

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

Sri Wahyuningsih Yulianti\*<sup>1</sup>  
Ismawati Septiningsih<sup>2</sup>

<sup>1,2</sup> Law Study Program, Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia  
\*e-mail: sriwahyuningsih@staff.uns.ac.id<sup>1</sup>

## Abstrak

Asas legalitas merupakan sebuah asas yang sangat penting dalam ilmu hukum pidana. Asas legalitas memegang peranan penting dalam pemberlakuan aturan hukum pidana materiil dan menjadi dasar legitimasi perbuatan yang dikategorikan sebagai tindak pidana. Pembaruan hukum pidana dengan pengesahan Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana tidak hanya mengubah bunyi rumusan asas legalitas secara substantial semata, akan tetapi mengubah asas legalitas formal yang semula jauh dari rasa keadilan masyarakat, diperluas menjadi asas legalitas materiil yang lebih menjamin rasa keadilan masyarakat. Artikel ini akan membahas terkait dengan asas legalitas materiil sebagai pembaruan dari asas legalitas formil yang bertujuan untuk memperluas daya jangkau asas legalitas di dalam memberikan perlindungan bagi masyarakat dari akibat negative yang ditimbulkan dari tindak pidana.

**Kata kunci:** asas legalitas, pembaruan, hukum pidana

## Abstract

The principle of legality is a very important principle in criminal law. The principle of legality plays an important role in the implementation of material criminal law rules and is the basis for the legitimacy of actions that are categorized as criminal acts. Criminal law reform with the ratification of Law Number 1 of 2023 concerning the Criminal Code does not only change the sound of the formulation of the principle of legality in a substantial way, but also changes the principle of formal legality, which was previously far from society's sense of justice, to be expanded into a principle of material legality that ensure a greater sense of justice in society. This article will discuss the principle of material legality as an update of the principle of formal legality which aims to expand the reach of the principle of legality in providing protection for society from the negative consequences resulting from criminal acts.

**Keywords:** legality principle, reforming, criminal law

## INTRODUCTION

Legal principles are tendencies required by law to understand morality. Principles are understood as the basic thoughts behind the working of the legal system in a country. Based on this definition, it can be understood that the existence of principles in a legal system is very significant because it is the basis for establishing legal rules and implementing legal rules (Atmadja, 2018). The principle of legality is a very fundamental principle in criminal law. As a principle in criminal law, the principle of legality contains an abstraction regarding the existence of a criminal law rule and also guidelines for implementing material criminal law rules.

The principle of legality is a fundamental principle of criminal law which determines that no act is prohibited and punishable by criminal law if it is not previously determined in legislation. This principle in Latin is often known as "Nullum delictum nulla poena sine praevia lege" (no offense, no crime without prior regulations)(Situngkir, 2018).

The principle of legality of criminal law in Indonesia is regulated for the first time in Article 1 paragraph (1) of the Criminal Code, which is a principle of legality originating from a translation from Wetboek van Strafrecht voor Nederlandsch Indie (WvS-NI). Article 1 paragraph (1) of the Criminal Code determines that no one can be punished or subject to action, unless the act committed has been designated as a criminal offense in the laws and regulations in force at the time the act was committed. The formulation of the principle of legality in Article 1 paragraph (1)

reads. The Criminal Code is the basis or legitimacy for imposing criminal sanctions on anyone who commits a criminal act (Setyawan, 2021).

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 things, namely: an act must first be formulated in statutory regulations, and criminal legislation that regulates an act as a criminal act must exist first 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 gives rise to principles that follow the principle of legality, namely the non-retroactive principle which means that the application of criminal law rules must not be applied retroactively.

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

Responding to this problem, Law Number 1 of 2023 concerning the Criminal Code has shifted the principle of legality, which was originally the principle of formal legality, to the principle of material legality. The principle of material legality in the new Criminal Code determines that the basis for an act to be punished is the law that exists in society (unwritten law) (Irmawanti & Arief, 2021). The implementation of the principle of material legality is to substantially expand the reach of the principle of legality and philosophically give respect to traditional communities that still exist in Indonesia today.

This article will discuss the formulation of the principle of legality which shifts from the principle of formal legality to the principle of material legality as found in criminal law reform. The focus of the study in writing this article is to explore the meaning of changes in the principle of legality which are not only substantial changes (the sound of the legal formulation only) but to explore the meaning related to the philosophical aspects contained therein relating to the protective function of criminal law which must be balanced for the entire community.

## **METHOD**

This article was prepared using normative legal research methods. Normative legal research is a process of finding legal rules, legal principles and legal doctrines to answer legal issues faced (Marzuki, 2022). This research aims to determine legal rules, especially related to the principle of legality which has experienced a shift from the principle of formal legality to the principle of material legality. The approach used in writing this article is a statutory approach which is carried out by examining all relevant regulatory laws related to the problem being handled. The Legislative Approach is an approach that uses legislation and regulations (Fajar ND & Achmad, 2007). The problem that will 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 deduction method stems from submitting a major premise, then submitting a minor premise. Then, from these two premises a conclusion or conclusion is drawn. The major premise in this research is legal concepts, both statutory regulations and doctrine (expert opinion) related to the topic studied, namely the principle of legality. Meanwhile, the minor premise in this research is that the meaning of updating the principle of legality to the principle of material legality is linked to the protective function of criminal law which must provide balanced protection between the perpetrator and the victim

## RESULT AND DISCUSSION

The provisions of Article 2 paragraph (1) of Law Number 1 of 2023 state that: "The provisions as referred to 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 the Law. Invite this." The formulation of Article 2 paragraph (1) is seen as an expansion of the previous article concerning the principle of legality, which limits the application of the principle of legality to the principle of formal legality which only bases the application of criminal law on positive criminal law.

Furthermore, the provisions of Article 2 paragraph (2) state "The laws that live in society as intended in paragraph (1) apply in the place where the law lives and as long as they are not regulated in this Law and are in accordance with the values contained in Pancasila, the Law The 1945 Foundation of the Republic of Indonesia, human rights and general legal principles recognized by the people of nations." The provisions of paragraph (2) clearly illustrate that the expansion of the principle of legality is not simply changing the principle of legality from the principle of formal legality to the principle of material legality.

The meaning of the substantial change in the formulation of the principle of legality from the principle of formal legality to the principle of material legality is as an effort to Indonesianize criminal law provisions which have so far been influenced by Dutch inherited criminal law which is based on the spirit of colonialism. The true existence of law cannot be separated from the existence of society itself, just as the existence of criminal law cannot be separated from society. Indonesian society before the proclamation of Indonesian independence on 17 August 1945 actually had its own legal rules known as the living law, which indigenous peoples call customary law.

After Indonesia's independence, the existence of customary law was eliminated due to the implementation of national law which actually maintained colonial 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. Determining whether an act is punishable or not is only based on written criminal law rules. The implication of applying the principle of formal legality is that the reach of criminal law to punish an act becomes narrower/limited. After going through a very long discussion process, Law Number 1 of 2023 concerning the Criminal Code was finally passed which carries the principle of material legality.

The application of the principle of material legality which expands the principle of formal legality has a positive impact on the application of criminal law in enforcing criminal law. Initially, the principle of formal legality was only close to legal certainty in the enforcement of criminal law, whereas after the implementation of the principle of material legality, the application of criminal law did not become any more rigid and broader. Enforcement of criminal law 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 enforcement of the principle of material legality also shows a balance of functions. criminal law protection. The principle of formal legality that was previously enforced through the Old Criminal Code (WvS-NI translation) was clearly based only on the spirit of protection for perpetrators of criminal acts. Meanwhile, after the enactment of Law Number 1 of 2023 concerning the Criminal Code, the protection provided does not only touch perpetrators of criminal acts but also pays attention to victims of criminal acts. The balance of protection provided by the principle of material legality embedded in the New Criminal Code shows that the current criminal law is prepared based on the spirit of Indonesianism by realizing comprehensive justice as an embodiment of the 5th principle of Pancasila, namely Social Justice for All Indonesian People.

## CONCLUSION

The reform of criminal law into national criminal law as ratified by Law Number 1 of 2023 concerning the Criminal Code was followed by updating the principle of legality. The renewal of the principle of legality which was originally a principle of formal legality to a principle of material

legality contains a number of meanings. The meaning of this renewal of the principle of legality is to expand the reach of the principle of legality in punishing someone in order to achieve justice for the perpetrator and victim, and to create a balance for the protection of perpetrators and victims in order to realize comprehensive justice for all Indonesian people. This renewal of the principle of legality is inspired by the spirit to form a National Criminal Code with an Indonesian spirit, namely based on Pancasila as the source of all sources of law.

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