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Ideological Struggle in The Principle of Material Legality of the New Indonesian Criminal Code and its Future

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Abstract

This article emerged from the authors' hypothesis that the principle of legality in the new Indonesian criminal code is complex to apply due to its reliance on four foundational principles: Pancasila, UUD NRI 45, human rights, and the general principles of law. To prove this hypothesis, the authors use the theory of ideology to analyze the battle of values, ideas, and motives in the four. Based on the authors' reading, the new Indonesian criminal code has expanded the principle of legality into two, namely, the principle of formal and material legality. In the next instance, the authors identified an ideological struggle in the principle of material legality of the new Indonesian criminal code, which encompasses the clash of personal, political, and legal policy ideologies. Therefore, the principle of material legality is challenging to implement because

competing ideologies often counteract one another. Finally, the authors recommend that the principle of legality be enforced by allowing power-sharing in legal jurisdiction between the Indonesian government and Indigenous law people.

KEYWORDS: *Ideological Struggle, The Principle of Material Legality, The New Indonesian Criminal Code*

Introduction

The Indonesian government officially promulgated Law Number 1 of 2023 on the Criminal Code (the new Indonesian criminal code) in January 2023. This means the new Indonesian criminal code will replace Law No. 1/1946 (the old Indonesian criminal code). In effect, the old Indonesian criminal code has been revoked and no longer applies and the new Indonesian criminal code will enter into force in January 2026, or exactly three years after it was promulgated.[1] The enactment of the new Indonesian criminal code is expected to be a concrete measure in decolonizing criminal law from *Wetboek van Strafrecht* (*WvS*) and becoming a milestone in the new civilization of Indonesian criminal law.[2] Several fundamental differences exist between the new and old Indonesian criminal codes, one of which concerns the principle of legality.[3]

There are theoretical differences between the old and new Indonesian criminal codes regarding the principle of legality. The old Indonesian criminal code considers legislation the only instrument to determine a crime (the principle of formal legality). In contrast, the new Indonesian criminal code uses legislation and laws existing in society to judge a crime (the principle of material legality). The laws existing in society are active when positive law does not arrange an act, meaning they are complementary.[4] Despite its transformative potential, the material legality principle faces significant challenges. Its application depends on harmonizing four foundational elements: Pancasila, the 1945

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[1] Sugeng Apriyanto, Fauzie Yusuf Hasibuan, and Atma Suganda, "Resolving Transnational Crime in the Indonesian Sea Border Area: Case Studies and Legal Effects," *LITERACY: International Scientific Journals of Social, Education, Humanities* 3, no. 2 (2024): 98–113.

[2] Simon Butt, "Indonesia's New Criminal Code: Indigenising and Democratising Indonesian Criminal Law?," *Griffith Law Review* 32, no. 2 (2023), https://doi.org/10.1080/10383441.2023.2243772.

[3] Nafi Mubarok, "Sejarah Perkembangan Hukum Pidana Di Indonesia: Menyongsong Kehadiran KUHP 2023 Dengan Memahami Dari Aspek Kesejarahan," *Al-Qanun: Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 27, no. 1 (2024): 15–31, https://doi.org/https://doi.org/10.15642/alqanun.2024.27.1.15-31.

[4] Pemerintah Pusat Indonesia, "The New Criminal Code," Pub. L. No. Undang-Undang Nomor 1 Tahun 2023, Undang-Undang Nomor 1 Tahun 2023 tentang (2023).

Constitution (UUD NRI 45), human rights, and general principles of law. These elements often conflict[5] , making harmonious implementation improbable.

The impossibility of applying the principle of material legality prompted the authors to present this article. Similar topics have been discussed by several Indonesian legal scientists, namely Tody Sasmitha Jiwa Utama and Nella Sumika Putri. Tody, in his article entitled *"Hukum yang Hidup dalam Rancangan Kitab Undang-Undang Hukum Pidana (KUHP): Antara Akomodasi dan Negasi,"* discusses the constructions of Indigenous law in the bill of the new Indonesian criminal code, the purposes of arranging, and the implications of these rules. Tody concluded that legal constructions by Indigenous law in the bill of the new Indonesian criminal code are partial because they make Indigenous law the basis of a punishment without involving it as a reason for removing the criminal penalty.[6] The next one, Nella, in her article entitled *"Memikirkan Kembali Unsur Hukum yang Hidup dalam Masyarakat dalam Pasal 2 RUKUHP Ditinjau Perspektif Asas Legalitas",* discusses the application of Indigenous law as the basis to prosecute an individual in the principle of legality perspective and the indicator of Indigenous law in the criminal justice system. Nella concluded that Indigenous law as the basis for examining an individual as a criminal is contrary to the principle of legality, even human rights, making legal uncertainty, which results in government arbitrariness and enforcement very hard.[7]

According to the explanation above, it can be justified that this article is diverse from the two previous articles. The article from Tody identifies the constructions of Indigenous law in the bill of the new Indonesian criminal code using a legal pluralism approach, while Nella assesses the application of Indigenous law as the basis for prosecuting an individual from the principle of legality perspective and the indicator of Indigenous law in the criminal justice system utilizing the principle of legality perspective. Building on these dicussions, this article focuses to explain the theory which encourages the emergence of the principle of material legality in the new Indonesian criminal code, ideological battles in the principle of material legality in the new Indonesian criminal code, and emphasize that the principle of material legality is hard to apply if it has to be based on four fundamentals exerting legal ideology approach. There is only one similarity between this article and two previous articles,

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[5] Indonesia.

[6] Tody Sasmitha Jiwa Utama, "'HUKUM YANG HIDUP' DALAM RANCANGAN KITAB UNDANG-UNDANG HUKUM PIDANA (KUHP): ANTARA AKOMODASI DAN NEGASI," *Masalah-Masalah Hukum* 49, no. 1 (2020), https://doi.org/10.14710/mmh.49.1.2020.14-25.

[7] Nella Sumika Putri, "Memikirkan Kembali Unsur 'Hukum Yang Hidup Dalam Masyarakat' Dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas.," *Indonesia Criminal Law Review* 1, no. 1 (2021), https://scholarhub.ui.ac.id/iclr/vol1/iss1/5.

such as the object of research, which discusses living law or Indigenous law or the principle of material legality in the new Indonesian criminal code.[8] Therefore, the authors emphasize that this article is an entirely new idea.

Method

This article will employ qualitative research methods to investigate the facts that occurred and interpret them narratively.[9] The qualitative research that will be conducted is grounded theory research, which intends to challenge the relevance of the theory used in society.[10] In legal science, grounded theory research is categorized as socio-legal or non-doctrinal legal research using relevant theories to illuminate and examine the data. The validity of this research is measured by proving the theory, whether it is appropriate or irrelevant to a social order. The theory that will be applied in this article is the theory of legal ideology. Meanwhile, the research object in this article is the principle of material legality in the new Indonesian criminal code. Thus, in this article, the theory of legal ideology will challenge the relevance of the theory, which encourages the emergence of the principle of material legality in the new Indonesian criminal code and shows ideological battles in the principle of material legality.[11]

Result & Discussion

A. Legal Ideology

In the contemporary era, law is often viewed as a neutral entity not bound by any values, ideas, or motives. In other words, law is viewed as an objective entity that can generalize social phenomena. However, law is never separated from certain powers, which always play a role in forming the characteristics of norms. Thus, reading the struggle of legal norms without observing the agenda behind them is inappropriate. The reason for reading various interests behind the law is what drives the authors to use the theory of legal ideology in this article to observe the struggle in the principle of material legality of the new Indonesian criminal

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[8] Indonesia, The New Criminal Code; Utama, "'HUKUM YANG HIDUP' DALAM RANCANGAN KITAB UNDANG-UNDANG HUKUM PIDANA (KUHP): ANTARA AKOMODASI DAN NEGASI"; Putri, "Memikirkan Kembali Unsur 'Hukum Yang Hidup Dalam Masyarakat' Dalam Pasal 2 RKUHP Ditinjau Perspektif Asas Legalitas."

[9] Scott Reeves, Ayelet Kuper, and Brian David Hodges, "Qualitative Research: Qualitative Research Methodologies: Ethnography," *BMJ* 337, no. 7668 (2008), https://doi.org/10.1136/bmj.a1020.

[10] Arya Priya, "GROUNDED THEORY AS A STRATEGY OF QUALITATIVE RESEARCH: AN ATTEMPT AT DEMYSTIFYING ITS INTRICACIES," *Sociological Bulletin* 65, no. 1 (2016), https://doi.org/10.1177/0038022920160104.

[11] S N Jain, "Doctrinal and Non-Doctrinal Legal Research," *Journal of the Indian Law Institute* 17, no. 4 (1975): 516–36.

code.

As Alan Hunt states, legal ideology is the idea, value, and motive behind the law that has its own will.[12] This theory functions to read several forces behind the law and how these forces determine legal norms according to their will. In this context, the authors define ideology flexibly by placing every idea, value, and motive as the background of forming certain legal forms. The authors' disclaimers are made to avoid debates on the meaning of ideology that may often be disputed. Some scientists interpret ideology as an idea with a system of thinking and working, meaning it should have belief systems or values of struggle and methods for realizing it *(weltanschauung).*[13] On the other hand, scholars named Louis Althusser, define ideology as an idea with specific purposes that do not need an operational and technical working system.[14]

In this article, the authors propose to explain and diversify ideology, covering three types: personal, political, and legal policy. All three are sequential and sub-ordinate; personal ideology influences political ideology, and political ideology infiltrates legal policy ideology. Personal ideology refers to the values or ideas that individuals and society hold, such as traditionalism, collectivism, individualism, and modernism. Political ideology, namely nationalism and internationalism, leads to a personal ideology with motives for struggle and power in legal and political systems. Lastly, legal policy ideology is a political ideology that has contaminated legal norms and has its terms, such as traditional and modern law.

Traditional law, such as religious, Indigenous, or customary law, initially dominated history and legal science development.[15] This doctrine was entrenched in the global system for quite a long time, at least until the 18th century, when capitalism emerged to play a role in the Industrial Revolution.[16] Since then, according to Max Weber, capitalism has forced laws to become more certain, measurable, and predictable. In other words, capitalism supported the birth of positivistic modern law and linearly encouraged eliminating unmeasurable traditional law.[17] The

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[12] Alan Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law," in *Consciousness and Ideology*, 2017, https://doi.org/10.4324/9781315259604-1.

[13] Herman Schmid, "On the Origin of Ideology," *Acta Sociologica* 24, no. 1–2 (1981), https://doi.org/10.1177/000169938102400105.

[14] Louis Althusser, *For Marx*, vol. 2 (London; New York: Verso, 2005).

[15] Sally Engle Merry, "Law and Colonialism," *Law & Society Review* 25, no. 4 (1991), https://doi.org/10.2307/3053874.

[16] Brian Leiter, "Marx, Law, Ideology, Legal Positivism," *Virginia Law Review* 101, no. 4 (2015), https://doi.org/10.2139/ssrn.2465672.

[17] Martin Albrow, "Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law," *British Journal of Law and Society* 2, no. 1 (1975),

authors argue that since modern law existed in legal civilization to replace traditional law, the two legal regimes have clashed because the power of modern law, supported by capitalism, has not reduced traditional law inherent in local society. However, the conflict originated from a personal ideological struggle between individualism and collectivism. This dispute resulted in a battle between nationalism and internationalism regarding political ideologies, which led to the final debate of legal policy ideology between modern law and traditional law.[18]

Apart from the ideological disputes behind the law, an alternative idea called “real legal certainty” has recently emerged as a middle ground between traditional and modern law. Jan Michael Otto’s critiques modern law for compelling traditional law, such as Indigenous law, to conform to state frameworks, assuming that legitimate Indigenous law is defined by the state. Furthermore, this idea also aims to integrate modern and traditional law in one legal system, positioning the state as a legal maker for modern law and a legal facilitator for traditional law.[19] According to the authors, the idea of real legal certainty is a consequence of society's plural character and characterized by conflicting values, a phenomenon which Fred W. Riggs calls a prismatic society.In the legal context, complementing Riggs, Mahfud MD stated that a prismatic society will create a prismatic legal state where the law is built on conflicting values in the state's groundwork, namely the constitution.[20]

The principle of material legality in the new Indonesian criminal code encourages the authors to use a legal ideology approach to explain its struggle. Two political ideologies fight in it, namely nationalism and internationalism. Pancasila and UUD NRI 45 reflect nationalism, while human rights and the general principles of law represent internationalism. The theory of legal ideology enables the authors to analyze deeply the underlying motives of modern and traditional law in playing their influence on the principle of material legality. In addition, legal ideology will also greatly assist the authors in explicating the regime adopted by the principle of material legality. The analysis seeks to determine whether the principle aligns with modern law, traditional law, or a combination of both. Finally, the inclusion of legal ideology allows the authors to assess the principle of material legality more comprehensively and predict its

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https://doi.org/10.2307/1409782.

[18] Adriaan W. Bedner and Stijn Van Huis, “The Return of the Native in Indonesian Law Indigenous Communities in Indonesian Legislation,” *Bijdragen Tot de Taal-, Land- En Volkenkunde* 164, no. 2–3 (2008), https://doi.org/10.1163/22134379-90003655.

[19] Adriaan Bedner and Barbara Oomen, *Real Legal Certainty and Its Relevance: Essays in Honor of Jan Michiel Otto* (Leiden University Press, 2018), https://doi.org/10.24415/9789087283155.

[20] Moh Mahfud, *Membangun Politik Hukum, Menegakkan Konstitusi* (Jakarta: LP3ES, 2006).

potential trajectory.

B. The Principle of Legality: An Overview

Paul Johan Anselm von Feuerbach, a German criminal law scholar, introduced the principle of legality term in his book entitled *"Lehrbuch des Peinlichen Rechts"* in 1801.[21] Feuerbach formulated the principle of legality in Latin with the text *"nulla poena sine lege, nulla poena sine crimine, sine poena legali"* which is the basis of the famous adage in Latin such as *"nullum delictum, nulla poena sine previa lege poenali"*. Feuerbach proposed that "there is no crime and hence there shall not be punishment if no penal law existed".[22] There are differences of view regarding who first discovered the principle of legality. Sahetapy, in his dissertation, stated Samuel von Pufendorf was the first legal scientist who discovered the principle of legality[23], Oppenheimer claimed that the principle of legality comes from Talmudic Jurisprudence,[24] and M. Shokry El-Dakkak has a sure view that the principle of legality is sourced from the Al-Qur'an.[25]

Regardless of differences of judgment regarding the history of the principle of legality, the authors believe that the essence of the principle of legality from Feuerbach, Pufendorf, Oppenheimer, and El-Dakkak are the same: "there is no criminal act unless there is a law that regulates it beforehand". However, the authors argue that while Pufendorf, Oppenheimer, and El-Dakkak's view on the principle of legality originated from mystical doctrines,[26] Feuerbach's view is rooted from modern legal doctrines.[27] Building upon this analysis, the authors argue that the principle of legality currently exists in several countries, including Indonesia, in Feuerbach's version. The authors' arguments are strengthened by a couple of facts as follows. **First,** the term that is the primary reference of the principle of legality is *"nullum delictum, nulla*

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[21] Shahram Dana, "Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing," *Journal of Criminal Law and Criminology* 99, no. 4 (2009).
[22] Markus D. Dubber, "The Comparative History and Theory of Corporate Criminal Liability," *New Criminal Law Review* 16, no. 2 (2013), https://doi.org/10.1525/nclr.2013.16.2.203.
[23] Jacob Elvinus Sahetapy, *Ancaman Pidana Mati Terhadap Pembunuhan Berencana* (Bandung: Universitas Airlangga, 1979).
[24] Ach, Tahir, "MENGGALI MAKNA ASAS LEGALITAS DAN PERKEMBANGANNYA DI INDONESIA," *Al-Mazaahib: Jurnal Perbandingan Hukum* 6, no. 2 (2018): 271–78, https://doi.org/10.14421/al-mazaahib.v6i2.2319.
[25] M S El-Dakkak, *Criminal Law: Over View on the United Arab Emirates Penal Law*, Criminal Law: Over View on the United Arab Emirates Penal Law (Judicial Department, 2014), https://books.google.co.id/books?id=PMQcogEACAAJ.
[26] LEONARD ANGEL, "Mystical Naturalism," *Religious Studies* 38, no. 3 (September 17, 2002): 317–38, https://doi.org/10.1017/S003441250200598X.
[27] Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," *Law & Society Review* 17, no. 2 (1983), https://doi.org/10.2307/3053348.

poena sine previa lege poenali" which comes from Feuerbach.[28] **Second,** one of the objectives of the principle of legality is to provide legal certainty for individuals so that they are not treated arbitrarily by public officials.[29] **Third**, legal certainty refers to written law, which reflects the modern legal civilization used by most countries nowadays.[30]

The emergence of the principle of legality was triggered by factors such as arbitrary rule by the king, uncertainty in penal law, and unfair trials.[31] In accordance with Pompe, the principle of legality is reciprocal with the background of its emergence and attends to protecting individuals from power arbitrariness.[32] While Pompe put forward the narrow aim of the principle of legality, Fletcher expanded its scope to include both negative and positive objectives. The negative objective of the principle of legality is to protect individuals from power arbitrariness, while the positive objective is to protect society from crime by punishing criminals by the state.[33] The authors tend to agree with Fletcher's broader interpretation because it is more analogous to the spirit of criminal law, which aims to protect public interest and order.[34]

Feuerbach's *psycologische-zwang* theory reinforces the authors' view. This theory states that the deterrent effect arising from criminal provisions is not because an act is prohibited by criminal law but because criminal provisions convey the threat that someone will be afraid to commit a criminal act. Feuerbach's *psycologische-zwang* theory expands the aim of the principle of legality, which initially only protected individuals from power arbitrariness.[35] Thus, according to the authors' elaboration, Feuerbach's view regarding the objectives of the principle of legality is parallel with Fletcher's thought, namely having negative and positive objectives.

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[28] Paul Johann Anselm Von FeuerbAch, *Lehrbuch Des Gemeinen in Deutschland Gültigen Peinlichen Rechts* (Georg Friedrich Heyer, 1847).
[29] Han Bing Siong, "Developments in the Criminal Law of the Republic of Indonesia before the Transfer of Sovereignty," in *An Outline of the Recent History of Indonesian Criminal Law*, 2022, https://doi.org/10.1163/9789004286566_003.
[30] A L Goodhart, "Legal Theory," *The Modern Law Review* 8, no. 4 (1945): 229–36, http://www.jstor.org/stable/1090187.
[31] James Leigh Strachan-Davidson, *Problems of the Roman Criminal Law*, *Problems of the Roman Criminal Law*, 2023, https://doi.org/10.1163/9789004652569.
[32] Eddy O S Hiariej, "Prinsip-Prinsip Hukum Pidana: Edisi Penyesuaian KUHP Nasional," *Depok: Rajawali Pers*, 2024.
[33] Kenneth S. Gallant, "Legality in Criminal Law, Its Purposes, and Its Competitors," in *The Principle of Legality in International and Comparative Criminal Law*, 2009, https://doi.org/10.1017/cbo9780511551826.003.
[34] T I M CARMODY, "Criminal Law," in *Dealing with Uncertainties in Policing Serious Crime*, ed. Gabriele Bammer (ANU Press, 2010), 101–14, http://www.jstor.org/stable/j.ctt24hbrf.11.
[35] Fernando Morganda Manullang, "THE PURPOSE OF LAW, PANCASILA AND LEGALITY ACCORDING TO ERNST UTRECHT: A CRITICAL REFLECTION," *Indonesia Law Review* 5, no. 2 (2015), https://doi.org/10.15742/ilrev.v5n2.141.

The principle of legality is a fundamental tenet of criminal law which is contained in the constitution of many countries, such as the United States,[36] France,[37] Germany,[38] Poland,[39] Netherlands,[40] and Indonesia. Indonesia modulates the principle of legality in Article 28I (1) of the Constitution of the Republic of Indonesia (UUD NRI 45), which sounds:

> "The right to life, the right to be free from torture, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right to not to be prosecuted based on retroactive laws are human rights that cannot be reduced under any circumstances."[41]

Although implied, the authors believe that the text "the right to not to be prosecuted based on retroactive laws" reflects the principle of legality as an inherent component of UUD NRI 45. Thus, the authors argue that applying the principle of legality in each piece of Indonesian legislation, including the criminal code, is a constitutional obligation.

The principle of legality in Indonesian criminal law can be observed in Article 1 (1) of the old Indonesian criminal code, which expresses, "An act cannot be punished, except in accordance with the force existing criminal law provisions".[42] According to Moeljatno, the principle of legality in Article 1 (1) of the old Indonesian criminal code means that a person can be convicted if the conviction is based on criminal provisions in Indonesian legislation, nothing else. Moeljatno's interpretation refers to the Dutch text *"wettelijke strafbepaling"*, which means criminal provisions in legislation.[43] Posit Moeljatno's interpretation, the authors believe that the principle of legality in Article 1 (1) of the old Indonesian criminal code

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[36] J Remmelink and D Hazewinkel-Suringa, *Mr. D. Hazewinkel-Suringa's Inleiding Tot de Studie van Het Nederlandse Strafrecht* (Gouda Quint, 1996), https://books.google.co.id/books?id=jcyYt5s2nJkC.

[37] E Utrecht, "Hukum Pidana I, Penerbitan Universitas, Bandung, Cet. Ke-2, 1960," *Peraturan Pemerintah Pengganti Undang-Undang Nomor* 1 (n.d.).

[38] "Book Review: Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court, Machteld Boot (Ed.).," *International Criminal Law Review* 2, no. 4 (2003), https://doi.org/10.1163/156753602761061842.

[39] Article 42 of "Constitution of the Republic of Poland" (1997), https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm, accessed December 20, 2024.

[40] C J Enschedé, M Bosch, and E P R Sutorius, *Beginselen van Strafrecht* (Kluwer, 2002), https://books.google.co.id/books?id=FcpGj85w4UEC.

[41] Indonesia, Article 28I (1) of "Constitution of the Republic of Indonesia (UUD NRI 1945)" (n.d.). the Constitution of the Republic of Indonesia (UUD NRI 45), https://jdih.mkri.id/mg58ufsc89hrsg/UUD_1945_Perubahan.pdf, accessed December 21, 2024.

[42] Indonesia, "Law No. 1 of 1946 on Criminal Law Regulations in Indonesia," Pub. L. No. 1 (1946).

[43] Moeljatno, "Perbuatan Pidana Dan Pertanggungjawaban Dalam Hukum Pidana," *Pidato Yang Diucapkan Pada Upacara Perayaan Dies Natalies Ke- 6 Universitas Gadjah Mada Tanggal 19 Desember 1965*, 1983.

means that the basis of punishing a person criminally is written provisions, which means Indonesian legislation, which is *letterlijk*. The Indonesian legislation refers to criminal provisions within and outside the old Indonesian criminal code. Examples of criminal provisions outside the old Indonesian criminal code are election crimes,[44] corruption crimes,[45] environmental crimes,[46] and human trafficking crimes.[47] Thus, the principle of legality in the old Indonesian criminal code was positivistic and rigid.[48] According to the analysis above, the authors argue that the principle of legality in the old Indonesian criminal code has at least three meanings in the following. First, an individual can be punished if criminal provisions existed before committing the act. Second, new criminal provisions are unavailable to ensnare an act in the past (non-retroactive). Third, the criminal provisions, as intended, are Indonesian legislation both within and outside the old Indonesian criminal code.

The principle of legality in the old Indonesian criminal code began in 1946 and has existed for approximately 78 years. This means that Indonesia has utilized the positivistic principle of legality in accordance with its legislation during that time.[49] Along the way, the old Indonesian criminal code drew criticism from criminal law scholars for three general reasons. **First,** the old Indonesian criminal code was transplanted from the *WvS*, meaning the values reflected Dutch colonial values. **Second,** several old Indonesian criminal code norms were examined to conflict with Pancasila. **Third**, as an independent state, Indonesia should have a criminal code that reflects the values of the Indonesians contained in Pancasila.[50] These critiques then gave rise to discourse among criminal law scholars and the Indonesian government to draft a new Indonesian

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[44] Indonesia, "Law Number 7 of 2017 on the General Election," Pub. L. No. 7 (2017). https://jdih.kpu.go.id/detailuu-6c4d54564530516c4d3051253344, accessed November 29, 2024.

[45] Indonesia, "Law Number 31 of 1999 and Law Number 20 of 2001 on the Eradication of Corruption Crimes," Pub. L. No. 31 & 20, BPK RI (1999). https://peraturan.bpk.go.id/Details/45350/uu-no-31-tahun-1999, accessed November 25, 2024.

[46] Indonesia, "Law Number 32 of 2009 on the Environmental Protection and Management," Pub. L. No. 32, BPK RI (2009). https://peraturan.bpk.go.id/Details/38771/uu-no-32-tahun-2009, accessed December 18, 2024

[47] Indonesia, "Law Number 21 of 2007 on the Eradication of Human Trafficking," Pub. L. No. 21, BPK RI (2007). https://peraturan.bpk.go.id/Details/39849, accessed December 17, 2024

[48] D. Dyzenhaus, "The Genealogy of Legal Positivism," *Oxford Journal of Legal Studies* 24, no. 1 (2004), https://doi.org/10.1093/ojls/24.1.39.

[49] Bagus Satrio Utomo Prawiraharjo, "IMPLEMENTASI IDE KESEIMBANGAN MONODUALISTIK DALAM UNDANG-UNDANG NOMOR 1 TAHUN 2023 TENTANG KITAB UNDANG-UNDANG HUKUM PIDANA," *Jurnal Hukum Progresif* 11, no. 2 (2023), https://doi.org/10.14710/jhp.11.2.159-171.

[50] Noveria Devy Irmawanti and Barda Nawawi Arief, "Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana," *Jurnal Pembangunan Hukum Indonesia* 3, no. 2 (2021), https://doi.org/10.14710/jphi.v3i2.217-227.

criminal code in 1964, the principal mission of which was decolonizing Indonesian criminal law from *WvS*. After a long dynamic of approximately 59 years, the new Indonesian criminal code was finally promulgated in January 2023 and will be entered into force as Indonesian legal norms in January 2026.[51] There are 40 fundamental differences between the new and old Indonesian criminal codes, one of which concerns the principle of legality.

C. Extension of Purpose and Ideological Battles in The Principle of Legality

The adjustment of the principle of legality between the new and old Indonesian criminal code has fundamental theoretical differences.[52] The principle of legality in the old Indonesian criminal code supposes that an act can be considered a criminal act if the criminal regulations (Indonesian legislation) existed before the act was committed. [53] In contrast with the old Indonesian criminal code, the new one has different rules regarding the principle of legality. The new Indonesian criminal code maintains the principle of legality in the old Indonesian criminal code but adds new provisions to provide space for laws existing in society. Therefore, the principle of legality in the new Indonesian criminal code has two fundamentals: Indonesian legislation and laws existing in society.[54] The principle of legality in the new Indonesian criminal code is arranged in Article 1 (1), which reads, “No one act can be subject to criminal sanctions and/or action, except based on legislation that existed before the act was committed” and Article 2 (1), which states, “The provisions intended in Article 1 (1) do not reduce the validity of the laws existing in society which determines that a person deserve to be punished even though the act is not regulated in this law”.

The term “laws existing in society” is often called “living law.” Eddy Hiariej said that the living law intended in the new Indonesian criminal code is the situation and condition of society, the general principle of law, and customary international law.[55] Parallel with Eddy, Ali Masyhar stated

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[51] Faisal et al., “Progressive Consideration of Judges in Deciding Sentencing Under Indonesia New Criminal Code,” *Jambe Law Journal* 6, no. 1 (2023), https://doi.org/10.22437/jlj.6.1.85-102.
[52] Lidya Suryani Widayati, “Perluasan Asas Legalitas Dalam RUU KUHP,” *Negara Hukum* 2, no. 2 (2011).
[53] Indonesia, Law No. 1 of 1946 on Criminal Law Regulations in Indonesia. See Article 1 (1) Law Number 1 of 1946 on The Criminal Code
[54] Faisal Faisal, “Membangun Politik Hukum Asas Legalitas Dalam Sistem Hukum Pidana Indonesia,” *JURNAL HUKUM IUS QUIA IUSTUM* 21, no. 1 (2014), https://doi.org/10.20885/iustum.vol21.iss1.art5.
[55] *Op.cit, Hiariej, “Prinsip-Prinsip Hukum Pidana: Edisi Penyesuaian KUHP Nasional.” pp.87*

that living law means the development of values in society, which includes the general principles of law and customary international law.[56] Divergent with Eddy and Ali, Tody Sasmitha Jiwa Utama, and Nella Sumika Putri believe living law means Indigenous law, called *adat recht* in Dutch and *hukum adat* in Indonesia. According to Cornelis Von Vallenhoven, Indigenous law is a rule of community behavior accompanied by uncodified sanctions.[57] The authors tend to agree with Tody and Nella's views that living law means Indigenous law, nothing else. The authors' view is strengthened by the explanation text of Article 2 (1) of the new Indonesian criminal code[58] and the Academic Text of the new Indonesian criminal code [59], which states that living law means Indigenous law.

In the Indonesian criminal law tradition, the principle of legality based on Indonesian legislation is known as "the principle of formal legality." On the other hand, the principle of legality referring to Indigenous law is known as "the principle of material legality."[60] Theoretically, applying the principle of material legality complements the principle of formal legality, meaning that the principle of material legality only applies if the principle of formal legality does not regulate an action.

However, the expectation of applying the principle of material legality has encountered obstacles because its utilization should cumulatively refer to four fundamentals: Pancasila, UUD NRI 45, human rights, and the general principles of law.[61] Meanwhile, historically, Indigenous law as the basis of the principle of material legality emerged before all four and its moral compass according to the truth of that time, so it is almost improbable for Indigenous law to be in accordance with all four cumulatively. These obstacles are getting thicker because all four were ideologically contradictory. Pancasila and UUD NRI 45 are part of

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[56] Beni Puspito and Ali Masyhar, "Dynamics of Legality Principles in Indonesian National Criminal Law Reform," *Journal of Law and Legal Reform* 4, no. 1 (2023), https://doi.org/10.15294/jllr.v4i1.64078.

[57] Franz Von Benda-Beckmann and Keebet Von Benda-Beckmann, "Myths and Stereotypes about Adat Law: A Reassessment of Van Vollenhoven in the Light of Current Struggles over Adat Law in Indonesia," *Bijdragen Tot de Taal-, Land- En Volkenkunde* 167, no. 2–3 (2011), https://doi.org/10.1163/22134379-90003588.

[58] Indonesia, The explanation of Article 2 (1) of The New Criminal Code, https://peraturan.bpk.go.id/Details/234935/uu-no-1-tahun-2023, accessed November 28, 2024.

[59] Badan Pembinaan Hukum Nasional (BPHN), "The Academic Text of the New Indonesian Criminal Code" (Jakarta, n.d.). https://bphn.go.id/data/documents/naskah_akademik_tentang_kuhp_dengan_lampiran.pdf, accessed November 28, 2024

[60] I Dewa Made Suartha, "PERGESERAN ASAS LEGALITAS FORMAL KE FORMAL DAN MATERIAL DALAM PEMBAHARUAN HUKUM PIDANA NASIONAL," *Yustisia Jurnal Hukum* 4, no. 1 (2015), https://doi.org/10.20961/yustisia.v4i1.8640.

[61] Indonesia, The New Criminal Code. Article 2 (2) Law Number 1 of 2023 on The Criminal Code, https://peraturan.bpk.go.id/Details/234935/uu-no-1-tahun-2023, accessed November 28, 2024.

nationalism, and their values originate from Indonesia. At the same time, human rights and the general principles of law are a portion of internationalism whose values are partly contrary to Pancasila and UUD NRI 45.[62]

Nationalism, according to George V. Kracht, is an ideology that prioritizes the interests of a race or nation above the interests of other groups.[63] Diverging from Kracht, Soekarno described nationalism as an ideology that explicates individuals with the same values and shared ideals.[64] Coinciding with Soekarno, the authors also state that nationalism is an ideology that describes individuals with similar visions and values. The authors' arguments are supported by the fact that nowadays, there is almost no nationalism by virtue of a particular tribe, race, or nation but rather by common goals, ideals, and values that are fought for.[65] Why is that? Because in this contemporary era, there is almost no state inhabited by only one tribe, only one religion, or only one nation; all are blended, even though there must be one that is more dominant.[66] According to this explanation, the authors want to emphasize that today's nationalism is reflected by the existence of countries that have their own goals, ideals, and values. Generally, the texts of nationalism can be observed in their constitution. In the Indonesian context, it can be found in the UUD NRI 45.

Meanwhile, James H. Mays defines internationalism as an ideology that promotes international cooperation to achieve world peace and human welfare.[67] Discrepant with Mays, Fred Halliday states that internationalism is an ideology with three meanings. First, there is a growing communication, economic processes, and social empathy among international communities. **Second,** there is a growing understanding that international and humanitarian interests are more important than national interests, which are actualized through international cooperation. **Third,** it positions individuals as the primary social units of policy-making in both national and international contexts.[68]

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[62] Andrg Droogers, "Cultural Relativism and Universal Human Rights?"," in *Currents of Encounter*, vol. 8, 1995, https://doi.org/10.5479/10088/22372.
[63] George V. Kracht, "The Fundamental Issue Between Nationalism and Internationalism," *The International Journal of Ethics* 30, no. 3 (1920), https://doi.org/10.1086/intejethi.30.3.2377663.
[64] Sjafruddin Prawiranegara, "Pancasila as the Sole Foundation," *Indonesia* 38 (1984), https://doi.org/10.2307/3350846.
[65] Anatol Lieven, "The New Nationalism," *The National Interest*, no. 150 (2017): 21–29, https://www.jstor.org/stable/26557401.
[66] Mary E. Mc Intosh et al., "Minority Rights and Majority Rule: Ethnic Tolerance in Romania and Bulgaria," *Social Forces* 73, no. 3 (1995), https://doi.org/10.1093/sf/73.3.939.
[67] JAMES H MAYS, "INTERNATIONALISM," *The Advocate of Peace (1894-1920)* 57, no. 7 (1895): 153–55, http://www.jstor.org/stable/20665324.
[68] Fred Halliday, "Three Concepts of Internationalism," *International Affairs* 64, no. 2 (1988), https://doi.org/10.2307/2621845.

The authors tend to agree with Halliday, but the authors felt compelled to modify Halliday by defining internationalism as an ideology that places individuals as the primary social unit (the main target of policy) through the instruments of international cooperation, international law, and international institutions.

International cooperation can be found in various international forums initiated by countries to pursue certain ideals. For instance, the United Nations Conference on Sustainable Development 2012 was named one of the international forums with a sustainable development goals (SDGs) mission.[69] International law can be captured in several fields. For example, in human rights, there are the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR).[70] International institutions include the United Nations (UN), the Office of the High Commissioner of Human Rights (OHCHR),[71] and the International Criminal Court (ICC).[72] According to the definition, all components of internationalism are oriented towards one social unit, namely individuals. One of the ideals of the SDGs is poverty alleviation; the primary target is human beings. The function of the UDHR is to lay the fundamentals of international human rights law, the apparent target of which is individuals. The main task of the UN is to realize world peace, the principal sitter of which is human beings. Finally, this is how the internationalism that the authors mean works.

Implementing the principle of material legality in accordance with all four foundational elements will be difficult because the differences between nationalism and internationalism are challenging to compromise. The aim of nationalism is to preserve the national ideals set out in the constitution, while internationalism modulates policies directed towards individuals by breaking down national boundaries. Within the context of material legality principle, nationalism, represented by Pancasila and the UUD NRI 45, explicitly permits this principle. Pancasila, through its first principle, “belief in God”, has explained that the principle of material legality parallels the value of the Indonesian nation. How is that possible?

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[69] David Griggs et al., “An Integrated Framework for Sustainable Development Goals,” *Ecology and Society* 19, no. 4 (2014), https://doi.org/10.5751/ES-07082-190449.
[70] Tony Evans, “International Human Rights Law as Power/Knowledge,” *Human Rights Quarterly*, 2005, https://doi.org/10.1353/hrq.2005.0035.
[71] Hurst Hannum, “Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding,” *Human Rights Quarterly* 28, no. 1 (2006), https://doi.org/10.1353/hrq.2006.0004.
[72] Makau Mutua, “The International Criminal Court: Promise and Politics,” *Proceedings of the ASIL Annual Meeting* 109 (2015), https://doi.org/10.5305/procannmeetasil.109.2015.0269.

Yes, it can because Indigenous law, as the foundation of the principle of material legality, one of its goals is to avoid the wrath of nature and God. This means that the principle of material legality is one of Indonesian society's beliefs in God.[73] Reciprocal with Pancasila, UUD NRI 45, as the constitution of Indonesia, also provides space for the application of Indigenous law as a fundamental of the principle of material legality as arranged in Article 18B (2), which expresses:

> "The state recognizes and respects Indigenous law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary States of the Republic of Indonesia".[74]

Thus, according to the nationalist perspective, the application of the principle of material legality is a legitimate norm. Furthermore, in the context of the principle of material legality, internationalism is reflected in human rights and the general principles of law. Human rights, one of the bases for enacting the principle of material legality, has laid the foundation for legitimizing its application. Generally, the legal norms can be found in Article 27 UDHR and Article 15 ICESCR. However, both are still abstract in regulating cultural rights. Therefore, it is necessary to look at the rules in Article 4 of the Universal Declaration of Cultural Diversity (UDCD), which states:

> "The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous people. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."[75]

Also, Article 34 of the United Nations Declaration on the Rights of Indigenous People (UNDRIP) which sounds:

> "Indigenous people have the right to promote, develop, and maintain their institutional structures and their distinctive customs, spiritually, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international

[73] Daniel Dagur et al., "SILA KETUHANAN YANG MAHA ESA SEBAGAI LANDASAN EKSISTENSI AHMADIYAH DI INDONESIA," *Pancasila* 2, no. 2 (2021).
[74] Adriaan W. Bedner and Stijn Van Huis, "The Return of the Native in Indonesian Law Indigenous Communities in Indonesian Legislation," *Bijdragen Tot de Taal-, Land- En Volkenkunde* 164, no. 2–3 (2008): 165–93, https://doi.org/10.1163/22134379-90003655.
[75] "UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO): UNIVERSAL DECLARATION ON CULTURAL DIVERSITY," *International Legal Materials* 41, no. 1 (2002): 57–62, http://www.jstor.org/stable/20694211.

human rights standards."[76]

Clearly, two legal instruments show that Indigenous law may be used but should be in accordance with international human rights standards. This means that international human rights standards are determinative of Indigenous law. Then, what is the Indigenous law that complies with international human rights standards? Karima Bennoune, the Special Rapporteur of Cultural Rights, in her thematic report number A/73/227, explained that what Indigenous law means in accordance with international human rights standards is the conduction of Indigenous law that must not violate the human rights of others. If the Indigenous law violates the human rights of others, the Indigenous law must be revitalized by the state.[77] Thus, the authors argue that internationalism does not require Indigenous law to be applied freely according to their traditions.

This further strengthens the authors' argument that the application of the principle of material legality adheres to a significant struggle between nationalism and internationalism. The authors' perspective on this struggle between nationalism and internationalism also became clearer when considering the meaning of the second principle of Pancasila, namely "just and civilized humanity" which did not provide legitimacy for Bennoune's view on Indigenous law in accordance with international human rights standards. Soekarno, the founder of Pancasila, stated that the second principle of Pancasila meant brotherhood among nations, peace between nations, and harmony among people. Fundamentally, the second principle of Pancasila calls for the cessation of wars between countries, mass killings, and conflict, promoting coexistence without requiring the modification or elimination of Indigenous law.[78] The disharmony between nationalism and internationalism in the principle of material legality certainly makes this norm hard to enact. Since nationalism and internationalism are positioned as equals, neither holds greater authority. In addition, these ideologies must be applied cumulatively rather than selectively, despite their inherent contradictions.

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[76] Duane Champagne, "UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights," *Wicazo Sa Review* 28, no. 1 (2013), https://doi.org/10.5749/wicazosareview.28.1.0009.

[77] Karima Bennoune, "Symposium on Art, Aesthetics, and International Justice. Dignifying, Restoring, and Reimagining International Law and Justice through Connections with Arts and Culture," in *AJIL Unbound*, vol. 114, 2020, https://doi.org/10.1017/aju.2020.23.

[78] Institute for Policy Analysis of Conflict, "THE CONTROVERSY OVER PANCASILA," *INDONESIAN ISLAMISTS:*, ACTIVISTS IN SEARCH OF AN ISSUE (Institute for Policy Analysis of Conflict, 2020), http://www.jstor.org/stable/resrep31661.7.

An example of the application of the principle of material legality that may encounter significant contention in the upcoming day is "Kasepekang," a traditional sanction practiced by the Balinese Indigenous law community that will remain in effect at least until 2024. The acts sanctioned by *Kasepekang* are unique and generally not addressed in the new Indonesian criminal code. For instance, a person was punished by *Kasepekang* for suing a fellow Indigenous law community in court.[79] The form of *Kasepekang* punishment is to ostracize the perpetrator so that the perpetrator is considered non-existent by the Indigenous law people.[80] According to nationalism assessments, *Kasepekang*'s conduct is legitimate because it aligns with the values of Pancasila and UUD NRI 45. So, what about internationalism? The authors believe *Kasepekang* contradicts internationalism because it is not analogous to human rights principles. *Kasepekang*, contrary to the right to be free from torture, because it tortures the perpetrator mentally and causes psychological suffering.[81] It also violates the right to fair trial by degrading the perpetrator's dignity as a human being.[82] *Kasepekang* is also against the right to health because it will disrupt the mental health of the perpetrator and their family.[83]

From a more conceptual perspective, implementing *Kasepekang* based on the traditional legal regime is considered legitimate because it intends to maintain ancestral traditions passed down from generation to generation and is considered the truth.[84] However, according to modern legal tradition, *Kasepekang* is outdated and irrelevant because it is not based on the actual conditions and developments of the time.[85] This raises the question: which approach will Indonesia adopt? The authors suggest that Indonesia will adopt both. However, these approaches are inherently contradictory: traditional law wants to preserve the legacy of its ancestors, while modern law advocates to replace traditional law with more rational legal frameworks. In the context of the principle of material legality, the authors also hold the view that nationalism is categorized as

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[79] Ni Made Lastri Karsiani Putri, "2 Warga Di Denpasar Kena Sanksi Adat Dikucilkan, Urus Dokumen Tak Dilayani," detikBali, October 3, 2023.
[80] I. Nyoman Darma Putra, "Balinese and Westerners: Cultural Perceptions in Modern Balinese Writing," *Asian Studies Review* 24, no. 1 (2000), https://doi.org/10.1080/10357820008713259.
[81] Jonathan Cohen and Tamar Ezer, "Human Rights in Patient Care: A Theoretical and Practical Framework," *Health and Human Rights* 15, no. 2 (2013).
[82] Lewis F Powell, "The Right to a Fair Trial," *American Bar Association Journal* 51, no. 6 (1965): 534–38, http://www.jstor.org/stable/25723242.
[83] Paul Hunt, "Interpreting the International Right to Health in a Human Rights-Based Approach to Health," *Health and Human Rights* 18, no. 2 (2016).
[84] Peter Fitzpatrick, "Traditionalism and Traditional Law," *Journal of African Law* 28, no. 1–2 (1984), https://doi.org/10.1017/S0021855300005209.
[85] *Op.cit, Teubner, "Substantive and Reflexive Elements in Modern Law."*

traditional law and internationalism is a part of modern law. Theoretically, the principle of material legality embodies antinomy because there is a conflict between traditional law and modern law and a broader ideological struggle between nationalism and internationalism.

D. The Future of the Principle of Material Legality

The authors temporarily believe that applying the principle of material legality in the future will be difficult and face various challenges. Some of these challenges include the following: **First,** Article 2 (2) of the new Indonesian criminal code has the potential to be submitted for judicial review because it is considered unconstitutional with Article 18B (2) of UUD NRI 45. **Second,** civil society will encourage the government and the House of Representatives to revise Article 2 (2) of the new Indonesian criminal code to remove the antinomies within it. **Third,** the government's steps to determine the procedures and criteria for Indigenous law through the government regulations will draw protests from Indigenous law people whose Indigenous law is not considered to the criteria. **Fourth,** the local government's measures to establish Indigenous laws are permitted to operate will be met with resistance from Indigenous law peoples whose Indigenous laws are not permitted to be applied because this is examined discrimination. Even though they are both Indigenous laws, the basis of which is Indigenous hereditary. **Fifth,** if the local government permits all Indigenous laws, then human rights activists will conduct a judicial review of Article 2 (2) of the new Indonesian criminal code to argue that it is unconstitutional because it is against the right to fair trial, the right to be free from torture, and the right to health as stated in Article 28I (1) of UUD NRI 45.

It is essential to emphasize that these challenges are likely to arise when nationalism and internationalism intersect; in other words, the application of the principle of material legality encompasses Pancasila, UUD NRI 45, human rights, and the general principles of law, all of which are considered collectively. This means that fighting modern and traditional law is inappropriate because they do not produce unanimous consent when considered individually. Instead, there is always room to adapt modern law to traditional law or to modernize traditional law in line with modern standards. Finally, the authors must affirm Fred W. Riggs' theory of prismatic society, which explains a society with conflicting values. This occurs in the principle of legality, which has two conflicting

ideologies and is forced to unite. According to Mahfud MD, the phenomenon of the principle of material legality is a consequence of the prismatic legal state adopted by Indonesia. The authors also emphasize Jan Michael Otto's concept of "real legal certainty," in which modern law and traditional law can coexist in a state without negating each other. If Otto's idea is applied, the government's role should shift from being the sole authority determining Indigenous law criteria to a legal facilitator that legitimizes Indigenous law in the criminal code. Specifically, the government would simultaneously form and promulgate positive law while recognizing and facilitating Indigenous law.

However, Otto has not yet presented a concrete mechanism for this coexistence. Therefore, the authors believe it is essential to recall what Christiaan Snouck Hurgronje explained regarding the power-sharing between the Dutch colonial government and the indigenous law people in Indonesia's pre-independence era. Hurgronje observed that the Dutch colonial government in Indonesia did not force the Dutch positive law to apply to Indigenous people, but allowed the law to exist with its own mechanisms. Dutch positive law was only enacted in urban areas where Indigenous law did not apply.[86] Cornelis van Vollenhoven's commentary further supported this, highlighting how the Dutch colonial recognition of Indigenous governance opened up opportunities for Indigenous law people to articulate their various interests, such as law and land, through the Indigenous government system without any intervention from the Dutch colonial government.[87]

Building on these historical examples, the authors argue that if Hurgronje and Vollenhoven's statements were appropriately elaborated, the principle of material legality in the new Indonesian criminal code should recognize Indigenous law as a living law, without formalizing it in legislation with several utopian conditions. If this idea is implemented, the government will face several consequences in responding to the application of the principle of material legality in the days to come. The first and most significant consequence would involve revising Article 2(3) of the new Indonesian criminal code, which initially outlined the criteria for Indigenous law to be permitted to apply, but would also recognize it. This would lead to the next consequence, namely handing over Indigenous law jurisdiction to Indigenous law people with their respective criminal justice systems. Last but not least, the consequences must be accepted and should be carried out to remove all attributes of state law

[86] J. F. Holleman and H. W.J. Sonius, *VAN VOLLENHOVEN ON INDONESIAN ADAT LAW*, *Van Vollenhoven on Indonesian Adat Law*, 2023, https://doi.org/10.1007/978-94-017-5878-9.
[87] *Ibid, Holleman and Sonius, pp. 230-256*

from Indigenous law people so that police, prosecutors, and the court cannot enter the jurisdiction of Indigenous law people for reasons of law enforcement, meaning that adjustments of Indonesian criminal procedure are obligatory. As a complement, the authors would like to express that the opinion above further strengthens the purpose of the new Indonesian criminal code in decolonizing from Western values and standards (WvS), rather than being as current as the new Indonesian criminal code, which tends to colonize its citizens.

Conclusion

The new Indonesian criminal code has revitalized some fundamental principles in criminal law, including the principle of legality. The principle of legality, which initially relied on a single instrument, such as legislation, has been expanded into two fundamental principles: legislation and living law. This extension introduces two principles of legality into the new Indonesian criminal code: formal and material legality. In its application, the principle of material legality applies when the principle of formal legality does not apply to an act. According to the authors, implementing the principle of material legality is impossible because it should be analogous to four foundational principles, namely Pancasila, UUD NRI 45, human rights, and the general principles of law, which originally conflict with each other. To understand this war, the authors employ the theory of legal ideology to explain that the ideological struggle over the principle of material legality in the new Indonesian criminal code is real, making it highly difficult to enact if it applies to all four aspects cumulatively. The ideological struggle encompasses the conflict between personal ideologies, specifically individualism and collectivism, which in turn influence the debate over political ideologies, including internationalism and nationalism, ultimately culminating in the contest between legal policy ideologies, such as modern law and traditional law. Finally, the authors intend to emphasize that the conduction of the principle of material legality by colliding modern law and traditional law *vis-à-vis* is hard to occur, so applying the idea of real legal certainty with the power-sharing between Indigenous law people and the Indonesian government in the enactment of the principle of material legality is an idea that is worth attempting.

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