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ANALYSIS OF LIVING LAW INTEGRATION IN INDONESIAN CRIMINAL LAW REFORM

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ABSTRACT

The principle of formal legality promoted by the WvS-NI translation of the Indonesian Criminal Code (Old Criminal Code) has laid down statutory regulations (written law) as the only basis for implementing criminal law provisions. The principle of formal legality has closed the existence of the living law of Indonesian society which has existed since the Indonesian state was still in the form of kingdoms. The purpose of writing this article is to analyze the integration of living law into criminal law in updating the principle of legality, which was originally only a formal legality principle, but now also includes a material legality principle. This article was written using a normative legal research method with a conceptual approach. The result of this research is that the integration of living law as a source of criminal law to implement criminal law provisions is a positive step to provide space for the application of the original laws of the Indonesian nation. However, in its implementation, comprehensive regulations are needed, especially regarding the institutionalization of living law because its nature is local, while criminal law is national. Apart from that, there is also a need for a common perception regarding the measures of justice so as to create legal certainty regarding the application of living law in criminal law.

Keywords: *living law, criminal law, reform*

INTRODUCTION

The long history of reforming Indonesian criminal law with the drafting of the National Criminal Code led to the enactment of Law Number 1 of 2023 concerning the Criminal Code. The ratification of the New Criminal Code replacing the Old Criminal Code is a form of decolonialization and recodification of criminal law norms which still have a Dutch colonial style (Setyawan, 2020). The formation of this new Criminal Code will only be fully implemented within the next 3 (three) years since it was passed. The existence of this National Criminal Code replaces the Old Criminal Code which was previously in force, namely Wetboek Strafrecht voor Nederlandsch Indie which was translated into Indonesian, where WvS NI has been in effect since 1918 (Vincentius Patria Setyawan, 2023). When WvS-NI came into force, of course the criminal law system implemented in Indonesia adopted the spirit of establishing Dutch law based on the values promoted by the colonial state.

Even though it is based on values that are not in accordance with the values of the Indonesian nation, the implementation of the WVS-NI Criminal Code is still implemented for the reason of filling a legal vacuum because Indonesia does not yet have regulations regarding national criminal law. Through the enactment of Article II of the Transitional Rules of the 1945 Constitution which were ratified on August 18 1945, it mandates the application of previously existing laws and regulations, before new laws are formed. For this reason, the government enacted Law no. 1 of 1846 concerning Criminal Law Regulations which determine the application of WvS-NI in Java and Madura, and have come into force nationally since 1973 (Setyawan & Rhiti, 2022).

From a historical perspective, the implementation of WvS-NI in Indonesia is based on the principle of concordance, which applies according to Article 131 of the Indische Staatsregeling (IS). The principle of concordance was part of the legal politics of Continental European colonialism at the beginning of the modern century, with the aim of establishing legal domination to reconstruct the socio-political dimensions of indigenous communities in the colonial territories, by implementing a monopolistic system (Tongat et al., 2020).

Apart from that, the concordance also aimed to facilitate economic relations and provide legitimacy for the colonial government in running government and enforcing the law. Apart from WvS-NI at the criminal law level, the principle of concordance is also applied by establishing the Burgerlijke Wetboek (Civil Law Book) and Wetboek van Koophandel (Commercial Law Book) as material sources at the civil law level (Mubarok & Yulianti, 2023). As legal products prepared on the basis of the interests and paradigmatic pillars of the Continental European system, both WvS-NI, BW, and WvK have disparities with the social and cultural conditions of Indonesian society. Therefore, the urgency of renewing WvS-NI by reintegrating the socio-cultural values of the Indonesian nation is an inevitable step in the development of contemporary criminal law (Setyawan, 2021).

In fact, the enthusiasm to nationalize criminal law provisions that have colonial nuances has existed for a long time. It has been at least half a century, namely since the first Indonesian National Law Seminar was held in 1963. This spirit was then followed up by forming various teams to prepare and discuss criminal law reform with the formation of a new Criminal Code. Socio-cultural aspects are the most dominant consideration in replacing colonial legacy legislation with regulations that are Indonesian in nature (Halim & Patria Setyawan, 2024).

The New Criminal Code stipulated through Law no. 1 of 2023, although it still raises a number of critical notes regarding the formulation of several articles, has accommodated a number of important ideas that are very basic in renewing the space for criminal law enforcement in Indonesia. The concepts that emerged as the antithesis of the classical paradigm of formal positivism became an important integral part. One of the important aspects of several New Indonesian Criminal Code novelties is the unification of laws that exist in the national criminal law system (Pawana, 2023).

The addition of the principle of material legality to the New Criminal Code is not just adding a principle in the form of mere words. There is a paradigmatic change in thinking with the inclusion of the principle of material legality in the New Criminal Code (Faisal & Rustamaji, 2021). Because the Old Criminal Code (WvS-NI translation) used a foundation in the form of the principle of formal legality. Where the principle of formal legality has limited that the source of the enforcement of criminal law in Indonesia is only based on written criminal law legislation, and the logical consequence is that criminal law can no longer be found outside of law (Setyawan, 2021).

The implementation of law in the Indonesian criminal law system produces a number of fundamental discourses. There is a dichotomous condition in the source of punishment, so that the principle of legality in the Criminal Code has been expanded to become the principle of formal legality and the principle of material legality (Lase et al.,

2021). The existence of dualism in determining the source of the application of criminal law needs to be addressed wisely for the sake of legal certainty in the application of criminal law. Also remembering that the characteristics of criminal law and living law are very different because they come from different sources.

This article will discuss the intrinsic meaning embedded in the addition of the principle of material legality to the Criminal Code. Of course, the addition of the principle of material legality is not just adding a series of words known as the formulation of the principle of material legality, but of course contains meaningful implications for changes in the structure of Indonesian criminal law.

LITERATURE REVIEW

The Principle of Legality was created by Paul Johan Anslem von Feuerbach (1775-1833), a German criminal law scholar in his book Lehrbuch des penlichen recht in 180. According to Bambang Poernomo, what Feuerbach formulated contains a very deep meaning, which in Latin reads : nulla poena sine lege (no crime without law); nulla poena sine crimine (there is no crime without a criminal act); nullum crimen sine poena legali (there is no criminal act without a crime according to law) (Abdullah & Achmad, 1983).

Jonkers stated that according to Article 1 paragraph (1) of the Criminal Code, no act can be punished except on the strength of the criminal law that existed before the act was committed. This article is an article about principles. Different from other legal principles, this legality principle is stated explicitly in the law. In fact, in the opinion of legal experts, a legal principle is not a concrete legal regulation (Purwoleksono, 2003). Sudikno emphasized that legal principles are not concrete legal rules, but rather concrete, general or abstract regulatory background (Takdir., 2013).

Regarding the meaning contained in the principle of legality, there are differences of opinion among criminal law experts. A simple thought regarding the meaning contained in the principle of legality was put forward by Enschede. According to Enschede, there are only two meanings contained in the principle of legality, namely: (Tahir, 2018)

First, an act can be punished only if it is regulated in criminal legislation (...*wil een feit strafbaar zijn, dan moet het vallen onder een wettelijke strafbepaling*...). Second, the power of criminal provisions may not be applied retroactively (...*zo'n strafbepaling mag geen terugwerkende kracht hebben*...). The meaning of the principle of legality put forward by Enschede is the same as the meaning of the principle of legality put forward by Wirjono Prodjodikoro, namely that criminal sanctions can only be determined by law and that criminal provisions must not apply retroactively.

METHOD

This article was written using normative legal research methods with a conceptual approach. The legal materials used in this research are primary legal materials and secondary legal materials. The technique for collecting legal materials uses library research. The legal material analysis technique uses syllogism deductive logic.

RESULT AND DISCUSSION

The principle of legality is a product of revolutionary thought that emerged as a reaction to the absolutism of European monarchical power at the end of the

Renaissance and Aufklarung (Widayati, 2011). This principle is the anti-thesis of the legal principle of the Ancient Roman era, namely crimina extra ordinaria or crimes that are not mentioned in the law.

Previously, in Roman times, determining whether an act was declared prohibited and whether it could be subject to criminal sanctions or not was determined by the ruling king/emperor. The king/emperor at that time had such absolute and unlimited power, that his power also included the power to determine whether an act was said to be an act that was prohibited according to criminal law and could be subject to criminal sanctions. (Sudibyo & Rahman, 2021)

The principle of legality was formulated by von Feurbach at the beginning of the 19th century, in the book Lehrbuch des Peinlichen Rechts (1801) which explained the adegium nullum delictum nulla poena sine praevia lege poenali, or that an act cannot be punished except on the strength of criminal regulations in legislation that existed before the act was committed (Sri Rahayu, 2014). Feurbach's writing also complements the criticism of absolutism in judicial power previously pioneered by Montesquieu in L'esprit des Lois (1748) and J.J Rousseau in Die Contract Social. Prior to Feurbach's formulation, the principle of legality also obtained a partial form in Article 8 of the Declaration des droits de L'homme et du citoyen (1789) which emphasized that nothing could be punished other than because it was regulated in a valid law. Both the principles in the French declaration and Feurbach's writings conclusively require the prohibition of an act to be regulated in a valid law, before it can be used as a basis for punishment.

Historically, the existence of the legality principle in Article 1 Paragraph (1) was adopted from the ideas of the French Penal Code which was formulated in WvS-NI by the Dutch East Indies government which had experienced colonialism by France during the time of Napoleon Bonaparte. The principle of legality in Article 1 Paragraph (1) of the Criminal Code, which is also still maintained in the New Indonesian Criminal Code with the addition of Paragraph (2) to emphasize that analogies are not permitted, has three forms of meaning (Putri, 2021).

First, the categorization of acts that are prohibited and punishable by crime must be included in statutory regulations. This meaning is in accordance with the legacy of the civil law tradition which prioritizes lex scripta (written law) as a valid source of law. Second, the application of criminal law must not be carried out using analogies or metaphors. The flexibility of norms is carried out through interpretation, but not with parables that analogize an act as another act that is punishable by crime. Third, criminal law cannot apply retroactively, because criminal acts must be preceded by law. The new provisions regarding punishment in the law cannot be used to criminalize someone who committed the crime before the law was enacted.

The application of the principle of material legality with the addition of living law provisions as a source of criminal law seems to give rise to dualism in the application of criminal law in Indonesia. This dualism is criminal law as contained in written law, and criminal law as contained in living law. However, if we investigate further in Article 1 paragraph (3), it is clearly written that the living law provisions that apply in criminal law apply to acts that have no equivalent in the Criminal Code. This means that the act is completely new and has not been regulated in criminal law.

The weakness of this provision is that most of the acts regulated in living law already have equivalents or similarities to those regulated by the Criminal Code. So far, even though there are no explicit provisions regarding customary offenses, they can still be considered in court as a basis for punishing someone. As long as it is in the interests of the victim and to achieve justice for the victim who has actually been harmed as a result of the perpetrator's actions.

In the future, these living law provisions are indeed good to implement, but it is necessary to make an inventory of which living law provisions still exist in indigenous communities and can be institutionalized nationally. Then it is also important to carry out uniformity in the field of criminal sanctions imposed so that there is standardization of criminal sanctions for certain acts based on living law so that there are no gaps for the same or similar acts.

CONCLUSION

The integration of living law into Indonesian criminal law by adding the principle of material legality to criminal law is a step towards nationalizing the provisions of the Indonesian Criminal Code. Incorporating the original laws of the Indonesian nation into criminal law can be called decolonialization of criminal law provisions, in order to eliminate provisions that are not in harmony and in line with the spirit of the Indonesian nation.

The addition of the principle of material legality to the new Criminal Code is not just reformulating the law by adding a series of new words with the meaning of the principle of material legality. However, it has the consequence of expanding the scope of criminal law in Indonesia. From actions that were previously only assessed based on statutory provisions, they become actions that are regulated according to living law. This addition of course has the consequence that management needs to accommodate the living law provisions.

First, by managing living laws where the community still exists and the law is declared still valid. Second, inventory the acts that are said to be customary offenses and do not find equivalents in the Criminal Code, and determine the standard of sanctions for these acts.

REFERENCES

Abdullah, M., & Achmad, R. (1983). Intisari Hukum Pidana. *Intisari Hukum Pidana*.

Faisal, F., & Rustamaji, M. (2021). Pembaruan Pilar Hukum Pidana Dalam Ruu Kuhp. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, *10*(2). Https://Doi.Org/10.24843/Jmhu.2021.V10.I02.P08

Halim, C., & Patria Setyawan, V. (2024). The Importance Of Law Enforcement Based On Progressive Law In Realizing Community Welfare. *Unes Law Review*, *6*(3), 8987–8991. Https://Doi.Org/10.31933/Unesrev.V6i3

Lase, S. M. N., Adinda, A., & Yuliantika, R. D. (2021). Reinterpretasi Makna Asas Legalitas Sebagai Bentuk Pengakuan Hukum Pidana Adat Dalam Upaya Menjamin Hak Asasi Masyarakat Adat. *Padjadjaran Law Review*, *9*(1).

Mubarok, H., & Yulianti, Y. (2023). Peluang Dan Tantangan Era Baru Sistem Pemidanaan Indonesia. *Restorative : Journal Of Indonesian Probation And Parole System*, *1*(1).

Https://Doi.Org/10.61682/Restorative.V1i1.6

Pawana, S. C. (2023). Polemik Atas Konsep" Hukum Yang Hidup" Dalam Pembaharuan Kuhp Di Indonesia. *Judicatum: Jurnal Dimensi Catra Hukum*, *1*(1).

Purwoleksono, D. E. (2003). Hukum Pidana, Demokrasi Dan Ham. *Perspektif*, *8*(3). Https://Doi.Org/10.30742/Perspektif.V8i3.304

Putri, N. S. (2021). Memikirkan Kembali Unsur "Hukum Yang Hidup Dalam Masyarakat". Dalam Pasal 2 Rkuhp Ditinjau Perspektif Asas Legalitas. *Indonesia Criminal Law Review*, *1*(1).

Setyawan, V. P. (2020). Prospek Pemberlakuan Hukum Adat Dalam Hukum Pidana Nasional. *Justitia Et Pax*, *35*(2). Https://Doi.Org/10.24002/Jep.V35i2.2069

Setyawan, V. P. (2021). Asas Legalitas Dalam Perspektif Filsafat Hukum. *Justitia Et Pax*, *37*(1). Https://Doi.Org/10.24002/Jep.V37i1.3276

Setyawan, V. P., & Rhiti, H. (2022). Relasi Asas Legalitas Hukum Pidana Dan Pemikiran Hukum Alam. *Jurnal Inovasi Penelitian*, *2*(12).

Sri Rahayu. (2014). Implikasi Asas Legalitas Terhadap Penegakan Hukum Dan Keadilan. *Jurnal Inovatif*, *Vii*(September).

Sudibyo, A., & Rahman, A. H. (2021). Dekonstruksi Asas Legalitas Dalam Hukum Pidana. *Journal Presumption Of Law*, *3*(1). Https://Doi.Org/10.31949/Jpl.V3i1.985

Tahir, A. (2018). Menggali Makna Asas Legalitas Dan Perkembangannya Di Indonesia. *Al-Mazaahib: Jurnal Perbandingan Hukum*, *6*(2). Https://Doi.Org/10.14421/Al-Mazaahib.V6i2.2319

Takdir. (2013). Mengenal Hukum Pidana. In *Laskar Perubahan*.

Tongat, T., Prasetyo, S. N., Aunuh, N., & Fajrin, Y. A. (2020). Hukum Yang Hidup Dalam Masyarakat Dalam Pembaharuan Hukum Pidana Nasional. *Jurnal Konstitusi*, *17*(1). Https://Doi.Org/10.31078/Jk1717

Vincentius Patria Setyawan. (2023). Pemaknaan Asas Legalitas Materiil Dalam Pembaruan Hukum Pidana Indonesia. *Gudang Jurnal Multidisiplin Ilmu*, *1*(1). Https://Doi.Org/10.59435/Gjmi.V1i1.3

Widayati, L. S. (2011). Perluasan Asas Legalitas Dalam Ruu Kuhp. *Negara Hukum*, *2*(2).