoller, C. (2023). Corporate Restructuring Laws Under Stress: Policy-Making in Uncertain Times. *European Business Organization Law Review,* 24, 387 - 407. https://doi.org/10.1007/s40804-023-00274-6.

28 Schuett, J. (2022). Risk management in the Artificial Intelligence Act. *ArXiv,* abs/2212.03109. https://doi.org/10.1017/err.2023.1.

29 *Op. Cit.,* Vergara, C., & Agudo, L. (2021).

30 Li, Z., Miao, S., & Xu, L. (2024). Digital transformation and environmental, social, and governance greenwashing: Evidence from China. *Journal of environmental management,* 365, 121460 . https://doi.org/10.1016/j.jenvman.2024.121460.

31 Jørgensen, S., Mjøs, A., & Pedersen, L. (2021). Sustainability reporting and approaches to materiality: tensions and potential resolutions. *Sustainability Accounting, Management and Policy Journal*. https://doi.org/10.1108/sampj-01-2021-0009.

32 Rodríguez, N., Ser, J., Coeckelbergh, M., De Prado, M., Herrera-Viedma, E., & Herrera, F. (2023). Connecting the Dots in Trustworthy Artificial Intelligence: From AI Principles, Ethics, and Key Requirements to Responsible AI Systems and Regulation. *Inf. Fusion,* 99, 101896. https://doi.org/10.48550/arxiv.2305.02231.

33 Settembre-Blundo, D., González-Sánchez, R., Medina-Salgado, S., & García-Muiña, F. (2021). Flexibility and Resilience in Corporate Decision Making: A New Sustainability-Based Risk Management System in Uncertain Times. *Global Journal of Flexible Systems Management,* 22, 107 - 132. https://doi.org/10.1007/s40171-021-00277-7.

34 Ruggie, J., Rees, C., & Davis, R. (2021). Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations. *Business and Human Rights Journal,* 6, 179 - 197. https://doi.org/10.1017/bhj.2021.8.

In the context of digital financing, due diligence does not end at the user onboarding stage; it continues throughout the product life cycle: product design, marketing, data approval, disbursement, restructuring, and collection. Thus, due diligence serves as a bridge between prevention and recovery: when risks occur, the due diligence system must produce evidence, audit trails, and lines of responsibility that facilitate recovery.[35] Without reasonable due diligence, law enforcement tends to rely on scattered evidence and public scrutiny. In terms of normative, information justice requires that material information be presented in language that is understandable to the average user, including MSMEs with varying levels of digital literacy. Proportionality also implies risk segmentation: the higher the risk of loss or vulnerability to users, the stricter the verification, disclosure, and control obligations. Sustainability, defined as risk management, rejects the separation between 'business risk' and 'social risk', as both influence the stability of financing.[36] Effective remedies work as a 'feedback loop' for product improvement, so that complaints do not end as statistics, but become the basis for system correction.

Remedies are positioned as an inherent part of due diligence. Many compliance regimes only emphasize prohibitions and sanctions when victims need concrete improvements: data correction (rectification), cessation of certain collection practices, reimbursement of losses (compensation), and restoration of reputation. Effective remedies require easy access, handling deadlines, and precise escalation mechanisms. In the digital ecosystem, remedies also require traceable evidence: communication records, changes to terms and conditions, and automated decisions must be documented. Otherwise, victims are forced to prove their losses without the support of data that the system controller should hold. This framework leads the article to formulate due diligence that explicitly binds the obligation of remedy at every stage of operations. Normatively, information justice requires that material information be presented in language that is understandable to the average user, including MSMEs with varying levels of digital literacy. Proportionality also implies risk segmentation: the higher the risk of loss or user vulnerability, the stricter the verification, disclosure, and control obligations. Sustainability, defined as risk management, rejects the separation between 'business risk' and 'social risk', as both influence the stability of financing. Effective remedies act as a feedback loop

[35] Bright, C., & Buhmann, K. (2021). Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition. *Sustainability*. https://doi.org/10.3390/su131810454.

[36] Cohen, G. (2022). ESG risks and corporate survival. *Environment Systems & Decisions,* 43, 16 - 21. https://doi.org/10.1007/s10669-022-09886-8.

for product improvement, so that complaints do not remain mere statistics, but become the basis for systemic correction.

Based on these concepts, this article formulates a "Proportionate Sustainable Due Diligence" (PSDD) model with three pillars: (i) the pre-contract pillar, transparency, product governance, identification of actors, and valid data approval; (ii) the ongoing pillar, sustainable risk monitoring, data processing control, and ethical billing; and (iii) the post-contract pillar, accessible, fast, and traceable recovery mechanisms. PSDD also requires a chain of accountability across actors (platforms, funders, and vendors) to prevent "passing the buck." The following section applies this framework to diagnose information-justice deficits and to design a more consistent reconstruction of obligations. Normatively, information justice requires that material information be presented in language that is understandable to the average user, including MSMEs with varying levels of digital literacy.[37] Proportionality also implies risk segmentation: the higher the risk of loss or vulnerability to users, the stricter the verification, disclosure, and control obligations.[38] Sustainability, defined as risk management, rejects the separation between 'business risk' and 'social risk', as both influence the stability of financing.[39] Effective remedies work as a feedback loop for product improvement, so that complaints do not remain mere statistics but become the basis for systemic correction.[40]

IV. INFORMATION JUSTICE AND RECOVERY DEFICITS

The information justice deficit in digital financing can be mapped into three layers.[41] The first layer is the identity and legal deficit: consumers/MSMEs find it

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37 Mathiesen, K. (2015). Informational Justice: A Conceptual Framework for Social Justice in Library and Information Services. *Library Trends,* 64, 198 - 225. https://doi.org/10.1353/lib.2015.0044.

38 Oluoha, O., Odeshina, A., Reis, O., Okpeke, F., Attipoe, V., & Orieno, O. (2022). A Unified Framework for Risk-Based Access Control and Identity Management in Compliance-Critical Environments. *Journal of Frontiers in Multidisciplinary Research*. https://doi.org/10.54660/.ijfmr.2022.3.1.23-34.

39 Schulte, J., & Hallstedt, S. (2018). Company Risk Management in Light of the Sustainability Transition. Sustainability. https://doi.org/10.3390/su10114137.

40 Minelli, A., & Ruffini, R. (2018). Citizen feedback as a tool for continuous improvement in local bodies. *International Journal of Public Sector Management,* 31, 46-64. https://doi.org/10.1108/ijpsm-01-2017-0010.

41 Tay, L., Tai, H., & Tan, G. (2022). Digital financial inclusion: A gateway to sustainable development. *Heliyon,* 8. https://doi.org/10.1016/j.heliyon.2022.e09766.

difficult to verify the license status, affiliations, and locations of business actors when promotions are carried out through rapidly changing digital channels. The second layer is the cost and risk deficit: information about effective interest rates, penalties, service fees, and the consequences of late payments is often presented in a format that is not easy to understand, so decisions are made without a complete picture of the total cost of credit. The third layer is the data and algorithm deficit: users do not know what types of data are collected, the purpose of processing, who receives the data, or the basis for automated decisions, such as rejections or limit changes. These three layers of deficits create a situation of "multi-level uncertainty" that weakens contractual autonomy and opens the door to mis-selling.[42] This requires auditable documentation across the product lifecycle.

This information deficit is intertwined with a recovery deficit. In many cases, effective access to recovery only emerges when a case gains public attention; however, the legal system requires procedures that are accessible without high costs or the social capital of virality. The recovery gap is evident in unclear complaint procedures, easily lost digital evidence, and uncertainty about who is responsible when violations are committed by billing vendors or third-party data processors. In addition, recovery is often understood solely as the termination of application access, rather than as the recovery of losses and data rights. As a result, victims face an unbalanced burden of proof. Without due diligence obligations that produce an audit trail, recovery becomes slow, uncertain, and dependent on ad hoc intervention.

V. RECONSTRUCTION: PROPORTIONAL CONTINUOUS DUE DILIGENCE

PSDD reconstruction begins with the affirmation that sustainability and consumer protection must be treated as a single risk management logic.[43] Sustainability in the financial services sector requires integrating environmental and social risks into governance, while consumer protection requires transparency, fair treatment, and

[42] Zokaityte, A. (2025). UK Car Finance Mis-selling: Reassessing Legal and Regulatory Challenges within Consumer Credit Markets. *European Journal of Risk Regulation.* https://doi.org/10.1017/err.2025.10052.

[43] Settembre-Blundo, D., González-Sánchez, R., Medina-Salgado, S., & García-Muiña, F. (2021). Flexibility and Resilience in Corporate Decision Making: A New Sustainability-Based Risk Management System in Uncertain Times. *Global Journal of Flexible Systems Management,* 22, 107-132. https://doi.org/10.1007/s40171-021-00277-7.

recovery mechanisms. PSDD connects the two by making social impacts, such as over-indebtedness, degrading collection practices, and data misuse, part of the sustainability due diligence.[44] Thus, claims of "sustainable MSME financing" are invalid if the business process results in predictable and preventable social harm. The focus of reconstruction is on auditable process obligations: who does what, when, based on what data, and how corrections are made in the event of harm.[45] This principle requires adequate documentation so regulators can assess compliance without waiting for cases that go viral or cause massive casualties. At the product design stage, product governance obligations prevent mis-selling by ensuring that product features, costs, and limitations align with the needs and capabilities of the user segment. At the data processing stage, minimization and purpose limitation reduce the risk of misuse and minimize the attack surface in the digital ecosystem. At the billing stage, ethical standards and prohibitions on degrading practices must be accompanied by vendor audit mechanisms and real contractual consequences.

In the pre-contract pillar, PSDD requires four core obligations. First, strong verification of legality and identity, including clarity of the relationship between the platform operator, funder, and marketing party. Second, a comprehensive yet straightforward disclosure of total costs, accompanied by simulations of delay scenarios, so users understand the real consequences. Third, an affordability assessment that takes into account the volatility of MSME income; this assessment must be documented and reviewable, especially for high-risk products. Fourth, lawful consent based on data minimization and purpose limitation; consent must not be misleadingly bundled and must provide equivalent choices. These four obligations form a "gateway" of prevention that reduces the space for mis-selling and closes loopholes from the outset.

In the ongoing pillar, PSDD frames sustainability as a continuous risk-management process that extends beyond contract formation, recognizing that material consumer and systemic risks frequently emerge during default, restructuring, and collection phases. Empirical studies in credit risk management demonstrate that post-contract monitoring, particularly of delinquency patterns, complaint trends,

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[44] Nobanee, H., Hamadi, F., Abdulaziz, F., Abukarsh, L., Alqahtani, A., AlSubaey, S., Alqahtani, S., & Almansoori, H. (2021). A Bibliometric Analysis of Sustainability and Risk Management. *Sustainability*. https://doi.org/10.3390/su13063277.

[45] Mökander, J., Morley, J., Taddeo, M., & Floridi, L. (2021). Ethics-Based Auditing of Automated Decision-Making Systems: Nature, Scope, and Limitations. *Science and Engineering Ethics,* 27. https://doi.org/10.1007/s11948-021-00319-4.

and collection practices, provides critical early warning signals and supports corrective interventions before risks escalate into broader market failures.[46] Accordingly, PSDD adopts a preventive governance approach by integrating product governance, data governance, and algorithmic oversight throughout the lifecycle of digital financial products, requiring adequate documentation to enable ex ante regulatory assessment rather than relying solely on ex post enforcement. Within this framework, obligations relating to product design, data processing, and billing and collection function collectively to mitigate mis-selling, discriminatory decision-making, and unethical collection practices, thereby embedding sustainability as an operational standard rather than a static compliance requirement.[47]

The remedy pillar in PSDD is built on the standards of "accessibility, speed, and traceability." Accessibility means that complaint channels are easy for MSMEs to use, provide secure communication options, and do not require evidence that is impossible to fulfill. Speed means there are deadlines for handling, status notifications, and escalation channels to dispute resolution mechanisms and regulators. Traceability means that all stages, contracts, changes in terms, collection communications, and automated decisions, have an audit trail that can be downloaded or traced. Remedies must also include data correction, cessation of specific processing, and compensation for material and immaterial losses. With these standards, recovery does not depend on virality, as the system provides inherent procedures and evidence.

PSDD requires a transparent chain of accountability to prevent "passing the buck" between actors. In the digital MSME funding ecosystem, there are at least three nodes: platform operators, funders, and third-party partners (marketing, scoring, collection, and infrastructure providers). PSDD requires due diligence on partners: collection vendors must comply with codes of ethics and dignity protection standards; data processors must comply with security, purpose limitation, and data deletion requirements; while marketing parties must comply with non-misleading standards and prohibitions on manipulation. These obligations must be reflected in contracts, compliance audits, and sanctions for termination of

[46] Röder, J., Palmer, M., & Muntermann, J. (2022). *Data-driven decision-making in credit risk management: The information value of analyst reports*. Decision Support Systems, 158, 113770. https://doi.org/10.1016/j.dss.2022.11377

[47] European Commission. (2023). *Proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of consumer credit and on responsible lending (PSDD)*. Brussels.

cooperation. Thus, PSDD shifts the focus from "who is at fault after the event" to "who is responsible for preventing and remedying risks from the outset."

Empirically, information deficits and weak screening can be reflected in complaint indicators and in authorities' findings regarding illegal entities and MSME financing dynamics. The empirical indicator summary below summarizes policy data published by the OJK in the October 2025 RDKB on MSME credit growth and complaints about illegal online lending, as well as the number of illegal entities shut down. This data is important because it shows that the problem of digital financing cannot be separated from the SME financing and consumer protection agenda: when formal financing channels are inadequate or slow to grow, the risk of migration to illegal channels increases; and when complaints are high, disclosure design and remedy mechanisms need to be evaluated as a priority. Such policy indicators help translate the PSDD framework into a risk-based supervisory agenda.

In October 2025, several empirical indicators highlight two intertwined issues: the need to strengthen MSME financing and the persistent risk posed by illegal financial entities. MSME credit growth stood at only 0.23% (yoy), signalling the need for more robust financing while underscoring PSDD's emphasis on product governance and payment-capacity assessments to prevent over-indebtedness. At the same time, 16,343 complaints related to illegal online lending illustrate gaps in legal information and literacy, prompting PSDD requirements for identity/license verification, standardized disclosures, and complaint channels that are accessible, traceable, and adequately documented. Furthermore, the shutdown of 1,556 illegal online lending entities reflects enforcement dynamics that remain largely reactive, whereas PSDD seeks to reduce reliance on ex post crackdowns by requiring auditable processes.[48]

Based on the diagnosis and data in the empirical indicator summary below, PSDD can be formulated into a set of minimum compliance indicators. These indicators include: (i) disclosure of total costs that pass readability tests; (ii) auditable records of payment capacity assessments; (iii) operational data minimization and purpose limitation policies; (iv) documented monitoring of complaints and corrective

[48] Financial Services Authority, *Summary of General Bank Financial Data (RDKB) October 2025* (MSME credit and illegal online lending complaints/terminations section), ojk.go.id (accessed December 21, 2025).

actions; (v) vendor governance and sanction mechanisms; and (vi) measurable complaint resolution time and remedy outcomes. These indicators enable risk-based supervision: platforms with high complaint volumes, high-risk products, or problematic vendors may be subject to stricter oversight. At this point, proportionality works as an instrument of regulatory efficiency, not a weakening of protection.

VI. COMPARATIVE INSIGHTS

Limited comparisons show that sustainability and proportionality integration can be achieved through governance expectations, not just reporting obligations. In the Philippines, the central bank's sustainable finance framework emphasizes expectations for integrating sustainability principles and environmental and social risks into governance, risk management, and strategic objectives, with adjustments for size and operational complexity. In the European Union, taxonomy serves as a tool for market transparency and a common language for classifying sustainable activities, while discouraging greenwashing through more precise definitions and criteria. In Thailand, industry guidelines supported by authorities emphasize the internalization of environmental and climate risks into banks' business processes based on the principle of risk proportionality. This comparison is relevant as inspiration for how PSDD can be gradually operationalized in Indonesia.

A limited comparison of sustainability and proportionality frameworks for due diligence in digital MSME funding shows a shared regulatory direction, embedding sustainability into governance while calibrating obligations to risk and operational complexity, yet with different operational emphases. In Indonesia, POJK 51/POJK.03/2017 on Sustainable Finance, POJK 22/2023 on consumer protection in the financial services sector, and Law 27/2022 on personal data protection collectively signal expectations for sustainability integration in governance and reporting, alongside stronger duties of fair treatment, transparency, and data protection; these instruments suggest that PSDD would benefit from more concrete operational guidelines tailored to digital products, including clearer disclosure of total costs, data minimization, governance of vendor-based collections, and audit-trail remedies. The Philippines, through BSP Circular No. 1085 (Sustainable Finance Framework, 2020), similarly requires banks to integrate sustainability principles and environmental and social (E&S) risks into governance and risk management in a manner proportionate to their size, risk

profile, and operational complexity, reinforcing the idea that PSDD functions as an ongoing process and governance obligation, with proportionality potentially formalized as an audit and supervisory benchmark. In the European Union, the EU Taxonomy and the Platform on Sustainable Finance's 2023 report on streamlining sustainable finance for SMEs emphasize classification transparency and improved access to sustainable finance through simplification and adaptation, offering PSDD inspiration for "simplicity-by-design" indicators for SMEs, such as concise disclosures, minimum data standards, and a requirement that "sustainable" claims be tied to verifiable evidence. Meanwhile, Thailand's sustainable finance agenda, reflected in Bank of Thailand initiatives and industry guidance such as *The Sustainable Finance Initiatives for Thailand,* underscores the value of practical, collaborative steps across the ecosystem, highlighting that PSDD should not remain a mere compliance document but must be internalized within product governance and vendor management processes.

The comparative summary below summarizes the comparison to highlight elements that can be adopted: integration of E&S risks into governance, application of the principle of proportionality, and transparency mechanisms. This comparison is not intended to suggest that one model is correct, but rather to show that auditable process obligations are increasingly common practice. By learning from other jurisdictions, Indonesia can position PSDD as a "bridge" between the implementation of sustainable finance, consumer protection in the financial services sector, and personal data protection. The focus is on formulating specific operational obligations for digital products, including disclosure standards, algorithm governance, and vendor oversight, so that sustainability does not stop at reporting but is embedded in service design. This principle requires adequate documentation so regulators can assess compliance without waiting for a case to go viral or cause massive casualties. At the product design stage, product governance obligations prevent mis-selling by ensuring that the product's features, costs, and limitations align with the needs and capabilities of the user segment. At the data processing stage, minimization and purpose limitation reduce the risk of abuse and minimize the attack surface in the digital ecosystem. At the billing stage, ethical standards and prohibitions on degrading practices must be accompanied by vendor audit mechanisms and real contractual consequences.

VII. POLICY AND NORMATIVE IMPLICATIONS

The normative implications of PSDD for Indonesia can be formulated into three agendas. First, a prevention agenda through digital financing product governance guidelines that include standards for total cost disclosure, readability testing, and user vulnerability testing. Second, a social risk control agenda that includes indicators of over-indebtedness, collection complaints, and data breaches as "material risks" affecting compliance evaluations and supervisory ratings. Third, a recovery agenda by ensuring deadline-based complaint mechanisms, data correction, compensation, and clear escalation channels. These three agendas can be integrated into a risk-based supervisory framework and supplemented with progressive administrative sanctions. With this design, the tendency for "viral enforcement" can be reduced because prevention and recovery become measurable structural obligations.

Taken together, the analysis indicates that sustainability claims in digital MSME funding are credible only when they are backed by auditable product governance, fair-risk allocation, and traceable remedies.

VIII. CONCLUSION

This article concludes that the main problem in the digital MSME funding ecosystem is not only the existence of illegal entities, but also the weak binding of the financing process to standards of information fairness and auditable recovery. The philosophy of law, through distributive and procedural justice, needs to be operationalized so that the mandate of sustainable finance does not stop at reporting, but is present in product design, data processing, and dispute management. The Proportionate Sustainable Due Diligence (PSDD) model offers a reconstruction by placing proportionality at the center of calibrating obligations: the higher the risk and complexity of the product, the stronger the obligations for disclosure, payment capacity assessment, vendor governance, and audit-trail remediation. Thus, sustainability is proven through a fair process, not just claims.

The main recommendations of this article are: (i) develop PSDD operational guidelines for digital MSME financing that set standards for pre-contract summaries, comparable total cost indicators, and data minimization parameters; (ii) mandate vendor accountability chains (including billing and data providers) with audit rights and incident reporting; (iii) strengthen contestability rights for

automated decisions; (iv) improving the design of complaint channels to be traceable, time-bound, and include proportional compensation obligations; and (v) locking in "sustainable" claims on verifiable indicators to prevent greenwashing. The implementation of these recommendations is expected to bring together inclusion and protection, so that digital financing truly supports the resilience of MSMEs in the Society 5.0 era.

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Integration of Gender Perspective in the Indonesian Criminal Justice System

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ABSTRACT: Sexual violence cases in Indonesia frequently expose persistent gender bias, victim-blaming tendencies, and a lack of sensitivity among law enforcement officers toward victims lived experiences. These conditions often lead to revictimization and impunity, undermining the integrity of the legal process. This study aims to analyze the integration of a gender perspective within the Indonesian Criminal Justice System specifically following the enactment of Law No. 12 of 2022 on Sexual Violence Crimes. Using a normative-empirical legal research method, this study combines an examination of the new regulatory framework with an assessment of its practical application during investigation, prosecution, and adjudication. The research findings demonstrate that while the Law of Sexual Violence Crimes marks substantial legislative progress, practical challenges remain significant. Cultural barriers persist through patriarchal interpretations of legal norms and gender stereotypes in proceedings. Structurally, the system suffers from limited institutional capacity, a lack of integrated Standard Operating Procedures aligned with non-discrimination principles, and insufficient resources for specialized units. Procedural deficiencies also remain, particularly in ensuring psychological protection and fulfilling victims' procedural rights. This study concludes that incorporating a gender perspective into the Criminal Justice System requires more than the mere existence of legal norms; it demands a meaningful cultural and institutional transformation. Consequently, this study recommends: (1) reforming legal education and professional training curricula to prioritize gender justice; (2) reinforcing internal gender-based monitoring systems; and (3) adopting comprehensive case-handling guidelines that safeguard victims' rights while minimizing trauma. This research contributes to advancing criminal law theory by underlining that substantive justice for survivors can only be realized through a gender-sensitive and victim-centered Criminal Justice System.

Keywords: Access to Justice; Gender Perspective; Criminal Justice System; Sexual Violence

I. INTRODUCTION

Sexual violence in Indonesia persists as a fundamental human rights challenge, rooted in systemic gender inequalities that permeate the legal apparatus. Despite progressive legal shifts, survivors often confront a biased criminal justice process characterized by victim-blaming and a lack of gender sensitivity among practitioners. These systemic failures frequently trigger secondary victimization and perpetuate impunity, ultimately eroding the rule of law and public confidence. Consequently, there is an imperative need for a judicial framework that transcends formal procedure to embrace the lived experiences of victims through the lens of gender justice and human dignity.[1]

Extant scholarship on Indonesian sexual violence has predominantly scrutinized substantive criminal statutes, sociological stigmas, and the historical inadequacies of the old Criminal Code. While recent academic discourse has lauded Law No. 12 of 2022 on Sexual Violence Crimes as a milestone for its victim-centric philosophy, much of this analysis remains confined to normative legal theories. There is a notable scarcity of research evaluating how these progressive norms are operationalized within the day-to-day functions of law enforcement agencies.

The primary lacuna in current studies is the disconnection between the "law in books" and "law in action" during the investigation and adjudication phases. The efficacy of Law of Sexual Violence Crimes is often stifled by a persistent patriarchal legal culture and structural deficits, such as the absence of unified Standard Operating Procedures and inadequate psychological support systems. This study argues that legislative reform alone is insufficient without a rigorous empirical assessment of institutional behavior and the deeply ingrained stereotypes held by legal actors.[2]

This study introduces scientific novelty by adopting a normative-empirical approach to evaluate gender integration within the Indonesian Criminal Justice System post-Law of Sexual Violence Crimes. It moves beyond doctrinal debates to demonstrate that substantive justice requires a tripartite transformation of legal culture, institutional architecture, and procedural protections. Therefore, this research aims to analyze the current state of gender integration in the Criminal Justice System and identify remaining barriers, specifically addressing how these

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1 Tim Lindsey and Simon Butt, Indonesian Law (Oxford University Press 2018) 250

2 Sulistyowati Irianto, 'Women's Access to Justice and the Indonesian Criminal Justice System' (2023) 15(2) Journal of Indonesian Legal Studies 112, 115

perspectives are manifested in practice and what strategic interventions are required to fortify a victim-centered justice model.[3]

II. METHODOLOGY

This study employs a normative-empirical legal research method to examine the integration of a gender perspective within the Indonesian Criminal Justice System in handling sexual violence cases following the enactment of Law No. 12 of 2022 on Sexual Violence Crimes. The normative approach focuses on the analysis of statutory regulations, legal doctrines, and principles related to gender justice, victim protection, and criminal procedure. Primary legal materials include Law of Sexual Violence Crimes, relevant provisions of the Criminal Code, the Criminal Procedure Code, Supreme Court regulations concerning gender-sensitive adjudication, and implementing policies related to the handling of sexual violence cases. Secondary legal materials consist of scholarly articles, legal commentaries, policy briefs, and reports published by state institutions and civil society organizations addressing gender-based violence and criminal justice reform.

The empirical component of this research is directed at assessing the practical application of gender perspectives during the stages of investigation, prosecution, and adjudication. Empirical data are obtained through a qualitative research approach, including an examination of selected court decisions on sexual violence cases, institutional reports from law enforcement agencies, and documentation issued by oversight bodies.[4] This approach enables the study to identify gaps between normative legal standards and their implementation, particularly in relation to victim treatment, procedural safeguards, psychological protection, and the prevention of revictimization within the criminal justice process.

Data analysis is conducted using a qualitative descriptive-analytical method. Normative legal materials are analyzed through statutory interpretation and conceptual analysis, while empirical findings are examined to reveal patterns of institutional practices, cultural biases, and structural constraints affecting the realization of gender-sensitive justice. By integrating normative and empirical analyses, this study seeks to evaluate the effectiveness of Law of Sexual Violence

[3] Alimatul Qibtiyah, 'The Breakthrough of UU TPKS: A New Era for Gender Justice' (National Commission on Violence Against Women Report 2022)

[4] R. McGlynn & N. Westmarland, "A Trauma-Informed Approach to Criminal Justice Responses to Sexual Violence," International Journal of Law, Crime and Justice, Vol. 73 (2023).

Crimes implementation and to formulate evidence-based recommendations for strengthening a victim-centered and gender-responsive criminal justice system in Indonesia.[5]

III. REFORMING LEGAL EDUCATION AND PROFESSIONAL TRAINING CURRICULA TO PRIORITIZE GENDER JUSTICE

Curriculum reform and professional training for law enforcement officials constitute a fundamental prerequisite for the effective integration of a gender perspective within the Indonesian criminal justice system, particularly in the adjudication of sexual violence cases following the enactment of Law of Sexual Violence Crimes. Empirical data demonstrate that legal reform alone has not translated into gender-sensitive justice in practice. According to the 2024 Annual Report of the National Commission on Violence Against Women, more than 70% of reported sexual violence cases that entered the criminal justice process in 2023 were marked by procedural shortcomings, including insensitive questioning, disbelief toward victims' testimonies, and excessive evidentiary burdens placed on survivors.[6] These findings indicate that the persistence of gender bias is not primarily a normative deficit, but a systemic failure rooted in legal education and professional socialization processes.

Legal education and professional training in Indonesia remain largely dominated by a legalistic-positivist paradigm that conceptualizes law as a value-neutral system of rules detached from social context, power relations, and victims lived experiences. This paradigm has proven inadequate in addressing gender-based violence, as it obscures structural inequality and legitimizes procedural practices that marginalize victims, such as rigid evidentiary standards and the prioritization of formal consistency over substantive truth. Empirical assessments conducted by the Indonesian Judicial Commission in 2023 further reveal that judicial reasoning in sexual violence cases frequently reproduces patriarchal assumptions regarding morality, consent, and credibility, particularly when victims deviate from socially constructed norms of "ideal victimhood."[7] These patterns underscore the urgent

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5 Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia, updated ed., 2022).

6 Komisi Nasional Anti Kekerasan terhadap Perempuan (Komnas Perempuan), Annual Report on Violence Against Women 2024 (Jakarta: Komnas Perempuan, 2024).

7 Indonesian Judicial Commission, Judicial Conduct and Gender Bias in Sexual Violence Cases (Jakarta: Judicial Commission, 2023).

need for a paradigmatic shift toward a sociological justice approach that situates criminal law within its broader social and cultural context and recognizes victims as rights-bearing subjects entitled to dignity, protection, and meaningful participation in the justice process.

Such a shift must be grounded in a coherent conceptual framework integrating substantive justice, victimology, and gender sensitization as its core pillars. Substantive justice requires a comprehensive understanding of the protections introduced by Law of Sexual Violence Crimes, including the expansion of admissible evidence, recognition of power imbalances, and the explicit obligation of the state to prevent revictimization throughout criminal proceedings.

Data show that electronic evidence and psychological expert testimony both expressly recognized under Law of Sexual Violence Crimes were inconsistently accepted by investigators and judges in more than 40% of reviewed cases.[8] This gap illustrates how normative advances remain underutilized when legal actors lack conceptual and practical training. Victimology complements this framework by equipping legal professionals with an understanding of the psychological impact of sexual violence, particularly insights from the neurobiology of trauma, which explain why survivors may display fragmented memory, delayed reporting, or emotional detachment during testimony. Without this understanding, victims' narratives are often assessed through gender-biased standards of rationality, reinforcing victim-blaming discourses and undermining survivors' credibility. Gender sensitization further strengthens this framework by enabling legal professionals to identify and dismantle unconscious biases such as patriarchal assumptions about sexuality and consent that continue to shape legal reasoning and decision-making.[9]

The implementation of this reform agenda must occur across the entire legal career pathway, beginning with pre-service legal education and continuing through in-service professional training. At the university level, law schools play a strategic role in shaping future legal actors. Yet a 2023 survey conducted across major Indonesian law faculties revealed that fewer than one-third require courses on gender justice or gender and law as mandatory components of the curriculum.[10]This gap necessitates institutionalizing gender justice by

[8] Komnas Perempuan, Monitoring the Implementation of Law No. 12 of 2022 (Policy Brief, 2024).
[9] R. McGlynn & N. Westmarland, "A Trauma-Informed Approach to Criminal Justice Responses to Sexual Violence," International Journal of Law, Crime and Justice, Vol. 73 (2023).
[10] Indonesian Association of Law Faculties, Survey on Gender Justice in Legal Education (2023).

transforming such courses from electives into compulsory subjects. In addition, clinical legal education should be strengthened by integrating supervised experiences in legal aid clinics that handle sexual violence cases, allowing students to engage directly with victims' realities under the guidance of gender-competent academics and practitioners. Reform is also needed in methods of legal reasoning and case analysis, replacing abstract, gender-neutral case studies with jurisprudential analyses that foreground structural inequality, power relations, and victims lived experiences.

At the in-service level, professional training for police officers, prosecutors, and judges must be designed as an integrated and cross-institutional process. Fragmented, institution-specific training programs have contributed to inconsistent interpretations of gender-sensitive norms across the criminal justice system. Data from the Indonesian National Police in 2024 indicate that less than half of investigators assigned to sexual violence cases had received specialized gender or victim-centered training.[11] Joint training sessions involving women and children protection units, prosecutors, and judges would promote a shared understanding of victim-centered case handling and procedural safeguards mandated by Law of Sexual Violence Crimes. Furthermore, law enforcement officials should be systematically trained in Psychological First Aid to ensure empathetic and non-discriminatory responses during the initial stages of reporting and investigation, thereby reducing the risk of secondary victimization. These training initiatives must be reinforced through internal monitoring mechanisms based on gender-sensitive performance indicators, ensuring that gender competence becomes an integral component of professional accountability rather than symbolic commitment.

Gender-sensitive training must ultimately engage with legal reasoning, professional ethics, and trauma-informed practices. From the perspective of legal logic, legal actors must be encouraged to abandon patriarchal interpretations of evidentiary standards and fully embrace the broader evidentiary framework recognized under Law of Sexual Violence Crimes. In terms of professional ethics, the elimination of discriminatory language and moral judgment in investigative and courtroom settings is essential to ensuring proceedings that respect victims' dignity. Trauma-informed approaches are equally critical, as they enable legal actors to recognize trauma responses during examination and cross-examination,

[11] Indonesian National Police, Internal Training and Capacity Report on Sexual Violence Handling (2024).

thereby preventing testimonial "freeze" responses and secondary trauma that may compromise both victims' well-being and the integrity of the judicial process.[12]

Within the Indonesian context, the sustainability of these reforms depends on the establishment of binding institutional mechanisms. This study therefore recommends that the National Commission on Violence Against Women collaborate with the Supreme Court and the National Police of Indonesia to develop a standardized Gender Justice Certification for law enforcement officials. Such certification should serve as a mandatory prerequisite for any official involved in handling sexual violence cases. Ultimately, this research underscores that the effectiveness of Law of Sexual Violence Crimes should not be measured solely by the severity of criminal sanctions, but by the gender sensitivity, professional competence, and ethical awareness of those entrusted with the authority to adjudicate sexual violence cases.

IV. REINFORCING INTERNAL GENDER-BASED MONITORING SYSTEMS

The effectiveness of integrating a gender perspective within the criminal justice system depends not only on progressive legal norms, but also on the presence of robust, gender-responsive internal monitoring mechanisms capable of evaluating justice as experienced by victims. In practice, monitoring in Indonesia still tends to be treated as a procedural audit focused on whether a case file moves forward rather than a substantive assessment of whether the process protects victims from revictimization, minimizes discriminatory treatment, and ensures compliance with gender-sensitive safeguards. Recent national trends underscore why this shift is urgent. In the CATAHU 2024 launch statement, Komnas Perempuan reported 330,097 documented cases of gender-based violence against women, representing a 14.17% increase from the previous year. This rising trend signals that system performance cannot be evaluated solely through throughput (e.g., clearance rates) but must be measured through the quality of institutional responses especially in sexual violence cases where victims' procedural experiences directly affect case sustainability and reporting behavior.

Substantive monitoring becomes even more critical in the context of Law of Sexual Violence Crimes implementation. Komnas Perempuan's two-year reflection on

[12] UN Women, Handbook for Gender-Responsive Justice Systems (New York: UN Women, 2023).

Law of Sexual Violence Crimes indicates that from May 2022 to December 2023, the Commission received 4,179 complaints related to Sexual Violence Crimes, with online gender-based violence as the largest category (2,776 cases), followed by physical sexual harassment (623) and rape (297). The same statement also records recurring obstacles faced by victims in accessing justice, including pressures toward informal settlement, intimidation through counter-allegations (e.g., defamation), burdensome "transport" demands during examinations, and uncomfortable treatment during victim questioning. These patterns provide an empirical basis for reframing internal monitoring as an evaluation of how authority is exercised across investigation, prosecution, and adjudication not merely whether procedural steps were completed.

A core instrument for strengthening gender-based monitoring is the reformulation of institutional performance indicators. Existing metrics remain dominated by quantitative outputs such as case completion and conviction statistics while failing to capture whether institutional behavior aligns with victims' rights and the victim-centered orientation embedded in Law of Sexual Violence Crimes. A gender-sensitive monitoring framework should therefore incorporate key performance indicators that explicitly track: (i) victim experience (e.g., perceived safety, dignity, and absence of victim-blaming during proceedings); (ii) procedural adherence to gender-sensitive standards (e.g., availability and use of specialized service spaces and trained personnel); and (iii) evidentiary responsiveness consistent with Law of Sexual Violence Crimes, particularly in recognizing forms of evidence that are often pivotal in sexual violence cases (including electronic traces and expert testimony). This KPI shift is also consistent with the state's evolving regulatory architecture: Komnas Perempuan notes that Indonesia has issued implementation instruments supporting capacity building and institutional strengthening such as Presidential Regulation No. 9/2024 on education and training for prevention/handling of sexual violence crimes and Presidential Regulation No. 55/2024 on UPTD PPA yet practical harmonization and institutional uptake remain uneven. [13]

Internal monitoring must also be reinforced through independent oversight interfaces and accessible complaint channels. Victims and their legal advocates require safe, confidential, and retaliation-resistant reporting pathways to contest discriminatory treatment, harassment, or coercion during the criminal process. Without credible reporting channels, gender bias remains underreported and

[13] Komnas Perempuan, *Refleksi Dua Tahun Implementasi Undang-Undang Nomor 12 Tahun 2022 tentang Tindak Pidana Kekerasan Seksual* (Policy Brief, 2024)

institutionally invisible. In parallel, monitoring capacity depends on data integration. Komnas Perempuan's CATAHU 2024 statement emphasizes improvements in documentation strategy and response rates from partners, highlighting how data governance directly affects policy and accountability. For criminal justice monitoring, this implies that case management systems should be synchronized with gender-disaggregated variables (including case stage progression, use of Law of Sexual Violence Crimes provisions, and access to victim protection measures) to identify points where sexual violence cases most frequently stall, are redirected outside the justice process, or result in revictimization.

Regular gender audits further strengthen monitoring by targeting institutional culture and structural capacity, rather than treating gender sensitivity as an individual ethical attribute. Komnas Perempuan's monitoring report on two years of Law of Sexual Violence Crimes explicitly identifies multiple determinants affecting enforcement, including not only legal substance but also law enforcement factors, facilities, societal factors, and cultural factors. Importantly, the report also notes methodological limitations linked to constrained institutional responsiveness to information requests, implying that transparency deficits themselves can hinder evidence-based oversight.

Gender audits conducted with independent gender experts should therefore assess (i) patriarchal bias in legal reasoning (e.g., within police reports, indictments, and judicial considerations), and (ii) resource allocation to ensure budgets prioritize victim support, psychological assistance, and specialized training. Without sustained institutional investment, monitoring risks collapsing into symbolic compliance. Indonesia has also begun strengthening the legal infrastructure for coordinated monitoring. Government Regulation No. 27/2024 specifically regulates coordination and monitoring for prevention and handling of sexual violence crime victims, providing a governance basis to institutionalize monitoring beyond ad hoc initiatives.

This framework should be operationalized through structural synergy across the criminal justice system: internal police oversight (Inspectorate mechanisms) should mandate audits of UPPA protocols; prosecutorial oversight should systematically evaluate implementation of the Attorney General's guidelines on women and children's access to justice; and judicial supervision should assess compliance with gender-sensitive adjudication principles, including those embedded in Supreme

Court regulation on women confronting the law. The point is not merely coordination, but continuity of gender standards across stages so that victim-centered handling at investigation is not negated at prosecution or trial.[14]

Monitoring outcomes must be tied to disciplinary and career consequences. Where victim-blaming, discriminatory language, coercive settlement pressure, or violations of gender-sensitive protocols are substantiated, remedial action should include mandatory intensive retraining and competency certification, while promotion systems should treat gender-sensitive conduct as a prerequisite for leadership positions. Otherwise, monitoring becomes a formalistic ritual without behavioral impact. In this sense, internal monitoring is not a peripheral administrative function; it is the institutional mechanism that determines whether the "gender perspective" becomes a judicial reality rather than a normative aspiration, particularly under a legal regime that already recognizes the need for coordinated monitoring and implementation instruments.

V. ADOPTING COMPREHENSIVE CASE-HANDLING GUIDELINES THAT SAFEGUARD VICTIMS' RIGHTS WHILE MINIMIZING TRAUMA

The formulation of comprehensive case-handling guidelines constitutes a critical institutional response to persistent revictimization within the criminal justice process. Empirical evidence indicates that survivors of sexual violence frequently experience secondary victimization not from perpetrators, but from procedural practices that disregard the psychological effects of trauma. Data from Komnas Perempuan's 2024 Annual Result (CATAHU) reveals that a significant proportion of victims who withdrew their complaints or declined to pursue litigation cited distress caused by repeated questioning, confrontational examinations, and dismissive attitudes by legal officials. This finding reinforces the necessity of embedding trauma-informed prosecution as a core principle within prosecutorial and judicial guidelines, particularly following the enactment of Law of Sexual Violence Crimes.[15]

A trauma-informed prosecutorial framework requires a fundamental shift in legal reasoning. Traditional criminal procedure often assesses victim testimony through

[14] Komisi Nasional Anti Kekerasan terhadap Perempuan (Komnas Perempuan), Catatan Tahunan Kekerasan terhadap Perempuan 2024 (Jakarta: Komnas Perempuan, 2024)

[15] Komnas Perempuan, Annual Report on Violence Against Women 2024 (CATAHU 2024) (Jakarta: Komnas Perempuan, 2024).

a lens of internal consistency and chronological coherence, implicitly assuming that truthful accounts are linear and emotionally neutral. However, contemporary psychological research acknowledged in international justice standards demonstrates that trauma disrupts memory consolidation, emotional regulation, and narrative recall. In this context, a trauma-informed approach reframes legal inquiry from questioning perceived inconsistencies in victims' accounts to understanding how violence has affected their cognitive and emotional responses. This paradigm shift is particularly relevant in Indonesia, where Komnas Perempuan's 2024 monitoring of Law of Sexual Violence Crimes implementation found that investigators and prosecutors continued to discredit victims' testimonies based on delayed reporting or fragmented recall, despite explicit statutory recognition of trauma under the new law.[16]

To operationalize trauma-informed prosecution, procedural safeguards must be systematically integrated to minimize revictimization throughout the criminal process. One of the most critical safeguards is the institutionalization of the 'Tell It Once' principle, which strengthens the evidentiary role of the Police Investigation Report and recorded testimonies. Komnas Perempuan reports that victims are frequently required to recount traumatic events multiple times to investigators, prosecutors, medical personnel, and judges often without adequate psychological support. By enhancing the legal weight and inter-agency usability of initial recorded statements, the justice system can reduce unnecessary repetition while preserving evidentiary integrity. Equally important is the provision of safe physical environments for examinations. Despite the availability of Ruang Pelayanan Khusus (RPK), field monitoring in 2023–2024 indicates inconsistent use, with many examinations still conducted in standard interrogation rooms that replicate coercive settings and exacerbate trauma.[17]

Protection from direct confrontation with perpetrators constitutes another essential safeguard. Article 52 of Law of Sexual Violence Crimes explicitly allows victims to provide testimony through audiovisual links or behind one-way mirrors, yet Komnas Perempuan's two-year evaluation of the law found that this provision remains underutilized, largely due to lack of procedural guidance and judicial reluctance. The absence of clear case-handling guidelines has resulted in

[16] Komnas Perempuan, Two Years of the Implementation of Law No. 12 of 2022 on Sexual Violence Crimes (Policy Review, 2024).

[17] Indonesian National Police & Komnas Perempuan, Joint Monitoring Report on Special Service Rooms (RPK) (2023).

discretionary, rather than rights-based, application of protective measures, thereby undermining the victim-centered orientation of the law.

The effectiveness of these safeguards depends on their integration across all stages of the criminal justice process. Fragmented handling where gender-sensitive practices applied during investigation are abandoned at prosecution or trial remains a recurring weakness in Indonesia's system. Integrated standard operating procedures are therefore essential to ensure continuity of protection from the police station to the courtroom. During the investigation stage, the presence of psychologists and legal counsel from the first interview is critical to stabilizing victims emotionally and facilitating reliable evidence collection. At the prosecution stage, pre-trial preparation that explains courtroom procedures and roles has been shown to significantly reduce victims' anxiety and fear of the unknown, factors that often lead to withdrawal of cooperation. During adjudication, judges must actively exercise their authority to prevent defense strategies that rely on victim-blaming or irrelevant inquiries into sexual history practices that Komnas Perempuan continues to identify in court transcripts reviewed in 2024.[18]

Beyond procedural protection, case-handling guidelines must also operationalize the substantive rights granted under Law of Sexual Violence Crimes. One of the most under-implemented rights is restitution. Although the law mandates compensation for victims, Komnas Perempuan's 2024 report notes that prosecutors frequently fail to calculate or formally request restitution during sentencing, resulting in judgments that recognize guilt without addressing victims' material and psychological losses. Clear prosecutorial guidelines on restitution assessment and claims are therefore indispensable. Equally important is the right to information. Victims consistently report uncertainty regarding progress, contributing to distrust and disengagement. Mandatory case updates delivered through a designated liaison officer would significantly enhance transparency and victim participation. In addition, the institutional adoption of gender-sensitive and non-discriminatory language through standardized terminology handbooks for investigators, prosecutors, and judges would address persistent symbolic violence embedded in legal discourse.

This study concludes that case-handling guidelines function as the "operating system" of the criminal justice system. Without detailed, binding, and trauma-informed guidelines, the progressive protections enshrined in Law of Sexual

[18] Indonesian Judicial Commission, Judicial Conduct Review in Sexual Violence Cases (2024).

Violence Crimes remain dormant and unevenly applied. Recent implementation data demonstrate that legal reform, absent procedural translation, fails to alter victims lived experiences of justice. By adopting comprehensive trauma-informed case-handling guidelines, Indonesia can move toward a criminal justice system in which the pursuit of truth and accountability does not come at the expense of victims' psychological well-being but is instead strengthened by it.

VI. CONCLUSION

This study demonstrates that the effective integration of a gender perspective within the Indonesian Criminal Justice System cannot be achieved through legislative reform alone, even after the enactment of Law of Sexual Violence Crimes. The research confirms that substantive gender justice depends on three interrelated pillars: the adoption of comprehensive, trauma-informed case-handling guidelines; the reinforcement of internal gender-based monitoring systems; and the reform of legal education and professional training curricula. Together, these pillars address the structural, procedural, and cultural dimensions that continue to hinder the realization of victim-centered justice. Without clear guidelines that translate legal norms into daily practice, robust monitoring mechanisms that ensure accountability, and sustained capacity-building that reshapes legal reasoning and professional ethics, gender sensitivity remains uneven and vulnerable to institutional inertia.

From a practical standpoint, the findings suggest that Indonesian criminal justice institutions should prioritize the institutionalization of trauma-informed guidelines as binding operational standards, supported by measurable gender-sensitive performance indicators and enforceable oversight mechanisms. At the same time, long-term transformation requires embedding gender justice into the formation of legal professionals through mandatory curricula and integrated cross-institutional training. These measures not only enhance protection for victims of sexual violence but also strengthen the integrity and credibility of the justice system itself. Ultimately, this research underscores that a criminal justice system committed to gender justice is one that evaluates success not merely by procedural completion or punishment severity, but by its capacity to deliver dignity, protection, and substantive justice to survivors.

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Law Instrumentalization by the Regime to Perpetuate Discrimination against Gender Minorities in Indonesia

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ABSTRACT: Gender diversity is neither new nor taboo; rather, it has existed and lived alongside society for years. Historically, several societies recognized the existence of genders other than male and female, as evidenced by the existence of *Kathoey* (Thailand), *Hijra* (India), and *Two-spirit* (Native American). Within Indonesian culture itself, there are also non-binary gender constructions, one of which is the existence of *Calalai*, *Calabai*, and *Bissu* in the Bugis community. Nevertheless, the reality of Indonesian society today is unfortunately often unwelcoming towards minority gender groups. This is partly reflected in the creation of legal regulations that should be inclusive but often become tools for discrimination and restricting the movement of gender minorities. One reason is that the national legal system is still influenced by the mainstream textual interpretation of certain religious norms, especially those of dominant religions, which are understood only textually. Consequently, the formation and implementation of these regulations fail to accommodate the reality of gender diversity. This research finds that legal regulations that should protect vulnerable groups are instead used by the regime to perpetuate discrimination against gender minorities. For example, there are Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia and Article 30 of the Human Rights Law (Law 39/1999), which guarantee everyone the right to security and protection from threats of fear. These regulations should protect vulnerable groups from discrimination and threats of violence. Ironically, these regulations are misused to repress gender minorities, serving as the legal basis for the argument that "everyone has the right to feel safe from the existence of gender minorities who may brainwash children or commit sexual harassment."

Keywords: Gender Diversity; Gender Constructions; Gender Minorities

I. INTRODUCTION

Gender and sex each have their own definitions. Gender is a social construct, while sex is a classification of biological characteristics such as chromosomes, hormones, reproductive organs, and anatomy. Gender is a dynamic concept, meaning societal knowledge regarding gender can change over time, in other words, adapting to scientific developments.[1] Therefore, it is important to know that gender is constructed by society and has its own definition in each society at any given time.

The dynamics of gender and sexuality are inseparable from the biological and sociocultural aspects that are inherent in a society. In Indonesian society itself, gender and sexuality are—or were—diverse and non-binary. It is supported by the existence of several indigenous communities that acknowledge gender diversity, from the five gender identities of the Bugis tribe (orowane, makkunrai, calalai, calabai, bissu), the third gender "to' burake" in the Toraja tribe, to the role of trans women as royal servants in ancient Javanese society.[2]

Besides Indonesia, there are also societies that recognize gender and sexual diversity, as evidenced by the existence of Kathoey (Thailand), Hijra (India), and Two-spirit (Native American). According to Matzner and Costa,[3] Kathoey refers to biological males who exhibit non-normative sexual traits and behaviors and identify as feminine. On the other hand, Hijra and Two-Spirit are terms for individuals who are neither male nor female (non-binary)[4]. With the existence of non-binary gender identities recognized by various societies, it can be understood that gender and sexual diversity are not recent or taboo, but have existed and coexisted in society for a long time.

However, Indonesian society has recently shown a tendency toward gender binarism that ignores gender diversity. This is reflected, among other things, in the similarity of the definitions of gender and sex in the KBBI (Big Indonesian

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1 Ade Kartini and Asep Maulana, "Redefinisi Gender Dan Seks" (2019) 12 An-Nisa' : Jurnal Kajian Perempuan & Keislaman 217, [222].

2 Myrtati Dyah Artaria and others, "Priawan in Indonesia: A Study of Transmasculine Female-to-Male Individuals" (2024) 11 DiGeSt Journal of Diversity and Gender Studies 86 <https://doi.org/10.21825/digest.90113>, [87].

3 Andrew Matzner and Leeray M Costa, "Kathoey," *The International Encyclopedia of Human Sexuality* (John Wiley & Sons, Inc 2015), [1].

4 Nat Thorne and others, "The Terminology of Identities between, Outside and Beyond the Gender Binary – A Systematic Review" (2019) 20 International Journal of Transgenderism 138 <https://doi.org/10.1080/15532739.2019.1640654>, [141].

Dictionary).[5] This reality is caused, in part, by colonialism and the introduction of Abrahamic religions (Islam, Catholicism, and Christianity). Asmarani and Hanjani[6] explain that colonialism and international trade, which also brought Abrahamic teachings, contributed to the spread of homophobia under religious pretext.

This situation is quite ironic, because Indonesia's cultural identity—which originally accepted gender diversity— has now been reversed due to colonialism by European nations—which are now more accepting of gender diversity. For example, the Netherlands—one of the nations that colonized Indonesia—was actually the first country to legalize same-sex marriage, in other words, accepting the existence of the LGBTQ+ community. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) in 2023[7] reported that several postcolonial laws often rely on heteronormativity and gender and sexual binarism to repress LGBTQ+ groups and diverse gender and sexual identities and practices that do not conform to these norms.

The media is one of the spaces that contributes to how an identity is made or recognized by the public. Mass media plays a significant, yet temporary, role in non-normative sexuality and gender.[8] The representation of minority gender identities through cultural products such as print media, television broadcasts, and films is crucial for at least affirming their real existence among the public. The emergence of such representations can be seen primarily as an indication of the recognition and discussion of these subjects' positions within society more generally. Public discourse may not always be positive, but it at least exists.[9] Comprehensive surveys of the emergence of popular discourse related to homosexuality (as a form of gender minority) in Indonesian print media have been

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5 Sayf Muhammad Alaydrus and Azzah Kania Budianto, "Marginalized Identity in Indonesian Higher Education: Navigating Nonbinary Students' Experience on Campus" (2024) 7 SIMULACRA JURNAL SOSIOLOGI 35 <https://doi.org/10.21107/sml.v7i1.22930>, [36].

6 Dinara Tsafina Asmarani and Vania Pramudita Hanjani, "Makhluk Nyata Dunia Maya: Fenomena Alienasi Diri Para Non-Biner Sebagai Dampak Ketaksaan Gender" (2020) 15 Sabda.

7 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World), "The Impact of Colonial Legacies in the Lives of LGBTI+ and Other Ancestral Sexual and Gender Diverse Persons" (2023) <https://www.ohchr.org/sites/default/files/documents/cfi-subm/2308/subm-colonialism-sexual-orientation-cso-ilga-world-joint-submission-input-2.pdf>, [3].

8 Tom Boellstorff, *A coincidence of desires: Anthropology queer studies, Indonesia*, (Duke University, 2007), [45].

9 Ben Murtagh, *Genders and sexualities in Indonesian cinema: Constructing gay, lesbi and waria identities on screen*. (Routledge, 2013), [11].

conducted by Boellstorff[10] and Blackwood.[11] As these anthropologists note, the Indonesian press and media's interest in the homosexual subject position, both in Indonesia and abroad, appears to have begun in the 1970s. These media representations include letters to a recovering aunt, exposés about gay life in Indonesia, and news about progress on gay rights internationally.

Not limited to popular culture products, mass media in the form of journalistic products also plays a role in distributing information that touches on the lives of gender minorities in Indonesia. It is important to understand that mass media serves as a construct for real facts on the ground. Mass media plays a crucial role in disseminating ideology and as an instrument in shaping public opinion.[12] Therefore, the assumption that mass media is neutral is a misconception—mass media is actually susceptible to bias and is constructed by ideology and particular interests. Although the media generally functions as a watchdog, this function is not being carried out properly. The true function of media demonstrates that they have a vested interest in the reality they report. This interest will influence the media's framing.[13] Framing is usually characterized by the conscious or unconscious highlighting of certain aspects of the reality being reported. As a result, other aspects receive less attention in media coverage. The power of framing lies in its ability to mobilize the masses.

The Alliance of Indonesian Journalists (AJI) found that in 2024, with the simultaneous General Elections (Pemilu), several online media outlets displayed discriminatory reporting against gender minorities, potentially escalating violence and persecution targeting them in Indonesia.[14] Two years earlier (2022), in a study titled "Their Story," Konde.Co, in collaboration with USAID and Internews, demonstrated that the media continued to marginalize gender minorities by using negative language and selecting sources limited to official authorities—limiting

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10 Tom Boellstorff, 'Between religion and desire: Being Muslim and gay in Indonesia', (2005), 107 *American Anthropologist*, [577].

11 Evelyn Blackwood, *Falling into the lesbi world: Desire and difference in Indonesia*, (University of Hawaii Press, 2010), [82].

12 Stephen M. Engel, 'Frame spillover: Media framing and public opinion of a multifaceted LGBT rights agenda', (2013), 38 Law & Social Inquiry, [413].

13 Ibnu Hamad, *Konstruksi realitas politik dalam media massa: Sebuah studi critical discourse analysis terhadap berita-berita politik. (*Yayasan Obor Indonesia, 2004), [21].

14 Ika Idris; Derry Wijaya; Nurul Amalia; Lucky Susanto; Musa Wijanarko, *Laporan Pemantauan Ujaran Kebencian di Pilkada 2024* (Aliansi Jurnalis Independen Indonesia 2025).[31].

the opportunity for individuals belonging to gender minorities to express their opinions.

The stigma attached to gender minorities in Indonesia is inseparable from the role of the mass media, which has contributed to constructing images and stereotypes associated with their identities. This situation is a concern because this rampant discrimination threatens the security and safety of gender minorities in Indonesia. The mass media should be an agent supporting human rights and inclusivity amidst the diversity of Indonesian society.

Alongside discriminative media representation, gender minorities in Indonesia still face significant challenges in terms of regulation. Regulations that should be inclusive often become tools to discriminate and restrict gender minorities from having equal space as cisgenders. Indonesia's national legal system is still heavily influenced by religious norms which are inspired by textual interpretations, so that the formulation of regulations does not accommodate gender and sexual diversity. Almost all laws and regulations formulated by the legislature are influenced by Islamic legal values and principles.[15]

This religious influence is reflected in Article 1 of Law Number 1 of 1974 on Marriage, which defines marriage as a physical and spiritual bond between a man and a woman. This norm demonstrates heteronormativity and closes the door to the legality of same-sex marriage. Furthermore, at the local regulation level, queer individuals are viewed as deviants and equated with perpetrators of sexual violence such as necrophilia and bestiality.

Besides Marriage Law, there are several regional regulations that show discriminatory sentiment against gender minorities and queer people as a whole, such as Garut Regency Regulation Number 13 of 2015 on Anti-Immoral Acts which traps and criminalizes queer people. Even down to drafts of laws, such as the Broadcasting Bill, the state shows oppression by limiting representation of gender minorities in order to alienate gender minorities from the public's eyes.

In the Broadcasting Bill, there are three articles that can be highlighted because they contain norms prohibiting the broadcasting of content that contains queer content. First, Article 28A paragraph (1) letter d prohibits Subscription Broadcasting Institutions (LPB) from broadcasting programs that contain lesbian,

[15] Hasan Husaini, Mariani, et.al, 'Peran Hukum Islam dalam Pembangunan Hukum Nasional di Indonesia', (2023), 6 UNES Review. [4287].

gay, bisexual, and transgender behavior. Article 46A paragraph (2) letter h also prohibits broadcast advertising material that uses advertising models and promotes lesbian, gay, bisexual, and transgender behavior. Finally, Article 50B paragraph (2) letter h prohibits the Broadcasting Content Standards (SIS) from broadcasting content and broadcast material that depicts lesbian, homosexual, bisexual, and transgender behavior.

In 2016, the Indonesian Broadcasting Commission issued a letter which contained a similar demand as the Broadcasting Bill namely Circular Letter No. 184/K/KPI/02/2016, which prohibited broadcasters from airing programs that promote lesbian, gay, bisexual, and transgender contents. The promotion in question can be seen from the aspects of title/theme, narrative, host, balance of sources, and duration in conveying opinions and conclusions that contain the message that queer is a normal part of life. This shows that the state severely restricts the representation of gender minorities in the Indonesian media.

II. METHODOLOGY

This research is sociolegal research. Therefore, it evaluates the implementation of law in society by empirical data related to community and law enforcer behavior also public sentiment towards gender minorities. This research uses an interdisciplinary approach which combines legal and social perspectives related to discrimination against gender minorities.

There are four approaches used in this research. Firstly, Statute Approach by analyzing laws which discriminates gender minorities and tracing the mechanism of discrimination against gender minorities through regulations. Secondly, Conceptual Approach by applying relevant theories, such as Authoritarian Legality and Feminist Legal Theory. Thirdly, Case Approach by examining legally binding court decisions which reflects state's oppression against gender minorities. As an example, Purwokerto District Court Decision Number 30/Pdt.P/2022/PN Pwt which rejects gender change in Petitioner's ID Card despite they already went through gender affirming medical surgery. Fourthly, Empirical Quantitative Approach by gathering data regarding discrimination against gender minorities which occurred through literature review.

III. LEGAL ANALYSIS

Law Number 39 of 1999 on Human Rights ("Human Rights Law") is a legal framework which guarantees the protection of every person's fundamental rights, including gender minorities. This commitment is reflected through Article 69 paragraph (1), which reads: "*Every person shall respect the human rights of others.*" This respect is intended to create a sense of security and peace from all kinds of threats, which is also guaranteed in Article 30. This security is also regulated in Article 35, which guarantees the right of every person to live in a peaceful, safe, and secure society. Such a society could only be achieved if the community applies the values of respect, protection, and full implementation of human rights as the obligation of every human being. In this discourse, gender minorities are no exception. As a marginalized group, gender minorities often face discrimination that undermines their fundamental rights.

Theoretically, Human Rights Law was made to protect marginalized groups, including gender minorities. Therefore, gender minorities shall achieve a sense of security through the existence of Human Rights Law. However, in practice, these laws are often applied in a manner contrary to their intended purpose. For example, Constitutional Court Decision No. 46/PUU-XIV/2016 on Adultery, Rape, and Sexual Abuse contains a request for a judicial review of Article 292 of the Criminal Code, which states: "*An adult who commits indecent acts with another person of the same sex, whom they know or should reasonably suspect to be a minor, shall be punished with a maximum imprisonment of five years.*" The Petitioners filed a judicial review to remove the phrase "whom they know or should reasonably suspect", therefore sexual intercouse between consenting adults of the same sex can still be criminalized. This opens the door to the criminalization of queer groups, including gender minorities.

In the judicial review, the Petitioners used Article 69 paragraph (1), Article 30, and Article 35 of the Human Rights Law as their legal basis. The Petitioners stated that Article 69 paragraph (1) of the Human Rights Law guarantees respect for everyone's human rights. Since freedom of expression is guaranteed in Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia ("Constitution of Indonesia"), the Petitioners believe that their rejection of queer groups is a manifestation of freedom of expression as their fundamental right. Thus, this rejection must be respected.

The Petitioners based their argumentations on Article 30 and Article 35 of Human Rights Law because the existence of queer groups in society strike a sense of insecurity. The Petitioners are worried that children who are exposed to queer groups might be queer themselves. This such an irony, since the Petitioners are demanding their fundamental rights to be respected as they derogate the fundamental rights of queer groups. By this, Human Rights Law is weaponized to discriminate against gender minorities. Although this discrimination is based on the misinterpretation of Human Rights Law, there are quite a few regulations intended to discriminate gender minorities. Those regulations were formed with the intention to limit gender queer's space by not giving them equal rights as cisgenders.

Firstly, Law Number 1 of 1974 on Marriage ("Marriage Law"). Article 1 describes a marriage as a physical and spiritual bond between a man and a woman. Therefore, it excludes gender minorities since marriage can not be conducted by non-cisgender individuals. The existence of this regulation influences other regulations which also discriminate against minority gender groups.

Garut Regency Regulation Number 13 of 2015 concerning Amendments to Garut Regency Regulation Number 2 of 2008 on Anti-Immoral Acts in Chapter IV Part I on Prohibition of Prostitution and Immorality implies that prostitution is an immoral act that is prohibited. Prostitution is defined in Article 1 point 7 as: "*sexual intercouse outside of marriage between people of the same or different sexes without marital ties, either with or without compensation.*" Although sexual intercourse outside of marriage by opposite sex couples are also identified as prostitution, heterosexual couples could escape by conducting a marriage.

Sexual intercourse are categorized as prostitution only if they were conducted without marital ties. Article 1 of Marriage Law stated that marriage can only be conducted by cisgender individuals in a heterosexual marriage, which can clearly be fulfilled by opposite sex couples as referred to in Article 1 point 7 of the Garut Regional Regulation. This is not the case for gender minorities. The subjective element of Article 1 of Marriage Law is cisgender individuals, which means gender minorities does not fulfill the conditions. Thus, this regulation seems to trap gender minority groups in a loophole of "sexual relations outside of marriage is prostitution, but gender minorities cannot get married."

Not only gender minorities are being trapped, Article 22 paragraph (1) gives criminal penalties for prostitution, namely imprisonment for a maximum of 3

(three) months or a fine of up to Rp 50,000,000.00 (fifty million rupiah). Therefore, gender minorities who engage in sexual intercourse within the jurisdiction of the Garut Regional Regulation are trapped and criminalized even though the act is based on the consensus of competent adults.

Secondly, Law Number 44 of 2008 on Pornography ("Pornography Law"). Article 4 paragraph (1) letter a prohibits the act of producing, reproducing, distributing, broadcasting, offering, trading, or providing pornography that explicitly contains sexual intercourse, including deviant sexual intercourse. The glossary of this article explains that what is meant by "deviant sexual intercourse" is: "*sexual intercourse or other sexual activities with corpses, animals, oral sex, anal sex, lesbianism, and homosexuality*." Violations of this article are punished under Article 29, namely imprisonment for a minimum of 6 (six) months and a maximum of 12 (twelve) years and/or a fine of at least Rp250,000,000.00 (two hundred and fifty million rupiah) and a maximum of Rp6,000,000,000.00 (six billion rupiah).

Pornography Law equates homosexuality with sexual deviance, even sexual crimes. Sexual intercourse with a corpse or necrophilia is a crime as referred to in Article 271 of Law Number 1 of 2023 since it is an uncivilized act against a corpse. Sexual intercourse with animals or bestiality are also a crime as referred to in Article 337 paragraph (1) letter b of Law Number 1 of 2023. Placing homosexuality in the same classification as sexual crimes is an insult to the queer community.

The statement which categorized homosexuality as a sexual deviation is not based on logical arguments. In 1973, the American Psychiatrist Association agreed that homosexuality is not a sexual deviation and officially removed it completely from the list of mental illnesses in the Diagnostic and Statistical Manual (DSM) in 1987.[16] Thus, the Pornography Law has no clear reason to equate homosexuality with sexual deviance or even sexual crimes

Thirdly, Draft on Law Number 32 of 2002 on Broadcasting ("Broadcasting Bill"). Article 28A paragraph (1) letter d prohibits the broadcasting of programs that contain lesbian, homosexual, bisexual, and transgender behavior; Article 46A paragraph (2) letter h prohibits the use of advertising models and promotion of lesbian, homosexual, bisexual, and transgender behavior, and; Article 50B paragraph (2) letter g prohibits the broadcasting of programs or content that contains lesbian, homosexual, bisexual, and transgender behavior. By using the

[16] Guneet Juneja, 'Homosexuality: Not a mental illness', (2021), 7 International Journal of Law,[156].

phrase "behavior", Pornography Law mistaken sexuality as behavior rather than an identity, while it is not a behavior of any kind.[17] Thus, the use of the phrase "lesbian, homosexual, bisexual, and transgender behavior" is an act of stereotyping queer groups based on actions. It is the same thing as describing an action as "female behavior" or "Batak behavior," which both generalizes an identity.

The Broadcasting Bill was intended to limit the freedom of gender minorities to obtain the same opportunities as cisgender heterosexuals to participate in broadcasting. Although the Broadcasting Bill has not yet been officially enacted, the practice of limiting gender minority representation has been going on for a long time. As an example, Circular Letter No. 184/K/KPI/02/2016 issued by the Indonesian Broadcasting Commission in 2016, prohibits the broadcasting of content that includes LGBTQ+ practices, behaviors, and promotion. Therefore, representation of minority gender groups is further narrowed to alienate them from "normality." The more representation of gender minorities declines, the more isolated these groups become from society.

IV. AUTHORITARIAN LEGALITY

Weaponizing regulations to discriminate against gender minorities is an attempt by the regime to practice a legitimized authoritarianism. Such efforts are referred to as authoritarian legality, a situation in which authoritarian leaders use legal instruments to legitimize their actions that undermine democracy. Today, authoritarianism is not only armed by military or practiced by dismantling democratic institutions, but also includes authoritarian actions that are legitimized so that they appear to be lawful. Regimes create discriminatory regulations as a cover for formal legality that appears to be procedurally valid.[18] However, the existence of these regulations actually restricts civil space

Take Hungary under Viktor Orbán and Poland under the Law and Justice Party (*Sprawiedliwość*) as an example. It is obvious that authoritarian legality is applied in democratic countries by implementing elements of democracy in which outcomes

[17] Amy L. Reynoldsa, Margaret E. Manges, Eleanor A. McCabe,Bijan Kashani, Ernesto Mercado Irizarry Aaron Reslink, 'Examining the Intersection of Sexual Orientation andGender on Outness and Identity', (2025), 19 Journal of LGBTQ Issues in Counseling,[199].

[18] Kim Lane Scheppele, 'Autocratic Legalism', (2018), 85 The University of Chicago Law Review.[571]

are predictable.[19] For example, leaders obtain their power through general elections, which is a form of democracy because civilians have the right to choose their leaders. After being elected, these leaders make decisions that undermine democratic values through constitutional changes, control over legal institutions, and restrictions on civil liberties. Therefore, the law is upheld, but not to protect the people, but to protect the power of the authoritarian leader and their entourage. As a result, the narrowing of civil space, which is the concretization of authoritarianism, is legitimized through regulations that justify this narrowing.

Authoritarian legality is a visualization of the transition of the legal system from prioritizing supremacy of law to becoming a tool of the regime to support the government. Therefore, there has been a shift from the rule of law—where law is used to control power—to rule by law—where law is used as a tool of power. In this case, the legal framework is manipulated in a way as to legitimize and strengthen authoritarian leadership.[20]

An increasingly weakened democracy through authoritarian legality poses a real threat to marginalized groups. As a group who are vulnerable to discrimination and restrictions on their fundamental rights, gender minorities as marginalized groups are further cornered by the creation of regulations used to silence them. The Marriage Law, Pornography Law, Broadcasting Bill, and Garut Regency Regulation Number 13 of 2015 are concrete examples of this discrimination. These regulations serve as legitimization of the regime's intention to derogate the rights of gender minorities by limiting their space and representation.

Regimes use discriminatory regulations as a political tool to mobilize public and maintain their power. In this case, regimes exploit society's reluctance to accept gender diversity to create regulations that restrict the movement of gender minorities. The regime's intention to discriminate against gender minorities is clearly going according to plan because gender minorities are often scapegoated by society in many situations. For example, queer groups are particularly vulnerable during elections because of the negative narratives often found in media, followed by discriminatory regulations issued during the election period. This was proven through AJI (Independent Journalists Alliance) and Monash University report

[19] Alfeus Jebabun, 'Autocratic Legalism in the 2024 Election: Distortions of the Rule of Law in Indonesia's Democracy', (2025), 26 Sociae Polites.[78].

[20] Fiona Shen-Bayh, *Autocratic Legalism* (The Oxford Handbook of Authoritarian Politics 2024).[2].

which shows that compared to other groups, queer groups received the highest number of hate speech, namely 4,779 instances of hate speech.[21]

The existence of discriminatory regulations against gender minority is not without reason. The regime plays an important role in drafting such regulations to derogate the fundamental rights of gender minority groups while exploiting the conservative nature of society to repress gender minority groups. In this way, the regime maintains its power by stifling democracy for marginalized groups and gaining public sympathy by perpetuating discrimination against gender minorities.

V. ISLAM, MEDIA AND REGIME

Discussing the current position of gender minorities in Indonesia cannot be separated from the historical context that has bound them for decades. The current massive public moral panic stems not solely from Western influence, as often echoed in mainstream discourse, but from socio-cultural and political conditions, particularly during the democratic transition following the authoritarian rule of Suharto's New Order regime (1966-1998).[22] The encounter with modern minority gender identity discourse (LGBTQ), along with its relevance to local practices, has led to the argument that Indonesian culture is actually tolerant of homosexuality. In fact, transgender women and/or men with feminine behavior frequently appear in locally produced films and television shows, and there has been no government effort to ban or censor any gender subversion in the media.[23]

The existence of gender minorities during the New Order era was not perceived as a direct political threat with the potential to destabilize the country. Meanwhile, during that era, Suharto restricted the movement of Islamic organizations due to the Single Principle of Pancasila, enacted through Law No. 8 of 1985 concerning Mass Organizations and Law No. 3 of 1985, as well as MPR Decree No. II/MPR/1978 concerning Guidelines for the Understanding and Implementation of Pancasila (P-4), which emphasized that everything in Indonesia must be based

[21] Ika Idris; Derry Wijaya; Nurul Amalia; Lucky Susanto; Musa Wijanarko, *Laporan Pemantauan Ujaran Kebencian di Pilkada 2024* (Aliansi Jurnalis Independen Indonesia 2025).[31].

[22] Hendri Yulius Wijaya, *Intimate assemblages: The politics of queer identities and sexualities in Indonesia*. (Springer Nature, 2020), [4].

[23] Ben Murtagh, *Genders and sexualities in Indonesian cinema: Constructing gay, lesbi and waria identities on screen*. (Routledge, 2013), [11].

on Pancasila. This depoliticization was applied to all levels of society, including schools, universities, and the general public. New Order regulations only permitted cultural diversity and expression as long as they did not challenge the unitary state and its dominant authority.[24] Efforts to suppress political Islam were accompanied by efforts to promote non-politicized forms of Islamic and other religious teachings. It was hoped that Islamic teachings could serve as 'a foundation for public morality, a shield against Western liberalism, and an antidote to communism'.[25] However, the principle of 'asas kekeluargaan'[26], a myth rooted in the post-genocide anti-communist tendencies of members of the Indonesian Communist Party (PKI), left-wing activists, and their sympathizers, has expanded the ideology of sexuality used to justify the state's implementation of heteronormative and gender-based family principles—voiced by the New Order regime, becoming an inseparable part of how Indonesian society imbues itself with its identity, namely men with the role of father who controls all family movements and women with domestic roles who are required to care for and obey—especially the father. Being an Indonesian citizen means to create and maintain a family that is as good as possible. This understanding has penetrated so deeply that men who are attracted to the same sex decide to enter into marriage so that they are considered whole with their masculinity. Their choices are to maintain the marriage with a woman and hope that one day the homosexuality will fade or choose to divorce and continue their relationship with a man—knowing that at least the status of being married is attached and he can be seen as an "ideal" man. These heterosexually married "homosexual" subjects not only signaled how culturally distant the concept of "gay" was for many Indonesians at the time; they also embodied the interplay between ideologies of the state, nation, and sexuality.[27] This landscape did not imply that the state and society supported people with same-sex desires or individuals with overtly transgressive gender expressions. Rather, the New Order regime considered "national instability" the most likely consequence of heterosexual relations outside of marriage. In line with this

[24] Kathryn Robinson, 'Sawerigading vs. Sharia: Identities and political contestation in decentralised Indonesia', (2011), 39 Asian Journal of Social Science, [237].

[25] Robert W. Hefner, *Civil islam: Muslims and democratization in Indonesia*. (Princeton University Press, 2011), [59].

[26] Julia Suryakusuma, *The State and Sexuality in New Order Indonesia: Fantasizing the Feminine in Indonesia.* (Duke University Press, 1995), [102].

[27] Tom Boellstorff, 'Between religion and desire: Being Muslim and gay in Indonesia', (2005), 107 *American Anthropologist*, [577].

concern, the regime primarily positioned and instilled traditional heterosexual family principles as the state's gender ideology.[28]

Dédé Oetomo continues to demonstrate that local society was initially sexually and sensually diverse. The implication of this understanding is that negative attitudes toward homosexuality can be considered alien to traditional Indonesian culture, as these homophobic sentiments are a result of the influx of organized religions and modern bourgeois values into society:

These traditional forms of homosexuality, along with their cultural context, are threatened by the influx of organized religions, particularly Islam and Christianity. The adoption of modern bourgeois values has also alienated some Indonesians from our traditional culture.[29]

In addition to Lambda Indonesia and GAYa Nusantara, which work on issues surrounding homosexuality, lesbian groups in Indonesia such as SAPHO and the Indonesian Lesbian Association (Perlesin) also contributed to education and advocacy. Unfortunately, records of lesbian movements during this period are scarce. Furthermore, tensions between lesbian activists and gay men can arise due to the persistence of misogynistic attitudes among gay activists.[30] In addition to their commitment to encouraging lesbians to accept their homosexuality and providing safe spaces for lesbians to socialize, in the early stages of their movement, lesbian activists also provided life skills training for lower-class lesbians to improve their quality of life.[31]

There is a link between gender minority activism in Indonesia and its democratization since 1998, precisely at a time when globalization and gender minority rights have become increasingly prominent. Indonesia's democratization has led to conservative Islamic forces gaining more political power in the public sphere, while simultaneously opening up space for LGBT activists to advocate for the acceptance of gender minority identities.[32] Examining Indonesian gender and sexuality politics at this historical juncture reveals the rapidly shifting streams of

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28 Hendri Yulius Wijaya, *Intimate assemblages: The politics of queer identities and sexualities in Indonesia*. (Springer Nature, 2020).

29 Oetomo-Oen, Dédé T. 1982. "Charting Gay Politics in Indonesia." Unpublished Manuscript.

30 Hendri Yulius Wijaya and Sharyn Graham Davies, *Activists in Transition: Progressive Politics in Democratic Indonesia*, (Ithaca, NY: Cornell University Press, 2019). [155].

31 RR. Agustine, 'Rahasia Sunyi: Gerakan Lesbian di Indonesia', (2008), 58 Jurnal Perempuan, [65].

32 Hendri Yulius Wijaya, *Intimate assemblages: The politics of queer identities and sexualities in Indonesia*. (Springer Nature, 2020), [114].

power and political contestations of diverse figures, commitments, and beliefs[33] in their attempts to engage with the state and, subsequently, shape democratic orientations. Here, LGBT activists, utilizing available democratic mechanisms, seek to create pathways to participation in various state institutions to "transform" the orientation of the nascent democracy.

Of course, at the heart of this new dynamic are the citizenship mechanisms adopted and reshaped by local activists to demand recognition and protection from the state, as they face increasingly violent attacks from conservative groups. Sexual citizenship mechanisms, interwoven with human rights paradigms, gain significant value for activists as they confront the narrowing of democratic principles and the rapid escalation of violence and attacks from conservative groups. Consequently, as activists repurpose these mechanisms in their local contexts, they also transform the connection between their sexual identities and claims of national membership in pushing the government to include gender minorities as legitimate citizens. In this process, local activists highlight and mobilize their 'wounds' particularly to hold the state accountable for the complexities experienced by Indonesia's gender minorities.

Wijaya also shows that the narrative of "wound" developed by local activists has been productive, particularly because this rhetoric creates a new entry point for gender minorities to claim a place in national membership, by showcasing and highlighting the 'unfulfilled promises'[34] of democratic reforms for gender minorities.

Another equally important factor is social inequality and political pressure, which create space for fundamentalism to grow. Social conditions such as poverty, injustice, and political oppression trigger collective frustration that is then channeled into violent and exclusive religious expressions.[35] In these conditions, religion is used as a means of liberation and identity, as well as a form of resistance to established socio-political structures.

In the reform era or post-New Order, threats to state stability no longer stem from armed rebellion, but rather from horizontal conflict and social pressure. Often, the

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[33] Davina Cooper, *Feeling Like a State: Desire, Denial, and the Recasting of Authority*. (Durham and London: Duke University Press, 2019), [61].

[34] Hendri Yulius Wijaya and Sharyn Graham Davies, *Activists in Transition: Progressive Politics in Democratic Indonesia*, (Ithaca, NY: Cornell University Press, 2019). [160].

[35] Fauzan. 'Fundamentalisme Dalam Islam.' (2010), 5 Al-Adyan: Jurnal Studi Lintas Agama, [54].

state takes "safe" actions by accommodating pressure from dominant groups. In the context of this research, dominant groups refer to conservative groups that reject gender and sexual diversity, each with its own arguments. Some groups argue that gender and sexual diversity contradict moral values and religious teachings.[36] Indonesia's transition to democracy after the collapse of Suharto's New Order regime, on the other hand, opened opportunities for conservative Islamic groups to gain political power in society.[37] This is because, unlike during the New Order, Islamic groups are not restricted by the state to maintain the regime's political stability. In fact, they ride on populist campaigns that promise or embody patriarchy.[38] These dynamics contribute to discrimination against gender minorities in Indonesia, in the post-New Order context.

In addition to applicable laws and practical political dynamics, understanding the state's view on the existence of gender minorities can be done through queer representation in electronic and journalistic media. Regarding the existence of gender minorities after the New Order or reform era, this study refers to the chronology by Wijaya[39], namely the democratic regime (1998-2015) and the moral panic towards LGBTQ+ (2016-present). During the democratic regime, there were several electronic media in the form of films and television shows that included the presence of gender minorities and sexual orientations other than heterosexual, such as the film "Arisan!" (2008) which featured a homosexual character and "Lovely Man" (2011) which featured a transgender character and discussed the social stigma against transgender women, also the television show "Dorce Show" which aired on TransTV with Dorce Gamalama, a transgender public figure. Despite the dismissal of the show, Dorce still frequently appears on television and is the subject of discussion in popular media.[40] The visibility and representation of queer people in Indonesian media at the beginning of the reform era—alongside conservative

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36 Toba Sastrawan Manik and others, "Eksistensi LGBT Di Indonesia Dalam Kajian Perspektif HAM, Agama, Dan Pancasila" (2021) 18 Jurnal Kewarganegaraan 84 <https://doi.org/10.24114/jk.v18i2.23639>, [85].

37 Hendri Yulius Wijaya, "Conservative Islamic Forces, Global LGBT Rights, and Anticipatory Homophobia in Indonesia," In Public Discourses About Homosexuality and Religion in Europe and Beyond (2020) <https://doi.org/10.1007/978-3-030-56326-4_15>, [327].

38 Kathryn Robinson, "Masculinity, Sexuality and Islam: The Gender Politics of Regime Change in Indonesia," *Sex and Sexualities in Contemporary Indonesia* (Routledge 2014), [56].

39 Hendri Yulius Wijaya, "Intimate Assemblages: The Politics of Queer Identities and Sexualities in Indonesia," *Conservative Islamic Forces, global LGBT rights, and anticipatory homophobia in Indonesia* (Springer Nature Singapore Pte Ltd 2020) <https://doi.org/10.1007/978-981-15-2878-1>.

40 Ben Murtagh Jr, "Double Identities in Dorce's Comedies: Negotiating Gender and Class in New Order Indonesia Cinema" (2017) 173 Bijdragen Tot De Taal-, Land- En Volkenkunde 181, [183]

Islamic groups that were also increasingly showing their presence and strengthening their socio-political positions—was somewhat quite progressive.

2016 was a crucial year for gender minority groups in Indonesia and significantly influenced the political climate of the past few years. At that time, a moral panic arose in society regarding the existence of LGBTQ+ people. This was sparked by the Family Love Alliance (AILA), an organization consisting of middle-class Muslim women, which proposed amendments to the Criminal Code (KUHP) to criminalize consensual same-sex and extramarital sex.[41] As reported by the Jakarta Post, earlier that year, Minister of Research, Technology, and Higher Education at the time, Muhammad Nasir, also stated that the LGBT community was damaging the nation's morals, and that universities should uphold Indonesia's moral and ancestral values. This statement was in response to the establishment of the Support Group and Resource Center on Sexuality Studies (SGRC) under Universitas Indonesia (UI).[42] In other words, 2016 can be understood as an expansion of supervision and control over all sexual orientations outside of marriage within the LGBT community in Indonesia—control that is based on a power struggle in a decentralized and unstable country.[43]

Reporting on gender minorities also serves as a platform to reinforce ideological narratives or values held through media framing. Journalistic media portals in Indonesia have their own patterns in framing gender minorities or LGBTQ+ media. Syam and others[44] compared media framing by journalistic media outlets Republika.co.id and Tempo.co. The article explains that Republika was born from the Indonesian Muslim Intellectuals Association (ICMI), so the content of its columns and articles is based on Islamic values and perspectives to act as a check on the public—who are unfriendly to gender minorities. On the other hand, Tempo, founded in 1971, is known as a movement media outlet. It was banned by

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41 Hendri Yulius Wijaya, "Conservative Islamic Forces, Global LGBT Rights, and Anticipatory Homophobia in Indonesia," *In Public Discourses About Homosexuality and Religion in Europe and Beyond* (2020) <https://doi.org/10.1007/978-3-030-56326-4_15>, [337].

42 Diego García Rodríguez and Ben Murtagh, "Situating Anti-LGBT Moral Panics in Indonesia: Homophobia, Criminalisation, Acceptance, and Religiosity" (2022) 50 Indonesia and the Malay World 1 <https://doi.org/10.1080/13639811.2022.2038871>, [3]

43 Sharyn Graham Davies, "Indonesia's Anti-LGBT Panic" [2016] *East Asia Forum Quarterly* <https://search.informit.org/doi/10.3316/informit.337964851307684> accessed December 29, 2025.

44 Hamdani M Syam and others, "Ideology and Media Framing: Stigmatisation of LGBT in Media Coverage in Indonesia" (2021) 37 Jurnal Komunikasi: Malaysian Journal of Communication 59 <https://doi.org/10.17576/jkmjc-2021-3701-04>, [62-63]

the New Order regime in 1982 for its vocal criticism of the government, then later re-emerged after signing an agreement with the then Minister of Information. To this day, Tempo presents news with a vision of freedom of opinion and thought, with one of its missions being "to produce independent products free from all pressure by accommodating and distributing fair and diverse voices."

Media play of news related to gender minorities has also become an opportunity for political elites. They exploit public rejection, hostility, as well as mainstream narratives of the dominant religion toward gender minorities, by constructing a religious and moralist image and promoting heteronormativity, convincing the public that they are figures capable of "overcoming" gender minorities or LGBTQ+ groups— which then can legitimize their political power. Essentially, discriminatory public views toward gender minorities in Indonesia have been influenced by the ruling regime and have consistently become a "sexy" commodity for the elites.

VI. FEMINIST LEGAL THEORY (FLT)

Feminist Legal Theory (FLT) or also known as Feminist Jurisprudence first emerged during the 1970s, alongside the development of Critical Legal Studies (CLS) as an intellectual movement that sought to challenge the operation of law in relation to women and the discrimination experienced by women within the legal system.[45] The rise of Feminist Legal Theory (FLT) represents an antinomy to the inequalities produced by a legal system that has long been promoted as "Justice for All", being neutral, objective, and equal for everyone.[46] The concept of legal neutrality is based on a view that legal rules and its enforcement mechanism are objective, universal, and unconnected to particular cultural and political interests. In the classical liberalism framework, this assumption is regarded as a guarantee of justice because the law is presumed to treat everyone equally.[47]

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[45] Aditya Yuli Sulistyawan, Feminist Legal Theory dalam Telaah Paradigma: Suatu Pemetaan Filsafat Hukum (2018) 47 Masalah-Masalah Hukum 56 https://ejournal.undip.ac.id/index.php/mmh/article/viewFile/18912/13376 accessed 22 December 2025.

[46] *Ibid*.

[47] Indah Ratnanun, Turnip Mega Marta, Zahrah Khan, Khairunnisa Zain Dzakiyah and Elviandri, Feminist Legal Theory: Perjuangan Kesetaraan dalam Struktur Hukum (2025) 6 Judge: Jurnal Hukum 1440 https://journal.cattleyadf.org/index.php/Judge/article/view/1882/1041 accessed 22 December 2025

From the feminist's lens, law is fundamentally not neutral but rather reflects the prevailing political philosophy. In patriarchal societies, law is viewed primarily through a male perspective because men are the ones who draft legal rules and embed their interests.[48]

Terminologically, the word 'feminist' itself is an adjective form of 'feminism' which refers to a theory concerning political, economic, and social equality based on gender.[49] According to the Oxford Dictionary of Law, Feminist Legal Theory is defined as "A broad movement that seeks to show how conventional legal theory, far from being gender-blind, ignores the position and perspective of women". At its core, Feminist Legal Theory analyzes how law constructs and regulates gender, sexuality, and identity while also examining how gender shapes legal norms, procedures, and outcomes.

Feminist Legal Theory arises from a long and complex intellectual struggle within the broader landscape of feminism.[50] In the international context, feminism has developed through various theoretical perspective starting from liberal traditions, radical feminism that critiques patriarchal structures, Marxist feminism that highlights class relations and economic factors, postcolonial feminism that examines the impact of colonialism on women, to postmodern feminism that emphasize the intersection of identities such as gender, race, sexual orientation, and class, in the experience of law and social inequality.[51]

Postmodern feminism is regarded as one of the initial foundations for the development of Feminist Legal Theory (FLT) that is able to accommodate the formulation of inclusive regulation, including for gender minorities. Unlike liberal or radical feminism which still assumes the existence of "women" as a relatively homogenous category, postmodern feminism rejects essentialism and emphasizes the diversity of identities.[52] Postmodern feminism arose from the concept of the 'Liyan', which they sought to reclaim and reinterpret in order to produce new

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48 *Ibid*.

49 Triantono, 'Feminist Legal Theory dalam Kerangka Hukum Indonesia' (2023) 1 Progressive Law and Society (PLS) 21.

50 *Ibid*.

51 Indah Ratnanun, Turnip Mega Marta, Zahrah Khan, Khairunnisa Zain Dzakiyah and Elviandri, Feminist Legal Theory: Perjuangan Kesetaraan dalam Struktur Hukum (2025) 6 Judge: Jurnal Hukum 1436 https://journal.cattleyadf.org/index.php/Judge/article/view/1882/1041 accessed 22 December 2025.

52 *Ibid., 1439*.

perspectives.[53] Postmodern feminism believes that 'Liyan' can criticize dominant structures such as discrimination against gender minorities. This type of feminism is mostly influenced by Michael Foucault's ideas on power relations and knowledge, as well as Jacques Derrida's deconstruction of language and legal texts.[54] Feminist figures such as Judith Butler later developed the idea that gender is not a fixed identity but is formed by social construct and performative practices.[55] In legal studies, this perspective encourages critical analysis towards the formation of legal categories, such as family, labor, and equality, which are constructed through the legal language and reflect the dominance of masculine norms.

Feminist Legal Theory (FLT) through postmodern feminism can serve as a solution for the formulation of more inclusive legal instruments. In the process of law-making, Sweden has implemented Feminist Legal Theory through the launch of its feminist foreign policy in 2014.[56] The policy is based on intersectionality, which means taking into account the fact that people have different living conditions, levels of influence and needs. Furthermore, in Canada, the Government has adopted GBA Plus (Gender Based Analysis Plus) as a framework to ensure that policies and law are analyzed through a gender and diversity lens. The Netherland exemplifies Feminist Legal Theory (FLT) through its legalization of same-sex marriage and robust anti-discrimination laws. Unfortunately, Indonesia demonstrates minimal and inconsistent application of feminist legal theory. Gender minorities rights remain unrecognized and public discourse around gender and sexuality is often framed with heteronormative and moralistic narratives. Thus, the implementation of Feminist Legal Theory in Indonesia has so far only resulted in regulations that focus on fulfilling women's rights (e.g. The Indonesian Criminal Code).

Considering the practices in Sweden, Canada, and the Netherlands, the Indonesian government needs to seriously adopt Feminist Legal Theory (FLT) grounded in postmodern feminism in the process of law-making and public policy formulation.

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53 Nadya Karima Melati, *Membicarakan Feminisme* (Mojok Group 2019) 18.

54 Indah Ratnanun, Turnip Mega Marta, Zahrah Khan, Khairunnisa Zain Dzakiyah and Elviandri, Feminist Legal Theory: Perjuangan Kesetaraan dalam Struktur Hukum (2025) 6 Judge: Jurnal Hukum 1439 https://journal.cattleyadf.org/index.php/Judge/article/view/1882/1041 accessed 22 December 2025

55 *Ibid*.

56 Handbook – Sweden's Feminist Foreign Policy (Government Offices of Sweden, August 2018) https://www.swedenabroad.se/globalassets/ambassader/zimbabwe-harare/documents/handbook_swedens-feminist-foreign-policy.pdf accessed 22 December 2025.

The implementation of Feminist Legal Theory (FLT) should not be limited by fulfilling women's rights only but also directed to creating an inclusive regulation for all diverse legal subjects.

VII. CONCLUSION

The existence of Human Rights Law as a framework for the protection and fulfillment of every person's fundamental rights is not being implemented as it should be. In practice, Human Rights Law is often used to legitimize discrimination and criminalization of gender minorities. Although this phenomenon arises from misinterpretation of Human Rights Law, it illustrates the repressive behavior that is still being practiced against marginalized groups. In fact, there are regulations that are specifically intended to repress gender minorities as a marginalized group. For example, Marriage Law, Pornography Law, Broadcasting Bill, and Garut Regency Regulation Number 13 of 2015 trap gender minorities in a loophole then criminalize them. Regulations that are supposed to protect have been transformed into a weapon to discriminate and criminalize marginalized groups.

Repressive regulations against gender minorities are a manifestation of authoritarian legality, a condition in which law no longer functions as an instrument of power control that emphasizes the supremacy of law, but rather as a tool for the regime to legitimize its efforts to maintain and strengthen its power. Procedurally, the formation of these regulations appears to be legitimate, but the regime has inserted provisions to restrict civil liberties and narrow the space for democracy. As a marginalized group, gender minorities should be protected by law. However, the regime uses the law to discriminate against gender minorities. This is intended to gather sympathy by exploiting conservative sentiments in society regarding gender diversity. Therefore, gender minorities are turned into scapegoats by perpetuating structural discrimination. Such actions were taken by the regime solely to maintain the stability and sustainability of its power.

The fact that gender minority groups are not directly perceived as a serious political threat does not necessarily mean they are exempt from discrimination. The family-based ideology promoted by Suharto undoubtedly indirectly narrowed their identities, forcing them to merge with heteronormativity. The depoliticization imposed on all members of society, including Islamic-based organizations, is one of the roots of the discrimination perpetrated by these groups in the post-reform era.

During the reform era, the position of conservative Islamic groups strengthened socio-politically. This influenced public acceptance of gender minorities. Nevertheless, there was still visibility and representation of queer individuals in electronic media through films and television shows. However, in 2016, a moral panic occurred, triggered by queerphobic statements from public officials and Family Love Alliance (AILA)'s request for amendments to the Criminal Code (KUHP). In the media itself, gender minorities were reported with varying narratives by various media outlets, each based on their own vision and mission. Through the media, political elites exploited hatred and rejection, as well as the dominant religion's mainstream narratives toward gender minorities, to construct an image that aligned with societal values—namely, one that was hostile to gender and sexual diversity.

The core principles of postmodern feminism, anti-essentialism, legal deconstruction, critique of legal language as a site of power relations, and recognition of the plurality and relativity of experiences, demand that Indonesian law no longer based on the assumption of a universal legal subject that is masculine and heteronormative. Through this approach, the state is encouraged to create regulations that accommodate diversity in identity, experience, and needs, including gender and sexual minority groups that have historically been marginalized. Therefore, the application of Feminist Legal Theory (FLT) based in postmodern feminism represents a strategic step toward achieving substantive justice and inclusive law in Indonesia.

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The Conflict Between Freedom of Expression as a Human Right and the Criminalization of Digital Content: An Analysis of the Criminal Code and the ITE Law

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ABSTRACT: The criminalization of digital content remains a crucial issue in the enforcement of human rights and justice in Indonesia, particularly regarding restrictions on freedom of expression in the digital space. The application of Article 27 paragraph (3) of the 2024 ITE Law and Articles 240 and 241 of the 2023 Criminal Code often creates tension between criminal law enforcement and human rights protection. Norms that are still open to multiple interpretations and overlapping often create legal uncertainty, the potential for criminalization of public criticism, and hinder the achievement of structural justice in access to legal protection. This study aims to analyze the application of both regulations in practice and assess the urgency of norm harmonization based on Gustav Radbruch's theory, which emphasizes the balance between justice, legal certainty, and utility. The method used is normative juridical with a statutory and conceptual approach, using primary legal materials (the 1945 Constitution of the Republic of Indonesia, the ITE Law, the 2023 Criminal Code) and secondary legal materials (scientific literature, reports from institutions related to digital rights, and related journal articles). The analysis was conducted descriptively and prescriptively to identify conflicting norms and their implications for freedom of expression. The results indicate that the existence of two criminalization regimes governing similar acts creates legal uncertainty, the risk of abuse of authority, a chilling effect, and obstacles to structural justice. This situation demonstrates the need for harmonization of the ITE Law and the 2023 Criminal Code to guarantee the protection of freedom of expression, strengthen digital democracy, and ensure the consistent application of the principles of the rule of law and good governance.

Keywords: Freedom of Expression; Criminalization of Digital Content; Gustav Radbruch's

I. INTRODUCTION

In recent years, the rapid development of information and communication technology (ICT) has opened up a vast space for digital expression. Social media has become an online platform, serving as a primary means for people to express their opinions, criticisms, and aspirations. Indonesia is witnessing a high internet penetration rate. Data from the Indonesian Internet Service Provider Association (APJII) predicts that by 2025, approximately 80.66%, or 229,428,417 million Indonesians, will be internet users.[1] This reflects that digital space is no longer merely a means of communication, but has become a crucial platform for exercising the right to freedom of expression, a fundamental human right. Freedom of expression is a fundamental human right expressly guaranteed in the Indonesian constitution.[2] Based on Article 28 E paragraph (3) of the 1945 Constitution of the Republic of Indonesia, it states that "everyone has the right to freedom of association, assembly and expression of opinion," thus providing a normative basis that the state is obliged to respect, protect and fulfill the freedom of citizens to express thoughts, criticism and information without intimidation or criminalization.[3] However, the expansion of digital space now brings significant challenges to legal regulations. As stated in the literature of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions (ITE Law), Article 27 Paragraph (3) is often used as an instrument to limit digital freedom of expression, with articles that are "rubber" and potentially open to multiple interpretations, such as the terms "violating decency," "insult," or "hate speech" which do not have clear definitions.[4] In the development of law enforcement practices in Indonesia, a social phenomenon has emerged that law enforcement officials' attention and response to an event often increases after the issue receives widespread attention in the digital space. This phenomenon, known in public discourse as "no viral, no justice," reflects a situation where public expression through social media is seen as an

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1 "APJII Rilis Data Terbaru 2025: Pengguna Internet di Indonesia Capai 229 Juta Jiwa" (7 August 2025), online: *Teknologi.id* <https://teknologi.id/tekno/apjii-rilis-data-terbaru-2025-pengguna-internet-di-indonesia-capai-229-juta-jiwa>.

2 Muhammad Irfan Pratama, Abdul Rahman & Fahri Bachmid, "Kebebasan Berpendapat dan Berekspresi di Media Sosial dalam Perspektif Hak Asasi Manusia" (2022) 3:1 Qawanin J Ilmu Huk 1–16, online: <https://jurnal.fh.umi.ac.id/index.php/qawaninjih/article/view/406>.

3 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Pasal 28E ayat (3).

4 Undang-Undang Republik Indonesia Nomor 1 Tahun 2024 tentang Perubahan Kedua atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik, Pasal 27 ayat (3).

alternative means to promote accountability and obtain justice.[5] The criminalization of digital content through the ITE Law has drawn widespread criticism, particularly regarding insults and hate speech. This lack of clarity has given rise to the phenomenon of the criminalization of digital content, where expressions, criticisms, or opinions that should fall within the bounds of freedom of expression are treated as criminal offenses.

The urgency of this research becomes even clearer when considering recent data on violations of freedom of expression in the digital space. Data from the 2023 Digital Rights in Indonesia Situation Report notes that the criminalization of digital expression occurs nationally, with numerous cases reported under the ITE Law in various regions, including "revenge reports" that demonstrate the use of the ITE law as a tool of revenge.[6] On the other hand, based on SAFEnet records as quoted by Kompas, during 2024 there were 146 cases of violations of digital freedom of expression with 170 victims, followed by 330 cases of digital attacks in the form of doxing, hacking, and threats.[7] This fact demonstrates that despite the vast number of digital users, the space for expression remains weak and vulnerable to legal intimidation. From a normative perspective, the conflict between human rights protection and digital law enforcement efforts creates a serious conflict. Human rights theory teaches that freedom of expression must be protected by the principles of legality, necessity, and proportionality.[8] One of the philosophical theories that is relevant to the assessment of digital regulation is Gustav Radbruch's theory, which states that perfect law must balance three basic principles, namely justice, legal certainty, and utility.[9] However, on the other hand, there is a problem with legal uncertainty in this research. Because in today's digital age, everyone certainly has a gadget and has the right to use technology to report or publish information. This action also has a legal basis regarding Article 28E of

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5 Arthur Josias Simon Runturambi, Munarni Aswindo & Eliza Meiyani, "No Viral No Justice: A Criminological Review of Social Media-Based Law Enforcement from the Perspective of Progressive Law" (2024) 12:1 J IUS Kaji Huk Dan Keadilan 177–195, online: <https://jurnalius.ac.id/ojs/index.php/jurnalIUS/article/view/1361>.

6 *Digital-Rights-in-Indonesia-2023.pdf*, online: <https://www.icnl.org/wp-content/uploads/Digital-Rights-in-Indonesia-2023.pdf>.

7 Safenet Voice, "Situasi Hak-Hak Digital Indonesia 2024 Menunjukkan Estafet Represi di Internet - SAFEnet" (17 February 2025), online: <https://safenet.or.id/id/2025/02/situasi-hak-hak-digital-indonesia-2024-menunjukkan-estafet-represi-di-internet/>.

8 Gehan Gunatilleke, "Justifying Limitations on the Freedom of Expression" (2021) 22:1 Hum Rights Rev 91–108, online: <http://link.springer.com/10.1007/s12142-020-00608-8>.

9 Mutia Evi Kristhy et al, "The Role of Judges in Realizing the Three Basic Legal Values Reviewed from Gustav Radbruch's View" (2024) 1:3 J Polit Leg Sovereignty 87–91, online: <https://acityajournal.com/index.php/jpls/article/view/81>.

the 1945 Constitution as the right of every person to freedom of opinion and expression. This is a similar problem that arises in the 2023 Criminal Code, specifically Articles 240 and 241 concerning insults against the government or public officials, as if officials do not accept criticism from the public, because it has the potential to limit political criticism and establish a criticism-sensitive regime in Indonesian criminal law.[10] This could open up opportunities for abuse of the law against legitimate criticism.

Based on the background we discussed, the problem formulation in this study refers to two main things. First, how the application of Article 27 paragraph (3) of the ITE Law No. 1 of 2024 and Articles 240 and 241 of the 2023 Criminal Code gives rise to the practice of criminalizing digital content against acts of expression, criticism, and conveying public opinions in the digital space. Second, to what extent the phenomenon of digital content crime shows the need for harmonization between the articles in the ITE Law and the 2023 Criminal Code, especially regarding insults and defamation, to test whether they are in harmony or in conflict with the principles of Gustav Radbruch's theory.

Practically, this research develops a study on the limitations of freedom of expression in the realm of Indonesian digital law, particularly regarding the criminalization of digital content through the ITE Law and the 2023 Criminal Code. In addition, this research provides a theoretical perspective by linking the application of both regulations with the principles of justice, legal certainty, and utility in Gustav Radbruch's theory. Practically, this research serves as a reference material regarding the problems related to the criminalization of digital content that still occur in society. The results of this analysis can be used as evaluation material for policymakers to refine the formulation of articles on insults and defamation in the ITE Law and the 2023 Criminal Code to be more in line with human rights principles. This research can also help media journalists, activists, and legal practitioners in understanding the legal limitations when expressing themselves in the digital space, thereby preventing the misuse of criminal provisions that can hinder freedom of expression.

After analyzing previous research, we discovered differences or gaps with this study. Research by Alya Rahmadani et al. (2024) highlighted the same issue

[10] Alfina Koriahningsih, "Problematika Politik Hukum Penerapan Kriminalisasi Dalam KUHP Baru: Tinjauan Terhadap Pasal Penghinaan Presiden dan Wakil Presiden" (2024) 6:2 J Huk Leg 205–217, online: <https://jurnal.umko.ac.id/index.php/legalita/article/view/1539>.

regarding multiple interpretations of the ITE Law, which creates legal uncertainty and creates the perception that the regulation is used as an instrument to restrict freedom of expression in the digital space.[11] Meanwhile, according to research by Tommi Imanuel et al. (2023), it is also emphasized that freedom of expression in the digital era is influenced by technology, but is still overshadowed by the threat of criminalization through certain articles in the ITE Law, which is mapped through a SWOT analysis as strengths, weaknesses, opportunities, and threats to the public space of expression.[12]

Compared to the two previous studies, this study has a different focus, where there has been no study linking the ITE Law with the 2023 Criminal Code, particularly on the issue of articles on insulting the government and public officials, especially the relationship between Article 27(3) of the ITE Law No. 1 of 2024 and Articles 240 and 241 of the 2023 Criminal Code to identify the potential criminalization of digital content as a new form of restriction on freedom of expression in the era of digital challenges. In addition, this study proposes to harmonize the two regulations, namely Article 27(3) of the ITE Law No. 1 of 2024 and Articles 240 and 241 of the 2023 Criminal Code based on the principle of legal ideals according to Gustav Radbruch's theory to create just regulations. This is a novelty from the two previous studies. Therefore, this study will examine in depth and provide a more comprehensive academic contribution because it discusses conflicts of norms, overlapping regulations, and their impact on the digital expression space in more depth.

II. METHODOLOGY

This study uses normative juridical research, namely a legal approach method that focuses on examining primary, secondary, and tertiary legal materials to answer the problems that are the focus of the research. This approach was chosen because the issue studied is a conflict of norms and legal uncertainty in regulations that

[11] Alya Rahmadani et al, "REGULASI DIGITAL DAN IMPLIKASINYA TERHADAP KEBEBASAN BERPENDAPAT (STUDI KASUS: UU ITE PADA PLATFORM MEDIA SOSIAL DI INDONESIA)" (2024) 2:1 J Soc Contempl 1–18, online: <https://idereach.com/Journal/index.php/JSC/article/view/75>.

[12] Tommi Imanuel, Warjio & Indra Fauzan, "Analysis of Freedom of Expression in the Digital Age in the Issue of Electronic Information and Transaction Law in Indonesia" (2023) 12:4 PERSPEKTIF 1117–1126, online: <https://ojs.uma.ac.id/index.php/perspektif/article/view/9875>.

have the potential to limit freedom of expression in the digital space. The approach used in this study, which consists of the Statute Approach to examine the provisions of Article 27 Paragraph 3 of Law Number 1 of 2024 concerning Electronic Information and Transactions, Articles 240 and 241 of the 2023 Criminal Code, as well as constitutional regulations in Articles 28E and 28F of the 1945 Constitution of the Republic of Indonesia regarding freedom of expression. This approach aims to assess consistency, harmony, and determine the potential for conflict between norms in criminal law in Indonesia. In addition, the Conceptual Approach is used to understand and analyze basic concepts such as freedom of expression, criminalization of digital content, and defamation, including the use of Gustav Radbruch's legal ideals which emphasize the values of justice, legal certainty, and utility as an analytical framework in assessing the accuracy of the formulation of articles in the ITE Law and the 2023 Criminal Code, in addition, the structural justice perspective is used as a supporting framework to determine the impact of the application of norms in law enforcement practices, particularly regarding power relations between the state, public officials, and citizens. Data sources include primary legal materials in the form of Articles 28E and 28F of the 1945 Constitution of the Republic of Indonesia, the ITE Law No. 1 of 2024, the 2023 Criminal Code, especially articles 240 and 241, secondary legal materials such as books, journals, academic articles, and reports from institutions such as SAFEnet. All legal materials were collected through literature studies, then analyzed using descriptive analysis techniques to describe normative conditions, interpretative analysis to interpret articles that have the potential for multiple interpretations, comparative analysis to assess the relationship and potential overlap between the ITE Law and the 2023 Criminal Code, and analysis of Gustav Radbruch's theory as part of legal philosophy to be used for normative analysis to adjust the ITE Law regulations to the principles of legal ideals according to Gustav Radbruch's theory. This research is descriptive-analytical, namely describing legal facts and analyzing them critically to find clarity regarding the limitations and harmonization of regulations in order to protect freedom of expression in the digital space.

III. ANALYSIS OF THE IMPLEMENTATION OF ARTICLE 27 PARAGRAPH (3) OF THE ITE LAW NO. 1 OF 2024 AND ARTICLES 240 AND 241 OF THE 2023 CRIMINAL CODE IN THE CRIMINALIZATION OF DIGITAL CONTENT

Reviewing the implementation of Article 27 paragraph (3) of the ITE Law No. 1 of 2024 which prohibits the dissemination of content containing insults and defamation, together with Articles 240 and 241 of the 2023 Criminal Code which regulate insults against the government or public officials, has had a significant impact on freedom of expression in the digital world.[13] Normatively, both regulations are designed to maintain public order and protect both the public and state institutions. However, the reality shows the opposite tendency, as these articles are often used as instruments to restrict legitimate expression, including public criticism of state policy.[14]

Article 27, paragraph 3 of the ITE Law, has been criticized from the outset by various digital law experts for its openness to interpretation and lack of clear definitions of "insult," "honor," or "defamation." This lack of clarity in definition makes the norm overbroad and potentially leads to excessive criminalization of online expression, particularly if law enforcement does not establish strict standards of proof in online defamation cases.[15] This is relevant to the issue of misuse of Indonesian digital media, where a report from SAFEnet shows that most ITE Law cases related to insults stem from public criticism of public officials, government institutions, or figures with social power.

In the socio-political context, the individual reporting mechanism in the ITE Law opens up space for the phenomenon of revenge reporting, namely the act of reporting someone with the motive of revenge for unpleasant criticism or

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[13] Pasal 27 Ayat (3) Undang-Undang Republik Indonesia Nomor 1 Tahun 2024 tentang Perubahan Kedua atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik, dan Kitab Undang-Undang Hukum Pidana (KUHP) 2023, Pasal 240 dan Pasal 241

[14] Raihana, Ermanto & Cecep Sujapar, "PENGARUH POLITIK HUKUM TERHADAP PENGHINAAN DAN ATAU PENCEMARAN NAMA BAIK BERDASARKAN UNDANG-UNDANG INFORMASI DAN TRANSAKSI ELEKTRONIK" (2022) 5:2 Coll Stud J 122–132, online: <https://ejournal.stih-awanglong.ac.id/index.php/csj/article/view/793>.

[15] Brilliant Lintong, "PENGATURAN TINDAK PIDANA PENGHINAAN DAN PENCEMARAN NAMA BAIK DALAM UNDANG-UNDANG INFORMASI DAN TRANSAKSI ELEKTRONIK PASCA PUTUSAN MAHKAMAH KONSTITUSI NOMOR 50/PUU-VI/2008 DAN NOMOR 2/PUU-VII/2009" (2021) 10:7 LEX Crim, online: <https://ejournal.unsrat.ac.id/v3/index.php/lexcrimen/article/view/35006>.

opinions.[16] In order to operate in a democracy, criticism of public officials must be seen as a vital element in ensuring accountability and part of the checks and balances mechanism of society against the state.[17] However, Articles 240 and 241 of the Criminal Code provide the legal basis for denouncing such criticism as insults, as they are always sensitive when applied to digital content, as digital spaces are interactive and highly responsive, often resulting in sudden and emotional outbursts in public. This phenomenon creates the potential for criminalization through two channels at once, which is difficult to avoid. A single act of criticism of a public official can be considered both defamation and an insult to the government. The rule regarding insults to the government or public officials has actually been removed in several court decisions, including Constitutional Court Decision No. 013-022/PUU-IV/2006, which emphasized that public officials should not receive greater legal protection than ordinary citizens.[18] However, the 2023 Criminal Code reinstates it in a more current formulation, but it still poses problems. This overlapping norm not only burdens the legal system but also exacerbates legal uncertainty for the public. According to Jimly Asshiddiqie, there are twelve basic principles that support the establishment of a democratic state based on law, namely: the supremacy of law, equality before the law, the principle of legality, limitations on power, the existence of independent supporting organs, an independent and impartial judiciary, the existence of state administrative courts, a system of checks and balances, protection of human rights, a democratic nature, functioning as a means of realizing the goals of the state, and transparency and social control.[19]

According to modern criminal law theory, legal uncertainty in defamation articles always results in a chilling effect, where citizens choose to remain silent rather than risk being caught in a criminal case.[20] When an article is ambiguous, law

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16 Iman Wildan Alaudy & Nadia Utami Larasati, "Kriminalisasi Aktivis Yang Dilakukan Oleh Pejabat Negara Ditinjau Dari Perspektif Teori Konflik" (2024) 8:2 IKRA-ITH Hum J Sos Dan Hum 427–437, online: <https://journals.upi-yai.ac.id/index.php/ikraith-humaniora/article/view/3956>.

17 Toni M Massaro & Helen Norton, "Free Speech and Democracy: A Primer for Twenty-First Century Reformers".

18 Mahkamah Konstitusi Republik Indonesia, *Putusan Nomor 013-022/PUU-IV/2006 tentang Pengujian Undang-Undang Nomor 11 Tahun 2008*, 2006.

19 Gokma Toni Parlindungan, "Prinsip-prinsip Negara Hukum dan Demokrasi Dalam Pembentukan Peraturan Daerah" (2018) 16:2 J Huk Respublica 384–400, online: <https://journal.unilak.ac.id/index.php/Respublica/article/view/1447>.

20 Jelena Gligorijevic, "Taming the 'Chilling Effect' of Defamation Law: English Experience and Implications for Australia" (2022) 50:2 Fed Law Rev 221–248, online:

enforcement officers have too much room for interpretation. As a result, citizens cannot predict whether criticism, digital comments, or expressions on social media could potentially be classified as a criminal offense. The safest option for citizens is simply to avoid speaking out or commenting on government policies.[21] From a structural justice perspective, as a result of the unequal power relations between the government and society in the law enforcement structure, state apparatus and public officials are in a more dominant structural position, but society bears the legal risks from the use of its right to expression.[22] This phenomenon is often referred to as preventive silence, which is when an individual censors himself before he actually intends to express his opinion.[23] Therefore, public space is no longer developing well, the public's courage to criticize the government or public officials is decreasing, and citizen participation in the democratic process is also weakening.

IV. HARMONIZATION OF ARTICLE 27 PARAGRAPH 3 OF THE ITE LAW NO. 1 OF 2024 AND ARTICLES 240 AND 241 OF THE 2023 CRIMINAL CODE BASED ON GUSTAV RADBRUCH'S LEGAL IDEALS

A classic adage in legal philosophy states, "Ubi jus, ibi remedium," meaning that where there are rights, there must be legal protection. This principle emphasizes that the existence of law not only functions as a tool of social control, but also as an instrument for protecting the fundamental rights of citizens. This idea is in line with the mandate of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which affirms that Indonesia is a state of law, so that every government action and applicable regulation must guarantee and not reduce the space for citizen freedom, including freedom of expression in the digital space.[24] Within this framework, the issue of criminalization of digital content through Article 27 paragraph (3) of the ITE Law No. 1 of 2024 and Articles 240 and 241 of

<https://www.cambridge.org/core/product/identifier/S0067205X00000934/type/journal_article>.

21 Rahmadani et al, "REGULASI DIGITAL DAN IMPLIKASINYA TERHADAP KEBEBASAN BERPENDAPAT (STUDI KASUS", *supra* note 11.

22 Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the Chilling Effect" (1978) 58 Boston Univ Law Rev 685-732 1978, online: <https://scholarship.law.wm.edu/facpubs/879>.

23 Daragh Murray et al, "The Chilling Effects of Surveillance and Human Rights: Insights from Qualitative Research in Uganda and Zimbabwe" (2024) 16:1 J Hum Rights Pract 397–412, online: <https://academic.oup.com/jhrp/article/16/1/397/7234270>.

24 Pasal 1 ayat (3) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

the 2023 Criminal Code is a legal problem that needs to be seriously examined because it concerns the protection of human rights and the principle of the rule of law in a democratic society.[25]

The overlap between the ITE Law and the 2023 Criminal Code requires harmonization to ensure that regulations regarding insults, defamation, and attacks on the dignity of public officials do not conflict with the principles of a democratic rule of law. When two different regulations govern the same act, there is a risk of dualism in law enforcement, legal uncertainty, and abuse of authority.[26] Therefore, harmonization is needed based on legal ideals. A normative evaluation is needed that can test whether the two regulations are consistent with the principles of justice, legal certainty and utility as contained in Gustav Radbruch's theory.[27]

From the aspect of legal certainty, harmonization is necessary because the formulation of the elements of the crime in Article 27(3) of the ITE Law and Articles 240 and 241 of the Criminal Code remains unclear. The absence of explicit definitions of "insult," "attacking the honor of the government," or "the dignity of an official" leaves law enforcement officials with too much room for interpretation. Furthermore, from the aspect of expediency, the existence of two overlapping criminalization regimes has a negative impact on citizen participation in the digital democracy process. From the aspect of justice, criminalizing public criticism is difficult to justify because public officials should have a higher level of tolerance for criticism. In democratic law, criminal law protection should be used to protect the public interest, not the personal feelings of officials. If a regulation fails to fulfill the elements of justice because it opens up room for abuse, or ignores legal certainty through formulations that are open to multiple interpretations, then the law can be deemed to have lost its legitimacy.

Based on the problems between the ITE Law and the 2023 Criminal Code, which have been proven to cause overlap, uncertainty, and open up space for criminalization of legitimate digital expression, it is necessary to change and harmonize regulations through policies based on the principles of good

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[25] Devi Tri Indriasari, "Kebebasan Berekspresi dalam Tekanan Regulasi: Studi terhadap Undang-Undang Informasi dan Transaksi Elektronik (UU ITE)" (2024) 49:2 Masy Indones 243–256, online: <https://jmi.ipsk.lipi.go.id/index.php/jmiipsk/article/view/1373>.

[26] Aisyah Rahman, Sadino Sadino & Yusup Hidayat, "Eksistensi Peranan Penilaian Reformasi Hukum Pada Penataan Regulasi Nasional" (2025) 5:6 J Ilmu Huk Hum Dan Polit 5656–5667, online: <https://dinastirev.org/JIHHP/article/view/5564>.

[27] Gustav Radbruch, loc. cit., page. 112.

governance.[28] This principle demands transparency, accountability, public participation, and legal certainty in the legislative drafting process so that the law is not used as an instrument to silence criticism, but rather as a means of protecting citizens from voicing their opinions and evaluating policies made by authorities. This harmonization effort is not only relevant from a national legal perspective but also aligns with Indonesia's obligations as a state party to the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR states that any restriction on freedom of expression is only lawful if it is based on clear law and aims to protect legitimate interests.[29] In relation to problematic regulatory harmonization, there is Article 20 of the ICCPR which prohibits restrictions imposed arbitrarily or for political purposes.[30] Nevertheless, the harmonization of the ITE Law in Article 27 paragraph 3 and the 2023 Criminal Code articles 240 and 241 must be directed to be in line with the principles of good governance as well as with international human rights standards, so that the regulations formed are able to guarantee justice for the protection of freedom of expression without ignoring the need for law enforcement in the digital space.

V. CONCLUSION

The development of the digital space in Indonesia presents serious challenges to the protection of freedom of expression as a constitutionally guaranteed human right. Through an analysis of Article 27 paragraph (3) of the 2024 Electronic Information and Transactions Law No. 1 and Articles 240–241 of the 2023 Criminal Code, it was found that both regulations have the potential to lead to the criminalization of digital content due to the formulation of norms that are open to multiple interpretations, overlapping, and provide too much room for interpretation for law enforcement officials. The unclear definition of the elements of "insult," "dignity of officials," and "defamation" creates the risk of diverse interpretations that in practice are often used to ensnare public criticism, especially when targeting state officials, public figures, or government institutions. This situation gives rise to a chilling effect and preventive silence, namely a condition

[28] Dobi Yuliansa et al, "Implementasi Prinsip Negara Hukum dalam Meningkatkan Good Governance di Indonesia" (2024) 3:1 Hutanasyah J Huk Tata Negara 39–60, online: <https://jurnal.staibsllg.ac.id/index.php/hutanasyah/article/view/888>.

[29] "International Covenant on Civil and Political Rights", online: *OHCHR* <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

[30] Pasal 20 International Convenant on Civil and Political Rights

where people choose not to express opinions or criticism for fear of being criminalized. This results in the two legal regimes governing the Electronic Information and Transactions Law and the 2023 Criminal Code creating legal uncertainty that impacts weak protection of the right to expression in the digital space. From Gustav Radbruch's theoretical perspective, these two regulations fail to fully meet the principles of justice, legal certainty, and expediency. Criminalizing political criticism is considered unfair, as public officials should have a higher tolerance for criticism. Legal uncertainty arises when legal norms are not clearly and explicitly formulated. Meanwhile, from a utility perspective, overlapping regulations actually hinder public participation in democratic life.

Therefore, regulatory harmonization between the ITE Law and the 2023 Criminal Code is necessary to avoid conflict and create dualism in law enforcement. This harmonization must adhere to the principles of good governance and international human rights standards, particularly Articles 19 and 20 of the ICCPR, to ensure that restrictions on freedom of expression are only implemented proportionately, legally, and in accordance with legitimate objectives. Thus, more harmonized and equitable regulations can protect freedom of expression while ensuring legal certainty in the digital age.

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Reconstructing Legal Philosophy through Moral Awakening toward Climate Justice

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ABSTRACT: The global climate crisis exposes the limits of modern law in addressing ecological injustice. Dominant positivistic and anthropocentric paradigms often treat environmental harm as a technical externality, thereby weakening law's ethical vocation to protect life and to distribute burdens and benefits fairly. This article aims to reconstruct legal philosophy through a moral awakening toward climate justice by reorienting classical concepts—rights, legal subjecthood, responsibility, legitimacy, and justice—toward ecological interdependence and intergenerational claims. Using a normative–philosophical method, the study critically rereads the modern legal-philosophy tradition and integrates contemporary climate-justice and ecological-ethics scholarship, with attention to the situation of developing countries that contribute least to emissions yet experience the gravest impacts. The analysis is supported by empirical descriptions of climate inequality (historical and current emissions, vulnerability, and adaptation readiness) to show that the climate crisis is fundamentally a problem of justice. The article proposes a framework of moral awakening consisting of four core values: expanded empathy, intergenerational responsibility, cross-border solidarity, and ecological humility. These values operate as corrective principles against reductive legal reasoning and provide criteria for evaluating the legitimacy of norms and decisions in the Anthropocene. The findings highlight practical implications for legal education, law-making, and adjudication: curricula and professional ethics should integrate climate justice, regulatory design should internalize long-term and transboundary harms, and legal reasoning should recognize relational responsibilities to humans and nature. Ultimately, reconstructing legal philosophy in this way enables law to function not merely as a procedural system but as a moral agent capable of guiding transformative responses to ecological crisis.

Keywords: Anthropocene; Climate Justice; Legal Philosophy; Legal Reconstruction; Moral Awakening.

I. INTRODUCTION

Today's climate crisis can no longer be understood solely as a technical issue of emission reduction or environmental regulatory adjustment, but rather as a fundamental moral test for modern legal civilization.[1] Rising global temperatures, increasingly frequent hydrometeorological disasters, the loss of living space for coastal communities and indigenous peoples, and worsening inequalities between developed and developing countries illustrate that the burden of the crisis is shared unfairly. Those who contribute least to emissions bear the most significant damage, while the centers of global economic and political power are slow to change patterns of production and consumption. In this landscape, the law often appears as an administrative mechanism that manages impacts, rather than a moral compass that changes direction. Legal philosophy, which forms the foundation of how we understand rights, obligations, and justice, can therefore no longer be left neutral.[2] In this article, legal philosophy refers to the philosophical inquiry into law's moral foundations, legitimacy, and justice, particularly as they shape responses to ecological and intergenerational injustice. It must be questioned: what moral values have guided the law so that it has failed to respond to the cries for climate justice from those who are most vulnerable?

For a long time, the architecture of modern legal philosophy has been dominated by an approach that glorifies procedural certainty, formal rationality, and individual rights.[3] However, it is relatively indifferent to the ecological and intergenerational dimensions of justice. Legal positivism encourages a sharp separation between "law" and "morals," so that the validity of a norm is measured primarily by the procedure by which it is formed, not by its commitment to the preservation of life.[4] The liberal paradigm presents legal subjects primarily as individuals with rights, while nature is reduced to a resource to be legitimately exploited as long as the rules are followed.[5] In this framework, the suffering of

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1 Sultana, F. (2021). Critical climate justice. *The Geographical Journal*. https://doi.org/10.1111/geoj.12417.

2 Langille, J. (2025). The Constitutive Demands of Corrective Justice. *Oxford Journal of Legal Studies*, 45, 821 - 838. https://doi.org/10.1093/ojls/gqaf016.

3 Cortés-Monroy, J. (2025). A Critical Consideration of Two Methodologies of General Jurisprudence. *Oxford Journal of Legal Studies*, 45, 775 - 800. https://doi.org/10.1093/ojls/gqaf020.

4 Kliemt, H. (2021). The logical foundations of constitutional democracy between legal positivism and natural law theory. *Public Choice*, 195, 269 - 281. https://doi.org/10.1007/s11127-021-00888-9.

5 Himes, A., Muraca, B., Anderson, C., Athayde, S., Beery, T., Cantú-Fernández, M., González-Jiménez, D., Gould, R., Hejnowicz, A., Kenter, J., Lenzi, D., Murali, R., Pascual, U., Raymond,

communities displaced by tidal floods, prolonged droughts, or massive forest fires is often interpreted as a side effect of development, rather than a sign of the moral failure of the legal system. The reconstruction of legal philosophy through a moral awakening to climate justice is urgent, so that the law no longer rests on assumptions that normalize ecological damage and global injustice.

In the field of thought, several recent publications on *climate justice* and environmental ethics have shifted the focus from the mere effectiveness of legal instruments to the question of who bears the burden and who enjoys the benefits of the global climate regime.[6] Various studies highlight historical injustice between developed and developing countries, an imbalance in adaptive capacity, and the invisibility of local communities' suffering in international decision-making forums. At the level of moral philosophy, concepts such as intergenerational responsibility, cross-border distributive justice, and recognition of the rights of affected communities have been proposed.[7] However, most of these discussions remain in the realm of morality and politics, without systematically exploring how the foundations of legal philosophy we use every day contribute to the impasse in climate justice. In other words, the relationship between the climate crisis as a global moral challenge and the need to reconstruct legal philosophy is often mentioned implicitly rather than made the subject of a conceptual and methodological analysis.[8]

At the same time, mainstream legal philosophy studies, whether based on the traditions of positivism, liberalism, or *the* procedural *rule of law* approach, have been relatively slow to respond to the explosion of literature on the climate crisis and ecological justice.[9] Discussions of justice in legal philosophy still primarily

C., Ring, A., Russo, K., Samakov, A., Stålhammar, S., Thorén, H., Zent, E., Mexico, D., González-Jiménez, M., & Thorén, S. (2023). Why nature matters: A systematic review of intrinsic, instrumental, and relational values. *Bioscience*, 74, 25 - 43. https://doi.org/10.1093/biosci/biad109.

6 Resnik, D. (2022). Environmental justice and climate change policies. *Bioethics*. https://doi.org/10.1111/bioe.13042.

7 Lau, J., Gurney, G., & Cinner, J. (2021). Environmental justice in coastal systems: Perspectives from communities confronting change. *Global Environmental Change*. https://doi.org/10.1016/j.gloenvcha.2020.102208.

8 Solomonian, L., & Di Ruggiero, E. (2021). The critical intersection of environmental and social justice: a commentary. *Globalization and Health*, 17. https://doi.org/10.1186/s12992-021-00686-4.

9 Alves, R., Maia, R., & Lima, F. (2023). Development of a Digital Twin for smart farming: Irrigation management system for water saving. *Journal of Cleaner Production*. https://doi.org/10.1016/j.jclepro.2023.135920.

revolve around the general relationship between law and morality, the conflict between freedom and security, or the classic debate over compliance with unjust laws. Climate change, biodiversity loss, and the ecological vulnerability of Global South communities are rarely treated as key tests of concepts of justice, legitimacy, and legal responsibility.[10] As a result, the bridge between the demands of climate justice and the normative foundations of legal philosophy remains fragile. Initiatives to connect the two generally come from the margins, through interdisciplinary writings that have not yet entirely changed the mainstream of legal philosophy teaching and research, especially in developing countries at the forefront of the climate crisis.

This configuration of thought creates an important research gap. On the one hand, the idea of climate justice has developed a rich moral framework for assessing the distribution of burdens and benefits, historical responsibility, and the rights of future generations.[11] On the other hand, legal philosophy, as a discipline that should reflectively examine the normative foundations of legal systems, still rarely focuses on the climate crisis as a central theme in re-reading key concepts such as rights, obligations, justice, and legitimacy.[12] This gap means the agenda for climate and environmental legal reform is often disconnected from a deeper reconstruction of legal philosophy. As a result, regulatory changes often only move at a technical level without shaking the moral assumptions that underpin permissive attitudes towards ecological damage.[13] This article departs from the belief that, without a clearly articulated moral awakening in legal philosophy, efforts to achieve climate justice will easily get caught up in rhetoric rather than the necessary paradigmatic transformation.

Based on this context and gap in thinking, this article formulates three main questions. First, how does the climate crisis reveal the moral failure hidden behind

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10 Brockhaus, M., Di Gregorio, M., Djoudi, H., Moeliono, M., Pham, T., & Wong, G. (2021). The forest frontier in the Global South: Climate change policies and the promise of development and equity. *Ambio*, 50, 2238 - 2255. https://doi.org/10.1007/s13280-021-01602-1.

11 Brousseau, J., Stern, M., Pownall, M., & Hansen, L. (2024). Understanding how justice is considered in climate adaptation approaches: a qualitative review of climate adaptation plans. *Local Environment*, 29, 1644 - 1663. https://doi.org/10.1080/13549839.2024.2386964.

12 Putro, W., & Bedner, A. (2023). Ecological Sustainability from a Legal Philosophy Perspective. *Journal of Indonesian Legal Studies*. https://doi.org/10.15294/jils.v8i2.71127.

13 Oludoye, O., Supakata, N., Srithongouthai, S., Kanokkantapong, V., Van Den Broucke, S., Ogunyebi, L., & Lubell, M. (2024). Pro-environmental behavior regarding single-use plastics reduction in urban–rural communities of Thailand: Implication for public policy. *Scientific Reports*, 14. https://doi.org/10.1038/s41598-024-55192-5.

the foundations of modern legal philosophy, particularly in the way it interprets the relationship between humans, law, and nature? Second, what moral values need to be articulated as a "moral awakening" to redirect legal philosophy so that it is in line with the demands of climate justice, including intergenerational responsibility and partiality towards the most vulnerable communities? Third, how can the reconstruction of legal philosophy grounded in this moral awakening provide a framework for formulating new standards of justice in climate and environmental law, so that the law no longer merely manages impacts but also shifts the direction of development models that drive the climate crisis?

This article offers contributions on three interrelated levels. On a theoretical level, this paper proposes a framework for reconstructing legal philosophy through a moral awakening to climate justice, positioning the climate crisis as the ultimate test of classical legal-philosophical concepts. At the methodological level, this research uses a normative-philosophical approach that combines a critical reading of the modern legal philosophy tradition with developments in the discourse on climate justice and ecological ethics, particularly from the perspective of developing countries. At the practical level, this article outlines implications for legal education, law formation, and legal professional practice, emphasizing the importance of incorporating the dimensions of climate justice and intergenerational responsibility into how we assess policies, decisions, and legal instruments. Thus, the reconstruction of legal philosophy does not stop at abstract debate, but leads to concrete changes in the orientation of the legal system.

To avoid excessive abstraction from reality, the philosophical discussion in this article is supported by empirical descriptions of global climate inequality that show who contributes most to the crisis and who bears its brunt.[14] Data on historical and current emissions, levels of climate vulnerability, and the adaptation readiness index of developed and developing countries provide a backdrop that confirms that the climate crisis is a matter of justice, not merely a technical or natural issue.[15] This empirical mapping forms the basis for the argument that the reconstruction of legal philosophy through a moral awakening towards climate justice is not merely a conceptual discourse, but a normative response to a measurable configuration of injustice. The following paragraph presents this

[14] Schöngart, S., Nicholls, Z., Hoffmann, R., Pelz, S., & Schleussner, C. (2025). High-income groups disproportionately contribute to climate extremes worldwide. *Nature Climate Change*, 15, 627 - 633. https://doi.org/10.1038/s41558-025-02325-x.

[15] Resnik, D. (2022). Environmental justice and climate change policies. *Bioethics*. https://doi.org/10.1111/bioe.13042.

mapping, and the next section will develop the necessary theoretical and conceptual framework.

To ground the philosophical argument in a concrete configuration of global climate inequality, several widely used indicators highlight the asymmetry between high-income and lower-middle-income countries.[16] Historically, high-income countries account for a substantially larger share of cumulative CO_2 emissions since the industrial era, despite representing a much smaller fraction of the global population, while lower-middle-income countries contribute a markedly smaller share even though they are home to a far larger population.[17] In recent decades, the gap persists in per capita terms: average annual CO_2 emissions per person remain considerably higher in high-income countries than in lower-middle-income countries.[18] Yet thedistribution of harm moves in the opposite direction. A large proportion of the population in lower-middle-income countries lives under high to very high climate vulnerability, and these countries tend to score worse on vulnerability and readiness measures such as the ND-GAIN indices.[19] Taken together, these indicators show that the climate crisis is structured by an unequal distribution of responsibility and exposure: those who have contributed least to emissions bear the most significant risks and have weaker adaptive capacity.[20] This empirical backdrop strengthens the need to reconstruct legal philosophy through a moral awakening toward climate justice.

These indicators clearly show the moral paradox of the climate crisis: high-income countries, whose populations represent only a small fraction of the world's population, have contributed the largest share of cumulative carbon dioxide

16 Hosseinzadehtalaei, P., Hamdi, R., Moradkhani, H., Termonia, P., & Tabari, H. (2025). Inequality in human exposure to future climate extremes. *Nature Communications*, 16. https://doi.org/10.1038/s41467-025-63385-3.

17 Li, R., Wang, Q., Liu, Y., & Jiang, R. (2021). Per-capita carbon emissions in 147 countries: The effect of economic, energy, social, and trade structural changes. *Sustainable Production and Consumption*. https://doi.org/10.1016/j.spc.2021.02.031.

18 Wang, M., & Feng, C. (2022). Tracking the inequalities of global per capita carbon emissions from perspectives of technological and economic gaps. *Journal of environmental management*, 315, 115144 . https://doi.org/10.1016/j.jenvman.2022.115144.

19 Bianco, G., Espinoza-Chávez, R., Ashigbie, P., Junio, H., Borhani, C., Miles-Richardson, S., & Spector, J. (2024). Projected impact of climate change on human health in low- and middle-income countries: a systematic review. *BMJ Global Health*, 8. https://doi.org/10.1136/bmjgh-2024-015550.

20 Deivanayagam, T., English, S., Hickel, J., Bonifacio, J., Guinto, R., Hill, K., Huq, M., Issa, R., Mulindwa, H., Nagginda, H., De Morais Sato, P., Selvarajah, S., Sharma, C., & Devakumar, D. (2023). Envisioning environmental equity: climate change, health, and racial justice. *Lancet (London, England)*, 402, 64 - 78. https://doi.org/10.1016/s0140-6736(23)00919-4.

emissions since the beginning of industrialization, while enjoying much higher per capita emissions in recent decades.[21] In contrast, lower-middle-income countries, home to the majority of the world's population, contribute a much smaller share of both historical emissions and per capita emissions, but bear a higher level of climate vulnerability and lower adaptation capacity, as reflected in the ND-GAIN vulnerability and readiness index.[22] This inequality reveals that the climate crisis is not merely a neutral consequence of technological development, but rather the result of economic and political power configurations that perpetuate patterns of unequal environmental exploitation, and that it is a matter of justice demanding a much deeper ethical response than mere technical regulation. It affirms the need to reconstruct legal philosophy by making the moral awakening towards climate justice the central axis.

The dominant modern legal philosophy framework has been built on several main pillars, such as positivism, liberalism, and procedural formalism.[23] Positivism emphasizes a strict separation between law and morality, so that the validity of a rule depends more on the procedure by which it is formed than on whether it is fair to other humans, future generations, and nature.[24] Legal liberalism focuses on individuals as rights holders, while the social and ecological relations that sustain communal life are often reduced to a neutral backdrop.[25] Procedural formalism then reinforces an orientation toward certainty and predictability, assuming that, as long as procedures are followed, justice has been served.[26] In this configuration, ecological damage and the suffering of communities affected by the climate crisis tend to be read as side effects of legitimate policies, rather than as indicators of moral failure that demand correction at the level of legal philosophy.

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21 Piazza, A. (2021). Collective Responsibility in the Cooperative Governance of Climate Change. *Sustainability*, 13, 4363. https://doi.org/10.3390/su13084363.

22 Schwerdtle, P., Ngo, T., Hasch, F., Phan, T., Quitmann, C., & Montenegro-Quiñonez, C. (2024). Climate change resilient health facilities: a scoping review of case studies in low and middle-income countries. *Environmental Research Letters*, 19. https://doi.org/10.1088/1748-9326/ad472b.

23 Teubner, G. (2021). Substantive and Reflexive Elements in Modern Law. *Luhmann and Law*. https://doi.org/10.2307/3053348.

24 Latifiani, D., & Ilyasa, R. (2021). THE POSITION OF MORAL VALUES IN LAW. *Diponegoro Law Review*, 6, 51-61. https://doi.org/10.14710/dilrev.6.1.2021.51-61.

25 Blühdorn, I. (2021). Liberation and limitation: Emancipatory politics, socio-ecological transformation and the grammar of the autocratic-authoritarian turn. *European Journal of Social Theory*, 25, 26 - 52. https://doi.org/10.1177/13684310211027088.

26 Walters, G. (2024). Mediating the court procedural justice-delinquency relationship with certainty perceptions and legitimacy beliefs. *International journal of law and psychiatry*, 97, 102031. https://doi.org/10.1016/j.ijlp.2024.102031.

The Anthropocene era, in which human activity has become a geological force that alters the climate and the Earth's life support systems, shakes the basic assumptions of modern legal philosophy.[27] If the law continues to depart from the view that nature is merely a passive backdrop for economic and political activity, then it will tend to protect patterns of production and consumption that actually drive the climate crisis. The Anthropocene reveals that the sharp separation between humans and nature, as well as the assumption that ecological damage can always be managed technically, is a dangerous illusion.[28] In the face of interconnected floods, droughts, heat waves, and rising sea levels, a concept of justice that focuses solely on individual rights in the short term is inadequate. Legal philosophy needs a new framework that recognizes the deep interconnectedness between humans, communities, and ecosystems.[29] It incorporates dimensions of space and time that go far beyond short-term political cycles.

It is at this point that the idea of climate justice offers a sharper ethical lens. Climate justice asks not only who is responsible for reducing emissions, but also who bears the damage, who has the capacity to adapt, and how the burdens and benefits of the transition to a low-carbon economy are shared across countries and generations.[30] The distributive dimension of climate justice highlights inequalities in the distribution of mitigation and adaptation burdens; the procedural dimension demands meaningful participation of affected communities in decision-making; the recognition dimension affirms the importance of seeing the experiences and knowledge of groups that have been marginalized; while the intergenerational dimension reminds us that the current generation wields enormous power over the living conditions of generations yet to be born.[31] These

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27 Sari, D., Triatmodjo, M., & Purwanto, H. (2025). Constitutionalism in the Anthropocene: Compliance of International Environmental Law (IEL) Instruments. *IOP Conference Series: Earth and Environmental Science*, 1438. https://doi.org/10.1088/1755-1315/1438/1/012087.

28 Banerjee, S., & Arjaliès, D. (2021). Celebrating the End of Enlightenment: Organization Theory in the Age of the Anthropocene and Gaia (and why neither is the solution to our ecological crisis). *Organization Theory*, 2. https://doi.org/10.1177/26317877211036714.

29 Gauthier, P., Chungyalpa, D., Goldman, R., Davidson, R., & Wilson-Mendenhall, C. (2025). Mother Earth kinship: Centering Indigenous worldviews to address the Anthropocene and rethink the ethics of human-to-nature connectedness. *Current opinion in psychology*, 64, 102042. https://doi.org/10.1016/j.copsyc.2025.102042.

30 Reich, P., Grace, K., Agrawal, A., & Nagendra, H. (2025). Mitigation justice. *Proceedings of the National Academy of Sciences of the United States of America*, 122. https://doi.org/10.1073/pnas.2411231122.

31 Levenda, A., Behrsin, I., & Disano, F. (2021). Renewable energy for whom? A global systematic review of the environmental justice implications of renewable energy technologies. *Energy research and social science*, 71, 101837. https://doi.org/10.1016/j.erss.2020.101837.

four dimensions open up space for criticism of legal philosophy that still centers on a single subject, the here-and-now relationship, and processes that appear neutral but perpetuate climate inequality.

However, adopting the idea of climate justice into law is not enough to be done by adding new articles or instruments without shaking up the fundamental way of thinking. A "moral awakening" is needed that makes sensitivity to disproportionate suffering, intergenerational responsibility, cross-border solidarity, and ecological humility core values in legal philosophy.[32] This moral awakening is not merely a general ethical appeal, but a shift in the center of gravity: from law that is neutral toward ecological damage to law that actively sides with the preservation of life; from an understanding of rights as separate individual claims to rights as a relationship of responsibility; from the state as the guarantor of formal certainty to the state as the guardian of the integrity of our shared home. Thus, moral awakening toward climate justice means placing the climate crisis as a mirror to reassess what it means to have laws that are legitimate, just, and worthy of obedience.[33]

The reconstruction of legal philosophy through a moral awakening towards climate justice requires an in-depth review of key concepts that have been taken for granted. The concept of rights, for example, needs to be understood not only as boundaries around individuals, but also as claims to minimum ecological conditions that make a dignified life possible.[34] The concepts of obligation and responsibility need to be expanded beyond the state-citizen relationship in a single generation to a network of obligations involving transnational actors, transnational corporations, and future generations who cannot be present at the negotiating table.[35] Even the concept of legal legitimacy needs to be assessed not only in terms of the procedures of its formation and public compliance, but also in terms of the extent to which the law preserves the ecological foundations that

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[32] Yan, S., Almandoz, J., & Ferraro, F. (2021). The Impact of Logic (In)Compatibility: Green Investing, State Policy, and Corporate Environmental Performance. *Administrative Science Quarterly,* 66, 903 - 944. https://doi.org/10.1177/00018392211005756.

[33] Pearson, A., Tsai, C., & Clayton, S. (2021). Ethics, morality, and the psychology of climate justice. *Current opinion in psychology*, 42, 36-42. https://doi.org/10.1016/j.copsyc.2021.03.001.

[34] Ormaza-Zulueta, N., & Mehrabi, Z. (2025). Global inequality in environmental conditions underpinning human rights. *Environmental Research Communications*, 7. https://doi.org/10.1088/2515-7620/ae0407.

[35] Virdin, J., Vegh, T., Jouffray, J., Blasiak, R., Mason, S., Österblom, H., Vermeer, D., Wachtmeister, H., & Werner, N. (2021). The Ocean 100: Transnational corporations in the ocean economy. *Science Advances*, 7. https://doi.org/10.1126/sciadv.abc8041.

sustain life.[36] This reconstruction requires a clear comparative map between the modern legal philosophy paradigm and the new climate justice-oriented paradigm.

To clarify the direction of the reconstruction, Table 1 below maps several key dimensions of legal philosophy relevant to the climate crisis and illustrates the proposed shift from the dominant modern paradigm toward a reconstructive paradigm based on a moral awakening toward climate justice. The selected dimensions include views on rights, legal subjects, justice, responsibility, and legal legitimacy, as these five shape how we understand the relationships among humans, the state, and nature. The first column summarizes the general characteristics of the modern legal philosophy paradigm that is widely taught and practiced; the second column proposes an alternative perspective that departs from the need to make climate justice the central orientation. This table is not intended to negate the entire legacy of modern legal philosophy, but rather to identify the points where moral and ecological corrections are needed so that the law can be part of the solution, not part of the problem.

Table 1. Shift in Key Dimensions of Legal Philosophy Toward a Moral Awakening for Climate Justice

No	Dimension of legal philosophy	Dominant modern paradigm	Reconstructive paradigm based on moral awakening towards climate justice
1	The concept of rights	Rights as individual claims on the state/other individuals in the short term	Rights as claims to decent and sustainable ecological conditions, with an intergenerational and cross-community horizon
2	Subject of law	The main subjects are individuals and corporate entities; nature is positioned as an object and resource	Subjects are understood within relational networks; vulnerable communities and future generations are recognized as stakeholders
3	The concept of justice	Justice as equal treatment under neutral formal rules	Justice as a correction for historical and structural inequalities, including in the

[36] Zhao, L., & Zhao, R. (2025). Ecological rule of law and enterprise green innovation - Evidence from China's environmental courts. *Journal of environmental management*, 374, 124081. https://doi.org/10.1016/j.jenvman.2025.124081.

No	Dimension of legal philosophy	Dominant modern paradigm	Reconstructive paradigm based on moral awakening towards climate justice
			distribution of climate risks and burdens
4	Legal responsibility	Responsibility is limited to clear and immediate violations, with national and generational boundaries	Responsibility includes long-term, cross-border, and intergenerational impacts on humans and ecosystems
5	Legal legitimacy	Valid formation procedures and majority compliance determine legitimacy.	Legitimacy is also determined by the law's ability to preserve the ecological foundations of life and to respond to demands for climate justice.

Table 1 shows that the reconstruction of legal philosophy is not simply a matter of adding "climate issues" to the list of topics, but touches on the heart of how we interpret rights, justice, responsibility, and legitimacy. The proposed conceptual shift opens up space for a new assessment of various policies and legal instruments related to climate and the environment. A procedurally valid regulation, for example, can be deemed illegitimate if it substantially worsens the climate vulnerability of specific communities or sacrifices the rights of future generations to a livable environment. Similarly, legal responsibility cannot be limited to immediately apparent violations; it must include cumulative contributions to the climate crisis. With these dimensions as a map, the next section will explain the research methods used and develop results and discussions that show how this reconstructive framework can redirect the conversation about climate justice in legal philosophy.

II. METHODOLOGY

This research employs a normative-philosophical legal approach that focuses on the conceptual and argumentative analysis of justice, responsibility, and legal

legitimacy in the context of the climate crisis.[37] The normative-philosophical approach was chosen because the main objective of this article is not to assess the effectiveness of specific legal instruments, but rather to examine and reformulate the value foundations that should guide the legal system in addressing climate injustice.[38] The analysis is conducted by critically reading modern legal philosophy traditions, such as positivism, liberalism, and procedural formalism, and then contrasting them with the demands for climate justice that have emerged from recent literature and the reality of global inequality.[39] Thus, this study positions the climate crisis as a litmus test for legal philosophy's normative claims about what is fair, legitimate, and worthy of obedience.

The primary materials used in this study comprise three groups. First, representative texts of modern legal philosophy that form the dominant framework of thinking in legal education and practice, especially those related to the concepts of rights, justice, obligations, and legitimacy.[40] Second, literature on climate justice, environmental ethics, and the Anthropocene offers sharp criticism of the current world moral order and develops ideas of intergenerational responsibility, global solidarity, and ecological justice.[41] Third, scientific and policy reports from international institutions on the configuration of emission inequalities, climate vulnerability, and the adaptive capacity of developed and developing countries, which provide an empirical context for philosophical analysis.[42] These materials were selected deliberately for their relevance to answering the research questions and enriching the normative argument.

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[37] Zhao, L., & Zhao, R. (2025). Ecological rule of law and enterprise green innovation - Evidence from China's environmental courts. *Journal of environmental management*, 374, 124081. https://doi.org/10.1016/j.jenvman.2025.124081.

[38] Chapman, A., & Ahmed, A. (2021). Climate Justice, Humans Rights, and the Case for Reparations. *Health and Human Rights*, 23, 81 - 94.

[39] Davidson, M. (2021). How Fairness Principles in the Climate Debate Relate to Theories of Distributive Justice. *Sustainability*. https://doi.org/10.3390/su13137302.

[40] Langille, J. (2025). The Constitutive Demands of Corrective Justice. *Oxford Journal of Legal Studies*, 45, 821 - 838. https://doi.org/10.1093/ojls/gqaf016.

[41] Rockström, J., Kotzé, L., Milutinović, S., Biermann, F., Brovkin, V., Donges, J., Ebbesson, J., French, D., Gupta, J., Kim, R., Lenton, T., Lenzi, D., Nakicenovic, N., Neumann, B., Schuppert, F., Winkelmann, R., Bosselmann, K., Folke, C., Lucht, W., Schlosberg, D., Richardson, K., & Steffen, W. (2024). The planetary commons: A new paradigm for safeguarding Earth-regulating systems in the Anthropocene. *Proceedings of the National Academy of Sciences of the United States of America*, 121. https://doi.org/10.1073/pnas.2301531121.

[42] Sasse, J., & Trutnevyte, E. (2023). A low-carbon electricity sector in Europe risks sustaining regional inequalities in benefits and vulnerabilities. *Nature Communications*, 14, 1-15. https://doi.org/10.1038/s41467-023-37946-3.

The analysis technique used is qualitative-critical and takes place in three main steps. First, a normative diagnosis, which identifies and explains points of moral failure within the framework of modern legal philosophy, in light of the reality of the climate crisis and global inequality, as outlined in the empirical indicators presented above.[43] Second, conceptual reconstruction, which involves formulating a moral awakening towards climate justice as a shift in the meaning of key dimensions of legal philosophy, is summarized in Table 1.[44] Third, articulation of implications, namely elaborating how this reconstructive framework can change the way we assess legal policies and practices, as well as providing direction for the future agenda of legal education and reform. This series of steps forms the basis for the results and discussion section, which describes in more detail the theoretical and practical consequences of the proposed reconstruction of legal philosophy.

III. DIAGNOSIS OF THE MORAL FAILURE OF MODERN LEGAL PHILOSOPHY IN THE ERA OF CLIMATE CRISIS

The first diagnosis concerns the way modern legal philosophy understands rights and justice too narrowly within an individual and short-term horizon. In many classical debates, rights are understood as claims individuals have against the state or other individuals, while justice is understood as equal treatment under formal rules.[45] This perspective tends to ignore the fact that the right to a dignified life depends on stable ecological conditions and a fair distribution of climate risks. Policies that legally authorize the exploitation of fossil fuels, for example, may appear neutral when viewed from the perspective of short-term contractual rights, but in fact shift the burden of damage to vulnerable communities and future generations.[46] The inability to internalize these broader spatial and temporal dimensions reveals a serious moral flaw: justice is narrowed to procedural equality.

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43 Rice, J., Long, J., & Levenda, A. (2021). Against climate apartheid: Confronting the persistent legacies of expendability for climate justice. *Environment and Planning E: Nature and Space*, 5, 625 - 645. https://doi.org/10.1177/2514848621999286.

44 García-Portela, L. (2022). Backward-Looking Principles of Climate Justice: The Unjustified Move from the Polluter Pays Principle to the Beneficiary Pays Principle. *Res Publica (Liverpool, England)*, 29, 367 - 384. https://doi.org/10.1007/s11158-022-09569-w.

45 Forman, L., Karim, S., & Kolawole, O. (2025). Global Health "With Justice": The Challenges and Opportunities for Human Rights in Global Health Law. *Journal of Law, Medicine & Ethics*, 53, 18 - 22. https://doi.org/10.1017/jme.2025.1.

46 Trout, K., Muttitt, G., Lafleur, D., Van De Graaf, T., Mendelevitch, R., Mei, L., & Meinshausen, M. (2022). Existing fossil fuel extraction would warm the world beyond 1.5 °C. *Environmental Research Letters*, 17. https://doi.org/10.1088/1748-9326/ac6228.

At the same time, real climate injustice is left outside the framework of legal analysis.

The second diagnosis relates to the illusion of legal neutrality and objectivity that is often supported by positivism and procedural formalism.[47] By emphasizing that the primary task of law is to provide transparent and predictable rules, modern legal philosophy tends to ignore questions about who benefits and who is harmed by the configuration of those rules, especially in the long term.[48] In the context of the climate crisis, this illusion of neutrality operates when the law is used to protect investment certainty in high-carbon sectors.[49] At the same time, the vulnerability of affected communities is recognized only as a social problem to be addressed later.[50] In fact, as outlined in the empirical indicators presented above, the inequality in emissions contributions and vulnerability is not coincidental but rather the result of the accumulation of policy choices that favor specific interests. When the law is neutral towards this structure of inequality, it actually takes a highly political position: supporting an unjust status quo.

The third diagnosis touches on the relationship between humans and nature as constructed in the imagination of modern legal philosophy. Nature is seen primarily as a backdrop and a resource whose use can be regulated for the benefit of humans, rather than as part of a network of life that has intrinsic value and boundaries that must be respected.[51] This perspective facilitates the enactment of laws that accelerate the exploitation of forests, land, and oceans as long as the impacts can be mapped and compensated financially in the short term. The climate crisis shows that this logic has failed: cumulative damage and ecological tipping

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47 Schofield, P. (2021). Jeremy Bentham and the Origins of Legal Positivism. *The Cambridge Companion to Legal Positivism*. https://doi.org/10.1017/9781108636377.009.

48 Pham, T. (2025). Ethical and legal considerations in healthcare AI: innovation and policy for safe and fair use. *Royal Society Open Science*, 12. https://doi.org/10.1098/rsos.241873.

49 Richstein, J., & Neuhoff, K. (2022). Carbon contracts-for-difference: How to de-risk innovative investments for a low-carbon industry?. *iScience*, 25. htt Kumar, A., & Mohanasundari, T. (2025). Assessment of livelihood vulnerability to climate change among tribal communities in Chhindwara and Dhar district, Central India. *Scientific Reports*, 15. https://doi.org/10.1038/s41598-025-90769-8. ps://doi.org/10.1016/j.isci.2022.104700.

50 Kumar, A., & Mohanasundari, T. (2025). Assessment of livelihood vulnerability to climate change among tribal communities in Chhindwara and Dhar district, Central India. *Scientific Reports*, 15. https://doi.org/10.1038/s41598-025-90769-8.

51 Murali, R., Anderson, C., Muraca, B., Arias-Arévalo, P., Gould, R., Lenzi, D., Zent, E., Athayde, S., Kenter, J., Raymond, C., & Vatn, A. (2025). Navigating diverse human-nature worldviews for more inclusive conservation. *Conservation biology: the journal of the Society for Conservation Biology*, e70144. https://doi.org/10.1111/cobi.70144.

points cannot be controlled solely by market and technocratic mechanisms.[52] By persisting with a paradigm that sharply separates humans from nature, modern legal philosophy is morally unprepared to grasp the depth of the damage occurring.[53] It thus tends to underestimate the urgency of the structural changes demanded by climate justice.

These three diagnoses show that the climate crisis not only demands regulatory adjustments but also questions the moral legitimacy of the legal philosophy that underpins the system.[54] If rights are limited to short-term individual claims, justice is reduced to procedural conformity, and nature is treated as a passive object of exploitation.[55] The law will continue to fail to respond to the cries for justice from communities drowning, suffering drought, or losing their livelihoods due to climate change. It is at this point that the need for a moral awakening becomes clear: not as a cosmetic addition, but as an effort to shift the center of gravity of legal philosophy from pseudo-neutrality toward explicit partiality in favor of the preservation of life and the protection of those who are most vulnerable.[56] The following section outlines the architecture of this moral awakening in terms of core values that can guide the reconstruction of legal philosophy toward climate justice.

IV. THE ARCHITECTURE OF MORAL REVIVAL TOWARD CLIMATE JUSTICE

The moral awakening towards climate justice can be understood as a process of restructuring ethical sensibilities that shape how we view the relationships among humans, communities, and the Earth.[57] The first core value is expanded empathy,

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52 Keen, S., Lenton, T., Garrett, T., Rae, J., Hanley, B., & Grasselli, M. (2022). Estimates of economic and environmental damages from tipping points cannot be reconciled with the scientific literature. *Proceedings of the National Academy of Sciences of the United States of America*, 119. https://doi.org/10.1073/pnas.2117308119.

53 Wesche, P. (2021). Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision. *Journal of Environmental Law*. https://doi.org/10.1093/jel/eqab021.

54 Böhm, S., Carrington, M., Cornelius, N., De Bruin, B., Greenwood, M., Hassan, L., Jain, T., Karam, C., Kourula, A., Romani, L., Riaz, S., & Shaw, D. (2022). Ethics at the Centre of Global and Local Challenges: Thoughts on the Future of Business Ethics. *Journal of Business Ethics*, 180, 835 - 861. https://doi.org/10.1007/s10551-022-05239-2.

55 Bennett, N., Blythe, J., White, C., & Campero, C. (2021). Blue growth and blue justice: Ten risks and solutions for the ocean economy. *Marine Policy*, 125, 104387. https://doi.org/10.1016/j.marpol.2020.104387.

56 Dimyati, K., Nashir, H., Elviandri, E., Absori, A., Wardiono, K., & Budiono, A. (2021). Indonesia as a legal welfare state: A prophetic-transcendental basis. *Heliyon*, 7. https://doi.org/10.1016/j.heliyon.2021.e07865.

57 Pearson, A., Tsai, C., & Clayton, S. (2021). Ethics, morality, and the psychology of climate justice. *Current opinion in psychology*, 42, 36-42. https://doi.org/10.1016/j.copsyc.2021.03.001.

the ability to feel the suffering of those most affected by the climate crisis, even when they are geographically and socially distant from us.[58] This empathy encompasses not only the victims of today's disasters, but also future generations who do not yet have a political voice. The second value is intergenerational responsibility, which rejects the logic of "take the benefits now, bear the consequences later" and demands that legal and policy decisions be tested by their long-term impact. The third value is cross-border solidarity, which sees climate justice as a shared task of humanity, not merely a battle of national interests. The fourth value is ecological humility, the awareness that humans are not absolute rulers of nature, but part of a fragile and interdependent web of life.[59]

These values are not intended to replace the entire existing structure of legal philosophy, but serve as a correction and counterbalance to the reductive tendencies that have been dominant. Expanded empathy corrects the tendency of legal approaches that rely too heavily on abstract subjects without bodies and living spaces; intergenerational responsibility challenges the narrow limits of time in assessing legality and justice; cross-border solidarity expands the horizon of justice beyond nation-state boundaries; and ecological humility rejects the notion that all damage can be negotiated within the framework of short-term financial compensation. Together, these values form an architecture of moral awakening that can serve as the basis for a new assessment of the legitimacy and appropriateness of legal norms in the era of climate crisis.[60] In other words, before talking about regulatory reform, we must first answer the question of what moral values should guide the law when the Earth itself is wounded.

In practice, this architecture of moral awakening can be translated into several key questions directed at every policy and legal instrument that impacts the climate.[61] For example, from an expanded empathy perspective, we can ask: have those who are most vulnerable been heard and seriously considered in the decision-making

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58 Muradova, L., & Beauvais, E. (2025). Promoting Pro-environmental Beliefs and Behaviour: Choose-Your-Own Story Futuristic Climate Game. *PLOS One*, 20. https://doi.org/10.1371/journal.pone.0317773.

59 Jasanoff, S. (2021). Humility in the Anthropocene. *Globalizations,* 18, 839 - 853. https://doi.org/10.1080/14747731.2020.1859743.

60 Kotzé, L., & Knappe, H. (2022). Youth movements, intergenerational justice, and climate litigation in the deep time context of the Anthropocene. *Environmental Research Communications*, 5. https://doi.org/10.1088/2515-7620/acaa21.

61 Wang, D., Dong, L., & Mei, J. (2023). An advanced review of climate change mitigation policies in Germany, France, and the Netherlands. *Environmental Research Letters*, 18. https://doi.org/10.1088/1748-9326/acf58f.

process? From the perspective of intergenerational responsibility: do these rules strengthen or weaken the ability of future generations to live with dignity on a habitable planet? From the perspective of cross-border solidarity: do these policies help to redress the historical inequalities between rich and poor in terms of climate contributions and impacts, or do they exacerbate them? From the perspective of ecological humility: does this law respect the ecological limits known to science, or does it ignore them for short-term gain?[62] These questions shift the orientation of legal assessment from mere procedural compliance to a more profound moral examination.

In order for moral awakening not to remain an abstract call, it is necessary to formulate a framework for the reconstruction of legal philosophy that integrates these values into its conceptual structure. This is where Table 2 plays an important role: it provides an initial map of how the concepts of rights, legal subjects, justice, responsibility, and legal legitimacy need to be rearticulated. The next step is to link this conceptual map to the concrete domains in which the law operates, such as climate policy formulation, environmental law enforcement, and the resolution of disputes arising from ecological damage. Thus, the reconstruction of legal philosophy not only generates internal discourse among academics but also provides practical guidance to policymakers, judges, and other legal professionals in assessing whether their actions align with the demands of climate justice. The following section will outline this reconstruction framework more systematically and reveal its implications.

V. RECONSTRUCTION OF LEGAL PHILOSOPHY BASED ON MORAL AWAKENING

The reconstruction of legal philosophy from the perspective of climate justice requires a change in the way rights and obligations are viewed as the central axis of legal discourse.[63] Rights can no longer be limited to individual claims against direct interference, but must include the right to stable climate conditions and a livable environment as prerequisites for the realization of other rights. This right

[62] Jasanoff, S. (2021). Humility in the Anthropocene. *Globalizations,* 18, 839 - 853. https://doi.org/10.1080/14747731.2020.1859743.

[63] Mohtat, N., & Khirfan, L. (2021). The climate justice pillars vis-à-vis urban form adaptation to climate change: A review. *urban climate*, 39, 100951. https://doi.org/10.1016/j.uclim.2021.100951.

means that when excessive emissions from a policy threaten climate stability, a structural violation of rights has occurred. On the other hand, obligations are not borne solely by the state as a single entity, but also by other actors, such as transnational corporations and the international community, whose policies have a significant impact on the climate. Reconstructed legal philosophy must provide a clear normative basis for demanding cross-actor and cross-border accountability and recognize that failure to act to prevent climate damage can constitute moral and legal negligence.[64]

Reconstruction also touches on the dimensions of justice and legal legitimacy. Justice is no longer sufficiently measured by the extent to which rules apply equally to all, but must consider how these rules affect groups that are historically and structurally disadvantaged.[65] Seemingly neutral climate policies, such as uniform emission standards, can be unfair if they fail to account for differences in adaptive capacity and economic dependence on specific sectors. Therefore, legal philosophy needs to recognize the importance of differential justice that allows for special treatment for vulnerable communities and developing countries. Legal legitimacy must also be assessed in terms of its contribution to the restoration and protection of the ecological foundations of life.[66] Laws that are procedurally valid but substantively accelerate climate destruction are challenging to defend as legitimate in the horizon of climate justice.

To operationalize this reconstructive framework, Table 2 can be arranged as a matrix that brings together the dimensions of legal philosophy and their implications for the climate justice agenda. This table places key dimensions such as rights, responsibilities, justice, and legitimacy on one side; on the other side, it details the normative questions that must be answered when a policy or legal decision is reviewed from the perspective of climate justice. In this way, the philosophical framework becomes not only a conceptual backdrop but also a set of evaluation criteria for decision-makers. Although this article does not discuss any

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64 Carter, T., Benzie, M., Campiglio, E., Carlsen, H., Fronzek, S., Hildén, M., Reyer, C., & West, C. (2021). A conceptual framework for cross-border impacts of climate change. *Global Environmental Change*. https://doi.org/10.1016/j.gloenvcha.2021.102307.

65 Jahn, J., Zubizarreta, D., Chen, J., Needham, B., Samari, G., McGregor, A., Douglas, M., Austin, S., & Agénor, M. (2023). Legislating Inequity: Structural Racism In Groups Of State Laws And Associations With Premature Mortality Rates. *Health affairs (Project Hope)*, 42, 1325 - 1333. https://doi.org/10.1377/hlthaff.2023.00471.

66 Su, D., Wu, K., & Nie, A. (2025). China's Legal Protection System for Pangolins: Past, Present, and Future. *Animals: an Open Access Journal from MDPI*, 15. https://doi.org/10.3390/ani15162422.

specific cases, the framework is intended as a tool that can be applied in various contexts, from the assessment of climate legislation to the analysis of court decisions in environmental cases.

Table 2. Dimensions of legal philosophy reconstruction and key questions of climate justice

No	Dimension of reconstruction	Related climate justice focus	Key normative questions for policy/legal decision assessment
1	Rights	The right to a stable climate and a livable environment	Does this policy/decision protect or undermine the ecological conditions necessary for a life of dignity?
2	Responsibility	Cross-actor and intergenerational responsibility	Who bears the burden of climate impacts, and is it proportional to their contributions and capacity to act?
3	Justice	Distributive, procedural, recognition, and intergenerational justice	Does this policy/decision correct or exacerbate historical and structural inequalities in risks and benefits?
4	Legal legitimacy	Compatibility between procedural validity and commitment to sustainability	Can a law be considered legitimate if the procedure is valid but its substance accelerates the climate crisis or ignores vulnerable groups?

Table 2 confirms that the reconstruction of legal philosophy has direct consequences for how we examine legal policies and decisions in the era of the climate crisis. Questions about who owns rights and who is responsible can no longer be answered by referring only to the current subjects of the state and individuals. However, they must include future generations and communities that are disproportionately affected. Similarly, justice cannot be understood as formal equality alone, but must include corrective and transformational dimensions that change the structure of inequality. By posing a series of normative questions as listed in the table, reconstructed legal philosophy provides a compass for assessing whether a policy is truly moving toward climate justice or merely refining the old face of injustice.

VI. IMPLICATIONS FOR LEGAL EDUCATION AND LEGAL PRACTICE

The reconstruction of legal philosophy through a moral awakening towards climate justice has significant implications for legal education. Legal philosophy curricula, which have focused on the classic debates between positivism and naturalism, or between liberalism and Marxist criticism, need to be expanded to include the climate crisis and ecological justice as key touchstones.[67] Law students should not only be taught to understand theories of justice in the abstract. However, they should also be trained to understand how these concepts work when communities lose their land, water sources, or livelihoods due to climate change. Legal clinics and practical courses can be directed toward developing advocacy that departs from a climate justice perspective, so that a new generation of legal scholars becomes accustomed to seeing the relationship between legal texts, power structures, and ecological suffering. Such legal education will help ensure that moral awakening does not stop at discourse, but shapes the professional habitus of law enforcers.

In the realm of practice, this reconstructive framework encourages legislators, judges, and other law enforcers to examine policies and decisions beyond the narrow confines of procedural compliance. Lawmakers need to assess every climate and environmental regulation through the lens of justice: Is the burden of energy transition, for example, shared proportionally, and does it protect the most vulnerable groups? Judges, when faced with cases involving climate damage, can use the principles of intergenerational responsibility and cross-border solidarity to interpret the obligations of states and business actors more progressively. Law enforcement and environmental oversight agencies are also encouraged to view climate violations not merely as administrative violations, but as violations of the fundamental rights of communities and future generations.[68] Thus, the reconstruction of legal philosophy becomes the basis for shifting legal practice from pseudo-neutrality to conscious alignment with climate justice.

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VII. CONCLUSION

This article departs from the thesis that the climate crisis is a moral test for modern legal philosophy. Data on emissions inequality and climate vulnerability show that the most significant suffering is borne by those who contribute the least to the crisis, especially in lower-middle-income countries. Meanwhile, the dominant legal philosophy framework—with its emphasis on positivism, liberalism, and procedural formalism—has not made this reality the primary focus of reflection on rights, justice, and legitimacy. The diagnosis of a narrow interpretation of rights, the illusion of legal neutrality, and an instrumental view of nature reveals a deep moral flaw. In this context, the idea of a moral awakening towards climate justice is presented as a fundamental necessity, not an optional add-on.

By articulating core values such as expanded empathy, intergenerational responsibility, cross-border solidarity, and ecological humility, and mapping them onto a shift in the dimensions of rights, subjects, justice, responsibility, and legitimacy, this article offers a framework for reconstructing legal philosophy that is more in line with the demands of climate justice. Tables 2 and 3 illustrate how these conceptual changes can be operationalized into a series of normative questions for assessing legal policies and decisions. The main contribution of this article lies in its attempt to bridge the rich literature on climate justice with the discourse of legal philosophy, which has been relatively closed to global ecological problems, thereby placing the climate crisis at the center of legal normative claims.

The practical implications of this reconstruction extend to legal education, rule-making, and law enforcement practices. Legal philosophy curricula need to incorporate the climate crisis and ecological justice as key themes. At the same time, policymakers and judges are encouraged to apply the framework of climate justice in assessing environmental policies and cases. Beyond that, this article opens the door to further empirical research to test how this reconstructive framework can be applied to concrete case studies across various jurisdictions, especially in the Global South. Thus, the moral awakening towards climate justice proposed here is expected not only to enrich theoretical debates but also to inspire real change in the direction of legal development in the Anthropocene era.

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Mapping Global Blockchain Regulation: A Systematic Literature Review

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ABSTRACT: Blockchain technology has evolved from its initial role as the foundation of cryptocurrency into a transformative infrastructure that influences multiple sectors of the global economy. Its expansion across finance, governance, digital identity, intellectual property, healthcare, and environmental systems introduces complex regulatory challenges that existing legal frameworks were not originally designed to address. This study presents a Systematic Literature Review (SLR) aimed at mapping how blockchain is utilized across diverse domains and how various jurisdictions regulate their applications beyond cryptocurrency. Drawing upon academic publications, statutory instruments, and policy guidelines from 2020 to 2025, this paper identifies twelve key domains of blockchain application, including financial and crypto assets, central bank digital currencies (CBDC), smart contracts, supply chain systems, digital identity, creative tokenization, healthcare data, carbon markets, land registration, legal evidence, educational credentials, and decentralized autonomous organizations (DAO). The synthesis reveals a layered pattern of regulation shaped by governance structures, legal classifications, technical standards, and ethical considerations. The analysis shows that these regulatory layers are interdependent and mutually reinforcing, influencing each other in shaping how blockchain systems are governed, particularly when observed across different regulatory environments. Comparative analysis across selected jurisdictions including the European Union (Market in Crypto Asset Act), United States (U.S. Securities and Exchange Commission or U.S. Commodity Futures Trading Commission framework), Asia (Monetary Authority of Singapore Sandbox), and Indonesia (Indonesia Financial Service Authority Regulation No. 27/2024) reveals distinct regulatory philosophies which are rule-based, principle-based, and adaptive co-regulation. The study concludes that effective blockchain governance requires an adaptive and principle-oriented framework capable of balancing innovation with justice. Philosophically, it questions how legal centralism can coexist with decentralized systems, emphasizing the need for regulatory models that uphold technological progress while ensuring justice, accountability, and public trust in the digital era.

Keywords: Blockchain Regulation; Crypto Assets; Digital Economics; Cyber Law.

I. INTRODUCTION

The rise of blockchain technology has completely changed the way that rules are made and enforced in many places. Blockchain is a decentralized, unchangeable, and borderless technology that poses unique challenges for legal systems that are mainly meant for centralized, territorial institutions. The fast growth of blockchain applications, such as cryptocurrencies, smart contracts, supply chain management, and digital identity systems, has outpaced the creation of clear regulatory frameworks. This has led to a complicated situation with different national approaches, chances for regulatory arbitrage, and legal ambiguities.

This fragmentation of regulations shows up in several important ways. The cross-border nature of blockchain networks directly contradicts the territorial constraints of national legal systems, prompting essential inquiries regarding jurisdictional authority, enforcement mechanisms, and international collaboration. Second, blockchain's main technical features, especially its immutability and decentralization, don't fit well with current legal systems. The most obvious example of this is the European Union's General Data Protection Regulation (GDPR), which gives people the right to have their personal data erased. Third, the financial services sector is the main user of blockchain applications. It must deal with a wide range of regulatory responses, from those that encourage innovation to those that are strict and require a lot of compliance.

Even though there is more academic writing about blockchain regulation, there are still not many full systematic reviews that show the global regulatory landscape. Current research predominantly concentrates on specific jurisdictions, particular applications, or discrete regulatory challenges, rather than offering a comprehensive examination of complex regulatory issues across various contexts. This gap in literature hinders policymakers, legal scholars, and industry stakeholders from acquiring a comprehensive understanding of the regulatory challenges and potential solutions arising from varied global experiences. Governments around the world are trying to figure out how to effectively regulate blockchain technology, so there is a pressing need for evidence-based insights from a comparison of different regulatory approaches. Learning about which frameworks have worked, which problems still exist in different places, and which new ideas are promising can help create more consistent and effective regulatory systems.

This systematic literature review fills in these gaps by looking at peer-reviewed academic studies published between 2017 and 2025 and making a complete map of the global blockchain regulatory landscape. The review integrates findings from 25 meticulously chosen studies that investigate regulatory challenges, proposed frameworks, and implementation experiences across various jurisdictions and application domains. The review systematically analyzes this body of literature and identifies five key thematic areas: challenges in cross-border regulatory coordination, frameworks for privacy and data protection, approaches to financial services regulation, challenges in sectoral application, and adaptive regulatory strategies. The main research questions that this review is based on are: (1) What are the main regulatory issues that have been found in the literature about blockchain technology in different parts of the world? (2) What regulatory frameworks and solutions have been suggested or put into place to deal with these problems? (3) What patterns can be seen when you look at how different sectors and jurisdictions handle regulation? (4) What do these results mean for the future of regulatory development?

This review adds to the body of work in a few important ways. First, it offers the most thorough synthesis to date of global blockchain regulatory challenges and frameworks, utilizing empirical studies, legal analyses, and policy reviews from 23 jurisdictions. Second, it points out important differences between the technical features of blockchain technology and current legal frameworks, especially when it comes to privacy rights, cross-border enforcement, and liability attribution. Third, it talks about new regulatory ideas that could help with the unique problems that blockchain technology brings up. These ideas include regulatory sandboxes, technology-enabled supervision, and risk-based adaptive approaches. Lastly, it gives policymakers who want to create better and more consistent regulatory frameworks recommendations based on evidence.

II. METHODOLOGY

This systematic literature review follows established methodological guidelines for conducting comprehensive reviews in the social sciences and legal studies. The methodology encompasses three main phases: search and identification of relevant literature, screening and selection based on predetermined criteria, and data extraction and synthesis. This rigorous approach ensures transparency,

replicability, and comprehensive coverage of the relevant scholarly literature on blockchain regulation.

The literature search was conducted using several academic search engines, which provide access to over 138 million academic papers from comprehensive databases including Semantic Scholar and OpenAlex. This search infrastructure enables semantic searching beyond simple keyword matching, allowing for more nuanced identification of relevant studies that may use varied terminology to discuss similar regulatory concepts.

The primary search query employed was: "What are the key regulatory challenges and proposed frameworks for blockchain technology across different global jurisdictions?" This query was designed to capture studies addressing three core dimensions: regulatory challenges (problems and obstacles), proposed frameworks (solutions and approaches), and global scope (multiple jurisdictions and comparative analyses). The semantic search algorithm retrieved 498 papers most relevant to the query, forming the initial pool for screening.

The search strategy used a number of important design elements to make sure it was complete. First, the search's semantic nature found studies that used different words to talk about the same regulatory ideas (like "distributed ledger technology," "crypto assets," "digital assets," and "virtual currencies"). Second, the wide range of time included studies published from the first signs of blockchain regulation in 2017 to the most recent changes in 2025. This shows how regulatory thinking has changed over this important time. Third, the fact that major academic databases are used all over the world meant that studies from different parts of the world and legal traditions were included.

The 498 papers that were first found were systematically screened using six pre-set criteria. These criteria were meant to make sure that the studies chosen directly answered the review's research questions and met minimum quality standards. All six criteria had to be met for studies to be included. The screening process required a comprehensive evaluation of how well each paper met the overall review goals, rather than just applying each criterion separately.

The first criterion, Regulatory Focus, required that studies look at regulatory problems that blockchain technology causes or look at and analyze regulatory frameworks for blockchain technology. This criterion did not include papers that were only about the technical side of blockchain, such as its architecture or

performance, or business or economic studies that did not include any regulatory analysis. The second criterion, Government/Formal Regulation, required a focus on government regulatory bodies, policymakers, legal institutions, or formal governmental regulatory approaches, rather than just industry standards or self-regulation by the private sector. This criterion shows that the review is more interested in formal legal frameworks than voluntary governance mechanisms.

The third criterion, Study Design Rigor, required that studies employ empirical methods, case studies, legal analysis, policy reviews, systematic reviews, meta-analyses, or other systematic analysis with empirical evidence. This criterion excluded opinion pieces, editorials, or commentary without systematic analysis, ensuring that included studies provided evidence-based rather than merely speculative insights. The fourth criterion, Blockchain Application Coverage, required that studies address applications of blockchain technology subject to regulation across any sector, including but not limited to finance, healthcare, supply chain, and government services.

The fifth criterion, Jurisdictional Scope and Insights, required that studies either cover multiple jurisdictions, provide comparative analysis, or offer single-jurisdiction analysis with broader regulatory insights that could be transferable to other contexts. This criterion ruled out national case studies that were too specific and didn't offer any insights that could be used in other situations. The sixth criterion, Regulatory Implications, required that studies include regulatory implications or considerations, rather than focusing solely on technical aspects of blockchain without regulatory relevance.

Through application of these screening criteria, 25 studies were selected for full inclusion in the systematic review. These studies represent diverse jurisdictional coverage (from single-country analyses to global comparative studies), varied methodological approaches (from empirical studies to legal analyses), and comprehensive topical scope (from financial services to energy and government applications).

A structured data extraction protocol was developed to systematically capture relevant information from each included study. The protocol comprised six main categories of information: Jurisdiction Scope, Regulatory Challenges, Proposed Frameworks, Blockchain Applications, Stakeholder Perspectives, and Key Findings. For each category, specific extraction instructions guided the identification and recording of relevant information.

For Jurisdiction Scope, extraction concentrated on pinpointing particular countries or regions analyzed, the utilization of comparative analysis across various jurisdictions, and any sub-national jurisdictions referenced. For Regulatory Challenges, extraction captured all specific problems identified, including technical challenges (like immutability versus right to erasure), legal challenges (like fitting blockchain into existing frameworks), jurisdictional challenges (like cross-border coordination), enforcement challenges, industry-specific challenges, consumer protection issues, and regulatory gaps or uncertainties.

For Proposed Frameworks, extraction focused on the names and types of frameworks, the main principles or parts, the types of regulatory responses (hands-off, retrofitted, bespoke, sandboxes), the specific regulatory mechanisms suggested, the implementation status (proposed, pilot, enacted), and any assessment of the framework's effectiveness. Extraction found that Blockchain Applications were being used in certain areas, such as cryptocurrencies, e-commerce, data privacy, smart contracts, and supply chain applications.

For Stakeholder Perspectives, extraction gathered data on various stakeholder groups and their stances, encompassing stakeholder types (regulators, industry, consumers, advocacy groups), specific organizations referenced, identified conflicting interests or viewpoints, stakeholder concerns or priorities, and the degree of stakeholder involvement in regulatory development. For Key Findings, extraction focused on primary research findings or conclusions, policy recommendations, assessments of current regulatory effectiveness, identified best practices or successful approaches, future regulatory needs or directions, and any empirical results about regulatory impacts.

The data extraction process employed large language model assistance to systematically apply the extraction protocol to each study. This approach enabled efficient processing of the substantial volume of literature while maintaining consistency in data extraction across studies. However, all extracted data were subsequently verified through manual review to ensure accuracy and completeness.

After extracting the data, thematic synthesis was used to find patterns, similarities, and differences among the studies that were included. This analytical method included coding the extracted data multiple times, grouping similar ideas, and coming up with broad themes that show important parts of the blockchain regulatory landscape. This synthesis revealed five principal themes: challenges in

cross-border regulatory coordination, frameworks for privacy and data protection, approaches to financial services regulation, difficulties in sectoral application, and adaptive regulatory strategies.

The analysis looked at how frequently different problems or solutions were talked about for each theme, how many different jurisdictions had problems, how regulatory thinking changed over time, and how strong the evidence was for different claims or suggestions. This analytical method facilitates the identification of robust patterns substantiated by numerous studies across varied contexts, while simultaneously emphasizing areas where evidence is either scarce or conflicting.

III. CHARACTERISTICS OF STUDIES

The first diagnosis concerns the way modern legal philosophy understands rights and justice too narrowly within an individual and short-term horizon. In many classical debates

The systematic search and screening process yielded 25 studies that met all inclusion criteria. These studies, published between 2017 and 2025, represent a diverse body of scholarship examining blockchain regulation from multiple methodological, jurisdictional, and thematic perspectives. The included studies demonstrate considerable heterogeneity in their research designs, geographic coverage, and regulatory focuses, reflecting the multifaceted nature of blockchain regulation as an emerging field of legal and policy scholarship. Table 1 provides an overview of the study characteristics, including jurisdictional coverage and methodological approaches.

Table 1. Comprehensive Overview of Included Studies

Study (Year)	Jurisdiction (s)	Methodology	Proposed Framework	Regulatory Focus
Blandin	23 jurisdictions globally	Desktop research, interviews	Comparative analysis of existing, retrofitted, bespoke, and sandbox	Regulatory landscape, legal frameworks[1]

[1] Apolline Blandin et al, "Global Cryptoasset Regulatory Landscape Study" (2019) SSRN Electronic Journal, online: <http://dx.doi.org/10.2139/SSRN.3379219>.

Study (Year)	Jurisdiction (s)	Methodology	Proposed Framework	Regulatory Focus
			regimes	
von Hafe	Switzerland, Liechtenstein, Malta, EU, Estonia, Portugal	Legal text and policy analysis	Blockchain specialized vs. generalist frameworks (for example, Liechtenstein's Blockchain Act, European Union Markets in Crypto-Assets Regulation)	Legal frameworks, Anti Money Laundering/Know Your Customer (AML/KYC), asset classification[2]
Ochigbo	Japan, Switzerland, China, Gulf Cooperation Council (GCC), US, others	Literature review, comparative analysis	Flexible, innovative legal frameworks, global standards, regulatory authority	Privacy, harmonization[3]
Yeoh	EU, US, other Western countries	Qualitative, statutes, case studies	Hands-off, minimal intervention	Regulatory innovation, sandboxes[4]
Blemus	US, EU, main	Review of projects and consultations	Review of trends, no	Virtual currencies, Initial Coin

[2] Francisco Von Hafe et al, "Legal frameworks for blockchain applications: a comparative study with implications for innovation in Europe" (2025) 8 Frontiers in Blockchain, online: .

[3] Adah Dominic Ochigbo et al, "Legal frameworks for digital transactions: Analyzing the impact of Blockchain technology" (2024) 6:7 International Journal of Applied Research in Social Sciences 1205–1223, online: .

[4] Peter Yeoh, "Regulatory issues in blockchain technology" (2017) 25:2 Journal of Financial Regulation and Compliance 196–208, online: <https://doi.org/10.1108/jfrc-08-2016-0068>.

Study (Year)	Jurisdiction (s)	Methodology	Proposed Framework	Regulatory Focus
	economic countries		specific framework	Offering (ICO), smart contracts[5]
Bolívar	Not specified	Empirical, stakeholder theory	Stakeholder informed regulation	Stakeholder involvement[6]
Giannino	EU, Malta	Analysis of guidelines, national law	Malta's bespoke regime, harmonized European Union approach	Legal frameworks, regulatory arbitrage[7]
Guarín Duque & Zuluaga Torres	Not specified	Review, policy analysis	Principles for trust, transparency, efficiency	E-commerce, interoperability[8]
Al-Abdullah	EU	Narrative review, framework proposal	GDPR-compliant blockchain framework	GDPR compliance, privacy[9]
Jiaying	China, US	Impact assessment, legal analysis	Technology-enabled co-regulation, sandboxes	Regulatory Technology (RegTech), co-

5 Sttphane Blemus, "Law and Blockchain: A Legal Perspective on Current Regulatory Trends Worldwide" (2018) SSRN Electronic Journal, online: <http://dx.doi.org/10.2139/ssrn.3080639>.

6 Manuel Pedro Rodríguez Bolívar, Hans Jochen Scholl & Roman Pomeshchikov, "Stakeholders' Perspectives on Benefits and Challenges in Blockchain Regulatory Frameworks" in Public Administration and Information Technology (Springer International Publishing, 2021) 1.

7 Antonio Giannino, Damiano Di Maio & Andrea Vianelli, "Innovation through regulation: A comprehensive regulatory framework for blockchain-based services and products" (2019) 3:2 Journal of Financial Compliance 147, online: <http://dx.doi.org/10.69554/clly9895>.

8 Gustavo Guarín Duque & Julián David Zuluaga Torres, "Enhancing E-Commerce through Blockchain (DLTs): The Regulatory Paradox for Digital Governance" (2020) 20:2 Global Jurist, online: .

9 Muhammad Al-Abdullah et al, "Designing privacy-friendly data repositories: a framework for a blockchain that follows the GDPR" (2020) 22:5/6 Digital Policy, Regulation and Governance 389–411, online: .

Study (Year)	Jurisdiction (s)	Methodology	Proposed Framework	Regulatory Focus
				regulation, sandboxes[10]
Ferreira	Liechtenstein, Malta, Singapore, US, EU	Review, comparative analysis	Bespoke frameworks (token container, Virtual Financial Assets Act, sandboxes)	Tokenization, legal certainty, harmonization[11]
Herian	EU, US, Asia	In-depth legal analysis	Financial Action Task Force guidance, market-led standards	Anti Money Laundering/Combating the Financing of Terrorism (AML/CFT), digital identity[12]
Mulligan	Global	Systematic literature review	Policy recommendations for Environmental, Social, and Governance, net zero	Sustainability, Environmental, Social, and Governance (ESG)[13]

[10] Jiang Jiaying, "Technology-Enabled Co-Regulation for Blockchain Implementation" (2022) 83:4 University of Pittsburgh Law Review, online: <http://dx.doi.org/10.5195/lawreview.2022.876>.

[11] Agata Ferreira, "Emerging regulatory approaches to blockchain based token economy" (2020) 3:1 The Journal of The British Blockchain Association 1–9, online: <http://dx.doi.org/10.31585/jbba-3-1-(6)2020>.

[12] Robert Herian, *Regulating Blockchain* (Routledge, 2018).

[13] Catherine Mulligan, Suzanne Morsfield & Evîn Cheikosman, "Blockchain for sustainability: A systematic literature review for policy impact" (2024) 48:2 Telecomm Policy 102676, online: .

Study (Year)	Jurisdiction (s)	Methodology	Proposed Framework	Regulatory Focus
Selvanesan & Rodrigo	Global	Systematic literature review	Summary of policy initiatives	Policy initiatives, adoption[14]
Schwerin	EU	Delphi study, framework proposal	Privacy impact assessment, open standards	General Data Protection Regulation (GDPR) compliance, privacy[15]
Brophy	EU, Australia	Review, commercial/regulatory analysis	Sandboxes, innovation hubs	Insurance, Financial Technology (FinTech), sandboxes[16]
Riva	EU, US	Legal analysis, technical overview	Centralized governance, Privacy by Layers	Privacy, immutability, compliance[17]
Spafford	US, international	Policy analysis	Cooperative, deference to foreign regulators by US CFTC	Cross-border, extraterritoriality[18]
Jiang	Not specified	Impact assessment	Technology-enabled co-regulation	Regulatory Technology

[14] Hirusheekesan Selvanesan & Navodana Rodrigo, "Laws and policy initiatives in regulating blockchain and digital currencies" (2024) Journal of Science and Technology Policy Management, online: .

[15] Simon Schwerin, "Blockchain and Privacy Protection in the Case of the European General Data Protection Regulation (GDPR): A Delphi Study" (2018) 1:1 The Journal of the British Blockchain Association 1–77, online: .

[16] Richard Brophy, "Blockchain and insurance: a review for operations and regulation" (2019) 28:2 Journal of Financial Regulation and Compliance 215–234, online: <http://dx.doi.org/10.1108/jfrc-09-2018-0127>.

[17] Gianluigi Maria Riva, "What Happens in Blockchain Stays in Blockchain. A Legal Solution to Conflicts Between Digital Ledgers and Privacy Rights" (2020) 3 Frontiers in Blockchain, online: .

[18] Michael L Spafford, Daren F Stanaway & Sabin Chung, "Blockchain and cryptocurrencies: a cross-border conundrum" (2019) 20:3 Journal of Investment Compliance 10–19, online: <http://dx.doi.org/10.1108/JOIC-05-2019-0027>.

Study (Year)	Jurisdiction (s)	Methodology	Proposed Framework	Regulatory Focus
				(RegTech), co-regulation[19]
Jovanić	Western Balkans, EU	Comparative analysis	Risk-based, phased, adaptive strategies	Regulatory arbitrage, licensing[20]
Downes & Reed	Brazil, India, Kazakhstan, Mexico, South Africa, EU	Legal regime analysis	Linked blockchains, compliance gateways	Energy, sustainability, transparency[21]
Auer (2019)	US, Lithuania, EU	Theoretical, pilot analysis	Embedded supervision, legislative change	Embedded supervision, compliance[22]
Yang	US (Northern District of California)	Case study, legal analysis	Effect-based jurisdiction rule, de minimis exception	Jurisdiction, legal certainty[23]
Collomb	Europe, US	Comparative, regulatory analysis	Risk-based, functional equivalence, regulatory technology	ICO regulation, risk-based

[19] Jiaying Christine Jiang, "Technology-Enabled Co-Regulation as a New Regulatory Approach to Blockchain Implementation" (2021) SSRN Electronic Journal, online: .

[20] Tatjana Jovanić, "An Overview of Regulatory Strategies on Crypto-Asset Regulation - Challenges for Financial Regulators in the Western Balkans" (2020) 6 Gestion & Finances Publiques 4–12, online: <https://papers.ssrn.com/abstract=3784258>.

[21] Lauren Downes & Chris Reed, "Blockchain for Governance of Sustainability Transparency in the Global Energy Value Chain: Part 2, Reconciling the Technology/Regulation Mismatch" (2021) 2:1 Global Energy Law and Sustainability 22–50, online: .

[22] Raphael A Auer, "Embedded Supervision: How to Build Regulation into Blockchain Finance" (2019), online: <https://doi.org/10.24149/gwp371>.

[23] Alex Yueh-Ping Yang, "When Jurisdiction Rules Meet Blockchain: Can the Old Bottle Contain the New Wine?" (2022) SSRN Electronic Journal, online: .

Study (Year)	Jurisdiction (s)	Methodology	Proposed Framework	Regulatory Focus
				approach, compliance[24]
Wibowo	Global	Systematic literature review	Technology-Organization-Environment framework, legal frameworks for government	Government adoption[25]

Table 1 demonstrates substantial heterogeneity across all dimensions of the included studies. Jurisdictionally, the European Union emerged as the most frequently studied region (13 studies), followed by the United States (10 studies) and global comparative analyses (4 studies). Several smaller jurisdictions like Malta, Liechtenstein, and Switzerland received disproportionate attention as exemplars of innovative regulatory approaches. Methodologically, legal and policy analysis predominated (7 studies), alongside comparative analysis (4 studies) and systematic literature reviews (3 studies). The predominance of qualitative and analytical methods reflects both the nascent state of blockchain regulation and the challenges of gathering systematic quantitative data across diverse jurisdictional contexts. Thematically, compliance and supervision mechanisms, privacy and data protection, and tokenization/ICO regulation emerged as the most examined regulatory aspects, while cross-border coordination, sectoral applications, and sustainability issues remain relatively understudied. This distribution reflects financial services' dominance in blockchain adoption, the theoretical challenges posed by immutability-privacy tensions, and the relative novelty of blockchain applications in non-financial sectors.

[24] Alexis COLLOMB, Primavera DE FILIPPI & Klara SOK, "Blockchain Technology and Financial Regulation: A Risk-Based Approach to the Regulation of ICOs" (2019) 10:2 European Journal of Risk Regulation 263–314, online: .

[25] Wahyu Setiawan Wibowo, "A SYSTEMATIC LITERATURE REVIEW: BENEFITS AND CHALLENGES OF CLOUD-BASED BIG DATA ANALYTICS" (2023) Issues In Information Systems, online: .

IV. KEY FINDINGS

The systematic analysis of included studies revealed five major thematic areas that capture the core challenges and proposed solutions in blockchain regulation. These themes which are cross-border regulatory coordination challenges, privacy and data protection frameworks, financial services regulation approaches, sectoral application challenges, and adaptive regulatory strategies, emerged consistently across studies with diverse methodological approaches and jurisdictional focuses. Each theme encompasses specific regulatory problems, proposed solutions, and implementation experiences documented in the literature. Table 2 provides a comprehensive overview of these themes, after which the two most critical themes, cross-border coordination and privacy frameworks are examined in greater detail.

a. Cross-Border Regulatory Coordination Challenges

The inherently transnational nature of blockchain networks creates fundamental tensions with the territorial basis of traditional legal systems. Multiple studies identified cross-border regulatory fragmentation as one of the most pressing challenges facing blockchain governance. Blandin documented the lack of unified approaches across 23 jurisdictions, finding that each country has developed its own regulatory approach based on its legal traditions, economic priorities, and risk perceptions.[26] This fragmentation complicates crypto asset regulation and enables regulatory arbitrage, where firms strategically locate operations in jurisdictions with more favorable regulatory environments.

Von Hafe and Ferreira discussed how different countries in Europe and around the world make it harder to use blockchain applications across borders. Their comparative analyses revealed that, despite the relatively integrated nature of the European Union, member states have implemented markedly divergent regulatory approaches, ranging from Malta's tailored Blockchain Act to the retrofitting of existing financial services regulations in other nations.[27] These differences make it hard for businesses that operate in more than one jurisdiction to follow the rules because they must deal with different definitions of digital assets, different licensing requirements, different consumer protection standards, and different supervisory regimes.

[26] Blandin et al, *supra* note 1.
[27] Von Hafe et al, *supra* note 2; Ferreira, *supra* note 11.

The cross-border nature of blockchain also brings up difficult questions about enforcement and authority outside of a country's borders. Spafford and Yang investigated the constraints of extraterritorial regulatory jurisdiction and the imperative of international collaboration. Spafford et al. conducted a focused examination of the cross-border enforcement challenges faced by the United States Commodity Futures Trading Commission (US CFTC), advocating for U.S. regulators to defer to and collaborate with their foreign counterparts to prevent the emergence of overlapping and contradictory regulations.[28] Yang suggested an effect-based jurisdiction rule with de minimis exceptions to handle cases where blockchain transactions have little to do with a certain jurisdiction.[29]

Several studies highlighted the urgent need for coordinated frameworks to mitigate regulatory arbitrage and enhance global information exchange. Jovanić investigated regulatory arbitrage in the Western Balkans, where companies take advantage of the differences between national regimes and the EU framework.[30] Downes and Reed emphasized the necessity for harmonization in the energy sector, where blockchain applications aimed at sustainability transparency demand uniform standards among countries engaged in global value chains.[31] Both studies contended that without enhanced harmonization, the complete potential of blockchain for cross-border applications remains unfulfilled.

However, the literature shows that even though these problems are well-known, progress toward international coordination is still slow. Several attempts at harmonization have been recorded, such as the Financial Action Task Force's guidance on virtual assets, the EU's Markets in Crypto-Assets Regulation, and bilateral cooperation agreements. However, these efforts have only been partially successful. There are still big differences between legal systems (common law vs. civil law), regulatory philosophies (principles-based vs. rules-based), and national priorities (innovation promotion vs. consumer protection) that make it hard to come up with truly harmonized approaches. The literature indicates that effective cross-border coordination necessitates both the technical harmonization of regulations and institutional frameworks for continuous collaboration, information exchange, and conflict resolution. Numerous studies advocated for the creation of international regulatory networks, mutual recognition agreements among

[28] Spafford, Stanaway & Chung, *supra* note 18.
[29] Yang, *supra* note 23.
[30] Jovanić, *supra* note 20.
[31] Downes & Reed, *supra* note 21.

supervisory authorities, and the formulation of model laws that nations can tailor to their specific contexts while preserving fundamental compatibility.

b. Privacy and Data Protection Framework

The conflict between blockchain's unchangeability and privacy rights has been recognized as one of the most theoretically complex regulatory challenges in the literature. Privacy and data protection, especially in relation to the European Union's General Data Protection Regulation (GDPR), are key topics in a number of studies. The primary challenge stems from the perceived incompatibility between blockchain's essential technical feature which are the permanent, immutable recording of data and privacy regulations that ensure individuals' rights to deletion, correction, and portability of personal data.

The literature proposed several technical and governance solutions to address these tensions. Schwerin developed a privacy impact assessment framework specifically for blockchain applications, emphasizing privacy-by-design principles where privacy considerations are integrated into blockchain system architecture from the outset.[32] Al-Abdullah proposed architectural tactics including storing personal data off-chain while keeping only encrypted references on-chain, using private or permission blockchains where access can be controlled, and establishing clear governance structures that designate data controllers.[33] Riva advocated centralized governance models with "Privacy by Layers" approaches, where different layers of the blockchain architecture have different privacy characteristics.[34] These studies converged on the need for active dialogue between blockchain developers and privacy regulators, development of open standards for privacy-preserving blockchain architectures, and clear appointment of data controllers in blockchain governance structures.

The evidence in these studies is mostly theoretical, with little empirical support for the proposed frameworks. This shows that both blockchain use and privacy law enforcement are still in their early stages. As European data protection authorities start to enforce GDPR against blockchain apps and privacy laws spread to other places, we will probably see more real-world examples of what works and what doesn't. The literature indicates that a definitive resolution may necessitate not only technical modifications but also the potential evolution of privacy law to

[32] Schwerin, *supra* note 15.
[33] Al-Abdullah et al, *supra* note 9.
[34] Riva, *supra* note 17.

accommodate the distinctive attributes of decentralized technologies. These technical solutions recognize that attaining flawless compatibility between blockchain and GDPR may necessitate concessions regarding either the immutability of blockchain or the stipulations for data protection.

c. Financial Services, Sectoral and Adaptive Approaches

Financial services emerged as the most heavily studied application domain, with the literature documenting a spectrum of regulatory responses ranging from hands-off minimal intervention to comprehensive bespoke regulatory frameworks. Blandin conducted one of the most comprehensive comparative analyses, examining crypto asset regulation across 23 jurisdictions globally. Their study identified four main regulatory approaches: hands-off approaches where regulators take minimal action, retrofitted approaches where existing financial regulations are adapted to blockchain applications, bespoke approaches where specialized legislation is developed specifically for blockchain, and sandbox approaches where regulators create experimental environments with relaxed requirements.[35]

Von Hafe[36], Giannino[37], and Ferreira[38] provided detailed analyses of specific national frameworks. These studies contrasted Malta's comprehensive Virtual Financial Assets Act and Liechtenstein's Blockchain Act—both representing bespoke, specialized frameworks—with more generalist approaches such as the EU's Markets in Crypto-Assets Regulation and the fragmented state-federal system in the United States. Specialized frameworks demonstrated several advantages: clear legal definitions for different types of digital assets, licensing framework specifically designed for blockchain business models, specialized supervisory authorities with technical expertise, and comprehensive compliance guidance. Studies suggested these bespoke frameworks were associated with more mature blockchain ecosystems and greater legal certainty. In contrast, generalist or fragmented approaches struggled with inconsistent enforcement and regulatory gaps. The literature documented confusion about whether digital assets should be classified as securities, commodities, currencies, or property, with different agencies providing conflicting guidance.

35 Blandin et al, *supra* note 1.
36 Von Hafe et al, *supra* note 2.
37 Giannino, Di Maio & Vianelli, *supra* note 7.
38 Ferreira, *supra* note 11.

Collomb proposed risk-based methodologies for Initial Coin Offering regulation, advocating for regulatory requirements tailored to specific risks instead of a one-size-fits-all approach.[39] This method separates utility tokens, security tokens, and asset-backed tokens and sets different standards for each group. The literature identified several trends: a shift away from purely hands-off approaches as risks emerged, including exchange hacks, ICO fraud, market manipulation, and money laundering; an increase in the sophistication of regulatory frameworks as jurisdictions learn from the experiences of earlier countries; a growing interest in technology-enabled supervision that leverages blockchain's transparency rather than viewing it solely as a challenge; and a gradual convergence toward risk-based, functionally-equivalent approaches that focus on activities and risks rather than technologies themselves. But there are still problems that won't go away. Regulatory frameworks have a hard time keeping up with the rapid changes in technology because new applications and business models come out faster than regulations can change. The fact that blockchain doesn't have borders makes jurisdictional problems that national financial regulations can't fully solve. There are still tensions between promoting innovation and protecting consumers, with different jurisdictions making different trade-offs. Finally, it's not clear how well-bespoke frameworks will work in the long run, since they may become outdated as blockchain technology changes or create too much regulatory fragmentation.

Sector-specific challenges were documented across multiple domains. Brophy examined blockchain in insurance, identifying opportunities including automated claims processing through smart contracts, improved fraud detection, and more efficient reinsurance.[40] However, regulatory challenges include ensuring smart contracts comply with insurance law, maintaining consumer protection standards, supervising decentralized insurance pools, and ensuring financial soundness. Brophy highlighted regulatory sandboxes' role in facilitating experimentation—the EU and Australia have implemented programs allowing insurers to test blockchain with relaxed requirements under close supervision. These sandboxes enable regulators to understand emerging business models and develop appropriate approaches. The study reported that sandbox experiences have been particularly valuable in insurance because they allow regulators to observe how smart contract-based claims processing operates in practice, how consumers interact with blockchain-based insurance products, and what new risks emerge from

[39] COLLOMB, DE FILIPPI & SOK, *supra* note 24.
[40] Brophy, *supra* note 16.

decentralized insurance models. Sandbox participants have provided regulators with insights about technical implementation challenges, consumer understanding and acceptance of blockchain-based insurance, and appropriate regulatory safeguards that balance innovation with protection. However, Brophy also noted that transitioning successful sandbox experiments to full market authorization remains challenging, as insurance regulations were not designed to accommodate blockchain-based business models.

Guarín Duque and Zuluaga Torres identified a "regulatory paradox" in e-commerce where blockchain's decentralization creates both opportunities (transparent transaction records, automated dispute resolution, reduced intermediary costs) and challenges (complicated enforcement of consumer protection laws, product safety standards, tax obligations, intellectual property rights). The study emphasized interoperability needs between blockchain systems and existing e-commerce frameworks.[41] Meanwhile Downes and Reed examined blockchain for sustainability transparency in energy, identifying a "technology/regulation mismatch" where different countries' energy regulations are incompatible with blockchain's need for standardized data formats. They proposed linked blockchains with compliance gateways enabling jurisdictions to maintain specific requirements while achieving interoperability.[42]

Wibowo examined government blockchain adoption, identifying lack of legal frameworks as a major barrier.[43] Government applications offer benefits including improved service delivery, enhanced transparency, reduced corruption, and efficient inter-agency information sharing. However, unique challenges exist which are ensuring compatibility with administrative law frameworks, maintaining accountability in decentralized systems, protecting sensitive data while leveraging transparency, ensuring citizen accessibility, and establishing governance mechanisms for shared networks. Wibowo recommended comprehensive legal frameworks, strategic planning aligning with e-government initiatives, capacity building for officials, pilot projects before large-scale deployment, and international cooperation for standards development. The study noted that early government adopters have generally taken cautious approaches with small-scale pilots rather than wholesale transformation, reflecting both the complexity of government operations and the political sensitivity of public sector

41 Guarín Duque & Zuluaga Torres, *supra* note 8.
42 Downes & Reed, *supra* note 21.
43 Wibowo, *supra* note 25.

blockchain implementation. Government blockchain applications also face particular scrutiny regarding data sovereignty, as the decentralized nature of blockchain may be perceived as conflicting with national security interests and requirements for governmental control over citizen data. Furthermore, the study emphasized that successful government blockchain adoption requires not only technical implementation but also organizational change management, legal reforms to recognize blockchain-based records, and public education to build citizen trust in blockchain-based government services.

Adaptive and technology-enabled regulatory strategies are increasingly advocated as superior alternatives to traditional approaches. Jiaying[44] and Jiang[45], advocated for technology-enabled co-regulation combining regulatory oversight with industry participation and technological tools with Regulatory Technology (RegTech) and Supervisory Technology (SupTech) tools, enabling automated compliance monitoring and real-time risk assessment. In this model, regulators establish high-level principles while industry develops specific technical standards. These studies argued technology-enabled co-regulation offers advantages: reduced compliance costs through automation, more flexible responsive regulation adapting without legislative amendments, leveraging industry expertise while maintaining regulatory authority, better consumer protection through proactive supervision, and encouraging innovation by providing clear compliant pathways.

Several studies have explored innovative regulatory approaches designed specifically for blockchain. Auer introduced "embedded supervision" where compliance requirements are programmed directly into blockchain protocols, enabling automated monitoring and enforcement.[46] This approach leverages blockchain's transparency to reduce compliance costs while enabling more comprehensive supervision. Examples include anti-money laundering through automated transaction monitoring, capital requirements enforced through smart contracts restricting activities when capital falls below thresholds, and market manipulation monitoring through real-time analytics. Auer's pilot analysis identified benefits (dramatically reduced compliance costs, improved supervisory information through continuous monitoring, faster problem detection, reduced retrospective enforcement need) and challenges (difficulty translating legal

44 Jiaying, *supra* note 10.
45 Jiang, *supra* note 19.
46 Auer, *supra* note 22.

requirements into programmable rules, risks of regulatory inflexibility, liability questions when automated systems fail, potential for circumvention by sophisticated actors).

Regulatory sandboxes emerged as another important adaptive tool Jiaying documented widespread adoption, particularly in the China and United States. Sandboxes allow firms to test innovations with relaxed requirements under close monitoring, enabling regulators to learn about emerging business models before developing permanent regulations while firms experiment without full regulatory burden.[47] The literature reported generally positive assessments—sandboxes have facilitated innovation while managing risks. However, limitations exist since typically accommodating only small-scale pilots creating scaling challenges, burdensome application processes potentially favoring well-resourced firms, possible competitive advantages for participants, and unclear pathways transitioning from sandbox to full authorization.

Across different studies, some common themes came up. Each sector requires tailored approaches accounting for specific risks, existing frameworks, and stakeholder needs, a one-size-fits-all regulation is inadequate. Sandboxes and pilots are important for both regulators and the industry to learn from. Interoperability between blockchain and legacy systems is crucial but challenging. Questions about legal validity of blockchain records, smart contract enforceability, and liability attribution persist across sectors. Harmonization of standards is particularly important for inherently cross-border applications like supply chains and international trade. The studies showed that effective regulation needs both a good understanding of blockchain and a lot of knowledge about the industry. This means that people need to learn both about blockchain and their industry. The sectoral studies also revealed that timing matters significantly, early regulatory clarity can facilitate healthy ecosystem development, while delayed or unclear regulation may push innovation to less regulated jurisdictions. Moreover, the studies demonstrated that sector-specific characteristics fundamentally shape what types of blockchain applications are feasible and desirable, with some sectors (like insurance and supply chains) proving more amenable to blockchain than others (like certain government services requiring high privacy).

The evidence supporting the efficacy of adaptive strategies is predominantly theoretical or derived from preliminary pilots. Many sandbox programs and

[47] Jiaying, *supra* note 10.

technology-enabled supervision initiatives are recent and have little data on long-term outcomes. There are still questions about how to scale beyond pilot projects, how to protect consumers better than traditional regulation, how to avoid giving an advantage to either new or old companies, and how to avoid regulatory capture when regulators and industries work closely together. Challenges to implementation include the need to build up a lot of regulatory capacity to understand and use new supervisory technologies, the possibility of resistance from both regulated entities and regulators who are used to traditional methods, legal questions about giving regulatory duties to automated systems, and the risk that technology-enabled regulation could become too rigid if it isn't carefully designed to allow for ongoing adaptation. Even though there are still some questions, the literature shows that most people agree that traditional static rules-based regulation doesn't work for technologies that change quickly. It seems that some kind of more adaptive, flexible, technology-informed regulation is needed. The exact methods will differ from one jurisdiction or sector to the next, depending on legal traditions, regulatory capacity, and policy priorities. The main point is that regulating blockchain well means not only changing some rules but also making the whole regulatory system more flexible and able to keep up with changes in technology. This change needs a long-term commitment to new ways of doing things in regulation, more money spent on supervision and technology, and a willingness to try new things while still keeping the main goals of protecting consumers, keeping the economy stable, and keeping the market honest.

Before moving into the broader analytical discussion, it is important to visualize how the regulatory themes identified in this systematic review converge into a unified conceptual structure. Figure 1 synthesizes the four major regulatory dimensions, governance structures, legal classifications, technical standards, and ethical considerations highlighting how each domain both shapes and is shaped by the others. Rather than operating as isolated regulatory pillars, these dimensions function as an interconnected ecosystem in which legal definitions influence governance mechanisms, technical standards constrain or enable regulatory choices, and ethical principles inform both institutional design and compliance obligations. This integrated regulatory framework illustrates the multilayered nature of blockchain governance uncovered in the literature and provides a conceptual bridge between the empirical findings of the preceding section and the normative analysis developed in the Discussion that follows.

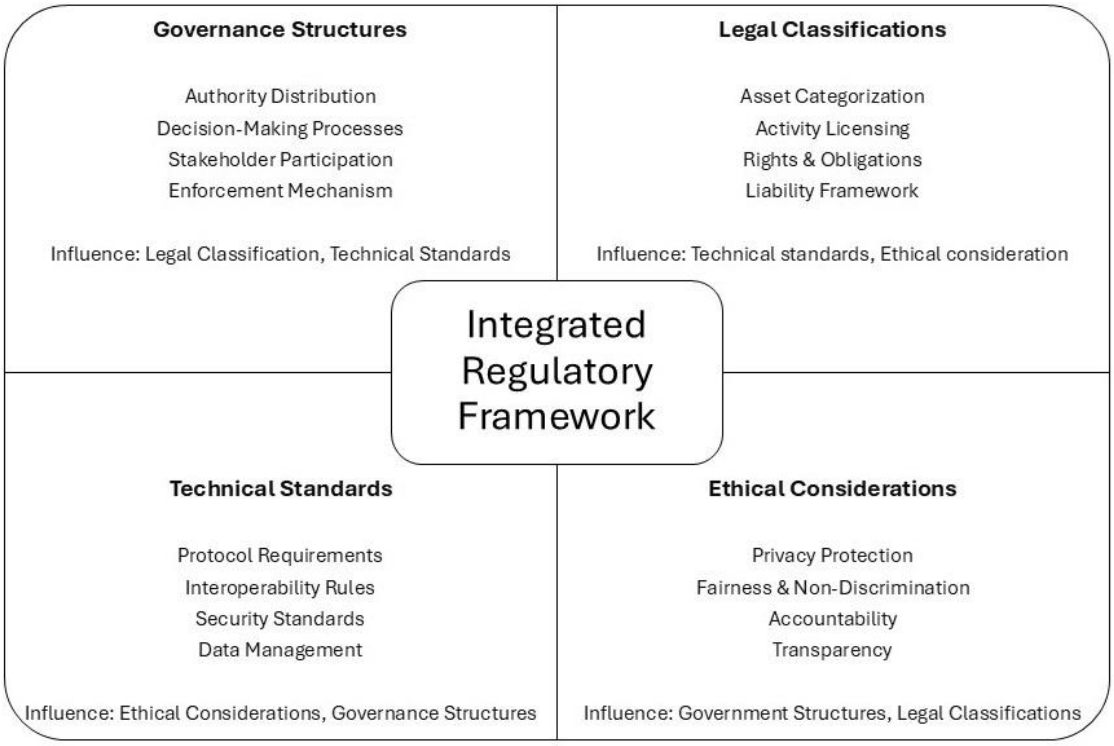


Figure 1. Blockchain Integrated Regulatory Framework (*Source: Authors*)

V. INTEGRATION OF KEY FINDINGS

Integration of the thematic findings reveals several overarching patterns. First, there is a basic conflict between the fact that blockchain is global and doesn't have borders and the fact that law is based on territory. This tension shows up not only in problems with coordinating across borders, but also in privacy rules (where different countries have different data protection rules), financial services rules (where there are many chances for regulatory arbitrage), and sectoral applications (where national standards make it hard for systems to work together). The literature indicates that this tension cannot be entirely alleviated through national regulation alone, necessitating either substantial international harmonization or the acceptance of enduring regulatory fragmentation, along with its associated inefficiencies and risks.

Second, there is a basic conflict between the fact that blockchain can't be changed and the fact that the law says data can be changed or deleted. This tension is most evident in privacy law, particularly with GDPR's right to erasure; however, it also manifests in other areas, such as rectifying inaccuracies in records, executing court orders mandating data alteration, eliminating unlawful content, refreshing

obsolete information, and rescinding credentials or authorizations. The proposed solutions in the literature—off-chain data storage, controlled mutability mechanisms, and permissioned rather than public blockchains—each require giving up some of the most important features of blockchain. This implies that blockchain might be inadequate for certain applications requiring data modification rights, or conversely, that legal frameworks may need to adapt to embrace immutability.

Third, there is a conflict between protecting consumers and encouraging new ideas, and different places find different ways to balance these two goals. Jurisdictions emphasizing innovation (such as Malta, Liechtenstein, and Singapore) have adopted permissive, bespoke frameworks that provide clarity and support for blockchain businesses. Countries that care about protecting consumers, like China and some EU member states that are more conservative, have stricter rules, higher barriers to entry, and more oversight. The literature does not definitively resolve which approach proves superior in the long run—innovation-focused jurisdictions attract more blockchain activity but may face greater consumer harm risks, while protection-focused jurisdictions face less immediate risk but may fall behind in technological development.

Fourth, people are starting to realize that the usual ways of regulating things like static rules, ex-post enforcement, and centralized oversight don't work for blockchain. The literature increasingly supports more adaptable strategies, such as regulatory sandboxes for experimentation, technology-driven oversight that takes advantage of blockchain's transparency, risk-based regulation that is based on real risks rather than one-size-fits-all rules, co-regulation that combines government oversight with industry participation, and rules that are based on principles rather than strict rules. These adaptive methods look promising, but they haven't been tested on a large scale yet, so we don't know how well they will work in the long run.

VI. IMPLICATIONS FOR POLICY AND PRACTICE

The results have many important effects on policymakers and regulators. First, they say that regulating blockchain on a national level won't work because the technology is used all over the world. Even big places like the US and the EU can't effectively regulate blockchain on their own. Regulatory arbitrage, extraterritorial

transactions, and problems with cross-border enforcement will still be there. This means that more money needs to be put into international coordination systems, such as making multilateral bodies stronger, creating model laws and standards, signing agreements for regulatory cooperation, making it easier for supervisors to share information, and setting up networks for information sharing.

Second, the results show that regulators need to learn more about how blockchain technology works. Regulators in industries where blockchain is being used must understand it. If they don't, they could either overregulate, which stops good innovation, or underregulate, which allows bad activities. This means that a lot of work needs to be done to improve regulatory capacity. This includes giving technical training to current staff, hiring people with blockchain knowledge, working with technical advisors, joining international networks for sharing knowledge, and buying technological tools for supervision.

Third, the results show that a single set of rules for blockchain is not the best way to go. Different blockchain applications have different risks, work in different situations, and need different kinds of regulation. Applications in the financial services sector that involve consumers need more oversight than applications in the enterprise supply chain sector. Public blockchains with anonymous participation require different treatment than private blockchains with identified participants. Transactions with high values need stricter rules than those with low values. This indicates the necessity for risk-based, proportionate regulation tailored to actual risks, rather than the imposition of uniform rules irrespective of context.

Fourth, the findings suggest that privacy law may require evolution to address immutability. The GDPR's right to erasure, which was made for centralized databases where deletion is easy to do, may not work with blockchain's core architecture. More nuanced approaches may be needed instead of making blockchain applications give up immutability (which could hurt the technology's value) or letting blockchain off the hook from privacy law (which could create unacceptable privacy risks). These could include accepting pseudonymization as sufficient for low-risk applications, clarifying that right to erasure does not require physical deletion in all circumstances, developing specific standards for blockchain privacy compliance, or accepting that some blockchain use cases are incompatible with current privacy law and should not be pursued.

Fifth, the findings suggest that regulatory sandboxes and innovation hubs, despite limitations, provide valuable mechanisms for adaptive regulation. They help

regulators learn about new technologies and business models, let companies try out new ideas without having to follow all the rules, make it easier for regulators and businesses to talk to each other, and provide evidence to help create permanent rules. However, sandboxes need improvement to address current limitations, including clearer pathways from sandbox to full authorization, reduced barriers to entry for smaller firms, mechanisms to avoid creating unfair competitive advantages, and better approaches to scaling successful pilots.

VII. LIMITATION AND FUTURE RESEARCH

There are a number of problems with this systematic review that need to be pointed out. The literature on blockchain regulation is rapidly expanding but is still in its early stages, with numerous studies published only in recent years. The evidence base is mainly made up of early-stage pilot evaluations, legal reviews, and conceptual analyses, not full-scale empirical studies of how well regulations work. As blockchain adoption develops and regulatory frameworks gain additional implementation experience, more substantial empirical evidence regarding the most effective approaches will emerge.

Second, the studies included show a geographic bias toward developed countries, especially the United States and the European Union. The regulation of blockchain in developing countries, where the technology may present distinct advantages and encounter unique obstacles, is still insufficiently examined. Likewise, regional disparities within extensive nations (for instance, state-level regulation in the United States) are inadequately addressed. Future research ought to investigate blockchain regulation in a broader array of contexts, encompassing developing nations, sub-national jurisdictions, and countries characterized by distinct legal traditions.

Third, most research concentrates on the financial services applications of blockchain, while other sectors are comparatively overlooked. This shows how people are using it right now, but it makes it harder to understand the problems that different sectors face in healthcare, education, government, the supply chain, and other new application areas. As blockchain grows in these areas, research that looks at regulatory problems and solutions in each area will become more important.

Fourth, the literature focuses more on regulatory issues and problems than on solutions and success stories. This negative bias may indicate that issues garner more scholarly focus than achievements, or it may truthfully signify that blockchain regulation continues to be challenging with few validated solutions. Future research ought to investigate affirmative instances in which regulation has effectively facilitated advantageous blockchain applications while mitigating risks.

Fifth, the review was mostly based on peer-reviewed academic papers, which means it might have missed important information from policy reports, industry white papers, and regulatory guidance documents. Academic literature offers rigor; however, practitioners may possess valuable insights that have not yet been incorporated into scholarly publications.

The identified gaps highlight several critical areas for future research. First, longitudinal studies that look at how regulatory approaches change over time would help us understand how regulations learn and change. Second, research on comparative effectiveness that looks at results under different regulatory approaches would help find best practices. Third, empirical studies of regulatory sandbox programs that look at how well they really work to encourage innovation while keeping risks in check would help design sandboxes. Fourth, research on regulatory capacity and expertise that looks at how regulators learn about blockchain technology would help build their skills. Fifth, research on stakeholder involvement in regulatory development that looks at how different groups affect blockchain governance would shed light on political economy issues. Sixth, studying new problems like decentralized autonomous organizations, non-fungible tokens, central bank digital currencies, and other new blockchain uses would help regulators learn more about how to deal with these problems as they come up.

VIII. CONCLUSION

This systematic literature review shows that blockchain regulation is still not consistent across different jurisdictions. This makes it hard to coordinate across borders, follow privacy rules, and implement blockchain in different sectors. The analysis of 25 studies across 23 jurisdictions demonstrates that while financial services dominate blockchain applications and regulatory focus, emerging domains such as central bank digital currencies, healthcare records, land

registration, educational credentials, legal evidence systems, creative economy tokenization, and decentralized autonomous organizations present distinct regulatory complexities that existing frameworks struggle to address effectively. The fundamental tensions between blockchain's immutability and privacy rights, particularly under the General Data Protection Regulation (GDPR) combined with jurisdictional ambiguities inherent in decentralized systems, underscore the inadequacy of simply retrofitting traditional legal structures to govern distributed technologies. A comparative analysis shows that jurisdictions that use adaptive, principle-based methods, like Singapore's multi-tiered regulatory sandbox, Liechtenstein's comprehensive blockchain legislation, and Switzerland's technologically neutral framework, are better at encouraging innovation while still protecting consumers. On the other hand, fragmented or overly strict regulatory environments slow down beneficial development and unintentionally encourage regulatory arbitrage.

To make blockchain governance work, we need to move away from reactive, jurisdiction-specific rules and toward proactive, internationally coordinated frameworks that are neutral to technology but still protect core legal principles like accountability, consumer protection, and the rule of law. Policymakers should put three strategic directions at the top of their list: First, we need to set up strong cross-border regulatory collaboration mechanisms to deal with the fact that blockchain networks are inherently transnational. Second, we need to create adaptive regulatory tools that can change as technology changes quickly, such as regulatory sandboxes, innovation hubs, and technology-enabled supervision systems. Third, we need to make comprehensive sector-specific guidance that recognizes blockchain's many uses beyond cryptocurrency, especially in areas like healthcare, education, public administration, and creative industries where trust, transparency, and data integrity are very important. Future research should examine the empirical outcomes of various regulatory approaches via longitudinal studies, investigate the scalability challenges of blockchain-based governance systems, and explore how emerging technologies, such as zero-knowledge proofs and layer-2 solutions, can harmonize privacy requirements with the transparency attributes of blockchain. Ultimately, creating detailed and useful rules for blockchain technology needs ongoing talks between technologists, legal experts, policymakers, and people who work in the industry. These talks should be based on real-world evidence of what works instead of guesswork.

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Harmonization of Legal Principles in UNDRIP into the Indonesian Legal Regime to Protect *Adat* Law Communities' Tenurial Rights (A Comparative Study of Indonesia, the Philippines, and Ghana)

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ABSTRACT: The rights of *adat* law communities are regulated by the 1945 Constitution and a range of sectoral laws and regulations, down to the government and/or municipal regulations. These rights, granted through recognition, are attributed to *adat* law communities based on the fulfillment of certain criteria, such as their existence not conflicting with state interests or existing laws. As a result, *adat* law communities do not enjoy full freedom through this recognition. Instead, it comes with certain limitations.

Aside from national laws and regulations in Indonesia that govern the rights of *adat* law communities, these communities are also recognized internationally as indigenous peoples. The rights of indigenous peoples are regulated by international law instruments such as the ILO Convention No. 169 of 1989 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). These instruments uphold some principles such as self-determination, self-identification, and Free, Prior, and Informed Consent (FPIC), thereby strengthening indigenous peoples' rights to their land.

Limitations on the rights of *adat* law communities have weakened their position, while land-grabbing efforts to acquire their territories have become increasingly rampant. Therefore, there is a need to harmonize UNDRIP into Indonesian national law to strengthen the rights of *adat* law communities.

This study is a normative juridical research employing statutory, conceptual, and comparative approaches. It includes a comparative analysis of the recognition and protection of *adat* law communities' rights in the Philippines, Malaysia, and Ghana. The paper will provide recommendations for Indonesia that, by harmonizing international and national legal frameworks and by referencing other countries with similar backgrounds, the state can grant full freedoms to *adat* law communities, and ensure that the protection of the tenurial rights of *adat* law communities is in line with the mandate of the Indonesian Constitution.

Keywords: ILO; United Nations Declaration on the Rights of Indigenous Peoples; Adat Law.

I. INTRODUCTION

Adat law communities in Indonesia possess tenurial rights, locally known as *ulayat* right, which represent the collective authority of these communities over land within their territories. This authority encompasses the regulation, control, utilization, and management of land resources for the collective interest of the community and its members. Tenurial rights are not merely legal constructs but are deeply embedded in religious-magical, economic, and social dimensions.[1] These rights are transmitted across generations and understood to be granted by supernatural powers or inherited from ancestors, thereby creating an eternal and indissoluble bond between the community and the land, reflecting a profound philosophical connection with their ancestral territories.[2]

In a broader conceptual sense, the tenurial rights of *Adat* Law Communities are comparable to the Hak Bangsa (Right of the Nation). As communal property, tenurial rights cannot be transferred to external parties outside the community and encompass the authority to plan and implement policies, as well as to regulate, administer, utilise, and maintain land and all natural resources within the relevant territory, supported by authorised customary governance structures. [3]

Within Indonesia's legal framework, the tenurial rights of *Adat* Law Communities are recognised by the 1945 Constitution, specifically under Article 18B paragraph (2), which provides that 'The States recognise and respect units of *Adat* Law communities and their traditional rights, as long as they remain in existence and are in accordance with societal development and the principles of the Unitary State of the Republic of Indonesia'. Furthermore, various sectoral laws, government regulations, ministerial decrees, and provincial and municipal regulations also reference these rights upon *Adat* Law Communities, as the legal framework remains fragmented and subject to multiple layers of statutory qualifications.

At the international level, the rights of Indigenous peoples are articulated in the United Nations Declaration on The Rights of Indigenous peoples (UNDRIP), which enshrines the rights to self determination in article 3 and 4, the principle of

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1 Djamanat Samosir, *Hukum Adat Indonesia (Eksistensi dalam Dinamika Perkembangan Hukum di Indonesia)* (Nuansa Aulia 2013) 211, cited in Rosnindar Sembiring, *Hukum Pertanahan Adat* (Rajawali Press 2019) 62.

2 Sembiring (n 1) 13.

3 Rudy, Rudy Wijaya and Muhammad Amin Putra, *Rekognisi Hukum Adat dan Masyarakat Hukum Adat dalam Sistem Ketatanegaraan Indonesia* (Rajawali Press 2021) 32.

Free, Prior, and Informed Consent (FPIC) in article 10, and the the right to self-identification in article 33. Although UNDRIP functions as soft law and serves as a normative reference for UN member states rather than a binding treaty obligation, it represents the most comprehensive international articulation of Indigenous peoples. In the Indonesian context, the term 'Indigenous Peoples' corresponds to *Masyarakat Hukum Adat,* a legal category denoting communities governed by indigenous law and possessing distinct social structures, customary institutions, and historical claims to land and natural resources.

Despites constitutional and international recognition, international legal principles concerning the rights of Indigenous peoples have not been fully integrated into the National Legal System. Legal recognition of *Adat* Law Communities remains conditional, and their tenurial rights are subject to extensive limitations, largely contingent upon the political will of the government. These rights may be overridden in the name of public interest, rendering the protection afforded to *Adat* Law Communities insufficient and inconsistent with the inherent nature of tenurial rights as recognised under international principles. In practice, the tenurial rights of *Adat* Law Communities are frequently undermined by competing interests, including large scale business venture, natural resource exploitation, government led development projects framed as serving the public interest. Such pressures result in weak legal certainty regarding the status and rights of *Adat* Law Communities, exposing their tenurial rights to systemic land grabbing and dispossession.

This paper seeks to address the primary issue of whether Indonesian laws and regulations regarding the tenurial rights of Adat law communities have accommodated the principles of UNDRIP, and subsequently, how those principles can be harmonized into national law by examining the examples of the Philippines and Ghana. Both Philippines and Ghana have more explicitly incorporated principles in UNDRIP, particularly with regard to the recognition of indigenous people tenurial rights and the institutionalisation of community consent mechanism, Indonesia may enhance its legal framework and provide more effective safeguard for *Adat* Law Communities.

II. METHODOLOGY

This paper employs a normative juridical method with a comparative law approach to examine the extent to which international legal principles concerning Adat Law Communities tenurial rights have been accommodated within Indonesia's national legal framework, and to assess how Indonesia's protection mechanism compare with those of the Philippines and Ghana.[4] Comparative law, as defined by Gutteridge, is a method of legal study and research that compares the laws of different countries or different periods to uncover the background and rationale of particular legal provisions, with findings serving as recommendation for legislative reform.[5]

This study conducts a structured analysis of constitutional provisions, national law, judicial decisions, and administrative practices in the three selected jurisdictions, focusing specifically on how each how each jurisdiction defines and recognises indigenous communities, operationalises the principles of self-determination and Free, Prior, and Informed Consent (FPIC), establishes institutional mechanism for rights protection, and distributes authority between the state and customary governance structures.[6]

The selection of the Philippines and Ghana as comparative references is justified by their explicit incorporation of international indigenous rights principles into domestic statutory frameworks, the Philippines through the Indigenous Peoples Rights Act (IPRA) and specialised institutional mechanism, and Ghana though constitutional vesting of land in customary authorities with mandatory revenue sharing arrangements.[7] Through this comparative methodology, this study identifies normative gaps, institutional weaknesses, and policy contradictions in Indonesia's fragmented legal regime, and proposes concrete pathways for harmonisation based on demonstrably effective models from the two comparator jurisdictions.[8]

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4 Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (Kencana 2017) 172

5 Ibid 172-173.

6 Ibid 173.

7 Ibid 176; *Indigenous Peoples' Rights Act 1997* (Republic Act No 8371) (Philippines); *Constitution of the Republic of Ghana 1992*, art 267.

8 Marzuki (n 4) 173.

III. INTERNATIONAL LEGAL PRINCIPLES UNDER THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP)

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations General Assembly in 2007, is the most comprehensive international instrument regulating the rights of indigenous peoples. It covers civil, political, economic, social, cultural, and environmental rights.[9] The recognition of indigenous peoples' rights is grounded in the human rights framework established by international legal instruments, particularly the Universal Declaration of Human Rights (UDHR) which emphasizes equality for all. Under the ICCPR and ICESCR of 1966, states are the primary duty-bearers responsible for eliminating discrimination and promoting equal integration. This framework later gave rise to ILO Convention No. 107, which sought to integrate indigenous peoples into the labor market through non-discrimination and vocational training, while recognizing land dispossession as a source of their vulnerability.[10]

Indigenous peoples previously had little to no presence in international forums. This situation changed significantly with the establishment of the Working Group on Indigenous Populations (WGIP). Over time, as studies such as Martínez Cobo's comprehensive investigation into discrimination against indigenous populations progressed, and following a series of international conferences that increasingly highlighted the issues faced by indigenous peoples, existing international instruments were viewed as inadequate. Indigenous activists challenged the integration-oriented approach of international law and called for a shift toward self-determination and greater control over their lands and natural resources.[11]

In short, after the proposal to create a declaration reinforcing the principle of self-determination for indigenous peoples and following discussions, the declaration was supported by 143 countries, including Indonesia. Four countries—Australia,

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9 Claire Charters and Rodolfo Stavenhagen, 'Making the Declaration Work' in Claire Charters and Rodolfo Stavenhagen (eds), *The United Nations Declaration on the Rights of Indigenous Peoples: How It Came to Be and What It Heralds* (International Work Group for Indigenous Affairs (IWGIA) 2009) 13.

10 Asbjørn Eide, 'The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009) 35.

11 Ibid 37.

Canada, New Zealand, and the United States—voted against it, while eleven countries abstained, including the Russian Federation and three African countries: Burundi, Kenya, and Nigeria. Nearly all European and Latin American countries voted in favor, except Colombia, which abstained.[12]

As previously explained, the main principle of UNDRIP is self-determination. This principle is reflected in many articles of UNDRIP, but is explicitly stated in Article 3, which provides that

> "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The principle of self-determination in Article 3, although not restrictive, must be understood in accordance with Article 46(1), which states that the Declaration shall not be interpreted as granting any State, group, or individual the right to engage in actions contrary to the Charter of the United Nations, or to disrupt, divide, or diminish the political unity and territorial integrity of sovereign and independent States. The UNDRIP's notion of the right to self-determination is not intended to create new states, as in the decolonization concept, but rather to free indigenous peoples from an end-state approach.[13]

Regarding the principle of the right to self-determination, it is important to emphasize its connection with state autonomy as provided in Article 46 of UNDRIP, that that indigenous nations do not have the right to secede from their surrounding nation-states and do not intend to challenge the cultural, political, or institutional structures of those states.[14] This is due to many states being concerned that indigenous peoples' rights to control their own destinies and maintain their distinct identities and livelihoods could potentially undermine the political unity and territorial integrity of the state,[15] given that Article 4 of UNDRIP clarifies what self-determination by Indigenous peoples entails, stating that self-determination

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12 Ibid 42.

13 D C Cambou, 'The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective' (2019) 23(1-2) *The International Journal of Human Rights* 34, 2

14 Duane Champagne, 'UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights' (2013) 28(1) *Wicazo Sa Review* 9, 12.

15 Paul Keal, 'Indigenous Self-determination and the Legitimacy of Sovereign States' (2007) 44 *International Politics* 287, cited in J. Andrew Grant et al, 'The Global Implementation of UNDRIP: A Thematic Review' (2025) 29(2) *The International Journal of Human Rights* 306, 310.

includes autonomy or self-government in matters relating to their internal and local affairs, as well as the ways and means to finance their autonomous functions.

Anaya further clarifies the link between self-determination and independent statehood, noting that substantive self-determination applies equally to all peoples, allowing them to participate in the development of their governing systems and to live freely without necessarily forming a new state.[16] Indigenous peoples have experienced violations of this right and are entitled to remedies for colonial and ongoing injustices, as highlighted by the Martínez Cobo Study, which documented the disadvantages faced by indigenous communities due to oppression and discrimination, a principle later reflected in UNDRIP.[17]

Consequently, UNDRIP functions as a remedial instrument, addressing ongoing barriers that indigenous peoples face in freely living and developing in their ancestral lands. Thus, Article 3 affirms that indigenous peoples possess the same right to self-determination recognized in other international instruments as a right of "all peoples." The Declaration aims to address the historical denial of this right and related human rights, enabling indigenous peoples to overcome systemic disadvantages and attain equality with previously dominant groups.[18]

The core concept of self-determination is that all people, whether as individuals or as communities, have an equal right to manage their own futures and to exist within governance systems designed to respect that autonomy.[19] In Article 4 of UNDRIP, it can be seen that, in light of the extent to which the social, economic and political life of indigenous peoples is connected to land, their autonomy cannot be effectively guaranteed without recognizing control by indigenous peoples of the lands and territories they have traditionally occupied or used. The phrase "internal affairs" refers to how indigenous peoples organize their social, economic, and political life, and how governmental functions can operate under their guidance.The phrase, "ways and means for financing their autonomous functions"

16 S James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009) 189.

17 Ibid 190.

18 Ibid 191.

19 Ibid 187.

highlights the need for sufficient resources to support their self-governing activities.[20]

As the principle of the right to self-determination is closely linked to control over land and territories, it is also reflected in Article 26 of UNDRIP. Article 26 provides that indigenous peoples' rights to land and resources include the right to "own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation," along with the corresponding duty of the state to recognize and protect these lands, territories, and resources.

The nexus between land and all resources within it and the principle of the right to self-determination subsequently leads to the next principle, namely Free, Prior, and Informed Consent (FPIC), because the right to manage land and natural resources encompasses their right to participate in decision-making processes.[21] This is regulated in Article 32 of UNDRIP, which stipulates that:

> "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources and that state have the duty to consult and cooperate in good faith with the indigenous peoples concerned (…) in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources."

This principle is also reflected in Articles 18, 19, and 20 of UNDRIP, which concern the rights of indigenous peoples to participate in decision-making and the obligations of states to consult and cooperate in good faith on matters that may affect indigenous peoples.

The FPIC principle encompasses four key elements[22]: (1) Free, meaning no coercion, pressure, or undue influence should be applied; (2) Prior, signifying that consultations must occur before any activity starts; (3) Informed, requiring that indigenous peoples receive all relevant information and are updated if new information emerges; and (4) Consent, where indigenous peoples engage in a

[20] Steven Wheatley, in *International Law Association*, 'The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report' (London: International Law Association, 2010) 13.
[21] Cambou (n 13) 10.
[22] Grant et al (n 15) 314.

transparent, fair negotiation process as equals, with genuine decision-making power and respect for their rights.

Generally, FPIC can be understood as having both a procedural and a substantive dimension. As a process, FPIC involves stages of information sharing, consultation, internal decision-making, and negotiation aimed at securing the approval of Indigenous peoples and affected local communities prior to the implementation of a project or activity. This process may lead to several possible outcomes: full consent without conditions, consent subject to certain modifications to the proposed activity, or the withholding of consent altogether.[23]

The final principle to be explored is the right to self-identification. In fact, this principle is discussed more extensively in ILO Convention No. 169; however, since Indonesia has not ratified that convention, only UNDRIP will be used as a reference. Regarding the principle of the right to self-identification, UNDRIP does not explicitly regulate it in its articles. Article 8 of the Sub-Commission text, which was a draft of UNDRIP, had proposed self-identification as a means of determining indigenous peoples, which stipulated that "Indigenous peoples have a collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such."[24] However, this article was opposed by many states. Eventually, the discussion faded, and the declaration was adopted without a rigid definition, leading to the removal of the article on self-identification.[25]

The internationally recognized definition of indigenous peoples is from José R. Martínez Cobo, who argued that:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them.

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[23] Accountability Framework Initiative (2019), cited in Iman Prihandono, Ekawestri Prajwalita Widiati and Juozas Valčiukas, 'Free, Prior, Informed Consent as a Legal Principle and Its Link to the Right to Freedom of Conscience' (2023) 9(2) *International Comparative Jurisprudence* 187.

[24] ECOSOC, 'Draft UN Declaration on the Rights of Indigenous Peoples' UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994).

[25] Luis Enrique Chávez, 'The Declaration on the Rights of Indigenous Peoples: Breaking the Impasse – the Middle Ground' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009) 103.

> They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."[26]

In José R. Martínez Cobo's definition, it can be concluded that indigenous peoples have four characteristics, including: 1) the occupation of ancestral territories with historical continuity prior to the arrival of colonial societies; 2) the preservation of their customary culture; 3) the maintenance of social and political systems with specific features based on customary law; and 4) a commitment to protect and pass on their collective identity and ancestral lands to future generations.[27] This definition highlights the impact of colonialism, which rendered indigenous peoples as non-dominant groups, while the dominant population consisted of the descendants of colonizers, in Indonesia's case, the Dutch.[28] This non-dominant group definition does not fully apply in the Indonesian context, as the state considers the majority of Indonesians to be, in fact, indigenous.

Self-identification is defined as the right to determine who is eligible and appropriate to be categorized as indigenous people. To be considered as part of an indigenous community, an individual must be recognized and accepted by their group through a shared group consciousness.[29] Flexibility is required in determining the criteria for indigenous peoples, depending on the specific circumstances of each case. At the same time, general criteria such as a special connection to ancestral lands, historical continuity, distinctiveness, and clear self-identification should be considered.[30] If these elements are evident in a community, that group should be recognized as indigenous.

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[26] Jose R Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* (UN Economic and Social Council, 30 July 1981)

[27] IG Wardana, 'Access to Justice for Indigenous Peoples in International Law' (2012) 9(2) *Indonesian Journal of International Law* 309 https://doi.org/10.17304/ijil.vol9.2.349.

[28] Colin Samson and Carlos Gigoux, *Indigenous Peoples and Colonialism: Global Perspectives* (Cambridge: Polity Press, 2017), cited in Chairul Fahmi et al, '*Defining Indigenous in Indonesia and Its Applicability to the International Legal Framework on Indigenous People's Rights*' (2023) 8(2) Journal of Indonesian Legal Studies 1019, 1022.

[29] Yance Arizona, *Satu Dekade Legislasi Masyarakat Adat: Trend Legislasi Nasional Tentang Keberadaan dan Hak-hak Masyarakat Adat Atas Sumber Daya Alam di Indonesia (1999-2009)* (Epistema Institute 2010) 37.

[30] Van Dyke and Sinclair Salas-Ferguson (n 20) 8-9.

This approach is necessary given the large number of indigenous communities worldwide, including in Indonesia, making it impractical to impose rigid criteria. The process of identifying indigenous communities can be conducted internally based on their communal rights, granting them the autonomy to declare their status as indigenous peoples by self-aligning and confirming their characteristics against the criteria established by law.[31]

IV. ADAT LAW COMMUNITIES' TENURIAL RIGHTS WITHIN INDONESIAN LEGAL FRAMEWORKS AND UNDRIP

The systematic analysis of included studies revealed five major thematic areas that capture the core challenges and proposed solutions in blockchain regulation.

Article 28I paragraph (3) of the 1945 Constitution affirms that the rights of traditional communities are part of human rights by stipulating that:

> "The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations."

However, this provision does not explicitly use the terms "*Adat* Communities" or "*Adat* Law Communities," but instead employs the term "traditional communities." It is also unclear with regard to the rights referred to, giving rise to ambiguity as to whether a community may lose its special rights if it is no longer considered traditional, and whether those rights may likewise lose protection if they no longer align with changing times and culture.[32] The rights possessed by *adat* law communities, which are regarded as human rights, mean that any violation of such rights also constitutes a violation of human rights. Nevertheless, given the ambiguity of this provision, it may result in an insufficient level of protection that can be grounded upon this article.

The rights of *adat* law communities as part of human rights that must be protected are further embodied in Article 6 of Law No. 39 of 1999 on Human Rights, which provides that the differences and specific needs of *adat* law communities must be taken into account and protected by law, society, and the Government in the context of the enforcement of human rights. Article 6 paragraph (2) further explains

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31 Yance Arizona (n 29) 56.

32 Adriaan Bedner and Stijn van Huis, 'The Return of the Native in Indonesian Law: Indigenous Communities in Indonesian Legislation' (2008) 164(2–3) *Bijdragen tot de Taal-, Land- en Volkenkunde* 170.

the scope of such human rights protection, which includes the protection of the cultural identity of *adat* law communities, including their *ulayat* rights, in harmony with the development of the times.

Article 18B paragraph 2 of the 1945 Constitution of Indonesia serves as the constitutional basis for the recognition of *adat* law communities. It is stipulated that

> "The State recognises and respects traditional communities along with their traditional rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law. "

The recognition of *adat* law communities and their traditional rights as guaranteed by the 1945 Constitution is conditional. This means that *adat* law communities and their traditional rights are recognized and exist only insofar as they are in accordance with the development of society and principles of the Unitary State of the Republic of Indonesia This stipulation also requires that the recognition of *adat* law communities be further regulated by law. However, in practice, the regulation of the recognition of *adat* law communities is carried out through Regional Regulations rather than through law. According to the Constitutional Court's interpretation of Article 18B paragraph (2) of the 1945 Constitution in Case Number 31/PUU-V/2007 concerning the judicial review of Law Number 31 of 2007 on the Establishment of the City of Tual, the Court held that:[33]

(1) The phrase "*in accordance with societal development*" is fulfilled if two conditions are met. First, it is recognized under the applicable laws as a reflection of ideal societal development, whether of a general or sectoral nature. Second, the substance of these traditional rights is recognized and respected by the relevant *adat* law community and by the wider society, and does not conflict with human rights.

(2) The phrase "*the principles of the Unitary State of the Republic of Indonesia*" means that the *adat* law community concerned does not undermine the existence of the Unitary State of the Republic of Indonesia. First, its existence must not threaten the sovereignty and territorial integrity of the Republic of Indonesia, and second, the substance of its *adat* legal norms must be consistent with and not contrary to statutory laws and regulations.

[33] Constitutional Court Decision Number 31/PUU-V/2007,166.

The conditions set out in Article 18B paragraph (2) of the 1945 Constitution are related to the legal standing of *adat* law communities to act as petitioners before the Constitutional Court when their constitutional rights are violated or impaired by the enactment of a law, as further clarified in Article 51 paragraph (1) letter (b) of Law Number 24 of 2003 on the Constitutional Court. Legal standing itself refers to the condition in which a party meets the requirements to file a petition and litigate before the Constitutional Court.[34] Legal standing before the Constitutional Court consists of two elements: first, the fulfillment of formal requirements as a legal subject as stipulated by law; and second, the fulfillment of material requirements in the form of constitutional harm resulting from the enforcement of the law being reviewed.[35]

The legal standing of *adat* law communities as legal subjects to litigate before the Constitutional Court is often considered to satisfy the formal requirements, even without a detailed examination of the constitutional harm suffered. Consequently, a petition may be dismissed if the requirements to be qualified as *adat* law communities are not fulfilled, even where the petitioner claims to have suffered constitutional harm. This can be seen in several cases submitted to the Constitutional Court involving the legal standing of *adat* law communities. As of 2025, there have been 7 cases filed before the Constitutional Court invoking the legal standing of *adat* law communities; of these seven cases, only three 3 were granted, as detailed below:

Table 1. List of Petitions Filed by *Adat* Law Communities in Cases before the Constitutional Court

No.	Case Number	Constitutional Harm	Decision
1.	31/PUU-V/2007	Article 18B	Inadmissible
2.	06/PUU-VI/2008	Article 18B	Inadmissible

[34] Harjono, *Konstitusi Sebagai Rumah Bangsa: Pemikiran Hukum* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2008) 176, cited in Irfan Nur Rahman, Anna Triningsih, Alia Harumdani W and Nallom Kurniawan, 'Dasar Pertimbangan Yuridis Kedudukan Hukum (Legal Standing) Kesatuan Masyarakat Hukum Adat dalam Proses Pengujian Undang-Undang di Mahkamah Konstitusi' (2011) 8(5) *Jurnal Konstitusi* 6.

[35] Irfan Nur Rahman *et al*, 'Dasar Pertimbangan Yuridis Kedudukan Hukum (Legal Standing) Kesatuan Masyarakat Hukum Adat dalam Proses Pengujian Undang-Undang di Mahkamah Konstitusi' (2011) 8(5) *Jurnal Konstitusi* 9.

3.	04/PUU-VI/2008	Article 28E(3) & Article 28I (2)	Inadmissible
4.	18/PUU-VIII/2009	Article 28H	Inadmissible
5.	127/PUU-VIII/2009	Article 18B	Partially granted
6.	29/PUU-IX/2011	Article 18B	Granted
7.	35/PUU-X/2012	Article 18B	Partially granted

In the cases submitted to the Constitutional Court, several decisions demonstrate differing approaches to the assessment of the legal standing of *adat* law communities. First, petitions were declared inadmissible due to the failure of the Petitioners to lawfully represent an *adat* law community. In Decisions No. 31/PUU-V/2007 the Petitioners were the Heads of the *adat* law communities who acted for and on behalf of the Lor Lim (Lim Itel), Ratschap Dullah, and Ratschap Lo Ohoitel *adat* law communities. The Court held that the petitions were inadmissible because the Petitioners failed to prove their lawful capacity to represent the relevant *adat* law communities in the *a quo* petitions.[36]

In Decision No. 06/PUU-VI/2008, the Petitioners were The Chairperson of the Banggai Adat Deliberative Council (Lembaga Musyawarah Adat Banggai/LMAB) of Banggai Regency and Banggai Islands Regency, and individual persons. The Court declared the petitions inadmissible on the ground that the Petitioners failed to prove their lawful capacity to represent the relevant *adat* law communities and the Petitioners' failed to demonstrate the existence of constitutional harm suffered.[37]

Second, petitions were declared inadmissible due to the absence of proven constitutional harm. This ground was applied in Decision No. 04/PUU-VI/2008[38] and Decision No. 18/PUU-VIII/2009[39], where the Court found that the Petitioners failed to demonstrate any constitutional harm resulting from the challenged laws.

[36] Constitutional Court Decision No 31/PUU-V/2007, 169.
[37] Constitutional Court of the Republic of Indonesia, *Minutes of Hearing*, Case No 6/PUU-VI/2008, 25.
[38] Constitutional Court Decision Decision No. 04/PUU-VI/2008, 59.
[39] Constitutional Court Decision No. 18/PUU-VIII/2009, 76.

Third, the Court recognized the legal standing of Petitioners in cases that satisfied the requirements of Article 51 paragraph (1) of the Constitutional Court Law. In Decision No. 127/PUU-VIII/2009, the Petitioner was the Tambrauw *adat* law community, which the Court acknowledged as having legal standing.[40] Similarly, in Decision No. 29/PUU-IX/2011, the Petitioners consisted of individual Indonesian citizens and an *adat* law community, both of whom were deemed to possess legal standing under Article 51 paragraph (1) of the Constitutional Court Law.[41] Furthermore, in Decision No. 35/PUU-X/2012, the Petitioners were a private legal entity and an *adat* law communities and the Court affirmed that both had legal standing.[42]

From these cases, it can be concluded that *adat* law communities continue to face difficulties in establishing themselves as parties in proceedings before the Constitutional Court. Decisions of the Constitutional Court denying such petitions are primarily attributable to the absence of a clear definition and the lack of legal recognition of the existence of the relevant *adat* law communities in statutory laws and regulations, including the absence of formal recognition of such communities.[43] The 1945 Constitution does not yet reflect the principle of the right to self-identification, which grants *adat* law communities the full right to recognize themselves first as a subjective criteria in identifying *adat* law communities.

In Indonesia's national legal regime, there are numerous laws and regulations governing who constitutes an *adat* law community, the criteria that must be met, and the stages of their recognition. These laws and regulations are outlined as follows

Table 2. Definition of Adat Law Communities in Indonesian Legal Framework

Law No. 39 of 1999 on Human Rights	Article 6 paragraph (1) and (2) It does not define *adat* law communities but gives attention to and protects the rights of indigenous communities in accordance with the development of the times.

40 Constitutional Court Decision No. 127/PUU-VIII/200, 71.
41 Constitutional Court Decision No. 29/PUU-IX/2011, 45.
42 Constitutional Court Decision No. 35/PUU-X/2012, 164.
43 Rudy (n 3) 148.

Law No. 32 of 2009 on Environmental Protection and Management	Article 1 number 31 *Adat* law communities are groups of people who have lived for generations in a specific geographic area due to ties to their ancestral origins, strong connections with the natural environment, and a system of values that governs their economic, political, social, and legal institutions.
Law No. 1 of 2014 on the Amendment to Law No. 27 of 2007 on the Management of Coastal Areas and Small Island	Article 1 number 33 *Adat* law communities are defined as groups of people who have lived for generations in a specific geographic area within the Republic of Indonesia, based on ties to their ancestral origins, strong connections to the land, territory, and natural resources, possessing *adat* governance institutions and a system of *adat* law in their *adat* territory in accordance with the provisions of laws and regulations.
Law No. 39 of 2014 on Plantation	Article 1 number 6 *Adat* law communities are groups of people who have lived for generations in a specific geographic area within the Republic of Indonesia due to their ties to ancestral origins, strong connections to the land, territory, and natural resources, and who possess *adat* governance institutions and a system of *adat* law in their territory.
Law No. 17 of 2019 on Water Resource	Article 1 number 22 Indigenous communities are *adat* law communities and/or traditional communities that have lived for generations in a specific geographic area, bound by cultural identity, strong connections to the land, as well as the territory and natural resources within their territory.
Regulation of the Minister of Home Affairs No. 52 of 2014 on Guidelines for the Recognition and Protection of *Adat* Law Communities	Article 1 number 1 *Adat* law communities are Indonesian citizens who have distinctive characteristics, live together harmoniously according to their *adat* law, have ties to ancestral origins and/or shared residence, maintain strong connections to the land and

	environment, possess a system of values that governs economic, political, social, cultural, and legal institutions, and utilize a specific territory on a hereditary basis.
Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 10 of 2016	Article 1 number 3 *Adat* law Community is a group of people bound by their adat legal system as members of a legal association, either due to shared residence or based on ancestry.
Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 14 of 2024 on the Implementation of Land Administration and Registration of *Adat* Law Communities' *Ulayat*'s Land Rights	Article 1 number 2 *Adat* Law Community Unit is a group of people bound by their *adat* legal system as members of a legal association, either through shared residence or ancestry, possessing *adat* institutions, communal property and/or *adat* objects, as well as a system of values that governs *adat* institutions and *adat* legal norms. Article 1 number 3 Members of an *Adat* Law Community Group are groups of people gathered as a social unit based on ancestral ties, place of residence, and/or shared interests in accordance with the applicable *adat* legal principles.

From the definition of "*adat* law community" provided in the legislation, it can be understood that an "*adat* law community" refers to a group of people living in a specific area within the territory of the Republic of Indonesia, who have kinship ties based on ancestry, have inhabited the area for generations, maintain strong connections to the land and its natural resources, and have their own authority and *adat* law. The distinction lies in Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 14 of 2024 on the Implementation of Land Administration and Registration of *Adat* Law Communities' *Ulayat* Land Rights, which differentiates *adat* law communities into two types: *adat* law community units and members of an *adat* law community group.

Table 3. Criteria for the Recognition of *Adat* Law Communities

Law No. 41 of 1999 on Forestry	Explanatory Notes to Article 67 paragraph (1) a. The community still exists in the form of a communal association (*rechtsgemeenschap*); b. It has institutional structures in the form of *adat* authorities; c. It has a clearly defined *adat* law territory; d. It possesses *adat* legal institutions, particularly an adat judicial system, that are still observed and complied with; and e. It continues to collect forest products in the surrounding forest areas to meet its daily subsistence needs.
Law No. 6 of 2014 on Villages	Article 97 paragraph (2) An *adat* law community unit and its traditional rights that are still in existence must have a territory and must at least satisfy one or a combination of the following elements: a. community whose members share a sense of collective identity; b. *adat* governance institutions; c. communal property and/or objects; and/or; d. set of *adat* law Article 97 paragraph (3) The criteria for an *adat* law community unit and its traditional rights are deemed to be in accordance with societal development if: a. its existence has been recognized under the applicable laws as evidence that it fulfills the requirements in line with values considered ideal in contemporary society, whether under general or sectoral legislation; and b. the substance of its traditional rights is acknowledged and respected by the relevant adat law community and the wider society, and does not conflict with human rights. Article 97 paragraph (4)

	The criteria for an *adat* law community unit and its traditional rights to be considered consistent with the principles of the Unitary State of the Republic of Indonesia (NKRI) are that the *adat* law community unit does not disrupt the existence of the NKRI as a political and legal unity, namely by: a. not threatening the sovereignty and territorial integrity of the NKRI; and b. ensuring that the substance of its *adat* law is consistent with and does not contravene the prevailing laws and regulations.

With regard to the criteria for the recognition of *adat* law communities, such criteria may be concluded by referring to Article 67 paragraph (1) of Law No. 41 of 1999 on Forestry, in conjunction with Constitutional Court Decision No. 31/PUU-V/2007 and Constitutional Court Decision No. 35/PUU-X/2012. These criteria include the following elements:[44]

1. The existence of an *adat* law community that has originated from ancestral times and has been continuously maintained up to the present without interruption;
2. The presence of a strong sense of collective identity or group solidarity (*in-group feeling*) among its members;
3. The existence of an *adat* governance system;
4. Ownership of communal property and/or objects;
5. The presence of *adat* law that regulate community life;
6. For territorially based *adat* law communities, the possession of a clearly defined territory;

[44] Joeni Arianto Kurniawan, 'Kedudukan Hak Masyarakat Hukum Adat atas Sumber Daya Alam Pasca Putusan MK No 35/PUU-X/2012' in *Laporan Simposium Masyarakat II: Gerakan Masyarakat Adat dan Pembaruan Hukum* (Jakarta, 2016) 14.

7. The substance of the traditional rights of the *adat* law community is acknowledged and respected both internally by its members and externally by the broader society, and does not conflict with human rights;
8. The existence of the *adat* law community does not threaten the sovereignty or territorial integrity of the Unitary State of the Republic of Indonesia;
9. The substance of *adat* law is consistent with, and does not contradict, prevailing laws and regulations;
10. The existence of the relevant *adat* law community is recognized by laws and/or regional regulations;
11. The community continues to collect forest products within surrounding forest areas to meet its daily subsistence needs.

Under Indonesian laws and regulations, the recognition of *adat* law communities is required to be carried out through Regional Regulations, as will be elaborated below

Table 4. The Procedure for the Legal Recognition of Adat Law Communities

Law No. 41 of 1999 on Forestry	Article 67 paragraph (2) The recognition of the existence of, and the dissolution of, *adat* law communities as referred to in paragraph (1) shall be stipulated by a Regional Regulation.
Law No. 6 of 2014 on Villages	Article 96 The Government, the Provincial Regional Government, and the Regency/Municipal Regional Government shall carry out the structuring of *adat* law community units and designate them as *Adat Villages*. Article 98 paragraph (1) An *Adat* Village shall be designated by a Regency/Municipal Regional Regulation. Article 101 paragraph (1) The Central Government, the Provincial Regional Government, and the Regency/Municipal Regional Government

	may undertake the structuring of *Adat* Villages. Article 109 The institutional structure, the filling of positions, and the term of office of the Head of an *Adat* Village based on *adat* law shall be stipulated in a Provincial Regional Regulation.
Regulation of the Minister of Home Affairs No. 52 of 2014 on Guidelines for the Recognition and Protection of *Adat* Law Communities	Article 3 (1) In carrying out the recognition and protection of *adat* law communities, the regent/mayor shall establish a Regency/Municipal Adat Law Community Committee. (2) The organizational structure of the Regency/Municipal Adat Law Community Committee as referred to in paragraph (1) shall consist of: a. the Regency/Municipal Regional Secretary as Chairperson; b. the Head of the Regional Work Unit (SKPD) responsible for community empowerment as Secretary; c. the Head of the Legal Bureau/Legal Division of the Regency/Municipal Secretariat as a member; d. the Sub-district Head (*Camat*) or equivalent as a member; and e. the Head of the relevant Regional Work Unit (SKPD), in accordance with the characteristics of the adat law community, as a member. (3) The organizational structure of the Regency/Municipal Adat Law Community Committee shall be determined by a Regent's/Mayor's Decree. Article 4 The recognition and protection as referred to in Article 2 shall be carried out through the following stages:

	a. identification of the *adat* law community; b. verification and validation of the *adat* law community; and c. determination of the *adat* law community. Article 5 (1) The Regent/Mayor, through the Sub-district Head (*Camat*) or equivalent, shall conduct the identification as referred to in Article 4 letter (a) by involving the adat law community or community groups. (2) The identification as referred to in paragraph (1) shall be conducted by examining: a. the history of the *adat* law community; b. the *adat* territory; c. *adat* law; d. assets and/or *adat* objects; and e. *adat* institutions/ governance system. (3) The results of the identification as referred to in paragraph (2) shall be subject to verification and validation by the Regency/Municipal Adat Law Community Committee. (4) The results of the verification and validation as referred to in paragraph (3) shall be announced to the relevant *adat* law community within a period of one (1) month. Article 6 (1) The Regency/Municipal Adat Law Community Committee shall submit recommendations to the Regent/Mayor based on the results of the verification and validation as referred to in Article 5 paragraph (4). (2) The Regent/Mayor shall determine the recognition and protection of the *adat* law community based on the recommendation of the Adat Law Community Committee through a Regional Head Decree.

	(3) In the event that an adat law community is located in two (2) or more regencies/municipalities, the recognition and protection of the *adat* law community shall be determined by a Joint Decree of the respective Regional Heads.
Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 10 of 2016 on Procedures for the Determination of Communal Land Rights of *Adat* Law Communities and Communities Located in Certain Areas	Article 18 paragraph (1) Where the report as referred to in Article 16 confirms the existence of an *Adat* Law Community and its land, then: a. the Regent/Mayor shall determine the existence of the *Adat* Law Communities and their land, where the land is located within one (1) Regency/Municipality; or b. the Governor shall determine the existence of the Adat Law Communities, where the land are located across regencies/municipalities. Article 18 paragraph (2) The determination of an *adat* law community through a Regent's/Mayor's or Governor's Decree, as referred to in paragraph (1), shall be submitted to the Head of the Land Office or the Head of the Regional Office of the National Land Agency (BPN) for the determination and registration of its communal land rights at the relevant Land Office.
Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 14 of 2024 on the Implementation of Land Administration and Registration of Adat Law Communities' *Ulayat* Land Rights	Article 14 paragraph (4) The recognition of *adat* law communities as referred to in paragraph (2) shall take the form of a regional regulation or a regulation/decree of the Governor, a regulation/decree of the Regent/Mayor that establishes the existence of *adat* law communities in accordance with the provisions of the prevailing laws and regulations.

Based on these statutory provisions, there are differences in the mechanisms for the determination or recognition of *adat* law communities. Law No. 41 of 1999 on Forestry provides that the determination of *adat* law communities is carried out through Regional Regulations. Law No. 6 of 2014 on Villages stipulates that the establishment of *adat* villages is conducted through regency/municipal regional regulations.

By contrast, Regulation of the Minister of Home Affairs No. 52 of 2014 provides that the determination of *adat* law communities is carried out through a Regent's/Mayor's Decree. Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 10 of 2016 further clarifies that the determination is made by a Regent/Mayor or a Governor, depending on whether the territory of the *adat* community is located within one regency/municipality or spans more than one. Meanwhile, Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 14 of 2024 provides that the recognition of *adat* law communities is carried out in the form of a Governor's regulation/decree or a Regent's/Mayor's regulation/decree.

It can be understood that the legal provisions governing the recognition of *adat* law communities in Indonesia have not yet accommodated the principle of the right to self-identification. This is evident from the existence of administrative requirements in the form of recognition through a regent/mayor's decree or a regional regulation, which ultimately depend on the political will of local governments. In addition, there is inconsistency in the form of such recognition, namely whether it should take the form of a regent/mayor's decree or a regional regulation.

Adat law communities are not given the opportunity to identify themselves as a subjective requirement, instead, only objective requirements imposed by the state are applied to qualify *adat* law communities. This can be seen in Regulation of the Minister of Home Affairs No. 52 of 2014, where, at the initial stage of the process of recognition and protection of *adat* law communities, a district/municipal *adat* law community committee is established. This committee is tasked with conducting verification and validation and providing recommendations to the regent/mayor for the determination of *adat* law communities. The structure of this

committee does not include representatives of the *adat* law communities themselves.

Furthermore, the identification stage is carried out by the sub-district head (*Camat*) by involving *adat* law communities or community groups. This means that involving *adat* law communities in identifying themselves is not a mandatory requirement, whereas such self-identification should in fact be carried out first and only thereafter adjusted to the requirements determined by the state.

Under Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 10 of 2016, *adat* law communities are involved as members of the IP4T Team established by the regent/mayor to determine the existence of *adat* law communities or communities located in Certain Areas, as well as their land, which may then be granted communal land rights. However, the application requirements stipulated in Article 5 are likely to be difficult for *adat* law communities to fulfil. The application may be submitted by a *adat* leader and must be accompanied by documentation on the history of the *adat* law community and the history of the land; where the applicant is an *adat* law community, copies of identity cards or deeds of establishment of cooperatives, units that are part of a village, or other community groups, as well as a certificate issued by the village head or another equivalent official, are required. Not all *adat* law communities are able to provide such written documentation.

Subsequently, under Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 14 of 2024, Article 5 paragraph (2) stipulates that the stages of land administration for *ulayat* land rights include inventory and identification. These activities are carried out by the directorate general responsible for the determination of land rights and land registration and may be assisted by local governments, universities, and/or *adat* institutions designated by the local government. From this provision, there is no direct involvement of *adat* law communities in conducting the inventory and identification, as these activities are primarily undertaken by the directorate general within the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN).

Meanwhile, where assistance is provided for such activities, the involvement of *adat* law community elements through *adat* institutions is also limited to those designated by the local government. There is no freedom for *adat* law communities to identify their own *ulayat* land rights, and the existence of *adat* institutions

designated by the local government potentially risks inaccuracies in determining the subjects and objects to be administratively recorded.[45]

Arizona points out several obstacles in the recognition of indigenous law communities.[46] First, indigenous law communities no longer conform to the image of homogeneous and harmonious societies; instead, they are often stratified and consist of various groups with their own interests, which may at times conflict with one another. Such conflicts create internal barriers even before indigenous law communities initiate the process of applying for recognition of their existence and their lands.

Second, existing procedures for the recognition of *ulayat* rights require prior recognition of indigenous communities as legal subjects entitled to the land they claim. At the same time, the competent authorities face difficulties in identifying or defining indigenous law communities, which may also result from migration and intergroup marriages that blur group identities. Third, the available recognition procedures are complex and costly, as they require extensive processes, intensive lobbying, and connections with those in power. Consequently, indigenous law communities tend to depend on NGOs, as they require their assessments and assistance.

With regard to the requirement for recognition based on a regional regulation, which is burdensome, as quoted from the legal reasoning of the Constitutional Court in Decision No. 29/PUU-IX/2011, the Court held that even though the Yawa Onat Tribe has not been formally established by a regional regulation as an *adat* law community, they must still receive constitutional guarantees and protection. The absence of a regional regulation does not nullify the existence of an *adat* law community, because relying solely on such recognition would mean that, legally, no *adat* law community in a province exists until formal confirmation is granted.[47]

Although the rights of adat law communities are guaranteed by the Constitution and constitute a form of human rights, in practice their enjoyment of state recognition is not accompanied by full freedom but rather by limitations on those rights. The rights granted by the state through such recognition therefore need to

[45] Aliansi Masyarakat Adat Nusantara (AMAN), 'Peraturan Menteri Agraria dan Tata Ruang No 14 Tahun 2024 tentang Penyelenggaraan Administrasi Pertanahan dan Pendaftaran Tanah Ulayat Masyarakat Hukum Adat, Peraturan Baru yang Salah Kaprah' (2024).

[46] Adriaan Bedner and Yance Arizona, 'Adat in Indonesian Land Law: A Promise for the Future or a Dead End?' (2019) 20(5) *The Asia Pacific Journal of Anthropology* 416, 425.

[47] Constitutional Court Decision (n 40), 61.

be further critically examined to assess whether they are consistent with the concept of *ulayat* rights under *adat* law and with the principles of right to self-determination and FPIC set out in UNDRIP.

1. Law No. 5 of 1960 on Basic Agrarian Law

The Basic Agrarian Law (UUPA) is a fundamental statute that provides the regulatory framework for *ulayat* land within the national land law system. Article 2 paragraph (4) of the UUPA stipulates that the State's right to control land may be delegated to *adat* law communities to the extent necessary and insofar as it does not conflict with the national interest. Furthermore, Article 3 of the UUPA provides that the exercise of *ulayat* rights and similar rights shall apply as long as, in reality, the relevant *adat* law communities still exist and the exercise of such rights is consistent with the national interest, and does not contravene higher laws and regulations.

Within the UUPA, the *ulayat* right is hierarchically positioned below the State's right to control land, as Article 2 paragraph (4) indicates that it derives from that right. Accordingly, the highest level is the right of the nation (*hak bangsa*), which constitutes the supreme right of control encompassing the entire territory of the state. This right is permanent in nature, communalistic, religious, and serves as the source of all subordinate land rights. The second level is the State's right to control land, which represents the exercise of the nation's right by the entire Indonesian people, vested in the Indonesian state as the highest authority. Subsequently, the State's right to control land may be delegated to *adat* law communities in the form of *ulayat* rights. Lastly, at the lowest level are individual land rights.

Conceptually, the right of the nation may be understood as *ulayat* rights at the highest level, covering the entire territory of the state, such that *ulayat* rights can be equated with the right of the nation. Within *adat* law communities, *ulayat* rights constitute the highest form of control, from which individual land rights over communal land may arise, in a manner analogous to the right of the nation. Maria S.W. Sumardjono argues that *ulayat* land rights constitute a distinct category, separate from state land and privately held land.[48]

Ulayat rights are the rights of an *adat* law community to exercise control over a territory, granting it the authority to regulate, manage, and utilize the territory for

[48] Rudy, (n 3), 43.

the collective welfare of the community.[49] The objects of *ulayat* rights can include land (terrestrial areas), water (waters, rivers, lakes, and coastal areas), wild plants growing on the land, and wild animals.[50] From this definition, it is clear that *ulayat* rights are more than merely land rights derived from the state's right of control, as *ulayat* rights can be analogized to state sovereignty in that they entail regulatory authority, governing power, and *adat* law.

In the General Explanation, Part II point (3) of the Basic Agrarian Law (UUPA), it can be understood that the interests of *adat* law communities are taken into account insofar as their existence is still recognized. Where a land right is to be granted over *ulayat* land, the *adat* law community holding *ulayat* rights over that land must be consulted and provided with "recognitie" (recognition). However, it must be borne in mind that *ulayat* rights may not be used as a basis to obstruct such grants of land rights when the land is required for broader public interests. *Adat law* communities may not refuse when their land is designated for public or national purposes, as also reflected in Article 18 of the UUPA, which provides that the government may revoke land rights for the purpose of land acquisition in the public interest, subject to the provision of appropriate compensation.

Philosophically, the close and enduring bond between *adat* law communities and the land and environment in which they live is commonly articulated through the concept of *pertiwi* or motherland. Within this perspective, land is not understood merely as a physical or economic asset, but as the symbolic mother of the *adat* law community. The relationship between *adat* law communities, their ancestral lands, and the surrounding environment is thus likened to the bond between a mother and her children, marked by interdependence, care, and emotional attachment, hence making this relationship inseparable.[51]

The UUPA does not reflect the principles of the right to self-determination or Free, Prior, and Informed Consent (FPIC). *Adat* law communities do not possess absolute rights over their lands and may be required to relinquish them whenever the land is considered necessary for the public interest, even without their consent. Moreover, the UUPA does not impose an obligation to ensure that *adat* law

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[49] Samosir (n 3) 110

[50] I. Gede A.B. Wiranata, *Hukum Adat Indonesia Perkembangan dari Masa ke Masa* (Citra Aditya Bakti 2005) 226, cited in Rudy (n 3), 48.

[51] Mohammad Koesnoe, *Prinsip-Prinsip Hukum Adat Tentang Tanah* (Ubhara Press 2000) 10–11, cited in Oemar Moechthar *et al*, 'The Epistemology of Land in an Adat Perspective: Philosophical Aspects of Human Relations with Land in the View of Mohammad Koesnoe' (2024) 7(1) *Media Iuris* 158.

communities participate in decision-making processes concerning land dispossession that directly affects their lives, as required under UNDRIP.

2. Law No. 41 of 1999 on Forestry in Conjunction with Constitutional Court decision Number 35/PUU-X/2012

Constitutional Court Decision Number 35/PUU-X/2012 is a landmark ruling that altered the regulation of customary forests under Law No. 41 of 1999 on Forestry. Previously, *adat* forests were classified as state forests located within the territories of *adat* law communities, meaning that *adat* law communities did not exercise full authority over their customary forests. Decision Number 35/PUU-X/2012 reclassified *adat* forests as separate from state forests, thereby placing them within the category of private forests (*hutan hak*).[52] Accordingly, the definition of *adat* forests was changed to forests located within the territories of *adat* law communities.[53]

Furthermore, *adat* law communities may hold rights over *adat* forests provided that their existence is formally recognized and that they meet the constitutional requirements under the 1945 Constitution, namely that they continue to exist in reality and are consistent with societal development and the principles of the Unitary State of the Republic of Indonesia.[54] This differs from the previous provisions of the Forestry Law, under which one of the conditions for recognizing *adat* law communities was that they must not conflict with the national interest. The Constitutional Court removed the phrase "national interest" from Article 4(3) of Law No. 41 of 1999.

Since the Constitutional Court Decision, *adat* forests can no longer be taken from *adat* law communities on the grounds of the national interest. However, there remains a normative disharmony with the Basic Agrarian Law (UUPA), which still provides that the national interest may be used as a justification to take *adat* land, and that adat law communities may not obstruct such measures, as reflected in the General Explanation of the UUPA, Part II point (3). This inconsistency constitutes a significant issue, given that *ulayat* rights under the UUPA forms the foundation of other rights of *adat* law communities, including rights over natural resources such as *adat* forests.

52 Constitutional Court Decision (n 42) 173,179,181
53 Constitutional Court Decision (n 42) 185
54 Constitutional Court Decision (n 42) 185-186

The Constitutional Court Decision has granted *adat* law communities full rights over their *adat* forests and enables them to defend these rights even when confronted with claims of national interest, insofar as they do not consent to the taking of their land. This decision is consistent with the principle of the right to self-determination, particularly in relation to the use and management of land and natural resources, amely *adat* forests, within the territories of adat *law* communities for the welfare of all members of the community. It also reflects the principle of Free, Prior, and Informed Consent (FPIC), insofar as customary forests may not be taken unilaterally by the state against the will of the *adat* law communities.

However, it should be noted that the full enjoyment of rights over *adat* forests is limited to *adat* law communities that have been formally recognized. Article 67 paragraph (2) of the Forestry Law stipulates that the recognition of the existence of an *adat* law community is to be conferred through a determination by the regional government, namely by way of a regional regulation.

3. Law No. 39 of 2014 on Plantation

This Plantation Law regulates situations in which land used for plantation activities constitutes *ulayat* land rights of *adat* law communities. Article 12 provides that, in order to acquire *ulayat* land rights for plantation purposes, plantation business actors must conduct deliberations with the *adat* law communities holding *ulayat* rights to obtain their consent regarding the transfer of land and the form of compensation. Such deliberations are conducted in accordance with statutory regulations, meaning that they are not carried out pursuant to the *adat* law of the relevant *adat* law community. Article 13 further stipulates that *adat* law communities as referred to in Article 12(1) must be determined in accordance with statutory regulations, implying that adat law communities must first obtain formal recognition.

Article 17 regulates the prohibition on issuing plantation business permits on the *ulayat* land rights of adat law communities unless prior consent has been reached between the adat law communities and plantation business actors concerning the transfer of land and the corresponding compensation. Article 55(b) of this Law provides that any person is unlawfully prohibited from cultivating, using, occupying, and/or controlling the land of *adat* law communities for plantation purposes, with criminal sanctions subsequently regulated under Article 107.

This Law is relatively adequate in regulating the principle of FPIC, as it requires that deliberation or consultation be conducted in advance with *adat* law

communities before plantation activities are carried out in their territories, in order to obtain their consent to use their land for plantation purposes. However, as with other statutes, the *adat* law communities entitled to be consulted and to provide consent and compensation for the use of *ulayat* land right are only those that have been formally determined in accordance with statutory regulations or have obtained legal recognition, such as through regional regulations. The implication is that *adat* law communities that have not yet been formally recognized are not entitled to defend their *ulayat* land right against plantation business actors or the state.

4. Law No. 6 of 2014 on Villages

The Village Law regulates in Article 6 paragraph (1) that villages are classified into villages and *adat* villages. Article 98 paragraph (1) of the Law further provides that *adat* villages are to be established by a regency/municipal regional regulation. Such designation must satisfy the requirements set out in Article 97 paragraph (1), namely that:

(a) the *adat* law community and its traditional rights demonstrably still exist, whether territorial, genealogical, or functional in nature;

(b) the *adat* law community and its traditional rights are considered to be compatible with the development of society; and

(c) the *adat* law community and its traditional rights are consistent with the principles of the Unitary State of the Republic of Indonesia.

Adat villages are vested with the authorities stipulated in Article 103 of the Law, which include:

(a) the regulation and administration of governance based on original customary structures;

(b) the regulation and management of *ulayat* rights or *adat* territories;

(c) the preservation of the socio-cultural values of *adat* villages;

(d) the settlement of *adat* disputes based on customary law applicable within the *adat* village, in harmony with human rights principles and prioritizing deliberation and consensus;

(e) the administration of *adat* village peace courts in accordance with the prevailing laws and regulations;

(f) the maintenance of public order and security within *adat* villages based on applicable *adat* law; and the development of *adat* law in accordance with the socio-cultural conditions of *adat* village communities.

This Law differs from other statutes enacted after the constitutional amendments, which generally align with Article 18B paragraph (2) of the 1945 Constitution, in that *adat* law communities are required to demonstrate that they continue to exist as *adat* law communities despite "societal developments," and that their rights may be overridden by higher-level laws and regulations on the grounds of the "national interest."[55] Nevertheless, this Law has not been well implemented in practice, as only a limited number of regions have established *adat* villages, due to both financial constraints and political considerations.[56]

Adat villages reflect, to a considerable extent, the principle of the right to self-determination as set out in Article 4 of UNDRIP, particularly the right to autonomy or self-government in matters relating to their internal and local affairs, as well as the ways and means of financing their autonomous functions. However, under this Law, the exercise of such a right to self-government is contingent upon state recognition, as provided in Article 98 through designation by regional government regulation.

5. Law No. 17 of 2019 on Water Resources

This Law defines ulayat rights in Article 1 point 23 as collective rights held by a particular *adat* law community over a specific territory that constitutes the living environment of its members. These rights include the right to utilize land, forests, and water and their contents in accordance with the prevailing laws and regulations. This indicates that the rights recognized are limited to the utilization of natural resources, particularly water resources.

Articles 9 paragraphs (2) and (3) of the Law further emphasize that the *ulayat* rights of *adat* law communities over water resources are recognized conditionally. Such

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[55] Yance Arizona (ed), *Antara Teks dan Konteks: Dinamika Pengakuan Hukum Terhadap Hak Masyarakat Adat Atas Sumber Daya Alam di Indonesia* (HuMa 2010), cited in Bedner (n 46)

[56] Jacqueline Vel and Adriaan Bedner, 'Decentralisation and Village Governance in Indonesia: The Return to the Nagari and the 2014 Village Law' (2015) 47(3) *The Journal of Legal Pluralism and Unofficial Law* 493, 503–504, cited in Bedner (n 46)

recognition applies only insofar as it does not conflict with the national interest and existing laws and regulations, and provided that the *adat* law community continues to exist and has been formally recognized through a regional regulation.

This Law does not regulate any obligation to obtain Free, Prior, and Informed Consent (FPIC) in cases where water resource development projects—such as dams, embankments, canal construction, drilling wells, or the allocation of water resources for beverage companies, hydropower plants, and similar activities—are carried out on *ulayat* land of *adat* law communities and may affect their lives.

Moreover, the Law reduces ulayat rights to merely a right of utilization rather than management, as full control and management of water resources remain vested in the state. This reflects the limited implementation of the right to self-determination for *adat* law communities in managing their internal affairs, including the management and use of their natural resources. Consequently, *adat* law communities are positioned as subjects who must obtain state recognition merely to utilize water resources, rather than as communities with authority to regulate the management and use of water resources within their own territories.

6. Law No. 1 of 2014 on the Amendment to Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands

This Law grants *adat* law communities the authority to use coastal waters and the waters of small islands within their territories, as stipulated in Article 21 paragraph (1). Furthermore, Article 22 paragraph (1) of Law No. 6 of 2023 provides that *adat* law communities are exempted from the obligation to comply with the conformity of marine spatial utilization activities determined by the central government. However, the exercise of this authority is conditional upon prior state recognition, which must be established in accordance with statutory regulations.

This Law does not yet regulate the principle of Free, Prior, and Informed Consent (FPIC) in situations where the coastal territories of *adat* law communities are to be used, for example, for reclamation projects. As a result, *adat* law communities are not afforded the opportunity to participate in decision-making processes concerning projects that affect their territories, thereby creating space for territorial dispossession without their consent. Moreover, the Law limits the rights of *adat* law communities to use, rather than control, their territories and natural resources, which is inconsistent with the principle of the right to self-determination, particularly as reflected in Article 26 of UNDRIP.

7. Law No. 22 of 2001 on Oil and Natural Gas

Article 33 paragraph (3) letter (a) of this Law provides that oil and gas business activities may not be carried out in burial grounds, places considered sacred, public places, public facilities and infrastructure, nature reserves, cultural heritage sites, as well as land owned by *adat* law communities. Furthermore, Article 33 paragraph (4) stipulates that a business entity or permanent establishment intending to carry out such activities may relocate buildings, public places, and public facilities and infrastructure only after obtaining prior authorization from the competent authority.

Article 34 paragraph (1) provides that where a Business Entity or Permanent Establishment intends to use land subject to land rights or state land within its Working Area, the relevant Business Entity or Permanent Establishment must first settle the matter with the holder of the land rights or the user of state land, in accordance with the applicable laws and regulations. The settlement referred to in paragraph shall be conducted through deliberation and consensus, by means of sale and purchase, exchange, fair compensation, recognition, or other forms of compensation to the holder of land rights or the user of state land. The explanatory note to Article 34 paragraph (1) clarifies that the term "recognition" refers to the acknowledgment of the existence of *ulayat* rights of *adat* law communities in a particular area, so that settlement may be carried out through deliberation and consensus based on the relevant *adat* law.

This law does not reflect the principle of Free, Prior, and Informed Consent (FPIC), as it fails to provide a clear procedure for the acquisition of indigenous peoples' land for oil and gas business activities. There is no requirement to obtain the consent of indigenous communities, as the process relies solely on obtaining permits from the government, without securing approval from the affected communities whose lives and livelihoods will be directly impacted.Furthermore, although indigenous communities are formally involved in deliberations conducted in accordance with customary law, such involvement is limited to settlement mechanisms, particularly in relation to compensation or restitution. It does not extend to meaningful consultation, adequate dissemination of information, or the obligation to obtain prior consent, as required under the FPIC principle.

8. Law No. 21 of 2014 on Geothermal

Article 16 paragraph (1) provides that the Minister may designate a Geothermal Working Area for indirect utilization, one of which may be located on *adat* land.

Article 42 stipulates that where state land, land under land rights, *adat* land, and/or forest areas within a Working Area are to be used, the holder of a Direct Utilization Permit or a Geothermal Permit must first carry out land-use settlement with the users of state land or the holders of land rights or forestry permits, in accordance with the applicable laws and regulations. Article 43 provides that before conducting geothermal exploitation on state land, land under land rights, *adat* land, or forest areas, the permit holder is required to: (1) present a valid permit (Direct Utilization Permit or Geothermal Permit); (2) notify the purpose and location of the proposed activities; and (3) complete or guarantee the completion of land-use settlement with the land users or rights holders (for example, through compensation).

Once these obligations have been fulfilled, the land users or rights holders, including those holding rights over *adat* land, are required to allow the geothermal activities to be carried out on the relevant land. Article 45 stipulates that the settlement of the use of state land, land under land rights, *adat* land, and/or forest areas as referred to in Article 42 shall be carried out in accordance with the provisions of the applicable laws and regulations.

The provisions governing the use of *customary* land for geothermal working areas under this Law do not reflect the principle of Free, Prior and Informed Consent (FPIC), particularly as set out in Articles 10, 19, and 32(2) of UNDRIP. First, with regard to the free element, *adat* law communities are required to allow their land to be used as a geothermal working area once the licensing procedures have been fulfilled, indicating an absence of freedom to refuse. Second, concerning the prior element, the Minister designates the geothermal working area before conducting consultations with the *adat* law community.

Third, with respect to the informed element, there are no procedures requiring socialization or education of *adat* law communities regarding the planned project, particularly concerning its environmental impacts. Fourth, in terms of consent, there is no obligation to obtain the approval of *adat* law communities; instead, only government authorization and the settlement of land-use issues with rights holders are required. Deliberation (*musyawarah*) is limited to resolving land-use arrangements and compensation or indemnification, rather than obtaining consent. Moreover, such deliberation is conducted in accordance with statutory procedures rather than *adat* law.

9. Law No. 30 of 2009 on Electricity

Article 30 paragraph (6) of this Law provides that where land used by a holder of an electricity supply business license includes *adat* (customary) land, the settlement shall be carried out in accordance with laws and regulations in the field of land administration, while taking into account the provisions of local *adat* law. This Law does not incorporate the principle of Free, Prior and Informed Consent (FPIC), as it does not regulate any procedure for the acquisition of land where the land to be used constitutes the ulayat land of Indigenous Peoples (*adat* law communities). The provisions of this Law do not grant Indigenous Peoples the freedom to accept or refuse the use of their land, nor do they require the obtaining of consent from Indigenous Peoples prior to such use.

10. Regulation of the Minister of Home Affairs No. 52 of 2014 on Guidelines for the Recognition and Protection of *Adat* Law Communities

This Regulation does not refer to ulayat rights as rights held by Indigenous Peoples (*adat* law communities) that form the basis for their control over land within their territories. It also reduces the meaning of ulayat rights over *adat* land to merely *adat* land in the form of land, water, and/or waters along with the natural resources contained therein, which are owned, used, and conserved. As a result, this Regulation positions Indigenous Peoples (*adat* law communities) as having only the right to utilize natural resources within their territories, rather than the authority to regulate how those resources are to be used and managed for the welfare of their communities.

The principle of the right to self-determination is not reflected in this Regulation, particularly with regard to the right to autonomy or self-government over the internal affairs of Indigenous Peoples, including the regulation of land use and the management of their natural resources.

11. Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 14 of 2024 on the Implementation of Land Administration and Registration of Adat Law Communities' *Ulayat* Land

Article 1 point 4 defines *ulayat* land rights as land located within the territory under the control of an *adat* law community, which in reality still exists and is not encumbered by any land rights. Article 2 paragraph (1) further clarifies that *ulayat* rights cannot be exercised over parcels of land that: (a) are already held by individuals or legal entities under registered land rights; (b) are used as public facilities or social facilities; or (c) have been acquired or released by government

institutions, legal entities, or individuals in accordance with applicable laws and procedures. This means that land located within the territory of an *adat* law community that has already been granted land rights to individuals or companies, for example for business purposes, is excluded from the land administration and registration of *ulayat* land.

Such land administration may subsequently be granted *Management Rights* (Hak Pengelolaan/HPL) if the *adat* law community submits an application. The HPL may then be used as the basis for cooperation with third parties through contractual arrangements.

Groups of members of an *adat* law community may also be granted *ownership rights* (hak milik) in the name of the group of *adat* community members as jointly owned land. The granting of such ownership rights begins with an application for ownership submitted by the group of *adat* law community members, followed by the collection and examination of juridical data, public announcement, and the issuance of a certificate of title. This allows sub-groups within an *adat* law community—such as clans or lineages—to obtain ownership rights over specific parcels of land within the territory of the *adat* law community.

This regulation is inconsistent with the concept of *ulayat* rights, as the authority to determine and allocate group rights derived from *ulayat* rights should lie within the internal authority of the *adat* law community itself. Such determinations should be made by the community's own institutions. This approach is not in line with the principle of the right to self-determination under UNDRIP, which recognizes that *adat* law communities possess autonomous authority to engage in self-governance, including regulating land use and determining land rights for their members within their territories.

V. URGENCY OF HARMONIZING THE PRINCIPLES OF THE UNDRIP INTO THE INDONESIAN LEGAL REGIME THROUGH THE *ADAT* LAW COMMUNITIES BILL

From an analysis of Indonesian laws and regulations concerning the rights of *adat* law communities and their *ulayat* rights, it is evident that the majority of Indonesian legislation has not yet accommodated the principles contained in UNDRIP relating to tenurial rights, including the right to self-determination, the right to self-identification, and Free, Prior, and Informed Consent (FPIC). The poor

implementation and adoption of UNDRIP principles in Indonesia can be attributed to the weak commitment of the Indonesian state to recognizing *adat* law communities.

The difficulties faced by *adat* law communities in Indonesia since the New Order era are not substantially different from those experienced today, despite the enactment of the Forestry Law, Constitutional Court Decision No. 35/PUU-X/2012, the Village Law, and other related regulations. This situation may be explained by the New Order's ideological framework, which suppressed strong regional identities, positioning adat as the local in opposition to the national, much like *Bhinneka* in contrast to *Tunggal*. Furthermore, the left-oriented agrarian reform discourse in Indonesia has not been sufficiently progressive, which may be attributed to the rise of neoliberalism as well as the decline of leftist movements in Indonesia.[57]

At the same time, *adat* law communities are increasingly confronted with discrimination and dispossession of their *ulayat* lands due to weak legal recognition and protection provided by the state, inconsistencies between laws and regulations, and the enactment of Law No. 6 of 2023 on Job Creation, which simplifies business licensing procedures and land acquisition processes, including for ulayat land for investment purposes.

There is an urgency to harmonize the principles of the UNDRIP into national law through a law specifically regulating *adat* law communities, namely the *adat* law communities Bill. This Bill will provide clear regulations and address the disharmony in Indonesian legislation concerning the legal status of *adat* law communities, recognition, the scope of ulayat rights, and legal protection for *adat* communities, which have so far been lacking.

The Bill can strengthen the rights of *adat* communities as human rights and as equal citizens of Indonesia, preserve the identity of *adat* communities, and encourage respect for diversity in Indonesia. Furthermore, the Bill could reduce land conflicts in Indonesia once the status of *adat* communities is clarified, serving as a legal reference that provides certainty, while also helping to preserve the environment and natural resources within *adat* territories.

The Draft Law on *adat* Law Communities (RUU MHA) has been under consideration since 2009. Initiated by AMAN and its partner organizations, the bill

[57] Bedner (n 46) 422.

was first drafted in 2010 and added to the National Legislation Program (Prolegnas) in 2011, prompting the Indonesian House of Representatives (DPR RI) to establish a Special Committee to examine it. The bill was once again included in Prolegnas in 2020 with "priority" status, yet it continues to face obstacles in the deliberation process and has not been enacted into law.

VI. COMPARISON WITH THE PHILIPPINES REGARDING TENURIAL RIGHTS OF INDIGENOUS PEOPLES

A comparison will be conducted with the Philippines to examine the recognition of tenurial rights for Indigenous Peoples in that country. The background for choosing the Philippines as a comparison is the similarity in geographical conditions between Indonesia and the Philippines, as both are archipelagic nations located in Southeast Asia. The Philippines already has the Indigenous Peoples Rights Act (IPRA), a specific law governing the rights of Indigenous Peoples that was based on or formulated in accordance with ILO Convention No. 169.[58] Nevertheless, the Philippines has not actually ratified ILO Convention No. 169.

The regulation of indigenous peoples' rights within the 1987 Philippine Constitution can be seen through state recognition in Article II, Section 22; Article XIII, Section 6, which governs ancestral land rights in accordance with the principles of agrarian reform; and Article XII, Section 5, which mandates Congress to enact legislation recognizing customary law. This latter provision ultimately served as the legal foundation for the birth of the IPRA in 1997. Indigenous Peoples recognized the importance of having a national written law to harmonize customary law and national law into a single piece of legislation regarding the ownership and use of customary land.[59]

IPRA provides legal guarantees over ancestral lands and domains by emphasizing the concept of collective ownership. Within the framework of the IPRA, ancestral domains are viewed as community assets passed down through successive generations. Beyond land issues, the regulation also acknowledges the validity of customary law and ensures the right of indigenous peoples to exercise autonomous

[58] Cathal Doyle, 'The Philippines Indigenous Peoples Rights Act and ILO Convention 169 on Tribal and Indigenous Peoples: Exploring Synergies for Rights Realisation' (2020) 24(2–3) The International Journal of Human Rights 170-190, 170.

[59] Jose M Molintas, 'The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts' (2004) 21(1) Arizona Journal of International & Comparative Law 269, 291.

self-governance.[60] "Regarding recognition, the IPRA has demonstrated significantly positive results; within two decades of its enactment, 221 Certificates of Ancestral Domain Titles (CADTs) have been issued, covering 5.4 million hectares[61]

The IPRA regulates self-identification or self-ascription, as evidenced in Chapter II, Section 3 of the Indigenous Peoples' Rights Act (IPRA), or Republic Act No. 8371 of the Philippines, which defines Indigenous Peoples as:

> "Indigenous Peoples/Indigenous Cultural Communities (IP/ICC) refer to a group of people sharing common bonds of language, customs, traditions and other distinctive cultural traits, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized a territory. These terms shall likewise or in alternative refer to homogenous societies identified by self-ascription and ascription by others, who have continuously lived as a community on community-bounded and defined territory, sharing common bonds of language, customs, traditions and other distinctive cultural traits, and who have, through resistance to political, social and cultural inroads of colonization, become historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of descent from the populations which inhabited the country at the time of conquest or colonization or the establishment of present state boundaries and who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains."

In several respects, the IPRA can even be described as more progressive than ILO Convention No. 169. The IPRA explicitly recognizes the principle of the right to self-determination, drawing from the draft of the UNDRIP which had not yet been adopted at that time. Furthermore, the IPRA expands the scope of ancestral domains to encompass all resources contained therein, implying indigenous peoples' control over natural resources. The IPRA also emphasizes a more comprehensive FPIC principle compared to the ILO Convention, which merely

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[60] Ibid.

[61] National Commission on Indigenous Peoples, Master List of Approved Certificate of Ancestral Domain Titles (CADTs) by Region as of March 31, 2018. https://www.doe.gov.ph/eicc/listprocess-certificate-ancestral-domain-titles-cadts-region, cited in Doyle (n 58) 171

positions 'consent' as an objective of consultation rather than an absolute requirement.[62]

The IPRA adheres to the principle of self-determination based on FPIC requirements. The IPRA explicitly defines Free and Prior Informed Consent in Chapter II, Section 3(g) as "the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community;" To implement this law, the IPRA also established the National Commission on Indigenous Peoples (NCIP), which shall be under the Office of the President, and which shall be the primary government agency responsible for the formulation and implementation of policies, plans and programs to recognize, protect and promote the rights of ICCs/IPs

The NCIP issued The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012, or the 2012 Guidelines. These guidelines regulate the certification of precondition, field-based investigation, project scale classification, the stages of the FPIC process, the drafting of a memorandum of agreement should the Indigenous Peoples provide their consent, the right to say no, and prohibited acts throughout the FPIC proceedings. These provisions are established to ensure that the implementation of FPIC for projects conducted on Indigenous Peoples' lands is carried out with genuine consent, standardized procedures, and transparency.

Before a project commences, the issuance of a certification of precondition is required by submitting an application to the NCIP along with the prescribed documents. Subsequently, the NCIP Regional Director will constitute a Field-Based Investigation (FBI) Team to conduct an investigation and prepare a report regarding the field conditions, such as the existence of indigenous peoples and their territories, as well as the extent to which the project will affect them. If it is determined that the project will be implemented outside of ancestral lands, a Certificate of Non-Overlap (CNO) will be issued, stating that the project or activity to be undertaken does not overlap with, or affect, any ancestral domain. This CNO is granted with the proviso that the applicant must execute an undertaking to

[62] Doyle (n 58) 173-174.

conduct the FPIC process should it be discovered later that an overlap with an Ancestral Domain does, in fact, exist

Subsequently, an FPIC Team will be formed, which must include indigenous elders or leaders representing the community, who are elected by the community in the first assembly. This FPIC Team will conduct the following stages: (1) Pre-FPIC Conference, (2) First Community Assembly, (3) Second Community Assembly, (4) Consensus-Building, (5) Communication of Consensus Results by elders/leaders, and (6) Validation Assembly. Following the FPIC process, if the indigenous community manifests a rejection, the NCIP will hold a Validation Hearing. If the rejection is affirmed during this hearing, the FPIC process must be stopped immediately. The NCIP will then issue a Resolution of Non-Consent. Conversely, if the indigenous community consents to the proposed project, a Memorandum of Agreement (MOA) will be drafted in the community's native language or a language they understand, and subsequently translated into English or Filipino. This MOA shall embody all terms and conditions requested by the community and the promises made by the company.

The IPRA and the provisions regarding indigenous peoples in the Philippines can serve as a valuable reference for Indonesia, with necessary adjustments to the specific context of Indonesian *adat* law communities. It is evident that a specialized law governing the rights of MHA is essential for domesticating the principles of UNDRIP into national legislation. A National Commission on MHA could be established to accelerate the recognition of MHA existence and their tenurial rights.

Furthermore, there is a need for standardized administrative and practical procedures regarding land acquisition for projects on communal lands; this would ensure that the process aligns with human rights and UNDRIP, while remaining attentive to the needs of the MHA. The focus should be on strengthening procedures to obtain free and transparent consent from the MHA, that is free from any external intervention. This National Commission could simplify complex and politically charged bureaucratic procedures into an effective mechanism to maximize the recognition of MHA and their rights, thereby ensuring optimal legal protection.

VII. COMPARISON WITH THE GHANA REGARDING TENURIAL RIGHTS OF INDIGENOUS PEOPLES

Indonesia and Ghana are compared due to their shared dualism in land governance, in which state authority coexists with indigenous tenure systems.[63] Both countries constitutionally recognize indigenous land rights, yet continue to face challenges in harmonizing these rights with centralized national land administration.[64] This parallel makes Ghana a particularly instructive comparative case for Indonesia, as both nations inherited colonial land policies that prioritized state control while simultaneously maintaining customary tenure as the dominant form of landholding in practice. The tension between these two systems, formal state law and living customary law, creates ongoing disputes over authority, revenue, and the legitimacy of land transactions, making the study of Ghana's legal evolution directly relevant to Indonesia's current debates over the recognition and protection of Adat Law Communities' tenurial rights. In both jurisdictions, the gap between constitutional promise and administrative implementation exposes indigenous communities to insecurity, elite capture, and competing claims by state agencies and private investors.

The 1992 Constitution of Ghana affirms that indigenous land forms an integral part of the national legal structure. Article 267(1) provides that all stool lands vest in the appropriate stool "on behalf of and in trust for" the subjects according to customary law and usage, establishing a constitutional foundation for customary land tenure that explicitly recognizes chiefs and traditional authorities as trustees rather than absolute owners.[65] This provision is reinforced by Article 36(8), a Directive Principle of State Policy, which mandates that the State shall recognize indigenous land tenure systems and guarantee the autonomy of traditional communities in the management of their lands.[66] Unlike Indonesia's conditional recognition under Article 18B(2) of the 1945 Constitution, which subjects Adat rights to requirements of "societal development" and administrative recognition through regional regulations (Perda), Ghana's constitutional framework embeds customary land ownership as a permanent feature of the legal order, with approximately 80% of

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63 Kasim Kasanga and Nii Ashie Kotey, *Land Management in Ghana: Building on Tradition and Modernity* (International Institute for Environment and Development 2001) 2.

64 Wordsworth Odame Larbi, 'Compulsory Land Acquisition and Compensation in Ghana: Principles and Practice' (FIG Working Week, Stockholm, June 2008) 3.

65 Constitution of the Republic of Ghana 1992, art 267(1).

66 Constitution of the Republic of Ghana 1992, art 36(8).

the country's land remaining under customary tenure.[67] The constitutional language of "fiduciary duty" places legal obligations on chiefs to act in the interest of their subjects, creating a conceptual basis for accountability that, while imperfectly enforced, contrasts sharply with Indonesia's state-centric model where *ulayat* rights are subordinated to the "right of state control" (Hak Menguasai dari Negara). Ghana's stool land framework, characterized by this fiduciary trusteeship and constitutionally mandated revenue-sharing mechanisms, offers a valuable comparative model for Indonesia's ongoing efforts to balance recognition of tenurial rights with state control over land and natural resources.

Following independence in 1957, Ghana undertook sweeping land reforms aimed at centralizing land control, justified by the rhetoric of modernization and administrative efficiency. [68]Political elites argued that fragmented customary tenure and the perceived conservatism of traditional authorities impeded planned urban expansion, infrastructure projects, and commercial agriculture, thereby justifying the transfer of significant decision-making power from stools and families to central government ministries and national land agencies. The impact of these reforms was profound, they weakened the authority of traditional institutions, enabled the capture of local revenue sources by the central state, and consolidated central political control over land allocation and resource extraction.[69] Chiefs and local communities experienced a gradual erosion of functional autonomy, while compensation for expropriated indigenous lands was frequently delayed or denied, creating widespread grievances and perceptions of state-enabled land-grabbing that persist to the present day. This period of centralization mirrors Indonesia's post-independence trajectory under the Basic Agrarian Law (UUPA) of 1960 and the Forestry Law of 1999, both of which subordinated customary rights to state development priorities and created bureaucratic barriers to recognition that the Constitutional Court attempted to address only decades later in Decision No. 35/PUU-X/2012.

The legislative instruments that operationalized this centralization were the State Lands Act 1962 (Act 125) and the Administration of Lands Act 1962 (Act 123). Act 125 granted the President broad powers to compulsorily acquire land in the so-

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67 Naa Alhassan Andani, 'Customary Lands Administration and Good Governance: The State Agency and Traditional Authority Interface' (5th FIG Regional Conference, Accra, March 2006) 4.

68 Kasanga and Kotey. (n 63) 14.

69 Wilfred K Anim-Odame, 'Compulsory Acquisition and Compensation in Ghana: Principles and Practice' (American Real Estate Society Annual Meeting, Seattle, April 2011) 5.

called public interest, with all other interests extinguished upon publication of an Executive Instrument, subject only to subsequent claims for compensation that were often honored only after protracted litigation or political pressure.[70] Act 123, by contrast, authorized the President to vest stool lands in himself "in trust," transferring legal control and administration to the state while ostensibly preserving the equitable interest of the customary community, a mechanism heavily applied in urban and resource-rich areas where mineral and timber concessions were prioritized over community subsistence needs.[71] These statutes created two new legal categories: State Lands (acquired outright under Act 125) and Vested Lands (customary lands vested in the President under Act 123), under which stool lands remained formally recognized but were effectively subordinated to state authority.[72] The emergence of the doctrine of state allodial ownership marked a significant shift toward the subordination of indigenous tenure to statutory land governance, privileging centralized statutory powers over historically entrenched customary entitlements and sharpening conflicts around dispossession, legitimacy, and the proper limits of public-interest takings. Scholars note that the coexistence of old colonial-era laws (such as Acts 123 and 125) with the 1992 Constitution's protections for stool lands created doctrinal confusion and enabled state agencies to continue asserting control even where constitutional provisions ostensibly guaranteed customary autonomy.

In response to growing concerns over transparency and the marginalization of communities in benefit-sharing, Ghana enacted the Office of the Administrator of Stool Lands Act 1994.[73] The Office of the Administrator of Stool Lands, while designed to enhance transparency and protect community interests, operates within carefully circumscribed legal boundaries that reflect the underlying tension between state oversight and customary autonomy.[74] Under Act 481, the Administrator possesses statutory authority to establish and maintain a Stool Land Account for each stool, receive and disburse all revenues accruing from stool lands, conduct audits of land transactions, and require chiefs and traditional authorities to submit annual returns of all grants, leases, and licenses issued over stool lands.[75] The Administrator is empowered to withhold disbursements to stools that fail to

[70] State Lands Act 1962 (Act 125).
[71] Administration of Lands Act 1962 (Act 123), s 7.
[72] Larbi, W.O. (n 64) 5.
[73] *Office of the Administrator of Stool Lands Act 1994* (Act 481).
[74] Kasim and Kotey, *(n 63)* 22.
[75] *Office of the Administrator of Stool Lands Act 1994* (Act 481), ss 2, 4, 9.

comply with reporting requirements or that are found to have engaged in unauthorized transactions, providing a mechanism of financial discipline that theoretically aligns customary land management with principles of public accountability.[76] However, the Administrator's powers are fundamentally limited in scope: the office cannot nullify or reverse land transactions entered into by customary authorities, lacks direct enforcement powers over chiefs who refuse to cooperate, and has no jurisdiction over the internal governance structures of stools or the customary criteria by which land is allocated within communities.[77] Furthermore, the Administrator operates under the authority of the Lands Commission and ultimately the Ministry of Lands and Natural Resources, creating a hierarchical structure in which indigenous land revenues are effectively channeled through state institutions before redistribution, thereby maintaining a degree of state control over customary land economics even where ownership formally vests in the stool.[78] Critics argue that this arrangement reflects a paternalistic model in which the state acts as a supervisor of indigenous land management rather than a partner, and that the lack of direct community participation in the Administrator's oversight processes undermines the very accountability the system was designed to promote.[79] In practice, delays in revenue disbursement, lack of transparency in the accounting methods used by the Administrator's office, and insufficient resources for field verification have weakened the effectiveness of this mechanism, demonstrating that legal powers on paper do not automatically translate into functional protection of community tenurial rights.[80]

The Act operationalizes Article 267(2) and (6) of the Constitution by establishing an independent office tasked with collecting all revenues from stool lands and redistributing them according to a mandatory formula: 10% for administrative costs, 25% to the stool, 20% to the traditional authority, and 55% to the relevant District Assembly.[81] This system reinforces the fiduciary nature of stool land trusteeship, promotes financial transparency, and channels a majority share of economic benefits into local government budgets that can be used for community development, infrastructure, and social services.

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76 *Office of the Administrator of Stool Lands Act 1994* (Act 481), s 9(2).
77 Andani (n 67) 8
78 *Ibid; Constitution of the Republic of Ghana 1992, art 267(2)*
79 Kasanga and Kotey (n 63) 23–24.
80 Odame (n 69) 12
81 *Constitution of the Republic of Ghana 1992*, art 267(6).

However, scholars and civil society organizations have documented persistent practical problems, including misreporting of revenues by chiefs, failure of District Assemblies to invest stool land revenues in the communities from which they originated, elite capture of land sales proceeds, and weak enforcement mechanisms to hold traditional authorities accountable to their subjects. The Land Act 2020 (Act 1036) further formalized this framework by requiring the establishment of Customary Land Secretariats (CLS) to maintain records, document transactions, facilitate dispute resolution, and serve as intermediaries between customary authorities and state land agencies.[82] Despite these institutional innovations, land disputes remain endemic in Ghana, often arising from conflicting court judgments, overlapping claims between stools and families, lack of clarity regarding boundaries, and tensions between customary norms and formal statutory procedures. The CLS model, while promising on paper, faces challenges of inadequate funding, political interference, and uneven implementation across regions, illustrating that institutional design alone cannot overcome deeper structural issues of power, accountability, and legal pluralism.

The Ghanaian experience offers a critical alternative model for Indonesia regarding the legal relationship between the state and indigenous communities. Whereas Indonesia's agrarian law is dominated by the Rights of State Control which often subordinates customary rights to national development interest,[83] Ghana's constitutional framework successfully decouples state sovereignty from land ownership through the doctrine of fiduciary trusteeship.[84] By vesting land in traditional authorities (Stool) rather than the state, Ghana demonstrates that it is possible to maintain a unitary legal system without extinguishing indigenous title. For Indonesia, this suggests that the implementation of Constitutional Court Decision No. 35/PUU-X/2012 could be strengthened by adopting a similar trusteeship model, where Adat Law Communities are legally recognized as the primary rights holders, with the state functioning merely as a regulator rather than a competing landowner[85]

Furthermore, Ghana's Institutionalization of Customary Land Secretariats (CLS) under the Land Act 2020 provides a practical blueprint for resolving the administrative bottlenecks currently plaguing Indonesia's recognition process. In

[82] *Land Act 2020* (Act 1036), ss 13–18
[83] *Constitution of the Republic of Indonesia 1945*, art 33(3); *Indonesia Agrarian Law 1960*
[84] *Constitution of the Republic of Ghana 1992*, art 267(1).
[85] *Constitutional Court Decision No 35/PUU-X/2012 of the Republic of Indonesia*

Indonesia, the recognition of Adat communities is heavily politicized, requiring complex regional regulations such as *Peraturan Daerah (Perda)* that depend on the discretion of local legislative bodies.[86] In contrast, the CLS model creates a technical, administrative interface that empowers communities to document and manage their own land rights within the national system, independent of political recognition.[87] Indonesia could emulate this by establishing similar community based land administration units under the National Land Agency (BPN), thereby shifting the focus from political recognition to technical capacity building and participatory mapping.

Finally, the statutory revenue sharing mechanism under Ghana's Act 481 offers a distinct improvement over Indonesia's current approach to economic benefits.[88] While Indonesia relies on 'partnership schemes' or corporate social responsibility which are often negotiable and unenforceable,[89] Ghana establishes a non derogable statutory right for traditional authorities to receive a fixed percentage of revenues derived from natural resources extraction on their land.[90] Incorporating a similar mandatory revenue sharing formula into Indonesia's proposed Bill on Indigenous People *(RUU Masyarakat Hukum Adat)* would transform the economics rights of Adat Communities firm discretionary corporate handouts into enforceable statutory entitlements, ensuring that indigenous communities directly benefit from the monetization of their customary territories.

VIII. CONCLUSION

This paper has examined whether international legal principles concerning Adat Law Communities' tenurial rights have been adequately accommodated within Indonesia's national legal framework, and how Indonesia's mechanisms for protecting these rights compare with those of the Philippines and Ghana. The analysis reveals that international legal principles, particularly those enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including the right to self-determination, Free, Prior, and Informed Consent (FPIC),

86 *Regulation of the Minister of Home Affairs No 52 of 2014* (Indonesia)
87 Larbi, W.O. (n 64) 7
88 *Office of the Administrator of Stool Lands Act 1994* (Act 481).
89 *Indonesia Law No 39 of 2014 on Plantations, s 58.*
90 *Constitution of the Republic of Ghana 1992*, art 267(6).

and the right to self-identification, have not been fully integrated into Indonesia's domestic legal system.

The constitutional recognition of Adat Law Communities under Article 18B(2) of the 1945 Constitution is conditional in nature, subjecting indigenous rights to vague standards of "societal development" and requiring administrative recognition through complex bureaucratic processes that depend on the political will of local governments. While the Constitutional Court Decision No. 35/PUU-X/2012 marked a significant legal breakthrough by separating adat forests from state forests, this development has not been accompanied by comprehensive legislative reform that would harmonize the fragmented sectoral laws governing indigenous rights. The result is a patchwork of inconsistent statutes, including the Basic Agrarian Law, the Forestry Law, the Plantation Law, and various ministerial regulations, which collectively fail to fully reflect the self-determination, FPIC, and self-identification principles articulated in UNDRIP.

In contrast, the Philippines has enacted the Indigenous Peoples' Rights Act (IPRA) of 1997, which explicitly domesticates UNDRIP principles into a comprehensive statutory framework. The IPRA establishes the National Commission on Indigenous Peoples (NCIP) as a specialized institutional mechanism, operationalizes FPIC through standardized procedures with clear stages of community consultation and consensus-building, and has successfully issued 221 Certificates of Ancestral Domain Titles (CADTs) covering 5.4 million hectares within two decades of implementation. Although implementation challenges persist, particularly concerning the conflict between IPRA and mining laws, the Philippines demonstrates the structural capacity to recognize and protect indigenous tenurial rights through dedicated legislation and institutional architecture.

Ghana's approach, while distinct from both Indonesia and the Philippines, offers a constitutionally embedded model of customary land trusteeship. Article 267(1) of Ghana's 1992 Constitution vests approximately 80% of the country's land in traditional authorities (stools) "in trust for" their subjects, fundamentally decoupling state ownership from customary tenure. Through the Office of the Administrator of Stool Lands Act 1994 and the Land Act 2020, Ghana has institutionalized a statutory revenue-sharing mechanism and created Customary Land Secretariats to document and manage indigenous land rights. Despite persistent implementation challenges, including elite capture, mismanagement of

revenues, and political interference, Ghana's fiduciary trusteeship model demonstrates that it is possible to subordinate state land control to customary authority within a unitary legal framework.

The comparative analysis reveals three critical gaps in Indonesia's legal regime. First, Indonesia lacks a unified, comprehensive law specifically governing Adat Law Communities and their rights, relying instead on fragmented sectoral legislation that often contradicts itself or subordinates indigenous rights to "national interest" justifications. Second, Indonesia has not operationalized the principle of self-identification, continuing to require administrative recognition by the state rather than accepting communities' self-determination as the primary criterion for legal standing. Third, Indonesia has failed to institutionalize FPIC through standardized, binding procedures; instead, consultations with adat communities remain optional, discretionary, and subordinate to permits issued by state agencies.

The weak legal certainty regarding the status and rights of Adat Law Communities has rendered them vulnerable to systematic land dispossession, particularly through large-scale business ventures, natural resource extraction, and infrastructure projects justified as serving the "public interest". While the Constitutional Court has attempted to remedy this through individual decisions, judicial interventions cannot substitute for coherent, comprehensive statutory reform. The persistence of these issues, despite the enactment of the Forestry Law, Constitutional Court rulings, the Village Law, and various ministerial regulations, underscores the insufficiency of incremental legal changes without a unified legislative framework.

Consequently, the harmonization of international legal principles into the Indonesian legal regime remains incomplete and inadequate. The tenurial rights of Adat Law Communities, though recognized constitutionally and internationally, are insufficiently protected by a fragmented national legal system that fails to reflect the self-determination, FPIC, and self-identification principles essential to meaningful indigenous rights protection. The experiences of the Philippines and Ghana demonstrate that comprehensive statutory frameworks, dedicated institutional mechanisms, and constitutional clarity are necessary to translate international principles into effective domestic legal protection.

Based on the analysis presented in this paper, the following recommendations are proposed to strengthen the protection of Adat Law Communities' tenurial rights

through the harmonization of international legal principles into Indonesia's national legal regime,

1. **Immediate Enactment of the Law on Indigenous Peoples (RUU Masyarakat Hukum Adat)**

The first and most urgent recommendation is the immediate enactment of the Draft Law on Indigenous Peoples (*Rancangan Undang-Undang Masyarakat Hukum Adat / RUU MHA*), which has been pending before the Indonesian Parliament since 2010 and has been included in the National Legislative Program (*Prolegnas*) on multiple occasions without passage. This comprehensive law must serve as an umbrella statute that supersedes the fragmented sectoral framework currently governing Adat Law Communities. The *RUU MHA* should explicitly incorporate the principles of UNDRIP, including self-determination (Articles 3-4), Free, Prior, and Informed Consent (Article 32), and the right to self-identification (Article 33), into binding domestic legal obligations. The law must also establish clear, objective criteria for recognizing Adat Law Communities that prioritize self-identification over bureaucratic approval, thereby eliminating the conditional recognition model that has historically subordinated indigenous rights to political discretion.

2. **Establish a National Commission on Indigenous Peoples (Komnas MHA)**

Given that the Philippines has successfully implemented indigenous rights protection through the National Commission on Indigenous Peoples (NCIP), Indonesia should establish a similarly empowered institutional mechanism—a *Komnas Masyarakat Adat* (National Commission on Indigenous Peoples)—to serve as a dedicated, specialized agency for the recognition, protection, and advocacy of Adat Law Communities' rights. This Commission must operate with administrative, quasi-legislative, and quasi-judicial functions, analogous to the NCIP's role in certifying ancestral domains and managing FPIC processes. The *Komnas MHA* should be granted independent status, adequate budgetary allocation, and statutory authority to issue recognition certificates for Adat Law Communities and their territories, eliminating the current requirement that recognition depend on regional legislative action (*Perda*). The Commission must also have enforcement powers to ensure that all government permits, licenses, and concessions affecting indigenous lands are subject to prior FPIC verification, preventing the issuance of permits that would violate tenurial rights.

3. **Implement Mandatory Free, Prior, and Informed Consent Procedures**

Indonesia must operationalize FPIC as a binding, standardized procedural requirement across all sectoral laws governing land use, natural resource

extraction, and development projects. The *RUU MHA* should establish clear, enforceable FPIC mechanisms similar to those outlined in the Philippines' 2012 FPIC Guidelines, including: (a) mandatory consultation stages with sufficient time for community internal deliberation; (b) disclosure of all project information in languages and formats accessible to the community; (c) independent fact-finding on the impacts of the proposed activity; and (d) genuine decision-making power for the community, including the right to withhold or condition consent. FPIC should not be merely advisory; withholding of consent by an Adat Law Community must be binding on government agencies and corporations, enforceable through both administrative and judicial remedies. All sectoral laws, including the Forestry Law, the Mining Law, the Plantation Law, and the Oil and Gas Law, must be amended to explicitly require FPIC certification before any activity is permitted on customary lands.

4. Adopt a Fiduciary Trusteeship Model for State Land Authority

Drawing from Ghana's constitutional model, Indonesia should reframe the concept of "Right of State Control" (*Hak Menguasai Negara*) not as absolute ownership, but as a *fiduciary trust* in which the state acts as a steward of land for the benefit of the nation and its communities, including Adat Law Communities. This reframing would establish a presumption that customary communities hold the primary tenurial right, with the state acting as a facilitator of dispute resolution and protector of community interests, rather than as a subordinate power that can override indigenous claims. The Constitutional Court should reaffirm in future decisions that Article 33(3) of the 1945 Constitution does not authorize unilateral state appropriation of customary lands without genuine community consent and adequate compensation.

5. Institute a Mandatory Revenue Sharing Mechanism for Natural Resources

Following Ghana's model under the Administrator of Stool Lands Act 1994, Indonesia should enact a statutory revenue-sharing framework that guarantees Adat Law Communities a non-negotiable, fixed percentage of all revenues derived from natural resource extraction and development on their customary lands. This mechanism must be enshrined in the *RUU MHA* and guarantee Adat Law Communities at minimum 50-60% of revenues, with secondary allocations to local government and the state treasury. Revenue collected must be transparent, regularly audited, and subject to community oversight, with penalties imposed on officials or corporations that misreport or divert funds. This approach would

eliminate the current reliance on discretionary corporate partnerships and CSR commitments, transforming economic benefits into enforceable statutory rights.

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Law No 27 of 2007 on the Management of Coastal Areas and Small Islands

Law No 32 of 2009 on Environmental Protection and Management

Law No 39 of 1999 on Human Rights

Law No 39 of 2014 on Plantations

Law No 41 of 1999 on Forestry

Office of the Administrator of Stool Lands Act 1994 (Ghana)

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Reconstructing Environmental Law Based on Ecological Justice through the Recognition of the Rights of Nature in the Indonesian Legal System

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ABSTRACT: Environmental law in Indonesia is still dominated by an anthropocentric paradigm that positions nature as an object of regulation, not as an entity that has intrinsic value. This orientation gives birth to a form of environmental protection that is fragmented, reactive, and procedural, so that it is not able to respond to ecological crises that are systemic and increasingly complex. Although the global legal discourse has evolved towards ecological justice and the recognition of the Right of Nature as an alternative normative framework, the study of environmental law in Indonesia still focuses on environmental governance, the human right to a good and healthy environment, and sustainable development. As a result, normative analysis of the position of nature as a subject of law is still relatively limited. This condition shows that there is a research gap related to how the Right of Nature can be systematically integrated into the Indonesian environmental law system through an ecocentric paradigm. This research aims to fill this gap by offering a reconstruction of Indonesian environmental law based on ecological justice through the recognition of the Right of Nature. This research uses normative legal research methods with a legislative approach, a conceptual approach based on ecological justice and earth jurisprudence, and a comparative approach by examining constitutional practices and legislation in Ecuador and New Zealand. Ecuador was analyzed as a country that constitutionally recognizes nature as a subject of law, while New Zealand is examined as an example of a model of legislation that grants legal personhood status to certain natural entities, specifically rivers. This comparative approach provides an overview of the variations in recognition models and mechanisms for the enforcement of natural rights that are relevant to the Indonesian context. The results of the study show that Indonesian environmental law has not yet recognized nature as an autonomous legal subject, because environmental damage is still assessed primarily based on human interests and losses. Therefore, the recognition of the Right of Nature is proposed as a strategic normative framework to encourage a paradigm shift in environmental law from anthropocentric to ecocentric, strengthen ecosystem protection substantively, and realize ecological justice. This reconstruction is expected to make a theoretical contribution to the development of environmental law, especially through the formulation of a normative model for the recognition of natural rights in the civil law system in Global South countries, as well as encourage the formation of an Indonesian environmental law system that is more sustainable, just, and responsive to ecology.

Keywords: Ecological Justice; Environmental Law; *Right of Nature*; Ecocentrism; Comparative Environmental Law.

I. INTRODUCTION

The environment and ecosystems are two concepts that are often used interchangeably in legal and public policy discourse, although they have different scopes and depth of meaning. The environment is often understood as a space where humans carry out social, economic, and cultural activities. This understanding tends to place the environment as a setting or container that surrounds humans. Meanwhile, ecosystems reflect a deeper and more complex relationship, namely the mutual relationship between biotic and abiotic elements that form a single living system.[1] When the law only looks at the environment on the surface, the ecosystem is reduced to elements that can be separated, managed sectorally, and utilized according to development needs.

The approach to environmental law in Indonesia still shows a tendency to understand the environment within thin and instrumental limits. The environment is treated as an object of administrative regulation, not as a living system that has carrying capacity and ecological limits.[2] This perspective has an impact on the weak protection of the ecosystem as a whole, because the law focuses more on controlling pollution and destruction after the impact has occurred. Damaged ecological relationships, such as loss of forest function, watershed degradation, and coastal degradation, often do not obtain adequate restoration within a positive legal framework.

Law Number 32 of 2009 concerning Environmental Protection and Management is often positioned as the main instrument of environmental protection in Indonesia. But conceptually, this law is not yet fully oriented towards ecological protection. Its normative structure still places the environment as an object that is managed for the benefit of human beings and national development. The principles of sustainable development that are carried out emphasize more on the balance between economic, social, and environmental interests, without giving recognition to the intrinsic value of nature itself. As a result, ecological sustainability is often negotiated with economic and political interests.

The absence of recognition of nature as a subject of law narrows the space for justice for ecosystems. Nature is not in a position to be considered independently in legal proceedings, so ecological damage is often judged on the basis of human losses alone. This approach creates structural inequality, where human interests

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1 Nommy Horas Thombang Siahaan, 2004, *Environmental Law and Development Ecology*, Erlangga.
2 R. M. Gatot P. Sumartono, 1991, *Getting to Know Indonesian Environmental Law*, Sinar Grafika.

acquire full legal legitimacy, while natural interests depend on the extent to which they directly impact humans. This condition shows that Indonesia's environmental law is still moving in a strong anthropocentric corridor.

In an increasingly real ecological crisis situation, the idea of ecological justice is becoming increasingly relevant. Ecological justice views humans and nature as equal entities in the ecosystem of life. This equality is not interpreted as equalizing roles, but rather as recognition that human sustainability cannot be separated from the sustainability of nature. Nature is not just a tool to meet human needs, but an existential partner who has the right to live, develop, and recover from damage.[3]

The principle of ecological justice demands a fundamental change in the way the law views the relationship between humans and nature.[4] The recognition of the rights of nature or the Right of Nature is one of the concrete manifestations of this paradigm. Through an ecocentric approach, the law is directed to protect ecosystems as subjects that have their own legal interests. The experiences of various countries show that the recognition of natural rights is able to substantively strengthen environmental protection and encourage collective responsibility for ecosystem sustainability.

In the Indonesian context, the application of ecological justice is in line with constitutional values and local wisdom that have long placed nature as part of the order of life. Therefore, the reconstruction of the environmental law paradigm through the recognition of the Right of Nature is a strategic step to answer the limitations of existing environmental law. This approach is expected to be able to shift the legal focus from procedural environmental management to just and sustainable ecosystem protection.

II. METHODOLOGY

This research is a normative or doctrinal legal research that focuses on the study of legal norms, legal principles, and legal doctrines that develop in the field of environmental law. The main focus of this research is directed at the conceptual analysis of the recognition of nature as a legal subject through the *Right of Nature approach*. Normative legal research was chosen because the problems studied are

[3] Sumba Declaration on Ecological Justice | WALHI, Https://Www.Walhi.Or.Id/Deklarasi-Sumba-Tentang-Keadilan-Ekologis, Retrieved 12 January 2026.

[4] Ibid.

directly related to the structure and substance of positive law.[5] Through this research, law is understood as a system of norms that contain certain values, goals, and orientations in regulating the relationship between humans and nature.

In addition, this research has a prescriptive character that aims to formulate legal arguments and recommendations. The analysis does not stop at the mapping of applicable norms, but is directed at a critical assessment of the adequacy of the existing environmental law paradigm in responding to the ecological crisis. This prescriptive character allows this research to offer a conceptual reconstruction of national environmental law through the integration of the principles of ecological justice and *the Right of Nature*.[6] Thus, this research seeks to make a theoretical and normative contribution to the development of environmental laws that are more responsive to ecosystem sustainability and nature protection as an integral part of the legal system.

The research approach used consists of several complementary approaches. First, the statute *approach*. The Constitution of the Republic of Indonesia in 1945 and Law Number 32 of 2009 concerning Environmental Protection and Management. This approach aims to assess the extent to which the prevailing norms accommodate ecocentric values and open up space for the recognition of natural rights.

Second, the *conceptual approach* is used to examine the concepts and principles of *the Right of Nature*, *earth jurisprudence*, and ecological justice as developed in the modern environmental law literature. This approach is important to build a theoretical framework capable of explaining the paradigm shift from anthropocentric to ecocentric. Third, a *comparative approach* is used to analyze the practice of recognizing natural rights in several countries, such as Ecuador, Bolivia, New Zealand, and India. This approach serves as a means of learning law to assess the relevance and adaptability of the *concept of Right of Nature* in the context of the Indonesian legal system.

The sources of legal materials in this study consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include laws and regulations relevant to environmental protection and management and the recognition of natural rights, including the 1945 Constitution of the Republic of Indonesia and Law Number 32 of 2009 concerning

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5 Dr. Russel Butarbutar M.M S. H. , S. T. , M. H., 2023, *Legal Research a Method, Philosophical Connection, Legal Theory with Its Analysis & Writing*, Mega Press Nusantara.

6 Ibid.

Environmental Protection and Management, along with the Constitutional Court's decisions related to the environment and natural resources. Secondary legal materials include scientific papers, legal journals, research results, and academic literature that discuss environmental law, ecological justice, *Right of Nature*, and the development of ecocentric paradigms in national and international legal systems. Tertiary legal materials are in the form of legal dictionaries, encyclopedias, and other supporting documents that are used to strengthen conceptual and terminological understanding in discussion.[7]

The collection of legal materials in this study was carried out through *library research*. This method is used to obtain primary and secondary legal materials by examining laws and regulations, court decisions, legal literature, academic journals, and official documents related to environmental law and the recognition of natural rights. The search is focused on national and international legal norms that contain the principles of ecological justice and *the Right of Nature* to build a normative basis and theoretical framework for research. Literature studies are carried out by examining scientific books, journal articles, institutional reports, and relevant academic publications, both through print and digital sources. This method is used to gain a comprehensive understanding of the development of the ecocentric environmental law paradigm and its relevance in the Indonesian legal system, thus supporting the preparation of systematic and argumentative legal analysis.

The analysis of legal materials was carried out qualitatively using the normative-prescriptive analysis method. This analysis aims to understand the structure of applicable legal norms, identify the limitations of the anthropocentric approach in Indonesian environmental law, and formulate legal arguments that support the application of *the Right of Nature*. The collected legal materials are systematically and critically analyzed by relating legal norms, doctrines, and legal practices in different countries. The results of the analysis were used to prepare conceptual recommendations regarding the strategy for the implementation of natural recognition as a legal subject in order to realize ecological justice and environmental sustainability in Indonesia.

[7] Diva Pitaloka S.H., M.H *et al*., 2023, *Introduction to Law*, Mega Press Nusantara.

III. THE EVOLUTION OF PARADIGMS, THE PHILOSOPHY OF RIGHT OF NATURE, AND PRACTICES IN DIFFEREN COUNTRIES

Modern environmental law was born in response to increasing environmental degradation that threatens the sustainability of human and non-human life. However, the normative development of environmental law from the beginning shows a strong tendency to position nature as an object of regulation, rather than as an entity with independent legal interests. This approach is rooted in an anthropocentric paradigm that places environmental protection within the framework of human interests, both as an economic resource and as a support for quality of life. This kind of legal construction forms the boundary of environmental protection that is instrumental and procedural, so that it is not fully able to answer the complexity of the global ecological crisis.[8]

Global data shows that the legal paradigm oriented towards impact control has not been able to contain the rate of environmental damage. The *Global Environment Outlook* report from the United Nations Environment Programme notes that more than 40 percent of the world's ecosystems are experiencing serious degradation due to human activities. This condition encourages the development of alternative legal approaches that recognize the intrinsic value of nature. Therefore, discussion I is directed to outline the evolution of the environmental law paradigm, the philosophical foundation *of Right of Nature*, and the practice of its application in various countries as a conceptual basis for the reform of Indonesian environmental law.

1. The Evolution of the Environmental Law Paradigm: From Anthropocentric to Ecocentric

The development of environmental law reflects a fundamental paradigm shift in how legal systems respond to global ecological challenges. In the realm of traditional law, the environment is often understood as an object that is under the interests of humans and the state, with the main focus on pollution control, business activity licensing, and technical regulation of environmental impacts. This framework rests on an anthropocentric paradigm that places humans as the main subjects protected by legal norms. This approach results in environmental law tending to focus on technical and administrative aspects, while the protection of

[8] Daud Silalahi, *Library of the College of Police Sciences (STIK),* Https://Library.Stik-Ptik.Ac.Id, accessed January 12, 2026.

the integrity of ecosystems as complex living systems is still outside the normative centerpiece.[9]

Empirical reality shows that this kind of approach is not effective enough in responding to increasingly complex ecological pressures. Scientific data show that ecological damage has reached alarming proportions. According to a national scientific study, Indonesia loses about 680,000 hectares of forests annually due to the exploitation of natural resources, which has a direct impact on the destruction of the ecological function of forests as a buffer for life and a global carbon sink.[10] In addition, the condition of rivers in Indonesia shows that 101 rivers are polluted on a moderate to severe scale according to data from the Ministry of Environment and Forestry (KLHK).[11] This phenomenon occurs at the same time as the increase in ecological disaster events recorded by the National Disaster Management Agency, namely an increase in the number of disaster events from 3,544 in 2022 to 5,400 in 2023.[12] Such data illustrate that environmental degradation is no longer just an administrative problem, but has gone beyond the boundaries of ecological functions that are essential for the sustainability of human and non-human life.

At the global level, biodiversity conservation is also showing less promising trends. International reports show that the target of protecting 30 percent of the world's land and oceans by 2030 is still far from being achieved, where protection covers only about 17.6 percent of land and about 8.4 percent of marine areas.[13] This condition indicates the ineffectiveness of various international legal instruments and policies in protecting the integrity of ecosystems substantively.

The above empirical conditions reflect that existing environmental laws are too tied to classical approaches that are inadequate to respond to systemic and cross-sectoral ecological crises. In response to these limitations, academic discourse and contemporary legal practice introduced an ecocentric concept that places nature as an entity that has intrinsic value beyond its utility to humans. The idea of *the Right of Nature* advocates the normative recognition of nature's rights to exist, develop,

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9 Febriyani Tue *et al*., "The Dialectic of Nature and Man in the Perspective of Social Geography (A Study of the Mutual Interaction of Environment and People)," *Innovative: Journal of Social Science Research*, Vol. 4, No. 6, December, 2024.

10 Kompas Cyber Media, *KOMPAS.com*.

11 Indonesia's Forests and Deforestation 2024, *Forestry*, https://www.kehutanan.go.id/news/article-10, accessed January 12, 2026.

12 2 0250613_Buku Data 2024.pdf.

13 WCMC, *UNEP-WCMC*, http://production-wordpress.unep-wcmc.org/beyond-coverage-strengthening-the-quality-of-protected-and-conserved-areas/, diakses 12 Januari 2026.

maintain its life cycle and functional structure, and obtain restoration when damaged. The Ecuadorian Constitution is an early example of constitutionally affirming natural rights with an explicit normative content that nature has the right to "exist, maintain and restore its life cycle, structure, function and evolutionary processes".[14] This allows communities and individuals to file claims against public authorities on behalf of nature.

This kind of recognition not only provides a legal basis for ecosystem protection, but also has implications for the state's responsibility to regulate development activities with regard to the broader ecological existence. The *Right of Nature approach* positions law as an instrument that facilitates ecological justice, namely the recognition of natural rights as well as respect for the relationship between humans and the environment in an equal legal relationship.[15] In the context of Indonesian law, this paradigm evolution is important to strengthen the normative foundations to ensure more effective protection of ecological systems that are under significant stress due to the development and exploitation of natural resources.

a. Principle and Philosophical Teachings *of Right of Nature*

The concept *of the Right of Nature* is a manifestation of ecological law that is rooted in the idea that nature not only has instrumental value for humans, but also has intrinsic value that deserves legal protection independently. In the study of traditional law, the environment is generally protected only to guarantee the protection of human rights, such as the right to clean air, clean water, and health. This kind of approach reflects the anthropocentric values that have dominated environmental law since its inception. *The Right of Nature* shifts this focus by placing nature as part of a legal community that deserves its own rights, including the right to *exist*, the right to flourish, and the right to be *restored*. This idea is rooted in the development of *earth jurisprudence* and *wild law* which views nature as an entity with moral and legal status, rather than just a normative object in positive law.[16]

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[14] By Katie Surma, *Inside Climate News*, https://insideclimatenews.org/news/17112025/ecuador-rights-of-nature-vote/, diakses 12 Januari 2026.

[15] Perrine Mouterde dan Martine Valo, "Biodiversity: The world is not on track to protect 30% of land and sea by 2030," *Le Monde*, 2024.

[16] The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature | MDPI, https://www.mdpi.com/2071-1050/8/2/174?utm_source=chatgpt.com, diakses 12 Januari 2026.

In the realm of legal philosophy, *Right of Nature* emphasizes the shift from a legal approach that sees nature as an economic resource to a law that views nature as a subject that has a normative position. *Earth jurisprudence*, as one of the philosophical foundations of *the Right of Nature*, states that law must conform itself to the ecological reality that humans are part of an ecosystem, not a superior independent entity. Thus, the law regulates not only human relationships, but also human relationships with the ecological environment that sustain life.[17] This philosophical foundation expands the scope of the law from simply regulating human behavior to protect its interests, to an instrument that gives legal legitimacy to ecosystems to demand protection for their inherent interests.

The conceptual implementation of *the Right of Nature* has shown that there are concrete possibilities in the practice of international law. Indonesia has not yet recognized nature as a subject of law in its constitution, but the experience of other countries reflects a significant normative shift. The Ecuadorian Constitution, for example, expressly lists the *Rights of Nature* which places the natural element as the subject of a constitutional right that can be defended before the law.[18] This kind of recognition is not just a symbolic tribute; in a ruling relating to the Vilcabamba River in Ecuador, the court ruled that nature has the right to exist and ordered rehabilitation for the environmental damage that occurred.[19] This decision suggests that the recognition of *the Right of Nature* can result in concrete legal obligations for states or other actors to respect and protect those ecological rights of nature.

The philosophical principles of *the Right of Nature* also have implications for the national legal framework. In the context of Indonesian law, the recognition of natural rights will require adjustments to positive legal norms to be more responsive to increasingly urgent ecological needs. The 1945 Constitution has not explicitly recognized the rights of nature as a subject of law, but Article 28H paragraph (1) and Article 34 paragraph (4) affirm the right to a good environment and the use of natural resources for the welfare of the people. These norms indicate the existence of a constitutional basis for a more comprehensive expansion of environmental protection, including the possibility of recognizing the ecological rights of nature itself.

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17 Peter D. Burdon, 2014, *Earth Jurisprudence: Private Property and the Environment*, Routledge, London.

18 Ecuador's Rights of Nature and the Barriers to Sustainable Development.

19 Perrine Mouterde dan Martine Valo, above note 15.

From the perspective of legal philosophy, the recognition *of the Right of Nature* also reflects the evolution of the concept of *ecological justice*. Ecological justice demands that the law not only protect the rights of human legal subjects, but also provides legitimacy for the entire ecological community to demand protection of its rights.[20] This philosophical message expands the scope of the law so that it is not only oriented to human interests, but ensures the sustainability and harmony between the legal system and the dynamics of natural life. Thus, *the Right of Nature* has become a relevant normative instrument in responding to the increasingly complex ecological crisis through a more inclusive and sustainable legal approach.

2. Rights of Nature *Implementation Model* in Various Countries

The Right of Nature as a legal concept not only offers a new philosophical framework but also opens up space for reflection on the normative structure that exists in the national legal system. When a natural entity is recognized as having legal rights, the traditional conception of the subject of law in the construction of legislation is expanded. In the Indonesian legal system, the subject of law has been understood to be limited to human beings and other legal entities recognized by the state. Recognition of ecological entities as legal subjects will demand changes in normative structures, including the definition of legal subjects, protected interests, and law enforcement mechanisms.

Empirical data on environmental conditions in Indonesia show the normative urgency to go beyond reactive environmental protection approaches. The latest report by the Central Statistics Agency (BPS) states that the contribution of the agriculture, forestry, and fisheries sectors to the Gross Domestic Product (GDP) reached 12.5% despite the pressure on sustainable natural resources.[21] In the same period, the level of land degradation and the quality of natural resources are still important records that affect the balance of the ecosystem and the welfare of the community (BPS, 2024). This condition shows the inseparable relationship between environmental law and development, so that a legal framework that only sees nature as an object is no longer able to answer the need for environmental protection in the context of sustainability and ecological justice.

The legal implications of *the Right of Nature* appear normatively as well as juridical. Normatively, the recognition of *the Right of Nature* leads to the explicit

[20] Brian Baxter, 2004, *A Theory of Ecological Justice*, Routledge, London.

[21] Indonesian Central Statistics Agency, https://www.bps.go.id/id/news/2025/05/05/703/ekonomi-indonesia-tetap-tumbuh-di-tengah-ketidakpastian-global.html, accessed January 12, 2026.

establishment of the rights of ecological entities in national legal instruments. This requires revision or update of existing laws and regulations, such as Law Number 32 of 2009 concerning Environmental Protection and Management, to include ecosystem rights as legal entities that must be protected by the state. Strengthening the normative framework of environmental law can be carried out through the principles of the right of nature to exist, the right of nature to recover, and the right of nature to maintain its ecological function. These principles can then form the basis of regulatory norms in other sectoral laws that have an impact on ecological living spaces.

Juridically, the recognition of *the Right of Nature* opens up the possibility of the generation of legal claims in the name of nature itself. In some countries that have adopted this concept, such as New Zealand which recognises the Whanganui River as a legal entity with legal *personhood*, ecological entities can be represented by legal representatives to bring suits, seek restoration or enforce their rights in court.[22] The jurisprudence reflects a shift in the environmental justice system that provides space for the existence of nature to be protected directly through positive legal mechanisms. This kind of juridical modeling produces legal precedents that can be used as a reference in developing legal instrumentation in Indonesia.

The recognition of *the Right of Nature* also has implications for public policy. National environmental policy in Indonesia has so far focused on the principle of sustainable development that balances economic, social, and environmental aspects.[23] However, this emphasis has not much on regulating the intrinsic value of ecosystems as an inherent right. *Right of Nature* positions environmental protection as a state obligation that must be proactively fulfilled in sectoral and cross-sectoral policies, including in more comprehensive environmental impact planning and assessment. In various public policies, including the 2020-2024 National Medium-Term Development Plan (RPJMN), there are a number of programs that touch on the issue of conservation and natural resource

[22] Kristianus Zega, Muhammad Muhdar, and Rosmini, "The Legal Status of the Whanganui River in the Perspective of Environmental Justice for Sustainable Ecology," *Unes Journal of Swara Justisia*, Vol. 8, No. 4, January, 2025.

[23] The Constitutional Implications of the Recognition of Natural Rights as a Legal Subject in Environmental Protection (Indonesian and Ecuadorian Legal Perspectives) | Journal Of Studia Legalia, Https://Studialegalia.Ub.Ac.Id/Index.Php/Studialegalia/Article/View/187, accessed 12 January 2026.

management. However, the integration of ecological rights as a policy principle still needs to be strengthened systemically.[24]

The problem of environmental quality thresholds and the lack of significant ecological restoration underscore that harmonization between legal norms and public policy is an important aspect that must be addressed in the face of contemporary ecological challenges. The legal and policy implications *of Right of Nature* at the national level are normative steps that are relevant to the need for holistic and equitable ecosystem protection.[25] This is an important part of strengthening the foundations of Indonesia's environmental law, which more substantially recognizes natural ecological rights as part of a dynamic national legal system.

IV. THE DOMINANCE OF THE ANTHROPOCENTRIC PARADIGM IN INDONESIAN ENVIRONMENTAL LAW AND THE RELEVANCE OF *THE RIGHT OF NATURE*

The discussion of *the Right of Nature* in the Indonesian context cannot be separated from the characteristics of the national legal system that still places the environment as the object of state management. Positive legal frameworks, especially Law Number 32 of 2009, focus on environmental protection in the context of fulfilling human rights and development interests. This construction shows that ecological justice is not yet a stand-alone normative principle, but is indirectly attached to human interests. As a result, ecosystem damage is often understood as an administrative violation, rather than a violation of the rights of an ecological entity.

The urgency of reviewing this legal paradigm is strengthened by the empirical conditions of Indonesia's environment. The Ministry of Environment and Forestry noted that more than 70 percent of rivers in Indonesia are in moderate to severely polluted conditions, while critical land area is still above 14 million hectares in 2023[26]. This fact shows that environmental protection based on an anthropocentric approach has not resulted in effective ecological protection. Therefore, discussion

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[24] Hyronimus Rhiti, "Reconstruction of Ecological Justice Based on Rights of Nature in the Perspective of Environmental Law Philosophy," *Sol Justicia*, Vol. 8, No. 2, December, 2025.

[25] Miftakhul Shodikin, "The Determination of Nature as a Legal Subject," *Journal of Indonesian Studies*, Vol. 2, No. 1, June, 2023.

[26] "Indonesia's Forests and Deforestation in 2024," Above Note 11.

II focuses on normative analysis of the Indonesian legal framework, criticism of the dominance of an anthropocentric approach, and identification of the direction of ecocentric development in national law as the initial foothold for the implementation of *the Right of Nature*.

1. Rights *of Nature* in the Perspective of Contemporary Environmental Law

The concept *of Rights of Nature* has developed into one of the central ideas in the study of modern environmental law that encourages the expansion of the scope of ecological protection beyond traditional boundaries. *Rights of Nature* refers to the recognition that natural entities such as rivers, forests, wetlands or certain ecosystems have inherent rights that deserve protection and fulfillment through legal instruments. This view no longer limits environmental protection to human interests alone, but treats nature as a subject of law that has its own normative interests within the framework of positive law.[27] This approach is rooted in the philosophy of *ecocentrism* and *earth jurisprudence*, which views the relationship between the law not only as a relationship between humans but also as a relationship between humans and nature as part of a normatively experienced community of life.

The recognition of *the Rights of Nature* has implications for a substantive paradigm shift in environmental law. Conceptually, the rights of nature include the right to exist, the right to maintain its fundamental ecological processes, as well as the right to recover from disturbances or damage suffered. In international juridical practice, some jurisdictions have adopted this principle to evoke the traditional limitations of the subject of law. For example, in New Zealand jurisdictions, the Whanganui River is recognized as a *legal person* and is granted enforceable legal rights through legal representation.[28] This suggests that traditional regulations that only provide room for legal protection on behalf of humans can be expanded to make room for legal claims on behalf of the ecological entity itself.

The relevance of *Rights of Nature* in the Indonesian context can be seen from the need to strengthen environmental law norms that are oriented towards the protection of ecosystems as a whole. Indonesia faces significant ecological pressures, including ongoing deforestation. Landscape analysis data shows that forests in Sumatra regions such as Aceh, North Sumatra, and West Sumatra have

[27] Hyronimus Rhiti, "Reconstruction of Ecological Justice Based on Rights of Nature in the Perspective of Environmental Law Philosophy," *Sol Justicia*, Vol. 8, No. 2, December, 2025.
[28] Kristianus Zega, Muhammad Muhdar, Dan Rosmini, Above Note 22.

shrunk by ±1.2 million hectares in the past three decades, with an average loss of nearly 100 hectares per day from 1990 to 2024. These changes affect not only biodiversity but also strategic ecological functions such as hydrological control and carbon sequestration.[29] This kind of data provides a clear picture of the need for strong ecological protection within the legal framework.

Within the framework of Indonesian law, the *principle of Rights of Nature* has not been explicitly accommodated in the national legal system. Existing normative norms, such as Law Number 32 of 2009 concerning Environmental Protection and Management (*PPLH Law*), emphasize more on everyone's right to a good and healthy environment, as well as the state's obligation to guarantee these rights. However, the principle of ecological justice as part of the principles of environmental law tends to be less normatively expressed in the provisions of legislation. It has been argued in the literature that the principles of environmental law need to be revisited to include the expression *of ecological justice* as a stand-alone principle, rather than as part of social justice alone.[30] This shows that the normative construction in the *PPLH Law* does offer a foundation but does not reflect the recognition of natural rights as a stand-alone legal subject.

From a juridical perspective, the application of the principle *of Rights of Nature* requires an adequate reconstruction of legal norms, including the determination of ecological entities as parties with *legal standing* to be submitted in litigation. The conceptual literature states that the recognition of the legal status of natural entities will form the basis for legal mechanisms that allow ecosystem restoration as well as preventive measures against potential systemic damage. This approach will strengthen the function of environmental law as an instrument that promotes ecological justice and sustainability, as well as expand access to justice not only for human society but also for the ecological communities that are the foundation of life.[31]

Substantially, the recognition of the *Rights of Nature* also has an impact on the formation and enforcement of public policies that are more responsive to ecological realities. Policies that integrate ecological rights in their formulation and

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[29] R. Albertus Krisna Pratama P.- Albertus.Krisna@Kompas.Com.

[30] Andang Binawan and Maria Grasia Sari Soetopo, "The Implementation of the Right to a Clean, Healthy, and Sustainable Environment in the Context of Indonesian Law," *Indonesian Environmental Law Journal*, Vol. 9, No. 1, 2022.

[31] constructing An Argumentation For Nature As A Legal Subject | Legal Reflections: Journal of Legal Science.

implementation will encourage the state to proactively fulfill its legal responsibilities for environmental protection, including in regulating licensing, supervising law implementation, and providing effective sanctions for ecological violations. Thus, *Rights of Nature* is a relevant legal instrument in the formulation of a more inclusive and comprehensive environmental law system in Indonesia.

2. Comparison of the Development and Implementation of *the Right of Nature Law*

The Right of Nature as an idea of environmental law has developed in various national jurisdictions and is part of environmental law reform at the global level. This recognition is not only a theoretical expression, but has been adopted in normative and juridical forms in several countries, reflecting the variety of approaches and implementation achievements that can provide important lessons for other national legal systems such as Indonesia.[32]

One of the most significant examples is the recognition of natural rights in the Ecuadorian constitution. Since the constitutional amendment in 2008, Ecuador has established that nature (*Pachamama*) has inherent rights, including the right to exist, *persist, maintain and regenerate its vital cycles*.[33] This norm provides a legal basis for civil society and organizations to file lawsuits in court on behalf of nature. In practice, Ecuador's Constitutional Court has issued rulings ordering ecological rehabilitation in damaged areas, as well as rejecting projects deemed to violate natural rights. This constitutional approach shows that natural rights are not just philosophical discourses, but can be operationalized through a strong and structured state legal mechanism. Research studying the implementation of natural rights in Ecuador shows that environmental litigation increased significantly after this recognition and became a strategic instrument for protecting vulnerable ecosystems.

Another example that is often cited in the literature is the recognition of rivers as a legal entity in New Zealand. In 2017, the Whanganui River Act was passed by the New Zealand parliament, recognising the Whanganui River as a *legal entity* with its own rights that must be respected and fulfilled by both the government and the community.[34] This legal status makes the river legally represented by a representative appointed to protect its interests in court. This model provides an

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[32] Peter Josephson, 2002, *The Great Art Of Government: Locke's Use Of Consent*, University Press Of Kansas.

[33] By Katie Surma, Above Note 14.

[34] Kristianus Zega, Muhammad Muhdar, dan Rosmini, above note 22.

important precedent that legal protection is not only limited to humans or corporations, but can also be extended to nature as a subject that has a protected legal interest. In this context, New Zealand's juridical approach reinforces the position of ecological law through explicit sectoral legislation.

In U.S. home states such as Oregon and Florida, some rivers and protected areas have been recognized with some sort of legal right under local ordinances. For example, the Piedra River Ordinance in Colorado establishes certain legal rights for rivers to be able to demand ecological restoration. Although at the U.S. federal level natural rights have not been widely recognized, these developments at the state and local levels reflect the adaptation of *the Right of Nature* model in a common law context that differs from the codification approach in other countries.[35]

From a European perspective, although the concept *of the Right of Nature* has not yet been formally accommodated in national constitutions, legal and policy initiatives incorporating the principle of ecological protection are increasingly visible in some countries. For example, the revision of environmental laws in the Netherlands expands the concept of producer responsibility for environmental damage and strengthens the public's right to information and participation in environmental decision-making. This kind of approach reinforces the principle of access to ecological justice, although it does not explicitly state the rights of nature as a subject of law.

Academic data shows that since the beginning of the 21st century there has been an increase in the number of countries exploring legal recognition of natural rights. The *Global Rights of Nature Movement* report notes that more than 30 countries have currently integrated some form of *Rights of Nature* into national or local legal norms, whether constitutional, legislative, or juridically.[36] This trend shows a shift in the global paradigm in the framework of environmental protection that increasingly considers the intrinsic value of nature as part of the contemporary legal value system.

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[35] Florida Judge Asked to Recognize the Legal Rights Of Five Waterways Outside Orlando - Inside Climate News, Https://Insideclimatenews.Org/News/27042022/Florida-Rights-Of-Nature-Suit/, Diakses 12 Januari 2026.

[36] Global Alliance for The Rights Of Nature (GARN), Https://Www.Garn.Org/, Diakses 12 Januari 2026.

V. URGENCY AND STRATEGY FOR THE IMPLEMENTATION OF *RIGHT OF NATURE* IN INDONESIAN ENVIRONMENTAL LAW

The formulation of strategies for the implementation *of the Right of Nature* in the national legal system is a crucial stage after conceptual and normative analysis is carried out. The recognition of nature as a subject of law not only demands a change in legal norms, but also demands institutional reform and environmental governance. Without a clear implementation design, the recognition of natural rights has the potential to cease as a normative idea with no practical utility. Therefore, the discussion of implementation strategies is an important element in ensuring that *the Right of Nature* can function as an effective legal instrument.

Indonesia's empirical context shows the need for a more progressive legal strategy. Data from the National Disaster Management Agency recorded an increase in ecological disaster events from 3,544 events in 2022 to more than 5,000 events in 2023, with hydrometeorological disasters dominating.[37] This condition shows that the legal system and environmental policies are not sufficiently responsive to ecosystem vulnerability. Discussion III focused on the formulation of the urgency of recognizing nature as a legal subject, the conceptual and institutional design of the implementation *of the Right of Nature*, as well as the analysis of its challenges and prospects in the Indonesian legal system to realize sustainable ecological justice.

1. The Urgency of Recognizing Nature as a Legal Subject in the Context of the Ecological Crisis

The current ecological crisis shows that environmental damage is no longer incidental, but has become a structural problem rooted in the way the law positions nature in the normative system. Within Indonesia's positive legal framework, nature is still treated as an object of management and exploitation associated with development interests.[38] This approach has an impact on the substantive weakening of ecosystem protection, as the law is more oriented towards impact control than comprehensive ecological prevention and recovery. This condition underscores the urgency of recognizing nature as a legal subject in order to strengthen the foundations of ecological justice in the national legal system.

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[37] Indonesiabaik id teams, Http://Indonesiabaik.Id/Infografis/4940-Bencana-Terjadi-Di-Indonesia-Sepanjang-2023, accessed January 12, 2026.

[38] Vienna Alfiatun et al. Selma Dwi Agustin, Fahmi Fahrizal, 2025, *Human Footprint and Ecological Crisis*, Langgam Pustaka.

Empirical data shows that the level of environmental damage in Indonesia is in the worrying category. The Ministry of Environment and Forestry noted that in 2023 the critical land area in Indonesia will still be more than 14 million hectares, spread across forest and non-forest areas.[39] In addition, *the Indonesia Environment Outlook* report states that more than 70 percent of rivers in urban areas experience moderate to severe pollution. This fact shows that the legal approach that places nature as an object has not been able to stop the ongoing degradation of ecosystems. The damage not only has an impact on the environment, but also threatens people's right to life and long-term socio-economic stability.

In the perspective of environmental law, the recognition of nature as a legal subject has strategic significance because it broadens the spectrum of interests protected by law. The subject of law is no longer limited to human beings and legal entities, but includes ecological entities that have an inherent interest in maintaining their natural functions and balance. This approach allows the law to protect ecosystems directly, without always having to prove human harm as a prerequisite for protection. Thus, the recognition of nature as a legal subject strengthens the preventive and restorative function of environmental law.

This urgency can also be read in the context of global climate change. The *Intergovernmental Panel on Climate Change* (IPCC) report confirms that the tropics, including Indonesia, are at a high level of vulnerability to the impacts of climate change such as floods, droughts, and degradation of coastal ecosystems.[40] In this situation, environmental laws that rely solely on administrative instruments and permits have proven inadequate to protect the ecological systems that sustain life. The recognition of natural rights opens up space for a more proactive legal approach based on the protection of the entire life system.

Juridically, the recognition of nature as a subject of law is also closely related to the principle of state responsibility in environmental protection. The state functions not only as a regulator, but also as a guardian of ecological interests that cannot fight for itself in legal forums. The experience of several countries that have recognized *the Right of Nature* shows that the status of legal subjects for nature allows for a mechanism of legal representation (*guardian* or *trustee*) to defend the

[39] Ministry of Forestry, Https://Www.Kehutanan.Go.Id/Pers/Article-54, Retrieved 12 January 2026.

[40] Kelly Levin, Sophie Boehm, and Rebecca Carter, "6 Big Findings from the 2022 IPCC Report on Climate Impacts, Adaptation, and Vulnerability," March, 2022.

interests of ecosystems in court.[41] This model strengthens the accountability of the state and business actors for environmental damage.

In the Indonesian context, the urgency of recognizing nature as a legal subject is also in line with constitutional values that place the environment as part of the human rights and welfare of current and future generations. This recognition is not intended to negate the role of humans in development, but rather to rearrange the legal relationship between humans and nature more equally. By making nature a legal subject, Indonesia's environmental law system has the opportunity to move towards a paradigm of ecological justice that is more substantive, adaptive to environmental crises, and relevant to global sustainability challenges.

2. Conceptual and Institutional Plans for the Implementation *of the Right of Nature*

The application *of the Right of Nature* in the national legal system requires a clear conceptual and institutional design so that the recognition of natural rights does not stop at the symbolic level. The recognition of nature as a subject of law carries juridical consequences in the form of the expansion of legal subjects beyond human beings and conventional legal entities. Therefore, a legal framework is needed that explicitly establishes the legal status of a particular natural entity and the scope of rights and obligations attached to it. In the context of Indonesian law, this kind of arrangement can be designed through the renewal of environmental laws or the establishment of special regulations that recognize strategic ecological entities as legal subjects.

Conceptually, *the Right of Nature* demands the formulation of ecological rights that are fundamental. These rights include the right to exist, the right to maintain ecological functions and cycles, and the right to restoration in the event of damage. These rights are not interpreted as individual rights like human rights, but as collective rights of ecosystems that are protected for the sustainability of life systems.[42] This normative formulation is important to provide legal certainty and clear limits in environmental law enforcement, especially in the face of economic interests that have the potential to damage the ecosystem.

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41 Fátima Alves *Dkk*., "The Rights Of Nature And The Human Right To Nature: An Overview Of The European Legal System And Challenges For The Ecological Transition," Frontiers *Frontiers In Environmental Science*, Vol. 11, Juli, 2023.

42 Rights Of Nature: Why It Might Not Save The Entire World In: Journal For European Environmental & Planning Law Volume 16 Issue 1 (2019), Https://Brill.Com/View/Journals/Jeep/16/1/Article-P35_35.Xml, Diakses 12 Januari 2026.

From an institutional perspective, the implementation *of the Right of Nature* requires a mechanism of legal representation for nature. The experience of some countries shows that natural entities recognized as legal subjects are represented by institutions or individuals who act as *guardians* or guardians of ecosystems. In the Indonesian context, this role can be carried out by independent state institutions, local governments, or special bodies established by law. The representative mechanism allows the ecological interests of nature to be actively fought for in the judicial process and public policy-making.

Institutional design also needs to pay attention to cross-sector coordination. The recognition of natural rights cannot be separated from the authority of ministries and institutions that have been handling the forestry, mining, marine, and spatial planning sectors. Without an integrated institutional design, the recognition *of the Right of Nature* has the potential to clash with sectoral policies that are still oriented towards the exploitation of natural resources. Therefore, strengthening coordination and supervision functions is an important element in ensuring the effective implementation of natural rights.

The urgency of establishing special institutions can also be seen from the data on environmental law enforcement in Indonesia. A report by the Ministry of Environment and Forestry shows that the level of compliance of businesses with environmental permits still faces serious challenges, with hundreds of cases of environmental violations leading to administrative sanctions every year.[43] This condition shows that the existing legal instruments are not fully able to protect the ecosystem substantively. The presence of natural rights representative institutions is expected to strengthen the supervisory and law enforcement functions by placing ecological interests as the main focus.

Within the framework of national law, the conceptual and institutional design of *the Right of Nature* also needs to be aligned with the principles of regional autonomy and local wisdom. Many indigenous communities in Indonesia have long practiced ecocentric value-based nature management, such as Sasi and Tri Hita Karana.[44] The integration of these values into the institutional design of natural rights can strengthen the social legitimacy and effectiveness of the application of the law.

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[43] Dr. Sekhroni M.H S. H., S. Ag, 2025, *Environmental Law Enforcement in Indonesia: The Realization of Sustainable Development*, PT. Lost in education.

[44] I. Komang Giri Surya Gunawan, Ni Luh Eka Armoni, and Ni Putu Lianda Ayu Puspita, 2023, *The Application of Tri Hita Karana to Green Behavior at The Seminyak Beach Resort and Spa*, Undergraduate, Bali State Polytechnic.

Thus, the application of *the Right of Nature* not only serves as a legal innovation, but also as an instrument for the transformation of environmental governance towards more substantial and sustainable ecological justice.

3. Challenges and Prospects for the Implementation of *Right of Nature* in Indonesia

The implementation of *the Right of Nature* in Indonesia's national legal system faces a number of normative, institutional, and political-legal structural challenges. Normative challenges arise from positive legal frameworks that are still oriented towards an anthropocentric approach. Law Number 32 of 2009 concerning Environmental Protection and Management places the environment as an object of protection in the context of fulfilling human rights to a good and healthy environment. This construction has not yet made room for the recognition of nature as a subject of law that has inherent rights. As a result, environmental protection depends on the extent to which natural damage impacts human interests, not on the sustainability of the ecosystem itself.

The next challenge lies in the institutional and law enforcement aspects. Data from the Ministry of Environment and Forestry shows that throughout 2022–2023 there were more than 2,000 complaints of environmental violations, with the dominance of cases in the mining, plantation, and forestry sectors. Most case settlements still end up in administrative sanctions, while ecological restoration is often not optimally implemented.[45] This condition reflects the limitations of existing legal instruments in ensuring substantive ecosystem protection. Without recognition of natural rights, law enforcement processes tend to place environmental damage as an administrative violation, rather than as a violation of the rights of an ecological entity.

From a political and legal perspective, the implementation of *the Right of Nature* also faces resistance from economic interests and development paradigms that still rely on the exploitation of natural resources. Indonesia still makes the extractive sector one of the main pillars of national economic growth. Data from the Central Statistics Agency notes that the mining and quarrying sector contributes significantly to the Gross Domestic Product, although at the same time it creates great ecological pressures. This tension between economic interests and

[45] Kompas Daily Team, *Kompas.Id*, Https://Www.Kompas.Id/Baca/Humaniora/2023/12/28/Sebanyak-908-Kasus-Kejahatan-Lingkungan-Ditangani-Sepanjang-2023, accessed January 12, 2026.

environmental protection is a serious challenge in encouraging the normative and operational recognition of natural rights.[46]

Nevertheless, the prospect of the implementation of *Right of Nature* in Indonesia remains open and has a strong foundation. Constitutionally, the 1945 Constitution contains the principle of state control over natural resources for the greatest possible prosperity of the people which can be interpreted progressively by including the dimension of ecological sustainability. The Constitutional Court's rulings, especially those related to customary forests and the rights of customary law communities, show a tendency to recognize fairer ecological relations. This direction can be the initial juridical foothold for the development *of the concept of Right of Nature* in the national legal system.

Another prospect lies in strengthening the role of civil society and indigenous communities in environmental protection. Many local wisdom practices in Indonesia have long placed nature as an entity that must be respected and maintained in balance. The integration of these values into the formal legal framework can strengthen the social legitimacy of the application *of the Right of Nature*. In addition, the development of international law that increasingly recognizes natural rights provides normative pressure for developing countries, including Indonesia, to adapt their legal systems to the principles of global ecological justice.

In the long term, the implementation of *the Right of Nature* has the potential to strengthen environmental governance in Indonesia by shifting the legal orientation from impact control to the protection of life systems. The recognition of nature as a subject of law is not intended to hinder development, but rather to ensure that development takes place within the limits of the carrying capacity of the ecosystem. By gradually overcoming normative and institutional challenges, *the Right of Nature* can become a strategic legal instrument in realizing ecological justice and environmental sustainability in Indonesia.

[46] Sectors that recorded positive growth regarding the pace of growth..., *Filo*, Https://Askfilo.Com/User-Question-Answers-Smart-Solutions/Sektor-Yang-Mencatatkan-Pertumbuhan-Positif-Mengenai-Laju-34313039313833335, accessed January 12, 2026.

VI. CONCLUSION

Environmental law in Indonesia is still built on an anthropocentric paradigm that places nature as the object of legal regulation for the benefit of humans and development. This view reflects the philosophical foundations of modern law that separate humans from nature and position the environment as an instrumental means, so that ecosystem protection tends to be administrative, reactive, and procedural. Law Number 32 of 2009 concerning Environmental Protection and Management reflects this orientation by not recognizing nature as a legal subject that has intrinsic value and autonomous normative interests. As a result, environmental damage is still assessed primarily on the basis of its impact on humans, while the ecological interests of nature have not received equal legal protection.

In the perspective of the philosophy of environmental law, these limitations point to the need for a paradigm shift from anthropocentrism to ecocentrism through an ecological justice approach and the recognition of *the Right of Nature*. The recognition of natural rights is not intended to negate the role of humans, but rather to reorganize the legal relationship between humans and nature as part of an interdependent community of life. In terms of legal policy, this approach requires the reconstruction of the normative framework of national environmental law, especially through the integration of the principles of ecological justice and *the Right of Nature* into Law Number 32 of 2009 as the principle and purpose of environmental protection. This reconstruction can be implemented in stages by establishing strategic ecological entities, such as rivers and specific ecosystem areas, as legal subjects with a clear scope of rights.

In addition to the renewal of norms, the recognition of *the Right of Nature* requires strengthening of institutions and environmental governance. Regulating the mechanism of legal representation for nature is important so that ecological interests can be effectively fought for in the judicial process and public policy-making. On the other hand, the *principle of Right of Nature* needs to be mainstreamed in development planning, spatial planning, environmental licensing, and environmental impact assessment so that development takes place within the carrying capacity of the ecosystem. By integrating theoretical dimensions and legal policies in a balanced manner, ecological justice-based environmental law reconstruction is expected to be able to realize an Indonesian environmental law system that is more just, sustainable, and responsive to the global ecological crisis.

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Reconstructing Environmental Law Based on Ecological Justice through the Recognition of the Rights of Nature in the Indonesian Legal System

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ABSTRACT: The conflict between the Right to Use Business (HGU) owned by the Jember Regional Plantation Company (PDP) and the rights of local communities in the Ketajek area reflects the complexity of the relationship between agrarian law, power, and social justice in Indonesia. This conflict vividly illustrates how the clash between formal law and social practice at the local level creates inequality in land tenure, as well as tests the effectiveness of the principle of agrarian justice as mandated by the Basic Agrarian Law of 1960. This conflict also shows how top-down agrarian policies are often unable to accommodate local values, the social structure of village communities, and the economic needs of the people who depend on the land for their livelihoods. This research outlines three main dimensions. **First**, the legal, social, and political dynamics behind the agrarian conflict in Ketajek, including the overlap of the legal basis of HGU with the social legitimacy possessed by the cultivating community. In this context, the relationship between the state, regional corporations, and society shows that there is an imbalance of power that has implications for the marginalization of the rights of small people. **Second**, the implications of the conflict on the implementation of agrarian reform and the meaning of substantive justice in land tenure, which shows that there is still a gap between legal ideals and social realities on the ground. This indicates that the implementation of agrarian reform has not been fully in favor of the principles of equity, social justice, and the recognition of the communal rights of indigenous or local peoples. **Third**, a dispute resolution strategy through a restorative approach that emphasizes deliberation, active participation of the Agrarian Reform Task Force, and more inclusive, adaptive, and sustainable agrarian law policy reform. This approach is expected to be able to prioritize fair dialogue and mediation rather than litigation settlement that is retributive and formalistic. This research emphasizes the urgency of the reconstruction of agrarian law that places local communities as the main subject of justice, not just the object of policy. In addition, harmonization between economic interests, social rights, and environmental sustainability is needed in realizing the ideals of national agrarian justice that is just and sustainable. Furthermore, this research contributes to strengthening the paradigm of agrarian justice based on human rights and sustainable development, by placing land not only as an economic asset, but also as a living space, cultural identity, and a source of social sustainability for local communities.

Keywords: Agrarian Justice; Right to Use (HGU); Agrarian Conflict; Agrarian Reform; Local Communities; Inequality of Land Tenure.

I. INTRODUCTION

The conflict between the right to use business (HGU) and the rights of local communities is a complex reflection of the agrarian problems that have been going on for a long time in Indonesia. This conflict is not only rooted in the overlap of laws and policies, but also in the imbalance of power relations between the state, corporations, and the people.[1] The case of Ketajek land management in Jember Regency is a concrete example of how legal policies designed for certainty actually cause injustice when dealing with the social reality of the community. The Ketajek community, who have been managing land in the plantation area owned by the Jember Regional Plantation Company (PDP), are faced with formal claims based on HGU which are strengthened by administrative legality. On the other hand, they have a strong social and historical legitimacy as cultivators who depend on the land for their livelihood.[2] This situation raises fundamental questions about how national agrarian law implements the principles of social justice as mandated by the Basic Agrarian Law (UUPA) of 1960.

Several studies highlight that the implementation of HGU often does not take into account the rights of local communities who have previously managed land customarily and socially. However, most studies still stop at descriptive analysis of conflicts and have not provided an integrative approach between legal, social, and institutional aspects that is able to bring substantive justice. This is where the main limitation of previous research lies, which often places law as an administrative tool without delving into the moral and social values that live in agrarian societies. This scientific work is here to transcend these limitations by combining a socio-legal approach that places law not only as a written norm, but also as a reflection of social justice. This research seeks to explain in depth the legal and social dynamics that form the conflict between HGU and the rights of local communities in Ketajek. This approach is important to reveal that agrarian conflicts are not only a matter of the legality of land ownership, but also a matter of legal morality and the state's alignment with the welfare of its people. This research offers a collaborative dispute resolution model between communities, local governments, and agrarian institutions such as the Agrarian Reform Task Force (GTRA). This approach is expected to create equitable and sustainable land

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1 Mukmin Zakie, "Agrarian Conflicts That Never Subside", *Legality: Legal Scientific Journal*, Vol. 24, No. 1, 2016.

2 Tri Chandra Aprianto, "When Prolonged Conflict Must Be Resolved: The Case of the Ketajek Plantation Conflict, Jember", *Journal of Social and Political Sciences*, Vol. 13, No. 1, 2009.

governance, as well as be an inspiration for the formulation of national agrarian policies that are more humane and contextual to the social realities in the regions.

The purpose of this study is to comprehensively analyze the dynamics of legal and social conflicts in the Ketajek case, evaluate the extent to which these conflicts reflect the success or failure of the principles of agrarian justice, and formulate a settlement strategy that is able to balance the interests of the state, companies, and society. This research is organized into three main discussions. First, reviewing the legal and social dimensions of the conflict between HGU and the rights of local communities; second, examining the implications of conflict on the principles of agrarian justice and national agrarian reform; and third, offering a strategy for dispute resolution and reconstruction of agrarian law policies that are fair and sustainable. Through this structure, this research is expected to provide a scientific contribution as well as a practical solution for the improvement of the Indonesian agrarian legal system towards true social justice.

II. METHODOLOGY

This research uses a type of *socio-legal research* or in the tradition of Indonesian legal methodology known as a juridical-empirical approach.[3] This type of research was chosen because the issues studied are not only at the normative level, but also include the social realities that live in society. The conflict between the holder of the Right to Use (HGU) of the Jember Regional Plantation Company (PDP) and the local community in the Ketajek area is a tangible form of tension between formal law and the social experience of the community in managing the land that is their source of livelihood.

The socio-legal approach allows this study to understand law not solely as a regulatory text, but as a social system that shapes and is shaped by people's behavior.[4] Through this approach, agrarian law is understood as a dialectical space between state norms and social values that live in society, so that researchers can capture how agrarian justice is embodied in practice and how state law should respond to these realities.

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[3] Dr. Russel Butarbutar M.M S. H., S. T., M. H., 2023, *Legal Research a Method, Philosophical Connection, Legal Theory with Its Analysis & Writing*, Mega Press Nusantara.

[4] Ibid.

This study uses a juridical-empirical approach with a socio-legal perspective that combines normative analysis of legal rules with empirical studies of their implementation in the field. The juridical approach is used to examine the legal basis that governs land rights, such as the Basic Agrarian Law of 1960, Presidential Regulation Number 86 of 2018 concerning Agrarian Reform, and other implementing regulations. The analysis of this legal instrument provides an understanding of the legal position and legitimacy between HGU holders and the farming community in the context of national agrarian justice.

An empirical approach was used to see how the law works in the social reality in Ketajek, Jember. Through observation, this study seeks to explore land tenure practices, forms of social resistance, and public perception of justice. This approach provides a more complete picture of how agrarian conflicts are formed, managed, and tried to be resolved on the ground, as well as how living *law* interacts with positive state laws.

The sources of legal materials in this study consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include all laws and regulations relevant to agrarian issues and land rights, including (1) Law Number 5 of 1960 concerning Agrarian Principles (UUPA); (2) Presidential Regulation Number 86 of 2018 concerning Agrarian Reform.

Secondary legal materials include scientific papers, journals, research reports, and academic literature that discuss agrarian justice, business use rights, agrarian reform, and land conflicts in Indonesia. Tertiary legal materials are legal dictionaries, encyclopedias, and other supporting documents that are used to strengthen conceptual and terminological understanding in discussion.[5]

The collection of legal materials is carried out through two main ways, namely library research. Literature studies are used to obtain primary and secondary legal materials by examining various laws and regulations, legal literature, academic journals, and official documents related to the agrarian legal system and land conflicts in Indonesia. This process aims to establish a strong theoretical framework and normative basis in understanding the legal position between HGU holders and local communities. Furthermore, library research is a way of collecting legal research materials by examining books, scientific articles, notes, and reports that are related to the legal problems that the researcher is studying. Not only that, this

[5] Diva Pitaloka S.H., M.H *et al*., 2023, *Introduction to Law*, Mega Press Nusantara.

method can also be done by searching for literature found in magazines and on the internet. Basically, the method of collecting legal materials used by the researcher is intended to facilitate the preparation of this research.

The analysis of legal materials is carried out in a descriptive-analytical manner with a reflective qualitative approach. The normative and empirical data obtained were processed and analyzed to find the relationship between legal norms and social practices that occurred. The first step is carried out by examining the legal structure that regulates land rights and agrarian reform, then it is associated with social facts that describe the relationship of power and legitimacy between the community and HGU holders.

This analysis is directed to identify the gap between written law and social reality, as well as assess the extent to which the principles of agrarian justice are implemented in land management practices in Ketajek. Furthermore, the results of the analysis were used to formulate a conceptual argument regarding the need to reform the agrarian law paradigm that favors social justice and a balance between the interests of the state, companies, and the people.

Through this approach, the research seeks to present an analysis that not only describes legal phenomena but also provides a direction for constructive and equitable solutions. The results are expected to be a scientific contribution to the development of agrarian law studies in Indonesia, especially in formulating legal policies that are more inclusive of local communities and oriented towards social sustainability.

III. THE EVOLUTION OF PARADIGMS, THE PHILOSOPHY OF RIGHT OF NATURE, AND PRACTICES IN DIFFEREN COUNTRIES

Agrarian conflict is one of the classic problems that continues to color the face of land law in Indonesia. Although the Basic Agrarian Law (UUPA) of 1960 has affirmed that all earth, water, and space are controlled by the state for the greatest possible prosperity of the people, in practice, this principle is often distorted by policies that emphasize formal legal certainty rather than substantive social justice. This phenomenon is evident in the case of the conflict between the Right to Use Business (HGU) owned by the Jember Plantation Regional Company (PDP) and the rights of the local community in the Ketajek area, where the clash between legal

rights and social rights becomes an arena of attraction between economic, political, and moral legal interests.[6]

The problem in Ketajek, agrarian law is no longer just a text of regulations that regulate land tenure, but also an arena of social struggle that brings together two forms of legitimacy.[7] Thus, the legitimacy of the state through positive law and social legitimacy through the practice of land control and utilization by the community. Thus, the analysis of the Ketajek conflict requires an approach that is not only normative, but also socio-legal in order to reveal the power relations behind the legal norms and social practices that surround them. The discussion will focus on three main dimensions that describe the legal and social dynamics in the Ketajek conflict. First, the legal construction of the Right to Use Business and the basis of land ownership within the framework of national laws and regulations. Second, the social and historical legitimacy that shapes people's relationship with land as a source of life and social identity. Third, the socio-legal dimension that reveals the power imbalance between the state, regional-owned enterprises, and local communities.

1. Legal Construction of Land Use Rights and Land Ownership Basis in Plantation Areas

Conceptually the right to use land (HGU) is a land right given by the state to a certain party to cultivate land for a certain period of time for productive economic interests.[8] Based on Article 29 of the 1960 UUPA, HGU can be granted for a maximum period of 35 years and can be extended for 25 years. This instrument is intended to support national economic development, especially in the agriculture, plantation, and forestry sectors.

Thus, in practice, the regulation of HGU often poses a dilemma. Legal certainty that is the main purpose of granting HGU often causes tension with the principle of the social function of land as stipulated in Article 6 of the UUPA, which emphasizes that every right to land must have a social function.[9] In the context of

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6 Adv Harrys Pratama Teguh, S.Hi., M.H., C.Ps., C.Mk, Naufan Mufti Sudarmono.S.H., M.H, and Adv Nurokhim, S.H., M.H, 2025, *Agrarian Justice at the Crossroads: Between Legal Certainty and Social Justice*, The Tree of Light.

7 Tanahkita, Https://Tanahkita.Id/Data/Konflik/Detil/Ovzsmgtuuezfmxm, Accessed On November 10, 2025.

8 Eva Mustaqimah Slamet, 2024, *Analysis of Land Title Protection Based on Basic Agrarian Regulations*, Undergraduate, Sultan Agung Islamic University Semarang.

9 Indah Sari, "Land Rights in the Land Law System in Indonesia According to the Basic Agrarian Law (UUPA)", *Journal of Management Partners*, Vol. 9, No. 1, 2017.

Ketajek, based on historical data collected from the archives of the Jember Regency Government and the research of Dessy Delima Olivia (2006), the Ketajek area that is the object of conflict covers an area of about 350 hectares out of a total of 1,200 hectares of Land Use Rights (HGU) owned by the Jember Plantation Regional Company (PDP) in Panti District. The land was determined as part of the HGU through the Decree of the Minister of Agriculture and Agrarian Affairs Number 50/KA/64 and strengthened by the Decree of the Minister of Home Affairs Number 12a/HGU/DA/74.[10] However, on this land, people have lived and cultivated the land for generations long before the HGU was issued. This condition shows how the legitimacy of formal law is at odds with the historical legitimacy of the local people who have previously controlled and depended on the land. The data also emphasizes that the Ketajek conflict is rooted not only in the struggle for assets, but in the conflict between the legal rights of the state and the moral rights of agrarian communities who have an existential relationship with land.[11]

The positive law provides solid legitimacy for the Jember PDP as the holder of legal rights, but fails to accommodate the social reality that shows the existence of de facto management rights by the local community. As a result, hundreds of farming families have no legal certainty over their cultivated land, even thou gh they have occupied and managed it for more than three decades.[12] This historical fact is concrete evidence that the implementation of agrarian reform is still trapped in an administrative paradigm, without substantive alignment with the local community. This condition shows the tension between the principles **of** formal justice and substantive justice. Some agrarian experts, such as Boedi Harsono and Maria S.W. Sumardjono, have long emphasized that Indonesia's agrarian legal system has not fully balanced these two dimensions.[13] As a result, the law often appears as an administrative instrument that is dry from the value of social justice.

In a theoretical context, this condition can be explained through the view ***of Critical Legal Studies*** **(CLS)** which assesses that law often operates as a tool of legitimacy of dominant interests. In the case of Ketajek, the legal alignment of HGU holders

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[10] Dessy Delima Olivia, "The Resistance of Ketajek Farmers to Jember Regional Plantation Companies in 1974-2002", January, 2014.

[11] Reconstruction of the Concept of "Abandoned Land" in Uupa : Implications for the Management of Unproductive HGU Journal of Research in the Social, Political and Humanities Sciences.

[12] Dessy Delima Olivia, Above Note 10.

[13] Land Policy, Prof. Dr. Maria S.W. Sumardjono, Sh. Mpl. Mca, *Agrarian Library*, Https://Www.Pustakaagraria.Or.Id/2022/03/Kebijakan-Pertanahan-Prof-Dr-Maria-Sw.Html, Accessed On November 10, 2025.

shows a pattern of legal-formal hegemony that removes the agrarian social dimension. Therefore, the construction of land law needs to be reconstructed towards a legal pluralism approach, which recognizes the existence of state law and community law as equal in regulating land tenure.[14] Olivia's (2006) research shows that the Ketajek community mostly works in the agricultural and plantation sectors. Based on socio-economic data of Panti District in 2002, more than 65% of the population works as farmers or farm laborers, while the rest are spread across the informal sector such as small traders and service workers. This condition confirms the community's structural dependence on land as the main source of livelihood.[15]

2. Social and Historical Legitimacy of Land Tenure by Local Communities

The control of land by the Ketajek people cannot be separated from a long social and cultural history. Prior to the issuance of the HGU decision for PDP Jember, the community had managed the land for generations through a traditional cultivation system. The pattern of people's relationship with land is not only economic, but also symbolic and spiritual. Land for them is not just an asset, but a legacy that unites the identity and sustainability of community life.

From a legal perspective, this kind of mastery reflects the applicability of ***living law*** or living law in society, as Eugen Ehrlich argued that the true source of law is a living social order, not just a written norm. The Ketajek community has a value system that affirms moral rights to land based on the principles of justice and togetherness. They view justice not from the aspect of formal legality, but from the social benefits obtained fairly for all members of the community. The findings of this study show a very strong form of social legitimacy, which, although not formally recognized, remains a key basis in land management practices.[16] This distinguishes this study from previous agrarian studies that have emphasized land conflicts as a result of a lack of legal certainty. In fact, this study shows that the root of the problem is not the absence of law, but in the limitations of positive laws in recognizing social laws that have lived before.

In the context of justice theory, Nancy Fraser's view of "recognition and redistribution" becomes relevant. Fraser emphasized that justice is not only about the sharing of resources, but also the recognition of the social existence of

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[14] Indra Rahmatullah, "Philosophy of Law in Critical Legal Studies; Concept and Actualization in Indonesian Law", *Bulletin IS*, Vol. 5, No. 3, June, 2021.

[15] Dessy Delima Olivia, Above Note 10.

[16] Roger Cotterrell, 2017, *Living Law: Studies In Legal And Social Theory*, Routledge.

marginalized groups. Thus, the recognition of the rights of the Ketajek community does not only mean economic restitution, but also the restoration of social dignity. This recognition is essential to building true agrarian justice, in which local communities are not positioned as policy objects, but rather as legal subjects with historical and social legitimacy.[17]

3. The Socio-Legal Dimension of Agrarian Conflict in Power Inequality between the State, BUMD, and the People

Agrarian conflicts in Ketajek also reflect structural inequality between the state, regionally-owned enterprises, and local communities. The state, through its legal apparatus, plays the role of the holder of authority that determines who is entitled to land and who is not. The Jember PDP as the holder of the HGU obtains legal legitimacy through state permits, while people who have cultivated the land for decades are often considered as parties who "interfere with development interests".

From a socio-legal perspective, this shows that law has become a tool of reproduction of power. Roberto Unger on the concept of "*Law as Institutional Imagination*" it is emphasized that law is often produced to maintain existing social structures rather than to overhaul them. In the context of Ketajek, the law does not serve as an instrument of social emancipation; instead, it acts as a tool to legitimize the economic dominance of the Regional-Owned Enterprise (BUMD). Research findings indicate that the Ketajek community faces a dual set of obstacles: first, limited access to formal legal mechanisms, and second, a lack of public policy support for the agrarian community. The dispute resolution mechanisms employed are frequently administrative and opaque, offering no space for local community participation. This situation reinforces the perception that agrarian law tends to favor structural interests over the social justice mandated by the Basic Agrarian Law (UUPA). Unlike previous studies that focused primarily on the procedural aspects of conflict resolution, this study highlights the importance of transforming legal institutions to make them more adaptive to social realities. The Agrarian Reform Task Force (GTRA) could be optimized to serve as a mediation platform that brings together the interests of the state, corporations, and the community within a framework of social dialogue.

[17] Agus Miswanto, "Recognition and Redistribution in the Achievement of Social Justice: A Comparative Analysis of the Theoretical Models of Nancy Fraser and Axel Honneth", *Rule of Law: Journal of Legal Studies*, Vol. 11, No. 2, December, 2022.

4. The application of agrarian law in the conflict of the Right to Use Business does not fully reflect the principle of agrarian justice

The agrarian issue has always been the most tangible reflection of the extent to which law and public policy favor social justice. The conflict in the Ketajek area, Jember, between the Right to Use Business (HGU) of the Jember Regional Plantation Company (PDP) and the local community who cultivate the land illustrates the paradox between the agrarian ideals in the Basic Agrarian Law (UUPA) of 1960 and the practice of implementation in the field. The UUPA is actually designed to realize equal access to agrarian resources and protect small people from land ownership monopolies. However, reality shows that there is a wide gap between legal norms and their implementation.[18]

In this section, the discussion will focus on three main dimensions. First, the analysis of the principles of agrarian justice within the framework of the UUPA and Pancasila. Second, evaluation of the implementation of agrarian reform policies in plantation areas in relation to HGU conflicts and the rights of local communities. Third, an explanation of the difference between substantive justice and procedural justice in the context of conflict resolution Ketajek, which is the key to understanding the direction of agrarian law reform in the future.

5. The Principle of Agrarian Justice in the Framework of UUPA and Pancasila

Agrarian justice is a fundamental principle that is the philosophical foundation of the 1960 UUPA. In the General Explanation of the UUPA, it is stated that the main goal of national agrarian law is to realize the prosperity of the people in a fair and equitable manner. This normative foundation is also in line with Article 33 paragraph (3) of the 1945 Constitution, which affirms that the earth, water, and natural resources are controlled by the state for the greatest prosperity of the people. Thus, agrarian law has a social and moral function to correct the inequality of the land ownership structure inherited since the colonial period.[19]

However, in practice, this principle is often reduced by a legal-formal approach that emphasizes legal certainty for rights holders, rather than on the distribution of benefits to society. The concept of "control by the state" which should be interpreted as a mandate (*trusteeship function*) is often interpreted narrowly as a form of

[18] Mukmin Zakie, Above Note 1.

[19] Triana Rejekiningsih, "The Principle of the Social Function of Land Rights in the Legal State (A Review of Theory, Juridical and Its Application in Indonesia)", *Judiciary*, Vol. 5, No. 2, August, 2016.

absolute ownership by the state (*state ownership*).[20] As a result, the state has broad authority to grant land tenure permits to corporations, including BUMDs such as PDP Jember, without effective social control mechanisms from the community.

The analysis of the principle of agrarian justice also cannot be separated from the values of Pancasila, especially the fifth precept. *Social Justice for All Indonesian People*. Pancasila as the basis of the state provides a moral orientation for the national legal system to side with the small people and ensure a balance between economic interests and social welfare.[21] In the context of Ketajek, this principle is distorted because land policy still tends to favor the economic efficiency of corporations rather than the social justice of the cultivating community.

Previous studies of agrarian law have highlighted that the problem of agrarian justice in Indonesia lies in the weak implementation of the social function of land. This study expands on this analysis by emphasizing that the agrarian justice crisis is not only caused by weak law implementation, but also by a development paradigm that places land as an economic commodity, not as a space for social life. Therefore, the principle of agrarian justice must be returned to its essence, which is to ensure the welfare, dignity, and sustainability of people's lives.

6. Evaluation of the Implementation of Agrarian Reform in Plantation Areas: Between Ideality and Reality

Agrarian reform is a legal and policy strategy to realize equal land tenure and improve the economic structure of the community. Its implementation is regulated in Presidential Regulation Number 86 of 2018 which affirms two main pillars, *land redistribution* and *asset legalization*. However, in practice, the implementation of agrarian reform in plantation areas such as Ketajek faces serious obstacles from both legal, institutional, and political aspects. The results of the observation show that the overlap between HGU and community-cultivated land is the main obstacle to the implementation of agrarian reform. Many of the land that should be the object of redistribution is still in the status of active business use rights, even though it is no longer de facto productive. This condition occurs because HGU extensions are often carried out without transparent and participatory evaluation. In the case of the Jember PDP, land ownership by regional companies is not accompanied by

[20] Dr. Hengki Andora Ll.M S. H., 2023, *Government Land Ownership and Management: Concepts and Dialectics in the Indonesian Legal System - Rajawali* Persada, Pt. Rajagrafindo Persada.

[21] Ibrahim Ahmad, *The Principle of Justice in Land Dispute Resolution for the Benefit of Development*.

the optimization of the social function of the land as stipulated in Article 10 of the UUPA.[22]

From an institutional perspective, the Agrarian Reform Task Force (GTRA) which was formed to coordinate the implementation of agrarian reform is often constrained by the authority and coordination capacity between agencies.[23] The results of the study show that most of the mediation process between the Ketajek community and the Jember PDP is still administrative and has not reached a substantive settlement. This shows the weak synergy between local governments, the National Land Agency (BPN), and agrarian law institutions in applying the principles of social justice. When compared to previous agrarian studies, this study found that the main obstacle to agrarian reform is not only the lack of political will, but also the institutional fragmentation of agrarian law that makes the implementation of policies lose direction. Agrarian reform requires a more integrative institutional reconstruction based on the participation of local communities. Thus, agrarian reform is no longer just an administrative program, but a social movement that returns the land to its function as a just and sustainable source of life.[24]

7. Substantive Justice and Procedural Justice in Ketajek Agrarian Disputes

Justice in agrarian law has two main dimensions, procedural justice and substantive justice. Procedural justice is concerned with adherence to formal legal norms and procedures, while substantive justice is concerned with the ultimate goal of law to ensure social welfare and balance.[25] In the context of Ketajek conflict, these two dimensions often run in opposite directions. PDP Jember as the holder of the HGU has a procedurally valid legal basis, because the ownership is regulated by an official government decree and registered in the national land administration system. However, from a substantive perspective, this legitimacy does not necessarily reflect social justice, because on the land live the people who have managed and depended on the land for generations. This fact raises a legal

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22 Triana Rejekiningsih, Above Note 22.

23 The Role of Non-Governmental Institutions in Supporting Agrarian Reform in Indonesia | Nusantara Scientific Journal, Https://Ejurnal.Kampusakademik.Co.Id/Index.Php/Jinu/Article/View/3629, Accessed On November 10, 2025.

24 Ayu Nurhidaya, Gina Dwi Sari, and Dian Susantini, "Revisiting Legal Mechanisms and Agrarian Reform in Dealing with the Land Mafia in Indonesia: The Case of Nirina Zubir", *Journal of Legal, Political, and Humanistic Inquiry*, Vol. 1, No. 1, September, 2025.

25 Herlina Ratna Sambawa Ningrum, "Legal Analysis of the Justice-Based Land Dispute Resolution System", *Journal of Law Reform*, Vol. 1, No. 2, August, 2014.

dilemma, legal certainty for corporations actually creates social uncertainty for the people.

In the context of justice theory, John Rawls's view of *justice as fairness* becomes relevant. Rawls asserts that justice is not measured simply by formal procedures, but by the extent to which the law is able to provide the greatest benefits to the weakest groups.[26] Based on this framework, agrarian justice in Ketajek can be said to have not been fulfilled because positive law still functions as a protector of ownership structures, not as a means of distributing justice. This study expands on the analysis carried out by previous agrarian law experts by showing that agrarian conflicts cannot be resolved solely through the improvement of legal procedures. A paradigm shift towards substantive justice law is needed, where law plays an active role in restoring unequal social relations and providing space for the recognition of the rights of local communities. The application *of the principle of equity before the law* must be expanded to *equity within the law*, meaning that the law must create a balance, not just enforce the rules.

The conflict between the Jember PDP HGU and the local community in Ketajek shows that agrarian justice in Indonesia is still facing fundamental challenges at the implementation level. Agrarian law designed to ensure social justice is often an instrument of reproduction of inequality, because its implementation is trapped in formal procedures and bureaucracy that is insensitive to social realities. To realize true agrarian justice, it is necessary to reorient the agrarian law paradigm from legal certainty to substantive social justice. Agrarian reform must be implemented in a participatory, transparent, and based on the recognition of the rights of local communities. The government, through GTRA and land institutions, needs to prioritize a collaborative approach that harmonizes the interests of the state, corporations, and the people.[27]

Thus, agrarian justice is not just a normative ideal, but a real life process in people's lives. Land is not only an economic instrument, but a moral and social space that shapes the nation's identity. The state has a constitutional responsibility to ensure that any land policy is oriented towards restoring human dignity and ecological balance for the prosperity of the Indonesian people.

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[26] Pan Mohamad Faiz, "Teori Keadilan John Rawls (John Rawls' Theory Of Justice)", Social Science Research Network, Rochester, Ny, 2009.

[27] above note 26.

8. **The perspective of agrarian justice can be used to formulate a solution to conflicts between the Right to Use Business and the rights of local communities in a fair manner**

The prolonged agrarian conflict in the Ketajek area, Jember, between the Jember Regional Plantation Company (PDP) as the holder of the Right to Use Business (HGU) and the local community cultivating the land is a clear picture of the disharmony between state law and social reality.[28] This case confirms that Indonesia's agrarian law system has not been fully able to bridge economic, social, and ecological interests in a single framework of justice. The resolution of agrarian conflicts cannot be done partially through formal legal mechanisms, but requires an integrative approach that combines legal justice with social justice, as well as environmental sustainability.

In this context, the agrarian conflict resolution strategy must be directed at the renewal of the agrarian law paradigm, which not only prioritizes legal certainty, but also places the community as an active subject in the settlement process. This paradigm is based on the principles of *good governance*, and socio-ecological sustainability. This means that the law must be present to restore social relations damaged by power imbalances, not just to strengthen the position of formal rights holders.

9. **The Role of GTRA and Local Governments as Mediators of Agrarian Justice**

Legal institutions play an important role in creating a just conflict resolution. In this case, the Agrarian Reform Task Force (GTRA) is a strategic institution formed to accelerate the implementation of agrarian reform and resolve land disputes collaboratively. However, in practice, the effectiveness of GTRA is still highly dependent on local government support and cross-agency coordination. The results of the study show that in the case of Ketajek, the existence of GTRA at the district level has not been optimally functioning. The limitations of authority, resources, and coordination mechanisms make these institutions more often administrative than solution-oriented. In fact, GTRA has great potential to become a multi-stakeholder forum that brings together governments, companies,

[28] 039514138 Norman Safri, 1999, *Legal Review of Land Ownership of Ketajek Plantation, Jember, by P.D.P Jember Regency, in East Java*, Thesis, Airlangga University.

communities, and legal institutions to develop a social justice-based conflict resolution roadmap.[29]

The active role of local governments is also very crucial. As the entity closest to the community, local governments must take the initiative to bridge the interests between HGU holders and the cultivating community. Approaches based on local values, such as *village deliberations* or *customary institutions*, can be used as an instrument to strengthen the social legitimacy of conflict resolution. Local governments need to reaffirm the social function of land as mandated by Article 6 of the UUPA, and ensure that every land policy always contains the principles of participation and transparency.[30]

Previous studies on the resolution of agrarian conflicts in Indonesia, such as research by Wiradi (2018) and Sumardjono (2021), have generally highlighted the role of the state on a macro level without emphasizing local dynamics. This research expands on this view by emphasizing that the success of conflict resolution does not depend solely on national policies, but also on the capacity of local governments to build fair and inclusive agrarian governance. With the strengthening of local institutions, agrarian law can truly become an instrument of social justice, not just an administrative instrument.

10. Direction of Agrarian Law Reform: Harmonization between Economic Interests and Social Rights of Local Communities

The agrarian crisis that occurred in various regions of Indonesia, including Ketajek, emphasized the need to reform the paradigm of agrarian law that is just and sustainable. Indonesian agrarian law is currently still oriented towards formal legal certainty, which tends to prioritize economic efficiency and legal ownership. In fact, in the midst of an increasingly complex social and ecological crisis, agrarian law needs to move towards an equilibrium system that balances economic interests, social rights of the community, and environmental sustainability.[31]

The direction of agrarian law reform can start from three dimensions, normative, institutional, and substantial. From the normative side, there is a need for revision

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[29] The Role of the Agrarian Reform Task Force in Resolving Land Disputes at the Serdang Bedagai Regency Land Office | UNES Law Review, https://review-unes.com/index.php/law/article/view/2145, accessed on November 10, 2025.

[30] Triana Rejekiningsih, above note 22.

[31] Imam Koeswahyono and Diah Pawestri Maharani, "Rationalization of Agrarian Courts in Indonesia as a Solution to Equitable Agrarian Dispute Resolution", *Legal Arena*, Vol. 15, No. 1, April, 2022.

to the HGU implementation regulations, especially related to the mechanism for evaluation and license extension. The government needs to require an analysis of social functions and environmental sustainability as part of the HGU renewal process. This is important to ensure that the land controlled by the company is not only economically productive but also contributes to the welfare of the surrounding community.

From an institutional perspective, agrarian law reform must strengthen integration between agencies, especially between the National Land Agency (BPN), GTRA, and local governments. This synergy is needed so that the resolution of agrarian conflicts is not trapped in overlapping authorities which actually slows down the legal process. The establishment of *Agrarian Mediation Councils* at the provincial and district levels can be an institutional breakthrough to strengthen the role of non-litigation mediation in land dispute resolution.[32]

Substantially, the direction of agrarian law reform must reaffirm the principle of *agrarian justice* as the basis for national legal development. This principle places land as *a public good*, not just an economic commodity. The law must side with societies that socially and historically have an existential relationship with land. This approach is in line with the concept *of Earth Jurisprudence* which emphasizes the balance between humans and nature as the basis of sustainability.[33]

This study shows that the main difference with previous studies lies in the emphasis on the aspect of legal transformation. If previous studies focus more on policy evaluation, then this study proposes a paradigmatic reconstruction of agrarian law, from rigid law to adaptive law, from elitist law to participatory law, and from economically oriented law to law based on social and ecological justice.

IV. CONCLUSION

This study concludes that the conflict between the holder of the Jember PDP Business Use Rights (HGU) and the local community in Ketajek reflects the inequality between positive law and the social reality of the agrarian community.

[32] Muhenri Sihotang and Megawati Barthos, "The Urgency of Mediation as a Mechanism for Resolving Agrarian Disputes within the Framework of the Legal Regulation System in Indonesia", *Greenation International Journal of Law and Social Sciences*, Vol. 3, No. 2, June, 2025.

[33] A Theory of Earth Jurisprudence 37 Australian Journal of Legal Philosophy 2012, https://heinonline.org/HOL/LandingPage?handle=hein.journals/ajlph37&div=4&id=&page=, accessed on November 10, 2025.

The conflict shows the dominance of formal legality that ignores the social, historical, and moral legitimacy of local communities in land tenure, so that agrarian justice has not been substantively realized.

The results of the study show that the application of agrarian law is still oriented towards procedural law certainty and economic interests, and has not fully reflected the principles of agrarian justice as mandated in the Basic Agrarian Law of 1960. Although the Right to Use Business has a legal basis, its implementation often ignores the social function of the land and has implications for the marginalization of local communities in land tenure and utilization.

Therefore, this study emphasizes the need to reconstruct the agrarian law paradigm towards a substantive justice approach and a socio-legal perspective. Agrarian justice must be interpreted as a normative principle that integrates legal certainty, land social function, and community participation, by strengthening the role of the Agrarian Reform Task Force (GTRA) and local governments through participatory, restorative, and collaborative conflict resolution mechanisms to realize a fair and sustainable agrarian legal system.

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