

The Expansion of the Principle of Legality in the Criminal Code as a Renewal of Criminal Law

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Abstract. *The principle of legality is a very fundamental principle in criminal law. The principle of legality contained in Article 1 paragraph (1) of the Criminal Code absolutely adheres to the principle that no act can be punished without a prior statutory provision that sets out a clear formulation of the act. There are quite a number of acts that according to the public's view are disgraceful and deserve punishment (customary offences), but law enforcers cannot follow up on them because they collide with the principle of formal legality. This study aims to find out and analyze the extension of the principle of legality as a reform in criminal law, this study uses a normative juridical approach, based on the results of the study it was concluded that the expansion of the legality principle from formal to material in criminal law reform in Indonesia was motivated by the manifestation of the motivation in reforming the Criminal Code since the Dutch government with criminal sanctions that were more in line with the noble concepts of the Indonesian nation. The principle of material legality will no longer be opposed to the principle of formal legality, but will complement each other in order to achieve legal interests, namely certainty, usability, and legal justice.*

Keywords: Legality; Principle; Renewal.

1. Introduction

The principle is a very vital concept in law, the principle in the science of law is used as a basis for applying the law. Criminal law is an example of a branch of law that has a central principle, namely the principle of legality. The principle of legality/principle of legality or in Latin is called *nullum delictum nulla poena sine praevia lege poenali* is a principle which confirms that no behavior is threatened or punishable by law if it is not decided beforehand through law. The principle of legality understood in criminal law in Indonesia arises based on sociological categories that unify the concept of protecting the population from arbitrary acts

in power.¹The principle of legality has 3 definitions or meanings which are translated into:

- a. there is no behavior that is threatened or prohibited by crime if it is not decided beforehand through law.
- b. It is not permissible to use analogies in determining the existence of a criminal act.
- c. All regulations in criminal law cannot be retroactive.²

Until now the principle of legality is translated into the Criminal Code (KUHP) Article 1 paragraph (1) as a central principle in the implementation of criminal penalties in Indonesia. The application of the Legality Principle in the existing Criminal Code has the aim of guaranteeing the rights of all residents. With the principle of legality, the basis of the law regarding the urgency of a punishment is given as well as regarding the existence of a sanction itself is a necessity in order to maintain the freedom of all individuals with reciprocity through eliminating the individual's desire to carry out actions that are not related to the law. So that legality is a main principle for imposing sanctions on criminal law.³Regarding the principle of legality itself in Indonesian positive law, it is explained in the policy of Article 1 paragraph 1 of the Criminal Code. Based on the provisions of Article 1 of the Criminal Code, it can be seen that the existing legality principle is a formal legality principle. The existence of the principle of legality in Indonesian positive law is a step to ensure legal certainty for the people of Indonesia. The inclusion of the principle of legality in criminal law is also a measure to protect the population from arbitrary laws.

The existence of the principle of legality in Indonesian law seems capable of having a positive impact on applicable law in Indonesia, but it should also be noted that the principle of formal legality can also have a negative impact, namely setting aside the existence of customary law as original Indonesian law. So far, customary law is the original law of the Indonesian state, customary law is a law that has existed and has lived in the population since ancient times. The existence of the principle of formal legality has resulted in living or unwritten laws that have never been found and studied in full and clear, especially in the practice of criminal

¹ Sudibyo, Ateng, and Aji Halim Rahman. "Deconstruction of the Principle of Legality in Criminal Law" *Journal of Presumption of Law* 3, no. 1, (2021), p. 55-79.

²Lidya Suryani Widayati, "Expanding the Principle of Legality in the Draft Criminal Code," *State Law* 2, no. 2, (2011), p. 1

³Rika Kurniasari Abdulgani, "Reconstruction of the Principle of Legality in the Draft Concept of the Criminal Code in Relation to the Principles of Local Wisdom," *Institutional Repositories & Scientific Journals*, no. 1-2, (2019), p. 5.

courts.⁴As previously explained that customary law is original Indonesian law, but in Indonesian positive law, especially criminal law, customary law is often underestimated because the law is often unwritten. The Criminal Code does not seem to provide an opportunity to explore the laws contained in the population. In fact, long before Dutch law entered, the existence of religious and customary law was a living law in the population.⁵Completion of a crime using customary law in society is not a new thing in Indonesia, but whether or not a decision made in customary law is legal or not is still an issue in criminal law in Indonesia. The Criminal Code as the main criminal law does not include strict provisions regarding the existence of customary law in the Indonesian legal community. The Indonesian government has started to make efforts to solve this problem, one of which is by drafting a new Criminal Code by including several rules that reflect Indonesian original law.

The newest Criminal Code Law still maintains the principle of legality as a fundamental principle and is explained in Article 1 paragraph (1) of the Criminal Code. This article states that no individual can be sanctioned or imprisoned unless the act committed has been regulated as a criminal act in the applicable laws and regulations at the time the violation was committed.⁶

The provisions in this article are still in line with the current policy of Article 1 of the Criminal Code. Significant changes have occurred in Article 2 paragraph (1) and paragraph (2) of the Criminal Code which were passed into Law dated 6 December 2021 explaining:

- 1) The appropriate policy contained in Article 1 paragraph (1) does not cut the validity period of the existing law in the population which explains that individuals must be subject to criminal punishment even though the related actions are not explained in the legislation.
- 2) The law contained in the population as described in paragraph (1) is enforced where the law is located and as long as it is not explained in the law and is in line with the concepts contained in the 1945 Constitution, Pancasila, human rights, and legal principles accepted by civilized people. .

It is this article that has paved the way for the enactment of the living law or "the living law" in society. Based on this article, individuals can be sentenced according to the regulations contained in the population, even though the law does not make

⁴Barda Arief Nawawi, 2011, *What Aspects of Criminal Law Enforcement and Development Policies*, Bandung, PT Citra Aditya Bakti, p. 122-123.

⁵Faisal and Muhammad Rustamaji, "Updating the Criminal Law Pillars in the Criminal Code Bill," *Udayana Master Law Journal*, no. 2, (2021), p. 8

⁶Widayati, "Expanding the Legality Principle in the Criminal Code Bill." *Op. cit*, p. 2

an explicit determination that the related action is a criminal act.⁷The existence of the policies in Article 2 paragraphs (1) and (2) provide confirmation regarding the implementation of the living law in the newest Criminal Code as long as the law is in line with the principles contained in the 1945 Constitution, Pancasila, Human Rights, and legal principles accepted by people who believe *adab*. The latest Criminal Code expands the meaning of the legality principle in it by taking into account the original Indonesian law, namely customary law. Although this expansion is likely to provide positive input for Indonesian criminal law in the future, the expansion of the meaning of the legality principle in the RKUHP also raises various polemics as previously explained that the legality principle highly upholds legal certainty. The presence of the concept of the principle of material legality also raises debates regarding these living legal boundaries.

Based on the description above, the writer is interested in developing the purpose of writing to study and analyze the expansion of the principle of legality as a reform of criminal law.

2. Research Methods

To conduct research in this writing, the authors use the normative juridical method. Writing specifications are carried out using a descriptive analytical approach. The data used for this writing is secondary data. To obtain the data in this writing, secondary data collection methods were used which were obtained from literature books, laws and regulations, as well as the opinions of legal experts. The data that has been obtained is then analyzed by qualitative analysis

3. Results and Discussion

3.1 Background to the Expansion of the Legality Principle in the New Criminal Code

The Criminal Code as the main criminal law in Indonesia is a legacy of Dutch colonial law, of course it has an a-historical nature as a result of its existence not keeping pace with population growth then and now.⁸The current Criminal Code is often considered incomplete and unable to facilitate various problems and the scale of innovation in the latest forms of criminal behavior, which are certainly in line with the growing aspirations and needs of the population.⁹The current Criminal Code is also still motivated by individualism-liberalism

⁷Prianter Jaya Hairi, "Contradictions to Legal Arrangements Living in Society as Part of the Legality Principles of Indonesian Criminal Law" *Journal of Negara Hukum* 7, (2016), p. 2

⁸Arista Candra Irawatu, "Legal Politics in Criminal Law Renewal (Ruu Criminal Law Principles of Legality)," *Adil Indonesia Journal* 2, no. 1, (2019), p. 1.

⁹Barda Nawawi Arief, 2016, "New Criminal Code Bill: A Reconstruction of the Indonesian Criminal Law System", Semarang, Diponegoro University, p. 2

thoughts/understandings and is heavily influenced by classical schools.¹⁰ Attempts to make changes to the Criminal Code have been carried out several times, this is evidenced by the existence of the concept of several New Criminal Codes from the oldest to the newest. There are several reforms that have occurred in the new Criminal Code, for example, namely the widening of the meaning of the principle of legality. So far, the principle of legality is known in the Latin term "Nullum delictum, nulla poena, sine praevia lege poenali", namely that a behavior cannot be punished unless it is based on criminal law attorneys that have been made beforehand, changes in format and essence. ¹¹These changes can be found in Articles 1 and 2 of the New Criminal Code. The principle of legality is expanded by the use of the phrase "do not cut the validity period of the living law on the population", meaning that a person can be declared to have committed criminal behavior based on local customary law, the living law, even though national law has not or does not state the act as a crime. The New Criminal Code seeks to find stability between the guarantee of legal certainty through the principle of legality and the recognition pathway for the ins and outs of adat that still exist in various groups of the population in Indonesia.¹²

Expansion of the principle of legality from formal formulation to material formulation, based on legislative provisions of national laws issued after independence; as well as agreements at national seminars. Unwritten legal recognition factors, based on:

a. Article 5 paragraph (3) sub b Act No. 1 Drt. In 1951, which essentially regulated behavior based on living law, it was mandatory to be considered a criminal act, but there was no comparison in the Civil Criminal Code, so it was categorized as punishable by a maximum of 3 months in prison and/or a fine of Rp. 500,000, namely as a replacement sanction if the customary law imposed is not accepted by the defendant, if the customary punishment given is based on the judge's response exceeding the intended fine or prison sanction, then the defendant can receive a replacement sanction of up to 10 years in prison, with the definition that customary punishment which is no longer in line with the times will be renewed like that

b. Settlement in terms of criminal law 1st National Law Seminar in 1963 point 4 explains that what is considered to be criminal acts are behaviors whose components are spelled out in the Criminal Code and other laws. This does not rule out the possibility of prohibiting actions based on living customary law and

¹⁰Faisal, "Building Legal Politics in the Indonesian Criminal Law System", *Ius Quia Iustum Law Journal*, no. 1, (2014), p. 81-95

¹¹Prianter Jaya Hairi, "Contradictions to Legal Arrangements Living in Society as Part of the Legality Principles of Indonesian Criminal Law." *Op. cit.*, p. 2

¹²*Ibid.*, p. 12

does not prevent the formation of a population that is expected to be subject to customary punishment which can be in line with the dignity of the nation. While the 8th point resolution explains "Elements of Religious Law and Customary Law are woven into the Criminal Code".

c. Law on Judicial Powers (Act No. 14 of 1970 according to amendments to Act No. 35 of 1999 and with Act No. 4 of 2004, and most recently revised with Act No. 48 of 2009 concerning Judicial Powers).

1. Article 14 paragraph (1): The court is not permitted to give a refusal in examining and adjudicating a case that is reported for unclear/unclear legal reasons, but must conduct an examination and adjudicate.

2. Article 23 paragraph (1): Apart from having to contain the reasons and grounds for the decision, all judicial policies must also include specific articles of relevant regulations and unwritten sources of law.

3. Article 27 paragraph (1): Judges as enforcers of law and justice are obliged to study, follow and understand living legal values.

4. Seminar on National Law IV in 1979. In the report sub B. II regarding "National Legal System".¹³

Expansion of the principle of legality materially is actually not a new thing in the renewal of the Criminal Code. In fact, the idea of elaborating the principle of legality in material terms has also been translated into "constitutional policies" in Article 14 paragraph (2) of the 1945 Constitution, which essentially states that no individual can be prosecuted or subject to sanctions, except for those caused by existing legal provisions and recognized for them. Related articles use the designation of rule of law (*recht*) which certainly has

an understanding that includes more than "law" (*wet*) regulations, because the definition of "law" (*recht*) can be in the form of "unwritten law" or "written law".¹⁴

The essence of the principle of legality which includes the principle of material legality is actually a manifestation of the spirit to replace the Dutch colonial heritage Criminal Code with criminal penalties that are in line with the noble concepts of the Indonesian nation.¹⁵The principle of legality is actually not perfect,

¹³Ibid

¹⁴Endang Pristiwati, "Consequences Arising From the Principle of Legality in Material Criminal Law," *Sharia Journal of Law and Thought* 13, no. 2, (2014), p. 12.

¹⁵Hairi, "Contradictions to the Arrangement of 'Law Living in Society' as Part of the Legality Principles of Indonesian Criminal Law." *Op. cit*, p. 14.

the principle has many limitations. The principle of formal legality only has 2 functions, namely the protection function to provide protection for the population from the arbitrary actions of officials and judges' decisions and the function of restrictions to provide boundaries for elements in power and judges' decisions. The function of protection is in fact only intended for the accused. Defendants will not be charged as long as their actions do not violate the criminal law, even if the actions in question cause a large negative impact on society and the victims.¹⁶

The expansion of the meaning of the legality principle which was originally focused on the formal legality principle to become material is expected to be able to overcome this imbalance. With the enactment of the principle of material legality, it can provide justice for victims because the perpetrators of criminal acts, especially customary crimes, cannot get away with it. The perpetrators of customary crimes will receive rewards for their actions in accordance with customary law in the area where the perpetrators committed their actions, so that victims do not lose their rights as victims and can restore the situation to normal. The application of the principle of material legality is also expected to be able to provide protection to victims through customary law so that justice can be achieved between the two parties.

3.2. The Expansion of the Meaning of the Legality Principle in the New Criminal Code contradicts or does not contradict the meaning of the Legality Principle Itself

The New Criminal Code regulates the principle of legality in Article 1 and Article 2 of the New Criminal Code. When compared between the legality principles in the New Criminal Code and the Criminal Code, there are differences regarding the legality principle provisions in the New Criminal Code extending the meaning of the legality principle from formal to material, which can be seen in Article 2 paragraph (1) and (2) which states:

Section 2

(1) The appropriate policy referred to in Article 1 paragraph (1) does not weaken the existing law enforcement on the people which determines that individuals deserve to be given sanctions even though related actions are not regulated in legislation

(2) The law that exists for the population as explained in paragraph (1) is enforced in the location of the law of life and as long as it is not regulated in the law and is

¹⁶Deni Setya, Subaidah Ratna Juita, Indah Sri Utari, Joice Soraya, "Nullum Crimen Sine Poena Principle in the Draft Criminal Code" Mahupiki Journal 2, no. 1, (2021), p.222

in line with the concepts contained in Pancasila, the 1945 Constitution, human rights, and generally accepted legal principles. by the people

The provisions of Article 2 paragraphs (1) and (2) are something new and were not previously regulated in the current Criminal Code. The provisions of Article 2 paragraphs (1) and (2) also show that later when the RKUHP is ratified, Indonesia adheres to two principles of legality, namely the principle of material legality and the principle of formal legality. The principle of formal legality holds that the basis for the appropriateness of a criminal act is based on the principle of formal legality, namely legislation that existed before the relevant action was taken (written law), while the principle of material legality states that the basis for a criminal act is the law contained in the population, whether written or not. or unwritten. The application of the principle of material legality is very dependent on local customary criminal law.¹⁷

Article 2 paragraph (2) of the RKUHP has explicitly decided the limits on the application of living law. There are 4 parameters that must be met, namely:¹⁸

1. Applies to the location where the law lives;
2. As long as it is in line with the concepts contained in the 1945 Constitution and Pancasila;
3. human rights; as well as
4. General legal principles accepted by the people

The four parameters above are parameters that have a cumulative nature, which means that all related parameters must be met before the living law is applied. The existence of the RKUHP article 2 paragraph (2) can be used as an obstacle or complicate the stage of enforcing the law because the judiciary must be able to provide evidence on all relevant parameters before applying them, which are cumulative in nature, which means that 4 related parameters must be met before applying the living law.

In the elucidation section of Article 2 paragraph (1) the RKUHP also contains the legal basis regarding the application of customary offenses (criminal law) which must be confirmed and consolidated by the government originating from regional regulations for each location where customary law is enforced. This unit contains the laws that exist in the population which are categorized as Customary Crimes.

¹⁷Widayati, "Expanding the Legality Principle in the Criminal Code Bill." Op. cit, h. 10

¹⁸Nella Sumika Putri, "Rethinking the Elements of Law Living in Society in Article 2 of the RKUHP in a Legality Principle" Indonesia Criminal Law Review 1, no. 1, (2021), p. 10-11

This condition will not be ruled out and will always be a guarantee for the implementation of analogical prohibitions and the principle of legality. If the confirmation of the compilation of customary law has been carried out by the respective regional governments where customary law applies, it is hoped that the application of the material legality principle will not conflict with the meaning of the legality principle itself.

4. Conclusion

The background to the expansion of the principle of legality from formal to material in reforming criminal law in Indonesia was the manifestation of the motivation in reforming the Criminal Code since the Dutch government with criminal sanctions that were more in line with the noble concepts of the Indonesian nation. The expansion of the meaning of the legality principle that occurs in the New Criminal Code is also based on the background that customary law/the living law, which is Indonesian original law, is now present in the expansion of the material legality principle as "living law in society". When compared between the principle of formal legality which prioritizes legal certainty and the principle of material legality which prioritizes justice, it certainly creates conflicts and conflicts, but these problems can be overcome with the active role of the local government. by issuing regional regulations (Perda) by including customary criminal elements in them. Thus, the identification and classification of criminal acts within the law that live in a Perda is a solution to streamline the application of the principle of material legality, so that there is no more ambiguity regarding living legal boundaries. The role of the Regional Government in applying the principle of material legality is also emphasized in the elaboration of Article 2 paragraph (1) of the RKUHP which contains the legal basis for the application of customary offenses (criminal law) which requires compilation from the Regional Government through Regional Regulations for each location where customary law is enforced. In line with this, the principle of material legality will no longer be opposed to the principle of formal legality, but will complement each other in order to achieve legal interests, namely certainty.

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