

Implementation of the Principles of Material Legality in Law Enforcement in Indonesia



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ABSTRACT: This research aims to research and analyze the implementation of the material legality principle in the Criminal Code to increase public awareness and legal compliance in Indonesia now and in the future. The research method used is normative juridical, using secondary data in the form of statutory regulations, and supported by primary data in the form of field research. The research results show that the implementation of the principle of material legality in law enforcement in Indonesia originates from the laws that exist in society. Formally, it is stated in Article 2 of Law No.1 of 2023 concerning the National Criminal Code, National Law Seminar I of 1963 in Semarang, Article 5 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power, Article 5 paragraph (1) Law no. 2 of 2002 concerning the Police of the Republic of Indonesia, Article 8 paragraph (4) of Law No.11 of 2021 concerning Amendments to Law No.16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia, but until now it is still very difficult to implement because it is still oriented in the WvS (Criminal Law Book) inherited from Dutch colonialism S. 1915:732 which still adheres to the Certainty (formal) model and is rigid in nature so that it cannot accommodate the values that live in Indonesian society. The implementation of the principle of material legality in law enforcement in Indonesia in the future must adhere to a balance model that is flexible or elastic so that it can accommodate the legal values that live in society as contained in Pancasila as an embodiment of Intellectual Philosophy, so that it can increase legal awareness and compliance in society.

KEYWORDS: Material legality principle; National crime code; Law enforcement.

I. INTRODUCTION

In the Dutch Criminal Code (WvS), Indonesian criminal law recognizes two principles of legality, namely the principle of formal legality as stipulated in Article 1 paragraph (1) of the Criminal Code and the principle of material legality as stipulated in Article 2 of the National Criminal Code. The basis for whether an act is appropriate to be punished on the principle of formal legality is the law that existed before the act was committed (written law). Meanwhile, the principle of material legality determines that the basis for an act to be punished is the law that exists in society (unwritten law).

Most of the laws that exist in society are unwritten laws. The emergence of legal terminology that lives in society in the National Criminal Code is to designate laws other than laws established by the state. Thus, the National Criminal Code opens up opportunities for legal pluralism even though the resolution mechanism still uses criminal justice. The principle of legality is faced with the implementation of laws that live in society (Article 2 of Law No. 1 of 2023 concerning the National Criminal Code). Society will be carried out by the state through the criminal justice system. If a violation occurs, it will be processed through a formal process, including investigation, inquiry, prosecution, up to examination in court and execution or implementation of the crime. Article 1 and Article 2 of Law No.1 of 2023 concerning the National Criminal Code were created on the basis of the principle of balance using a two-track system.

By recognizing the laws that live in society or unwritten laws, it becomes a logical consequence that unwritten laws become written/formal laws. The National Criminal Code adheres to monodualistic balance, namely the principle of balance between the interests/protection of individuals (personal principle/culpability principle) with the interests/protection of individuals and society (social principle), balance between formal and material criteria, and balance between legal certainty and justice. Values/ideas balance in the National Criminal Code. Continuing to determine that a criminal act is always against the law by adhering to its unlawful nature, Article 12 paragraph (2) of the National Criminal Code determines: "To be declared a criminal act, an act is threatened with criminal sanctions and/or action by regulations. legislation must be unlawful or contrary to the laws that exist in society." And paragraph (3) "Every criminal act is always against the law, unless there is a justification", which means that in determining whether an act can be punished, one must pay attention to harmony with the laws that exist in society.

The implementation of the principle of material legality in Indonesia has been regulated in:¹

¹Arief, Barda Nawawi, Bunga Rampai Kebijakan Hukum Pidana, Kencana, Jakarta, 2008, hal.81-82

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1. Article 5 (3) sub b of Law no. 1 Drt. 1951
2. Resolution in the Field of Criminal Law at the 1st National Law Seminar in 1963
3. Judicial Power Law (Law No.14 of 1970)
- Article 14(1), Article 23 (1), Article 27 (1)
4. National Law Seminar IV/1979
5. National Law Seminar VI/1995

Apart from the 5 things mentioned above, according to the author, they are regulated in:

1. Article 2 of Law No.1 of 2023 concerning the National Criminal Code,
2. Article 5 paragraph (1) Law no. 48 of 2009 concerning Judicial Power.
3. Article 5 paragraph (1) Law no. 2 of 2002 concerning the Police of the Republic of Indonesia.
4. Article 8 paragraph (4) Law No.11 of 2021 concerning Amendments to Law No.16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia.

The inclusion of the principle of Material Legality in the seminars and laws mentioned above is certainly a reflection of the values that live in society in an effort to balance norms (law in the book) and values, so that it does not only adhere to the model of certainty (formal) which is rigid. With this balance model, it is hoped that it will provide harmony and continuity in criminal law enforcement in Indonesia which is in accordance with Pancasila as an Intellectual Philosophy so that it can increase awareness and legal compliance among people in Indonesia. This should be a basis for law enforcement officials from the Police, Prosecutor's Office, Judges and Lawyers to apply the principle of material legality in law enforcement in Indonesia.

Based on the background above, the problems can be formulated, including: first, what is the policy for formulating the principle of material legality in the National Criminal Code for law enforcement in Indonesia today? Second, how is the material legality principle implemented in the National Criminal Code for future law enforcement?

II. RESEARCH METHODS

This research uses a normative juridical approach using secondary data in the form of statutory regulations, and supported by primary data in the form of field research.

III. RESULTS AND DISCUSSION

A. Policy for Formulating the Principle of Material Legality in the National Criminal Code for Law Enforcement in Indonesia Today.

The principle of legality is a principle regarding the legal basis/legal basis/legal source for declaring whether an act is an offense or not. The essence of the principle of legality regulates the sources of law. It contains the principle of legality in Article 1 of the Criminal Code WvS, which means that the origin of the action if it meets the formulation of the Law is called a delict or criminal act and must be punished. The formulation of the principle of legality comes from Dutch heritage and is known as the principle of formal legality. The principle of legality is the principle regarding the source of law, especially in the field of criminal law, which states that the source of criminal law is the law. When viewed from the national legal system, the formulation of the principle of legality is clearly neither appropriate nor harmonious. The national legal system recognizes unwritten law as a source of law. This could be one of the reasons for updating.

The concept expands its formulation materially by emphasizing that the provisions in Article 1 paragraph (1) do not reduce the application of "living law" in society. Thus, besides written legal sources (UU) it is the main formal criterion/benchmark. The concept also still gives place to unwritten sources of law that live in society as a basis for determining the appropriateness of punishment for an act. It should be noted that the application of law that lives in society is only for offenses that have no appeal (similarity) or are not regulated in law.²

Changes made by the National Criminal Code are material or substantive changes. In the formulation of changes to Article 1 paragraph (1) in the old Criminal Code, there was only a positive legality principle but there was no negative legality principle. In its development, Article 1 of the National Criminal Code has included a formulation of the principle of negative legality, and in paragraph (2) a draft has been added which states that even though the act fulfills the formulation of the Law, if it is not against the law then it cannot be said to be illegal. as a criminal offence.

The renewal of the national criminal law and the National Criminal Code is that after 75 years of independence there is no national Criminal Code which is the first form of reform and has been running for 75 years. WvS Bld [1881](#) has changed [455](#) times. So criminal law, which contains norms and values (basic ideas /concepts), requires changes/renewal of criminal law in its values/basic ideas/concepts.

²Arief, Barda Nawawi, Bunga Rampai Kebijakan Hukum Pidana, Kencana, Jakarta, 2008, hal. 80

³Undang-undang Republik Indonesia No. 1 Tahun 2023 Tentang KUHP Nasional

⁴Mulyadi, Lilik, Hukum Pidana Adat (Kajian Asas, Teori, Norma, Praktik, dan Prosedur), PT. Alumni, Bandung, 2021, hal.76-80

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Changes in the formulation of the principle of formal legality to material legality in the National Criminal Code:³
article 1

(1) No act can be subject to criminal sanctions and/or action, except under the force of criminal regulations in laws and regulations that existed before the act was committed.

(2) When determining the existence of a criminal act, analogies are prohibited from being used.

Section 2

(1) The provisions as intended in Article 1 paragraph (1) do not reduce the validity of laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this Law.

(2) The law that lives in society as intended in paragraph (1) applies in the place 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, rights human rights, and general legal principles recognized by the people of nations.

(3) Provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations.

There are several substantial notes regarding the existence of the legality principle as regulated in the provisions of Article 1 paragraph (1) and (2):⁴

1. The principle of legality in the provisions of Article 1 paragraph (1) is the principle of formal legality, while the principle of material legality is regulated in the provisions of Article 2 paragraph (1). On the principle of formal legality, the basis for an act to be punished is the law that existed before the act was committed. Then, the principle of material legality determines that the basis for the appropriateness of punishment for an act is the law that exists in society, namely unwritten law or customary law.

2. When determining the existence of a criminal act, it is prohibited to use the analogy of Article 1 paragraph (2).

3. The principle of formal legality in the provisions of Article 1 paragraph (1) cannot be applied absolutely/absolutely or imperatively because there are exceptions as regulated in Article 2 paragraph (1)

Policy for formulating the principle of material legality in criminal law reform in Indonesia:

a. First National Law Seminar in 1963 in Semarang

b. Article 5 paragraph (1) Law no. 48 of 2009 concerning Judicial Power.

Article 5 paragraph (1) "Constitutional judges and justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society."⁵

c. Article 5 paragraph (1) Law no. 2 of 2002 concerning the Police of the Republic of Indonesia.

Article 5 paragraph (1) "The National Police of the Republic of Indonesia is a state instrument that plays a role in maintaining security and public order, enforcing the law, and providing protection, guidance and service to the community in the context of maintaining domestic security."⁶

d. Article 8 paragraph (4) Law No.11 of 2021 concerning Amendments to Law No.16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia.

The embryo or embryo of the main idea (still recognizing the existence/enactment of unwritten laws that live in society), has actually been around for quite a long time and has been spread across several legislative products so far, namely in:⁷

1. Article 5 (3) sub b of Law no. 1 Drt. 1951

"...that an act which according to living law must be considered a criminal act, but which has no equivalent in the Civil Criminal Code....."

2. Resolution in the Field of Criminal Law at the 1st National Law Seminar in 1963

- Resolution Point IV: "...does not close the door to the prohibition of actions according to living customary law....."

- Resolution Point VIII: "Elements of religious law and customary law are intertwined in the Criminal Code."

3. Judicial Power Law (Law No.14 of 1970)

- Article 14(1): "The court may not refuse to examine and try a case filed on the grounds that the law is unclear, but is obliged to examine and try it."

- Article 23 (1): "All court decisions, apart from having to contain the reasons and grounds for the decision, must also contain certain articles from the relevant regulations or sources of unwritten law."

- Article 27 (1): "Judges as enforcers of law and justice are obliged to explore, follow and understand living legal values."

4. National Law Seminar IV/1979

In sub report b. II regarding the "National Legal System", stated, among other things:

a. The National Legal System must be in accordance with the needs and legal awareness of the Indonesian people.

b. As far as possible, National Laws must be kept in written form. In addition, unwritten laws remain part of National Law.

⁵UNDANG-UNDANG REPUBLIK INDONESIA NOMOR 48 TAHUN 2009 TENTANG KEKUASAAN KEHAKIMAN

⁶UNDANG-UNDANG REPUBLIK INDONESIA NOMOR 2 TAHUN 2002 TENTANG KEPOLISIAN NEGARA REPUBLIK INDONESIA

⁷Arief, Barda Nawawi, Bunga Rampai Kebijakan Hukum Pidana, Kencana, Jakarta, 2008, hal.81-82

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5. National Law Seminar VI/1995

Written law and unwritten law should be "complementary"

- Customary law is an important source of law in national life.

- In the PJP II era, the legal community in Indonesia must be directed to respect customary law as a source of law, in addition to statutory regulations and permanent jurisprudence.

B. Implementation of the principle of material legality in the National Criminal Code for law enforcement in Indonesia in the future

Criminal law reform is essentially an effort to review and reassess ("reorient and reevaluate") the sociopolitical, sociophilosophical and sociocultural values that underlie and provide content to the normative and substantive content of the criminal law that is envisioned. It is not reform ("reform") of criminal law, if the value orientation of the envisioned criminal law (for example, the new Criminal Code) is the same as the value orientation of the old criminal law inherited from the colonialists (old Criminal Code or WvS).⁸

Barda Nawawi Arief groups Pancasila values which can be used as a legal source for the development of Indonesian criminal law, namely:

1. Divine Values

2. Human Values,

3. Community Values, which include:

a. Nationalistic Values,

b. Democratic Values, and c. Value of Justice.

The three values mentioned above must be understood in their entirety because Pancasila as stated in the preamble to the 1945 Constitution of the Republic of Indonesia is a unified and complete unity of the five principles, namely Belief in One God, Just and Civilized Humanity, Indonesian Unity, and Democracy led by wisdom and representative deliberation, social justice for all Indonesian people. The development of national law is essentially building concepts of order that are oriented towards Pancasila values, namely religious morals, democracy and social justice.⁹

The development of national law that is oriented towards social justice means that the values of substantive justice must be reflected in every national legal policy. This justice covers various aspects of people's lives, both in the economic, social, cultural and political fields. Legal development that is oriented towards the values of justice and prosperity will give birth to inner and outer prosperity for the Indonesian people or nation.¹⁰

IV. CONCLUSION

The research results show that the implementation of the principle of material legality in law enforcement in Indonesia originates from the laws that exist in society. Formally, it is stated in Article 2 of Law No.1 of 2023 concerning the National Criminal Code, National Law Seminar I of 1963 in Semarang, Article 5 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power, Article 5 paragraph (1) Law no. 2 of 2002 concerning the Police of the Republic of Indonesia, Article 8 paragraph (4) of Law No.11 of 2021 concerning Amendments to Law No.16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia, but until now it is still very difficult to implement because it is still oriented in the WvS (Criminal Law Book) inherited from Dutch colonialism S. 1915 :732 which still adheres to the Certainty (formal) model and is rigid in nature so that it cannot accommodate the values that live in Indonesian society.

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⁸Arief, Barda Nawawi, Bunga Rampai Kebijakan Hukum Pidana, Kencana, Jakarta, 2008, hal.30

⁹Suteki, Hukum dan Masyarakat, Thafa Media, Yogyakarta, 2021, hal.395

¹⁰M. Abdul Karim, Menggali muatan Pancasila dalam Perspektif Islam, Yogyakarta, Sunan Kalijaga Press, 2004, hal.5