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A Juridical Analysis of the Comparison of Legality Principle in the Indonesian Criminal Code (WvS) and the Draft of New Indonesian Criminal Code (National Criminal Code)

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Abstract

The principle of legality in the current Indonesian Criminal Code (WvS) is a principle of formal legality. This principle is influenced by the positivist school which only considers law as written legislation/regulations. In contrast to the principle of legality in the current Indonesian Criminal Code, the principle of legality in the Draft of New Indonesian Criminal Code (Indonesia's Original Criminal Code), or called National Criminal Code, is known as the principle of formal legality and the principle of material legality. The combination of these two principles does not only consider law as a written legislation/regulation but also provides space for customary law or law that exists in society as a basis for proper punishment for a crime as long as the crime has no similarities or is not regulated in the existing laws. This study was normative research, aiming at determining the juridical differences in the legality principle in the current Indonesian Criminal Code (WvS) and the Draft of New Indonesian Criminal Code (National Criminal Code). In this study, the researchers applied a qualitative analysis method.

Keywords
Comparison; principle of legality; Indonesian criminal code; draft of new Indonesian criminal code

I. Introduction

The principle of legality first took the form of a law in the 1776 American Constitution. After that, it was manifested in Article 8 of *Déclaration des Droits de l'Homme et du Citoyen de 1789: … nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et légalement appliquée.* This principle was then incorporated into Article 4 of the French Penal Code compiled by Napoleon Bonaparte. From this code, the principle was then included in Article 1 Paragraph 1 of the *Wetboek van Strafrecht* in the Netherlands, which clearly states "*Geen feit is stafbaar dan uit kraft van eenedaaraan voorafgegane wetelijke strafbepaling.*" Furthermore, this principle was contained in Article 1 Paragraph 1 of the Indonesian Criminal Code (Rahayu, 2014).

The existence of legal principles in a legal field is highly important considering that these legal principles are the basis and guidelines for the development of each legal field so as not to deviate. In criminal law, the existence of this legal principle is emphasized as an effort to limit the arbitrariness of criminal justice in determining the presence or absence of prohibited acts (Christianto, 2009). One of the main principles in criminal law is the principle of legality. The principle of legality has a very fundamental position and therefore becomes one of the most important principles in criminal law. This principle, among others, regulates what and how an action or deed can be categorized as a crime and based on what arguments. The introduction of the principle of legality in the science of law initially functions normatively to set standards for a person's behavior to be categorized as a crime (delict) or not. However, in its development, the principle is also used as a tool to

determine legal policies arbitrarily by the authorities. This is one of the forms of absolutism on the principle of legality (Khasan, 2017).

The principle of legality in the Indonesian Criminal Code is stated in Article 1 Paragraph 1. The literal translation version from the original Dutch is that "No act (*feit*) can be punished other than based on the strength of the provisions of the criminal law that preceded it." It should also be noted that the term *feit* can also be translated as "event" because it includes both actions that violate something prohibited by criminal law or neglect something that is required (Hamzah, 2010). The Latin translation of Article 1 Paragraph 1 of the Indonesia Criminal Code is "*Nulum delictum nulla poena sine praevia legi poenali*." Meanwhile, its original Indonesian is "*Tidak ada delik, tidak ada pidana tanpa ketentuan pidana yang mendahuluinya*." The article may refer to the Latin expression saying "*Nulum crimen sine lege stricta*" or "*Tidak ada delik tanpa ketentuan yang tegas*" (English: No crime without strict provisions) (Hamzah, 2010). The formulation of the principle of legality in Article 1 of the Indonesian Criminal Code (WvS) consists of 2 paragraphs, shown in the following. (1) No act shall be punished unless by virtue of a prior statutory penal provision before the act is committed. *(Tiada suatu perbuatan dapat dipidana kecuali atas kekuatan aturan pidana dalam perundang-undangan yang telah ada sebelum perbuatan dilakukan.)* (2) In case of alteration in the legislation after the date of commission of the act, the most favorable provisions for the accused shall apply. *(Jika sesudah perbuatan dilakukan ada perubahan dalam perundang-undangan, dipakai aturan yang paling ringan (menguntungkan)bagi terdakwa.)* (Iksan, 2007).

Based on the formulation of the legality principle, it is defined that the source or legal basis for appointing or stipulating an act that was originally an ordinary act into an act that can be punished/criminal act is only the law. Therefore, the principle of legality in the current Indonesian Criminal Code (WvS) is considered as the principle of formal legality (Wijaksana, 2020). Substantially, the principle of legality has several limitations. First, it can only be meaningful if it is supported by good criminal laws based on the embodiment of rational intellectual abilities and a sense of re-examination of the principle of legality using two ideas, namely *nullum crimen sine poena* and the revival of natural law. All limitations of the principle of legality are due to the building of the principle of legality based on the foundation of *nullum crimen sine lege* (no crime without laws) and *nullum crimen sine poena legali* (no crime without criminality according to law). This foundation only builds the relationship between criminal acts and the criminal law or the authorities and the perpetrators by providing value for benefits to actions (Yuherawan, 2012).

To date, the principle of legality is regulated in Article 1 Paragraph 1 of the Indonesian Criminal Code which stipulates that an act cannot be punished except under the provisions of existing criminal law. Along with that, the 2010 Draft of the New Indonesian Criminal Code still maintains the principle of legality as a fundamental principle. Article 1 Paragraph 1 of the draft stipulates that no one can be convicted or subject to action unless the act committed has been determined as a criminal offense in the laws and regulations in force at the time the act is committed. Furthermore, Paragraph 2 in the same article stipulates that, in determining the existence of a criminal act, it is prohibited to use analogies. However, the principle of legality has been expanded in subsequent provisions. Article 1 Paragraph 3 stipulates a different concept from the adage *nullum delictum nulla poena sine pravia lege.* Paragraph 3 determines that the provisions as referred to in Paragraph 1 do not reduce the validity of the law that lives in society (Widayati, 2011). It also means that it is based on unwritten rules. However, it turns out that this opinion is not

accepted by many people because it is considered that there is no legal certainty. Therefore, in the newest draft, the source of criminal law is the provisions in the legislation.

However, as a consequence of the nation's culture in which there are still various customary laws in society, the Draft of the New Indonesian Criminal Code provides a place for the existence of customary law. This is also a consequence of the adoption of both formal and material understanding of the unlawful nature of an act. This unlawful nature, both formal and material, is contained in Indonesia's Law No. 3/1971 concerning the Corruption Eradication and the jurisprudence of the Supreme Court in the case of 'Ir. Otjo' (Hendardi, 2000). The principle of material legality was born from efforts to reform the development of criminal law in Indonesia for the sake of creating the aspired society. The principle of material legality provides space for customary law that applies among indigenous peoples to be recognized before national law. The formulation of the principle of material legality which is an effort to fulfill the need to make room for customary law that exists in the community seems to still have pros and cons in its discussion (Pricilia, Seirkat, & Pujiyono, 2009). Based on the description of the aforementioned condition and problems, this article explores two study focuses, namely the formulation of the principle of legality in the current Indonesian Criminal Code (WvS) and changes to the principle of legality in the Draft of the New Indonesian Criminal Code (National Criminal Code).

II. Research Methods

Research is the main activity in the development of science and technology. This is because research aims to reveal the truth in a systematic, methodological, and consistent manner. Through the research process, analysis and construction of the data that has been collected and processed are carried out (Suteki & Taufani, 2018). This study was normative research. Normative legal research in essence examines the law that is conceptualized as a norm or rule that applies in society and its results can become a behavioral reference. According to Soerjono Soekanto & Sri Mamudji, normative legal research is a legal study conducted by examining library materials or secondary data (Ishaq, 2013). The method of data analysis used in normative legal research is a qualitative analysis by describing qualitative data in the form of regular, coherent, logical, non-overlapping, and effective sentences, thus facilitating data interpretation and understanding of the results of the analysis. In other words, the researchers in the qualitative analysis analyze data from legal materials based on concepts, theories, laws & regulations, doctrines, legal principles, expert opinions, or the views of the researchers themselves (Ishaq, 2013).

III. Results and Discussion

3.1 Formulation of the Principle of Legality in the Current Indonesian Criminal Code (WvS)

The principle of legality, or in Latin terms known as the principle of "*nullum delictum, nulla poena sine praevia lege poenali*", is based on a long history fought by legal warriors in the XVIII century in Western Europe as a reaction to the enactment of the criminal law in the era of absolute monarchy. At that time, criminal penalties were imposed arbitrarily and only based on the king's needs. Arbitrariness in enforcing criminal law can occur because the system of enactment of criminal law at that time still adhered to the "Criminal Extra Ordonaria" from the Roman legal system, which is a legal system to

determine a crime not based on statutory regulations but according to the needs of the power holder, namely the king. This system allows kings to apply criminal law according to their desire and at will, because no provisions limit it in terms of determining the act as a crime, the form of punishment imposed, and how to carry it out (Zakaria, 2006).

The principle of legality is based on the principle of "*nullum delictum, nulla poena sine praevia lege poenali*" (English: no crime without a criminal provision that precedes it). It is also mentioned by Hazewinkel-Suringa using the Dutch words "*Geen delict, geen straf zonder een voorafgaande.*" The term is often referred to another Latin term, namely "*Nullum crimen sine lege stricta*," meaning no crime without clear provisions or "*Geen dilict zonder een precieze wettelijke bepaling*" in the Dutch words by Hazewinkel-Suringa (Zakaria, 2006). Moelyatno wrote that the principle of legality contains three understandings, namely (1) there is no prohibited act or an act punishable by a criminal penalty if it has not been stated in a statutory regulation, (2) to determine the existence of a criminal act, the analogy may not be used, and (3) the rules of criminal law are not retroactive. Even though the formula is from the Latin words, the provisions, according to Andi Hamzah, do not come from Roman law. Roman law did not recognize the principle of legality both during the republican period and the period after it. The formula was made by Paul Johann Aslem von Feurbach (1775-1883), a German criminal law expert, in his book "*Leherbuch des peinlichen Rechts*" in 1801 (Situngkir, 2018).

Article 1 Paragraph 1 of the Indonesian Criminal Code includes the provision that an act cannot be punished, except based on the strength of existing criminal provisions (Mongi, 2013). The article is based on its formulation from the Dutch, namely "*Geen feit is strafbar uit kracht van eene daaraan voorafgegane wettelijke strafbepaling,*" literally meaning that "No act (*feit*) can be punished other than based on the strength of the provisions of the criminal law that preceded it (Lamintang, 2013). Citing completely the sentence from the Dutch is considered very important. It is to fully understand the formulations of the criminal provisions from their original form and to find out whether the Indonesian or English translation is correct or turns out to be wrong (Lamintang, 2013).

In observing these provisions, we may find one dimension of human rights protection in the process of enforcing criminal law. Article 1 Paragraph 2 of the Indonesian Criminal Code stipulates protection for criminals during the transition period of the rule of criminal law in the event of a change. The provisions of the article stipulate that in case of alteration in the legislation after the date of commission of the act, the most favorable provisions for the accused shall apply. This is often misinterpreted as the retroactive principle. Intrinsically, this is not a retroactive principle because it does not always have to apply new rules during the transition period. Old rules can also be applied as long as they are favorable to the defendant (Setyawan, 2021).

The principle of legality is closely related to the legal positivist school of thought. Legal positivists state that the law is identical to the legislation in which outside the legislation is not law. Law must be separated from morals, politics, culture, economics, and others. The view of legal positivists is related to the philosophical thought of positivism which states that everything is considered true if it can be confirmed as reality. In the legal positivist school, there must be a clear separation between law and morals. The influences of positivism thought into legal positivist school are as follows. First, in law, there is a cause-and-effect relationship so that the punishment imposed on the perpetrator is the result of the existence of a law. This is the principle of legality in criminal law. Second, the rule of law is something that exists, while what does not exist is not law but morals (Anjari, 2019).

The weakness of the legal positivist school is in identifying the law as only

legislation. In the management of state power, it can become an authoritarian state if (1) only laws are a manifestation of the exercise of state power by overriding the process of law formation and law application, and (2) the law is formed arbitrarily, its enforcement is based on state coercion, law-making is controlled by the state, and its interpretation is based on the interest of the state (Sudibyo & Rahman, 2021).

It is the effect of codification and the nature of glorifying the law by adhering to the teachings of the nature of being against the formal law in the principle of legality in the Indonesian Criminal Code. The teaching says that a criminal act has occurred if the elements as stated in the description of the offense have been fulfilled. In other words, an act against the law is the same as being against the legislation. These results show that there is no place for unwritten law (habits) when considering the validity of the teachings of nature against formal law. Moreover, the teaching is oriented to criminals only with the intent of punishment as a means of retaliation in determining disgraceful acts. Such formalistic teachings prioritize the principle of legality over human and humanitarian principles. In fact, the teaching only considers the consequences of actions rather than providing a solution to why and what is the background of a despicable act and how to break the chain of roots that cause the problem.

The principle of legality with the nature of teachings against formal law gets a lawsuit in reality. The history of criminal law events has given birth to the first jurisprudence on the doctrine of the nature against material law in 1993 (Arrest Hoge Raad, February 20, 1933, which is known as the Veaart arrest), proving that law is not sufficient to guarantee the discovery of justice in concrete cases. The jurisprudence in the case of Veaarts arrest is proof that legalism is slowly getting resistance. The teaching of being against the law formally kills the judge's common sense to think critically outside the text of the law, in which judges become only mouthpieces of the legislation. In the end, such judges accept the law as the final scheme (Faisal, 2014).

Based on what has been described in the previous section, the principle of legality in the Dutch Criminal Code tends to represent the legal tradition of civil law (written law). The legal construction that is built is legal positivistic because the authority of criminal acts only relies on written law by upholding the value of legal certainty. Therefore, the pattern of the principle of legality contained in it is action-oriented (people/perpetrators of criminal acts). In addition, the figure of the principle of legality is a crystallization of individualism-liberalism which is influenced by classical thought, making indeterminism great for classical schools, in which freedom of will focuses on the actions of the perpetrator. For this reason, human free will must be faced with a criminal law regime that is oriented towards retaliation as a pretext for punishment. In this context, criminal law becomes retributive and repressive (Faisal, 2014).

The principle of legality in the current Indonesian Criminal Code (WvS) is closely related to the legal positivist school which is an understanding that views law as identical with legislation. In this view, the role of judges in law enforcement is nothing more than a mouthpiece of the legislation, namely examining and deciding cases according to the formulation of the law without room to make judgments following the community's sense of justice. In line with the principle of legality, legal sanctions imposed on the perpetrators must be based on applicable legal regulations. Furthermore, when the legal rules have been enacted, any actions that are contrary to these rules must be subject to legal sanctions. Law enforcement that adheres to the principle of legality is indeed very easy to realize legal certainty but it is not necessarily able to realize justice.

Justice to be realized through law enforcement is not only formal justice according to the formulation of the law but also substantial justice, namely justice that is truly based on

the community's sense of justice. The reality in law enforcement practice shows that, with the principle of legality, it is often only to realize formal justice which is not necessarily based on the community's sense of justice. On that basis, judges in deciding cases, in addition to applying the principle of legality, should also pay attention to customs, traditions, and a sense of justice that lives in the community. Therefore, law enforcement does not only produce formal justice but also can produce substantial justice, namely justice that is based on the community's sense (Sunarto, 2016).

3.2 Changes in the Principle of Legality in the Draft of New Indonesian Criminal Code (National Criminal Code)

As a public law, criminal law finds its importance in Indonesian legal discourse. In criminal law, some rules determine actions that should not be carried out and are accompanied by threats in the form of punishment. In addition, some rules also determine the conditions for which the criminal can be imposed. Furthermore, the law is enforced throughout the territory of the Republic of Indonesia. By considering that the criminal law material is full of human values, criminal law is often described as a double-edged sword. On the one hand, criminal law aims to uphold human values. On the other hand, its enforcement provides sanctions for humans who violate it. Therefore, the discussion of criminal law material must be carried out with extra care, namely by taking into account the context of the community where criminal law is enforced and upholding civilized human values (Bahiej, 2006)

The Indonesian criminal law regulations are compiled in the Indonesian Criminal Code (Indonesian: *Kitab Undang-Undang Hukum Pidana* (KUHP)). The main source of the code is *Wetbooek van Strafrecht voor Nederlandsch Indie* (WvSNI) which was enforced in Indonesia for the first time with the *Koninklijk Besluit* (King's Decree) No. 33 on October 15, 1915, and came into force on January 1, 1918. WvSNI is a derivative of the Dutch WvS which was created in 1881 and enforced in the Netherlands in 1886. Although WvSNI is a copy of the Dutch WvS, the colonial government at that time applied the principle of concordance (adjustments) for the implementation of WvS in its colonies. Several articles were abolished and adapted to the conditions and mission of Dutch colonialism over Indonesian territory (Bahiej, 2006).

The current Indonesian Criminal Code is a regulation regarding criminal acts which are inherited from the Dutch East Indies government. Its validity is regulated by Indonesia's Law No. 1/1946 concerning Criminal Law Regulations. To date, the Indonesian Criminal Code is the only codification of criminal law in Indonesia. Although the original version of the code is still in Dutch, the Indonesian Criminal Code already has 6 Indonesian translation versions. However, it is unfortunate that from these translations, none of them are officially recognized by the government.

Along with the rapid development of Indonesian society and the strong demands for justice, the formulation of the criminal law contained in the Indonesian Criminal Code is no longer able to be used as a legal basis for overcoming crimes and demands for justice (Wardadi, Rais, & Manurung, 2019). The necessity for the presence of the new Indonesian Criminal Code systematically, structurally, substantively, and culturally over the old Indonesian Criminal Code or WvS from the Dutch colonial is the "*Raison D'etre*" or the most important reason or purpose in addition to the vision or description and objectives in the future in the form of realizing a new national criminal law based on Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society to replace the colonial legacy of the Criminal Code. This will be reflected in the various comprehensive missions (ways to achieve the vision), as

described further in the following.

The idea of replacing the colonial legacy of the Criminal Code has emerged since the Proclamation of Independence. This is reflected in Article II of the Transitional Rules of the 1945 Constitution and Indonesia's Law No. 1/1946 Jo. Indonesia's Law No. 73/1958 concerning Criminal Law Regulations. It then strengthened and reached its peak at the National Law Seminar in 1963. The seminar recommended that in the shortest possible time, the existence of the new Indonesian Criminal Code called the National Criminal Code should be pursued and realized. On this basis, in 1964, the Ministry of Justice issued a Draft Bill on "Principles and Basic Foundations of Indonesian Criminal Law" to replace Book I of the existing Indonesian Criminal Code (General Section). After being typed by Prof. Mulyatno, the National Law Development Institute (Indonesian: *Lembaga Pembinaan Hukum Nasional* (LPHN)) issued the Draft of Book I in 1968. After that, in 1979, the National Legal Development Agency (Indonesian: *Badan Pembinaan Hukum Nasional* (BPHN)) – the new name of the National Law Development Institute – had prepared the concept of Book II. In 1982, the agency produced the Proposed Draft of a new Indonesian Criminal Code for Book I, which was then discussed in a workshop on December 13-14, 1982 (Muladi & Sulistyani, 2020).

The vision of Indonesia's criminal law reform is to build a national criminal law that can replace the colonial legacy Criminal Code. The vision is described in the form of the main mission, namely the decolonization process in the form of "open recodification" which is systematic and not fragmentary or amendments (Muladi & Sulistyani, 2020). The meaning and nature of criminal law reform are closely related to the background and urgency of holding criminal law reform. The background and urgency of criminal law reform in Indonesia can be viewed from socio-political, socio-philosophical, and socio-cultural aspects or various policy aspects (especially social, criminal, and law enforcement policies). This means that the meaning and nature of criminal law reform are also closely related to these various aspects. In other words, criminal law reform must essentially be a manifestation of changes and reforms to various aspects and policies that underlie it. Therefore, criminal law reform essentially implies an effort to reorient and reform criminal law based on the central socio-political, socio-philosophical, and socio-cultural values of Indonesian society that underlie social, criminal, and law enforcement policies. In short, it can be stated that criminal law reform in essence must be pursued with a policy-oriented approach and at the same time a value-oriented approach (Arief, 2012).

The Draft of the New Indonesian Criminal Code departs from the premise of a mono-dualistic balance, meaning that it pays attention to the balance of two interests, namely the interests of the community and the interests of individuals. This mono-dualistic view is usually known as "*Dad-dader Strafrecht*". It is a criminal law that pays attention to the objective aspects of "actions" (*Daad*) and the subjective aspects of "people/makers" (*Dader*). By starting from the principle of mono-dualistic balance, the concept maintains two very fundamental principles in criminal law, namely the principle of legality and the principle of error/culpability. These two principles are what can be referred to as "social principles" and "humanitarian principles". Unlike the current Indonesian Criminal Code, which only formulates the principle of legality, the 1993 concept formulates the two principles explicitly in Article 1 (for the principle of legality) and Article 35 (for the principle of culpability).

In contrast to the formulation of the principle of legality in the current Indonesian Criminal Code, the concept of the new Code expands the formulation by acknowledging the existence of a living law (unwritten law/customary law) as the basis for criminalizing an act as long as there is no equality or not regulated by existing Indonesian law. This line

of thought was continued by the drafter of the new Code by emphasizing the adoption of a material view of unlawful nature. The concept holds that the nature of being against the law is an absolute element of a crime. This means that even though the formulation of the crime does not explicitly state any element of being against the law, an act that has been formulated as a criminal act in the legislation must always be considered to be against the law. Therefore, the formal formulation in the legislation must be seen as an objective factor or measure to declare an act against the law. This formal or objective measure still has to be tested materially, whether there is a justification and whether the act is contrary to the legal consciousness of the people or the law that lives in society. The expansion of the principle of legality and the nature of being against the law cannot be separated from the basic premise of the principle of balance (between individual interests and the interests of society, between legal certainty and justice, and between formal and material legal criteria/sources). Such thoughts and formulations are also new things when compared to the current formulation of the Indonesian Criminal Code (Arief, 2012).

To reform the concept of the Indonesian Criminal Code, the Draft of the new Code also provides clear space for written law to have the power to become a source/legal basis. As a comparison, it can be seen that the formulation of the principle of legality in Article 1 of the current Indonesian Criminal Code (WvS) consists of two paragraphs, which are divided into two articles in the draft of the new Code. Article 1 Paragraph 1 of the current Indonesian Criminal Code is reformulated in Article 1 and Article 2 of the new Criminal Code. The comparison of those two formulations is presented in the following.

Current Indonesian Criminal Code (WvS)

Article 1

No act shall be punished unless by virtue of a prior statutory penal provision before the act is committed.

(Tiada suatu perbuatan dapat dipidana kecuali atas kekuatan aturan pidana dalam perundang-undangan yang telah ada sebelem perbuatan dilakukan.)

The Draft of New Indonesian Criminal Code per July 9, 2018

Article 1

(1) No act shall be subject to criminal sanctions and/or actions unless by virtue of a prior statutory penal provision before the act is committed.
(Tidak ada suatu perbuatan pun yang dapat dikenai sanksi pidana dan/atau tindakan kecuali atas kekuatan peraturan pidana dalam peraturan perundang-undangan yang telah ada sebelum perbuatan itu dilakukan.)
(2) In determining the existence of a crime, analogies are prohibited.
(Dalam menetapkan adanya Tindak Pidana, dilarang digunakan analogi.)

Article 2

(1) The provisions as referred to in Article 1 do not reduce the enactment of the law that lives in the society which determines that a person deserves to be punished even though the act is not regulated in law and regulation.
(Ketentuan sebagaimana dimaksud dalam 1 ayat (1) tidak mengurangi berlakunya hukum yang hidup dalam masyarakat yang menentukan bahwa seseorang patut dipidana walaupun perbuatan tersebut tidak diatur dalam peraturan perundang-undangan.)
(2) The law that lives in the community as referred to in Paragraph 1 applies in the place where the law lives and as long as it is not regulated in this law and is based on the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society.

(Hukum yang hidup dalam masyrakat sebagaimana dimaksud pada ayat 1 berlaku dalam tempat hukum itu hidup dan sepanjang tidak diatur dalam undang-undang ini dan sesuai dengan nilai-nilai yang terkandung dalam Pancasila, Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, hak asasi manusia, dan asas-asas hukum umum yang diakui masyarakat beradab.)

With the separation of Article 1 Paragraph 1 of the current Indonesian Criminal Code (WvS) into Article 1 and Article 2 of the Draft of the New Indonesian Criminal Code, the position of each article becomes clearer, in which Articles 1 and 2 of the Draft of the New Indonesian Criminal Code regulate the issue of source, base, or legal basis. From the comparison above, it can be seen that there is a difference between the principles of legality regulated in the current Indonesian Criminal Code and the Draft of the new Indonesian Criminal Code. In the current Indonesian Criminal Code, the principle of legality is only in the form of the principle of formal legality (Article 1), in which an act can be a criminal act or criminalized only by law as a legal basis. Meanwhile, in the Draft of the New Indonesian Criminal Code, we can find the principle of formal legality in Article 1 and the principle of material legality in Article 2. Juridically, the Draft of the New Indonesian Criminal Code provides a wider scope for the principle of legality in which Article 2 Paragraph 1 provides a legal basis for customary law/unwritten law/law that lives in society to become a source/legal basis recognized and used in the criminal law system in Indonesia. Therefore, there is a balance between formal legal certainty and material legal certainty. In other words, the unlawful nature of an act must be based on a formal basis but does not reduce the existence of materially against the law.

IV. Conclusion

Based on the discussion section, it can be concluded several things, namely as follows. The principle of legality in the current Indonesian Criminal Code is known as the principle of formal legality only. This is influenced by the legal positivist school stating that the law is identical to the legislation. Moreover, the impact of positivist school, which sees law as mere legislation, will tend to the authoritarian management of state power. In addition, the effect of codification by glorifying the law can make judges only act as a mouthpiece of the law, namely examining and deciding cases. In contrast to the formulation of the principle of legality in the current Indonesian Criminal Code, the Draft of the new Indonesian Criminal Code provides clear space for unwritten law to be able to have the power to become a source/legal basis. In the current Indonesian Criminal Code, the principle of legality is only in the form of the principle of formal legality. Meanwhile, the Draft of the new Code contains the principles of formal legality and material legality. The Draft of the new Code is also based on the idea of a mono-dualistic balance, meaning that it pays attention to the balance of two interests, namely the interests of the community and the interests of individuals.

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