

# Islamic Criminal Law Review on the Duality of Principles of Legality in the Draft of Indonesia Criminal Law Code

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Renewal in the field of criminal law provides various breakthroughs including the recognition of the law that lives during society as a source of law. Therefore, the principle of legality experiences a shift in meaning from what was originally only a formal legal principle and is now coupled with the material legal principle. This normative research aims to examine the principle of material legality from the perspective of Islamic criminal law. Therefore, this study uses normative juridical methods that prioritise secondary data, namely primary legal materials, secondary legal materials, and tertiary legal materials. Secondary data were collected by library techniques and analysed by an analytical descriptive method. The results of this study indicate that the duality of the principle of legality is compatible with the concept of the principle of legality in Islamic criminal law. This suitability lies in the balance between two interests, namely, individual interests and public interests.

**Keywords:** *Duality Principle of Legality, Islamic Criminal Law, Criminal Code Draft.*

## Introduction

The principle of legality was born from the political struggle to protect the interests of many people from the arbitrary authority of the king. Surely this will be achieved by limiting the power of the king to prosecute and make decisions that contradict principles that are by human rights (Latif, 2010). These ideas began to emerge from various leaders of the people

who spearheaded the political struggle which automatically also struggles in the realm of law (Nurdin and Nur, 2020). Among these figures are John Locke with his work in the form of “*Trestise of Government*”, Montesquieu’s work “*De l'esprit Des Lois*”, Rousseau’s work “*Du Contract Social, Ou Principes du droit Politique*”, and Beccaria with “*Dei Delitte e Delle Pene*”. All these figures agreed the people should not be treated arbitrarily by the ruling king (Poernomo, 1993).

The works of these figures contain the principles of legality and are the beginning of the spread of a general understanding of the importance of this principle. The principle of legality, as put forward by Moeljatno, was first outlined in an official state regulation (even in the form of a constitution) in Article 8 of the *Declaration des Droit de Lomme de du Citoyen* (1789) which was the first constitution formed after the outbreak of the great French revolution. The sound of the article is more or less “*nothing can be punished except for a wet stipulated in the law and legally enacted*”. Furthermore, this arrangement is also enshrined in Article 4 of the French penal code under the leadership of Napoleon Bonaparte (1801). After the French colonised Nederlands (the Netherlands), the principle of legality gained a place in Article 1 *Wetboek van Strafrecht* Nederlands (1881). This principle arrived in the archipelago as a colony of the Netherlands, then called the Nederlands Indie. This was precisely formulated in Article 1 *Wetboek Van Strafrecht voor Nederlands Indie* in 1918 (Moeljatno, 2003). This is by the principle of legal concordance which requires that the colonial state's law be enforced on the territory of its colonies. Therefore, the people of Indonesia (Indigenous) who, from the beginning, have used living law (customary law) as a source of law and daily behaviour must comply with legal provisions as the European class. Of course, this has drawn a lot of criticism even from the Dutch themselves namely van Vollenhoven who argues that the substance of Western law is not suitable if applied amid Indonesian society. According to van Vollenhoven, Indonesian people, when viewed in addition to Dutch jurists already have their laws (Rahardjo, 2009). Until now, the Indonesian Penal Code is still a legacy from the Dutch colonials along with the principle of legality in it (Rofiq, 2019).

The law will always be one step behind its social reality. It seems to have obtained evidence of its reality. This can be seen from law enforcement which tends to be formalistic and legalistic which only emphasises the legal aspects without looking at the philosophical aspects of law, namely, substantive justice (Angkasa, 2019). This is one of the considerations to make a systemic update of the Indonesian Criminal Justice System. It seems that the Indonesian people are still colonised by Article 1 (1) WvS which is a Dutch heritage, according to Barda Nawawi Arief's opinion as quoted by Eko Soponyono. Of course, to renew the law, a comprehensive renewal is also required which involves the level of value. This is because the essence of legal reform is the renewal of legal values and is not just a legal norm. This was stated by Satjipto Rahardjo as a cultural component consisting of

values and attitudes with which the legal system is bound and then providing a place for the legal system in society. Regarding culture, it can also be explained how the law can work or vice versa, that is, it cannot perform its function as it should ( Rahardjo, 2008).

It can be understood that legal reform should be carried out from the most fundamental level and the core of the law itself touches on the area of the philosophical value of the law( Sueb, 2020). In the aspect of legal substance, legal reform must also touch on fundamental issues in the form of 3 (three) main problems in criminal law. These problems include the formulation of criminal acts/ *actus reus*, criminal responsibility/error (criminal responsibility/mens rea) this includes discussion of mistakes in human beings as well as in their development also the mistakes of legal entities or corporations (corporate criminal responsibility), and finally, criminal itself in this case also includes actions/treatment (Muladi & Diah Sulistyani, 2013). The effort to establish a national Penal Code as a form of legal reform to replace the colonial legacy WvS has long been associated with various thoughts, efforts, and actions. This kind of effort has been started in 1963 precisely in a seminar of the first national law that produced a recommendation that the draft of the codification of national criminal law is completed as soon as possible. With these recommendations, in the following year (1964) the first renewal concept began to be discussed. Successive discussions then produced various changes in the concept, starting from the concept of 1968, the concept of 1971/1972, the concept of 1982/1983, which was then continuously updated to become the concept of 1987/1988. This concept also underwent continuous studies until it became a 1991/1992 concept (Barda Nawawi Arief, 2014).

The resulting changes in the Draft of Indonesia Criminal Law Code (as RKUHP), is the addition of the principle of material legality which is coupled with the principle of formal legality as a form of recognition of the law that lives in society as a basis for one's conviction (Sasmitha Jiwa Utama, 2020). According to Barda Nawawi Arief (YEAR), the expansion of the formulation of the principle of legality and nature against the law is also a divestment of the main ideas used in the renewal which is called the "*idea of balance*". In brief, this idea is intended to cover a variety of crucial interests, including individual interests and the interests of society, legal certainty, and justice, between criteria/sources of formal and material law.

Living legal recognition as a basis for conviction has generated controversy and dissent(Kamalludin, 2018). The most frequently echoed disagreement is that the principle of material legality is very contrary to the meaning of the principle of legality itself ( Bakhri, 2018). This is because Article 1, Paragraph (1) of the RKUHP requires that a criminal act/actus reus must be determined in advance in law before an act can be held accountable for it. The legislation in question is, of course, a formal regulation that is formed by using

state institutions that are tasked with certain formal mechanisms. While living laws are far from the pattern of forming such regulations. This is in the sense that it is not legislation written and made by an authorised body (Gofar, 2005). Indonesia's positive law, in its development, has recognised the existence of living law as a source of law, that the principle of legality is not only associated with the meaning of *nullum delictum sine lege*, but with the meaning of *nullum delictum sine ius*. Law is more interpreted as legislation only, but further to the law that lives and is obeyed during society (Christianto, 2009).

Since the beginning, Indonesia was a pluralistic nation and consisted of various ethnic groups with various socio-cultural backgrounds. The diversity of the Indonesian nation holds various noble values of the nation's culture that reflect the unique, and invaluable identity of the Indonesian nation. These values are entrenched in various cultures including living traditions, ways of life, outlook on life, rules of life, tools of life, and so on. Not only in terms of culture, but Indonesia is also diverse in religion and beliefs which, of course, also has rich and deep values that can shape Indonesian people that are uniquely Indonesian. These distinctive values and norms are obeyed and carried out with delight by their respective communities. These values and norms are maintained and preserved in various forms and ways. One of the ways is by continuing to uphold the values and norms as a social identity amid the hustle and bustle of globalisation with all its negative influences on national identity. It has been stated that the diversity of Indonesia also includes the diversity of religions and beliefs. Islam, as one of the religions amid Indonesian society, has a set of values and norms which are adhered to by its followers. Even values and norms in Islam touch various aspects of human life without exception of aspects of criminal law. Of course, not everything can be carried out in this Republic, but as a matter of consideration, it can certainly be used as an overview of various reforms, especially in the area of criminal law (Luthan, 2009).

This paper would like to outline the concept of the legality principle in the *RKUHP* (formal and material legality) and review it with the conception of the legality principle that is contained in Islamic Criminal Law. Islamic law was chosen because Islamic law is the law of the religion adopted by the majority of Indonesians and is the most complete order of religious law and criticises all aspects of human life including in the realm of criminal law. For this reason, it is very interesting if the two legal fields are compared.

From the brief explanation above, the purpose of this paper is to find out the conceptual elaboration of the formation of the principle of legality. This includes to understand the historical background that gives rise to the principle of legality, to find out how the effect of the legality principle on the legal culture of Indonesian society. Additionally, this paper aims to understand the conceptual elaboration the principle of legality of Islamic Criminal Law, then to find out the basic ideas of the principle of legality of Islamic Criminal Law. Finally,

this paper aims to find out whether there is a match between the principle of legality of Islamic Criminal Law with the conception of the principle of legality that is contained in the RKUHP.

## Method

The research method used is a normative juridical research method. This method uses a statutory approach as well as a conceptual approach. This approach is intended to examine the legal principles and principles of law, concerning secondary data, namely primary legal material, secondary legal material, and tertiary legal material. The legal materials are in the form of laws and regulations, library materials, and legal journals. Data collection techniques in this study are library research where later legal materials found will be grouped according to the criteria. This makes it easier for the writer to analyse. Based on the analytical descriptive nature of the research, the analysis of the data used is qualitative analysis to reach the desired conclusion( Disemadi, and Roisah, 2019)

## Result and Discussion

### *Conceptualisation of the Principle of Legality (West) and Its Journey in the Path of Human History*

Moeljatno said that the principle of legality had at least 3 basic conceptions in the following forms: 1). Acts which are threatened with a crime must be formulated in advance in a statutory regulation; 2). Prohibiting the use of analogies in determining the existence of a criminal offence, and 3). The backward/retroactive criminal regulations are not permitted. (Moeljatno, 2008). The first basic conception requires that criminal legal norms must be written legal norms so that their existence is known by legal representatives, in this case, the community. This is because with them knowing so, surely in the minds of everyone there will be a feeling of warning to avoid these actions so as not to trip over legal issues which will eventually drag themselves into suffering called crimes. This sense of warning is what Von Feuerbach called *psychologische zwang* or psychological pressure theory.

The second conception of the principle of legality is to tell the public that a person must not be arbitrarily ensnared with rules that are completely absent or not written in the rules of law even though they have identities with each other. This idea is, of course, is to protect everyone from being easily criminalised under the pretext of their actions being seen as analogous to existing rules. Then, as is well known, the debate turns into giving meaning from the analogy itself, namely whether it is only a method of interpretation - which is often identified with extensive interpretation or is already a separate form. A frequent and popular example among academics is a case of theft of electric power in 1921. This popular case

revolved around the meaning of *goed* (objects) in the application of Article 362 of the Criminal Code (article on theft) which later led to disagreements among scholars.

Paul Scholten (DATE) considers there is no principle difference between analogy and extensive interpretation. Both differ only in terms of gradation, the rest is the same. However, Scholten (DATE) rejects the analogy in determining criminal acts which automatically also when viewed from his opinion rejects extensive interpretation. According to Moeljatno (DATE), the word *goed* in WvS 1880 means objects in the sense of having a form, but today the meaning is broad to include things that do not have a form. Moeljatno (DATE) does not deny that between analogy and extensive interpretation have gradual differences, but on the other hand, he thinks there are fundamental differences between the two. In extensive interpretations, people still adhere to the rules that exist, it's just that the rules are interpreted according to the current meaning not when the rules were made. Whereas in analogy, the new act does not depart from the existing textual rules, but the act is deemed appropriate also as a criminal act because it belongs to the core of the existing rules. Therefore, the analogy is to stick to the core ratios of the rules.

Understanding more about the principle of legality, our attention must not escape the historical facts that lie behind it. This principle is the fruit of a great French revolution (1789-1799). This revolution which echoes three words in the form of *liberte, egalite, and fraterlite* (freedom, equality, and brotherhood) and is the result of the resistance of the French people to the absolute power of the king. The king who was in power was King Luis XVI and ruled with absolute infinity. An example of how unlimited his government was when he deactivated *Etats Generaux* which is a kind of legislative body that existed at that time. His famous statement "*la etat c'est moi*" (the state is me), demonstrates the absoluteness of his government (Luthan, 2019).

A severe economic crisis due to state expenditure further aggravated the misery of the people. The scarcity of wheat caused the high price of bread and automatically afflicted the people until many famines led to death. The dominant factor of the depravity of the French economy at that time was the cost of fighting with several countries, namely Austria, Britain (Seven Year War), as well as the costs of fighting carried out to help the American Revolution against Britain. Even more irritating for the people was the hedonistic lifestyle of the royal family during the crisis that struck. The Queen Marie Antionette, the wife of King Luis XVI, deserved to be called "*madame deficit*" because of her very wasteful attitude.

Considering the worsening situation, finally, in 1789 Luis XVI brought back *Etat Generaux* which he had previously abandoned. The aim was clear and sought to formulate policies to save the French economy from adversity. Because the voting system was unbalanced, Group

III, included representatives of the lower-middle-class withdrawal and form a counter-representative body similar to *Etat Generaux* named *Asambel Nationale*. The formation of this institution on June 20, 1789, the embryo of the revolution's fire became more apparent. In the following month, on July 14, 1789, the rebels attacked and captured the Bastille prison which was a symbol of the King's arbitrariness and also seized a large number of weapons and ammunition. The governor and head of the Bastille prison, Marquis Bernard De Launay, was beheaded and his head paraded around the city. The people then formed a city government called the *Commune Paris*.

After the government was formed, a national body or council was formed under the name *Asamblee Nationale Constituante*. This council consists of three groups namely: *Mirabeau* (nobility), *lafayette* (nobility), and *sieyes* (religious people). The task of this council was to draw up a rule that protects basic human rights. On August 27, 1789, the Constituent Assembly announced a constitutional product called the *Declaration des Droits de L 'homme du Citoyen*. A constitution that was ratified on July 14, 1790. Since then, France became a constitutional monarchy with restrictions on the power of the King. King Luis XVI is required to swear to carry out the Constitution ( Jaelani, Handayani , Karjoko ,2020).

One important note in the Constitution resulting from the French Revolution is the “*Statement of basic human rights*” which also contains the necessity of being treated equally before the law, and the space to defend oneself in the case alleged. From this, the forerunner to the principle of legality has its initial form as an Act as stated by Moeljatno (Date) in the introduction to this article. After the French colonised the Nederlands, the principle of legality gained a place in Article 1 *wetboek van strafrecht nederlands* (1881). This principle arrived in the archipelago as a Nederlands colony which was then called the Nederlands indie, which was precisely formulated in Article 1 *wetboek van strafrecht voor nederlands indie* in 1918(Moeljatno, 2008).

In its journey, law enforcement in our country experiences legal inequality.. Legal phrases downward and bluntly upward are already familiar to our ears and even understood in the general public. Examples of such a form of law enforcement are superfluous to mention because we often hear that happening as if it raises a sceptical disgust about our punitive culture. From these various phenomena, we certainly do not necessarily give in to the situation. Unbalanced law enforcement, if we demand it until the source is a result of the legal paradigm that we profess, namely the positivistic paradigm or legal positivism (Yuherawan, 2012).

The substance of legal positivism, brought through the Dutch colonialism process towards Indonesia until the end of colonial rule in the mid-20th century, has never yielded concrete results throughout the country. However, it cannot be denied that up to now all formats,

structures, and functions in the Indonesian legal system can only be understood in a manner that is axiological epistemic as the positivism of Western law exists. The paradigm requires laws which are in the laws and regulations, not the others. As a result, laws outside the rules of law do not apply or at least are to be ruled out. Whereas the law that exists and applies is an expression of the structure of the society concerned. It is very strange and fatal if laws brought from certain social structures (West, Holland) are to be applied in other social structures that have different social and cultural backgrounds (East, Indonesia)(Suteki, 2015).

### ***Conceptualisation of the Principle of Legality in Islamic Criminal Law, Measuring Compliance with RKUHP***

It has been stated in advance that the initial milestone of the principle of legality found its formal form in the legal system is in the Declaration des Droits de Lomme du Citoyen (1789). This is a constitution that was born in France as a people's reaction to the absolute power of King Luis XVI. The basis of this constitution is to echo the rights of individuals to be treated fairly and not arbitrarily by the authorities. However, long before all of that, the principle of legality was introduced by the Islamic Sharia through the Koran as a guide for humans in living life. The main basis of the principle of legality in Islamic Criminal Law does not originate from human reason, but rather from Divine provisions. The Divine Understanding can better understand human nature and understand its various aspirations and goals more precisely. Allah SWT says “... *and we will not punish until we send an apostle*” (Qur’an, 17:15). In another surah, Allah SWT also said “... *he is a witness between me and you. And this Koran was revealed to me so that I give warning to you and those who reach the Koran (to him) ...*” (QS 6: 19). It can be said to be arrogance if Western civilisation overrides this fact and claims that this principle is only found in Europe and does not exist in Islamic Sharia (Santoso, 2016).

Before understanding the concept of the principle of legality in Islamic Criminal Law, it is important to understand in advance the division of criminal acts (*jarimah*) in it. It is felt very necessary to remember that each crime has its characteristics that distinguish between one another. In Islam, criminal acts are divided into three major groups based on the seriousness of an act and the severity of the sanctions for that act (Lego Karjokoa, Djoko Wahyu Winarno, Zaidah Nur Rosidah, I Gusti Ayu Ketut Rachmi Handayani,2020).

Islamic Criminal Law divides criminal acts (*jarimah*) into three major types, each of which has its characteristics and types. The division are 1). *jarimah hudud*, 2). *jarimah qishas-diat*; and 3). *jarimah ta'zir*. *Jarimah hudud* is conceived of as the top *Jarimah* and is also considered serious in the Islamic Criminal Law. This is due to the object being attacked by *Jarimah* is in the public interest. However, this does not mean that the crime of *hudud* does

not affect personal interests at all, especially about what is called the right of God. Classified as crimes of *hudud*, there are seven crimes namely *riddah* (apostasy), *al-baghyu* (rebellion), *zina* (adultery), *qadzaf* (accusation of false adultery), *sariqah* (theft), *hirabah* (robbery), and *surb al-khamr* (drinking khamr).

The second division of the *rahmah* is the *rahmah qishas-diat*. *Jarimah* is classified at the intermediate level between *Jarimah hudud* and *jarimah ta'zir* in terms of severity of punishment. As for the radius which is classified in the *qishas-diat* radius is less serious than the first (*hudud*), but heavier than the next (*ta'zir*). The pieces of law that are attacked by these tigers are the integrity of the human body, both intentionally and unintentionally. *Jarimah* is synonymous with a crime that exists in modern criminal law, namely, crimes against humans or crimes against person. The fingers that fall into this category are intentional killings, intentional homicides, homicides, neglect, and injury/illness due to negligence.

The last categorisation of *jarimah* is *jarimah ta'zir*. The *Jarimah* which is included in the *Jarimah* group is not determined by the *Syara'*, but rather is determined by *Ijma'* (consensus). This relates to the right of the state to determine various acts which if it deserves criminal punishment (criminalisation). These acts are more or less inappropriate actions that cause physical, social, political, financial, or moral damage to the individual or society as a whole.

According to Topo Santoso (DATE), the application of the principle of legality in Islamic Criminal Law can be categorised into two parts: 1) in terms of determining prohibited acts, *hudud*, *qishas*, and ordinary *ta'zir*, the *Shari'a* has determined all kinds. Whereas *ta'zir* is for public benefit, the actions are not formulated specifically, and 2) when viewed in terms of determining the punishment, in the *rahmah hudud* and *qishas syariah* has provided complete regulation of the sentence, while in the *rahmah ta'zir* the *Shari'a* provides sets of sentences that can be chosen by the judge. The same thing was also expressed by Abdul Qadir Audah that the application of the principle of legality in *hudud* and *qishas* crimes was carried out carefully and thoroughly. Whereas, in criminal acts *ta'zir*, the principle of legality was relaxed to a certain extent. The reason is more or less because the *ta'zir* crime has its style and the general benefit is required. As a result, in the *ta'zir*, crime does not require the mention of the sentence separately, like other criminal acts. Henceforth *Ulil Amri* was given the authority to determine *Jarimah* and the *ta'zir* punishment is of course with the limitations of *Shari'a* and adjusted to the general benefit.

Criminal *hudud* sanctions are clearly determined without being reduced or added by the Judge. Also, Islamic law does not give the rights of forgiveness for this type of crime to the executive branch. That is why this punishment is referred to as *hudud* which means

boundaries, meaning that the limits, levels, and types have been firmly determined and are the right of Allah SWT. Here, it is also determined that one can find the protection of individuals from the arbitrariness of the authorities because the authorities do not have the space for it.

The Judge's role in the *qishas* criminal act is almost the same as his role in the *hudud* crime in the sense that the Judge is not permitted to determine the level, type, and limit of a sentence, but must follow the provisions outlined. The most striking difference is the existence of a means of forgiveness by family members as victims and with it, judges are prohibited from imposing *qishas* sentences and must replace them with *diyat* (a kind of compensation) to the victims' families. Then if the family exempts the *diyat* that was charged to the perpetrator, the new judge may sentence *ta'zir* in exchange for the sentences that have been forgiven by the victim. This is because the *qishas* criminal act is a crime that concerns the rights of each individual, therefore both the victim and a guardian have the right to forgive the offender from punishment. Forgiveness is purely on the part of the victim. The ruler is not given the right to do so. According to the authors, this system is what is often echoed as *restorative justice* today. Inside there are aspects of protection not only of the perpetrators but also of the victims. It is evident that Islamic law knew this long before Western people understood this concept.

Regarding *ta'zir* criminal conduct, some circles are mistaken and ultimately fail to understand the conception of the principle of legality in it. Among these circles are scholars from the west who consider that the principle of legality does not apply in *ta'zir* crime because it is not found in the Qur'an and the *Sunnah* (hadith) of the Prophet Muhammad. This view is superficial and incorrect. According to Abdul Qadir Audah, this kind of view is a view that originates from false conjectures and prejudices caused by poor understanding and lack of effort in conducting studies. This little understanding of the terms in Islamic Law also causes an inability to understand Islamic Shari'a. The truth is that Islamic law has established which actions are categorised as immoral ones which are subject to *ta'zir* punishment. According to Nagaty Sanad as quoted by Topo Santoso, the correct view is the principle of legality in Islam that applies to *ta'zir* is the most flexible compared to other criminal acts.

Applying the principle of legality in such a way, the balance between community protection and individual protection is achieved through the categorisation of crime and its sanctions. This is what is sought by Western criminal law which was already known by the Islamic Shari'a long before they recognised the principle of legality. The RKUHP material which is about to be compiled like the Barda Nawawi Arief conveyed in essence, starting from a variety of points of thought, all of which can be referred to as "*the idea of balance*". These ideas include several points of thought in the form of 1) Monodialistic balance between

public/community interests and individual interests including the idea of criminal individualisation; 2). Balance of objective and subjective elements; 3). The balance between formal and material criteria; and 4). The balance between legal certainty and justice.

Starting from that main point, the RKUHP stipulates several formulation policies, one of which is to balance the principle of formal legality with the principle of material legality as a source of law. With the principle of material legality, a person can be blamed not only based on written law or legislation but also on the law that lives in a society that is not written and differs from one community to another community. The flow of thought is a consequence of the adherence to the teachings of the material nature against the law. RKUHP believes that the nature of unlawful acts is an important element in criminal acts even though in the formulation it is not often mentioned the element of unlawful nature. Therefore, the formulation in the Act must be seen as an objective measure in criminal offenses. Also, this measure must also be tested materially whether it is contrary to public legal awareness or with living law.

Using formal legal sources/formal legal principles is prohibited from using analogies. In using the material legal material/the principle of material legality, the law that lives in the community that can be used as a source of law is in accordance with the values of Pancasila (a national criteria/guidelines) and/or general legal principles recognised by peoples of nations (international criteria/signs). From past exposures, researchers are able to get the results of the analysis relating to the concept between several principles of legality. Then researchers can objectively evaluate which concepts are more suitable for our situation or our culture as a diverse country.

The similarity between the principle of formal legality with the principle of legality in Islamic Criminal Law is the level of rigidity and accuracy in the mention of criminal acts. This can be seen in the mention of criminal acts in the criminal acts of *hudud* and *qishas* where the type and sentence have been determined. Judges may not add and subtract provisions. What is a little different is that in Islamic Criminal Law is an acknowledgment of forgiveness by the victim or their family, which gives effect in imposing a sentence in a *qishas* crime. The rest of the authors conclude have in common. Rigidity and accuracy in the mention of these criminal acts aims to protect the public from the arbitrariness of the authorities in determining criminal acts and sentences. Also, the existence of forgiveness by the victim or their family shows that at the same time the Islamic Criminal Law also protects individuals as victims of criminal acts. This is where the advantages of Islamic Criminal Law where, on the one hand, it protects the interests of society and, on the other hand, it also protects the interests of individuals. The thing that has been sought in Western Criminal Law turned out to be in existence long before which the Islamic Criminal Law already knew. This also shows that the rules given by Allah SWT to humans are fair and have a

progressive dimension compared to rules made by humans which are often dry on these dimensions and only based on mere ratios.

The point of conformity between the principle of material legality with the principle of legality in Islamic Criminal Law lies in the non-specific mention of criminal acts. In the principle of material legality, the basis for a person's conviction is not only in the form of written rules as in the laws and regulations, but also unwritten rules relating to regional customs and, of course, differing from one region to another. In Islamic Criminal Law precisely in *ta'zir* criminal acts, especially in *ta'zir* for public benefit, there is no specific mention of the crime because of course actions that disturb public benefit will be very relative and vary from one place to another. This is similar to customary law which is certainly different from one region to another.

The conception of the legality principle in the RKUHP as stated by Barda Nawawi Arief (DATE) wants to strike a balance between formal criteria and material criteria by holding formal legality principles side by side with the material legality principle, apparently by the principle of legality in Islamic Criminal Law which also has these two things. In short, the writer can conclude that the legality principle contained in the RKUHP is by Islamic Law. Although Islamic Criminal Law is not applied or perhaps not yet in diverse parts of Indonesia, at least the fundamental principles contained in it are by what is going to apply. From this it can also be concluded that Islamic Law can adapt to even a pluralistic society. Once again that Allah SWT understands more about humans than humans themselves. Therefore the law that he determined, of course, if humans want to study and explore more deeply will be suitability in the application.

## **Conclusion**

The basis of the principle of legality from the West wants to echo the rights of individuals to be treated fairly and not arbitrarily by the authorities. This is by their historical background since the time when Luis XVI ruled the French empire in absolute terms without limits and arbitrariness arose to the misery of the people. Long before all of that, the principle of legality was introduced by the Islamic Shari'a through the Koran as a guide for humans in living life. The main basis of the principle of legality in Islam does not originate from human reason, but rather from Divine provisions. The Divine Understanding can better understand human nature and understand its various aspirations and goals more precisely. In the conception of the legality principle of Islamic criminal law in such a way, the balance between community protection and individual protection is achieved through the categorisation of crime and its sanctions. The conception of the principle of legality in the RKUHP comes from the main idea called the "idea of balance". The flow of thought is a consequence of the adherence to the teachings of the material nature against the law.



RKUHP believes that the nature of unlawful acts is an important element in criminal acts even though in the formulation it is not often mentioned the element of unlawful nature. So the formulation in the Act must be seen as an objective measure in criminal offences. Also, this measure must be tested materially whether it is contrary to the awareness of community law or with living law. The conception of the principle of legality in the RKUHP as stated by Barda Nawawi Arief (DATE) wants to strike a balance between formal criteria and material criteria by holding the formal legality principle side by side with the material legality principle apparently by the legality principle in Islamic criminal law. In short, the writer can conclude that the legality principle in the RKUHP is by Islamic law. Even though Islamic Criminal Law may or may not have been applied in Indonesia, at least the fundamental principles contained in it are by what is going to apply. From this it can also be concluded that Islamic Law can adapt to even a pluralistic society, and the principle of formal legality coupled with the principle of material legality is one of them.

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