

## The Meaning of the Principle of Material Legality in the Reform of Indonesian Criminal Law

**Itok Dwi Kurniawan**

*Sebelas Maret University*

[itokdwikurniawan@staff.uns.ac.id](mailto:itokdwikurniawan@staff.uns.ac.id)

### Abstract

The principle of legality is a very important principle in criminal law. The principle of legality plays an important role in the enactment of material criminal law rules and is the basis for the validity of acts categorized as criminal acts. The purpose of this study is to determine the meaning of the principle of material legality in the reform of Indonesian criminal law. This article was prepared using the normative legal research method. The results showed that the reform of criminal law with the enactment of Law Number 1 Year 2023 on the Criminal Code did not only change the formulation of the principle of legality substantially, but changed the formal principle of legality which was originally far from the sense of public justice, expanded into a material principle of legality that better guarantees the sense of public justice. This article will discuss the material legality principle as a renewal of the formal legality principle, which aims to expand the reach of the legality principle in providing protection to the community from the negative consequences of criminal acts.

**Keywords:** Principles of Legality, Criminal Law, Protection.

### I. INTRODUCTION

Legal principles are the tendencies required by law for the notion of decency. Principles are understood as the basic thoughts underlying the workings of the legal system in a country. Based on this definition, it can be understood that the existence of a principle in a legal system is so significant because it is the basis for the formation of legal rules and the implementation of legal rules (Sidharta, 2014). The principle of legality is a very fundamental principle in criminal law. As a principle in criminal law, the legality principle contains an abstraction regarding the existence of a criminal law rule and also guidelines for the implementation of material criminal law rules.

The principle of legality is the fundamental principle of criminal law which determines that no act is prohibited and punishable by crime if it is not predetermined in legislation. This principle in Latin is often known as "Nullum delictum nulla poena sine praevia lege" (no offense, no punishment without prior regulation) (Moeljatno, 2000).

The legality principle of criminal law in

Indonesia is regulated for the first time in Article 1 paragraph (1) of the Criminal Code, which is a legality principle derived from the translation of *Wetboek van Strafrecht voor Nederlandsch Indie* (WvS-NI). Article 1 paragraph (1) of the Criminal Code stipulates that no one can be convicted or subject to action, unless the act committed has been determined as a criminal offense in the laws and regulations that were in effect at the time the act was committed. The formulation of the principle of legality in Article 1 paragraph (1) of the Criminal Code is the basis or legitimacy in imposing criminal sanctions on anyone who commits a crime (Kristiyadi, 2023).

The principle of legality that applies in Indonesia initially refers to the formulation of the principle of formal legality. The formulation of the principle of formal legality refers to 2 (two) main points, namely: an act must be formulated in advance in laws and regulations, and criminal laws and regulations governing an act as a crime must exist before the act is committed (Widayati, 2011). In connection with the sound of the principle of formal legality as embedded in Article 1 paragraph (1) of the Criminal Code, it raises

principle consequences that follow the principle of legality, namely the non-retroactive principle which means that the application of criminal law rules cannot be applied retroactively (retroactively) (Pellokila, 2023).

The application of the principle of formal legality in Indonesia through the implementation of the Old Criminal Code (WvS-NI translation) has fundamental weaknesses. The basic weakness of the principle of formal legality embedded in the Old Criminal Code (WvS-NI translation) is the limited scope of punishment for actions that are categorized as criminal acts. The formal legality principle that was once enforced in Indonesia has a narrow reach in reaching actions that are categorized as criminal acts, namely limited to acts that are referred to as criminal acts because they are regulated in written criminal law rules (Santika, 2020). The question that then arises is, what if an act has not been categorized as a crime according to criminal law rules? Of course it is not a crime that can be subject to criminal sanctions. The next question that follows is if a criminal sanction cannot be imposed, what if the act has caused harm to the victim, both materially and immaterially? Of course the principle of formal legality cannot cover these actions and has implications for someone not being able to be convicted even though they have caused harm to another person (the victim).

Responding to this problem, Law Number 1 of 2023 concerning the Criminal Code has shifted the principle of legality, which was originally a formal legality principle, to a material legality principle. The principle of material legality in the new Criminal Code determines that the basis for an act to be punished is the law that lives in society (unwritten law) (Barda Nawawi Arief, 2008). The application of this material legality principle substantially expands the reach of the legality principle and philosophically pays respect to the customary community that still exists in Indonesia today.

This article will discuss the formulation of the legality principle which shifts from the formal legality principle to the material legality principle as contained in criminal law reform. The focus of the study of writing this article is to explore the meaning of changes to

the principle of legality which are not only substantial changes (the sound of the formulation of the law) but to explore the meaning related to the philosophical aspects contained therein relating to the function of criminal law protection which must be balanced for all society.

## II. METHODS

This article was prepared using the normative legal research method. . The approach used in writing this article is a statutory approach (statute approach) carried out by examining all relevant regulatory laws related to the problem being handled. The statutory approach is an approach using legislation and regulations (Achmad, 2010). The problem to be studied is related to criminal law legislation related to the principle of legality.

The legal material analysis technique used is the deductive method. The use of this method of deduction stems from the submission of the major premise, then the minor premise is proposed. Then, from the two premises a conclusion is drawn. The major premise in this study is legal concepts, both statutory regulations and doctrine (expert opinion) related to the topic under study, namely the principle of legality. While the minor premise in this study is the meaning of the renewal of the legality principle to become a material legality principle associated with the protection function of the criminal law which must provide balanced protection between perpetrators and victims.

## III. RESULT AND DISCUSSION

The provisions of Article 2 paragraph (1) of Law Number 1 of 2023 state that: "The provisions referred to in Article 1 paragraph (1) do not reduce the validity of the law that exists in society which determines that a person should be punished even though the act is not regulated in this Law." The sound of the formulation of Article 2 paragraph (1) is seen as an extension of the previous article regarding the legality principle, which limits the application of the legality principle to the formal legality principle which only bases the

applicability of criminal law on positive criminal law laws.

Furthermore, the provisions of Article 2 paragraph (2) state "The law that lives in society as referred to in paragraph (1) applies where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the people of nations." The provisions of paragraph (2) expressly illustrate that the expansion of the legality principle is not just changing the legality principle from the formal legality principle to the material legality principle.

The meaning of changing the formulation of the principle of legality substantially from the principle of formal legality to the principle of material legality is as an attempt to Indonesianize criminal law provisions which have so far been influenced by Dutch inherited criminal law based on the spirit of colonialism (Widiatmika, 2023). The existence of true law cannot be separated from the existence of society itself, as is the case with the existence of criminal law which cannot be separated from society. Indonesian people before the proclamation of Indonesian independence on August 17, 1945 actually had their own legal rules known as the living law, which the indigenous people called customary law (Wijaya, 2023).

After Indonesia's independence, the existence of customary law was eliminated due to the enactment of national law which actually maintained colonial inherited law. The principle of formal legality as a consequence of the implementation of the WvS-NI translation of the Criminal Code has ruled out the existence of customary law. Determination of whether an act can be punished or not is only based on written criminal law rules (Santika, 2019). The implication of applying the principle of formal legality is that the scope of criminal law to convict an act becomes narrower/limited as well. After going through a very long discussion process, finally Law Number 1 of 2023 concerning the Criminal Code was passed which carries the principle of material legality.

The application of the principle of material legality that expands the principle of formal legality has a positive impact on the application of criminal law in criminal law enforcement. Initially, the formal legality principle was only close to legal certainty from criminal law enforcement, whereas after the material legality principle was enacted, the application of criminal law was no longer rigid and wider. Criminal law enforcement is no longer limited to acts that are prohibited by law (*mala prohibita*) and can be subject to criminal sanctions. However, criminal law enforcement can also touch on actions that are not regulated in criminal legislation (unwritten law) and also include living legal provisions (customary criminal law).

The enactment of the principle of material legality also shows a balance of the criminal law protection function. The principle of formal legality that was enforced previously through the Old Criminal Code (WvS-NI translation) is clearly based only on the spirit of protection for perpetrators of criminal acts since. Meanwhile, after the enactment of Law Number 1 of 2023 concerning the Criminal Code, the protection provided does not only touch the perpetrators of criminal acts, but has also paid attention to victims of criminal acts. So the rights of victims of criminal acts to obtain legal protection from the state are fulfilled. Given that the law must indeed provide justice in the form of legal protection to the perpetrator, it is the victim whose rights must be restored that must be guaranteed. The balance of protection provided by the principle of material legality embedded in the New Criminal Code shows that the criminal law is currently drafted based on the Indonesian spirit by realizing comprehensive justice as the embodiment of the 5th precept of Pancasila, namely Social Justice for All Indonesian People

#### IV. CONCLUSION

Renewal of criminal law into national criminal law as enacted in Law Number 1 of 2023 concerning the Criminal Code, followed by renewal of the principle of legality. The renewal of the legality principle which was originally a formal legality principle to become a material legality principle contains a number of meanings. The meaning of



reforming the legality principle is expanding the reach of the legality principle in convicting someone in order to achieve justice for perpetrators and victims, and create a balance for the protection of perpetrators and victims in order to realize comprehensive justice for all Indonesian people. This renewal of the legality principle is imbued with the spirit of forming a National Criminal Code with the spirit of Indonesianness, namely based on Pancasila as the source of all sources of law.

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