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Legal Legism in the Era of the National Criminal Code: The Prosecutor's Office as a Fair Law Enforcer

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ABSTRACT

The enactment of Law Number 1 of 2023 concerning the Criminal Code (*National Criminal Code*) impacts the Prosecutor's Office, which has traditionally been formalistic and procedural. This law encourages a stronger focus on justice, effective law enforcement, and victims' rights, while enhancing the Prosecutor's strategic role in preventing and prosecuting crimes under the new *Criminal Code* norms. However, the *National Criminal Code*'s recognition of living law in society, alongside written law, creates tension between legal certainty and substantive (social) justice. Prosecutors face dilemmas when acts criminalized by customary law are absent from written law, leading to legal uncertainty in prosecution. This study highlights that Article 1 paragraph (1) of the *National Criminal Code* follows the legalism school, emphasizing formal legality, where punishment is based solely on written law, ensuring legal certainty and human rights protection. Meanwhile, Article 2 expands this principle by acknowledging living law, social values, customary norms, and substantive justice, reflecting the principle of material legality. Practical implementation is evident in innovations by the Bali High Prosecutor's Office through *Bale Kertha Adhyaksa Jaga Desa* and *Umah Restorative Justice*, which blend positive law with the customary law of *Tri Hita Karana*. The Prosecutor's Office now adopts an adaptive, humanist, and fair approach, balancing social harmony with legal certainty.

INTRODUCTION

The reform of the national criminal law through the ratification of Law Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as the National Criminal Code) is an important milestone in the history of legal development in Indonesia (Bedner & Vel, 2010; Pompe, 2017). This change not only marked the end of colonial legal dominance but also tested the extent to which the national legal system could strike a balance between legal certainty derived from legalism and substantive justice derived from the "law" that lived in society (Scheb & Scheb II, 2015).

Legism is a school in legal philosophy that holds that the only legal source is what is written in the statute (Benda-Beckmann & Benda-Beckmann, 2014). Based on this understanding, judges and law enforcement officials should not interpret the law outside the text of the law because legal certainty can only be guaranteed through written laws (Hiariej, 2016). The principle of legality that applies in the National Criminal Code is linear with the idea of *legism* that emphasizes legal certainty with the adagium *nullum delictum nulla poena sine praevia lege poenali*, meaning that there is no delict, no crime, without being preceded by criminal provisions in the legislation. As stipulated in the

provisions of Article 1 paragraph 1 of the *National Criminal Code*, which states, "No act can be subject to criminal sanctions and/or actions, except on the strength of criminal regulations in existing laws and regulations before the act was committed." This formulation is known as the principle of *formal legality*, which emphasizes that every act considered criminal must first be determined by existing laws and regulations before the act is committed (Cahyadi, 2025; Diantha, 2019; Efendi & Ibrahim, 2018; Ehrlich & Ziegert, 2017).

The National Criminal Code, in its development, provides a significant update to the principle of formal legality by expanding its scope (Anwar, 2023). This expansion appears in two important aspects: first, the prohibition of interpreting analogies, which is explicitly affirmed to maintain legal certainty; and second, the recognition of living law, including customary law, as part of the national criminal law system (Artadinata & Sahuri, 2023). This change marks a shift in the principle of legality from being formal, which is only based on written law, to also material, which accommodates the values of justice that live in society (Banulita, 2023). This is an expansion of the principle of legality not only formally (based on written laws), but also materially (accommodating the laws that live in society).

Table 1. Comparison of Principles of Formal and Material Legality in the National Criminal Code

Principles of Formal Legality	Principles of Material Legality
Article 1 paragraph (1) of the National Criminal Code *No act can be subject to criminal sanctions and/or actions, except for the strength of criminal regulations in laws and regulations that existed before the act was committed*	**Article 2 paragraph (1) of the National Criminal Code** *The provisions as referred to in Article 1 paragraph (l) do not reduce the validity of the law that lives in society which determines that a person deserves to be punished even though the act is not regulated in this Law.* **Article 2 paragraph (2) of the National Criminal Code** *The law that lives in society as referred to in paragraph (1) applies where the law is alive and as long as it is not regulated in this Law and in accordance with the values contained in Pancasila, the Constitution of the Republic of Indonesia in 1945, human rights, and general law principles recognized by the people of nations.*

Source: Law Number 1 of 2023 concerning the National Criminal Code (KUHP), articles 1 and 2

This expansion, on the one hand, strengthens legal certainty as desired by the notion of *legalism*, but on the other hand, provides space for flexibility and substantive justice. Thus, Indonesian criminal law in the era of the National Criminal Code no longer focuses solely on legal certainty but also pays attention to social justice that grows in the socio-cultural context of the nation, oriented towards the values of justice.

Conceptually, the existence of this reform in national criminal law, especially related to the recognition of law that lives in society as a manifestation of the value of justice in criminal law, should have a great influence on the role of the Prosecutor's Office of the Republic of Indonesia as a law enforcer and controller of criminal cases (Musdalifah et al., 2025; Zulyadi & Lubis, 2023). The Prosecutor's Office has a central role in upholding the principle of legality. As an institution exercising state power in prosecution and case control (dominus litis), the Prosecutor's Office is obliged to ensure every criminal law enforcement process is conducted based on legal, clear, and pre-existing laws and does not use interpretations exceeding legality limits (Fadilla et al., 2024; Faisal & Hikmah, 2025; Faradila, 2025); Jiwanti, 2024). With the enactment of the National Criminal Code, the Prosecutor's Office also plays a role in ensuring every law enforcement action aligns with

substantive justice objectives as mandated by *Pancasila* and the National Criminal Code, positioning it at the forefront of maintaining a balance between legal certainty and social justice (Manullang, 2021; Marzuki, 2016).

Nevertheless, the Prosecutor's Office's implementation of its role within the principle of legality framework faces several obstacles. The Office should adhere to the (formal) principle of legality and uphold human rights. However, the expanded regulation of the principle of material legality challenges the Prosecutor's Office because in enforcing criminal law, it must ensure the integration of customary law (the principle of material legality) does not conflict with human rights and the rule of law. Regulatory adjustments and human resource capacity building among prosecutors and other law enforcement officials are crucial for effective and sustainable integration in Indonesia's dynamic socio-cultural diversity. Lack of integration between customary and national law complicates prosecutors' interpretation of the *living law* applied in the National Criminal Code. Cultural and institutional barriers, such as political pressure, limited independence in handling strategic cases, and constrained human resource capacity, also affect the effectiveness of applying the principle of fair legality. These obstacles impact the Prosecutor's Office's success in enforcing fair criminal law in the National Criminal Code era, which relies not only on adhering to the law's text but also on understanding social, customary, and humanitarian values embedded in society.

The principle of legality embraced in Indonesian criminal law is based on the legalist school view that the sole legitimate source of law is written law, so an act can only be punished if expressly regulated in existing laws and regulations. Historically, the idea of legality, associated with legal certainty in law enforcement, especially criminal law, was born from the notion of *legism* as stated by L.J. van Apeldoorn.

L.J. van Apeldoorn, a Dutch jurist, explained the "birth" of the principle of legality idea. He stated that his thoughts originated from J.J. Rousseau's (1712–1778) influence on the law formation process, which is exclusively the legislators' authority. Rousseau's view excluded the habits living in people's daily lives as a basis for law formation. According to van Apeldoorn, Rousseau regarded law as the original statement of the people's will and the only source of law formation. Consequently, social customs became a source of law not formally recognized or, in van Apeldoorn's terms, "laws in secret." Rousseau's opinion was validated by the rise of state existence through the idea of sovereignty, making the state a tangible form of the people's will.

Van Apeldoorn's thinking does not fully explain the connection between the social contract idea and legality itself. This became clearer when J.M. van Bemmelen, a Dutch criminal law expert, elaborated further. Van Bemmelen stated that alongside Rousseau, Charles de Secondat, Baron de Montesquieu (1689–1755), also influenced the legality idea's origin.

Van Bemmelen explained the principle of legality links to human rights documents, including Montesquieu's philosophical ideas. According to him, this principle initially appeared in the *Déclaration des droits de l'homme et du citoyen* (1789), brought by Lafayette from America to France, influenced by the Virginia Bill of Rights (1776). The Virginia Bill of Rights stipulated no one can be prosecuted or arrested without law enforcement, absorbing the Habeas Corpus Act (1679) and Article 39 of Magna Carta (1215). UK law aimed to provide a legitimate legal process (procedural law) rather than material (substantive) criminal law limitations.

Montesquieu first explained the material limitation in his book *De l'esprit des lois* (1784), stating judges' duties are solely law's mouthpiece. Van Bemmelen also attributed a material understanding to Rousseau, who in *Du contrat social* posited law as a product of societal agreement, so behaviors punishable by society should be formulated in law. Cesare Beccaria (1738–1794) shared this view, asserting only the law can define crimes and lawmakers must hold the criminal law-making

power, representing community interests. Beccaria emphasized judges should not sentence people unless stipulated by law.

Van Bemmelen further highlighted Paul Johann Anselm von Feuerbach (1755–1833) who formulated Montesquieu's, Rousseau's, and Beccaria's thoughts into the principle *nullum crimen, nulla poena sine praevia lege poenali* (no crime, no punishment without prior penal law). Feuerbach viewed criminal law as psychological pressure preventing crime, adding to the other thinkers who focused on legal certainty and human rights guarantees. Feuerbach's addition emphasized law's sanction component creates psychological deterrence.

The influence of Montesquieu and others peaked in the 19th century, spawning the *legitimism* movement, as described by van Apeldoorn. This movement considers all law enforcement activities as rational, logical applications of law content to cases, viewing law as a logical system universally applicable.

In contrast, Eugen Ehrlich proposed the idea of *living law*, which governs life even if not codified in legal propositions. Ehrlich stated: "It is not a question of an ideal or of a metaphysical or historical significance. It is something to be found by actual looking into the facts of life of the time and place. It is a question of which are living, i.e., have an inner order which is actually functioning, and which are moribund, i.e., are ceasing to have such a working inner order. Such relations and associations are simply social facts."

Ehrlich described *living law* as opposite to state law (positive law), which depends on social factors and thus must consider the *living law* in society. Ehrlich's concept criticized historians who narrowly defined law as legal norms, neglecting legal relationships with society. Law emerges ideally from the community, not from power or nature or God. The state should explore *living law* rather than making laws detached from societal culture and values.

Sociologically, *living law* develops from community habits continuously practiced and formalized into rules in specific areas. Unwritten *living law* can evolve, possessing a dynamic nature adapting to contemporary developments. Community habits creating *living law* are voluntary, without state coercion. In the modern era, *living law* includes local community values and subcultures allowing cultural variation. Indonesia constitutionally recognizes *living law* under Article 18B paragraph (2) of the 1945 Constitution, stating: "The State recognizes and respects the units of customary law communities and their traditional rights as long as they exist and are in accordance with societal development and the principles of the Unitary State of the Republic of Indonesia, which is regulated in law."

To conclude, this study addresses a clear research gap concerning the lack of empirical and conceptual analysis on how the Prosecutor's Office reconciles its dual mandate of upholding formal legality and material justice under the new National Criminal Code. The purpose is to analyze the Prosecutor's role transformation and identify challenges and opportunities in implementing the expanded legality principle. Theoretically, it contributes to legal philosophy discourse by illustrating the convergence of *legism* and *living law* theory in contemporary Indonesian criminal law. Practically, the findings are expected to inform policymakers and law enforcement agencies in designing more adaptive, fair, and culturally sensitive prosecution guidelines and training modules.

METHOD

In this study, the type of normative legal research used was normative legal research. This type of legal research often conceptualized law as either written law or as norms guiding human behavior considered appropriate. The selection of this method was because the research aimed to analyze the dualism in law enforcement by the Prosecutor's Office, referencing the principles of *legalitas*—

specifically, formal legality (Article 1 paragraph (1) of the *National Criminal Code*) emphasizing legal certainty, and material legality (Article 2 paragraphs (1) and (2)) emphasizing substantive justice.

RESULTS AND DISCUSSION

The Prosecutor's Office of the Republic of Indonesia in the criminal justice system, especially law enforcement, has a central role in carrying out the main function in carrying out prosecutions. As referred to in the provisions of Article 1 number 1 of Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia (hereinafter referred to as the Attorney General's Law on Amendment) explains that "The Prosecutor's Office of the Republic of Indonesia, hereinafter referred to as the Prosecutor's Office, is a government institution whose function is related to judicial power that exercises state power in the field of prosecution and other authorities based on Law". The formulation emphasizes that the Prosecutor's Office is a government institution that carries out the functions of state power in the field of prosecution and has a close relationship with the exercise of judicial power. This shows that although the Prosecutor's Office is in the executive realm, its function has judicial characteristics because it is directly related to the criminal justice process and the enforcement of justice.

Contextually, the function of the Prosecutor's Office of the Republic of Indonesia in prosecuting crimes is related to the role of the prosecutor's office as a case controller, known as dominus litis. The principle of dominus litis is a legal principle that applies in the power of prosecution. This principle is inherent in the authority of the prosecutor as the public prosecutor. Dominus Litis itself comes from Latin, namely dominus which means owner, and litis means thing. In the practice of criminal law, dominus litis is often associated with who has authority. Dominus litis has correspondence with the authority, rights, obligations, and interests to prosecute a case in the judicial process based on the benefits obtained from the judge's decision that gives birth to certain legal obligations and status.

According to Marwan Effendy, the prosecutor as the public prosecutor is a dominus litis (procureur die de procesvoering vaststelt) who owns the case and who has a central position in determining whether a criminal case can be submitted to the court based on valid evidence such as criminal procedure law or not. Basically, dominus litis provides an exception, not all criminal acts or crimes must be prosecuted, but there is a condition for prosecution not to be carried out. Dominus litis is a form of authority attached to the prosecutor as a public prosecutor based on the law to determine whether a case will be continued or not. This aims to provide protection for human rights so that the handling of cases does not drag on. This means that the prosecutor in the application of this authority will assess and determine whether a case is suitable to proceed to the trial process or not.

Conceptually, dominus litis means that the prosecutor is the owner of the case in the prosecution stage, not in the sense of material possession, but in the sense of legal control over the course of the case. This position gives the prosecutor the authority to determine whether a criminal case is worth continuing to court or terminated based on considerations of law, justice, and the public interest. However, it is important to understand that the authority of this dominus litis is not absolute, because it must still be based on the principle of formal legality, which is the basis of every criminal law enforcement action in Indonesia, especially for the Prosecutor's Office in carrying out its prosecution function. The principle of formal legality as stated in Article 1 paragraph (1) of the National Criminal Code states that "No act can be subject to criminal sanctions and/or actions, except on the strength of criminal regulations in existing laws and regulations before the act was committed". Moving on from the formulation of this provision, the principle of formal legality means that all legal actions,

including prosecution by the Prosecutor, must be based on the criminal provisions in the previous legislation. In the context of dominus litis, this means that the prosecutor's decision to continue or stop the case should not be made arbitrarily, but must be subject to the criminal procedure law and the provisions of the applicable law, so that the principle of formal legality functions as a limiting principle for the authority of dominus litis to remain in the corridor of positive law.

This understanding is in line with the fundamental principle that Indonesia is a state of law, as expressly stipulated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that "Indonesia is a state of law." This principle means that all actions of state administrators, including law enforcement officials such as the Prosecutor's Office, must be based on the law and must not act outside the provisions of laws and regulations. The principle of the rule of law emphasizes that the law functions as an instrument to limit the power of the state so that it is not absolute, in this framework, the principle of formal legality plays a crucial role in ensuring that the Prosecutor as the executor of the prosecution function does not act on the basis of personal will, external pressure, or certain political interests, but solely on the basis of the applicable law and for the sake of justice. The application of the principle of formal legality by the Prosecutor's Office is a concrete embodiment of the principle of the rule of law in the practice of criminal law enforcement in Indonesia.

Nowadays, with the enactment of the National Criminal Code, the concept of legality principle has been significantly expanded. The principle of legality not only emphasizes the formal aspect, but also accommodates the material dimension, namely the recognition of the law that lives in society (living law) as stated in Article 2 of the National Criminal Code. The expansion of the meaning of the principle of legality has a direct impact on the role and authority of the Prosecutor's Office as the executor of state power in the field of prosecution (dominus litis). This provision is an important milestone in Indonesia's criminal law reform because it recognizes the existence of social norms and customary laws that live and develop in society as part of the national criminal law system. Indonesia's criminal law system now not only stands on rigid and positivistic written law, but also on substantive justice values that originate from people's social lives.

The expansion of the meaning of this principle of legality has a direct impact on the role and authority of the Prosecutor's Office of the Republic of Indonesia as the executor of state power in the field of prosecution (dominus litis). In modern criminal law, prosecutors are not only required to act based on written laws, but must also consider the laws that live in society, as long as they do not conflict with the values of Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general law principles recognized by the people of nations. As conveyed by the Attorney General, Sanitiar Burhanuddin, many new provisions in the National Criminal Code have direct consequences for law enforcement officials, including the Prosecutor's Office. Sanitiar Burhanuddin emphasized the importance for the Adhyaksa corps to pay close attention to the implementation of the National Criminal Code, especially in the context of the role of the prosecutor as a case controller (dominus litis) who now has to adjust to the recognition of the living law. One of the important aspects is how the procedures and criteria for determining the law live in society. The Prosecutor's Office needs to oversee these provisions, so that the regulated material provides a role to customary law communities to implement customary law norms. This is a form of protection against customary law.

The Prosecutor's Office plays a strategic role as a keeper of the balance between written law and living law, by ensuring that the application of customary law does not conflict with citizens' constitutional rights and the principle of universal justice. The implementation of this principle of material legality requires wisdom and social sensitivity from prosecutors, so that in assessing a case,

the Prosecutor's Office of the Republic of Indonesia is not only fixated on the formal elements of legislation, but also pays attention to the dimension of substantive justice that lives in society.

The Prosecutor's Office has a moral and institutional responsibility to oversee that the provisions of Article 2 of the National Criminal Code really provide space for participation to customary law communities in the implementation of their customary law norms. This step is a form of protection for the existence of customary law as an integral part of the national legal system. Through consultation mechanisms, cross-agency coordination, and the involvement of indigenous leaders, the Prosecutor's Office can ensure that the application of customary law in the national criminal system remains within the constitutional corridor and upholds human rights principles.

One of the concrete manifestations of the synchronization of the principles of formal legality and in law enforcement practice in the era of the National Criminal Code can be seen from the Prosecutor's approach in integrating living law in society (living law) with a positive legal system. This important breakthrough was realized by the Bali High Prosecutor's Office together with the Bali Provincial Government, traditional leaders and the community through the establishment of Bale Kertha Adhyaksa Jaga Desa and Umah Restorative Justice as explained in Council Decree Number 16 of 2025 concerning the Approval of the Determination of the Draft Regional Regulation of Bali Province concerning Bale Kerta Adhyaksa in Bali into Regional Regulations, which were inaugurated simultaneously in 27 villages, 16 urban villages, and 35 customary villages in Denpasar City. The Head of the Bali High Prosecutor's Office, Ketut Sumedana (term of office 2024-2025), emphasized that the presence of Bale Kertha Adhyaksa is a form of collaborative space between Balinese local wisdom (living law) and positive law. This initiative aims to realize justice that is on the side of the community, while affirming the commitment of the Prosecutor's Office in translating the values of substantive justice as mandated in Article 2 of the National Criminal Code.

The concept of Bale Kertha Adhyaksa is philosophically based on the values of Tri Hita Karana, namely harmony between humans and God, fellow humans, and the environment. This principle is in line with the restorative justice orientation which emphasizes the restoration of social relations and moral balance, not just the imposition of punishment, so that the presence of Bale Kertha Adhyaksa is not only a means of non-litigation settlement of cases, but also a tangible manifestation of the principle of material legality that recognizes the existence of customary law and social norms as part of the national justice system. This initiative shows that the function of the Prosecutor's Office as a dominus litis can interpret the role of the prosecution not only as an exercise of state power in the legal field, but as a control of the direction of social justice law enforcement. Through Bale Kertha Adhyaksa, the prosecutor has room to prioritize a restorative justice approach based on local wisdom, so that law enforcement becomes more humane and contextual to the values of the Balinese people.

Furthermore, the existence of Umah Restorative Justice strengthens the role of the Prosecutor's Office in building participatory justice, where indigenous peoples play an active role in resolving conflicts through deliberation and mutual agreement. This model not only reduces the burden of litigation in the courts, but also strengthens legal legitimacy through the application of local norms that are alive and respected by the community. This step by the Bali Attorney General is an important "step" for the Prosecutor's Office throughout Indonesia, because it shows how the principle of material legality in the National Criminal Code can be translated operationally at the local level without sacrificing the principle of the rule of law. Through the synergy between positive law and customary law, the Prosecutor's Office has succeeded in bridging the gap between legal certainty and social justice. The Bale Kertha Adhyaksa and Umah Restorative Justice programs ultimately became a symbol of the revitalization of the role of the Prosecutor's Office in the national legal system from just a prosecutor to a guardian of social harmony and local justice values. This is in line with the

direction of national criminal law reform which places the Prosecutor's Office at the forefront of enforcing laws that are not only legal certainty, but also fair and humane.

CONCLUSION

The Prosecutor's Office of the Republic of Indonesia plays a central role in the criminal justice system, balancing legal certainty and substantive justice. The National Criminal Code expanded the principle of legality to include both formal and material dimensions, requiring prosecutors to consider written law alongside living law and values aligned with *Pancasila*, the 1945 Constitution, and human rights. This shift is reflected in innovations like the Bali High Prosecutor's Office's Bale Kertha Adhyaksa Jaga Desa and Umah Restorative Justice programs, which integrate local wisdom (*Tri Hita Karana*) with formal law to promote restorative justice. Consequently, the Prosecutor's Office has evolved into an adaptive, humanist institution that balances legal certainty with social harmony and local justice. Future research could explore how these models can be adapted and scaled across diverse regions in Indonesia to strengthen culturally sensitive and equitable law enforcement nationwide.

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