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Reconciliation The Antinomy of the Principle of Formal Legality and *Living Law* in Reformulation of National Criminal Law

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Abstract: The enactment of Law Number 1 of 2023 concerning the National Criminal Code (KUHP) brings a paradigm shift through the recognition of living law in Article 2, triggering an antinomy with the principle of formal legality in Article 1. This study aims to analyze the potential judicial conflict between customary law and formal legal certainty and its impact on the judicial system in Indonesia. The research method used is doctrinal legal research with a statutory and conceptual approach. The results indicate that the existence of the legality principle in the National Criminal Code is no longer absolute as it promotes the idea of balance between formal and material criteria. The prohibition of analogy in Article 1, Paragraph (2) specifically applies only to written law and does not hinder the application of living law to fill legal vacuums. Although aimed at achieving substantive justice, its implementation risks creating criminal disparities. Therefore, standardization through Local Regulations aligned with Pancasila values and sentencing guidelines for judges is required to bridge the gap between legal certainty and social justice.

Keywords: Living Law, Legality Principle, New Criminal Code, Legal Certainty

INTRODUCTION

The dynamics of national criminal law reform reached its peak with the ratification and enactment of Law Number 1 of 2023 concerning the Criminal Code (KUHP). The actualization of Indonesian criminal law reform is a manifestation of decolonialization and recodification of norms, in order to enter the era of transformation of the Indonesian criminal law system after independence, both materially and formally, with an orientation towards preventing a legal vacuum (*rechtvacuum*). The realization of these regulations and policies is rooted in the manifestation of efforts to decolonize criminal law, which has been oriented towards the *Wetboek van Strafrecht (WvS)*, a legacy of the Dutch colonial era, which is considered individualistic.

Referring to a historical perspective, the implementation of the Dutch East Indies Code of Conduct (*WvS-NI*) in Indonesia rests on the principle of concordance as mandated in Article 131 of the Indies Statutes (*IS*). Substantially, the principle of concordance is a colonial legal and political instrument aimed at strengthening Continental European hegemony to overhaul the socio-political order of local communities through a single and monopolistic legal system. (Tongat, 2022: 188-209). Apart from being tool control, policy this also works for launch interest economy as well as give base legality for authority colonial in manage government. Considering *WvS -NI*, *BW*, and *WvK* built on foundation Western paradigm, emerged gap or sharp disparity with reality cultural nation. Because of that that, reconstruction law criminal nationally adopted values socio-cultural Indonesia becomes a inevitability in framework update law criminal contemporary (Arief, 2012: 5).

Reformation and initiation update law in draft This Draft Criminal Code (RKUHP) actually has rolled out since the implementation of the 1st National Criminal Law Seminar which took place disemarang in 1963. Foundation main update This based on urgency decolonization as well as recodification la, considering that old norms have aged almost One century and began lost relevance sociological. The journey length of Law No. 1 of 2023 in room legislation is fruit from dialectics intense intellectual, where it was this 14th draft that finally agreed with bring transformation of norms that are fundamental. Although a number of clause Still ignite debate critical, the National Criminal Code has succeed integrate various fundamental ideas that renew framework enforcement law criminal. One of the breakthrough or the most prominent novelty is effort unification living law in structure law criminal national, which emerged as antithesis to paradigm rigid formal positivism (Pawana, 2023 : 10).

In a way philosophical, new Criminal Code carry vision balance between interest individual, state, and protection to values social pluralistic society (Arief, 2018: 24). Focus main update This No only lies in modernization sanctions, but also on efforts integrate values local to in system formal law of the state. One of the the most fundamental and controversial changes is redefinition principle legality.

Accommodation living law in the National Criminal Code produces gap fundamental paradigmatic towards principle legality. As long as more from One century, Indonesia adheres to principle formal legality in rigid as arranged in Article 1 paragraph (1) of the old Criminal Code, which requires that action criminal must based on regulations legislation written there is before actions carried out. However, Article 2 paragraph (1) of the New Criminal Code now confess the existence of " living law" in society" (*living law*) as base criminalization (Hiariej, 2023). This is mark shift from paradigm formal legality towards legality material, where the law no Again only interpreted as text laws, but also values justice that lives in the midst public.

The pillars of legality which are explicit poured out Article 1 Paragraph (1) of the Criminal Code states that principle that : *"There is nothing actions can be punished, except on strength rule criminal in legislation that has been there is, before actions done"*. Phrases in principle legality the leave from LA von Feurbach's postulates, ie *"nullum delictum nulla poena sine praevia lege poenali"*, no criminalization without arrangement previously in valid law. Interpretation to laws that have been There is or valid laws referring to the regulations legislation issued by the state as authority single that can monopolize enforcement law and create order social through apparatus enforcer law. With monopolistic paradigm this, the state ignores existence laws that grow outside corridor legislation official. Therefore that, everything form enforcement law that originates from from non- state norms are seen illegal and not recognized in system justice formal criminal law (Setyawan, 2021).

Although Law No. 1 of 2023 concerning the National Criminal Code remains look after principle legality with state that sanctions criminal or action only can dropped based on regulations that have been There is previously, the law This bring change radical through exception to principle Recognition of the source law outside formal legislation, namely living

law, now become an integral part of system criminalization. As stated in Article 2 Paragraph (1), the existence of law customs still recognized for determine eligibility criminalization someone, even though his actions No listed in law written. Terms This in a way effective demolish domination monopolistic principle legality conventional and open room for pluralism law in the legal system Indonesian criminal law (Malau, 2023).

Confession as well as enforcement living law in system law Indonesian criminal law produces a number of fundamental discourse. In doctrinal, confessional This create antinomy or conflict of norms with principle *nullum delictum nulla poena sine praevia lege poenali*. The principle of formal legality demands existence *lex scripta* (law written) and *lex stricta* (strict law) to prevent arbitrariness apparatus enforcer law. On the other hand, living law in a way natural nature No written, dynamic, and flexible follow development of the times (Mulyadi, 2020). Tension between demands certainty law in one sides and demands justice sociologists on the other hand create gap vulnerability juridical in system justice Indonesian criminal law.

Problem technical appear when Article 2 paragraph (2) of the New Criminal Code requires that living law the must compiled to in Regional Regulation (Perda) for can enforced. Provisions This trigger criticism about the phenomenon of "positivity law custom". According to Achmad Ali, when law customs that are organic forced enter to in script written like regional regulation, then the essence of "life" law the precisely risky is lost Because He has freeze become law rigid positive (Ali, 2022). This is cause question whether integration the truly honor law customs or precisely is "colonizing" the law customs with method formalize it.

Apart from the problem certainty law, aspects system criminalization also becomes highlight sharp. In law criminal general, sanctions have clear parameters in the form of criminal prison or fine with minimum and maximum limits. While that, the law customs often apply sanctions in the form of recovery balance magical, fine customs, or exclusion social that is not known in standard Western criminalization. Potential occurrence disparity extreme crimes between regions to become threat real if the judge does not own standard guidelines in to judge matters involving living law (Prasetyo, 2019).

In a way more comprehensive, the implementation of Article 2 of the New Criminal Code requires readiness capacity source Power human at the level apparatus enforcer law, starting from police, prosecutors, and judges. Judges now sued for capable dig values laws that live in society in a way objective without trapped in subjectivity discriminatory local. This is need method invention law (*rechtsvinding*) which is more progressive and with integrity high so that the resulting decision No only powerful law still formally, but also has moral legitimacy in society.

Based on dynamics thoughts and descriptions said, research This become very crucial For analyze point meeting between principle formal legality and living law. Research This will dissect in a way critical whether harmonization second principle the in the New Criminal Code can walk side by side without each other eliminate. Focus study placed on search solution conceptual in order to create system punishment that provides certainty law for every citizens at the same time give room for justice local that during This neglected in system criminalization national.

METHODS

Writing in study This use type study juridical normative, with approach legislation (*Statute Approach*) and approach conceptual (*Conceptual Approach*) (Mrazuki, 2021). Second approach This done with elaborate regulation legislation related with living law use developing concepts, theories and doctrines in science law criminal contemporary For produce synthesis that shows correlation and relevance arrangement the to objective update law substantive criminal law. Research process This done through studies literature with do elaboration objective to source primary law originating from from regulations legislation. In addition, it is

carried out assessment to material secondary like article journals, books and literature related to formulating synthesis reliable, systematic, and comprehensive research can accountable in a way scientific. Analysis techniques study qualitative implemented in analysis This For dissect in a way deep dimensions political the law behind confession living law in the framework of the National Criminal Code in general comprehensive.

DISCUSSION AND RESULT

The Principle of Legality in the Construction of Indonesian Criminal Law

Updates law criminal especially also in update principles law criminal (such as principle legality), in essence must started from update basic values /ideas. Formulation mark That is embodiment from mark (basic idea, concept thinking / conception intellectual) (Arief, 2012: 3). As antithesis from practice law Roman criminal extra ordinaria, basic legality appear for end domination power monarchy arbitrary Europe during period enlightenment (Aufklärung) (Yanto, 2021). Previously, the concept criminal extra ordinary allow punishment to offenses that are not written, the scope of which is very flexible and depends on the moral judgment of the ruler. Under system monarchy absolute, mechanism This legitimize oppression juridical Because No existence limitation clear rules. Because that, the principle legality present as instrument protection citizens against uncertainty law and arbitrariness rulers in the past (Mallarangan , 2021: 8).

In a way historical base the application of the Principle of Legality of Article 1 of the Criminal Code (*WvS*) at the time after independence on August 18, 1945 did not can released from 1945 Constitution. Article II Rules The Transitional Constitution of 1945 states : all state bodies and existing regulations Still direct valid during Not yet held a new one according to this Constitution. Possible meaning dug in want principles general (fundamental) principles, among others legality should arranged in a way progressive, in essence change principle legality No just changing the norms will but the most fundamental changes in aspects value. The value offered is mark the balance of Pancasila, namely mark Divinity, values Humanity, and values Society. So, deep Meaning principle legality in a way progressive is part business do criticism to absolutism mark underlying liberalism- individualism principle legality.

The principle of legality must understood based on context social in order diversity single ika. Construction social Indonesian people understand law no singular, but plural (diverse). Diversity law That sourced from religious law, state law and civil law custom. Compilation principle legality in a way appropriate progressive personality Indonesia is meaning cultural based on law that lives in society. Meaning cultural the united with context development Indonesian revolution at the time that. Understand principle legality in the Criminal Code (*WvS*) even ideals for do update principle legality no may contradictory with the Constitution and the position of the Republic of Indonesia as an independent country. This means development the Indonesian revolution is meaning socially driven on base Spirit nationalism and patriotism.

Existence principle legality in Article 1 Paragraph (1) of the Criminal Code remains maintained in codification law criminal new national, even strengthened through Article (2) which specifically explicit forbid use analogy. There is three dimensions meaning main in principle this. (1) all actions forbidden along with the sanctions must poured out in regulations written, in line with doctrine civil law that upholds tall *lex scripta*. (2) enforcement law criminal No permitted use method analogy; development of norms only possible through interpretation, without equalize something actions with other offenses in figuratively. (3) the validity law criminal nature prospective or No receding, which means somebody No can entangled by the new rules set on actions carried out in the past (Setyawan, 2023).

Construction principle legality in system law Indonesian criminal law before update of the Criminal Code only confess source single for criminalization, namely law. According to

thinking Sudarto emphasize that implications principle legality in Article 1 of the old Criminal Code has consequences for freedom somebody from demands criminal during his actions No regulated by law (Yanto, 2022). However, the principle certainty law This experience anomaly in Indonesian context because existence dualism rooted law since the Dutch era, namely between law national and legal customs. National law standing on top foundation normative carried out by state institutions as the only one source formal law. On the other hand, the law customs represent living law with more characters flexible, where it applies No relying on codification Certain but rather on the dynamics sociological public local.

Traces of deconstruction principle legality that accommodates reality law customs can traced back to Law No. 1 Drt 1951. Specifically in Article 1 Paragraph (3) sub b, it is regulated about legitimacy criminalization on violation law customs that are not found the settings in law written. However, the essence from regulations This is not form respect to pluralism law, but rather A solution technical for fill in gap juridical in the Criminal Code legacy colonial policy this also becomes instrument for speed up unification law national through elimination Swapraja Courts in various regions. If reviewed from glasses political law, policy the is maneuver strategic government in the transition era independence for fortify stability security and guarantee coherence law in the middle public.

The reform process has push transformation system Indonesian justice towards achievement justice substantive, appropriate mandate of Article 24 Paragraph (1) of the 1945 Constitution post-amendment fourth. This is open opportunity for integration law No written as alternative enforcement law on the side formal regulations. The mandate emphasized in Article 5 Paragraph (1) of Law No. 48 of 2009, which requires judges and constitutional judges for dig, follow, and understand aspirations law as well as a growing sense of justice in the center society. In general principles, rules This has "reformed" the rigidity principle legality with requires the judge to consider existence living law in every decision. As a result, the principle legality in the reform era is not Again viewed as an absolute dogma, even though guarantee certainty to diversity source law criminal Not yet confirmed in a way implicit. With thus face principle legality in order law current Indonesian criminal law This has shifting and not Again nature single, even though synchronization to pluralism source law criminal Still leaving challenge in matter certainty law.

Reformulation of Living Law *in* the New Criminal Code Paradigm

Discussion of the National Criminal Code should be No just discuss problem formulation chapter in matter this (udnag). Build or do renewal law in essence is "building or update main points basic thought / concept /idea", not just update / replace formulation article (law) in textual. Therefore that, discussion the text of the National Criminal Code must understood or accompanied by with discussion conceptual and contextual. Not easy browse history main thinking or basic idea drafting of the National Criminal Code, because Already Enough long the journey of the National Criminal Code.

If referring to the National Criminal Code in Indonesia it seems principle legality No valid in a way absolute. The principle of legality in the National Criminal Code provides place to living law or law No written as source law. More to be clear can seen in Article 1 of the 2015-2017 Draft National Criminal Code : Article 1 (1) *"Not one actions can also be subject to sanctions except on strength regulation criminal in regulation legislation that has been There is before actions done "*. (2) *"In determining existence action criminal forbidden use analogy"*. Formulation of normative provisions paragraph (1) above understood as a "principle legality", is basis / foundation law, or source law he was convicted perpetrator action criminal. Orientation the formulation focused on the perpetrator action crimes and acts or action the crime. Orientation thus can understood from explanation Book I of the National Criminal Code (Soponyono, 2012: 206).

In a way overall fundamental differences between the Dutch legacy Criminal Code (*Wetboek van Strafrecht*) and the New Criminal Code is the underlying philosophy. The Dutch Criminal Code is a legacy of overall based on thought Flow Classical School which developed in the 18th century and focused on attention law criminal acts or action criminal law (Daad-Strafrecht). The New Criminal Code is based on self in thought The Neo - Classical School which maintains balance between factor objective (actions / outwardly) and factors subjective (person/ inner / attitude inner). The character “Daad-dader Strafrecht” which is more human the in a way systemic coloring the new Criminal Code, which among other things is also explicit and implicit from existence various arrangements that attempt guard balance between elements / factors objective (actions / outwardly) and elements / factors subjective (human / inner / attitude inner).

Living law with the principle of legality in formulation of the norm in paragraph (1) as principle legality formal, meaning base law for drop criminal provisions regulation legislation. The formulation of the norms of Article 1 paragraph (1) and (2) of the National Criminal Code is essence principle legality. Article 1 paragraph (1) of the National Criminal Code provisions about must enforce Constitution applicable criminal law moment actions done. In a way a contrario, is prohibition for enforce Constitution criminal offenses committed after actions done. The point is is forbid enforce Constitution criminal in a way low tide, which is known with the non-retroactive principle (Yuherawan , 2014: 257).

Regarding Article 2 of the National Criminal Code above, Eddy OS. Hiariej provides note. First, that in the future, the principle the legality adopted in Indonesia is not nature absolute Because existence provisions of Article 2 paragraph (1) which implicit confess living law (law no written) in society. Second, the provisions about prohibition apply the analogy of Article 1 paragraph (2) is something contradictory interminis when connected with Article 2 paragraph (1) where someone can convicted although his actions No arranged in regulation legislation (Hiariej, 2009: 38).

Analysis to opinion First show truth that implementation of Article 1 paragraph (1) of the New Criminal Code does not will Again nature absolute. Spirit decolonization in the National Criminal Code, the idea of balance is carried out which integrates formal criteria with criteria material. Paradigm This make an effort align certainty law with elasticity as well as justice substantial. As a result, the system law Indonesian criminal law front will standing on two pillars: on one side still uphold tall supremacy law, but on the other hand provides legitimacy for living law as part not inseparable from criminalization.

Then, it appears concern about existence contradictio in terminis between prohibition use analogy in Article 1 paragraph (2) with confession living law as base criminalization in Article 2 paragraph (1). However, the author own different arguments. Prohibition analogy the in a way specific only valid for source law written. In other words, the prohibition is contained in Article 1 paragraph (2) is addressed as barrier for Article 1 paragraph (1), which confirms that criminalization on something actions must based on regulations written or Constitution.

Draft living law in essence No touch with doctrine analogy, and prohibition the of course No designed for limit the applicability of Article 2 paragraph (1). The difference fundamentally lies in the characteristics principle : if principle formal legality in firm forbid analogy as arranged in Article 1 of the National Criminal Code, then principle legality material No relevant with draft said. This is due to essence legality material is for ensnare actions based on the norms that exist in society, as long as action the not yet accommodated by law written. With however, although something actions No own runway rule in law, perpetrator still can sentenced sanctions if his actions contradictory with law prevailing customs.

In Article 1 and Article 2 above which are often theorized as principle legality, is base worthy he was convicted something actions related close with problem source law or runway legality for state something actions as action criminal or not. Like case in point in the Criminal

Code (*WvS*), the Concept still depart from principle formal legality (based on the Law) Article 1 of the National Criminal Code. However, the concept also gives place to the “living law / law No written as source law (principle material legality) Article 2 of the National Criminal Code.

The principle of legality formulated in A norm formulation, if juxtaposed formulation principle legality in Article 1 paragraph (1) of the Criminal Code (*WvS*), Article 1 and Article 2 of the National Criminal Code, then reformulation of norms that become novelty from writer in Article 1 and Article 2 of the National Criminal Code. For more to be clear formulation principle legality as A formulation of the norm is as following :

Table 1. Comparison Formulation of the Principle of Legality in the Criminal Code

Formulation Criminal Code (<i>WvS</i>)	Formulation National Criminal Code	Reformulation National Criminal Code
article 1	article 1	article 1
(1) There is no such thing as actions can convicted except on strength rule criminal in legislation that has been There is before actions done	(1) Not one actions can also be subject to sanctions except on strength regulation criminal in regulation legislation that has been There is before actions done. (2) In determining existence action criminal forbidden use analogy .	“There is no such thing as a can punished, except on strength regulation criminal in regulation legislation that has been There is before actions done as well as also contradicts living law in public although actions the No arranged in regulation legislation”
	Article 2	Article 2
	(1) Provisions as intended in Article 1 paragraph (1) no reduce its validity living law in public which determine that somebody worthy convicted although actions the No arranged in regulation legislation . (2) Living law in public as referred to in paragraph (1) applies throughout in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, the right basic human beings, and the principles law generally recognized public civilized and deep place law That life .	(1) In determining existence action criminal on strength regulation criminal in regulation legislation forbidden use analogy. (2) Living law in public as referred to in Article 1 applies throughout in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia , the right basic human beings , and the principles law generally recognized public civilized and deep place law That life .

(Source : *Book Meaning of the Principle of Legality*)

Reformulation of basic norms legality based on the idea of balance integrative that is balance in a way integrative regulation living laws and regulations as sources and basis law in One norm formulation is affirmation from existence pluralism law. Based on substance mark the balance of Pancasila above, the embodiment implementation of the idea of balance integrative reformulate basic norms legality No separated on the contrary united in One

formulation of norms of a nature each other strengthen existence its validit. With thus need formulated principle legality based on the idea of balance integrative. If reformulated in a norm becomes "nothing" something actions can punished, except on strength regulation criminal in regulation legislation that has been There is before actions done as well as also contradicts living law in public although actions the No arranged in regulation legislation”.

Reconstruction principle current legality covers formal and material dimensions has give legitimacy for living law as a recognized basis for criminal punishment in a way officially by the state. Through mechanism this, individual can sentenced sanctions on actions that are considered violating social norms society, even though actions the No listed in codification law. Implementation living law This aim for give room for public law customs in look after tradition as well as authority law in territorial areas they. This is ultimately strengthen principle inclusivity as well as respect to diversity order law in Indonesia.

CONCLUSION

Implementation Constitution Number 1 of 2023 concerning the National Criminal Code marks fundamental shift in paradigm law Indonesian criminal law, from domination formal legality towards balance with legality material. Reconciliation This give room for confession living law (living law) as source legitimate criminalization in order to realize justice substantive that during This neglected by rigidity positivism law inheritance colonial. Although appear concern about contradictio in terminis between prohibition analogy in Article 1 paragraph (2) with confession law customs in Article 2 paragraph (1), research This confirm that both of them No each other abolish. Prohibition analogy in a way specific intended for limit law written (articles) law) in order to maintain certainty law, while confession living law present for fill in emptiness formal law against actions that are real hurt the sense of justice society. With Thus, the principle legality in system law current Indonesian criminal law This No Again nature absolute, but rather nature integrative with carrying the idea of balance between interest individual, certainty law and protection values pluralistic society.

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