THE EXISTENCE OF MATERIAL LEGALITY PRINCIPLES IN INDONESIA'S CRIMINAL LAW REFORM

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ABSTRACT

The draft of Indonesian Criminal Code, formulates the principle of material legality as a counterbalance to the principle of formal legality. The principle of material legality is an extension of the principle of formal legality. The existence of this material legality principle later in its implementation will have an impact on the nature of being against material law. The teaching of the nature of against material law states that a person is said to have committed an act that is against the law if his act is not only against the law but also the unwritten law. The existence of the principle of material legality in the reform of Indonesia's criminal law does not just exist but has previously been based on considerations of various national legislative policies, namely Article 5 paragraph 3 sub b of the Emergency Law no. 1 of 1951, which in its implementation has been applied in several customary law communities, one of which is customary law in Bali, in the settlement of Balinese customary offense cases in the lokika sanggraha case. In its development, the recognition of the existence of customary law as a source of law also received recognition in Article 18 B (2) of the 1945 Constitution of the Republic of Indonesia and Article 5 (1), Article 50 (1) of Law no. 48 of 2009.

Keywords: Formal Legality Principle; Material Legality Principle; Criminal Law Reform

A. INTRODUCTION

The demand for a new national Criminal Code to replace the colonial legacy has emerged since the proclamation of independence. According to Muladi:

> "The vision of Indonesia's criminal law reform is to build a national criminal law that can replace the colonial legacy of the Criminal Code through the Draft of Criminal Code which is described in the form of the main mission, namely the decolonialization process in the form of "open re-codification" which is systemic, and not fragmentary or patchy amendments.[1]
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> In the deliberations of the Draft of Criminal Code it was stated that:
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> "To realize efforts to reform national law, the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia, it is necessary to formulate a national criminal law to replace *Wetboek van Strafrecht* (Criminal Code) as a legal product of the Dutch East Indies colonial era.

One of the criminal law materials that will be built in the Draft of Criminal Code according to what is stated in the Draft of Criminal Code considerations is the balance between written and unwritten law.

In order to achieve a balance between written and unwritten law, the Draft of Criminal Code then stipulates the principle of material legality as an extension of the principle of formal legality. The Draft of Criminal Code includes the principle of material legality in Article 2 of the Draft of Criminal Code, which stipulates that: even if a person's actions are not regulated in the law, if they are contrary to the unwritten law, the person can be punished.

The Draft of Criminal Code in accommodating this unwritten law is also seen in Article 66, namely the inclusion of the fulfillment of local customary obligations, as an additional crime. Additional penalties in the form of fulfilling local customary obligations can be imposed even though they are not listed in the formulation of the crime.

The accommodation of the unwritten law in the Draft of Criminal Code, of course, does not just exist, but there are certain basic considerations, beforehand. Based on the above, this paper will discuss: "The Existence of The Principle of Material Legality in The Indonesian Criminal Law Reform".

Formulation of The Problem

How is the existence of the principle of material legality in the Indonesian criminal law reform?

[1] Muladi dan Diah Sulistyani RS, 2020, *Catatan Empat Dekade Perjuangan Turur Mengawal Terwujudnya KUHP Nasional* (Part 1, 1980-2020), Semarang: USM Press, p. 37.

B. DISCUSSION

State law

According to Article 1 paragraph (3) of the 1945 Constitution, Indonesia is a constitutional state. Padmo Wahyono stated that: "The concept of the Indonesian rule of law, which mentions *rechsstaat*, means that the Indonesian rule of law takes a pattern that does not deviate from the definition of the rule of law in general (*genusbegrip*) which is then adapted to the specific circumstances of Indonesia."[2]

According to Philipus M. Hadjon, saying that:

> "The Indonesian state of law is somewhat different from the rechtsstaat or the rule of law. *Rechsstaat* put forward *wetmatigheid* which later became *rechtsmatigheid*. The rule of law prioritizes the principle of equality before the law, while the State of Indonesia requires harmonious relations between the government and the people that prioritize the principle of harmony". [3]

According to Arief Hidayat:

> "The concept of the rule of law adopted in Indonesia is neither the concept of *Rechstaat* nor the concept of The Rule of Law, but rather forms a concept of a new state of law that is rooted in the views and philosophy of the noble life of the Indonesian nation. The new concept is the state of Pancasila law as a crystallization of views and philosophy of life which is full of noble ethical and moral values of the Indonesian nation, as stated in the Preamble to the 1945 Constitution and implied in the articles of the 1945 Constitution".[4]

The concept of a Pancasila state law is the main characteristic and distinguishes the Indonesian legal system from other legal systems. The concept of the Indonesian state of law takes a prismatic or integrative concept from the concept of rechtsstaats and the rule of law, so that the principle of "legal certainty" in rechtsstaat is combined with the principle of "justice" in The Rule of law. Indonesia did not choose one of them but included good elements from both.
The characteristics of the Pancasila state law are:[5]

1. It is a family country.
2. It is a state of law with certainty and justice.
3. Is a religious nation state.
4. Integrating law as a means of changing society and law as a reflection of society's culture.
5. The basis for making and forming national laws must be based on neutral and universal legal principles.

With regard to the characteristics of combining law as a means of changing society and law as a reflection of society's culture, the Pancasila state law tries to maintain and reflect the values that live in society (living law) while also positivizing the living law to encourage and direct society towards development and progress in accordance with the principles of Pancasila. One of the living laws that need to be positivized in the reform of national law is the principle of material legality.

Criminal Law Reform

Efforts to reform the criminal law in Indonesia are realized by one of them drafting the Draft of Criminal Code to replace *Wetboek van Strafrecht* (Criminal Code), as a product of the legacy of the Dutch colonialists in Indonesia. Criminal law reform (penal reform) is part of criminal law policy/politics (penal policy).

According to Soedarto:

> "Implementing criminal law politics means efforts to realize criminal laws and regulations that are in accordance with the circumstances and situations at a time and for the future."[6]

According to Barda Nawawi Arief, criminal law reform essentially contains meaning:

> "An effort to reorient and reform the criminal law in accordance with the central socio-political, socio-philosophical, and socio-cultural values of Indonesian society that underlie social policies, criminal policies, and law enforcement policies

[2] Moh Mahfud MD, 1999, *Hukum dan Pilar-pilar Demokras*i, Gama Media, Yogyakarta, p.141.
[3] *Ibid*, p.142.
[4] Arief Hidayat, 2011, *Negara Hukum Pancasila (Suatu Model Ideal Penyelenggaraan Negara Hukum)*, Paper presented at a seminar on Pancasila and Constitutional Education, organized by the Constitutional Court in Jakarta.
[5] Arief Hidayat, *Membumikan Konsep Negara Hukum Pancasila*, papers presented in national seminars with the theme "*Menjaga dan Mengaktualisasikan Pancasila Sebagai Philosophi Gronslag Dalam Kehidupan Berbangsa dan Bernegara",* organized by *pusat kajian Konstitusi* Faculty of Law, Diponegoro University Semarang, 29 June 2013, p.3-4. see also Moh Mahfud MD, 2012, *Membangun Politik Hukum Menegakkan Konstitusi*, PT RajaGrafindo Persada, Jakarta, p.32.
[6] Soedarto, 1983, *Hukum Pidana dan Perkembangan Masyarakat*, Bandung: Sinar Baru, p. 93.

in Indonesia. Criminal law reform in essence must be pursued with a policy-oriented approach as well as a values-oriented approach".[7]

He added that:

"The Draft Criminal Code is a draft of the National Criminal Law System which intends to build/update/create a new system". The discussion of the Draft Criminal Code is not only discussing the issue of article formulation, but also building or updating the main points of thought or basic ideas. Not only updating, changing the formulation of the article textually".[8]

Viewed from the point of view of the legal system, which consists of "legal substance", legal structure, and legal culture, the reform of the criminal law system can also cover a very broad scope which includes reforming the substance of criminal law, renewal of the structure of criminal law and renewal of criminal law culture.

The reform of the substance of the criminal law includes the reform of material criminal law (Criminal Code and laws outside the Criminal Code), formal criminal law (KUHAP), and criminal law enforcement.

According to Barda Nawawi Arief:

"In the context of the development and reform of the national legal system, it must be supported by a study of unwritten law, customary law, customary law, or the law that lives in society. Such a study is necessary because in various national policies so far it has been stated that the national legal system should be sourced from legal values or aspirations that live and develop in society. So, it is clearly a burden and a national mandate, even an obligation, a national challenge and need".[9]

The existence of the principle of material legality in the reform of the national criminal law

The Draft of Criminal Code as one of the objects of reform of the substance of criminal law accommodates the principles of material legality in addition to the formal legality principle. The principle of formal legality which is currently still in effect is the principle of no crime without a law. The law determines whether or not a person who commits a crime can be subject to a criminal offense for his actions, this is regulated in Article 1 paragraph (1) of the Criminal Code, which reads: No act can be punished but on the strength of the existing laws and regulations before the act was committed.

Theoretically, this means that: a criminal act must first be regulated in laws and regulations, this shows that punishment of living law, custom, or customary law/unwritten law is not allowed or prohibited. Based on the meaning of the legality principle, the basis for determining a criminal act is that an act is said to be a criminal act and must be determined in advance in the legislation. However, with the inclusion of the principle of material legality, the problem that arises is that the unwritten legal position will be parallel to the written law. Although the aim is to include the principle of material legality, as a counterbalance to the principle of formal legality, this will also change the criminal justice system, which can initially be resolved through deliberation through traditional institutions, by aligning the position of the principle of material legality with the principle of formal legality, the criminal justice system will also become formal like the ordinary criminal justice system.

The inclusion of the principle of material legality in the Draft of Criminal Code will also have an impact on the enactment of an unlawful nature of material, in addition to violating formal law. According to the teachings of nature against material law, a person is said to have committed an unlawful act not only if that person's actions are contrary to positive law but also to unwritten law.

Judging from the history that has happened in Indonesia, the sources of criminal law in Indonesia are divided into two things, namely written law and unwritten law. The legal basis for the application of unwritten law in Indonesia is Article 5 paragraph 3 sub b of Law No. 1 of 1951.

This article explicitly stipulates the obligation of judges to explore the laws that live in society. This article stipulates that if an act which according to living law must be considered a criminal act, but there is no comparison in the Civil Code, then it is considered threatened with a sentence of not more than three months in prison and/or a fine of five hundred rupiahs, namely as a substitute if the customary punishment imposed is not followed by the convicted party and the replacement in question is deemed commensurate by the judge on the basis of the convicted person's guilt. Such a statement shows the recognition of unwritten law as a source of criminal law in Indonesia.

According to the author, this shows that the article contains teachings on the nature of violating material law in a positive function, namely if the act is considered despicable by the community, but the law does not regulate it, then customary law can be applied by the Court.[10]

[7] Barda Nawawi Arief, 2011, *Bunga Rampai kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru*, Jakarta: Kencana Prenada Media Group, p. 29.

[8] Barda Nawawi Arief, 2017, *RUUKUHP Baru Sebuah Restrukturisasi Rekonstruksi Sistem Hukum Pidana Indonesia*, Semarang: Badan Penerbit Universitas Diponegoro, p. 30.

[9] Barda Nawawi Arief, 2005, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Bandung: PT citraAditya Bakti, p. 112.

[10] Krismiyarsi, 2015, *Pokok-pokok Materi Hukum Pidana*, Semarang: Badan Penerbit Universitas Diponegoro, p. 60.

The same thing was stated by Eddy O.S. Hiariej, in his notes on the Draft Criminal Code he stated that:

> "The limitation on the principle of legality as stated in Article 1 and Article 2 of the Draft Criminal Code shows that criminal law in Indonesia has implicitly recognized the teaching of being against material law in a positive function. That is, even though an act does not meet the formulation of the offense in a written law, the judge can impose a sentence if the act is considered disgraceful, contrary to justice and other social norms in people's lives". [11]

The existence of customary law in national law is also regulated in Article 5 paragraph (1) of Law no. 48 of 2009, which reads: "Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society".

The existence of this customary law is also recognized in the new 2019 Draft of Criminal Code, namely in Article 597, regarding the obligation to fulfill customary obligations as an additional crime.

One example of a customary crime whose existence is currently recognized is the offense of lokika sanggraha in Bali.

> "Lokika sanggraha is explained according to the Book of Adigama, namely a love relationship that leads to a husband and wife or sexual relationship between a man and a woman in which they are not bound by a valid marriage, either by national law or Balinese custom.
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> According to Widnyana, delik lokika sanggraha was preceded by a love relationship between a woman and a man, both of whom had no marital ties, then continued with marital/sexual intercourse on the basis of mutual liking, but after the woman became pregnant, the man left her and decided relationship with the woman for no reason".[12]

This delik lokika sanggraha is carried out by consensual lovers who are both Hindu and live in Bali, have husband and wife relations, there are promises to be married but when the woman is pregnant the man leaves her. This offense is not regulated in the Criminal Code, but the settlement of this case has been carried out by Bali Police investigators and tried in the general court, on charges of violating Article 359 of the Adigama Book. This proves that the teaching of material against the law in a positive function has been applied by judges at the District Court in Bali. In his book Nyoman Serikat Putra Jaya[13], it was stated that:

> "From the results of research conducted in three District Courts (Singaraja District Court, Klungkung District Court, and Gianyar District Court) in Bali, in the period 1980 to 1986 and the period 1992 to 1997 in four District Courts (Singaraja District Court, District Court Klungkung, Gianyar District Court and Denpasar District Court) and at the Denpasar High Court, it turned out that the customary crime that reached the Court was only the customary crime of Lokika Sanggraha".

Nyoman Serikat Putra Jaya added that: among the customary offenses found in Bali, the lokika sanggraha offense is a customary offense whose settlement has long been resolved through a formal settlement process, by the District Court (not resolved by customary institutions). This is because it has been regulated in Article 5 paragraph 3 sub b of the Emergency Law Year 1951. The sanctions imposed were also not customary sanctions but sanctions listed in Article 10 of the Criminal Code.

This shows that the existence of the principle of material legality before it was accommodated by the Draft of Criminal Code, had been accommodated by a formal institution in this case the Bali District Court, and had received recognition by the local community as a customary offense.

The recognition of customary law or unwritten law as a source of criminal law is also seen in:

1. Article 18 B (2) of the 1945 Constitution of the Republic of Indonesia, which reads: "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the unitary state of the Republic of Indonesia, which is regulated by law.
2. Article 5 (1) and Article 50 of Law no. 48 of 2009 concerning the Law on Judicial Power
   Article 50 (1) which reads:

   > "The Court's decision must not only contain the reasons and basis for the decision, but also contain certain articles of the relevant laws and regulations or unwritten legal sources that will be used as the basis for adjudicating".
   > Article 5 (1) which reads:
   >
   > "Constitutional judges and judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society".

[11] Ramadan Tabiu dan Eddy O.S Hiariej, *Pertentangan Asas Legalitas Formil Dan Materiil Dalam Rancangan Undang-Undang Kuhp,* tesis, Program Studi Pascasarjana, Fakultas Hukum Universitas Gadjah Mada, Yogyakarta. Jurnal penelitian Hukum Gadjah Mada https://jurnal.ugm.ac.id/jph/article/view/19112, Vol 2. No. 1 of 2015, p. 34. Accessed in 17 July 2021, at 12.37.

[12] I Made Widnyana, 1993, *Kapita Selekta Hukum Pidana Adat*, Bandung: Eresco, p. 5; lihat pula Anak Agung Linda Cantika and A.A. Ngurah Oka Yudistira Darmadi, 2021, *Delik Adat Lokika Sanggraha Sebagai Pembaharuan Hukum Pidana Nasional* Jurnal Kertha Semaya https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/70830, vol 9 No. 6 year 2021, accessed in 17 July 2021 at 12.37.

[13] Nyoman Serikat Putra Jaya, 2005, *Relevansi Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional*, Bandung: PT Citra Aditya Bakti, p. 170.

Although the Draft Criminal Code provides a place for living law as a source of law, it also provides limits on its validity, namely: (1) the act is not regulated in the legislation. (2) as long as the laws that live in society are in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society.

C. CONCLUSION

Based on the description above, it can be concluded that: The existence of the principle of material legality in the reform of Indonesian criminal law does not just exist but has been based on considerations of various national legislative policies, namely regulated in Article 5 paragraph 3 sub b of Emergency Law no. 1 of 1951, which in its implementation has also been applied in several customary law communities, one of which is customary law in Bali, namely in the settlement of Balinese customary offense cases in the lokika sanggraha case. Accommodating the principle of material legality has an impact on the case settlement process, which is no longer using traditional institutions but using formal institutions, in this case being resolved through the District Court. In its development, the recognition of the existence of customary law as a source of law also received recognition in Article 18 B (2) of the 1945 Constitution of the Republic of Indonesia and Article 5 (1), Article 50 (1) of Law no. 48 of 2009.

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