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Legal Positivism Influence on Law Enforcement and Judicial Practice in Indonesia

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Abstract

The study aims to examine the influence of legal positivism on law enforcement and judicial practices in Indonesia, particularly in the context of its limitations in realizing substantive justice. The main focus is on the issues of customary land rights, human rights enforcement, and corruption eradication.

This method is a normative qualitative approach combining doctrinal analysis and comparative law. Data was collected through a literature study of relevant laws and regulations, court decisions, and academic literature. This method is used to explore and interpret the principles of legal positivism and its influence on the Indonesian legal system, without involving empirical data collection.

The novelty of this study lies in its interdisciplinary approach that integrates classical legal positivism theory with contemporary challenges faced by Indonesia's pluralistic legal system. The research introduces the concept of "inclusivity positivism" which suggests that the legal system can retain a formal normative structure, yet still be accommodating to principles of substantive justice, constitutional values, and international human rights norms.

The results show that the rigid application of legal positivism often hinders the achievement of social justice. In cases such as customary land rights and corruption eradication, courts tend to prioritize written regulations even when they contradict social realities and constitutional values. The findings also show that although the Constitutional Court has tried to balance with constitutional principles, implementation at the general court level is still limited due to the highly formalist legal culture.

This study concludes that legal reform is needed that balances legal certainty and substantive justice. This can be achieved through updating laws in line with human rights principles, training judges in progressive constitutional approaches, and increasing the role of oversight institutions such as Komnas HAM. Thus, legal positivism in Indonesia does not need to be abandoned, but needs to be developed to be more responsive to the demands of justice in a pluralistic society.

Keywords: Legal positivism; Legal positivism; Substantive justice.

Abstrak

Tujuan Penelitian *ini untuk mengkaji pengaruh positivisme hukum terhadap praktik penegakan hukum dan peradilan di Indonesia, khususnya dalam konteks keterbatasannya dalam mewujudkan keadilan substantif. Fokus utama diarahkan pada isu-isu hak atas tanah adat, penegakan hak asasi manusia, serta pemberantasan korupsi.*

Metode Penelitian *yang digunakan dalam penelitian ini adalah pendekatan kualitatif normatif dengan menggabungkan analisis doktrinal dan perbandingan hukum. Data*

dikumpulkan melalui studi kepustakaan terhadap peraturan perundang-undangan, putusan pengadilan, serta literatur akademik yang relevan. Metode ini digunakan untuk mengeksplorasi dan menginterpretasi prinsip-prinsip positivisme hukum serta pengaruhnya terhadap sistem hukum Indonesia, tanpa melibatkan pengumpulan data empiris.
***Kebaruan Penelitian** ini terletak pada pendekatan interdisipliner yang mengintegrasikan teori positivisme hukum klasik dengan tantangan kontemporer yang dihadapi oleh sistem hukum Indonesia yang pluralistik. Penelitian ini memperkenalkan konsep "inklusivitas positivisme" yang menyarankan bahwa sistem hukum dapat tetap mempertahankan struktur normatif formal, namun tetap akomodatif terhadap prinsip-prinsip keadilan substantif, nilai-nilai konstitusional, dan norma hak asasi manusia internasional.*
***Hasil Penelitian** menunjukkan bahwa penerapan positivisme hukum secara kaku seringkali menghambat pencapaian keadilan sosial. Dalam berbagai kasus seperti hak tanah adat dan pemberantasan korupsi, pengadilan cenderung memprioritaskan peraturan tertulis meskipun bertentangan dengan realitas sosial dan nilai-nilai konstitusional. Temuan juga menunjukkan bahwa meskipun Mahkamah Konstitusi telah mencoba menyeimbangkan dengan prinsip konstitusional, implementasi di tingkat peradilan umum masih terbatas akibat kultur hukum yang sangat formalis.*
***Kesimpulan** Penelitian ini bahwa diperlukan reformasi hukum yang menyeimbangkan antara kepastian hukum dan keadilan substantif. Hal ini dapat dicapai melalui pembaruan undang-undang yang selaras dengan prinsip hak asasi manusia, pelatihan hakim dalam pendekatan konstitusional progresif, serta peningkatan peran lembaga pengawasan seperti Komnas HAM. Dengan demikian, positivisme hukum di Indonesia tidak perlu ditinggalkan, tetapi perlu dikembangkan agar lebih responsif terhadap tuntutan keadilan dalam masyarakat pluralistik.*
***Kata Kunci:** Positivisme hukum; Legal positivism; Keadilan substantif.*

1. INTRODUCTION

Legal positivism has long been the dominant legal doctrine in Indonesia, asserting that the validity of law flows from formal enactment rather than any moral content. This principle derives from classic jurisprudence.[1] Hans Kelsen conceptualized law as a hierarchy of norms culminating in a fundamental *Grundnorm*, and H. L. A. Hart introduced a "rule of recognition" for identifying valid laws based on social acceptance.[2] Indonesia's legal framework exemplifies these theories. Law No. 12 of 2011 requires that all legislation draw its authority from the 1945 Constitution, and Law No. 48 of 2009 on Judicial Power directs judges to base decisions strictly on written statutes.[3] This positivist paradigm has indeed provided legal certainty and uniformity. However, its rigid application has exposed tensions between formal legality and substantive justice in Indonesia's diverse society.

[1] Naufal Ariq Aisy and Fifiana Wisnaeni. "The Position of Moral Status in the Legal System in Indonesia and Its Practices in the Justice System." *International Journal of Social Science and Human Research* (2025). DOI: https://doi.org/10.47191/ijsshr/v8-i1-68.
[2] H L A Hart, Penelope A Bulloch, and Joseph Raz, "THE CONCEPT OF LAW SECOND EDITION With a Postscript Edited by CLARENDON PRESS · OX FORD," 1961. pp. 100-110.
[3] Fadly Andrianto. "Kepastian Hukum dalam Politik Hukum di Indonesia." , 3 (2020): 114-123. DOI: https://doi.org/10.14710/alj.v3i1.114-123.

Indonesia's complex legal landscape characterized by the coexistence of state law, Islamic law, and customary *adat* law, as well as modern human rights norms presents challenges for a strictly positivist approach. In practice, rigid adherence to written law has sometimes undermined fairness and social needs. For example, under Forestry Law No. 41 of 1999, vast tracts of indigenous land were long treated as state forests unless formally titled.[4] this positivist stance left many indigenous communities dispossessed until the Constitutional Court in 2013 Decision No. 35/PUU-X/2012 affirmed that customary forests belong to their traditional owners.[5] Likewise, courts rarely enforce international human rights obligations in the absence of explicit domestic legislation, even though Indonesia ratified the International Covenant on Civil and Political Rights in 2005.[6] This cautious legalism contrasts with jurisdictions that empower judges to uphold higher norms over conflicting statutes. In Europe, human rights courts have struck down laws infringing fundamental rights,[7] and in South Africa the post-apartheid constitution allows courts to invalidate unjust legislation.[8] A similar tension appears in anti-corruption cases. Indonesian judges have sometimes dismissed graft charges on technical grounds, prioritizing the letter of the law over its intent. In a 2016 decision, for instance, the Constitutional Court interpreted the anti-corruption statute to require proof of actual financial loss to the state for a conviction a standard that enabled certain officials to escape punishment. These examples illustrate how an uncompromising positivist stance, while maintaining consistency, may fail to deliver justice on the ground.[9]

Accordingly, a clear gap exists in both scholarship and practice. Many studies discuss Indonesian legal positivism in theoretical terms or examine isolated issues such us land rights, human rights, corruption in piecemeal fashion, but few have explored how the positivist paradigm as a whole can adapt to Indonesia's pluralistic context and contemporary demands. This study seeks to fill that gap by examining the influence of legal positivism on law enforcement and judicial practice in Indonesia today and by considering reforms that could better align legal certainty with substantive justice. The study employs a qualitative, normative methodology, analyzing Indonesian laws, court decisions, and jurisprudential

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[4] Faiq Tobroni. "Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/ PUU-X/2012)." *Jurnal Konstitusi* (2016). DOI: https://doi.org/10.31078/jk1035.

[5] Aliansi Masyarakat Adat Nusantara (AMAN). *Petition for MK No. 35 Ruling and Indigenous Peoples Bill*. Diakses dari https://www.aman.or.id/petition-for-mk-no-35-ruling-and-indigenous-peoples-bill. (15 April 2025)

[6] Wisnu Aryo Dewanto. "Penerapan Perjanjian Internasional di Pengadilan Nasional: Sebuah Kritik terhadap Laporan Delegasi Republik Indonesia kepada Komite Hak Asasi Manusia Perserikatan Bangsa Bangsa tentang Implementasi Kovenan Internasional tentang Hak-hak Sipil dan Politik..." , 1 (2014): 57-77. DOI: https://doi.org/10.22304/PJIH.V1N1.A4.

[7] Birgit Daiber. "Court of Justice of the European Union or European Court of Human Rights – Is There a 'Supreme Court of Europe'?." *ICL Journal*, 18 (2024): 109 - 126. DOI: https://doi.org/10.1515/icl-2023-0037.

[8] Fabrice Tambe Endoh. "Democratic constitutionalism in post-apartheid South Africa: the interim constitution revisited." *Africa Review*, 7 (2015): 67 - 79. DOI: https://doi.org/10.1080/09744053.2014.990769.

[9] Jefri Hardi. "Determination Authority of State Financial Loss in Criminal Acts of Corruption Post Constitutional Court Decision Number 25/Puu-Xiv/2016." *International Journal of Social Science And Human Research* (2022). DOI: https://doi.org/10.47191/ijsshr/v5-i1-13.

debates to assess how positivist principles have shaped outcomes in the areas mentioned, and drawing comparative insights from other jurisdictions that have moderated positivism with constitutional supremacy or legal pluralism. Through this combined doctrinal and comparative analysis, the study evaluates ways in which Indonesia's legal framework could become more responsive to societal needs without abandoning the rule of law.

In doing so, this study offers a distinctive contribution. Unlike prior works confined to abstract theory or narrow case studies, it bridges the gap between legal theory and judicial practice, providing an integrated perspective on Indonesia's legal development. The analysis yields concrete recommendations for balancing the rule of law with equity and human rights, contributing not only to academic discourse but also to ongoing debates on legal reform. As Indonesia strives to strengthen democracy, safeguard rights, and eradicate corruption, the study's insights are especially timely. By demonstrating how a recalibrated approach to legal positivism one tempered by constitutional values and recognition of legal pluralism can operate in Indonesia, the article underlines its relevance to current efforts to ensure that the law remains not only certain in form but also just in substance.

2. METHOD

This study uses a purely conceptual approach, which is part of the normative juridical tradition in legal research. Within this framework, the law is understood not through empirical observation but through the analysis of legal norms, principles, and doctrines found in statutory texts, judicial decisions, and academic literature. The focus of the research is to explore and understand the influence of legal positivism on judicial practice in Indonesia by interpreting relevant legal theories and systematically connecting them with the national legal structure. As such, this study does not involve the collection of primary data; instead, it relies entirely on secondary legal materials gathered through library research, including books, scholarly articles, Constitutional Court decisions, and legislative instruments. This type of doctrinal study is descriptive-analytical in nature, aiming to construct reasoned arguments and conceptual clarity based on authoritative legal sources. The analytical process is qualitative, emphasizing interpretation and critical reflection on the internal coherence of legal concepts and their normative implications. This method is widely recognized in legal scholarship for its role in structuring legal reasoning without engaging empirical data, making it highly relevant for theoretical legal inquiries such as this one.

3. DISCUSSION

3.1. Theoretical Foundations of Legal Positivism

Legal positivism has been the dominant jurisprudential theory in Indonesia, asserting that law's validity stems from its formal enactment by authorized institutions, irrespective of moral content. This outlook is rooted in the works of Hans Kelsen and H.L.A. Hart, whose ideas have significantly shaped Indonesia's modern legal system. Kelsen's "Pure Theory of Law" envisions law as a hierarchical normative order: each rule derives authority from a higher norm, culminating in a highest fundamental norm (Grundnorm) that underpins the

legal system's unity.[10] Indonesia's legal framework reflects this hierarchy. Codifies a strict order of sources of law, mandating that all legislation draw its authority from the 1945 Constitution (UUD 1945) as the supreme norm.[11] In practice, this means a statute's legitimacy is judged by its conformity to higher laws, ultimately the Constitution, mirroring Kelsen's tiered structure of norms. Indeed, some Indonesian scholars even characterize Pancasila (the state's founding philosophical principles) and the Constitution as the nation's "Grundnorm," from which all lower laws must derive legitimacy.[12]

Meanwhile, H.L.A. Hart's theory contributes a complementary lens. Hart's concept of the "rule of recognition" posits that a legal system's validity criteria rest on social practices rules are valid if they are accepted and practiced by legal officials. In Indonesia, the rule of recognition manifests in the consistent institutional acknowledgment of written statutes and the Constitution as the primary sources of law.[13] The judiciary, bureaucracy, and legislature largely concur that duly enacted laws, passed through the formal legislative process and not contradicting the Constitution, are the law. Hart also distinguished primary rules obligations from secondary rules, rules about rulemaking, adjudication, and change.[14] Indonesia's legal order, influenced by its civil law heritage, has well-defined secondary rules governing legislation e.g. procedures in Law No. 12/2011 and constitutional adjudication through the Constitutional Court's review authority. These provide the criteria for identifying valid law, akin to Hart's rule of recognition and rules of change.[15]

A direct reflection of Hart's influence is the strong judicial deference to written law in Indonesia. Law No. 48 of 2009 on Judicial Power underscores this deference by instructing that judges "base their judgments on the law", which has been interpreted to prioritize written statutes as the basis of decisions.[16] Indonesian judges are generally trained to apply legislation and codified regulations rigorously and historically have seen themselves as *"mulut Undang-Undang"* the "mouthpiece of the law" who merely pronounce the contents of enacted law rather than create or alter it.[17] This positivist outlook prizes legal certainty and

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[10] Muslihun Muslihun. "Legal Positivism, Positive Law, and the Positivisation of Islamic Law In Indonesia." , 22 (2018): 77-95. DOI: https://doi.org/10.20414/ujis.v22i1.305.

[11] Arnanda Yusliwidaka, Muhammad Ardhi Razaq Abqa and T. Gunawan. "MEASURING POSITIVISM IN LEGAL SCIENCE AND LEGAL PRACTICE IN INDONESIA." *Journal of Law and Policy Transformation* (2023). DOI: https://doi.org/10.37253/jlpt.v7i2.7288. p.75.

[12] *Ibid.* Pp.76-78.

[13] Triwahyuningsih Triwahyuningsih. "Emancipatory Of Legal Transendency In Indonesia: Study Of Moral Aspects In The Making Of Laws And Regulations In Indonesia." , 1 (2019): 124-146. DOI: https://doi.org/10.23917/jtl.v1i2.9132.

[14] Dwanda Julisa Sistyawan, Retno Saraswati, Lita Tyesta A.L.W., M. Jayawibawa and Mohammad Syaiful Aris. "THE DEVELOPMENT OF POSITIVISM'S LEGAL THEORY: FROM BENTHAM TO HART." *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH* (2024). DOI: https://doi.org/10.22373/petita.v9i2.402.

[15] *Ibid.*

[16] Ikhda Zikra and Cuong Lan Minh. "Participation of Judicial Decisions as The Form of The Implementation of Moral Values in Case Statement Based on Rechtvinding Activities and Negative Wetjlike Theorie." *Contemporary Issues on Interfaith Law and Society* (2022). DOI: https://doi.org/10.15294/ciils.v1i1.56714.

[17] J. Zaman, Achmad Khudori Sholeh, Fadil Fadil, Nor Salam and Aina Sofea Binti Ros Azman. "The Influence of Positivism and Empirism in The Enforcement of Islamic Inheritance Law in Indonesia." *Substantive Justice*

uniformity: by adhering to the letter of written law, courts aim to ensure predictable outcomes and to avoid subjective or personal moral judgments by judges.[18] The influence of this approach is evident in jurisprudence; for example, courts often eschew invoking abstract principles like justice or natural law unless grounded in a statute or constitutional provision. Many Indonesian jurists regard such fidelity to the text as essential to maintain the rule of law in a state based on law (*negara hukum*).[19]

However, the evolution of Indonesia's legal system has also introduced important nuances and critiques to strict positivism. The post-1998 reforms, especially the establishment of the Constitutional Court *(Mahkamah Konstitusi)* in 2003, represent a shift from absolute legislative supremacy toward a form of constitutional supremacy.[20] Kelsen's influence is visible here too, Kelsen himself advocated for a constitutional court to guard the hierarchy of norms. In Indonesia, the Constitutional Court can invalidate statutes that conflict with the Constitution, injecting a substantive constitutional review that tempers pure legislative positivism. This shows an evolution in applying Kelsen's theory. The hierarchy of norms is actively policed, ensuring that basic rights and principles in the Constitution trump lower laws. Hart's framework also evolved in practice: the rule of recognition in Indonesia expanded to include constitutional principles and court decisions.[21] Today, a statute, though formally enacted, will not be recognized as valid if the Constitutional Court has struck it down for violating higher norms a scenario that classic parliamentary positivism did not permit under the Suharto-era system.[22]

Indonesian legal scholars have long debated these theoretical foundations, often criticizing an overly rigid positivist approach. Notably, Prof. Satjipto Rahardjo advanced the idea of *"progressive law" (hukum progresif)* as a critique of mechanistic law enforcement. He argued that law should serve societal needs and justice, and that blindly obeying written rules can sacrifice substantive justice in favor of procedural formality.[23] Scholars in this vein contend that Indonesian judges should not regard themselves merely as executors of black-letter law, especially when the law produces inequitable results. They point out that Indonesia's legal culture includes plural sources of authority customary *adat* law, Islamic law, and general principles of justice that positivism marginalizes. For instance, the notion of *"living law"* (*hukum yang hidup*) community norms that live outside state legislation has

International Journal of Law (2024). DOI: https://doi.org/10.56087/substantivejustice.v7i1.267.

[18] *Ibid.*

[19] Rahayu Prasetianingsih. "JUDICIAL ACTIVISM IN INDONESIA." *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH* (2020). DOI: https://doi.org/10.22373/petita.v5i2.106.

[20] Luthfi Widagdo Eddyono. "The Constitutional Court and Consolidation of Democracy in Indonesia." , 15 (2018): 1-26. DOI: https://doi.org/10.31078/JK1511.

[21] Syofyan Hadi. "The Influence of Theorie Von Stufenbau Der Rechtsordnung in the Indonesian Legal System." *DiH: Jurnal Ilmu Hukum* (2024). DOI: https://doi.org/10.30996/dih.v20i2.10989.

[22] Wiratraman, Herlambang P. "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics." *Federal Law Review* 50, no. 3 (2022): 314–30. DOI: https://doi.org/10.1177/0067205X221107404.

[23] Ade Ilyas, Dicky Eko Prasetio and Felix Ferdin Bakker. "MEMBANGUN MORALITAS DAN HUKUM SEBAGAI INTEGRATIVE MECHANISM DI MASYARAKAT DALAM PERSPEKTIF HUKUM PROGRESIF." , 14 (2021). DOI: https://doi.org/10.30996/MK.V14I2.4694.

constitutional recognition in Article 18B (2) respecting traditional customary communities. Rigid positivism struggles to accommodate such unwritten norms. Critics like Rahardjo urge a more responsive adjudication that "lets the law flow" with social dynamics, instead of treating statutes as inflexible commands.[24] Similarly, other Indonesian jurists have noted that the purpose of law (justice) should guide interpretation a purely positivist judge might enforce an unjust regulation to the letter, whereas a more purposive approach would seek a fair outcome within the law's allowable interpretation.[25]

These critiques have practical resonance in Indonesia's courts. The judicial implications of Kelsen's and Hart's theories, when taken to the extreme, are seen in judges' reluctance to look beyond statutes. Court decisions are typically dense with citations of articles of law, but sparse in citing moral philosophy or international human rights norms as a basis. While this provides consistency, it also means that unless the legislature proactively updates laws, the judiciary feels bound even by outdated or unjust statutes.[26] Indonesian commentators have observed that this dynamic leads to a "gap" between law and justice – law enforcement officials focus on legal compliance rather than equitable outcomes. The late Prof. Moh. Mahfud MD (former Chief Justice of the Constitutional Court) famously lamented that Indonesian law enforcement too often emphasizes the *"certainty of law"* (*kepastian hukum*) at the expense of *"justice and benefit"* (*keadilan dan kemanfaatan*).[27]

Nonetheless, the formal legal structure continues to enshrine positivist principles. Key legislation reinforces these foundations. Law No. 12 of 2011 not only lists the hierarchy of laws but also strictly delineates law-making procedures and requires that lower regulations be made under authority of higher laws, echoing Kelsenian validity. Law No. 48 of 2009, despite containing a clause that judges shall explore societal values, is commonly cited for its instruction that judges must not refuse to adjudicate a case due to absence of a law – they must still decide it, ostensibly by applying or analogizing existing written rules.[28] This reinforces that there is always *some* written rule applicable or that judges may fill gaps by extending existing law, rather than resorting to extralegal standards. In Indonesian jurisprudence, there is also a strong tradition of "legalism" in which courts rarely invoke the Constitution directly unless a statute explicitly allows it, preferring to leave constitutional review to the Constitutional Court. This means trial judges seldom question the justice of a statute; they apply it and leave any *ultra vires* concerns to a separate judicial forum.[29]

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[24] H. P. Wiratraman. "Adat Court in Indonesia's Judiciary System: A Socio-Legal Inquiry." *Journal of Asian Social Science Research* (2022). DOI: https://doi.org/10.15575/jassr.v4i1.62.

[25] Rahmawati Prihastuty. "Philosophical Study of Hans Kelsen's Thoughts on Law and Satjipto Rahardjo's Ideas on Progressive Law." (2020).

[26] *Op. Cit.*

[27] A. Ridho, I. N. Aen, Ah. Fathonih, A. Ridwan, Nandang Najmudin, Nurol Aen, A. Hasan, Ridwan Dan, Asas Kepastian and H. Keadilan. "ASAS KEPASTIAN HUKUM KEADILAN KEMANFAATAN SERTA PENERAPANNYA DALAM PUTUSAN PENGADILAN TENTANG HAK-HAK ANAK AKIBAT PERCERAIAN." *Equality: Journal of Islamic Law (EJIL)* (2023). DOI: https://doi.org/10.15575/ejil.v1i1.482.

[28] *Op. Cit.*

[29] O. Agustine, S. Harijanti, Indra Perwira and Wida Wulandari. "Constitutional review of criminal norms: does

In summary, the Indonesian legal system's theoretical foundation remains largely positivist in Kelsen's and Hart's sense law is a system of norms enacted and recognized by official institutions, with validity flowing from higher authority rather than from moral content.[30] This foundation is evident in Indonesia's legislation which codifies hierarchy and procedure and judicial practice which defers to written law. Over time, however, the application of these theories has evolved through constitutional reform and scholarly critique. The system has begun to cautiously integrate broader principles for example, by empowering judges to consider the Constitution and by acknowledging customary law in theory yet the prevailing judicial philosophy is still one of deference to the text of statutes. The tension between legal certainty and substantive justice remains a central theme in Indonesian legal discourse, setting the stage for examining how positivism's dominance impacts actual law enforcement and judicial outcomes in the country.[31]

3.2. The Limitations of Legal Positivism in Indonesian Judicial Practice

While legal positivism provides Indonesia with stability and predictability, its strict application has often impeded substantive justice in practice. Indonesia's complex socio-legal landscape marked by plural legal systems, evolving constitutional norms, and international human rights commitments has exposed the shortcomings of a purely positivist approach. This section examines those limitations through concrete case studies and comparative insights. It highlights how an unwavering adherence to written law has affected outcomes in areas such as indigenous land rights, anti-corruption efforts, and individual liberties, and how Indonesia's approach contrasts with or is challenged by practices in other jurisdictions, including fellow Southeast Asian nations. Ultimately, it suggests pathways for legal reform to better harmonize Indonesia's positivist legal framework with principles of justice and human rights.[32]

3.3. Rigid Law and Indigenous Land Rights.

One profound example of positivism's limitations is the struggle over indigenous land rights. For decades, Indonesia's laws treated customary (adat) land claims as inferior unless converted into state-recognized titles. Under Law No. 41 of 1999 on Forestry, all forests not formally titled were deemed state forests, effectively negating communal land rights that indigenous communities had exercised for generations.[33] Courts, following the letter of this law, routinely dismissed indigenous claims to ancestral forests on the grounds that claimants

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Indonesia need judicial activism?." *The International Journal of Human Rights*, 27 (2023): 772 - 788. DOI: https://doi.org/10.1080/13642987.2023.2185608.

[30] Roro Hanum Hanum, Elfa Murdiana and R. Bahari. "Kedudukan Peraturan Pemerintah Pengganti Undang-Undang di Tinjau Dari Hierarki Perundang-Undangan Indonesia." *Siyasah Jurnal Hukum Tatanegara* (2023). DOI: https://doi.org/10.32332/siyasah.v3i2.8090.

[31] Raju Moh Hazmi, A. Jahar and Nurul Adhha. "Construction of Justice, Certainty, and Legal Use in the Decision of the Supreme Court Number 46 P/HUM/2018.." *Jurnal Cita Hukum*, 9 (2021). DOI: https://doi.org/10.15408/JCH.V9I1.11583.

[32] Pandapotan Damanik. "Strengthening Land Law Reforms through Legal Pluralism in Indonesia." *Rechtsidee*(2023). DOI: https://doi.org/10.21070/jihr.v12i2.993.

[33] Law No. 41 of 1999 on Forestry, Article 5.

lacked official land certificates. In line with positivist doctrine, only written proof issued by the state was accepted as legally valid ownership. This led to dispossession and conflict: communities who lived on and managed land per customary law found no remedy in courts, as judges felt bound to apply the statutory definitions of land rights. The judiciary's deference to the Forestry Law exemplified how positivism can produce inequitable outcomes when the enacted law fails to account for social realities.[34]

A turning point came with Constitutional Court Decision No. 35/PUU-X/2012, which was a response to these injustices. In that case, indigenous advocacy groups challenged the constitutionality of the Forestry Law's classification of customary forests as state land.[35] The Constitutional Court, acknowledging the 1945 Constitution's mandate to respect customary communities (Article 18B(2)), ruled that *hutan adat* (customary forests) are not part of state forest lands if they have been traditionally occupied by indigenous people.[36] This landmark 2013 decision effectively removed customary forests from state control and affirmed that indigenous land rights must be recognized in positive law. Notably, the Court's reasoning departed from a pure positivist stance; it held that legal interpretation should consider historical and social context, not just the text of legislation.[37] By reading the Forestry Law in light of constitutional principles, the Court infused substantive justice into the legal outcome.

However, the impact of Decision 35/PUU-X/2012 also highlights the limits of judicial victories under a positivist regime. Implementation has lagged and been inconsistent. Many lower courts and government agencies were slow to adjust their practices, continuing to enforce forestry and agrarian laws in a formalistic manner.[38] Judges in ordinary courts often reverted to requiring formal titles for land claims, seemingly more comfortable applying the black-letter Forestry Law (which remained on the books, albeit implicitly modified) than the Constitutional Court's ruling.[39] This inconsistency some courts embracing the new recognition of adat rights, others clinging to old statutory interpretations underscores how deeply ingrained positivist habits are in Indonesia's legal culture. Even when the Constitutional Court injects pluralist or progressive principles into law, realization on the

[34] M.Saleh. "Eksistensi Masyarakat Hukum Adat Dalam Pengelolaan Hutan Prespektif Undang-Udang N0mor 41 Tahun 1999." *JATISWARA* (2017). DOI: https://doi.org/10.29303/jtsw.v26i2.12.

[35] S. Suparto. "KEDUDUKAN DAN PROSES PENETAPAN HUTAN ADAT PASCA PUTUSAN MAHKAMAH KONSTITUSI NO. 35/PUU-X/2012 SERTA IMPLEMENTASINYA DI PROVINSI RIAU." , 5 (2021): 198-214. DOI: https://doi.org/10.24970/BHL.V5I2.171.

[36] Republic of Indonesia, The 1945 Constitution of the Republic of Indonesia, Article 18B(2).

[37] I. Muda. "INTERPRETASI MAHKAMAH KONSTITUSI TERKAIT UJI KONSTITUSIONAL PASAL 66 UNDANG-UNDANG JABATAN NOTARIS." Jurnal Yudisial (2021). DOI: https://doi.org/10.29123/JY.V13I3.440.

[38] Mahkamah Konstitusi Republik Indonesia. *Putusan Mahkamah Konstitusi*. Diakses dari https://www.mkri.id/index.php?id=21532&menu=2&page=web.Berita (2 September 2024).

[39] Muhammad Johan, A. Putra, Firman Freaddy, Marsudi Busroh, Utoyo Mahasiswa, P. Pasca, S. S. -. Sumpah, Pemuda, Kata Kunci, Analisa Hukum, Implementasi Putusan, Mahkamah Muhammad, Johan Aria Putra, Utoyo, Sekretariat Jenderal, Kepaniteraan, Mahkamah Konstitusi.hlm, 152-153, Jimly Asshiddiqie, "Sejarah Constituional, Review dan, Gagasan Pembentukan and Mahkamah Konstitusi. "ANALISA HUKUM IMPLEMENTASI PUTUSAN MAHKAMAH KONSTITUSI NOMOR : 65/PUU-VIII/2010 DIHUBUNGKAN KEABSAHAN PEMBUKTIAN SAKSI TESTIMONIUM DE AUDITU DALAM PERISTIWA PIDANA DAN KITAB UNDANG-UNDANG HUKUM ACARA PIDANA." *Lexstricta : Jurnal Ilmu Hukum* (2023). DOI: https://doi.org/10.46839/lexstricta.v1i3.15.

ground may falter if judges feel constrained by the text of unrevised statutes.[40] Over a decade later, many indigenous groups still await the full return of their traditional forests. The rigid hierarchy of norms means that unless Parliament amends the Forestry Law to clearly incorporate the Court's decision, some officials hesitate to act on the basis of the decision alone. Thus, the indigenous land rights saga reveals a paradox positivism ensured legal certainty in favor of the state, but at the cost of justice, until a constitutional intervention occurred and even then, the formalistic mindset diluted the effect.[41]

3.4. Formalism and Anti-Corruption Efforts.

Indonesia's fight against corruption provides another arena where strict legal positivism has shown its cracks.[42] The country has established numerous laws and agencies such as the Corruption Eradication Commission, KPK to combat graft.[43] These efforts initially benefited from a positivist framework in those clear statutory definitions of corruption offenses and procedures lent authority to anti-corruption courts. Yet, paradoxically, corrupt actors have exploited legal formalism to evade accountability.[44] For example, stringent requirements in the wording of anti-corruption statutes sometimes allowed defendants to argue technical loopholes such as ambiguity in defining "state financial loss" to escape conviction.[45] In 2016, the Constitutional Court decided a controversial case (Decision No. 25/PUU-XIV/2016) that narrowed the definition of certain corruption offenses, ruling that proving an offense required showing actual quantified loss to the state.[46] This positivist insistence on formal proof of loss made prosecuting some acts of corruption harder, as it excluded broader concepts of public harm. Lower courts, adhering to the letter of this ruling, began acquitting defendants in cases where monetary loss was hard to calculate, even if bribery or abuse of power was evident.[47] Critics argue this is "justice lost in legal detail" an illustration of how a formalist interpretation can undermine the spirit of the law (punishing public corruption).[48]

In response, Indonesia's anti-corruption judiciary has at times shown flexibility, suggesting a subtle shift away from pure positivism. Some judges and prosecutors started

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[40] Aliansi Masyarakat Adat Nusantara (AMAN). *Berita: Pengakuan Hutan Adat*. Diakses dari https://www.aman.or.id/news/read/1817 (18 Mei 2024).

[41] *Op. Cit.*

[42] Mashendra Mashendra. "Perampasan Aset Korupsi Dalam Upaya Pemberantasan Tindak Pidana Korupsi Menurut Hukum Pidana Indonesia." , 8 (2020): 37-56. https://doi.org/10.36090/JH.V8I1.

[43] Mahesa Rannie. "KEDUDUKAN KOMISI PEMBERANTASAN KORUPSI DALAM SISTEM KETATANEGARAAN INDONESIA." *Lex Librum : Jurnal Ilmu Hukum* (2021). DOI: https://doi.org/10.46839/LLJIH.V7I2.384.

[44] Dominikus Jawa, Parningotan Malau and C. Ciptono. "Tantangan Dalam Penegakan Hukum Tindak Pidana Korupsi Di Indonesia." *JURNAL USM LAW REVIEW* (2024). DOI: https://doi.org/10.26623/julr.v7i2.9507.

[45] Andi Munafri. "DIMENSI KERUGIAN KEUANGAN NEGARA DALAM TINDAK PIDANA KORUPSI." , 9 (2021): 1-17. DOI: https://doi.org/10.52103/JMH.V9I1.64.

[46] Fatkhurohman Fatkhurohman and Nalom Kurniawan. "Pergeseran Delik Korupsi dalam Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016." , 14 (2017): 1-21. DOI: https://doi.org/10.31078/JK1411.

[47] *Ibid.*

[48] Hukumonline. *Kritik dan Pandangan Hukum Pengampunan Korupsi di Bawah Rp 50 Juta*. Diakses dari https://www.hukumonline.com/berita/a/kritik-dan-pandangan-hukum-pengampunan-korupsi-di-bawah-rp-50-juta-lt61fbb4b09292d/ (3 Februari 2022).

invoking broader principles and auxiliary regulations to fill the gaps. For instance, courts have upheld convictions by relying on general criminal law provisions or by interpreting *mens rea* intent and method of illegality more expansively, effectively circumventing the loopholes.[49] The Supreme Court also issued guidance to harmonize how evidence of "state loss" should be assessed, to prevent ultra-formal demands from derailing cases. These moves reflect an emerging understanding that too much rigidity can sabotage the law's purpose.[50] Indeed, recent Constitutional Court decisions have been more cautious; in Decision No. 25/2018, the Court clarified its earlier stance, emphasizing that its rulings should not be misused to protect corruption under procedural technicalities. Although Indonesia's legal apparatus remains statute-bound, the urgent need to combat corruption has prompted a *pragmatic strain* in judicial reasoning – one that sometimes stretches or reinterprets the text in order to uphold the law's intent.[51] This represents a crack in the positivist façade: when literal adherence to a written rule would lead to impunity for corrupt officials, the judiciary has faced pressure (both public and internal) to find a lawful way to reach a just result. Nonetheless, such flexibility is patchy and often controversial, since it can be seen as going beyond the judge's mandate.[52] The overall anti-corruption experience demonstrates the tension between legal certainty (no punishment without clear law) and social necessity (punishing obvious wrongdoing), a tension at the heart of positivism's limitations.[53]

3.5. Human Rights, Individual Liberties, and the ICCPR Gap.

Perhaps the most compelling critique of Indonesia's positivist practice arises in the field of human rights enforcement. Indonesia has formally committed to international human rights standards by ratifying major treaties like the International Covenant on Civil and Political Rights (ICCPR) (through Law No. 12 of 2005).[54] On paper, many fundamental rights are also enshrined in the 1945 Constitution and in statutes such as Law No. 39 of 1999 on Human Rights. In practice, however, courts and law enforcement often prioritize written domestic laws (including older regulations that restrict rights) over these higher principles, due to a prevalent dualist view that treaties and even constitutional norms require

[49] Muslim Mamulai. "Eksistensi Komisi Yudisial Republik Indonesia dalam Menciptakan Hakim Agung Yang Berkualitas dan Berintegritas." *Kalabbirang Law Journal* (2019). DOI: https://doi.org/10.35877/454ri.kalabbirang15.
[50] Venna Melinda. "KESESUAIAN PENANGANAN PERKARA OLEH HAKIM MAHKAMAH AGUNG PADA PUTUSAN NOMOR 1975 K/PID.SUS/2018 DENGAN KETENTUAN PASAL 253 KITAB UNDANG-UNDANG HUKUM ACARA PIDANA." *Verstek* (2021). DOI: https://doi.org/10.20961/jv.v9i3.55062.
[51] Warih Anjari. "Kedudukan Asas Legalitas Pasca Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006 dan 025/PUU-XIV/2016." *Jurnal Konstitusi* (2019). DOI: https://doi.org/10.31078/JK1611.
[52] R. Kristianto, M. Candra and Yanto Yanto. "Rekontruksi Penggunaan Teori Positivisme Hukum dalam Penegakan Tindak Pidana Korupsi di Indonesia." *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga* (2023). DOI: https://doi.org/10.47467/as.v6i1.5838.
[53] Angga Alfiyan. "TINJAUAN YURIDIS PUTUSAN MAHKAMAH KONSTITUSI NOMOR 25/PUUXIV/2016 DALAM HAL PERUBAHAN KETENTUAN PASAL 2 DAN 3 UNDANG- UNDANG NOMOR 20 TAHUN 2001 TENTANG TINDAK PIDANA KORUPSI." (2020). DOI: https://doi.org/10.31228/osf.io/tja3b.
[54] Cekli S. Pratiwi. "The Permissible Scope of Legal Limitation on Freedom of Religion or Belief (FoRB) and Freedom of Expression (FoE) under International Human Rights Law (IHRL): The Study of Blasphemy Cases in Indonesia." *SSRN Electronic Journal* (2019). DOI: https://doi.org/10.2139/SSRN.3312715.

implementing legislation to be judicially operative.This has created an ICCPR implementation gap.[55] For example, freedom of expression is guaranteed by Article 28E(3) of the Constitution and Article 19 of the ICCPR, but prosecutions under Indonesia's Electronic Information and Transactions Law (ITE Law) for defamation or "blasphemy" have continued unabated. When defendants in such cases argue that the charges violate their freedom of speech or religion, judges often respond that unless the restrictive law itself is repealed or invalidated, they must enforce it. In a high-profile 2012 case, activists challenged the Blasphemy Law (Penal Code Article 156a) as inconsistent with freedom of religion, yet Constitutional Court Decision No. 84/PUU-X/2010 upheld the law's validity, reasoning that maintaining public order and religious harmony justified the restrictions.[56] The Court took a positivist stance that since the Blasphemy Law was a validly enacted statute and not expressly prohibited by the Constitution's text, it should stand effectively deferring to the legislature's judgment on limiting rights.[57] Several Justices dissented, warning that the decision ran afoul of Indonesia's international obligations under the ICCPR, but the majority's view prevailed.[58] The result has been that domestic statutes trump international human rights norms in day-to-day adjudication, unless a specific constitutional provision or a legislative amendment compels otherwise.[59]

Another poignant example concerns the right to marry and equality before the law. Indonesia's Marriage Law (No. 1 of 1974) requires that a marriage is conducted according to the religion of the parties in effect prohibiting marriage between individuals of different religions unless one converts. This has long been criticized as violating the ICCPR's guarantee of the right to marry and freedom of religion Articles 23 and 18. Yet Indonesian courts have been unwilling to circumvent or question this requirement absent legislative change.[60] Interfaith couples have little recourse; some have attempted to marry abroad or petition Indonesian courts for recognition, but judges consistently point to the explicit language of the Marriage Law, which requires religious conformity.[61] As Permanasari notes, courts often reject such petitions on the grounds that the law does not accommodate interfaith unions, with judicial reasoning reflecting a positivist stance that prioritizes adherence to written statutes over individual rights claims.[62] This deference exemplifies positivist practice fidelity

[55] L. Husen, Andi Ifal Anwar, Sufirman Rahman and M. K. Hidjaz. "Implementation of Legal Guarantees for Human Rights Protection in Indonesia." *Journal of Law and Sustainable Development* (2023). DOI: https://doi.org/10.55908/sdgs.v11i4.624.

[56] *Loc. Cit.*

[57] *Ibid.*

[58] S. Butt. "The Function of Judicial Dissent in Indonesia's Constitutional Court." *Constitutional Review* (2018). https://doi.org/10.31078/consrev411.

[59] Saru Arifin. "The Meaning and Implication of ICCPR Ratification to Religious Freedom in Indonesia." (2018): 193-198. DOI: https://doi.org/10.2991/ICLJ-17.2018.40.

[60] Andrew Betlehn. "Limitations on Interfaith Marriage Practices in Indonesia According to Human Rights Perspective." *International Journal of Social Science and Human Research* (2022). DOI: https://doi.org/10.47191/ijsshr/v5-i4-17.

[61] Hidaya, Wahab Aznul, et al. *PENGANTAR HUKUM INDONESIA*. CV Rey Media Grafika, 2025.

[62] Lolita Permanasari. "LEGAL ANALYSIS OF INTERFAITH MARRIAGE IN INDONESIA." *Journal Of Law Theory And*

to the statute outweighed the couple's individual rights claims. By contrast, the Constitutional Court has occasionally shown willingness to side with individual rights within the confines of written law. For example, Constitutional Court Decision No. 13/PUU-XV/2017 struck down a clause in the Manpower Law that allowed employers to dismiss workers for marrying a co-worker, if such prohibition was stated in a company regulation or employment agreement. The Court found this provision to be an unreasonable restriction on the constitutional right to marry and to form a family, as protected under Article 28B(1) of the Constitution.[63] Notably, the Court based its ruling on constitutional protections against discrimination and family rights, demonstrating that when a right is clearly anchored in the Constitution, the Court will enforce it even against a contrary regulation.[64] However, this protection did not stem from international law per se but from domestic constitutional law.[65] Where a right is only found in an international treaty (like ICCPR) or general principles, and not explicitly in Indonesian statutes, courts remain hesitant to apply it directly.

The reluctance to give direct effect to the ICCPR or other treaties in courts is well-documented.[66] Studies show that Indonesian judges seldom cite international human rights law unless it has been transformed into a domestic statute.[67] One 2014 critique noted that Indonesia's own delegation to the UN Human Rights Committee admitted that no domestic court decision had directly applied the ICCPR provisions – every right had to be traced to an Indonesian law or constitution article.[68] Even the Constitutional Court, while more receptive to global principles, often phrases its judgments in terms of national law and "universal values" rather than directly invoking treaty clauses.[69] The consequence is an enforcement gap: Indonesia may be a party to international human rights instruments, but citizens cannot easily invoke those rights in court unless the legislature has enacted a corresponding law.[70] This positivist insistence on legislative incorporation leads to situations where outdated or

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Law Enforcement (2023). DOI: https://doi.org/10.56943/jlte.v2i1.282.

[63] Constitutional Court of the Republic of Indonesia, Decision No. 13/PUU-XV/2017 on the Judicial Review of Law No. 13 of 2003 on Manpower against the 1945 Constitution of the Republic of Indonesia, pronounced on December 14, 2017, 84–85.

[64] Faqih Afif Ridlo, Putusan Mahkamah Konstitusi Nomor 13/PUU-XV/2017 tentang Uji Materil Pasal 153 Ayat (1) Huruf F Undang-Undang Nomor 13 Tahun 2003 Ditinjau dari Aspek Keadilan (Undergraduate thesis, Fakultas Syariah dan Hukum, UIN Syarif Hidayatullah Jakarta, 2019), 7–8, pp. 41–44. DOI: https://doi.org/10.35877/454RI.kalabbirang15.

[65] Winda Wijayanti and Alboin Pasaribu, "Constitutionality of Marital Tie between Fellow Co-worker after Decision of the Constitutional Court," Jurnal Konstitusi 17, no. 3 (September 2020): pp. 646–647, DOI: https://doi.org/10.31078/jk1738.

[66] Hendardi Hendardi. "Prospek dan Tantangan Implementasi ICCPR." *Jurnal Hak Asasi Manusia* (2021). DOI: https://doi.org/10.58823/jham.v4i4.43.

[67] Isroni Muhammad Miraj Mirza, R. Natamiharja and Jalil Alejandro Magaldi Serna. "Social Transformation of International Human Rights Law Through Indonesian Constitutional Court." *Uti Possidetis: Journal of International Law* (2023). DOI: https://doi.org/10.22437/up.v4i3.25721.

[68] Human Rights Watch. *Indonesia: Submission to UN Human Rights Committee*. Diakses dari https://www.hrw.org/id/news/2024/03/04/indonesia-submission-un-human-rights-committee (2024, Maret 4).

[69] *Op. Cit.*

[70] *Op. Cit.*

narrow national laws prevail over broader human rights commitments.[71] The implementation gap is evident in areas like freedom of expression (with continuing use of criminal defamation and blasphemy laws despite ICCPR protections), freedom of association (stringent rules on NGOs), and rights of minorities.[72] As a 2024 report by Asia Justice and Rights (AJAR) observes, Indonesia's adherence to formalistic legality has hampered accountability for human rights violations, calling for more honest alignment of domestic law with international standards.[73]

Addressing the Human Rights Gap – A Need for Reform: Bridging this gap requires reforms that gently move Indonesia beyond its strict positivist posture toward a more harmonious integration of international norms. Some potential reforms include: 1) *Legislative Incorporation:* Proactively harmonize national laws with treaty obligations. For instance, revise the Penal Code and ITE Law to ensure consistency with ICCPR Articles 19 and 21 (on expression and assembly), and amend the Marriage Law to accommodate interfaith marriages or civil marriage options. By updating statutes, judges can enforce rights without feeling they are stepping outside the law's text.[74] 2) *Guidance for Judiciary:* Issue interpretative guidelines or a Supreme Court regulation (Perma) instructing judges to consider international human rights law when interpreting ambiguous laws or filling legal gaps. Similar to how judges must consider "living law" values, they could be empowered (or required) to read domestic law in harmony with Indonesia's ratified treaties.[75] This would give a formal positivist footing to using international norms. 3) *Constitutional Amendment or Clarification:* Although politically challenging, an amendment to explicitly state that ratified treaties have legal force in domestic law (as is the case in some jurisdictions), or a Constitutional Court decision affirming that position, would significantly change the landscape. Short of that, the Constitutional Court could, in future cases, cite the ICCPR more boldly as interpretative guidance for constitutional rights – setting a precedent for other courts.[76] 4) *Strengthening Monitoring Bodies:* Empower the National Human Rights Commission (Komnas HAM) and other oversight bodies to bring test cases and to issue advisory opinions referencing international law.[77] If such opinions are given weight in court

[71] *Op. Cit.*

[72] *Op. Cit.*

[73] Asia Justice and Rights (AJAR), "Indonesia: Second Periodic Review of ICCPR — A Call for Honesty and Accountability on Human Rights," March 18, 2024, accessed March 21, 2025, https://asia-ajar.org/press-release/indonesia-second-periodic-review-of-iccpr-a-call-for-honesty-and accountability-on-human-rights/.asia-ajar.org.

[74] *Op. Cit.*

[75] Bambang Santoso, M. Rustamaji and I. Kurniawan. "PENGUATAN INSTRUMEN PERLINDUNGAN HAM DALAM PEMBAHARUAN KUHAP UNTUK MEWUJUDKAN CITA NEGARA HUKUM." *Jurnal Hukum Mimbar Justitia* (2023). DOI: https://doi.org/10.35194/jhmj.v9i1.3337.

[76] Nurrohim Yunus and Refly Setiawan. "THE ENFORCEMENT OF HUMAN RIGHTS IN THE CONSTITUTION OF THE REPUBLIC OF INDONESIA." *EL-SIYASA: JOURNAL OF CONSTITUTIONAL LAW* (2024). DOI: https://doi.org/10.61341/el-siyasa/v1i2.007.

[77] Hidayat, Muhammad Ridwan, Suteki Suteki, and Jean Claude Geofrey Mahoro. "Legal Wisdom in

(perhaps through legislative recognition), they can indirectly inject human rights norms into judicial reasoning in a way consistent with legal procedures.[78]

These reforms aim to maintain Indonesia's respect for rule of law by working through the legal system, not against it while expanding the sources of law that judges may legitimately draw upon.[79] By formally recognizing international standards within the domestic legal hierarchy or interpretive practice, Indonesia can improve enforcement of human rights without abandoning the positivist emphasis on written authority. In essence, the country can move toward a more "inclusive" positivism – one that still values clear sources of law, but includes the Constitution's spirit and international commitments as part of those sources.[80]

3.6. Comparative Perspectives Southeast Asia and Beyond.

Indonesia is not alone in grappling with the balance between legal positivism, pluralism, and human rights. A look at other countries with similar legal traditions illuminates how different approaches can yield different outcomes. For instance, Malaysia and the Philippines, like Indonesia, inherited legal systems that emphasize written codes and statutes, yet they have diverged in how they deal with plural legal sources and rights protection.

In Malaysia, a Commonwealth common-law jurisdiction with a written constitution, positivism is evident in the primacy of legislation and the Constitution.[81] However, Malaysia practices a form of legal pluralism by constitutionally recognizing Islamic Sharia courts for matters pertaining to Muslims (family law, inheritance, etc.) alongside the civil courts.[82] This means that what counts as "law" in Malaysia is not monolithic a marriage dispute, for example, might be governed by Islamic enactments in one court and civil law in another.[83] This plural structure has sometimes led to conflicts (e.g., jurisdictional tussles between civil and Sharia courts), but it also shows a different way of accommodating social realities.[84] Customary law for indigenous peoples (Orang Asli in Peninsular Malaysia, and native

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Indonesian Legal System: Toward Progressive Law Enforcement." *JUSTISI* 10.3 (2024): 518-534. https://doi.org/10.33506/js.v10i3.3198

[78] Elika Manullang, B. N. Sinaga and Kasman Siburian. "Protection Of Human Rights In The Context Of Indonesian Constitutional Law Against The Functions Of State Institutions." *Indonesian Journal of Law and Justice* (2025). DOI: https://doi.org/10.47134/ijlj.v2i3.3652.

[79] Ikhsan, Muhibbul, Wahab Aznul Hidaya, and Muharuddin Muharuddin. "Enforcement of Criminal Sanctions Against Trafficking of Protected Wildlife in Sorong City." *Journal of Law Justice (JLJ)* 3.1 (2025): 63-72. https://doi.org/10.33506/jlj.v3i1.3836

[80] Muhammad Iqbal Yunazwardi and Aulia Nabila. "Implementasi Norma Internasional mengenai Kebebasan Beragama dan Berkeyakinan di Indonesia." , 6 (2021). DOI: https://doi.org/10.14710/IP.V6I1.37510.

[81] Yvonne Tew. "Judicializing Religion." *Constitutional Statecraft in Asian Courts* (2020). DOI: https://doi.org/10.1093/oso/9780198716839.003.0008.

[82] Mohamed Azam Mohamed Adil, Wan Naim Wan Naim Wan Mansor and Azril Mohd Amin. "The Right to Freedom of Religion and Jurisdictional Conflicts in Malaysia." *Journal of Strategic Studies & International Affairs* (2023). DOI: https://doi.org/10.17576/sinergi.0301.2023.06.

[83] D. Shah. "The Law and Politics of Religion and Constitutional Practices in Asia." *Asian Journal of Comparative Law* (2018). DOI: https://doi.org/10.1017/ASJCL.2019.3.

[84] *Ibid.*

customary rights in Sabah and Sarawak) has similarly received judicial recognition despite scant legislation. In landmark cases like *Kerajaan Negeri Selangor v. Sagong Tasi* (2005),[85] Malaysian courts acknowledged indigenous land rights based on customary title, even though the rights were not explicitly detailed in any statute.[86] The judges in Sagong Tasi employed common-law principles to hold that native customary rights form part of the law unless extinguished, thereby infusing a degree of judicial creativity and moral reasoning that a strict positivist might hesitate to apply.[87] Malaysia's judiciary has also grappled with human rights within a positivist frame: the Constitution's fundamental liberties can be limited by parliamentary law, and Malaysian courts traditionally exercised restraint, upholding restrictive laws like the Sedition Act and Internal Security Act as long as procedurally valid.[88] In recent years, however, there has been a slight shift; Malaysian courts have started to apply a more purposive interpretation to rights guarantees, for instance, striking down a total travel ban on a citizen as disproportionate to the aim of the law (the Azmi Sharom case in 2015).[89] Still, Malaysia has notably not ratified the ICCPR, reflecting a state policy of caution towards international human rights treaties. This indicates that the Malaysian legal system addresses rights largely within domestic law channels.[90] The difference with Indonesia is subtle: Malaysia's pluralism is structurally built in (via dual court systems and common-law adjudication that can recognize custom), whereas Indonesia's pluralism (adat law, etc.) has had to fight for acknowledgment against an initially monistic, state-law-only stance.[91]

The Philippines, on the other hand, presents a more rights-forward legal culture while still operating within a positivist, codified system[92]. The Philippines adopts a mixed civil-common law tradition and has a constitution (1987) with an extensive Bill of Rights.[93] Crucially, the Philippine Constitution explicitly adopts generally accepted principles of international law as part of the law of the land, and the Supreme Court has been relatively

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[85] Narayan, A. Indigenous Land Rights and Common Law in Malaysia. Diakses dari http://www.commonlii.org/my/journals/JMCL/2005/3.html. (2005).

[86] Jerald Gomez & Associates. Court of Appeal Affirms Land Belongs to Orang Asli. Diakses dari https://jeraldgomez.com/news/civil/court-of-appeal-affirms-land-belongs-to-orang-asli/#:~:text=Court%20of%20Appeal%20Affirms%20Land,the%20Selangor%20Government%20to. (19 september 2005).

[87] Nurulizwan Ahmad Zubir and Izawati Wook. "Judicial Decisions on Indigenous Peoples' Land Rights: An Appraisal of Its Effect." *JURNAL UNDANG-UNDANG DAN MASYARAKAT* (16 Februari 2006). DOI: https://doi.org/10.17576/juum-2023-33-03.

[88] Yogeswaran Subramaniam and C. Nicholas. "The Courts and the Restitution of Indigenous Territories in Malaysia." *Erasmus law review*, 11 (2018): 67-79. DOI: https://doi.org/10.5553/ELR.000096.

[89] *Op. Cit.*

[90] Kantor Komisaris Tinggi PBB untuk Hak Asasi Manusia (OHCHR), Human Rights Indicators, diakses dari https://indicators.ohchr.org/.

[91] R. Bulan. "THE CIVIL COURTS AND DETERMINATION OF NATIVE CUSTOMARY LAND RIGHTS: MERELY DECLARING OR MAKING LAWS?." , 13 (2019): 1-23. DOI: https://doi.org/10.22452/brj.vol13no1.1.

[92] Surabhi Chopra. "The Constitution of the Philippines and transformative constitutionalism." *Global Constitutionalism*, 10 (2021): 307 - 330. DOI: https://doi.org/10.1017/S2045381721000174.

[93] D. Desierto. "Treaties in the Philippine Constitutional System." *ICL Journal*, 16 (2022): 27 - 134. DOI: https://doi.org/10.1515/icl-2021-0035.

willing to cite international treaties and customary law in its judgments.[94] For example, in *Mejoff v. Director of Prisons* (1949) and subsequent cases, the Philippine Supreme Court referenced the Universal Declaration of Human Rights and other international norms to inform its interpretation of domestic law on due process and liberty.[95] More recently, in cases addressing women's rights and extrajudicial killings, courts have invoked the CEDAW and ICCPR alongside constitutional provisions.[96] The Philippines has also passed legislation aligning with international law, such as the Indigenous Peoples' Rights Act of 1997, which explicitly protects indigenous customary land rights and self-governance.[97] This act effectively incorporates plural legal norms (customs of indigenous communities) into the national legal system, something Indonesia has struggled to do through formal law. When it comes to freedom of expression, the Philippine Supreme Court has struck down provisions that were seen as infringing on speech (for instance, portions of the Cybercrime Prevention Act were invalidated for over-breadth, citing both the Constitution and international free expression standards).[98] That said, the Philippine judiciary is not uniformly activist it often defers to Congress and the text of laws, especially on economic and social policy.[99] But compared to Indonesia, Philippine courts show a greater ease in referencing external sources like foreign jurisprudence or treaties, thereby mitigating some strict positivist limits. This could be attributed to the common law element, which traditionally grants judges a law-making role, and to the strong influence of the U.S. and global human rights norms on the post-Marcos legal order.[100]

Beyond Southeast Asia, international examples further illustrate the trend. European courts and South Africa have demonstrated how moving away from unyielding positivism can rectify injustices. In *Dudgeon v. United Kingdom* (1981), the European Court of Human Rights held that even though Northern Ireland's anti-homosexuality law was validly enacted and thus "*law*" in a positivist sense, it violated fundamental human rights and could not be justified.[101] The decision effectively said that compliance with higher principles of human rights is part of what gives a law its legitimacy a clear counterpoint to the positivist notion

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[94] *Ibid.*

[95] *Ibid.*

[96] Yordan Gunawan and Vensky Ghaniiyyu Putri Permana. "Extrajudicial Killings over the Drug War in the Philippines under the ICC Jurisdiction." *Jurnal Suara Hukum*(2024). DOI: https://doi.org/10.26740/jsh.v6n1.p31-47.

[97] C. Doyle. "The Philippines Indigenous Peoples Rights Act and ILO Convention 169 on tribal and indigenous peoples: exploring synergies for rights realisation." *The International Journal of Human Rights*, 24 (2020): 170 - 190. DOI: https://doi.org/10.1080/13642987.2019.1679120.

[98] Romeo Saliga. "Full Recognition for Indigenous Peoples' Rights in the Philippines: The Case of the Non-Moro Indigenous Peoples in the Bangsamoro and Lessons for Cordillera." (2023). DOI: https://doi.org/10.31752/idea.2023.96.

[99] J. L. Ragragio. "Contentious press freedom: Media law and the Supreme Court in the Philippines." *Media, Culture & Society* (2024). https://doi.org/10.1177/01634437241282238.

[100] *Op. Cit.*

[101] Emese Oláh. "Evolution of the Rights of Sexual Minorities in the Jurisprudence of the European Court of Human Rights." *Perspectives of Law and Public Administration* (2024). DOI: https://doi.org/10.62768/plpa/2024/13/4/14.

that procedure alone suffices.[102] Similarly, South Africa's post-apartheid jurisprudence rejected the idea that duly enacted apartheid laws were beyond question; in *S. v. Makwanyane* (1995), the new Constitutional Court struck down the death penalty, which had been authorized by statute, as unconstitutional.[103] The South African example is especially instructive: under apartheid, a strict application of positivism had upheld racially discriminatory laws because they were made by the competent authority. After 1994, South Africa's legal system pivoted to constitutional supremacy and empowered judges to test every law against fundamental moral-political values (human dignity, equality, etc.). This transformative constitutionalism was essentially a deliberate turn away from positivism's limits. It acknowledges that formal validity cannot excuse substantive injustice.[104] Indonesia's experience has not been as radical, but these global comparators highlight an important lesson a legal system can maintain order and authority and allow judges to enforce overarching principles of justice the two are not mutually exclusive.

In summary, Indonesia's steadfast legal positivism ensures an orderly framework but often at the expense of flexibility and fairness in hard cases.[105] The limitations of this approach manifest in unresolved indigenous claims, constraints on judicial anti-corruption innovation, and slow uptake of human rights norms.[106] Comparative perspectives from within Southeast Asia and beyond reveal that there are viable alternatives and modifications to pure positivism.[107] Malaysia's and the Philippines' experiences show that even in written law systems, courts can play a role in recognizing unwritten norms or rights whether through common law reasoning or robust constitutionalism, thereby better reflecting societal values and justice.[108] They also demonstrate different balances between pluralism and central authority Malaysia leans on plural legal sources but tightly controls rights via statute, while the Philippines leans on constitutional and international principles to broaden rights protections.[109] These differences underscore that Indonesia's heavy reliance on statutory law

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[102] *Ibid.*

[103] M. Sanders. "After the Death Penalty." *Cultural Critique*, 115 (2022): 177 - 185. DOI: https://doi.org/10.1353/cul.2022.0023

[104] Lucky M Mathebe. "The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial Activism." *Journal of Asian and African Studies*, 56 (2021): 18 - 33. DOI: https://doi.org/10.1177/0021909620946848.

[105] Clara Mega Kharisma Sari and Mohammad Jamin. "The Urgency of Expanding Judges' Perspectives to Response of Enactment Adat Law in the Indonesian Criminal Code." *International Journal of Sustainability in Research* (2024). https://doi.org/10.59890/ijsr.v2i4.2256.

[106] Asmadi Lubis, Runtung, Maria Kaban and Edy Ikhsan. "The Development of Recognition and Protection of the Customary Rights of Indigenous Peoples in Indonesia." *KnE Social Sciences* (2024). DOI: https://doi.org/10.18502/kss.v8i21.14717.

[107] Raiz Mukhliz, Azman Aziz, Kata Kunci, Pendekatan Fungsional, Pertikaian Pilihanraya, Semakan Kehakiman and Sistem Perundangan. "ELECTION DISPUTES: A COMPARATIVE ANALYSIS OF THE JUDICIAL REVIEW PROCESS IN MALAYSIA AND INDONESIA." *IIUM Law Journal* (2024). DOI: https://doi.org/10.31436/iiumlj.v32i2.946.

[108] Melissa H. Loja. "Recent engagement with international human rights norms by the courts of Singapore, Malaysia, and Philippines." *International Journal of Constitutional Law* (2021). DOI: https://doi.org/10.1093/ICON/MOAB006.

[109] Lala Anggina Salsabila, Siti Anisah Nasution, Febby Oktavia, Br. Tarigan, Sri Hadiningrum, Jln. Williem, Iskandar

is a policy choice as much as a legacy of its legal tradition.[110]

The comparative and domestic analyses suggest that Indonesia could evolve its legal paradigm without abandoning the foundations of positivism that ensure stability.[111] The goal would be a calibrated system that honors written law and certainty yet grants judges sufficient latitude to interpret and develop law in line with constitutional values, social needs, and international commitments.[112] Practical steps, as discussed, include legislative reforms aligning laws with rights, judicial training on the use of international law, and perhaps formal doctrinal shifts through either jurisprudence or amendment to embed a principle that justice and human rights are integral to the rule of law.[113] By doing so, Indonesia can mitigate the social injustices that arise from rigid application of outdated laws.[114] In an era of democratic consolidation and global interconnectedness, legal reform toward a more flexible, pluralistic rule-of-law system will strengthen Indonesia's judiciary and uphold the credibility of the legal system.[115] Ultimately, the influence of legal positivism on Indonesian law will remain but it need not be an influence that stifles justice.[116] With careful reform, positivism's strength (orderliness) can be retained even as its weaknesses are addressed by incorporating the *"higher law"* of the Constitution and universal human rights into the daily practice of courts.[117]

4. CONCLUSION

Ultimately, Indonesia's strict adherence to legal positivism has underpinned an orderly legal framework but often at the expense of adaptability and substantive justice in its pluralistic society. This tension is evident in three domains accommodating diverse legal norms, enforcing human rights, and combating corruption. In the area of legal pluralism, rigid statutes have marginalized customary *adat* law as seen in unresolved indigenous land claims indicating that formal law should explicitly integrate plural legal sources for example,

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Pasar, Studi Perbandingan, Sistem Peradilan Indonesia and Dan Malaysia. "Studi Perbandingan Sistem Peradilan Indonesia Dan Malaysia." *Doktrin: Jurnal Dunia Ilmu Hukum dan Politik* (2024). DOI: https://doi.org/10.59581/doktrin.v2i2.2515.

[110] *Loc. Cit.*

[111] S ChristinaMayaIndah and T. Prasetyo. "INITIATING LAW REFORM IN INDONESIA (FROM THE DIGNIFIED JUSTICE PERSPECTIVE)." , 3 (2020): 14-25. DOI: https://doi.org/10.30996/jhmo.v3i1.2981.

[112] Aisyah Fitri Kholifah and Farich Johandi Yahya. "LAW ENFORCEMENT IN THE INDONESIAN CONSTITUTIONAL SYSTEM IS IN ACCORDANCE WITH THE LAW THE ENFORCER'S CONSCIENCE." *International Journal of Social Service and Research* (2024). DOI: https://doi.org/10.46799/ijssr.v4i10.1025.

[113] *Op. Cit.*

[114] Fauziah Indriani, Putri Athena Maharani Tanu, Shakila Ayu Dwi Lestari and Stevani Anekhe Dwinita Karo. "Hak Asasi Manusia dalam Sistem Politik Indonesia: Antara Konstitusi dan Realitas." *Demokrasi: Jurnal Riset Ilmu Hukum, Sosial dan Politik* (2024). DOI: https://doi.org/10.62383/demokrasi.v1i3.337.

[115] Alexander Kennedy. "The Role of Indonesian Constitutional Law in Sustaining National Resilience Amid Global Challenges." *Jurnal Lemhannas RI* (2025). DOI: https://doi.org/10.55960/jlri.v12i4.957.

[116] H. Triyana. "Conscientious Objection Before the Indonesian Constitutional Court." *Constitutional Review* (2022). DOI: https://doi.org/10.31078/consrev825.

[117] Nunung Rodliyah, Elfa Murdiana and Ricco Andreas. "Judicial Ijtihad in Religious Courts for Achieving Substantive Justice in Indonesia." *Journal of Law and Regulation Governance* (2025). DOI: https://doi.org/10.57185/jlarg.v2i12.79.

by recognizing indigenous rights in legislation, as the Philippines has done to reconcile state law with social realities. Likewise, positivism's constraints on human rights enforcement illustrated by courts' reluctance to apply international human rights norms without enabling statutes call for aligning domestic laws with constitutional guarantees and treaty obligations, and for empowering judges through training and doctrinal reforms to uphold fundamental rights; comparative experiences in Europe and South Africa show that judicial enforcement of higher rights norms can correct injustices without undermining legal certainty. Finally, in anti-corruption efforts, an overly formalistic approach has enabled technical loopholes that shield offenders, underscoring the need to refine anti-corruption statutes and encourage purposive judicial interpretations so that clear legal standards cannot be manipulated to defeat accountability a strategy consistent with global anti-graft best practices. These reforms, informed by comparative insights from South Africa, Europe, and Southeast Asia, would allow Indonesia to preserve the rule of law's stability while embracing a more pluralistic and rights-oriented paradigm, ultimately creating a legal system that remains certain in its authority yet responsive to justice and societal needs.

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REFERENCE

A. Ridho, I. N. Aen, Ah. Fathonih, A. Ridwan, Nandang Najmudin, Nurol Aen, A. Hasan, Ridwan Dan, Asas Kepastian and H. Keadilan. "ASAS KEPASTIAN HUKUM KEADILAN KEMANFAATAN SERTA PENERAPANNYA DALAM PUTUSAN PENGADILAN TENTANG HAK-HAK ANAK AKIBAT PERCERAIAN." *Equality: Journal of Islamic Law (EJIL)* (2023). https://doi.org/10.15575/ejil.v1i1.482.

Ade Ilyas, Dicky Eko Prasetio and Felix Ferdin Bakker. "MEMBANGUN MORALITAS DAN HUKUM SEBAGAI INTEGRATIVE MECHANISM DI MASYARAKAT DALAM PERSPEKTIF HUKUM PROGRESIF." , 14 (2021). https://doi.org/10.30996/MK.V14I2.4694.

Aisyah Fitri Kholifah and Farich Johandi Yahya. "LAW ENFORCEMENT IN THE INDONESIAN CONSTITUTIONAL SYSTEM IS IN ACCORDANCE WITH THE LAW THE ENFORCER'S CONSCIENCE." *International Journal of Social Service and Research* (2024). https://doi.org/10.46799/ijssr.v4i10.1025.

Alexander Kennedy. "The Role of Indonesian Constitutional Law in Sustaining National Resilience Amid Global Challenges." *Jurnal Lemhannas RI* (2025). https://doi.org/10.55960/jlri.v12i4.957.

Aliansi Masyarakat Adat Nusantara (AMAN). *Berita: Pengakuan Hutan Adat*. Diakses dari https://www.aman.or.id/news/read/1817 (18 Mei 2024).

Aliansi Masyarakat Adat Nusantara (AMAN). *Petition for MK No. 35 Ruling and Indigenous Peoples Bill*. Diakses dari https://www.aman.or.id/petition-for-mk-no-35-ruling-and-indigenous-peoples-bill. (15 April 2025)

Andi Munafri. "DIMENSI KERUGIAN KEUANGAN NEGARA DALAM TINDAK PIDANA KORUPSI." , 9 (2021): 1-17. https://doi.org/10.52103/JMH.V9I1.64.

Andrew Betlehn. "Limitations on Interfaith Marriage Practices in Indonesia According to Human Rights Perspective." *International Journal of Social Science and Human Research* (2022). https://doi.org/10.47191/ijsshr/v5-i4-17.

Angga Alfiyan. "TINJAUAN YURIDIS PUTUSAN MAHKAMAH KONSTITUSI NOMOR 25/PUUXIV/2016 DALAM HAL PERUBAHAN KETENTUAN PASAL 2 DAN 3 UNDANG- UNDANG NOMOR 20 TAHUN 2001 TENTANG TINDAK PIDANA KORUPSI." (2020). https://doi.org/10.31228/osf.io/tja3b.

Arnanda Yusliwidaka, Muhammad Ardhi Razaq Abqa and T. Gunawan. "MEASURING POSITIVISM IN LEGAL SCIENCE AND LEGAL PRACTICE IN INDONESIA." *Journal of Law and Policy Transformation* (2023). https://doi.org/10.37253/jlpt.v7i2.7288. p.75.

Asia Justice and Rights (AJAR), "Indonesia: Second Periodic Review of ICCPR — A Call for

Asmadi Lubis, Runtung, Maria Kaban and Edy Ikhsan. "The Development of Recognition and Protection of the Customary Rights of Indigenous Peoples in Indonesia." *KnE Social Sciences* (2024). https://doi.org/10.18502/kss.v8i21.14717.

Bambang Santoso, M. Rustamaji and I. Kurniawan. "PENGUATAN INSTRUMEN PERLINDUNGAN HAM DALAM PEMBAHARUAN KUHAP UNTUK MEWUJUDKAN CITA NEGARA HUKUM." *Jurnal Hukum Mimbar Justitia* (2023). https://doi.org/10.35194/jhmj.v9i1.3337.

Birgit Daiber. "Court of Justice of the European Union or European Court of Human Rights – Is There a 'Supreme Court of Europe'?." *ICL Journal*, 18 (2024): 109 - 126. https://doi.org/10.1515/icl-2023-0037.

C. Doyle. "The Philippines Indigenous Peoples Rights Act and ILO Convention 169 on tribal and indigenous peoples: exploring synergies for rights realisation." *The International Journal of Human Rights*, 24 (2020): 170 - 190. https://doi.org/10.1080/13642987.2019.1679120.

Cekli S. Pratiwi. "The Permissible Scope of Legal Limitation on Freedom of Religion or Belief (FoRB) and Freedom of Expression (FoE) under International Human Rights Law (IHRL): The Study of Blasphemy Cases in Indonesia." *SSRN Electronic Journal* (2019). https://doi.org/10.2139/SSRN.3312715.

Clara Mega Kharisma Sari and Mohammad Jamin. "The Urgency of Expanding Judges' Perspectives to Response of Enactment Adat Law in the Indonesian Criminal Code." *International Journal of Sustainability in Research* (2024). https://doi.org/10.59890/ijsr.v2i4.2256.

Constitutional Court of the Republic of Indonesia, Decision No. 13/PUU-XV/2017 on the Judicial Review of Law No. 13 of 2003 on Manpower against the 1945 Constitution of the Republic of Indonesia, pronounced on December 14, 2017, 84–85.

D. Desierto. "Treaties in the Philippine Constitutional System." *ICL Journal*, 16 (2022): 27 - 134. https://doi.org/10.1515/icl-2021-0035.

D. Shah. "The Law and Politics of Religion and Constitutional Practices in Asia." *Asian Journal of Comparative Law* (2018). https://doi.org/10.1017/ASJCL.2019.3.

Dominikus Jawa, Parningotan Malau and C. Ciptono. "Tantangan Dalam Penegakan Hukum Tindak Pidana Korupsi Di Indonesia." *JURNAL USM LAW REVIEW* (2024). https://doi.org/10.26623/julr.v7i2.9507.

Dwanda Julisa Sistyawan, Retno Saraswati, Lita Tyesta A.L.W., M. Jayawibawa and Mohammad Syaiful Aris. "THE DEVELOPMENT OF POSITIVISM'S LEGAL THEORY: FROM BENTHAM TO HART." *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH* (2024). https://doi.org/10.22373/petita.v9i2.402.

Elika Manullang, B. N. Sinaga and Kasman Siburian. "Protection Of Human Rights In The Context Of Indonesian Constitutional Law Against The Functions Of State Institutions." *Indonesian Journal of Law and Justice* (2025). https://doi.org/10.47134/ijlj.v2i3.3652.

Emese Oláh. "Evolution of the Rights of Sexual Minorities in the Jurisprudence of the European Court of Human Rights." *Perspectives of Law and Public Administration* (2024). https://doi.org/10.62768/plpa/2024/13/4/14.

Fabrice Tambe Endoh. "Democratic constitutionalism in post-apartheid South Africa: the interim constitution revisited." *Africa Review*, 7 (2015): 67 - 79. https://doi.org/10.1080/09744053.2014.990769.

Fadly Andrianto. "Kepastian Hukum dalam Politik Hukum di Indonesia." , 3 (2020): 114-123. https://doi.org/10.14710/alj.v3i1.114-123.

Faiq Tobroni. "Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/ PUU-X/2012)." *Jurnal Konstitusi* (2016). https://doi.org/10.31078/jk1035.

Faqih Afif Ridlo, Putusan Mahkamah Konstitusi Nomor 13/PUU-XV/2017 tentang Uji Materil Pasal 153 Ayat (1) Huruf F Undang-Undang Nomor 13 Tahun 2003 Ditinjau dari Aspek Keadilan (Undergraduate thesis, Fakultas Syariah dan Hukum, UIN Syarif Hidayatullah Jakarta, 2019), 7–8, pp. 41–44. https://doi.org/10.35877/454RI.kalabbirang15.

Fatkhurohman Fatkhurohman and Nalom Kurniawan. "Pergeseran Delik Korupsi dalam Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016." , 14 (2017): 1-

21. https://doi.org/10.31078/JK1411.

Fauziah Indriani, Putri Athena Maharani Tanu, Shakila Ayu Dwi Lestari and Stevani Anekhe Dwinita Karo. "Hak Asasi Manusia dalam Sistem Politik Indonesia: Antara Konstitusi dan Realitas." *Demokrasi: Jurnal Riset Ilmu Hukum, Sosial dan Politik* (2024). https://doi.org/10.62383/demokrasi.v1i3.337.

Hidaya, Wahab Aznul, et al. *PENGANTAR HUKUM INDONESIA*. CV Rey Media Grafika, 2025.

Hidayat, Muhammad Ridwan, Suteki Suteki, and Jean Claude Geofrey Mahoro. "Legal Wisdom in Indonesian Legal System: Toward Progressive Law Enforcement." *JUSTISI* 10.3 (2024): 518-534. https://doi.org/10.33506/js.v10i3.3198

H L A Hart, Penelope A Bulloch, and Joseph Raz, "THE CONCEPT OF LAW SECOND EDITION With a Postscript Edited by CLARENDON PRESS · OX FORD," 1961. pp. 100-110.

H. P. Wiratraman. "Adat Court in Indonesia's Judiciary System: A Socio-Legal Inquiry." *Journal of Asian Social Science Research* (2022). https://doi.org/10.15575/jassr.v4i1.62.

H. Triyana. "Conscientious Objection Before the Indonesian Constitutional Court." *Constitutional Review* (2022). https://doi.org/10.31078/consrev825.

Hendardi Hendardi. "Prospek dan Tantangan Implementasi ICCPR." *Jurnal Hak Asasi Manusia* (2021). https://doi.org/10.58823/jham.v4i4.43.

Honesty and Accountability on Human Rights," March 18, 2024, accessed March 21, 2025, https://asia-ajar.org/press-release/indonesia-second-periodic-review-of-iccpr-a-call-for-honesty-and accountability-on-human-rights/.asia-ajar.org.

Hukumonline. *Kritik dan Pandangan Hukum Pengampunan Korupsi di Bawah Rp 50 Juta*. Diakses dari https://www.hukumonline.com/berita/a/kritik-dan-pandangan-hukum-pengampunan-korupsi-di-bawah-rp-50-juta-lt61fbb4b09292d/ (3 Februari 2022).

Human Rights Watch. *Indonesia: Submission to UN Human Rights Committee*. Diakses dari https://www.hrw.org/id/news/2024/03/04/indonesia-submission-un-human-rights-committee (2024, Maret 4).

I. Muda. "INTERPRETASI MAHKAMAH KONSTITUSI TERKAIT UJI KONSTITUSIONAL PASAL 66 UNDANG-UNDANG JABATAN NOTARIS." Jurnal Yudisial (2021). https://doi.org/10.29123/JY.V13I3.440.

Ikhda Zikra and Cuong Lan Minh. "Participation of Judicial Decisions as The Form of The Implementation of Moral Values in Case Statement Based on Rechtvinding Activities and Negative Wetjlike Theorie." *Contemporary Issues on Interfaith Law and Society* (2022). https://doi.org/10.15294/ciils.v1i1.56714.

Ikhsan, Muhibbul, Wahab Aznul Hidaya, and Muharuddin Muharuddin. "Enforcement of Criminal Sanctions Against Trafficking of Protected Wildlife in Sorong City." *Journal of Law Justice (JLJ)* 3.1 (2025): 63-72. https://doi.org/10.33506/jlj.v3i1.3836

Isroni Muhammad Miraj Mirza, R. Natamiharja and Jalil Alejandro Magaldi Serna. "Social

Transformation of International Human Rights Law Through Indonesian Constitutional Court." *Uti Possidetis: Journal of International Law* (2023). https://doi.org/10.22437/up.v4i3.25721.

J. L. Ragragio. "Contentious press freedom: Media law and the Supreme Court in the Philippines." *Media, Culture & Society* (2024). https://doi.org/10.1177/01634437241282238.

J. Zaman, Achmad Khudori Sholeh, Fadil Fadil, Nor Salam and Aina Sofea Binti Ros Azman. "The Influence of Positivism and Empirism in The Enforcement of Islamic Inheritance Law in Indonesia." *Substantive Justice International Journal of Law* (2024). https://doi.org/10.56087/substantivejustice.v7i1.267.

Jefri Hardi. "Determination Authority of State Financial Loss in Criminal Acts of Corruption Post Constitutional Court Decision Number 25/Puu-Xiv/2016." *International Journal of Social Science And Human Research* (2022). https://doi.org/10.47191/ijsshr/v5-i1-13.

Jerald Gomez & Associates. Court of Appeal Affirms Land Belongs to Orang Asli. Diakses dari https://jeraldgomez.com/news/civil/court-of-appeal-affirms-land-belongs-to-orang-asli/#:~:text=Court%20of%20Appeal%20Affirms%20Land,the%20Selangor%20Government%20to. (19 september 2005).

Kantor Komisaris Tinggi PBB untuk Hak Asasi Manusia (OHCHR), Human Rights Indicators, diakses dari https://indicators.ohchr.org/.

L. Husen, Andi Ifal Anwar, Sufirman Rahman and M. K. Hidjaz. "Implementation of Legal Guarantees for Human Rights Protection in Indonesia." *Journal of Law and Sustainable Development* (2023). https://doi.org/10.55908/sdgs.v11i4.624.

Lala Anggina Salsabila, Siti Anisah Nasution, Febby Oktavia, Br. Tarigan, Sri Hadiningrum, Jln. Williem, Iskandar Pasar, Studi Perbandingan, Sistem Peradilan Indonesia and Dan Malaysia. "Studi Perbandingan Sistem Peradilan Indonesia Dan Malaysia." *Doktrin: Jurnal Dunia Ilmu Hukum dan Politik* (2024). https://doi.org/10.59581/doktrin.v2i2.2515.

Lolita Permanasari. "LEGAL ANALYSIS OF INTERFAITH MARRIAGE IN INDONESIA." *Journal Of Law Theory And Law Enforcement* (2023). DOI: https://doi.org/10.56943/jlte.v2i1.282.

Lucky M Mathebe. "The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial Activism." *Journal of Asian and African Studies*, 56 (2021): 18 - 33. https://doi.org/10.1177/0021909620946848.

Luthfi Widagdo Eddyono. "The Constitutional Court and Consolidation of Democracy in Indonesia." , 15 (2018): 1-26. https://doi.org/10.31078/JK1511.

M. Sanders. "After the Death Penalty." *Cultural Critique*, 115 (2022): 177 - 185. https://doi.org/10.1353/cul.2022.0023

M.Saleh. "Eksistensi Masyarakat Hukum Adat Dalam Pengelolaan Hutan Prespektif Undang-

Udang N0mor 41 Tahun 1999." *JATISWARA* (2017). https://doi.org/10.29303/jtsw.v26i2.12.

Mahesa Rannie. "KEDUDUKAN KOMISI PEMBERANTASAN KORUPSI DALAM SISTEM KETATANEGARAAN INDONESIA." *Lex Librum : Jurnal Ilmu Hukum* (2021). https://doi.org/10.46839/LLJIH.V7I2.384.

Mahkamah Konstitusi Republik Indonesia. *Putusan Mahkamah Konstitusi*. Diakses dari https://www.mkri.id/index.php?id=21532&menu=2&page=web.Berita (2 September 2024).

Mashendra Mashendra. "Perampasan Aset Korupsi Dalam Upaya Pemberantasan Tindak Pidana Korupsi Menurut Hukum Pidana Indonesia." , 8 (2020): 37-56. https://doi.org/10.36090/JH.V8I1.

Melissa H. Loja. "Recent engagement with international human rights norms by the courts of Singapore, Malaysia, and Philippines." *International Journal of Constitutional Law* (2021). https://doi.org/10.1093/ICON/MOAB006.

Mohamed Azam Mohamed Adil, Wan Naim Wan Naim Wan Mansor and Azril Mohd Amin. "The Right to Freedom of Religion and Jurisdictional Conflicts in Malaysia." *Journal of Strategic Studies & International Affairs* (2023). https://doi.org/10.17576/sinergi.0301.2023.06.

Muhammad Iqbal Yunazwardi and Aulia Nabila. "Implementasi Norma Internasional mengenai Kebebasan Beragama dan Berkeyakinan di Indonesia." , 6 (2021). https://doi.org/10.14710/IP.V6I1.37510.

Muhammad Johan, A. Putra, Firman Freaddy, Marsudi Busroh, Utoyo Mahasiswa, P. Pasca, S. S. -. Sumpah, Pemuda, Kata Kunci, Analisa Hukum, Implementasi Putusan, Mahkamah Muhammad, Johan Aria Putra, Utoyo, Sekretariat Jenderal, Kepaniteraan, Mahkamah Konstitusi.hlm, 152-153,

Jimly Asshiddiqie, "Sejarah Constituional, Review dan, Gagasan Pembentukan and Mahkamah Konstitusi. "ANALISA HUKUM IMPLEMENTASI PUTUSAN MAHKAMAH KONSTITUSI NOMOR : 65/PUU-VIII/2010 DIHUBUNGKAN KEABSAHAN PEMBUKTIAN SAKSI TESTIMONIUM DE AUDITU DALAM PERISTIWA PIDANA DAN KITAB UNDANG-UNDANG HUKUM ACARA PIDANA." *Lexstricta : Jurnal Ilmu Hukum* (2023). https://doi.org/10.46839/lexstricta.v1i3.15.

Muslihun Muslihun. "Legal Positivism, Positive Law, and the Positivisation of Islamic Law In Indonesia." , 22 (2018): 77-95. https://doi.org/10.20414/ujis.v22i1.305.

Muslim Mamulai. "Eksistensi Komisi Yudisial Republik Indonesia dalam Menciptakan Hakim Agung Yang Berkualitas dan Berintegritas." *Kalabbirang Law Journal* (2019). https://doi.org/10.35877/454ri.kalabbirang15.

Narayan, A. Indigenous Land Rights and Common Law in Malaysia. Diakses dari http://www.commonlii.org/my/journals/JMCL/2005/3.html. (2005).

Naufal Ariq Aisy and Fifiana Wisnaeni. "The Position of Moral Status in the Legal System in Indonesia and Its Practices in the Justice System." *International Journal of Social*

Science and Human Research (2025). https://doi.org/10.47191/ijsshr/v8-i1-68.

Nunung Rodliyah, Elfa Murdiana and Ricco Andreas. "Judicial Ijtihad in Religious Courts for Achieving Substantive Justice in Indonesia." *Journal of Law and Regulation Governance* (2025). https://doi.org/10.57185/jlarg.v2i12.79.

Nurrohim Yunus and Refly Setiawan. "THE ENFORCEMENT OF HUMAN RIGHTS IN THE CONSTITUTION OF THE REPUBLIC OF INDONESIA." *EL-SIYASA: JOURNAL OF CONSTITUTIONAL LAW* (2024). https://doi.org/10.61341/el-siyasa/v1i2.007.

Nurulizwan Ahmad Zubir and Izawati Wook. "Judicial Decisions on Indigenous Peoples' Land Rights: An Appraisal of Its Effect." *JURNAL UNDANG-UNDANG DAN MASYARAKAT* (16 Februari 2006). https://doi.org/10.17576/juum-2023-33-03.

O. Agustine, S. Harijanti, Indra Perwira and Wida Wulandari. "Constitutional review of criminal norms: does Indonesia need judicial activism?." *The International Journal of Human Rights*, 27 (2023): 772 - 788. https://doi.org/10.1080/13642987.2023.2185608.

Pandapotan Damanik. "Strengthening Land Law Reforms through Legal Pluralism in Indonesia." *Rechtsidee*(2023). https://doi.org/10.21070/jihr.v12i2.993.

R. Bulan. "THE CIVIL COURTS AND DETERMINATION OF NATIVE CUSTOMARY LAND RIGHTS: MERELY DECLARING OR MAKING LAWS?." , 13 (2019): 1-23. https://doi.org/10.22452/brj.vol13no1.1.

R. Kristianto, M. Candra and Yanto Yanto. "Rekontruksi Penggunaan Teori Positivisme Hukum dalam Penegakan Tindak Pidana Korupsi di Indonesia." *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga* (2023). https://doi.org/10.47467/as.v6i1.5838.

Rahayu Prasetianingsih. "JUDICIAL ACTIVISM IN INDONESIA." *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH* (2020). https://doi.org/10.22373/petita.v5i2.106.

Rahmawati Prihastuty. "Philosophical Study of Hans Kelsen's Thoughts on Law and Satjipto Rahardjo's Ideas on Progressive Law." (2020).

Raiz Mukhliz, Azman Aziz, Kata Kunci, Pendekatan Fungsional, Pertikaian Pilihanraya, Semakan Kehakiman and Sistem Perundangan. "ELECTION DISPUTES: A COMPARATIVE ANALYSIS OF THE JUDICIAL REVIEW PROCESS IN MALAYSIA AND INDONESIA." *IIUM Law Journal* (2024). https://doi.org/10.31436/iiumlj.v32i2.946.

Raju Moh Hazmi, A. Jahar and Nurul Adhha. "Construction of Justice, Certainty, and Legal Use in the Decision of the Supreme Court Number 46 P/HUM/2018.." *Jurnal Cita Hukum*, 9 (2021). https://doi.org/10.15408/JCH.V9I1.11583.

Republic of Indonesia, The 1945 Constitution of the Republic of Indonesia, Article 18B(2).

Romeo Saliga. "Full Recognition for Indigenous Peoples' Rights in the Philippines: The Case of the Non-Moro Indigenous Peoples in the Bangsamoro and Lessons for Cordillera." (2023). https://doi.org/10.31752/idea.2023.96.

Roro Hanum Hanum, Elfa Murdiana and R. Bahari. "Kedudukan Peraturan Pemerintah Pengganti Undang-Undang di Tinjau Dari Hierarki Perundang-Undangan Indonesia." *Siyasah Jurnal Hukum Tatanegara* (2023).

https://doi.org/10.32332/siyasah.v3i2.8090.

S ChristinaMayaIndah and T. Prasetyo. "INITIATING LAW REFORM IN INDONESIA (FROM THE DIGNIFIED JUSTICE PERSPECTIVE)." , 3 (2020): 14-25. https://doi.org/10.30996/jhmo.v3i1.2981.

S. Butt. "The Function of Judicial Dissent in Indonesia's Constitutional Court." *Constitutional Review* (2018). https://doi.org/10.31078/consrev411.

S. Suparto. "KEDUDUKAN DAN PROSES PENETAPAN HUTAN ADAT PASCA PUTUSAN MAHKAMAH KONSTITUSI NO. 35/PUU-X/2012 SERTA IMPLEMENTASINYA DI PROVINSI RIAU." , 5 (2021): 198-214. https://doi.org/10.24970/BHL.V5I2.171.

Saru Arifin. "The Meaning and Implication of ICCPR Ratification to Religious Freedom in Indonesia." (2018): 193-198. https://doi.org/10.2991/ICLJ-17.2018.40.

Surabhi Chopra. "The Constitution of the Philippines and transformative constitutionalism." *Global Constitutionalism*, 10 (2021): 307 - 330. https://doi.org/10.1017/S2045381721000174.

Syofyan Hadi. "The Influence of Theorie Von Stufenbau Der Rechtsordnung in the Indonesian Legal System." *DiH: Jurnal Ilmu Hukum* (2024). https://doi.org/10.30996/dih.v20i2.10989.

Triwahyuningsih Triwahyuningsih. "Emancipatory Of Legal Transendency In Indonesia: Study Of Moral Aspects In The Making Of Laws And Regulations In Indonesia." , 1 (2019): 124-146. https://doi.org/10.23917/jtl.v1i2.9132.

Venna Melinda. "KESESUAIAN PENANGANAN PERKARA OLEH HAKIM MAHKAMAH AGUNG PADA PUTUSAN NOMOR 1975 K/PID.SUS/2018 DENGAN KETENTUAN PASAL 253 KITAB UNDANG-UNDANG HUKUM ACARA PIDANA." *Verstek* (2021). https://doi.org/10.20961/jv.v9i3.55062.

Warih Anjari. "Kedudukan Asas Legalitas Pasca Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006 dan 025/PUU-XIV/2016." *Jurnal Konstitusi* (2019). https://doi.org/10.31078/JK1611.

Winda Wijayanti and Alboin Pasaribu, "Constitutionality of Marital Tie between Fellow Co-worker after Decision of the Constitutional Court," Jurnal Konstitusi 17, no. 3 (September 2020): pp. 646–647, https://doi.org/10.31078/jk1738.

Wiratraman, Herlambang P. "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics." *Federal Law Review* 50, no. 3 (2022): 314–30. https://doi.org/10.1177/0067205X221107404.

Wisnu Aryo Dewanto. "Penerapan Perjanjian Internasional di Pengadilan Nasional: Sebuah Kritik terhadap Laporan Delegasi Republik Indonesia kepada Komite Hak Asasi Manusia Perserikatan Bangsa Bangsa tentang Implementasi Kovenan Internasional tentang Hak-hak Sipil dan Politik..." , 1 (2014): 57-77. https://doi.org/10.22304/PJIH.V1N1.A4.

Yogeswaran Subramaniam and C. Nicholas. "The Courts and the Restitution of Indigenous Territories in Malaysia." *Erasmus law review*, 11 (2018): 67-

79. https://doi.org/10.5553/ELR.000096.

Yordan Gunawan and Vensky Ghaniiyyu Putri Permana. "Extrajudicial Killings over the Drug War in the Philippines under the ICC Jurisdiction." *Jurnal Suara Hukum*(2024). https://doi.org/10.26740/jsh.v6n1.p31-47.

Yvonne Tew. "Judicializing Religion." *Constitutional Statecraft in Asian Courts* (2020). https://doi.org/10.1093/oso/9780198716839.003.0008.