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A Comparison of the Principle of Material Legality in the Indonesian Criminal Law System and English Legal System

Yosafat Geslauw[1], Prof. Dr. Eko Soponyono, S.H., M.H[2]

[1]Master of Law, Faculty of Law, Diponegoro University

[2]Lecturer Master of Law, Diponegoro University

ABSTRACT: The enactment of the principle of material legality as a source of material law in the Indonesian national criminal code which can be identified from the laws that live in Indonesian society based on the values of Pancasila. This is a renewal in the criminal law system in Indonesia. This research aims to analyse the comparison of the prinviple of material legality in the Indonesian legal system with the principle of material legality in the English legal system. The results of the analysis in this study found that the principle of material legality in Indonesia is based on Communal Morality and religious values while the principle of material legality in England is based on customary law or community customs developed based on court decisions.

KEYWORDS: Comparison; Principle of Material Legality; Communal Morality; Religious Values; Pancasila; Customary Law

I. INTRODUCTION

In the beginning, the law was influenced by the realities that lived together side by side in a community environment. The influence of society on the law is referred to as the realist of the law. This is in accordance with the view of Niuwenhuis who said that the real events that exist in society will influence the law. We cannot possibly fulfil legal norms, without first thinking fundamentally about the real events that exist in society, which are to be regulated by these legal norms. Law will always have a relationship with real events in society.[1] So that the law and human behaviour in society are like two sides of one coin that cannot be separated. There is no human behaviour in social life that escapes the rule of law. It is even clear what Cicero said that where there is society there is law (*ubi societas, ibi ius)*. In addition, the law can function as an object of development in order to realise an ideal law in accordance with the values that live in society. This is in accordance with the view of the sociolegal jurisprudence school that a good law is a law that is in accordance with the values that live in society. In order for the law to be in line with the values that live in the life of the community, the law must be extracted from the community itself.[2]

For this reason, when it is understood that the law must change along with developments in society, in order to keep up with developments in society, the law must always be updated and needs to be built on an ongoing basis. So it is said that the law is the object of development. In the aspect of development, the law functions in society as a driver and safeguard of development and its results. This is where the role of *law* as a means of changing society (*law as tool of social engineering)* as expressed by Roscoe Pound who also argues that law in addition to being a means of regulating social life or can be said to be a means of conducting social engineering, law is also seen as a means of controlling individuals so that their goals are in accordance with the goals of the society in which individuals become its citizens. [3]

National legal development is very important for the future of law in Indonesia. Legal *development* is essentially a *sustainable development*.[4] The government explicitly recognises the many problems in the legal field that have not been resolved optimally.[5] National development is a series of development efforts carried out continuously in all areas of the life of the

[1] Soejadi, *Pancasila sebagai Sumber Tertib Hukum Indonesia*, (Yogyakarta: Lukman Offset, 1999), p. 36

[2] Hariyanto, H., *Pembangunan Hukum Nasional Berdasarkan Nilai-Nilai Pancasila, Volksgeist*: Jurnal Ilmu Hukum dan Konstitusi, Vol. 1, No. 1, 2018, p. 54

[3] Soerjono Soekanto, *Pokok-Pokok Sosiologi Hukum*, (Jakarta: Rajawali, 2006), p. 44

[4] Djatmiko, W. *Paradigma Pembangunan Hukum Nasional yang Responsif dalam Perspektif Teori JH Merryman tentang Strategi Pembangunan Hukum*. Jurnal Rena Hukum, Vol. 11, No. 2, 2018, p. 418

[5] Setiadi, W., *Legal Development in the Framework of Increasing the Supremacy of Law*, Jurnal Recht Vinding:Media Pembinaan Hukum: Media Pembinaan Hukum, 2012, Vol.1, No. 1, p. 2

community, nation and state to realise national goals.[6] Conceptually, a country's national law can be formed due to various backgrounds.[7] The importance of building national law is because many laws that have been applied in Indonesia are no longer in accordance with the personality, values and culture of the Indonesian people. So that Indonesia needs to build a national legal system that is structured and has social value for the people and nation of Indonesia, namely national law that is in accordance with the minds of the Indonesian people based on the notion of collectivity. In other words, the development of national law must be built through a process of discovery, development, adaptation of the Indonesian nation's soul *(volkgeist)* and even a compromise of various existing laws.

Criminal law in this case is part of national law and is a system in which there are several subsystems that support each other for the enforcement of criminal law. Criminal law in the sense of a system can be understood as criminal law in a broad sense in which the system consists of subsystems of substantive/material criminal law, formal criminal law and criminal execution law. Such understanding is referred to as a system of punishment in a functional sense.[8] The definition of criminal law in a narrow sense agreed by experts is substantive criminal law or material criminal law, which Prof. Barda Nawawi Arief divided into two definitions. *First, the* entire system of material criminal law for punishment. *Second*, the entire system of rules or norms of substantive criminal law for the imposition and execution of punishment.[9] In this paper, what is meant by criminal law is criminal law in the narrow sense, namely substantive/material criminal law, which is often referred to as criminal law only.[10]

The development of National Legal Science is closely related to the understanding and nature of "legal science" which is a *"normatieve maatschappij wetenschap"*, namely "normative science about social relations or "the science of normative social relations *(*reality)" so that legal science is "normative science *(das Sollen)* about reality *(das Sein)*, or the science of normative reality *(das Sein)*". National Law Science also includes normative science or science about the "order of national life" (in various aspects of *"ipoleksosbud")*, including the ideology contained in Pancasila, especially the precepts of God. Also in the insight (Concept / Basic Idea) of Legal Science which is influenced by the *Civil Law System* and *the Common Law System*, Indonesia has its own characteristic legal system, namely the *Traditional Law System* and the *Religious Law System*.[11]

Every legal regulation starts and is rooted in legal principles, namely a value that is believed to be related to the structuring of society to achieve a just order.[12] The *Principle of Legality* is a fundamental principle in criminal law which determines that no act is prohibited and threatened with punishment if it is not determined in advance in the legislation. This principle in Latin is often known as "*nullum delictum nulla poena sine praveia lege"* (no offence, no punishment without prior regulation).[13] The principle of legality applicable 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 things, namely that an act must be formulated in advance in the legislation, and the criminal legislation governing an act as a criminal offence must exist before the act is committed.[14]

The implementation of the principle of formal legality in Indonesia through the enactment of the Old Criminal Code (WvS-NI translation) has a fundamental weakness. The weakness of the principle of formal legality embedded in the Old Criminal Code (WvS-NI translation) is the limited scope of punishment for acts categorised as criminal offences. The principle of formal legality currently applicable in Indonesia has a narrow reach in its coverage of acts categorised as criminal offences, namely limited to acts referred to as criminal offences regulated in written criminal law rules. [15]

Starting from the limitations of the principle of formal legality as explained above, Law Number 1 Year 2023 on the Criminal Code has shifted from the principle of legality which was originally the principle of formal legality to material legality. The material legality principle in the new Criminal Code determines that the basis for the punishment of an act is the law that lives in society (unwritten law). The enactment of this material legality principle substantially expands the reach of the legality principle and philosophically gives respect to indigenous peoples who still show their existence in Indonesia until now. So that in

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[6] Hasan, S., *Sistem Perencanaan Pembangunan dalam Penataan Hukum Nasional*, Meraja Journal, Vol. 3, No.1, 2018, p. 56

[7] Manan, B., Abdurahman, A., & Susanto, M., *Pembangunan Hukum Nasional Yang Religius: Konsep dan Tantangan dalam Negara Berdasarkan Pancasila*, Jurnal Bina Mulia Hukum, Vol. 5, No. 2, 2021, p. 179

[8] Barda Nawawi Arief, *Perkembangan Sistem Pemidaaan Indonesia*, (Semarang: Badan Penerbit Universitas Diponegoro Semarang, 2022), p. 2

[9] Barda Nawawi Arief, *RUU KUHP Baru: Sebuah Restrukturisasi dan Rekonstruksi Sistem Hukum Pidana Indonesia*, (Semarang: Badan Pustaka Magister Ilmu Hukum UNDIP, 2016).

[10] Yudianto, O. *Karakter Hukum Pancasila Dalam Pembaharuan Hukum Pidana Indonesia*, Jurnal Ilmu Hukum, Vol. 12, No. 23, 2016, p. 35

[11] Brian, S. D., Awaluddin, *Aspek Religius dalam Pembaharuan Hukum Pidana melalui Politik Hukum Nasional*, *Journal of Judicial Review*, Vol. 23, No. 1, 2021, p. 28

[12] Atmadja, I. D. G., *Asas-asas Hukum dalam Sistem Hukum*, Jurnal Kertha Wicaksana, Vol. 12, No. 2, 2018, p. 146

[13] Moeljatno, *Asas-asas Hukum Pidana*, (Jakarta: Rineka Cipta, 2000).

[14] Lidya, S. W., *Perluasan Asas Legalitas dalam RUU KUHP*, Jurnal Negara Hukum, Vol. 2, No. 2, 2011. (Vincentius, 2023) p. 316

[15] Vincentius, P. S., *Pemaknaan Asas Legalitas Materiil dalam Pembaharuan Hukum Pidana Indonesia*, Gudang Jurnal Multidispilin Ilmu, Vol. 01, No. 1, 2023, p. 13

this research there is an in-depth study of how the philosophy of the development of the principle of legality and what is the difference between the Indonesian material principle of legality and the material principle of legality in the UK.

II. FORMULATION OF THE PROBLEMS

Based on the background description above, the author will discuss the problem, namely how is a comparison of the principle of material legality in the Indonesian criminal law system and English legal system?

III. RESEARCH METHOD

In this research, the method used is a normative juridical, which is a scientific research procedure to find the truth based on the logic of legal science from normative side.[16] This legal research is conducted by requiring several approaches in finding ways to solve existing problems. The existence of this approach aims to obtain information from various aspects regarding the issues that are being tried to find answers to. The approaches used in legal research are statute approach, historical approach, comparative approach, and conceptual approach.[17]

IV. DISCUSSION

A. Development of the Principle of Legality

The principle of legality is one of the most crucial and standardised principles in Indonesian criminal law. Aside from this rule, there is a different principle which is the principle of guilt. Both of these principles are used in deciding whether an act is admissible or inadmissible. In particular, it is the initial stage that determines whether a criminal act has occurred to the perpetrator, which also determines his or her responsibility. The advancement of state life, which is related to the state of law, is related to the existence of this principle of legality at that time, which of course the social conditions of society were different from those that exist today.[18]

In the beginning, criminal laws were unwritten laws. Most of the criminal law in ancient Rome was unwritten. In the Middle Ages when Ancient Roman rules were considered Western Europe, there were crimes (crimina stellionatus) or offences that were not identified in the formal legal rules, so the rulers at that time acted arbitrarily. Because it was not regulated in a rule, the ruler could choose and represent erratic reasons with the power he had straightforwardly. The people at that time were certainly confused by the ruler's arbitrary behaviour, because the people did not know about what kind of actions should not be done or prohibited or what kind of actions were classified as permissible at that time. Montesquie offered a different perspective on legality, stating that in a moderate government, the delegated authority must own what happens from the sovereign and must provide discipline that is as clear as possible according to the legitimate plan. Judges in making decisions about must act very carefully to try not to prosecute innocent people unreasonably.[19] Based on this, the judge in imposing punishment must have previously been listed in the legislation as a consequence of clear criminal provisions in the law.

When the discussion is about formal legality, it will be closely related to the concept of positivistic thinking. Legalistic Positivism states that the law cannot be separated from legislation. Law must be separated from ethics, governance issues, culture, and economics and so on. The viewpoint of true positivism is connected to the philosophical idea of positivism which states that everything is considered self-evident if it can actually be seen as a current reality. In legitimate positivism there must be a clear division between rules and morals. [20]

The sociological jurisprudence school opposes the view of positivism which views that the ideal law must be in accordance with the local wisdom of the community or commonly known as customary law. This school of sociological jurisprudence began to develop in the United States and also in Indonesia.[21] In Indonesia itself, customary law has long been recognised even before Indonesia was agreed to become a country even as a state of law (rechtsstaat). But now its existence is slowly starting to be re-emphasised for in order to explore the potential and wisdom of local law. Even in Article 5 paragraph (1) of the Judicial Power Law which basically states "Judges and constitutional judges are obliged to explore, follow and understand the values of law and a sense of justice that live in society." This provision provides guidance to judges in terms of deciding a case must refer to the formulation of this article in order to explore the legal values that live in society.

In 1946, based on the principle of concordance, the principle of legality was applied to Indonesian criminal law as stated in Article 1 paragraph (1) of the Criminal Code, but Article 5 paragraph (3) Sub B of Emergency Law Number 1 Year 1951 affirmed that acts according to living law can be considered criminal acts as long as there is no appeal in the Criminal Code and judges can

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[16] Johny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif,* (Malang: Bayumedia Publishing, 2010), p. 57

[17] Peter Mahmud Marzuki, *Penelitian Hukum,* edisi Revisi, Cetakan ke 9, (Jakarta: Kencana Prenadamedia Group, 2014), p. 133

[18] Reki Anwar, *Eksistensi Asas Legalitas Formil dan Materil pada KUHP Nasional*, Jurnal Fakta Hukum, Vol. 2, No. 2, 2023, p. 151

[19] Eddy O.S Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana*, (Jakarta: Erlangga, 2002), p. 9

[20] Sukarno Aburaera, et al, *Philosophy of Law Theory and Practice*, (Jakarta: Kencana, 2013), p. 106

[21] Zainuddin Ali, *Filsafat Hukum Teori dan Praktek*, (Jakarta: Sinar Grafika, 2014), p. 61

impose a maximum imprisonment of three months for criminal acts. Until now, this regulation should still be used by judges to give verdicts on criminal offences related to customary law

In principle, legality has two meanings in the development of legal knowledge. First, formal legality describes the reason for deciding a criminal act is based on the law so that the act can be sanctioned, if it is not in the law then it is not a criminal act. Second, material legality states that the reason for deciding a criminal act is the value that lives in the community or customary law which is contained in strict characteristics, morals, customs and others that develop and grow in society as unwritten law.

The current National Criminal Code has tried to adjust to the standards and principles of Universal Human Rights, which Prof Muladi calls the Indonesian Way based on Pancasila and the 1945 Constitution.[22] Because this material legality can manifest the characteristics that live in society, it changes by forming a very harmonious impression and the sense of justice that exists in the local area will be restored, as well as providing legitimacy or significant certainty to the legal dynamics that exist in society. Meanwhile, the rules of formal legality provide formal legal certainty. The use of the principle of material legality in relation to the Criminal Code is a situation that needs to be developed again, because the customary law that still exists today cannot be systematised thoroughly and there must be legal certainty and security of freedom together.

B. Comparison Of the Principle of Material Legality in Indonesia, Which Is Based on Communal Morality and Religious Values

According to Prof Muladi, connecting the principle of legality with customary criminal law carelessly will clearly not find a match. Customary criminal law, which is based on the philosophy of harmony and *communal morality*, will contradict the *principle of legality*, which pivots on: *(1) legal definition of crime, (2) punishment should fit the crime, (3) doctrine of free will, (4) death penalty for some offences, (5) no empirical research, and (6) definite sentence*, which are characteristics of the classical school. The principle of legality in the contemporary sense with a different spirit from the original, will be more democratic, the spirit is*: (a) Forward Looking, (b) Restorative Justice, (c) Natural Crime, (d) Integrative.* Customary criminal law, if it is to be recriminalised (including "*law making"* and *"law enforcement")* must be able to clearly formulate the four things above, which when further elaborated will include the following requirements: a. Not solely for the purpose of retaliation in the sense that it is not *ad hoc*, b. Must cause a clear loss or victim (can be actual in material offences and can be potential in formal offences), c. If there are other better and more effective ways, criminal law should not be used, d. The loss caused by criminalisation should be avoided. The harm caused by punishment must be smaller than the consequences of the crime, e. Must be supported by the community, and f. Must be applied effectively. Must be able to be applied effectively.[23]

Indonesia is a country that has a high level of pluralism that spreads in every region.[24] The existence of *indigenous pe*oples is not only recognised at the national level, as in Article 18B paragraph (2) of the 1945 Constitution, but also on an international scale as contained in *the United Nations Declaration on the Rights of indigenous Peoples 2007*.[25] Customary law is part of Indonesian culture.[26] The recognition of customary criminal law is of course in accordance with the doctrine of the nature against material law both in its negative and positive functions. The doctrine of formal unlawfulness determines that an act is unlawful if it is contrary to written law or statute. The doctrine of material tort determines that an unlawful act is not only contrary to the written law / law but also contrary to the principles of law that live in society. Customary criminal law is a *living* law or *The Living Law* can be a: Source of positive law; and, Source of negative law in the sense that the provisions of customary criminal law/The *Living Law* can be a reason for justifying, mitigating or aggravating the punishment.[27]

Literally or etymologically "Pancasila" comes from Sanskrit, namely Panca means five and sila means joint stone, foundation, while in the Big Indonesian Dictionary, sila means the rules that underlie the behaviour of a person or nation, behaviour or actions according to custom, basis, manners, morals, thus Pancasila can also be interpreted as five rules / basics that underlie the behaviour of a person or nation. The Pancasila philosophy is also classified as a religious philosophy, which means that the Pancasila philosophy in terms of wisdom and truth recognises the absolute truth that comes from God Almighty (religious

[22] Setya Indra Arifin, *Rekonstruksi Sifat Melawan Hukum Pidana Materiil dalam Undang-undang Nomor 1 Tahun 2023 Tentang KUHP,* Jurnal Al-Wasath, Vol. 4, No. 1, 2023, p. 38

[23] Nyoman S.P.J., *Hukum (Sanksi) Pidana Adat dalam Pembaharuan Hukum Pidana Nasional,* Jurnal Masalah-Masalah Hukum, Vol. 45, No. 2, 2016, p. 126

[24] Runtoko, P., *Konsekuensi Yuridis Kemajemukan Bangsa Indonesia Terhadap Pembangunan Hukum Nasional,* Jurnal Lex Renaissance, Vol. 6, No. 1, 2021, p. 208

[25] Julranda, R., Siagian, M. G., & Zalukhu, M. A. P., *Penerapan Hukum Progresif sebagai Paradigma Pembangunan Hukum Nasional dalam Rancangan Undang-undang Masyarakat Hukum Adat,* Jurnal Crepido, Vol. 4, No. 2, 2022. p. 177

[26] Sudaryatmi, S., *Peranan Hukum Adat dalam Pembangunan Hukum Nasional di Era Globalisasi,* Jurnal Masalah-masalah Hukum, 2012, Vol. 41, No. 4, p. 574

[27] *Ibid.*

truth) while recognising the limitations of human abilities, including the ability to think. The Godhead contains the understanding and belief in the existence of God Almighty, the creator of the universe and its contents.[28]

Based on the explanation above, the principle of material legality is also basically based on the values of the Almighty God, which is realised by extracting the values of religious law (such as Islam, Christianity, Catholicism, Hinduism and Buddhism), which are then integrated into the principles of our positive law, so that the applicable law in Indonesia does not conflict with the values of the Almighty God.

C. The Principle of Material Legality of Criminal Law in The UK

Whilst the principle of legality has never been formally enacted into law in the UK, it remains a cornerstone of court decisions based on case law. The principle of legality, also known as the "principle of legality" in the context of English law, plays a crucial role in the country's Common Law legal system. Although this principle has never been formally enshrined in law, it is the basis for the interpretation of court decisions in the UK, with reference to case law or jurisprudence as its source. In the UK, the principle of legality means that criminal provisions cannot be applied retroactively. This means that an act can be punished only if it is regulated in criminal legislation. However, in later developments, the principle of legality was deviated from in several countries, namely Russia, Germany, and even the Netherlands.[29]

In the context of English law, the principle of legality emphasises that a person can only be punished if the act has been expressly prohibited by law. Initially, courts in the UK felt they had the power to create offences or develop the law through their decisions. However, in 1972, the House of Lords (now the Supreme Court) unanimously rejected the power of the courts to create new offences or expand existing ones. In the English Legal System, known as Common Law, the principles of unwritten law are the guiding values in society. The role of judges is to create legal rules governing community life, and judges are bound by legal principles resulting from court decisions in previous cases (doctrine of precedent). The main source of law is the judge's decision (jurisprudence). The main legal sources that support the principle of legality in the UK include:[30] a. Case law or jurisprudence: Court decisions that have become precedents or references in law enforcement in the past, b. Statute law: Laws made by the UK Parliament and generally applicable throughout the country.

In English criminal law, the principle of legality plays an important role. Although not formally set out in legislation, the principle of legality animates court decisions based on case law or jurisprudence. The principle of legality in English criminal law contains several key principles: 1. Nulla poena sine lege, no punishment without law. This means that a person cannot be punished unless their actions have been clearly regulated as a criminal offence in the applicable law, 2. Nulla poena sine crimine, no punishment without a crime. This principle emphasises that in order to be sentenced, a person must be proven guilty of committing a crime specified in the law, 3. Nullum crimen sine poena legali, no crime without punishment is regulated by law. This principle emphasises that every criminal offence must have a clearly defined punishment in the applicable law.

In the reform of criminal law in the UK, it is important to always pay attention to the source of law or legislation that applies. The aim is to ensure legal certainty and prevent abuse of power in law enforcement.[31]

This change indicates a shift from the material conception of the principle of legality to the formal conception of the principle of legality. In this context, the role of judges has changed where they no longer have the authority to create new laws, but they are bound by legal principles that have been established through previous court decisions (known as the doctrine of precedent). Over time, the determination of offences by judges could only be done based on statute law, which became the main source of law in the UK.[32]

As such, the principle of legality in English criminal law guarantees legal certainty by emphasising that only acts that are expressly provided for as criminal offences in law are punishable. The role of judges in interpreting the law and applying this principle of legality in court judgements is crucial. They do not have the authority to create new law, but are bound by legal principles that have been established through previous court decisions (the doctrine of precedent). The primary source of law in English criminal law is judicial decisions (jurisprudence), which guide the determination of whether or not an act is a criminal offence.

CONCLUSIONS

The philosophy of the development of the principle of legality is known from the beginning that criminal regulations exist starting from unwritten regulations. Most of the criminal law in ancient Rome was unwritten. In the Middle Ages when

[28] Sri E.W., *Urgensi Pembaharuan Hukum Pidana Materiel Indonesia Berdasarkan Nilai-Nilai Ketuhanan yang Maha Esa*, Jurnal Pembaharuan Hukum, Vol. 1, No. 1, 2014, p. 18-19

[29] Sri Rahayu, *Implikasi Asas Legalitas terhadap Penegakan Hukum dan Keadilan*, Vol. 7, No. 3, 2014, p. 3

[30] Hendri F, et al, *Tinjuan Yuridis Penerapan Asas Legalitas Dalam Tindak Pidana Korupsi*, Jurnal Ilmu Hukum dan Humaniora, Vol. 3, No. 2, 2020, p. 10

[31] *Op.Cit.*

[32] Bhakti, Yudha, A., *Hukum International*, (Bandung: PT. Alumni Bandung, 2014).

Ancient Roman rules were considered Western European, there were *crimes (crimina stellionatus)* or offences that were not identified in the formal legal rules, so the rulers at that time acted arbitrarily. Montesquie then offered a different perspective on legality, stating that in a moderate government, the delegated authority must own what happens from the sovereign and must provide discipline that is as clear as possible according to the legitimate plan. Judges in making decisions about must act very carefully to try not to prosecute innocent people unreasonably. Based on this, the judge in imposing punishment must have previously been listed in the legislation as a consequence of clear criminal provisions in the law. The difference in the Indonesian principle of material legality is based more on *Communal Morality* and religious values in contrast to the principle of material legality in the UK which is based on customary law or community customs developed based on court decisions.

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