Pakistan Journal of Criminology
Vol. 16, No. 04, October—December 2024 (575-582)

The Principle of Material Legality in the Criminal Code: A Paradigmatic Review of the Normativity of Adat Law in the Indonesian Legal System

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Abstract

This research adopts a constructivist paradigm, emphasizing the interaction between legal norms and the values held by stakeholders. Philosophical analysis of law is employed to delve into this interaction and understand its application in the Indonesian legal context. The research findings indicate that the normativity of customary law is significantly influenced by the principle of material legality in the Criminal Code. Customary law is recognized to a certain extent within the national legal system, but tension between being more formal and customary law often exists. The constructivist paradigm helps reveal these dynamics by emphasizing the importance of dialogue and interpretation in legal application. The study concludes that customary law holds an important position within Indonesia's legal system despite challenges in its application. Recognition of customary law needs to be enhanced through more inclusive policies and intensified dialogue between formal and customary law. The paradigmatic analysis provides valuable contributions to understanding the complexity of customary law normativity within the Indonesian legal system.

Keywords: paradigm, principle of material legality, criminal code, adat law, normativity, and constructivism.

Introduction

The application of the principle of material legality is reflected in the expression of Article 2 of the Criminal Code: "The provision referred to in Article 1 paragraph (1) does not reduce the applicability of living law in society that determines that a person deserves to be punished even though the act is not regulated in this Law." Although it seems that this article recognizes the existence of living law, the expression of paragraph (3) in the same article indicates

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otherwise: “Government Regulation regulates the provisions regarding procedures and criteria for determining living law in society.” The explanation of Article 2 paragraph (3) of the Criminal Code reinforces that the Government Regulation formulated is a guideline for regions to establish living laws in Regional Regulations.

The living law referred to by the Criminal Code is intended for adat law that applies in a particular region. For me, conflict arises when we try to measure the extent of the existence of adat law that can be accommodated by this regulation, including other forms of living law. Alternatively, whether this regulation can truly accommodate adat law, eliminate the disintegration of legal systems between them, and unite them into an integrated legal system. If this is true, assuming a country with several applicable legal systems, the issue of legal pluralism can be annulled.

This means that legal centralism, with state law as the only form of existing law, is the right solution to overcome the existing legal entanglement. They are, indeed, assuming that other “legal systems” are recognized without specific preconditions given by state law. However, even if this scenario can occur, conflicts arise when many norms applicable in the same situation contradict each other. It is necessary to understand how norms work in law and what makes a standard called a norm.

Norms are reasons for action and are a fact (Raz, 1999). At least, that is how Raz formulates it. For him, rules always prevail over other non-legal principles and standards due to their position as exclusionary reasons. By including non-legal standards, such as adat law, into the rules, conflict should not occur. According to Dworkin (1967), if there is a conflict between two rules, one of them is not a valid rule.

When various norms can be applied to the same situation, the actors involved are forced to clarify the relationship they see among them, and we move towards a more vital "centrality of the margin.” As actors engage in this practice, they also redefine the entire command, weighing the weight of each norm in that command and the relative strength of their claims to customs or institutions. Suppose our primary understanding of the law is a social construction. In that case, the shift of one actor to another in viewing the relationship between parts of the legal command forms the law.

A similar view was proposed by Brian Z. Tamanaha (1997; 2021), providing a way of viewing law known as the social theory of law. This perspective is rooted in interpretive analysis that focuses on how law is constructed as a social presence through shared meaning and participation in practice and coordinates complexity through social interaction. This label

recognizes that law is a social construction; about how social actors give meaning to law through meaningful actions.

The recognition of living law by the Criminal Code, which is touted as the state's step to accommodate a broader context of 'law', needs to be tested. Assuming that 'law' results from human construction, can this recognition align with such a view? If the adat law that lives in traditional communities applies, can this regulation make adat law 'valid'? Even, does this validity need to be questioned? If adat law is truly 'law,' recognition from textual legal sources will certainly not affect its validity. Both are essentially 'law,' whether they recognize each other.

All the foundations of the above thoughts certainly cannot be examined just by relying on positive law. A form of study that views law and its parts broadly is needed. Philosophy plays a role in this matter. As a field whose objects of investigation are deeply studied, philosophy has one goal: the ultimate truth. However, even if what is "true" does not exist, philosophy offers deep investigation and reflection on the world and everything in it, including law. Differences in thought from philosophical studies are inevitable. Thus, legal thought commonly studied in law classes is only a few of the many thoughts, like two or three out of thousands of lottery tickets.

Erlyn Indarti (2010) provides a bridge to various schools of legal philosophy. She does this by adopting the concept of paradigms from Guba and Lincoln into legal philosophy. Simply put, a paradigm is a set of fundamental beliefs or a mental construct. This concept makes it easier for someone to map - and see how far or close- various schools of legal philosophy through five main paradigms: positivism, post-positivism, critical theory, participatory, and constructivism. The paradigm, composed of ontology, epistemology, and methodology, is closely related to the building blocks of (broad) legal philosophy consisting of (narrow) legal philosophy, legal theory, and legal practice. By standing on the constructivist paradigm, I also aim to explore the concept of normativity previously discussed through the constructivist paradigm.

This research traces how customary law's normativity affects law enforcement holistically. It also interprets the forms of recognition and implementation to find the position of customary law within the legal system and construct it in line with what I believe. As previously mentioned, Guba and Lincoln's constructivist paradigm is a starting point for understanding the question of 'what is normativity' through shared meaning.

Research Method

This research adopts research strategies commonly used in philosophical studies, specifically employing conceptual analysis and hermeneutics within a constructivist paradigm as a guiding framework, as outlined by Guba and Lincoln. Conceptual analysis, originating from Descartes and Kant, explains and defines unclear expressions by breaking concepts into components. I use the term 'concept' as Keith and Ender (2004, pp. 1940–2000) do, referring to Kaplan's idea of concepts as human constructs. To analyze legal texts, I apply legal hermeneutics, which interprets and applies legal rules rooted in philosophical hermeneutics. Gadamer views hermeneutics not as rule-based text interpretation but as understanding what happens to the interpreter. The hermeneutic process includes application, understanding, and interpretation. The constructivist paradigm assumes a relativist ontology (multiple realities), a subjectivist epistemology (researcher and respondents co-create understanding), and naturalistic methodological procedures. Terms like credibility, transferability, dependability, and confirmability replace traditional positivist criteria such as internal and external validity, reliability, and objectivity (Denzin & Lincoln, 1994).

Results and Discussion

In discussing the paradigmatic analysis within the core of legal research, it is first essential to delineate the broader contributions of paradigms. Following Elliot W. Eisner's (1990) insights, paradigms are pivotal in offering alternative lenses that challenge the prevailing singular epistemology. This alternative paradigmatic approach critically examines how we define 'law' within legal academia. Traditionally, law has been construed as an objective entity, often grounded in textual authority wielded by the state. This perspective confines legal knowledge to a singular understanding, limiting the exploration of pluralistic views and diverse cultural interpretations.

Adopting alternative paradigms in legal academia expands the discourse on law beyond its conventional confines. It fosters a more nuanced understanding where legal scholars and students are encouraged to question the objectivity of legal norms and the possibility of multiple perspectives influencing legal interpretations. This approach recognizes the diversity of intelligence, cultural viewpoints, and cognitive constructs that shape our understanding of 'law'. It opens avenues for redefining legal norms, including recognizing non-legal norms as potentially valid legal standards.

This research endeavour exemplifies an effort to introduce alternative cognitive frameworks in legal education. It challenges the traditional state-centric

view by exploring how adat law norms, often considered non-legal, can be viewed through a legal lens. By doing so, it proposes a critical evaluation of the material legality principle as the foundational basis of the National Criminal Code. This study aims to provide a critical standard for evaluating how legal academia perceives legal norms specifically, thereby enriching legal education with diverse cultural insights. Ultimately, this work strives to inspire a more inclusive and pluralistic approach to legal education, encouraging a broader appreciation for multiple intelligences in interpreting legal norms.

In conclusion, adopting alternative legal research and education paradigms offers transformative potential. It challenges entrenched notions of legal objectivity and encourages a more inclusive approach to understanding legal norms. This paradigmatic shift enriches the discourse within legal academia and informs broader societal understandings of law, paving the way for a more comprehensive and culturally sensitive legal education.

The following are descriptions of each paradigm regarding the normativity of customary law in the context of the Indonesian legal system post the existence of Article 2 of the National Criminal Code, which is cited as a reflection of the principle of material legality:

Positivism Paradigm: Legislative regulations are an objective standard in the context of the Indonesian legal system. Whatever provision is referred to by legislative regulations as the principle of material legality is the "true" meaning of the principle of material legality in its understanding as a legal norm. Even if there are other understandings of the principle of material legality, only those regulated in the National Criminal Code hold the position as legal norms. Article 2 of the National Criminal Code refers to laws within society (living law). At the same time, its explanation states that the living law referred to is customary law regulated by regional regulations through mechanisms regulated in Government Regulations. Thus, Article 2 of the National Criminal Code imposes limitations on living law, even on customary law, which is a “correct” and objective matter. If there is a conflict regarding the legal rules regulated in the National Criminal Code, the resolution adopted refers to the types of settlements regulated in legal rules (the state).

Post-positivism Paradigm: Legislative regulations are an objective standard in the context of the Indonesian legal system. However, the objectivity of this matter is still worthy of examination. Periodic testing/revisions can continue to be conducted to approximate the “understanding of legal norms” that exist. Even though Article 2 of the National Criminal Code imposes limitations on the application of living law, there are still additional efforts to test these limitations. Moreover, there is still room to replace them with new standards, even though

they have been implicitly regulated in the National Criminal Code. In the Indonesian legal system context, "non-legal norms" for the positivism paradigm may constitute a legal norm. Testing is conducted to "discover" legal norms that have been overlooked and considered part of non-legal norms. In practice, such testing is often found in legal applications in cases where conflicts involving legal rules (state) arise. For example, Law No. 48 of 2009, which provides discretion for judges in decisions, shows that what is "law" can continue to be critically tested to approximate someone's understanding of the actual meaning of the law.

Critical Theory Paradigm: Legislative regulations establishing standards of what can be referred to as legal norms do not depict the "true" legal norms. Living law constitutes legal norms, while legislative regulations constitute non-legal ones. However, the crystallization of specific values causes legislative regulations to be referred to as legal norms and living law to be referred to as non-legal norms. In this case, there are two possible conflicts with the applicable "law": 1) conflicts with "virtual" state law (positioned as "virtual" law); and 2) conflicts with the actual "law". Thus, "virtual" law may conflict with the actual "law".

Similarly, the actual "law" may conflict with or not be recognized by "virtual" law. Such conditions require a meeting point between "virtual" law and the actual law to align "virtual" law (state) with the actual law. If this practice continues, "virtual" law (state) will gradually erode. As a result, the law understood by the state will no longer be law in its "virtual" meaning, but rather in the meaning that is "actual".

Participatory Paradigm: Legal norms are understood and applied through active and collaborative involvement between the community and policymakers, creating legal standards that reflect their social and cultural realities (for example). This means that "law" is not understood as something already existing. A co-creative dance exists between one's mind and the existing cosmos (primordial reality). The result of this interaction is what gives the true meaning of "law". In practice, if there is a conflict between someone and the meaning of "law" that exists within the cosmos order, that "law" can be referred to as pre-existing "reality" (primordial reality). This alone is not enough to determine the true meaning of the law. A meeting point is needed between one's understanding of "law" and the understanding of law as a primordial reality. Interaction between the two brings out the true meaning of the law. Resolving conflicts related to something that goes against the "law" must also be referred through such a resolution.

Constructivism Paradigm: Living law can be simultaneously called legal and non-legal norms. Given its diverse context, legal norms are understood through various local contexts and socially constructed through ongoing interactions and dialogue among various stakeholders. This results in a plural understanding of the

law. One may feel that an "objective" understanding of the law is impossible through such understanding. Even so, a common understanding of the law can be built by seeking a resultant/distillation of each existing legal thought. At the very least, this method can provide an acceptable understanding of the "law." In practice, adherents of this paradigm use consensus methods to produce a legal understanding acceptable to all forms of existing thoughts. One difference distinguishes the resolution of legal conflicts between participatory and constructivist paradigms. The participatory paradigm focuses on the interaction between individuals and the existing cosmos without the need to produce a decision that is positioned amid diverse thoughts. This means that the decision produced can still lean towards a specific thought as long as the result is produced through the interaction of individuals (subjective) and the cosmos (objective) that exists.

On the other hand, the constructivist paradigm requires agreement from each thought. To make decisions, one must consider the existing (objective) legal understanding. Consensus agreement illustrates the practice of legal resolution from this paradigm.

Based on the above analysis, each paradigm contributes to understanding the standards that can be called legal norms, together with the standards that can be called non-legal norms. Each paradigm also provides a means of resolution in case of conflicts with the existing "law," whether it is law referred to as "objective" or not.

Conclusion

Legal constructivism extends this understanding by viewing standards recognized as "legal norms" by the most robust authority in a broader context. This challenges the notion that legal rules (state rules) are always superior to other reasons. Paradigmatic analyses contribute to understanding these standards as legal or non-legal norms post the principle of material legality in Article 2 of Indonesia's National Criminal Code. This principle provides for living law but limits this space to customary law regulated by regional regulations. Legal paradigms like positivism, post-positivism, critical theory, participatory theory, and constructivism offer varied interpretations of customary law's normativity under Article 2 of the Criminal Code, depending on regional regulations - regulated standards.

From the three discussed issues, here are my suggestions for this research: First, regarding the initial issue, law academia (universities) should emphasize the distinction between legal norms and non-legal norms; legal norms are not solely confined to those found in legislation. Hence, legal thinkers' perspectives that

oppose such traditional views can be explored. Second, concerning the second issue, if the state (legislators) intends to implement the material legality principle as understood by the Criminal Code, then limitations on its application within Indonesia's legal system should be removed, recognition of living law should be comprehensive (not just limited to customary law), the determination of living law should be based on the consensus within each community and conflict resolution should be based on a consensus between differing legal values and understandings, with the state acting only as a facilitator. In a more radical sense, the state could recognize customary law as an independent legal system to achieve solid legal pluralism, no longer subject to Indonesia's national legal system.

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