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Analysis of Criminal Law Reform Regarding the Principle of Material Legality in Law Number 1 of 2023 concerning the National Criminal Code

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ABSTRACT

Currently, Indonesia is implementing a renewal of the Dutch colonial Criminal Code (KUHP) into the National Criminal Code. One of the significant changes between the colonial Criminal Code and the National Criminal Code is the expansion of the principle of legality. In the Colonial Criminal Code, only the principle of formal legality is recognized, namely, the benchmark for criminalizing someone is the law (written law), while in the National Criminal Code, it adopts the principle of formal legality and also the principle of material legality (unwritten law/customary law). This study aims to analyze whether the implementation of the principle of material legality is in accordance with the principles of justice and humanity. The results of the study indicate that the expansion of the principle of material legality, namely the point that the National Criminal Code wants to emphasize, is the harmony and compatibility between written law (civil law) and unwritten law (living law). If there is a conflict between written and unwritten law, the judge is obliged to prioritize the unwritten law. This study concludes that the principle of material legality provides the idea of a balance between justice and legal certainty, providing an opportunity for law enforcement officers to enforce the law in accordance with the conscience and justice of society.

KEYWORDS

Legal Reform; Living Law; Substantive Justice



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INTRODUCTION

Criminal law in Indonesia originated from Dutch colonial rule before independence. Since then, there has been a dualism in criminal law, namely for Europeans in Indonesia and non-Europeans. In 1918, the only codified law applicable to all residents within Indonesian territory since January 1, 1918, was named "*Wetboek Van Strafrecht*".¹ As times change, life begins to change, and the comprehensive nature of society requires the law to constantly adapt. Dutch criminal law is now considered irrelevant in several aspects of society, prompting efforts to reform the law. The current national Criminal Code has undergone significant reforms in line with the spirit of the Indonesian people, making it time to stop applying the principle of formal legality absolutely.²

Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code), as the new face of Indonesian criminal law, has implemented developments in the application of the principle of legality. The formulation of the principle of legality in Article 1 of the Criminal Code consists of two paragraphs, namely: 1) No one can be punished or subjected to action, unless the act committed has been defined as a criminal offense in the laws and regulations in force at the time the act was committed. 2) In determining the existence of a criminal act, the use of analogy is prohibited. In the colonial Criminal Code, this is closely related to the principle of formal legality. Simply put, this principle serves to protect the public from criminal acts that lack a clear legal basis.³

By recognizing the principle of legality in a material sense, the enforcement of law is no longer rigidly applied or focused solely on the text of the law, but also takes into account the values of justice upheld by living law. The paradigm shift in law, which initially only recognized written law (the principle of formal legality) to also recognize unwritten law (the principle of substantive legality), has provoked various reactions. Barda Nawawi Arief criticized the principle of legality in the WvS Criminal Code, as stated in Article 1 paragraph (1) of the WvS Criminal Code. According to him, with the provisions of Article 1 paragraph (1) of the Criminal Code, it seems that criminal law only consists of laws and nothing else. However, criminal law includes both written and unwritten law. Looking at history, the law that existed in society was deliberately buried by the colonizers in order to eliminate the values of justice that had existed long before the Dutch Criminal Code was introduced.

On the other hand, negative reactions are inevitable when we have completed the reconstruction of the criminal code through the application of the principle of material legality. The principle of material legality means giving opportunity to "living law/unwritten law," where the principle of formal legal certainty is balanced with material legal certainty. In other words, the unlawfulness of an act must be based on formal grounds, but this does not diminish the existence of material unlawfulness. Recognition of the living law in society can lead to legal uncertainty

¹ Roby Satya Nugraha, "Pembaharuan Berlakunya Asas Legalitas Dalam Undang Undang Nomor 1 Tahun 2023 Tentang Kitab Undang Undang Hukum Pidana" (2024) 10:1 J Palar Pakuan Law Rev.

² Erika Priscilla, "Kajian Yuridis Filosofis Pembaharuan Asas Legalitas Dalam Pembaharuan Konsep KUHP" (2019) 8:2 Diponegoro Law J.

³ Benny Satrio Wicaksono, "Rechterlijk Pardon Sebagai Penyeimbang Asas Legalitas Dalam Pembaharuan Hukum Pidana Indonesia" (2025) 7:4 J Multidiscip Res Development.



due to its unwritten nature and openness to diverse interpretations. This contradicts the principle of legality, which requires clarity and legal certainty for all citizens.⁴

In previous studies, such as that conducted by Roby Satria Nugraha using normative empirical research methods, the material legality aspect was discussed from both the pro and con perspectives, arguing that there are logical consequences to the application of the principle of material legality, which will lead to conflicts and potentially cause contradictions in its implementation. Meanwhile, this study will focus more on criticizing the arguments against the application of the principle of material legality, which aims to provide social protection. Based on this framework, the author will examine whether the expansion of the application of this principle of legality has fulfilled the sense of justice, certainty, and usefulness of the law, both at the normative level and in its implementation.

METHOD

This study uses a normative legal research method because the object of study in this research is at the level of norms contained in Article 1, paragraph 2 of Law Number 1 of 2023 regarding the expansion of the principle of legality, which is considered vague and legally flawed. Normative legal research analyzes the applicability of law by examining legal materials such as research on legal principles, positive law, legal rules, and legal norms.⁵ The approaches used are the statute approach and the case approach, which are carried out by examining all laws and regulations related to the legal issues being addressed. The researchers examined whether this principle of material legality could fulfill substantive justice in the aspect of law enforcement and related it to court cases that did not provide a sense of justice as a result of the application of the principle of legality.

RESULT & DISCUSSION

I. The Concept of Expanding the Principle of Legality in Law Number 1 of 2023 concerning the National Criminal Code

The concept of expanding the principle of legality stems from the awareness that law is not merely a “text”; it is deeper than that. In the renewal of national law, one of the alternative studies that must be developed is a study of the legal system that exists within society. The national legal system can support national development and international relations, but it must also be sourced from and not ignore the values and aspirations of the law that exist within society.⁶

The enactment of Law No. 1 of 2023 has given a new face to Indonesia's current national criminal law. The concept of criminal law contained in this law is very different from the concept contained in the Criminal Code (WvS). This can be seen from the systematics of Law No. 1 of 2023, which no longer distinguishes between

⁴ Roby Satya Nugraha & Christina Febriani Silalahi, “Pembaharuan Berlakunya Asas Legalitas dalam Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana” (2024) 10:1 PALAR (Pakuan Law Rev).

⁵ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif* (Rajawali Pers, Jakarta, 2015).

⁶ Ana Fauzia, Fathul Hamdani & Deva Gama Rizky Octavia, “The Revitalization of the Indonesian Legal System in the Order of Realizing the Ideal State Law” (2021) 3:1 Progress Law Rev 12–25.



crimes and offenses. Law No. 1 of 2023 consists of only two books: Book I on General Provisions, which consists of six chapters, and Book II on Criminal Acts, which consists of thirty-seven chapters. The significant difference between the old and new Criminal Codes lies in the application of the principle of legality.

The principle of formal legality, also known as the principle of procedural legality or formal legality, is a legal principle that emphasizes the need for clear and definite laws as the basis for government action and law enforcement. This principle relates to the procedures and methods of law enforcement. In the context of criminal law, the principle of formal legality requires that a person can only be punished if their actions are explicitly defined as a criminal offense by the law in force at the time the offense was committed. This principle also contains principles such as the prohibition of retroactive laws, the prohibition of legal analogies, and the prohibition of void laws.

An example of the application of the principle of formal legality is that a person cannot be criminally punished for an act unless that act has been explicitly declared a criminal offense by the law in force at the time the act was committed. In other words, neither the government nor the courts has the power to punish a person based on a law that was enacted after the act was committed. Originally, the principle of formal legality was only related to legal certainty in the enforcement of criminal law, whereas after the enactment of the principle of material legality, the enforcement of criminal law is no longer rigid and has become broader.⁷

Currently, Indonesia is preparing to welcome the National Law Code as a replacement for the Criminal Law Code left behind by the colonialists. The idea of criminal law reform essentially provides a principle of balance between legal certainty, justice, and the benefits of law. This is in line with Thalib Fuad's opinion that the principle of balance is based on the balance of values embodied in Pancasila: Belief in God, Humanity, Unity, Deliberative Democracy, and Justice.⁸ Recognizing that the existence of the principle of legality in Article 1 paragraph (1) of the Criminal Code inherited from the Dutch colonial era limits the judges' discretion in deciding cases according to their "conscience," the interpretation of the principle of legality has been broadened to recognize not only the existence of formal legality but also material legality.

The principle of material legality, also known as the principle of substantive legality or the principle of material legality, is a legal principle that emphasizes the need for substantive justice in legislation. This principle relates to the content or substance of laws enacted by the government or legislative bodies. The principle of substantive legality requires that laws be fair, not arbitrary, and in line with generally recognized values of justice and human rights.

An example of the application of the principle of substantive legality is that a law or government action may be considered to violate this principle if its substance or content conflicts with the fundamental principles of justice, human rights, or constitutional principles. In this case, even though such an act or law complies with formal procedures, it can be declared invalid because it violates the principle of

⁷ Vincentius Patria Setyawan, "Pemaknaan Asas Legalitas Materil Dalam Pembaharuan Hukum Pidana Indonesia" (2023) 1:1 J Multidisiplin Ilmu.

⁸ Fakhru Fuad, "Penerapan Asas Legalitas Materil Terhadap Hukum Pidana Adat: Studi Tana Toa Kajang" (2021) 2:1 J Lex Theory.



substantive legality. The aspect of criminal law reform, especially the paradigm shift in the principle of legality in the Criminal Code, means that the law can only be enforced through “human rationality.” Humans create laws, but to implement them, it is not enough to rely solely on written laws. The dynamic nature of society cannot guarantee that written laws will provide a sense of justice. One of the most striking cases is that of Grandma Minah, who stole three cocoa beans from a company and was sentenced to 1 (one) month and 15 (fifteen) days with a probation period of 3 (three) months. As a result of the rigidity of the principle of legality, the judge's verdict seemed to ignore the social context (factors such as poverty, age, and helplessness), thus tending to produce a decision that was not humane.

According to Custom, law is discovered, not created. The growth of law essentially occurs through an organic and unconscious process. Therefore, legislation is actually second in importance to custom. From this point of view, it can be said that good law is law that evolves and grows alongside social customs; what is believed to be true by conscience must also be believed to be true by law. Law is created to fulfill and realize the ideals and hopes for justice desired by society. Therefore, if there is a conflict between justice according to the law and justice according to society, it is the law that must follow, not the other way around, where people follow the rhythm of the law.

The expansion of the principle of formal legality in its material formulation cannot be separated from the main idea of realizing and guaranteeing the principle of balance between individual and public interests, and between legal certainty and justice. Legal certainty is a formal benchmark, while justice is a material benchmark. To accommodate decisions that have the potential to cause injustice, reconstructing the law on the application of the principle of legality is a bold and effective step. The point that the National Criminal Code wishes to emphasize is the harmony and compatibility between written law (civil law) and unwritten law (living law). If there is a conflict between written and unwritten law, judges must prioritize unwritten law.

The phrase in the article reads, “in the event of a conflict between legal certainty and living law, judges must prioritize living law.” The wording of this article is appropriate. In the author's opinion, what is fair according to the law is not necessarily fair according to society. The law is merely a product created by humans, and the flexibility of the law is highly dependent on humans. The relativity of perspectives on justice will continue to change. For example, in criminal law, there is no difference between a person who steals because they are hungry or severely poor and a person who steals. After all, they are a criminal. According to the law, punishing an elderly woman who steals cocoa beans is justice, but according to conscience and social justice, punishing an elderly woman who steals cocoa beans is an unjust decision or contrary to conscience. This difference in perspective in interpreting a sense of justice is the logical reason why the law must always adapt to the needs and sense of justice of society. The renewal of the concept of thinking, where the law is no longer viewed as merely textual legislation, provides an opportunity for judges to analyze, consider, and pass judgments that are close to the sense of justice of society.



II. Analysis of the Weaknesses of the Enforcement of the Principle of Material Legality in Law Number 1 of 2023 Concerning the National Criminal Code

The principle of legality is the most fundamental principle that serves as the main basis for determining whether an act is punishable by law or not. The National Criminal Code is an integration that determines whether an act is considered a crime or an unlawful act. However, it must then be tested against material criteria, where the act is contrary to the legal consciousness of society.⁹ In essence, the principle of legality aims to protect the public from the arbitrary actions of law enforcement officials. This means that in the administration of the criminal justice system, law enforcement officials, including the police, prosecutors, and judges, must adhere to the Criminal Code.

Some criminal law experts argue that with the application of the principle of material legality, this expansion is a form of legal regression before Indonesia's independence. Historically, positive law in Indonesia originated from the arbitrary power of kings to punish their subjects, so that an act could be classified as criminal or non-criminal only if it was first written down. Thus, the application of the principle of formal legality would be vulnerable to abuse by law enforcement officials.

The living law to be given space in the criminal law domain is not an easy task. Obstacles, challenges, and even opposition to this provision will inevitably always exist. Several weaknesses may arise if the principle of legality is expanded to include formal and material legality, according to some research findings:

- a. Recognition of Customary Law and Local Regulations: The new Criminal Code recognizes customary law as part of the national criminal justice system and incorporates local regulations as a source of criminal law, thereby expanding the scope of the principle of legality and adapting to Indonesia's socio-cultural diversity. This is expected to improve substantive justice, although it poses challenges in law enforcement due to the diversity of customary norms between communities.¹⁰ Another study explains that when the Criminal Code recognizes the principle of material legality, written law and unwritten law become equal, which can lead to legal uncertainty.¹¹ According to the author's analysis, the diversity of customary norms in each region does not hinder the application of the principle of material legality as long as the applicable customary law does not conflict with Pancasila and the Constitution, meaning that it does not conflict with moral standards according to the principles of Godliness and Humanity. Furthermore, the recognition of customary law has the main objective of resolving violations of customary criminal acts, not based on a retributive (revenge) perspective, but as a means of resolving conflicts, maintaining harmony among communities, and maintaining solidarity. This is in line with the

⁹ Anggia Nur Ramadhani, "Implementasi Perluasan Makna Asas Legalitas Berdasarkan Kitab Undang Undang Hukum Pidana (KUHP) Nasional" (2024) 3:2 J Ilm Huk dan Hak Asasi Mns.

¹⁰ Dyajeng Ayu Musdalifah, "Eksistensi dan Perluasan Asas Legalitas dalam Undang Undang Nomor 1 Tahun 1946 dan Undang Undang Nomor 1 Tahun 2023" (2025) 4:1 Jispendiora J Ilmu Sos Pendidikan, dan Hum.

¹¹ Fathul Hamdani et al, "Fiksi Hukum: Idealita, Realita, dan Problematikanya di Masyarakat" (2023) 1:2 Primagraha Law Rev 71-83.



- opinion of Pujiyono, a professor at Diponegoro University, that customary law is important to accommodate all interests in accordance with the characteristics and traits of Indonesian society, because our Criminal Code is a law imported from a colonial country, which is generally outdated and causes a lot of injustice.
- b. Impact on Legal Certainty and Justice: The expansion of the principle of legality has dual consequences. On the one hand, the recognition of living law and the prohibition of analogy strengthen legal certainty and substantive justice by accommodating evolving social values. On the other hand, the recognition of customary law and unwritten norms can lead to legal uncertainty and potential subjectivity in law enforcement. According to the author's analysis, in understanding the law, one must look at the entire system, namely the legal substance, legal structure, and legal culture. When a legal problem arises, it is necessary to analyze whether the problem arises from the legal substance or the law itself, or from the people who enforce the law (police, prosecutors, judges). If the concern is related to the subjectivity of law enforcement officials, then the relevant efforts that can be made are to change the paradigm and improve the moral values of law enforcement officials in order to be in line with the spirit of reform.

Barda Nawawi Arief explains that the principle of legality, as a principle of criminal law, must truly embody the value of God in every aspect of life. Making the principle of legality *tu'minuna billah* is part of the process of transformation/transcendence/monotheism of values. The current updated principle of legality is derived from religious teachings that are spiritually reflected in the first principle of Pancasila. No law is perfect, because law is a product created by humans. Therefore, the state provides the means for judicial review if, during its implementation, a law is found to be contrary to the principles of justice, benefit, and certainty. Concerns that the principle of material legality will lead to subjectivity on the part of law enforcement officials need to be understood as arising at the level of implementation rather than substance. Therefore, the ideal solution to minimize abuse in law enforcement is to conduct training that leads to the moral advancement and integrity of law enforcement officials.

CONCLUSION

In the first formulation of the problem, explaining the expansion of the principle of formal legality in its material formulation cannot be separated from the main idea of realizing and, at the same time, guaranteeing the principle of balance between individual interests and community interests, and between legal certainty and justice. Legal certainty is a formal benchmark, while justice is a material benchmark. To accommodate decisions that have the potential to cause injustice, reconstructing the law on the application of the principle of legality is a bold and effective step. The point that the National Criminal Code wants to emphasize is the harmony and compatibility between written law (civil law) and unwritten law (living law). If there is a conflict between written and unwritten law, judges must prioritize unwritten law. In the second formulation of the problem, one of the points considered to be a weakness in the enforcement of the principle of legality is the possibility of subjectivity on the part of law enforcement officials. This condition can be resolved at the implementation level by providing training aimed at improving the moral



understanding of law enforcement officials. The idea of criminal law reform is actually aimed at providing an opportunity for law enforcement officials to prioritize their conscience over the rigidity of the law itself.

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