

The Legality Principle's Expansion in the National Criminal Code as a Manifestation of the Idea of Balance (*Tawazun*)

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ABSTRACT

This paper aims to analyze the concept and justification of the legality principle's expansion in the Indonesian National Criminal Code and how its expansion is a manifestation of the idea of balance in the Indonesian criminal law's renewal. This paper employed doctrinal legal research, i.e., a process to find legal regulations, principles, as well as doctrines to answer the legal issues being faced. Based on the research results, the formulation of the legality principle (formal) in the Criminal Code (WvS) was developed based on the certainty principle which is difficult to adapt with the development of the living law in society. Therefore, the National Criminal Code expands the meaning of the legality principle from having formal characteristics into a legality principle with material characteristics. It is specifically formulated in Article 2 clause (1) of Law No. 1 of 2023 on the National Criminal Code. According to this regulation, the legal source which states that an action is categorized as a criminal action based on the formal legality principle (based on the law as referred to in Article 1 clause (1)) does not decrease the application of the living law in society which determines that a person can be penalized even though his actions are not regulated in legal regulations. The insertion of the material legality principle in the National Criminal Code has the objective that the living law is also acknowledged as a legal source. The formulation of the material legality principle aims to protect the standard of values and norms that live in society to fulfill a sense of substantial justice. This is to create a balance between "legal certainty" and "justice".

Keywords: legality principle, National Criminal Code, idea of balance, Indonesia

INTRODUCTION

The legality principle is a fundamental principle in the criminal law. It can be seen as a principle on legal sources and a principle on the scope of the criminal law's applicability. In perceiving the legality principle as a legal source, questions that usually arise are: (1) Is the criminal law merely sourced from legal regulations or written laws? Or (2) Can the law that lives in society become a legal source? (Arief, 2011).

Article 1 clause (1) of the Criminal Code (WvS) that has so far been applied only acknowledges the criminal law or what is called “*wettelijke strafbepaling*” in the Dutch text as a source of law. Related to this, Jan Remmelink interprets “the criminal law” or what is called “*wettelijke strafbepaling*” as all legal stipulations that regulate criminal actions based on the applicable law, both written and unwritten ones. According to him, the legality principle cannot only be focused on what is written in the written legal stipulations. However, it must also apply unwritten laws (Christianto, 2009).

In line with Remmelink’s opinion, Barda Nawawi Arief supports the acknowledgement of unwritten laws/living laws considering the rapid development of society that on the one hand strongly requires the criminal law’s protection. This can be seen in the development of the positive law after Indonesia’s independence (the development outside of the Criminal Code/WvS) which regards the living law as a legal source. Therefore, what actually happened was a shifting understanding of the legality principle from *nullum delictum nulla poena sine lege* into *nullum delictum nulla poena sine ius*. This means that the legality principle is not only based on legal regulations (*lege* or *lex*) but more fundamental than that, it is based on the law (*ius*) because the scope of the law (*ius*) is very extensive. It does not only encompass written laws but also unwritten ones (Christianto, 2009).

However, with the existence of the formal legality principle as manifested in the formulation of Article 1 clause (1) of the Criminal Code (WvS), the law that lives in society does not have a place as a legal source at all. This is ironic as Indonesia actually applies and acknowledges three laws, namely the state law, the religious law, and the customary law. In practice, many communities still use the customary law to regulate their daily lives and to resolve existing issues. One of the proofs is the existence of customary courts that apply customary penalties even though such customary criminal actions are not regulated in the Criminal Code (WvS). Therefore, the legality principle in Indonesia is not purely applied, unlike the stipulations of Article 1 clause (1) of the Criminal Code (WvS). This reality develops the spirit to expand the legality principle, from what was formerly formal (formal legality principle) to a legality principle that is material (material legality principle) (Hairi, 2016).

The expansion of the legality principle is formulated into Article 2 clause (1) of Law No. 1 of 2023 on the Criminal Code (hereinafter referred to as the National Criminal Code)

which states "Stipulations as regulated in Article 1 clause (1) does not decrease the application of the law that lives in society which determines that a person can be penalized even though that action is not regulated in this law." This expansion aims to give space to the living law to protect the legal interest of existing societies and anticipate legal needs that cannot be well accommodated in the law" (Wijaksana, 2020). Based on the background of the issue described above, the issues that will be discussed in this research are: (1) How is the concept and justification of the legality principle's expansion in the National Criminal Code? and (2) How does the expansion of the legality principle act as a manifestation of the idea of balance in the Indonesian criminal law's renewal?

RESEARCH METHOD

This research employed the normative legal research method which was commonly called the doctrinal legal research. Normative legal research was a process to find legal regulations, legal principles, as well as legal doctrines to answer the legal issues being faced (Marzuki, 2007). The approaches used in this research were the statute approach and the conceptual approach. The authors collected legal materials using the library research. To analyze the legal materials, the authors used the descriptive analytical technique by providing a comprehensive and in-depth description of the analyzed issue, namely the expansion of the legality principle in the National Criminal Code.

RESULTS & DISCUSSION

The Concept and Justification of the Legality Principle's Expansion in the National Criminal Code

The formulation of Article 1 clause (1) of the National Criminal Code is generally the same as the stipulations in Article 1 clause (1) of the Criminal Code (WvS), namely the application of the formal legality principle. This principle is maintained as the legality principle is a core principle in criminal law that aims to guarantee legal certainty and prevent the arbitrary actions of law enforcers (Widayati, 2011). This principle emphasizes that the basis to determine whether or not an action is deemed an action that is threatened by penalization is that it must first be regulated in legal regulations (Rahayu, 2014).

According to Barda Nawawi Arief, the application of the legality principle in the Criminal Code that was inherited from the Dutch colonials in the Indonesian context should not merely be defined as formal certainty/truth/formality (legal regulations). However, it must have a greater orientation for substantial certainty/truth/formality (Arief, 2017). Therefore, the legal source or the legality bases to declare a particular action as a criminal action must not only be based on the formal legality principle. However, it must also be based on the material legality principle, by giving space to the living law. The failure to enforce living laws may lead to the “erosion” of noble values (the national decency value).

With the stipulation of Article 1 clause (1) of the Criminal Code (WvS), it is as if the living law in society is purposely made to sleep or even, it is assassinated. The slumbering living law during the colonial era can still be understandable, as it was according to the Dutch legal politics at that time. However, it seems odd if that policy is continued after Indonesia's independence. With the formal legality principle, living laws are left undiscovered and they are not comprehensively uncovered to the surface, especially in the practice of criminal justice (Arief, 2011).

To fulfill the needs for noble ideals, the law and justice of society in the criminal law's operationalization in Indonesia as well as efforts to discover and develop the criminal law values that live in society are inevitable necessities. Barda Nawawi Arief used the term to revive "submerged stems", i.e., upholding living legal values.

Based on these thoughts, in the National Criminal Code, the legality principle is expanded, from having formal characteristics to having material characteristics. The legality principle's expansion was formulated into Article 2 clause (1) of the National Criminal Code. According to Article 2 clause (1) of the National Criminal Code, the legal source to state that an action is categorized as a criminal action that is based on the formal legality principle (based on the law as referred to in Article 1 clause (1)) does not decrease the application of the living law in society which determines that a person can be penalized even though his actions are not regulated in the law. The insertion of the material legality principle in the National Criminal Code aims so that the living law is also acknowledged as a legal source.

Different from the formal legality principle that applies criminal stipulations in the law for the whole Indonesian territory, the application of the living law in the material legality

principle is only limited to the location where that law lives. This means that this living law applies to anyone who commit customary crimes in that area (Sahyana, 2020). This was because different parts of Indonesia apply different living laws.

Then, the formal legality principle's basis of applicability or justification of expansion in its formulation with material characteristics is as follows:

- a. The national legislative policy bases which were issued after Indonesia's independence include Emergency Law No. 1 of 1951; Law No. 14 of 1970 which was amended into Law No. 35 of 1999; Law No. 4 of 2004; and Law No. 48 of 2009. The expansion of the material legality principle is a logical consequence that is according to the idea which was stipulated in the Law on Judicial Power Law No. 14 of 1970 which was amended into Law No. 35 of 1999, which is currently Law No. 4 of 2004, which was then amended again into Law No. 48 of 2009 which states that courtly decisions must contain certain articles from the related regulations or the unwritten legal laws. Stipulations of this Law on Judicial Power cannot be applied if the Criminal Code only applies the formal legality principle;
- b. The basis of scientific agreement in national seminars (see the conclusion of the I/1963, IV/1979, VI/1995, and VIII/2003 National Legal Seminars);
- c. The sociological basis departs from the familial legal culture. According to Satjipto Rahardjo, the individual legal culture results in the concepts of "liberal legalism" and "rule of law", while the familial legal culture results in the concepts of "familial legalism" and "the rule of justice/morals"); and
- d. The international basis departs from Article 15 of ICCPR (International Covenant on Civil and Political Rights) which states that there are two bases/sources of law to declare an action, namely:
 - 1) Based on the applicable legal regulations or positive laws in the period when the change is carried out (Article 1); and
 - 2) Based on the general principle of laws recognized by the community of nations, (clause 2) (Arief, 2018).

Departing from national legal principles such as Emergency Law No. 1 of 1951 and Law No. 14 of 1970 which have been amended several times with Law No. 4 of 2004 and

finally with Law No. 48 of 2009, it can be said that the legality principle's expansion in the material sense in the National Criminal Code is not a new idea. However, it is only to continue and implement existing ideas. Even, the idea of the formulation of the legality principle in the material sense has also been formulated as a “constitutional policy”. This is specifically stipulated in Article 14 clause (2) of the Temporary 1950 Constitution which states “No one can be prosecuted to be punished or to be imposed with punishments unless there is an existing law that is applicable to him.” This Article uses the terms “laws” (*recht*) which certainly has a wider scope than merely “legal regulations” (*wet*) because, in the definition of “law” (*recht*), it can include “written laws” as well as “unwritten laws”.

The legality principle's expansion in the National Criminal Code is continued with a statement on the application of the teaching on the characteristics of material law violation both in its positive and negative functions. Teachings on the characteristics of material law violation in its positive functions demand that the law that lives in society can be used as a basis to qualify a certain law-violating action. This means that an action that society deems inappropriate or that violates society's sense of justice (contrary to the living law) can be deemed as violating the law. Therefore, (if it fulfills other penalization conditions,) the perpetrator can be penalized. Meanwhile, characteristics of material law violation with negative functions state that the living law can be used as a basis to erase the law-violating characteristics of an action that has fulfilled the offense formulation in the law. In other words, the living law can function as a justification.

Barda Nawawi Arief opined that the formal formulation of the law must be perceived as a factor or an objective measurement to state that an action is deemed to violate the law. This formal/objective measurement must still be examined in the material sense, on whether or not that action violates the legal awareness or the living law in society (Arief, 2008). The existence of the regulation on the characteristics of material law violation in the negative function in the National Criminal Code can be found in Book One (General Regulations), specifically in Article 12 which is linked with Article 35. Article 35 states "The lack of law-violating characteristics in a Criminal Action as aforementioned in Article 12 clause (2) is a justification". Meanwhile, Article 12 clause (2) states “(2) To state that as a Criminal Action, an action that is threatened with criminal sanctions and/or actions by the legal regulations must have law-violating characteristics or it must violate the living law in society”. Therefore,

Article 35 desires that the lack of material law-violating characteristics be categorized as a justification.

This formulation is a new thing. This is because such a formulation does not exist in the general regulations of the Criminal Code (WvS) that have so far been applied. The lack of statement on the application of the teachings on the characteristics of material law violation in the Criminal Code (WvS) makes the law enforcement practice so far only have the capability to create formal justice that is still far from substantial justice. An example of this is the case of Manisih who was punished for collecting kapok which was remains of harvest. This happens even though the action of collecting kapok which were remains of harvest is a culture or custom of the local society that has been practiced since a long time ago. The action of collecting harvest remains is locally called “*gresek*”. Therefore, as “*gresek*” is a habit of the local society, such an action is materially not a violation of the law.

However, the “*gresek*” custom carried out by Manisih is deemed as an offense only because such an action fulfills the formulation of law (Article 363 of the Criminal Code/WvS). Meanwhile, according to the teaching on the characteristics of material law violation with a negative function, the “*gresek*” custom applied by Manisih cannot be qualified as an offense. Thus, she should not be punished.

Apart from teaching the characteristics of material law violation with a negative function, in society, there are also actions that can be regarded as criminal actions even though they are not regulated in legal regulations. This is called actions that violate the law in the material sense in the positive function. An example of this is “*kumpul kebo*” or cohabitation between an adult man and woman who are not tied in a marital contract. This “*kumpul kebo*” action does not have an equivalence in the Criminal Code. Thus, in the formal sense, that action does not violate the law even though it is deemed as highly indecent in society (it has the characteristic of violating the material law). Therefore, its perpetrators cannot be punished. However, based on the law that lives in society, the act of “*kumpul kebo*” is an indecent action. Thus, the perpetrator of such an action can be punished.

The acknowledgement of the living law as a manifestation of the legality principle’s expansion is according to the teaching on the characteristics of material law violation both in its positive and negative functions. In its positive function, the living law can become a basis

to state that an action is a criminal action even though it is not threatened with punishment in legal regulations, so long that according to the living law, it is deemed as a criminal action. Apart from that, the living law can function as a legal source with a negative function. It means that the living law can be used as a justification (*rechtsvaardigingsgrond*) that eliminates the law-violating characteristics of a particular action. Or, it can function as reasons that may minimize circumstances or even on the contrary, as those that may aggravate circumstances (Muladi, 1990).

The Legality Principle's Expansion as a Manifestation of the Idea of Balance (Tawazun) in the Indonesian Criminal Law's Renewal

Tawazun literally means balance or equilibrium. Then, terminologically, *tawazun* is defined as one's attitude to choose a balanced or just point in facing an issue (Wibowo, 2022). Balance (*tawazun*) is one of the principles of Islamic teachings. Balance opens the road to the values of truth, virtue, and beauty. If one cannot apply *tawazun*, he will create many problems. Allah (God) has made nature and all things therein in a very orderly balance, as shown in His statement in the Holy Qur'an, Chapter *Ar-Rahman* (The Beneficent) verse 7, which means, "As for the sky, He raised it 'high', and set the balance 'of justice'".

The National Criminal Code is arranged by departing from various core thoughts that in essence may be called the "ideas/values of balance". These ideas/values include the monodualistic balance, such as "the interest of the public/society" and "the interest of individuals/certain persons"; the balance between protection or interests of criminal violation perpetrators (the idea of the individualization of punishments) and the victims of crimes; the balance between the "objective" (actions/physic) and "subjective" (people/psyche/psychological attitude) elements/factors; the balance between "formal" and "material" criteria; the balance between "legal certainty", "flexibility or elasticity", and "justice"; as well as the balance between national values and global, international, or universal values (Arief, 2003).

The ideas/values of "balance" are manifested into three main issues of criminal law, namely the issue of regulations on criminal acts or law-violating actions, regulations on criminal responsibility or liability, and regulations on the criminal punishment and treatment

system. In the issue of “regulations on criminal acts”, the implementation of the ideas of balance orients towards the issue of the legal source (legality principle) (Arief, 2011).

With the acknowledgement of the “living law” as a legal source according to the material legality principle, there must be guidelines/criteria/conditions on which the “living law” can be used as a legal source (material legality). Therefore, the National Criminal Code provides guidelines, criteria, and conditions on the living law in society. In this case, the living law must be according to the values that are contained in Pancasila (“The Five Principles” that make Indonesia’s state ideals), the Republic of Indonesia’s 1945 Constitution, the human rights, and the general principles of law recognized by the community of civilized nations. This is a manifestation of balance (or what is called *tawazun* in the principles of Islamic teachings) which is in the form of “a balance between national values and global, international, or universal values”.

Then, there is balance in the form of “balance between formal and material criteria”, such as what was previously explained. In this case, an action is deemed criminal action after considering whether or not it violates legal stipulations as “formal criteria/measurement”. However, formal criteria must be examined on whether or not there is a justification and whether or not that action truly violates the legal awareness or the living law in society as “material criteria/measurement”.

Historically, the legality principle that becomes the basis of the modern legal system is a crystallization of the liberalism, individualism, and rationalism principles that aim to give a guarantee of protection to people against the arbitrary actions of rulers for the sake of legal certainty (Setyawan, 2021). Therefore, this principle aims to protect individuals’ interests as the main characteristic of the criminal law’s objective according to the classical school of thought (Rahayu, 2014). For instance, the customary criminal law as one of the living laws is based on the philosophies of harmony and communal morality will contradict the legality principle that pivots on: (1) the legal definition of crime, (2) punishments should fit the crime, (3) the doctrine of free will, (4) death penalty for some offenses, (5) no empirical research, and (6) definite sentence, which are characteristics of the classical school of thought. Therefore, the legality principle will become more democratic if it is sensed and implemented

with a different spirit that is different from its original one. These spirits are: (a) forward-looking, (b) restorative justice, (c) natural crime, and (d) integrative (Jaya, 2016).

According to Utrecht, the legality principle is not very effective in protecting collective interests (*collectieve belangen*), as it allows the liberation of the perpetrators of certain acts where in essence, such actions are punishable actions (*strafwaardig*) which have caused extraordinary harm to other people (victims), but that action (*strafwaardig*) is not formulated in legal regulations. Thus, the paradigm that this principle embraces is the *mala in prohibita* concept where an action is deemed as a crime due to the existence of a regulation, rather than the *mala in se* concept where an action is deemed as a crime because it is an indecent thing (Anjari, 2019).

A similar thing was also expressed by Nyoman Serikat Putra Jaya in his inauguration speech as a professor. According to him, the legality principle only protects individuals who are perpetrators of criminal actions. However, it lacks protection for the public/societal groups that become the victims of criminal actions. Thus, the victim's access to justice is limited, especially for collective victims (Jaya, 2016). For the sake of law enforcement, it is appropriate that indecent acts that violate the values in society are punished, even though they are formally not prohibited by legal regulations (Hiariej, 2009).

As a country whose citizens have communal characteristics, it is certainly unsuitable if the formal legality principle becomes the sole legal source principle in Indonesia. The stipulation of the material legality in the National Criminal Code aims to become a balancer of the formal legality principle that only protects individual interests by accommodating the collective (public) interests and protection. This is an effort to manifest a "mono-dualistic balance between public/societal interests and individual/personal interests" as well as "a balance between the protection or interests of criminal violation perpetrators (the idea on the individualization of punishments) and the victims of crimes".

One of the objectives of law is to guarantee legal certainty. Meanwhile, another more fundamental objective of law is to achieve justice. The Republic of Indonesia's 1945 Constitution as well as the Law on Judicial Power do not only use the terms "legal certainty" or "law enforcement". However, it uses the term "a just legal certainty" (Article 28D of the Republic of Indonesia's 1945 Constitution) or "enforcing the law and justice" (Article 24 (1)

clause of the Republic of Indonesia's 1945 Constitution and Article 3 clause (2) of Law No. 4 of 2004 which was amended into Article 2 clause (2) of Law No. 48 of 2009 (Arief, 2017). However, the legality principle's application based on the Criminal Code/WvS is a dilemma. The formulation of the (formal) legality principle in the Criminal Code/WvS was developed on the foundation of certainty that is difficult to adapt to the development of the living law in society (Faisal, 2021).

With the existence of the material legality principle as an expansion of the formal legality principle, the standard values and norms that live in society are still protected to fulfill the sense of justice in society. This is to create a balance between "legal certainty" and "justice". Even so, there is often a conflict between legal certainty and justice in the law enforcement practice. In facing this issue, Article 53 of the National Criminal Code has provided a guideline: in case there is a conflict between legal certainty and justice, the latter must be prioritized.

However, even though in reality, the legal politics on the legality principle's expansion is an effort to manifest the idea of "balance" as described above, the Explanation of Article 2 of the National Criminal Code defines the living law as the customary law that needs to be regulated in Regional Regulations. However, the living law in society is very wide. It does not only encompass the customary law, but also the habits, local laws, and other laws that are deemed to live in society. It is possible for instance, that in a certain area, the living law does not originate from the customary society, but what applies is the law from the majority group. With the existence of the stipulation that the only living laws that are acknowledged as legal sources (material legality) are those that have been regulated/compiled in the Regional Regulation, the implication is that law enforcers especially judges cannot further and more profoundly discover/reach values and the sense of justice in society. The living law will also be rigid and lose its characteristics as a law that is elastic and dynamic. The elastic and dynamic characteristics occur due to its unwritten nature. Thus, the living law can easily adapt to the development and situation of society.

Therefore, the living law should not only be defined as customary laws that are regulated in the Regional Regulation. However, it must be defined in a wider sense as it should encompass habits, local laws, as well as other laws that are deemed to live in society,

including those that are and are not regulated in Regional Regulations so long as they do not violate the values contained in Pancasila, the Republic of Indonesia's 1945 Constitution, the human rights, and the general principles of law recognized by the community of civilized nations. This is according to the Bill of the Criminal Code in 2015, which does not narrow the scope of the living law and does not state the condition that the living law must be regulated in Regional Regulations. This is also according to some currently applicable laws, such as Law No. 48 of 2009 on Judicial Power, which does not require "the values of the living law" that can be discovered by judges as only those that are regulated in Regional Regulations. This is so that judicial decisions are according to the law and society's sense of justice, to increase the possibility for the manifestation of the "balance" idea that is idealized through the legality principle's expansion.

CONCLUSION

In the National Criminal Code, the formal legality principle is still maintained. However, this principle is expanded in the material sense with the aim of giving space to the living law. The legality principle's expansion is a manifestation of the "balance" idea that is the core thought in the formulation of the National Criminal Code. The balance idea (or what is called *tawazun*) includes a balance between formal and material criteria; national values and global, international, or universal values; the mono-dualistic balance between the interests of the public/society and the interests of individuals/certain persons; the balance between protection or interests of criminal violation perpetrators (the idea on the individualization of punishments) and the victims of crimes; as well as the balance between legal certainty and justice.

This idea of balance has a greater chance of being manifested if the living law is not merely defined as a customary law that has been compiled in the Regional Regulation. However, it must be defined in a wider sense as it should encompass habits, local laws, as well as other laws that are deemed to live in society, including those that are and are not regulated in Regional Regulations so long as they do not violate the values contained in Pancasila, the Republic of Indonesia's 1945 Constitution, the human rights, and the general principles of law recognized by the community of civilized nations.

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