# ANALYSIS OF THE EXPANSION OF THE PRINCIPLE OF LEGALITY IN RENEWING CRIMINAL LAW

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**Abstract**

*The principle of legality is the most basic principle in the application of material criminal law. The principle of legality adhered to in Indonesian criminal law was originally the principle of formal legality. Meanwhile, in the renewal of criminal law embodied in the National Criminal Code, the principle of legality adopted also includes the principle of material legality. This article aims to analyze the expansion of the legality principle in the renewal of Indonesian criminal law and understand the meaning of the expansion of the legality principle. This article was written using a normative legal research method with a statutory approach. The result of this study is that the expansion of the legality principle in criminal law renewal is an effort to balance the fulfillment of legal objectives between legal certainty in the formal legality principle and justice in the material legality principle.*

## A. Introduction

The principle of legality is the most basic principle in criminal law. The existence of the principle of legality in criminal law is the basis for the implementation of material criminal law against anyone who commits acts that are prohibited according to criminal law. The principle of legality determines that no act is prohibited and punishable by criminal law if it is not specified in advance in legislation. This principle is known in Latin as *nullum delictum nulla poena sine praevia lege poenali* (no offense, no crime without prior regulation).[1]

The definition of the principle of legality implies that there are 3 (three) basic meanings of the principle of legality, namely:[2] first, there are no acts that are prohibited and punishable by criminal law if this has not been previously stated in a statutory regulation, second, to determine the existence of a criminal act, analogies (figures of speech) must not be used and third, criminal law rules do not apply retroactively.

The formulation of the principle of legality in Indonesian criminal law was first found in the old Indonesian Criminal Code (WvS-NI) which was stipulated in Law Number 1 of 1946 concerning Regulations on Criminal Law. The principle of legality in the old Criminal Code

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[1] L.S. Widayati, "Perluasan Asas Legalitas dalam RUU-KUHP", Negara Hukum: Membangun Hukum Untuk Keadilan dan Kesejahteraan 2, no. 2 (November, 2011): 307-327, http://dx.doi.org/10.22212/jnh.v2i2.219.
[2] Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2008), 26.

determined that[3] an act cannot be punished, unless based on the strength of existing criminal law provisions. The reform of criminal law which was realized in the ratification of Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code) still maintains the principle of legality as the main principle underlying the implementation of criminal law in Indonesia. Article 1 paragraph (1) of the National Criminal Code states that no one can be punished or subject to action, unless the act committed has been designated as a criminal offense in the applicable laws and regulations at the time the act was committed. Furthermore, Article 1 paragraph (2) of the National Criminal Code emphasizes that analogy is prohibited to determine the existence of a criminal act. The provisions of Article 1 paragraph (2) are new in the reform of criminal law, the Old Criminal Code did not include a prohibition on this analogy, and so far we have found it in criminal law science.

Updates to the legality principle in the National Criminal Code can also be found in the provisions of Article 2 paragraph (1), Article 2 paragraph (2) and Article 2 paragraph (3). The provisions of Article 2 paragraph (1) in general determine that the principle of legality as stated in Article 1 paragraph (1) does not override the application of laws that exist in society, a person deserves to be punished even though the act he committed is not determined by the Criminal Code as a prohibited act. Furthermore, Article 2 paragraph (2) explains the existence of laws that exist in the community that apply in the area where the indigenous community lives, as long as it is not regulated in the Criminal Code and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by community of nations.

The formulation of this article has implications for the expansion of the principle of legality, namely that a person can be prosecuted and punished based on the laws that exist in society even though the act is not prohibited by law. Explanation of Article 2 paragraph (1) The National Criminal Code states: a fact that in certain regions in Indonesia there are still unwritten legal provisions that live in society and apply as law in that area. Unwritten law as intended in Article 2 paragraph (1) In the realm of criminal law, this is often known as customary criminal law. The aim of expanding the principle of legality in Article 2 shows that the reform of the national criminal law which was realized by ratifying the National Criminal Code aims to provide space for certain indigenous peoples to obtain justice based on living law.

[3] *Ibid.*

Looking at the expansion of the legality principle contained in the National Criminal Code, we can find 2 (two) aspects of the legal objectives that the legality principle wants to achieve. Article 1 paragraph (1) refers to the aspect of legal certainty, where the article requires the existence of written criminal law legislation as a basis for punishment for a person's act. Meanwhile, Article 2 paragraph (1) places more emphasis on the aspect of justice (sense of justice) possessed by indigenous people. These two aspects show that the reform of criminal law in the formation of the National Criminal Code aims to harmonize legal certainty and justice, so that the application of material criminal law provisions does not become rigid like the previously applicable Criminal Code, namely the Criminal Code translated from WvS-NI.

Furthermore, regarding the confirmation of the principle of non-analogy in Article 1 paragraph (2), we actually also want to emphasize the applicability of the lex temporis delicti principle in criminal law. The principle of lex temporis delicti is the determination of an act as a criminal act according to the time the criminal law comes into force. The use of this principle in criminal law in mutatis mutandis manner (once the necessary changes have been made) closes the opportunity for an analogy for an act which is not actually a criminal act to be analogized as an act which is categorized as a criminal act according to the criminal law. This article will discuss the meaning of updating the principle of legality embedded in the expansion of the principle of legality as regulated in the National Criminal Code.

## B. Method

This article was written using normative legal research methods. The approach used in this research is a statutory approach. The technique for collecting legal materials uses library research. Literature studies were carried out on legal materials in the form of primary legal materials and secondary legal materials. The legal material analysis technique uses syllogism deductive logic.

## C. Analysis and Discussion

The principle of legality in criminal law was first discovered from the teachings of Anselm von Feuerbach, a German jurist. Judging from the year this teaching was initiated, the theory regarding the principle of legality is included in classical teachings because it was coined at the beginning of the 19th century.[4] Specifically, we can find teachings regarding the

[4] Jan Remmelink, *Hukum Pidana – Komentar Atas pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia* (Jakarta: Gramedia, 2003), 356.

principle of legality in the book by Anselm von Feuerbach entitled "*Lehrbuch des Peinlichen Recht*" written in 1801, which formulates the principle of legality *as nullum delictum nulla poena sine praevia lege poenali* which means: no act can be punished except under the force of criminal provisions in existing legislation, before the act is committed.[5]

The teachings regarding the principle of legality from Anselm von Feurbach were then used by the French state in the form of laws. Article 8 Declaration des droits de L'homme et du citoyen (1789) states: no act can be punished except because of a law that is stipulated in law and legally promulgated. This principle requires that the acts that can be punished in advance be determined in the law in advance, so that residents can know in advance and will not commit these acts.[6] Furthermore, influenced by the colonialization carried out by France against the Netherlands, the principle of legality was also embedded in *Wetboek van Strafrecht* (WvS) which was then finally included in Article 1 paragraph (1) *Wetboek van Strafrecht voor Nederlandsch Indie* (WvS-NI) which was used by the state Indonesia.

The principle of legality of material criminal law which is maintained to date in the reform of criminal law through the National Criminal Code includes 2 (two) important things. First, there is a necessity for regulation of an act in criminal law, and second, the provisions of the law must first exist before the act is committed.[7] This provision reiterates that the application of criminal law must not be applied retroactively (non-retroactively). This prohibition on the retroactive application of criminal laws is a manifestation of the initial aim of establishing the principle of legality, namely to provide protection for the people against the arbitrariness of the authorities (kings and judicial officials) in determining prohibited acts and imposing criminal sanctions.

Furthermore, Article 1 paragraph (2) of the National Criminal Code again emphasizes the principle of non-analogy in the application of criminal law provisions. Judging from the conditions of development of human civilization, it is possible for new types of criminal acts to emerge that have similarities in form, structure and nature with criminal acts that are regulated in criminal law. This provision constitutes a limitation on the validity of the law criminal law which aims to prevent judges from making analogy about acts committed by someone. The problem with using analogy is that if the judge makes a mistake in analogizing an act, it will have implications for hurting society's sense of justice. This article places the

[5] Moeljatno, *Op.Cit.*, 26.
[6] *Ibid.*
[7] Romli Atmasasmita, *Perbandingan Hukum Pidana Kontemporer* (Jakarta: Fikahati Aneska, 2009), 106.

application of criminal law solely on the provisions of the currently applicable criminal law (positive law).

Before discussing the application of living law (customary law) as the basis for a person being punished, it is necessary to discuss the existence of customary law in Indonesia. In the 1945 Constitution of the Republic of Indonesia, it is emphasized that the state recognizes the unity of indigenous communities, clearly stated in Article 18B paragraph (2) of the 1945 Constitution which states that the state recognizes and respects customary laws that are still alive as long as they are in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, where recognition of these customs must also be accompanied by protection of traditional rights within them. The state recognizes the unity of indigenous communities not only because of local Indonesian wisdom, but also to give appreciation for being able to maintain personal identity as indigenous communities and regional identity as indigenous community unit amidst the challenges of changing times. It is not an easy thing to maintain temporary uniqueness beyond to luxury.[8]

Indigenous communities are a group of people or a unit of several individuals who live vertically from generation to generation in a geographical area and have a history of ancestors that are one genealogy and are connected and have a unified cultural identity, the same place of residence, traditional norms, a close relationship with nature, and a strong value system upheld, all of which are regional characteristics. Those who are part of a customary community are generally part of the genealogy of parents who are also part of that customary society and they also give birth to those who will become part of that customary society as well, meaning that it is very rare for outsiders to become part of a customary society, that is also one of the reasons why a custom is so highly respected in a particular society.

One of the elements that exist in indigenous communities is the presence of customary law, namely values that are lived and upheld by indigenous groups in an unwritten manner but are believed to be true. In contrast to positive law, which to be recognized must go through various stages from planning, drafting, absorbing aspirations, discussions, ratification, promulgation to dissemination, where later the text of the law must be in written form to be recognized as applicable law, whereas customary law applies and it is believed from generation to generation to be related to the living norms of indigenous peoples, and usually there is no

[8] Ade Irawan and Margo Hadi Pura, "Analisis Yuridis Ketentuan Hukum yang Hidup dalam Masyarakat pada Kitab Undang-Undang Hukum Pidana Indonesia", Jurnal Hukum Ajudikasi 7, no. 1 (Juni 12, 2023): 59-74, https://doi.org/10.30656/ajudikasi.v7i1.6453.

written text in the law, but indigenous peoples will memorize what they must, may and are prohibited from doing.

The values that live in this society are basically part of the national development program, namely the formulation of Indonesian cultural values regarding the economic, political and legal order of life in the context of developing Indonesian national culture2. Law in indigenous communities refers to "disturbed balance". Where if an indigenous person disturbs the balance of the indigenous community then the person concerned will receive sanctions. In general, customary criminal law, the provisions governing it are still simple, where if according to conscience and customary beliefs it is an act that violates a prohibition or ignores an order then it is considered disturbing the customary balance.

Customary criminal law is usually not codified (not written) although now there is codification of customary law in several indigenous communities in Indonesia.[9] In customary communities and customary law, they also have an organ similar to a judicial institution which is tasked with resolving every customary case committed by its citizens. Customary sanctions are usually applied to provide a sense of remorse for the perpetrator and ensure that the perpetrator does not repeat his acts again. This customary justice institution is generally carried out by customary heads or customary elders as people who are believed to have more knowledge of customs and are even believed to be a liaison between the community and mystical elements in traditional society.

In contrast to the national criminal justice system, in general, the enforcement of customary law will be opened by customary elders for deliberations to find a solution, the parties will raise the main issues, attended by other indigenous peoples or representatives of indigenous groups to jointly provide the best solution to the problem and states whether those suspected of violating the custom have actually violated it or not, all parties present have the same rights and positions, parties present can put forward arguments for the best solution, different from the criminal justice system contained in the Criminal Procedure Code where only judges, public prosecutors, attorneys, defendants, witnesses and experts can speak, in customary justice the general customary community can also speak.

Although customary sanctions may differ in each community, they are usually social in nature, such as being ostracized, ridiculed, exiled or, most seriously, being expelled from the customary community unit, there are no criminal sanctions involved. However, customary law

[9] Asliani Harahap, "Pembaharuan Hukum Pidana Berbasis Hukum Adat," Jurnal Edutech 4, no. 2 (September, 2018): 1-9, https://doi.org/10.30596/edutech.v4i2.2268.

provisions specifically, both the settlement and sanction systems always vary for each traditional group, each has its own method according to the values of the norms it upholds.

Through Article 18B paragraph (2) the State also recognizes customary law and provides opportunities for indigenous peoples to settle cases in a customary manner without needing to be brought to a general court. This aims to provide the best thing for indigenous peoples, not infrequently customary sanctions can be more effective than criminal sanctions, the state also recognizes that the decision of the traditional institution that resolves the case is final and binding on the party or parties without the need for a court decision. Nevertheless, the state also still provides legal guarantees for indigenous groups. If they do not wish to be resolved according to custom, the case can still be brought to court. The aim of this is to protect and ensure legal certainty for the community.

Apart from the provisions of Article 18B paragraph (2) of the 1945 Constitution, there is also Article 28I paragraph (3) of the 1945 Constitution which also recognizes the existence of indigenous communities which explains that the identity and culture of traditional communities and their rights must be maintained in the nation's civilization. The ratification of the existence of indigenous communities is also explained in Article 32 paragraphs (1) and (2) which states that states guarantee the rights of communities to maintain and develop cultural values and regional languages as part of national cultural wealth.

In practice, in real life on the ground, the authority of customary law is limited only to acts that are considered to be customary violations committed in customary areas and by members of customary communities. This also means that it is true that the laws that live in society are the result of beliefs that are believed to be sacred in a traditional society, so it is very possible that other community groups are different in view that assumes that acts are prohibited in a society but do not apply in their area.

In the Criminal Code currently in force, there are no regulations regarding the laws that exist in society. The Criminal Code adheres to the principle of legality in which only acts that are regulated as criminal acts by law can be punished against the perpetrator, meaning that even though an act is considered by the public to be a disgraceful act but has not been regulated in law, the act in question cannot be convicted.

This provision is contained in Article 1 paragraph (1) of the Criminal Code which states that an act cannot be punished before it is regulated by law. This is a good aim, in order to protect the rights of citizens. It is also feared that there will be parties who just report it for personal interests without a valid basis. It is clear, with this provision which is the principle of legality, only cases that actually violate the law can be punished, and even then as a final way

to resolve the problem. Furthermore, as an effort to guarantee legal certainty, Article 1 paragraph (2) of the Criminal Code explains that the lowest sentence must be applied to the defendant if during the examination period there are changes to the law related to a criminal act, this provision is also to provide the best for the perpetrator, he can be punished but still guarantee legal rights. For 77 (seventy-seven) years since Indonesia's independence, Indonesia still adheres to the Dutch Criminal Code which was adopted and translated into Indonesian, even though the preparation of the National Criminal Code has been drafted a long time ago, but its ratification has never been completed, because there are still pros and cons of several articles of the National Criminal Code in society.

Reform of criminal law in Indonesia has been planned for a long time so it is considered a need that has the power of urgency, considering that the Criminal Code which has been in effect since Indonesia's independence is only a legacy from the Netherlands which was agreed to apply as positive Indonesian law through Law Number 1 of 1946 and Law Number 73 of 1958. Bearing this in mind, efforts to reform criminal law at least contain the following foundations:[10]

1. political basis; in the form of a sense of national pride in having its own Criminal Code;
2. sociological basis; in the form of global social demands to have a Criminal Code that characterizes national values; and
3. practical foundation; in the form of having the original Criminal Code in Indonesian; and
4. The adaptive foundation in the form of the National Criminal Code is expected to be able to adapt to developments over time.

Among the forms of reform in criminal law is the inclusion of new legal matters or provisions, such as provisions regarding living law which were not previously contained in the current Criminal Code. The provisions regarding living law are contained in Article 2 of Law Number 1 of 2023 concerning the Criminal Code which explains that the principle of legality does not simultaneously reduce the recognition of living law in society, the meaning of living law in society is norms relating to the law declared to still be valid or developing in the social order of a territory or known as customary law. In the explanation of Law Number 1 of 2023 concerning the Criminal Code, it is also stated that in order to provide clarity on the application of customary criminal law or customary offenses, it needs to be regulated in more detail by the

[10] Muladi, "Proyeksi Hukum Pidana Materiil Indonesia Dimasa Datang" (Pidato Pengukuhan Jabatan Guru Besar Ilmu Hukum Pidana, Universitas Diponegoro, Semarang, 1990), 3.

Regional Government through Regency/City Regional Regulations that oversee customary areas. This detail contains the main material related to the origins of customary territories, the scope of customary territories, the boundaries of customary territories, the specificity and uniqueness of customs, governance and life of customary communities, traditions and customs, as well as legal values that live in communities that are classified as acts of local customary criminal law which only applies to that area and the provisions of the sanctions are in accordance with the customs of the local customary community. However, the principle of legality and the prohibition on criminal analogies must still be observed. Furthermore, paragraph (2) explains that the laws that exist in a place must be in accordance with Pancasila and the 1945 Constitution of the Republic of Indonesia, and pay attention to human rights values, as well as legal principles recognized by civilized society.

Article 2 paragraph (1) of the National Criminal Code determines that the provisions referred to in paragraph (1) do not reduce the validity of laws existing in society which determine that a person deserves to be punished even though the act is not regulated in statutory regulations. The explanation of this verse states as follows: it is a fact that in certain regions in Indonesia there are still unwritten legal provisions that live in society and apply as law in that region. Judging from this formulation, it is very clear that the goal of reforming criminal law through the ratification of the National Criminal Code is to create criminal law regulations that have an Indonesian essence. Indonesian society has its own legal rules which are derived from the values that are firmly held by Indonesian society even long before Indonesia became independent. The existence of this article clearly provides respect for the "original law" of Indonesian society, namely living law. Giving the respect for living law aims to provide comprehensive justice for all Indonesian society, including certain customary law communities.

Furthermore, the provisions of Article 2 paragraph (3) apply the laws that live in society as intended in paragraph (3) as long as they are in accordance with the values of Pancasila and/or general legal principles recognized by the community of nations. Pancasila as the philosophical basis of the Indonesian nation contains principles and values that are firmly held by the Indonesian people. The explanation of this paragraph states that this paragraph contains guidelines or criteria or signs in determining sources of material law (laws that exist in society) which can be used as sources of law (sources of material legality). This provision has explicitly explained that the criminal law enforced by Indonesia, apart from containing national values, also recognizes international values adhered to by nations.

Initially, with the provisions of article 1 paragraph (1) of the Criminal Code which was adopted from the Netherlands, it resulted in unwritten laws living in society as if they had never existed, it was not considered that unwritten criminal laws during the colonial era were still considered normal things, because they were part of politics of the laws of Dutch colonialism at that time. However, it is not appropriate if these provisions are also maintained in the current era.[11] This is true because if during the colonial period, the colonialists had the desire to completely control the colonial territories thereby ignoring the noble values upheld by society, but at a time when Indonesia was able to regulate its own government, of course Indonesia should give clearer recognition to values recognized in society. Now, in an effort to reform criminal law, the principle of formal legality as in the Dutch Criminal Code is still maintained but the meaning is expanded materially by giving a clearer position to unwritten law (customary offenses) as the legal basis for a punishable act which is a customary offense.[12] Customary offenses that exist in society must be maintained to maintain the identity of a society, because Indonesia is the rule of law, the initial effort should be to first build the legal system referred to in a law.

With the implementation of the existing legal regulations in Law Number 1 of 2023 concerning the Criminal Code, legally the court has additional rights to examine cases that are deemed to be contrary to the cultural values upheld by a community (customary) group, where sanctions for such violations can be added by customary sanctions as believed by indigenous community units. As regulated in Article 601 paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code, which states that a person who intentionally or through negligence has committed an act prohibited by customary law can be threatened with criminal law, this is also what later became a debate or polemic in community bodies because on the one hand this enactment can further strengthen or improve the position of customary law in national law because the sanctions are contained in court decisions so that it has permanent and binding legal force, but on the other hand it is feared that the inclusion of this provision will actually eliminate the essence or meaning of customary law because it is not always the case that the judge who examines a case will be a native of the customary area who has a better understanding of the custom in question, it is feared that this will result in a wrong interpretation of the provisions of the customary law in question.

[11] Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan Dan Pengembangan Hukum Pidana* (Bandung: Citra Aditya Bakti, 2011), 122-123.
[12] I Dewa Made Suartha, "Pergeseran Asas Legalitas Formal Ke Formal Dan Material Dalam Pembaharuan Hukum Pidana Nasional," Yustisia Jurnal Hukum 9, no, 1 (January-April, 2015): 235-244, https://doi.org/10.20961/yustisia.v4i1.8640.

Customary criminal sanctions are contained in Law Number 1 of 2023 concerning the Criminal Code in the criminal paragraph, where Article 64 recognizes what is called additional punishment, which is further clarified in Article 66, one form of additional punishment is mentioned in paragraph (1) letter f, namely fulfilling local customary obligations. This means that judges can provide additional sanctions for indigenous peoples who commit customary violations with obligations according to their respective customs. This provision is in line with Article 601 paragraph (2) of Law Number 1 of 2023 concerning the Criminal Code which states that criminal offenses for customary violations are carried out in the form of fulfilling customary obligations. That is the system for applying customary sanctions that applies in accordance with Law Number 1 of 2023 concerning the Criminal Code which contains provisions regarding the laws that exist within it.

Living law is a reflection of the conditions of a society which is assessed as the rules implemented by that society[9]. However, it doesn't stop here, there is still conflict in society because they believe that the inclusion of this norm does not at the same time guarantee the protection of customs, there are even some groups who believe that customary law can only be resolved by customary elders who have a high understanding of the applicable customary law. Furthermore, Article 96 paragraph (1) states that the crime of fulfilling local customary obligations is applied to violations of the laws that exist in that community and can only be applied if it has been previously regulated in local customary law. Then it continues in paragraphs (2) and (3) explaining that if the perpetrator is unable to fulfill customary obligations then they can be replaced with a category II fine of IDR 10,000,000 (ten million rupiah) as a form of compensation for losses resulting from customary violations committed. So in its implementation, additional customary penalties are prioritized first for carrying out customary obligations, then if the perpetrator is unable or failing to do so, it can be replaced with a criminal fine for compensation. Furthermore, Article 97 states that customary punishment provisions can continue to be carried out as long as they are still living in society even though they are not explicitly regulated in the law. Furthermore, to ensure that a norm is declared as living law, it must be stated in a derivative legal product in the form of a Regional Regulation. The regional regulation states the recognition of a customary community unit, does not contain customary criminal provisions. If this provision has been issued, then it is clear that the law is believed by the new community is considered as part of the expansion of the principle of legality if the traditional community unit has been recognized through the Regional Regulation of the Regency/City area that houses the customary community.

The legal regulations that exist in the National Criminal Code actually have positive values, including being able to strengthen the values of Indonesian society, then aiming to enable law enforcers to prioritize legal justice and act as a balance to the principle of legality[10]. Living law or customary law has a good strong position either sociologically, juridically, or philosophically.[13] This is due to the development of Indonesian state law, where the nation's thinking has become increasingly open, including inland communities which have always upheld their customary law, so its position in positive Indonesian law should be strengthened, including in its distribution through criminal law reform. In fact, every law can be said to be a cultural product, meaning that in the course of culture it is always accompanied by the movement of law and vice versa, law will develop following cultural movements in society. This is one of the real applications of legal concepts in society.

Each society will represent its own laws and characterize its laws according to what exists in their respective social culture. It can be said that every society has its own laws that have developed since a community group was formed, which were born from the social life of the community and implemented continuously, which in the end the community consciously obeyed them with moral awareness.[14]

The relationship between law and culture is a necessity in a legal state that adheres to the principles of civilized humanity, where the positive laws created must always be in line and in harmony with the social values of society in order to create order and justice in legal development. This is in line with Eugen Ehrlich's sociological jurisprudence school of legal philosophy which views law as a social reality so that the law must reflect the values that live in the society where the law exists, this is in accordance with the rules of the application of law that live in the society that is currently contained in the National Criminal Code. Regarding customary crimes, currently customary justice institutions are more of an alternative, in the sense that their current position can be used as an option for indigenous peoples to resolve the problems they face through legal mechanisms that apply in certain areas that are considered to have a sense of justice, but in their implementation, the alternative options implemented must be based on mutual agreement between the parties. The inclusion of criminal provisions that live in society is a form of legal reform in the concept of nationalizing customary criminal law

[13] Rahmat Hi Abdulah, "Urgensi Hukum Adat Dalam Pembaharuan (Urgency of Customary Law in the Renewable of National Criminal Law)," Fiat Justisia Jurnal Ilmu Hukum 9, no. 2 (April-Juny, 2015): 168-181, https://doi.org/10.25041/fiatjustisia.v9no2.595.
[14] Syofyan Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)," DiH: Jurnal Ilmu Hukum 5, no. 2, (September, 2017): 259-266, https://doi.org/10.30996/dih.v0i0.1588.

so that indigenous community units in Indonesia have a strong basis for behavior and are able to be responsible for acts categorized as customary violations or crimes.

Based on an analysis of the formulation of the principle of legality in Article 1 and Article 2 of the National Criminal Code, it can be said that the National Criminal Code recognizes the existence of 2 (two) principles of legality, namely the principle of formal legality as stipulated in Article 1 paragraph (1) and the principle of material legality as stipulated in Article 2 paragraph (1). The basis for determining whether an act should be punished on the principle of formal legality is the law that existed before the act was committed (written law). Meanwhile, the principle of material legality determines that the basis for an act to be punished is the law that exists in society (unwritten law).[15]

The implementation of 2 (two) types of legality principles in the National Criminal Code shows that the Indonesian government actually wants legal pluralism in Indonesia, Legal pluralism in question is the harmony of the application of laws (written law) and living law (unwritten law). Although the judicial process uses national law through formal judicial channels in court.

Apart from that, the National Criminal Code also wants to realize legal objectives in a harmonious and balanced manner. The aim of law is to create peace based on harmony between order and tranquility. Legal objectives will be achieved if they are supported by legal duties, namely harmony between legal certainty and legal proportionality, so that it will produce justice.[16] Basically, the ultimate goal of criminal policy is the protection of society to achieve the main goal that is often mentioned with various terms, for example "happiness of the citizens", "a wholesome and cultural living", "social welfare" or to achieve equality.[17]

The principle of formal legality and the principle of material legality embedded in Article 1 and Article 2 of the National Criminal Code actually aim to achieve harmony and equality between legal certainty and justice as legal objectives. Both working together to obtain benefits for the Indonesian people at large. The application of the principle of material legality with the recognition of living legal provisions does not disturb the legal certainty embedded in the principle of formal legality.

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[15] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana – Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana, 2008), 75.
[16] Teguh Prasetyo and Abdul Halim Barkatullah, *Ilmu Hukum dan Filsafat Hukum – Studi pemikiran Ahli Hukum Sepanjang Zaman* (Yogyakarta: Pustaka Pelajar, 2009), 39.
[17] Muladi dan Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana* (Bandung: Alumni, 1992), 158.

## D. Conclusion

The meaning of updating the legality principles in the National Criminal Code is to expand the legality principles which previously only referred to formal legality principles. The principle of formal legality applied in the Criminal Code of WvS-NI translation (Old Criminal Code) is a rigid principle of legality, and only emphasizes legal certainty. Meanwhile, the implementation of the principle of material legality in Article 2 of the National Criminal Code is a balance to the principle of formal legality. The implementation of the principle of material legality aims to provide comprehensive justice for certain customary law communities.

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