The 2nd Proceeding
“Indonesia Clean of Corruption in 2020”

"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"

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# TABLE OF CONTENTS

Front Page ....................................................................................................................... i
Information of the International Seminar ................................................................. ii
Committee Composition ................................................................................................. iii
Preface .............................................................................................................................. iv
Greeting From The Dean Faculty of Law ................................................................. vi

**INDONESIA’S KPK AND NSW’S ICAC: COMPARISONS AND CONTRASTS**
Prof. Simon Butt .............................................................................................................. 1

**CAN INDONESIA FREE ITSELF FROM CORRUPTION IN 2020?**
Prof. Dr. Hikmahanto.,S.H.,LLM .................................................................................. 4

**AN ACT TO ESTABLISH THE ANTI-CORRUPTION AGENCY, TO VEST POWERS ON OFFICERS OF THE AGENCY AND TO MAKE PROVISIONS CONNECTED THEREWITH.**
Rohimi Shapiee ............................................................................................................. 7

**STRATEGY TO CREATE INDONESIA FREE CORRUPTION IN 2020**
Dr. Jawade Hafidz, S.H., M.H ....................................................................................... 11

**THE NETHERLANDS INGLOBAL CORRUPTION**
Siti Malikah Marlou Feer, M.A. ..................................................................................... 28

**ROBUST YET FRAGILE: EFFORTS IN COMBATING CORRUPTION IN INDONESIA**
Laras Susanti.,S.H., LLM .............................................................................................. 33

**LEGAL STATUS OF AKTOR’S FOR CORRUPTION (In the Perspective of Islamic Law)**
Sumarwoto Umar ......................................................................................................... 37

**THE ROLE OF LAW IN THE POVERTY REDUCTION STRATEGY**
Lantik Kusuma Aji ......................................................................................................... 46

Khalid ............................................................................................................................. 55

**THE URGENCY OF ANTI CORRUPTION EDUCATION FOR COLLEGES IN INDONESIA**
Siska Diana Sari ............................................................................................................. 62

**THE PROBLEMS OF DIVORCE IN CUMULATION AT THE RELIGIOUS COURTS BASED ON THE PRINCIPLES OF SIMPLE, FAST AND LOW COST**
Elis Rahmahwati ........................................................................................................... 78

**DISPARITIES DECISION RELATED TO INTERPRETATION OF ARTICLE 2 AND 3 CORRUPTION ERADICATION ACT**
Agung Widodo ............................................................................................................... 87

**DIVERSITY ADULT AGE LIMITS POSITIVE LAW IN INDONESIA (Studies in Multidisciplinary Perspective)**
Muhammad Andri .......................................................................................................... 102
THE APPLICATION OF BALANCE IDEA IN SETTLEMENT
OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION
Yati Nurhayati ............................................................................................................. 111

MODERNIZATION LAW AS A CRIME CORRUPTION VERY EXCEPTIONAL
THROUGH ENFORCEMENT OF ETHICS
Dr. Sukresno, SH, M.Hum .......................................................................................... 118

CORRUPTION POTENCIES IN LAND USE POLICY
(A Case Study in Kuningan Regency)
Haris Budiman ........................................................................................................... 126

CORRUPTION PREVENTION AND CONTROLS
INP Budiartha ............................................................................................................. 133

ISLAMIC LAW VALUES TRANSFORMATION IN THE RECONSTRUCTION
OF THE LEGALITY PRINCIPLE OF INDONESIAN CRIMINAL CODE
Sri Endah Wahyuningsih .............................................................................................. 145

JUSTICE AND CHARITY IN JAKARTA'S NORTH COAST RECLAMATION PROCESS
THAT WILL LEAD TO INDONESIA CLEAN OF CORRUPTION
Untoro ......................................................................................................................... 155

CORRUPTION CRIMINAL SANCTIONS WITH VALUES OF JUSTICE-BASED
Zulfiani ......................................................................................................................... 162

THE REFLECTION OF ISLAMIC BANKING IN THEORY AND PRACTICE
Anis Mashudurohatun ................................................................................................. 171

THE IMPLEMENTATION OF LOCAL WISDOM SIRI’NA PACCE AS AN EFFORT
OF CORRUPTION ERADICATION IN INDONESIA
Muh. Afif Mahfud ........................................................................................................ 181

DISCOURSE POLITICAL LAW IN INDONESIA
ON A COMPLETATION OF PLATO PHILOSOPHY
Adrianus M. Nggoro, SH, M.Pd .................................................................................. 189

STUDY OF INDONESIA'S PARTICIPATION IN ICSID
Agus Saiful Abib .......................................................................................................... 202

NOTARY ROLE IN THE IMPLEMENTATION OF EXECUTION PROCUREMENT
OF GOODS AND SERVICES ARE FREE OF CORRUPTION BASED
ON THE PRINCIPLE OF GOOD GOVERNANCE
Aris Yulia .................................................................................................................... 211

ANALYSIS WIRETAPPING AUTHORITY UPPER KPK LAW ENFORCEMENT
IN THE PERSPECTIVE OF HUMAN RIGHTS
Ariyanto, SH, MH ....................................................................................................... 221

SOCIAL WORKING PENALTY AS SOLUTION
IN ERADICATING CORRUPTION IN INDONESIA
Desy Maryani .......................................................................................................... 232

LEGAL POLITICSOF EMPLOYMENT IN TERM OF PART OF TASK HANDBOVER
TO OTHER COMPANIES IN INDONESIA
Endah Pujianti ........................................................................................................... 244
<table>
<thead>
<tr>
<th>Title</th>
<th>Author(s)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>RESOLUTION OF DISPUTES OF OUTSOURCING WORK FORCE IN THE COMPANY EMPLOYING OUTSOURCING SERVICE</td>
<td>Pupu Sriwulan Sumaya ........................................................................</td>
<td>256</td>
</tr>
<tr>
<td>THE APPLICATION OF CORRUPTION LAW TO WARD CRIMINAL ACT IN THE FIELD OF FORESTRY</td>
<td>Ifrani ..................................................................................................</td>
<td>267</td>
</tr>
<tr>
<td>THE EFFORTS OF ERADICATING CORRUPTION THROUGH INSTRUMENTS OF MONEY LAUNDERING LAW AND RETURN ACTORS’ ASSETS</td>
<td>Yasmirah Mandasari Saragih ..................................................................</td>
<td>276</td>
</tr>
<tr>
<td>AFFIRM ROLE OF EXISTENCE RECHTSVERWERKING TO ACHIEVING LEGAL CERTAINTY IN LAND REGISTRATION</td>
<td>Rofiq laksamana, Setiono, I Gusti Ayu Ketut Rachmi Handayani, Oloan Sitorus</td>
<td>287</td>
</tr>
<tr>
<td>ANTI-CORRUPTION EDUCATION AT AN EARLY AGE AS A STRATEGIC MOVE TO PREVENT CORRUPTION IN INDONESIA</td>
<td>Ida Musofiana ......................................................................................</td>
<td>304</td>
</tr>
<tr>
<td>FREED INDONESIA’S CORRUPTION BETWEEN HOPE AND REALITY</td>
<td>Dr. Tongat, SH., MHum., Said Noor Prasetyo, SH., MH ........................................</td>
<td>313</td>
</tr>
<tr>
<td>UTILIZATION OF INDONESIA MARINE RESOURCES IN AN EFFORT TO REALIZE INDONESIA TO WARD THE SHAFT OF THE MARITIME WORLD</td>
<td>Dr. Lathifah Hanami, SH.M.Hum., M.Kn. and Letkol (mar) MS. Noorman, S. Sos., M.Opsla</td>
<td>319</td>
</tr>
<tr>
<td>POTENTIAL CORRUPTION IN THE VALIDATION POLICIES ON ACQUISITION TAX OF LAND AND OR BUILDING</td>
<td>Lilik Warsito ......................................................................................</td>
<td>325</td>
</tr>
<tr>
<td>THE EFFORT OF LAW ENFORCEMENT IN COMBATING CORRUPTION IN SOUTH SUMATERA</td>
<td>Sri Suatmiati ......................................................................................</td>
<td>334</td>
</tr>
<tr>
<td>ETHICAL PERSPECTIVE AND THE MAPPING OF NORM IN CORRUPTION ACT</td>
<td>Siti Zulaekkah ..................................................................................</td>
<td>344</td>
</tr>
<tr>
<td>AN EXPANSION OF CONCEPT THE STATE ECONOMIC LOSS IN CORRUPTION IN INDONESIA</td>
<td>Supriyanto, Hartwiningsih, Supanto ........................................................</td>
<td>354</td>
</tr>
<tr>
<td>JURIDICAL STUDIES ON SUBSTANCES AND PROCEDURE OF THE DISMISSAL OF THE PRESIDENT AND/OR VICE-PRESIDENT AFTER THE REFORMATION</td>
<td>Siti Rodhiyah Dwi Istinah .....................................................................</td>
<td>364</td>
</tr>
<tr>
<td>THE ROLE OF THE SHARIA SUPERVISORY BOARD IN THE FRAMEWORK ENFORCING SHARIA PRINCIPLES AT THE INSTITUTE OF ISLAMIC BANKING IN SEMARANG</td>
<td>Aryani Witasari ..................................................................................</td>
<td>376</td>
</tr>
<tr>
<td>SEMARANG CITY GOVERNMENT ROLE IN CONSERVATION AND ENVIRONMENTAL PROTECTION TO THE CAPITAL OF THE NATIONAL HERITAGE IN INDONESIA</td>
<td>Achmad J Pamungkas (Indonesia), Carlito Da Costa (Timor Leste)</td>
<td>390</td>
</tr>
</tbody>
</table>
STUDYING THE WISDOM OF ZAKAT
Moch. Gatot Koco (Indonesia), Basuki R Suratno (Australia) ........................................... 398

HOMOLOGATION RECONSTRUCTION IN BANKRUPTCY THAT IS BASED ON
DIGNIFIED JUSTICE
Agus Winoto .................................................................................................................... 410

RECONSTRUCTION OF EXECUTIVE AND LEGISLATIVE AUTHORITY
IN MAKING GOOD GOVERNANCE (GOOD GOVERNANCE) VALUES BASED ON
WELFARE
Mohamad Khamim ........................................................................................................ 420

THE TASK RECONSTRUCTION AND BPKP’S AUTHORITY IN THE CASE
OF JUSTICE VAUE BASED CORRUPTION
Sarbudin Panjaitan ........................................................................................................ 429

THE RECONSTRUCTION OF MADLIYAH AND IDDAH MAINTENANCE
AND MUT’AH IN DIVORCE CASE FOR JUSTICE AND WELFARE
Mustar ............................................................................................................................ 438

JURIDICAL ANALYSIS OF THE ALLEGED CRIMINAL OFFENSE TO MANUFACTURE
A NOTARY DEED
Subiyanto ........................................................................................................................ 446

REVITALIZATION DEAL IN AKAD HYBRIDS IN SHARIA BANKING VALUE BASED
ISLAMIC JUSTICE
Masduqi ............................................................................................................................ 452

RECONSTRUCTION OF LEGAL PROTECTION DISTRICT HEAD IN THE ELECTION
IMPLEMENTATION OF VALUE-BASED JUSTICE
Kukuh Sudarmanto Alugoro ............................................................................................ 462

ABUSE OF AUTHORITY OFFENSE THEOLOGICAL RECONSTRUCTION LAW
ERADICATION OF CORRUPTION (LAW NUMBER 31 OF 1999
JO. LAW NUMBER 20 OF 2001) BASED ON VALUE OF JUSTICE
As’adi M. Al-ma’ruf ........................................................................................................ 472

RECONSTRUCTION OF THE DAILY PAID WORK AGREEMENT IN THE EMPLOYMENT
LAW BASED ON JUSTICE
Christina N M Tobing ..................................................................................................... 479

THE LAW AND THE IMPACT OF MARRIAGE SIRRI
Sahal Afhami .................................................................................................................... 489

CRIMES AGAINST CHILDREN AS ACTORS
Muhammad Cholil ........................................................................................................... 503

RECONSTRUCTION OF CRIMINAL PROCEDURAL LAW
(KUHAP) ABOUT THE DETENTION
Muhammad Khambali .................................................................................................... 512
BASED ON JUSTICE
PROBLEMS OF DISPUTE RESOLUTION REGIONAL CHIEF ELECTION (GOVERNOR, REGENTS AND MAYOR)
Esti Ningrum ................................................................. 520

RECONSTRUCTION REGIONAL MINIMUM WAGE (UMR) IN RENEWAL OF EMPLOYMENT LEGAL REMEDIES BASED INDONESIA THE VALUE JUSTICE PANCASILA
Urip Giyono ........................................................................... 531

IMPLEMENTATION OF LAW AS TO MAINTAIN SECURITY IN THE CONTEXT OF PROFESSIONAL POLICE POLMAS (CASE STUDY IN LAMPUNG POLICE)
Muhammad Yaman ............................................................... 539

RECONSTRUCTION OF CRIMINAL SANCTIONS PENAL CODE ACTORS ON ABORTION CRIME BASED ON THE VALUE OF JUSTICE
Hanuring Ayu Ardhani Putri ........................................................... 549

REGISTRATION FIDUCIARY GUARANTEE REALIZE LEGAL PROTECTION OF CREDITORS AND DEBTOR
Ansharullah Ida ........................................................................... 556

RECONSTRUCTION OF LEGAL DISPUTES MEDIATION IN HEALTH CARE FOR PATIENTS HOSPITAL BASED ON THE VALUE OF JUSTICE
Teguh Anindito ......................................................................... 569

RECONSTRUCTION OF CRIMINAL SANCTIONS AGAINST CRIME OF ACTORS AND MURDER MURDER IN PLAN BASED ON VALUE OF JUSTICE CRIMINAL CODE
Maria Marghareda Titiiek Pudji Angesti Rahayu Teguh Anindito ................................................................. 579

IMPLEMENTATION OF PENAL MEDIATION IN CRIMINAL LAW
Aji Sudarmaji ........................................................................... 587

FAIR SETTLEMENT RECONSTRUCTION OF PROBLEMATIC CREDIT DISPUTE AT BANK RAKYAT INDONESIA (STUDY CASE AT MEDAN-SINGAMANGARAJA BRI BRANCH OFFICE)
Bachtiar Simatupang ................................................................... 594

RECONSTRUCTION OF THE WASTE MANAGEMENT LAW BASED ON WELFARE VALUE
M. Hasyim Muallim .................................................................. 616

RECONSTRUCTION LAW OF PUNISHMENT AGAINST CHILDREN NARCOTICS ABUSE-BASED PROGRESSIVE LAW
Salomo Ginting .......................................................................... 625

LEGAL PROTECTION PROBLEM OF WIFE AND CHILDREN OF POLYGAMY SIRRI IN INDONESIA
Muhas ....................................................................................... 639

"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"
<table>
<thead>
<tr>
<th>Title</th>
<th>Author(s)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>IDEAL RECONSTRUCTION OF REHABILITATION PUNISHMENT FOR NARCOTICS</td>
<td>Ahmad Zaini</td>
<td>648</td>
</tr>
<tr>
<td>ADDICTS AND ABUSER’S VICTIMS JUSTIFIED BASED ON THE LAW OF THE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>REPUBLIC OF INDONESIA NO. 35 YEAR 2009 (CASE STUDY IN SUMATERA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UTARA PROVINCE)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>IMPLEMENTATION OF ACCELERATION SYSTEMATIC LAND REGISTRATION FULL</td>
<td>Ruslan</td>
<td>658</td>
</tr>
<tr>
<td>IN HUMBANG HASUNDUTAN DISTRICT</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RECONSTRUCTION OF STATUS AND AUTHORITY OF THE SHARIA COURT IN THE</td>
<td>Jufri Ghalib</td>
<td>667</td>
</tr>
<tr>
<td>NATIONAL JUDICIAL SYSTEM BASED ON JUSTICE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RECONSTRUCTION OF LIABILITY NOTARY PUBLIC OFFICERS TO ACT AS A</td>
<td>Elpina</td>
<td>679</td>
</tr>
<tr>
<td>VALUE-BASED JUSTICE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RECONSTRUCTION OF CONSUMER PROTECTION LAW IN MAKING THE BALANCE</td>
<td>Ramon Nofrial</td>
<td>693</td>
</tr>
<tr>
<td>BUSINESS BASED BUSINESS AND CONSUMER VALUE OF JUSTICE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RECONSTRUCTION OF LAND USED RIGHT EIGENDOM VALUES BASED ON JUSTICE</td>
<td>Hakim Tua Harahap</td>
<td>706</td>
</tr>
<tr>
<td>AND LEGAL CERTAINTY</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RECONSTRUCTION OF DIVERSION CONCEPT IN CHILD PROTECTION OF CONFLICT</td>
<td>Ulina Marbun</td>
<td>726</td>
</tr>
<tr>
<td>WITH THE LAWS BASED ON THE VALUE OF JUSTICE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RECONSTRUCTION OF PARATE EXECUTION MORTGAGE RIGHTS TO LAND BASED ON</td>
<td>Zaenal Arifin</td>
<td>740</td>
</tr>
<tr>
<td>THE VALUE OF JUSTICE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>THE RECONSTRUCTION OF DIVORCE DUE TO MARITAL STATUS UNDER THE</td>
<td>Abdul Kholiq</td>
<td>751</td>
</tr>
<tr>
<td>UNAUTHORIZED GUARDIAN AS VALUE OF JUSTICE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>THE RECONSTRUCTION OF LEGAL AID LAW FOR CHILDREN WHO GET CONFLICT</td>
<td>Adi Mansar</td>
<td>767</td>
</tr>
<tr>
<td>WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON THE VALUE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OF PANCASILA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE SETTLEMENT OF</td>
<td>Mariah S.M. Purba</td>
<td>778</td>
</tr>
<tr>
<td>DECLINE IN THE COURTS BASED ON THE VALUE OF JUSTICE (Study at the</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Simalungun District Court)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>POLYGAMIC POLICY IN INDONESIA (Analysis of Polygamic Arrangements</td>
<td>Warman</td>
<td>790</td>
</tr>
<tr>
<td>Title</td>
<td>Author(s)</td>
<td>Page</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>LAW ENFORCEMENT AGAINST CORRUPTION IN PERSPECTIVE OF HUMAN RIGHTS IN INDONESIA</td>
<td>Sekhroni</td>
<td>798</td>
</tr>
<tr>
<td>THE PRINCIPLE OF NATURAL JUSTICE AND HUMAN’S RIGHT PROTECTION FOR CITIZENS IN ERADICATION OF CORRUPTION IN INDONESIA</td>
<td>Indriyana Dwi Mustikarini</td>
<td>809</td>
</tr>
<tr>
<td>PREVENTING LAND MAFIA USING POSITIVE LAND REGISTRY SYSTEM</td>
<td>Bambang Sulistyo Widjanarko</td>
<td>816</td>
</tr>
<tr>
<td>UNRULY PASSENGER IN AVIATION: THE REGULATIONS AND CASES IN INDONESIA</td>
<td>Adya Paramita Prabandari</td>
<td>826</td>
</tr>
<tr>
<td>EDUCATION ANTI-CORRUPTION IN INDONESIA: PROBLEMS, CHALLENGES AND SOLUTIONS</td>
<td>Alwan Hadiyanto</td>
<td>839</td>
</tr>
<tr>
<td>SPIRITUAL URGENCY OF RELIGIOUS AND EXPENSES OF EVIDENCE IN COMBATING CORRUPTION IN INDONESIA</td>
<td>Sulistyowati</td>
<td>852</td>
</tr>
<tr>
<td>SUE FOR THE STATE ADMINISTRATION OF JUSTICE IN INDONESIA</td>
<td>Sarjiyati</td>
<td>863</td>
</tr>
<tr>
<td>CONSISTENCY MODEL OF COURT DESIGNATION TO FOSTER PARENT RIGHTS AUTHORITY DUE TO DIVORCE ON CHILDREN</td>
<td>Erna Trimartini</td>
<td>873</td>
</tr>
<tr>
<td>AN INVESTIGATION AUTHORITY OF CRIMINAL ACT ON CORRUPTION IN CRIMINAL JUSTICE SYSTEM IN INDONESIA</td>
<td>Sukmareni</td>
<td>885</td>
</tr>
<tr>
<td>PRO CONS THE EXISTENCE OF DEATH PENALTY IN CORRUPTION ACT OF 1999 IN INDONESIA</td>
<td>Anis Rifai</td>
<td>903</td>
</tr>
<tr>
<td>PENAL MEDIATION IN SOLVING MEDICAL MALPRACTICE CASES AS AN ALTERNATIVE OF PENAL SANCTIONS BASED ON LOCAL WISDOM</td>
<td>Sri Setiawati</td>
<td>913</td>
</tr>
<tr>
<td>SPECIAL PROTECTION OF CHILDREN IN CRIMINAL JUSTICE SYSTEM</td>
<td>Achmad Sulchan</td>
<td>922</td>
</tr>
<tr>
<td>MORAL REFORM BUREAUCRACY AS PREVENTION OF ILLEGAL PAYMENTS TO INDONESIA CLEAN OF CORRUPTION</td>
<td>Herwin Sulistyowati</td>
<td>932</td>
</tr>
<tr>
<td>STANCE AND AUTHORITY OF PEOPLE’S CONSULTATIVE ASSEMBLY DURING REFORMATION ERA 1945</td>
<td>Ahmad Mujib Rohmat</td>
<td>944</td>
</tr>
</tbody>
</table>
TAXES AND ALMS SEEN FROM ISLAMIC LAW
Mohammad Solekhan ................................................................. 954

DIVERSION IN COURT (Case Studies in Karanganyar District Court)
Anita Zulfiani ........................................................................ 964

International Seminar
Photos.................................................................................. 971
Islamic Law Values Transformation in the Reconstruction of the Legality Principle of Indonesian Criminal Code

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ABSTRACT

Criminal code of Indonesia is still using Dutch colonial era with background values of individualistic and liberalistic, so it is not in accordance with the conditions—in which we had already been recognized as an independent nation. Therefore it is necessary to make reconstruction penal code with transformation of the values of Islamic law, because the sociological, political and philosophical position of Islamic law occupies an important position as a source of law. Policy transformation is done by formulating the universal values of Islamic law into the process of formulation of the principle of legality in criminal code of Indonesia, because the principle of legality in criminal code currently recognizes only source legal written (Act) as a legal basis to convict, and does not recognize the source who live in the community (common law) as the legal basis to convict. As a result, enforcement of criminal law in Indonesia unfairly perceived by the public as many deeds by people regarded as disgraceful act but the offender can not subjected of criminal sanctions because of his actions not constitute a crime under the Criminal Code.

Keywords: Islamic law, legality principles, Criminal Code

A. Introduction

Criminal code of Indonesia is still using the legacy of the Dutch era with background values of individualistic and liberal, so it does not comply with the conditions of the nation that has been independent. Therefore it is necessary to do reconstruction by transforming the values of Islamic law as the law that live and thrive in society, because of sociological, political and philosophical position of Islamic law occupies an important position as a source of law. Transformation policy carried out by formulating the universal values of Islamic law into the process formulsi principle of legality in criminal law Indonesia, because the principle of legality in criminal law currently recognizes only legal source terlulis (Act) as a legal basis to convict, and did not acknowledge the source law who live in the community as a legal basis to convict. As a result, enforcement of criminal law in Indonesia felt unfairly by the public because it is only intended to enforce the rule of law only.
B. Discussion

The principle of legality which is a principle of social, substantially present in Islamic law both in the Quran and the Sunnah of the Prophet Muhammad.

Islamic law states that in the determination of a criminal offense must exist nas which prohibit such acts and threatened penalties against him. Their passages prohibiting and threatening punishment to an act that is not enough to punish every act, but there are other terms for people who commit forbidden acts have in order to be punished, that the passage prohibiting it valid (valid) at the time the act was committed, valid according to the scene of the crime, and valid for the individual who does. If one of these conditions can not be met, the penalty could not be imposed on the offender.

However, in addition to basing on nas / predefined rules, the principle of legality in Islam is also based on the general principle that the common law rule in Islam. The general rules are:

1. "There is no punishment for the act of a reasonable person before nas (provision)".
   That every act mukallaf can not be said to be forbidden before their passage (provision) is forbidden and the culprit has the freedom to do such act or leave it so that there are passages that forbid it.

2. "The basis of everything is permissible / permissible".
   That is, all actions or attitudes are not allowed to do with the ability of the original (is not a skill that is expressed by the expressed by syarak). So, as long as there is no scripture that prohibits, there are no charges against the person who acts or omissions.

3. "According syarak, no imposition of a law except against a person mukallaf capable to understand the arguments of loading and to implement the law. Works are charged only work which may be carried out and is affordable as well known by mukallaf so as to encourage him ".

Ground rules are equally leads to an understanding, "an act or gesture did not do should not be regarded as a criminal offense unless there nas (provision) clear and prohibited actions and attitudes do not do it. If there is no passage of such nature, no charges or punishment for the perpetrators.

Therefore, an act and attitude of not doing enough is not regarded as a criminal act simply because it is prohibited, but also must be stated sentence, either punishment or penalties had takzir. The conclusion of the statement that the basic principles of
Islamic law has established that there is no crime and no punishment except after the passage (provisions).

Based on this rule, the implicit meaning espoused the principle of legality in Islamic law. In line with the rules of the A. Hanafi in his book says:

That one of the basic rules are very important in Islamic law is a rule that says: "before there nas (provision) there is no law for the act of those sensible". In other words, the act of someone who ably impossible to say prohibited, unless there nas (provision) says so, and he has the freedom to do anything it or leave it, so there is a passage that forbids it1.

So according to Islamic law a deed or attitude does not should be viewed as jarimah (criminal offenses), except for their nas (provision) a clear and prohibiting actions and attitudes do not do it. If there is no such passage in nature then there is no demand or punishment for the perpetrators.

While H.A. Djazuli found that punishment must have a base, either from the Qur'an, hadits, or the legislative body has the authority to establish penalties for cases takzir2.

Based on the above provisions, it can be the sense that according to the norms of Islamic law "there is not a criminal offense without the prior nas broadcast or promulgated to the public".

In the Qur'an there are several verses that relate to the principle of legality. Allah does not impose a chastisement upon mankind unless it has no explanation and notification through His apostles, and load (liabilities) that are given to them, the case of affordable, as seen in the word of God as follows:

```
مَـنْ أَهْتَدَى فَلَأَنْتَ مُهْتَدِئًا يَهْتَدِي لِنَفْسِهِ وَمَنْ ضَلَّ فَلَأَنْتَ مُضَلِّلَ
يَضِلُّ عُلْيَهَا وَلا نَغْرِرُ وَأَنْزِرْ أَحِرَّ وَأَنْقِبل النَّافِئَ وَمَا كُنْتَ مَعْدِبًا بَيْنِي حَتَّى نَفَعَتَ
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Meaning: "Those who act in accordance with the guidance (of Allah), then indeed he did it for (safety) himself, and whoever is misguided then indeed he lost to (loss) himself. And a sinner can not bear sin others, and we are not going to punish until We sent a Messenger.

وَمَا كَانَ رَبُّكَ مَهِيلٌ الْقُرْرِي حَتَّى يَبْعَثَ فِي أُمَّاهَا رَسُولًا يَهْتَلُو عَلَيْهِمْ عَيْنًا وَمَا كَانَ مُهِيلٌ الْقُرْرِي إِلَّا وَأَهْلُهَا ظَلَمُونَ

means: And your Lord would not destroy the cities, before he sent in the capital was a messenger reciting to them Our Signs and never (well) We destroy the towns unless its people in a state do injustice.

فَلَأيُّ شَيْءٍ أَكْبَرُ شَهَدَةَ قَالَ اِلْلَّهُ شَهِيدٌ بَيِّنًا وَبَيِّنَكُمْ وَأُوحِيَ إِلَىُ هَذَا الْقُرْرِي أَنْ يَلَدُنَّ مَنْ يَشَأَّ وَمَنْ يَلُدُّ أَيْنُكُمْ لَتَشْهَدُونَ أَنَّ مَعَ ﺍٰللَّهِ ءَالَهَةٌ أَخْرَىٌ فَقُلْ لَا أَشْهَدُ قَالَ إِنَّمَا هُوَ إِلَهٌ وَحِيدٌ وَإِنْ شَاءَ كَرِيَ مَمَّا

means: Say: "Who is more powerful, testimony ? "Say:" Allah ", He is witness between me and you. And this Qur'an revealed to me that with him I gave a warning to you and to those who till the Qur'an (him)"

Based on the verses of the Qur'an over the principle of legality is in accordance with the spirit of these verses. So according to Islamic law an act that no one can be punished except after explanation and notices contained in the rule of law first.

In Islamic law all legal provisions already contained in the Qur'an and the Sunnah of Rasul is valid until the end of time, therefore Islamic law has accommodated all the acts that are considered as immoral, even for crimes that would come (never happened future decline in the Qur'an and the future leadership of the Prophet Muhammad SAW).
The principle of legality as the basic principle in criminal law enforcement means got a very important place in Islamic law, because it is according to Anwar Haryono be a measure of justice and assurance of legal certainty.

However, the principle of legality according to Islamic law is not applied absolud / rigid evidenced by the traditions of the Prophet Muhammad:

1. Hadith Anas said: "It is not something in which case there is retribution posed to the Prophet Muhammad, but he SAW commanded to forgive".

2. In Tirmidhi Hadith of Aisha also narrated that the Prophet Muhammad, said: "avoid hadd punishment of the Muslims, as long as possible. If there are grounds to remove a person from punishment, then let him be liberated. A better judge erred in pardon rather than err in imposing punishments ".

3. From Abu Hurairah from the Prophet Muhammad SAW said: "It is not forgiving someone from a tyranny, but Allah will add glory".

Based on the hadith above can be seen that the principle is not applied rigidly legaitas, it is also evident from the application of the principle of legality according to Islamic law which vary depending on the type of criminal acts, either in a criminal act hudud, retribution and takzir-blood money.

On the crime of hudud implementation of the principle of legality applied carefully and thoroughly. This can be clearly seen in seven kinds of criminal acts hudud, namely: the crime of adultery, qazaf (accusing others of committing adultery), drinking liquor, the crime of theft, criminal damage hirabah (security problems), the crime of apostasy, and criminal offenses uprising / subversion (al-Bagy).

Application of the principle of legality in criminal activities takzir different from the application of the principle of legality in criminal acts or criminal offenses hudud retribution and blood money. Application of the principle of legality in criminal acts takzir loosened to some extent. Leeway in this criminal act are both in terms of the form of the crime and the penalty (the penalty). Because of a criminal offense takzir forms of criminal acts that have certain properties do not require separate provisions stating as a crime, but quite put it nas and the way of a general nature. Takzir penalty imposed for acts that endanger the welfare of the individual, community, or public order.

In the Criminal Code as a positive Indonesian criminal law at this time, never explicitly formulated on "principles of criminal law" Given the principles of criminal law is generally only found in the lesson / criminalistics is usually inferred from the formulation of the norms contained in them.
The principle of legality as listed in the Criminal Code now emphasizes the value of the rule of law, as a source of law an act should be criminally, just based on written law (formal base) only and does not recognize the legal source of life (grounding material) as a source of law to criminalize deed. It is thus certainly not in accordance with the balance of wisdom religious values rooted in the values of Islamic law. From the results of the study of the legality principle in Islamic law, this principle is not rigid / absolute but there is flexibility for certain crimes. Fluidity principles are, among others, lies in:

In serious criminal acts and greatly affect the security and peace of the community, namely the crime of hudud (punishment stipulated limits by nas) and retribution (retribution in kind), the principle of legality are carefully formulated to include one by one penalty for each crime. Besides the types of crime and criminal threat already established with certainty in the law, so that for the crime of hudud and retribution judge will not create new types or criminal sanctions.

- On the criminal offense that is not so dangerous, that the criminal act takzir in general, syarak give no leeway to formulate each crime. For the crime of takzir syarak only gives a measure that the act is an act which according to the Shari'a is a disgraceful act, law only makes a nas (provision) general may include any acts that interfere with the interests and the peace of the community, in addition to those already defined in the crime of hudud and retribution substantive formulated in the National Criminal Code.

Embodiments of the implementation of the idea of a balance based on the values of wisdom religious, in terms of the principle of legality is seen as a source of law in setting can dipidananya an act, then the formulation should be based on a balance between resources formal law / principle of legality formal (by the law) and the source of unwritten law / legality materiel is to give place to the law of the living / unwritten law. The principle of the legality of the material as a source of positive law limited. This means that there are signs / criteria that an act be regarded as a criminal act or not if it posed a "danger / dlarar" and against the "goodness / benefit" for human life.

It so because according to religious moral values that the principle of legality according to Islamic law does not rigidly defined only based on the written law alone, but also by the unwritten law.

According to Islamic law the receipt of legal source material, especially in offenses takzir is a form of implementation of the principle of "dlarar" and "beneficiaries". That is an act regarded as a criminal act or not, if such actions posed
"dlarar / danger" and contrary to "benefit" for the benefit of human life both individuals and communities.

In criminal act takzir measure to criminalize the act is the nature of "dlarar / danger / mafsadah" and "benefit", if indeed such act is an act which may be harmful and contrary to the values of benefit / good of the community, it can be used as a criminal act, and vice versa.

The criteria for the legal source material is placed on the basic principles "da'urdhorori makdamun 'ala jalbilmanfa'ah" meaning "Refuse vices must take precedence over bringing benefits".

The formulation of the principle of legality which accommodates the source of an unwritten law in the reconstruction of the Criminal Code / WvS, also delivered by Hans de Doelder a professor of criminal law from Erasmus University Rotterdam, the Netherlands, found the source of law or a foundation of legality to declare an act as a criminal offense should only based on statutory law alone, in order to ensure Human Rights especially for the perpetrator.

Indeed there while saying that that by recognizing the unwritten law as a source of law is a setback and is contrary to the principle of legality, which is a safeguard for the protection, respect and promotion of human rights, which calls for restrictions on condemnation against someone.

From the research, the authors do not agree if it is stated that the recognition of the legal sources of unwritten then deteriorates and there is no protection, respect and uphold human rights.

According to the authors that the law does not tertulispun no legal certainty because when an act is considered as misconduct by the community and should be sanctioned, then surely the public opinion is correct because such actions are not in accordance with moral values and the value of common decency of a society. This means that it is society which constructs that such actions as misconduct and should be sanctioned. So in accordance with the values of philosophy, sociological values of a given society where the laws are made and will be implemented.

Based on the explanation above, in accordance with the opinion of Barda Nawawi Arief, that the reconstruction of the criminal law when viewed from the aspect of the value of the problem lies in "problem value concept or basic idea that animates / underlying norms of substantive criminal law itself."
C. Conclusion

Based on the explanation above, in reconstructing the principle of legality in the Criminal Code, should be the basis for criminalizing the act or a source of legislation legalizing the act is not only derived from the written law, but also a source of unwritten law or law in the society as a foundation material in criminalizing acts. The cornerstone dijadikannya customary law / law who live in the community as a source of law in setting dipidananya actions can be based on assessment of the aspects of the values of religious wisdom, so that the principle of legality accommodate formal legal source and a source of law can dipidananya materiel to establish an action. The criteria for substantive legal sources according to the assessment of the value placed on the religious wisdom of the basic principles "Refused vices must take precedence over bringing benefits".

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