



The Challenge of Paradigm Shift in Formulating Formal Legality Principles into Formal and Material Principles in the Revision of the Criminal Code

Wahyuning Kiscahyani^{1*}

¹ Faculty of Law, Universitas Islam Indonesia, Indonesia

* Corresponding author: 23912087@students.uii.ac.id

Article	Abstract
Keywords: new Criminal Code; paradigm shift; principle of formal legality; principle of material legality Article History Received: Feb 25, 2025; Reviewed: Apr 25, 2025; Accepted: May 25, 2025; Published: June 25, 2025;	<i>This research aims to examine the challenges of shifting the paradigm of the formulation of formal legality principles to formal and material in the reform of the Criminal Code which is still an academic debate by criminal law experts. Regarding this paradigm shift, some criminal law experts consider the change to be a form of expansion of the principle of legality, but others consider it as a setback. The method used is a normative or doctrinal legal method with a legislative and conceptual approach. Meanwhile, the data used is secondary data or literature data in the form of primary legal materials and secondary legal materials. This research found that the paradigm shift in the formulation of the principles of formal legality to formal and material in the provisions of Law Number 1 of 2023 regarding the Criminal Code is appropriate because it is a form of effort by the Indonesian nation to reorient and reform the criminal law in accordance with the socio-cultural values of the Indonesian people. Then to the challenges that will arise in the future regarding the complexity of cases that are closely related to the implementation of the principle of material legality in the new Criminal Code, each region can immediately codify the unwritten laws that are alive and applicable in its society into the form of Regional Regulations.</i>

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INTRODUCTION

The provisions commonly referred to as the old Criminal Code are regulated in Law Number 1 of 1946 concerning Criminal Law Regulations. These provisions were adopted from Dutch colonial law and adapted to the conditions of Indonesian society.

However, widespread criticism of the old Criminal Code prompted the need for legal reform to strengthen the rule of law. As a result, the provisions of the old Criminal Code have now been revoked and replaced by Law No. 1 of 2023 concerning the Criminal Code, hereinafter referred to as the new Criminal Code. Of course, the provisions contained in the new Criminal Code have undergone significant changes, one of which is the concept of the principle of legality.

Academically, the paradigm shift from formal to material legality is an interesting topic for academic discussion and debate. The change from formal to material legality has undoubtedly reduced the degree of certainty in criminal law (Prastowo, 2006). This has led some criminal law experts to view the change as an extension of the principle of legality, while others see it as a step backward (Tabiu & Hiariej, 2015). However, according to the author, the assumption of such a decline requires further study in accordance with the values that exist in the society of the nation concerned, in this case, the Indonesian nation.

The Indonesian people cannot turn a blind eye to the fact that their society has a variety of customary laws that differ from region to region throughout Indonesia. As we know, customary law consists of unwritten rules that exist within communities, which according to custom (tradition) must be obeyed, so that any violation is considered a breach of customary law (Sumodihardjo, 1954). Meanwhile, customary law communities are communities that have lived together for a long period of time, resulting in a culture and social system that serves as a container for the social mindset or personal and inter-group relationships within the community (Soekanto & Taneko, 1986). Because customary law is a form or reflection of the values that exist in customary law communities in Indonesia, these values must be protected by law.

However, upon closer inspection, it appears that many customary laws that are still practiced in Indonesian society have not been fully accommodated by Indonesian positive law. This is because the only customary laws that have been accommodated are those that have been incorporated into specific local regulations (PERDA). If this is the case, then what about laws that are believed in by certain communities, which have been practiced and become traditions passed down from generation to generation? Should these laws be simply disregarded, even though they have existed in society since before Indonesia's independence? Then what about the fate of new laws (*ius constituendum*) that develop in society, especially if these developing laws concern a person's life? For example, according to the community, certain acts are considered despicable and disturbing to the community, so the perpetrator must be given the death penalty. However, positive law does not yet regulate sanctions for such acts, because we also know that the law often lags behind developments in society. Therefore, based on the above description, the author will discuss *“How does the Indonesian people face the challenges of the paradigm shift from the formulation of formal legality to formal and material legality in the new Criminal Code?”*

METHOD

This type of research uses normative legal research or doctrinal research, where the object is law viewed as a norm or regulation. The role of this research is to maintain the critical aspects of legal science as a sui generis normative science, using a theoretical foundation from the realm of normative legal theory (Diantha, 2017). The research approach is a statutory approach, examining laws and regulations related to the legal issues in this study. In addition, this study also uses a conceptual approach, in which the author will construct legal arguments to resolve the legal issues under study based on perspectives and doctrines in legal science in order to find relevant legal ideas, concepts, and principles. Meanwhile, the data used is secondary data or bibliographic data in the form of primary legal materials and secondary legal materials, which will be the main sources of data for this study.

RESULTS AND DISCUSSION

Principle of Formal Legality

Based on the General Rules of Book One of the old Criminal Code, Article 1 paragraph (1) states that “No act can be punished unless it is based on the power of criminal law in existing legislation, before the act is committed.” This provision is the basis of the principle of formal legality. The principle of legality in the old Criminal Code is a principle that determines that no regulation is prohibited and punishable by criminal law if it is not first specified in legislation, which is known as *nullum delictum nulla poena sine praevia lege*, which means that there is no offense or no punishment without prior regulation. In short, the old Criminal Code stipulated that criminal law could not be applied retroactively (non-retroactive) (Hasibuan, 2024). This principle should be a form of legal certainty to protect individual rights from changes in the law (Hasibuan, 2024).

The principle of formal legality requires that there must be regulations in place before an act that is considered unlawful can occur. Its correlation is more related to legal certainty and disregards justice, because the principle of legality is a means to achieve justice in criminal punishment (Widayati, 2011). The principle of legality guarantees that every criminal act must be regulated based on clear and explicit policies or other provisions in the law (Tarigan et al., 2024). The principle of legality has three main meanings or interpretations. First, no act is prohibited and punishable unless it is regulated in a law. Second, the determination of a criminal act cannot be based on analogy. Third, criminal laws cannot be applied retroactively (Widayati, 2011). Then, according to Bambang Poernomo, Feuerbach grouped the profound concept of legality into three categories, namely (Tahir, 2012):

1. *Nulla poena sine lege* (no crime without law), meaning that every punishment or sanction must be based on a criminal law;
2. *Nulla poena sine crimine* ((no crime without criminal act), meaning that sanctions can only be imposed if the act in question is punishable under criminal law;

3. *Nullum crimen sine poena legali* (there is no criminal act without punishment according to the law), meaning that an act that is punishable by law will result in the imposition of punishment as stipulated in the law against the offender.

The principle of legality originated from the German jurist von Feuerbach. This principle emerged in the early 19th century and is therefore regarded as a product of classical teachings (Widayati, 2011). The principle of legality in the old Criminal Code was a Dutch cultural preference that accommodated the framework of individualism and liberalism, so it is not surprising that it only recognized written criminal law and actually disregarded material aspects (Faisal, 2016). However, as Indonesian society has developed, the principle of legality has been criticized for being discriminatory because it overlooks the diversity of Indonesian society, which has its own unwritten laws in each region. Each regional community has specific rules or laws that are believed in and have been passed down from generation to generation since the time of their ancestors, often known as unwritten laws that exist within the community. However, due to the diversity of regional communities in Indonesia, it is not uncommon for the laws that exist in these communities to be incompatible with or even contradict Indonesian positive law. As Satjipto Rahardjo has pointed out, law is always lagging behind societal development, and law is meant for the benefit of humanity, so humanity should be the center and point of reference for law (Saifullah, 2018). Therefore, the law should serve humanity, not the other way around, where humanity becomes a slave to the law.

Principle of Material Legality

Whereas the old Criminal Code only regulated the principle of formal legality, the new Criminal Code in Law Number 1 of 2023 concerning the Criminal Code regulates the principle of formal legality in Article 1 paragraph (1) and the principle of material legality in Article 2, which reads as follows:

Pasal 1

- (1) Tidak ada satu pun perbuatan dapat dikenai sanksi pidana dan/atau tindakan, kecuali atas kekuatan peraturan pidana dalam peraturan perundang-undangan yang telah ada sebelum perbuatan dilakukan.

Pasal 2

- (1) Ketentuan yang sebagaimana dimaksud dalam Pasal 1 ayat (1), tidak mengurangi berlakunya hukum yang hidup dalam masyarakat yang menentukan bahwa seseorang patut dipidana walaupun perbuatan tersebut tidak diatur dalam undang-undang ini.
- (2) Hukum yang hidup dalam masyarakat, sebagaimana dimaksud pada ayat (1), berlaku dalam tempat hukum itu hidup dan tidak diatur dalam undang-undang ini, dan sesuai dengan nilai-nilai yang terkandung dalam Pancasila, Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, hak asasi manusia dan asas umum yang diakui masyarakat bangsa.
- (3) Ketentuan mengenai tata cara dan kriteria penetapan hukum yang hidup dalam masyarakat diatur dengan Peraturan Pemerintah.

Meanwhile, with regard to the provisions of each article of the explanation of Law Number 1 of 2023 concerning the Criminal Code mentioned above, they are as follows:

Pasal 2

Ayat (1)

Yang dimaksud dengan “hukum yang hidup dalam masyarakat” adalah hukum adat yang menentukan bahwa seseorang yang melakukan perbuatan tertentu patut dipidana. Hukum yang hidup di dalam masyarakat dalam pasal ini berkaitan dengan hukum tidak tertulis yang masih berlaku dan berkembang dalam kehidupan masyarakat di Indonesia. Untuk memperkuat keberlakuan hukum yang hidup dalam masyarakat tersebut, Peraturan Daerah mengatur mengenai Tindak Pidana adat tersebut.

Ayat (2)

Yang dimaksud dengan "berlaku dalam tempat hukum itu hidup" adalah berlaku bagi setiap orang yang melakukan tindak pidana adat di daerah tersebut. Ayat ini mengandung pedoman dalam menetapkan hukum pidana adat yang keberlakuannya diakui oleh Undang-Undang.

Ayat (3)

Peraturan Pemerintah dalam ketentuan ini merupakan pedoman bagi daerah dalam menetapkan hukum yang hidup dalam masyarakat dalam Peraturan Daerah.

This differs from the principle of formal legality, which requires that there be regulations in place before an action can be deemed unlawful. The principle of material legality recognizes the existence of customary law as unwritten law, so that the ultimate goal of law is to prioritize justice over certainty, because without justice, law will only become a tool for justifying arbitrariness (Widayati, 2011). Discussions about justice have been around since ancient Greece, as discussed by three famous philosophers, Aristotle, Plato, and Thomas Hobbes. Justice does not mean that everyone gets an equal share. According to Aristotle, there are at least three concepts or types of justice that humans must understand, as follows (Pandit, 2016):

1. Commutative justice, equal justice. Justice that does not consider a person's merits, making it structural in nature because it does not discriminate.
2. Distributive justice, justice is upheld in accordance with the value that should be given. Justice that considers the services of the person concerned, so that this justice is individual in nature.
3. Corrective or Remedial Justice: In administering commutative and distributive justice, errors sometimes occur, necessitating the role of the law (in this case, judges).

Based on the brief description of the concept of justice above, it shows that with the enactment of the principle of material legality in the new Criminal Code, commutative justice, or equal justice without discrimination, has come into effect. Thus, there is no longer any discrimination by the government that disregards the unwritten laws that exist and apply in Indonesian society. This is in line with Satjipto Rahardjo's formula for justice, which adopts Ulpianus's thinking that justice is the desire to give everyone what they deserve (Fernando, 2007). Furthermore, it is also in line with the views of

Kelsen and Rawls, who stated that there are formal elements of justice, namely, first, justice provides protection and guarantees rights under the law, and second, justice provides benefits to every individual (Fernando, 2007).

The application of the principle of substantive legality in the new Criminal Code actually has a positive side, namely exploring the values of Indonesian society that have been neglected by foreign law, so that law enforcement prioritizes justice over legal certainty, and as a counterbalance to the principle of legality (Tabiu & Hiariej, 2015). In the author's opinion, the application of the principle of material legality in the new Criminal Code is related to the adoption of the concept of material unlawfulness. Material unlawfulness means that an act is considered reprehensible because it is not in accordance with the sense of justice or social norms (such as religious values, morals, customs, etc.) in society, even though the act is not or has not been regulated in Indonesian positive law (Wijaksana, 2020). This is in line with the provisions of Article 28D paragraph (1) of the 1945 Constitution, which reads, "Every person shall have the right to recognition, security, protection, and certainty of fair law and equal treatment before the law." The phrase "fair legal certainty" has a substantive meaning, which is not merely to guarantee formal certainty, but also to guarantee material certainty (Wijaksana, 2020).

Therefore, the principle of substantive legality in the new Criminal Code shows that the principle of formal legality has not been set aside or even regressed, but rather expanded by the government to include unwritten laws that are alive and applicable in Indonesian society. The nature of substantive illegality itself is divided into two functions, namely positive and negative functions. According to Didik Endero P., the positive function of the nature of material illegality is an act that is not prohibited by law but is prohibited by society, so that such acts can still be punished (Yunus et al., 2021). In contrast to negative functions, which mean that an act is prohibited by law but is considered by society to not violate unwritten legal norms, thereby removing the unlawful nature of the act and no longer constituting a criminal offense (Yunus et al., 2021).

The Challenge of Paradigm Shift in Formulating Material Legality Principles in the New Criminal Code

The implementation of the principle of substantive legality in the new Criminal Code will certainly be accompanied by challenges faced by the Indonesian people. These challenges are due to the history of the Indonesian nation itself, which has many different types of unwritten laws that exist in communities from one region to another. Therefore, it is very possible that in the future, the government, especially law enforcement agencies, will be faced with complex cases that are closely related to the implementation of the principle of substantive legality.

As stated by Prof. Barda Nawawi Arief, the provisions of Article 1 paragraph (1) of the old Criminal Code actually made it seem as if the unwritten criminal law that

existed in society was deliberately suppressed or eliminated. This is no longer relevant to apply today because Indonesia is no longer in the era of Dutch colonial law, so it is only appropriate that there be a balance between the principle of legal certainty and justice in the reform of criminal law (Suartha, 2015). This is supported by Prof. Sudarto's view that criminal law should reflect the cultural values that exist in society because criminal law is essentially a system of negative sanctions that punishes acts that are undesirable to society (Suartha, 2015). This is in line with Moh. Mahfud MD's view that laws that are not in line with the reality of society will be difficult to accept and implement by the nation concerned (Suartha, 2015).

CONCLUSION

The paradigm shift in the formulation of formal legality principles to formal and material principles in the provisions of Law Number 1 of 2023 concerning the Criminal Code is appropriate because it is a form of Indonesia's efforts to reorient and reform criminal law in accordance with the socio-cultural values of Indonesian society. Therefore, in response to the challenges that will arise in the future regarding the complexity of cases that are closely related to the application of the principle of substantive legality in the new Criminal Code, every region throughout Indonesia must immediately codify the unwritten laws that exist and apply in their communities into the form of Regional Regulations.

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