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The Urgency of Applying the Concepts of *Error in Persona* and *Aberratio Ictus* in Substantive Criminal Law in Indonesia.

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Abstract: *This study aims to examine the true nature of the concepts of error in persona and aberatio ictus from the perspective of legal dogma and their application in criminal law. The study employs legal research methods, utilizing primary and secondary legal materials and comparing them with existing regulations in several countries. The goal is to provide a fresh perspective on the concept and its practical application, as well as to examine its implications when applied to criminal law. The concepts of error in persona and aberatio ictus are not explicitly mentioned in the Criminal Code (KUHP), but its text clearly divides an act into two aspects of intention: intentional and unintentional.*

Abstrak: Penelitian ini bertujuan untuk mengkaji hakikat sejati konsep *error in persona* dan *aberatio ictus* dari perspektif dogma hukum serta penerapannya dalam hukum pidana. Penelitian ini menggunakan metode penelitian hukum, memanfaatkan bahan hukum primer dan sekunder, serta membandingkannya dengan peraturan perundang-undangan yang berlaku di beberapa negara. Tujuannya adalah untuk memberikan perspektif baru tentang konsep-konsep tersebut dan penerapan praktisnya, serta mengkaji implikasinya dalam hukum pidana. Konsep *error in persona* dan *aberatio ictus* tidak disebutkan secara eksplisit dalam Kitab Undang-Undang Hukum Pidana (KUHP), tetapi teks tersebut secara jelas membagi suatu perbuatan menjadi dua aspek kesengajaan: disengaja dan tidak disengaja.

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INTRODUCTION

Law is a rule made by a form of authority that is intended to regulate the order of life and is aimed at the general welfare. In formulating its own definition, until now there has been no standard definition regarding the meaning of law itself. Various understandings in understanding what is meant by law arise because law is a field of study that is prescriptive or full of values due to its universal nature, so that its definition can vary depending on the point of view from which the law is viewed, because of these different points of view, a difficulty arises in providing a holistic definition of law, because a definition must be brief, clear, firm, and systematic in summarizing the entire substance of the law (Santoso, 2022). The problem in defining the law itself is still relevant to what was conveyed by Immanuel Kant "noch suchen die juristen eine definition zu ihrem begriffe von recht", if interpreted freely it can be interpreted that there are still difficulties among jurists to provide a definition of law. Similarly, L.J Van Alpeldoorn stated that it is impossible to provide a single definition of law. The complexity in providing a definition of law itself is because law as a science is included in the part of prescriptive science, which can be interpreted as a science that is full of values, it is not included in

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empirical science because the truth to be achieved is the truth of coherence and not correspondence (Marzuki, 2018).

The absence of a standard definition for explaining law itself does not mean that jurists have not attempted to provide a definition. In this case, the correct understanding is that there is no agreement on which definition is most appropriate, thus, in its study, this gives rise to differences that have resulted in legal schools of thought. The existence of two schools of thought most widely adopted by jurists does not mean that this excludes the other schools. The positivist and naturalist schools offer very different perspectives on defining it. In the legal context, when viewed from a state perspective, positivism is the most consistent way to begin a discussion. Legal Positivism is the study of the laws in force in a country or society at a particular time. From this perspective, this study focuses on the laws currently in force in Indonesia, thus focusing on current law (*ius constitutum*), not future law (*ius constituendum*), or natural law *(ius naturale*) (Kusumaatmaja & Sidharta, 2009).

The development of law itself is divided into two forms: private law and public law. Private law regulates relationships between individuals to meet their needs, including civil law and commercial law. Meanwhile, public law regulates the power and authority of the ruler, as well as the relationship between society and the state, including administrative law, constitutional law, and criminal law. This article will focus on criminal law, which falls within the realm of public law.

Humans often find themselves in conflict with their personal needs in life. Generally, every human need should be met in non-urgent situations. However, in urgent situations, people often act without careful consideration, potentially endangering the environment or even other people (Djamali, 1984). This view aligns with Niccolò Machiavelli's thinking in Il Principe, which states that humans are inherently selfish, opportunistic, and will act to the detriment of others when given the opportunity and in the absence of a governing authority. Machiavelli emphasized that to maintain stability and order, a state must have mechanisms capable of controlling human actions (Machiavelli, 1532/2024). This idea was reinforced by Thomas Hobbes with his phrase homo homini lupus, "man is a wolf to man," which illustrates that without rules and power, life would be chaotic and full of conflict. Therefore, the state needs to be present through criminal law as an instrument to regulate, limit, and control human behavior that has the potential to cause harm. Criminal law is not only a means of punishment, but also a preventive tool and social control to maintain order in society, protect the public interest, and ensure social balance. Criminal law is not a new law, it derives from other, more general regulations. Its distinguishing characteristic from civil law is the existence of coercion, the violation of which will result in torture, such as the death penalty, imprisonment, and/or revocation of certain rights. Criminal law regulates acts that can cause harm to others, which are formulated as crimes (punishable acts). The act itself must fulfill the elements of a crime to be considered punishable. These elements include the act, the consequence, and the circumstances. However, in some circumstances, an unlawful act can be forgiven so that it does not violate the law. These acts are referred to as justifications, which include force majeure (overmacht), emergency (*noodtoestand*), self-defense (*noodweer*), enforcement of the law (*teruitvoerring van een wetelijk voorschrift*), and the execution of a lawful order (*ambetelijk bevel*) (Kansil, 2011).

Determining whether an act is prohibited also requires considering the perpetrator's motive. In this context, *mens rea* can be defined as the perpetrator's "evil mind" in committing an act. This definition means that in the context of criminal law, it is necessary not only to examine whether an act harms the interests of others, but also whether the act is based on a specific intention. Therefore, there are articles that aggravate or excuse the perpetrator, based on that intention. In Indonesia, without intent

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or fault on the part of the perpetrator, an act tends not to be criminally punishable, especially in crimes that require an element of intent (Munandar Ar et al., 2024). Therefore, there is a distinction regarding an act. The intended distinction is whether an act was indeed intended against the victim or not (error in persona), and whether the actual impact of an act is still within the perpetrator's plan (aberration ictus). This is because Indonesian criminal law applies the principle of legality, where the act can be considered a crime. Therefore, normatively, this is of course a discussion within the criminal law realm to determine sanctions for the perpetrator, and how this concept is actually applied within the Indonesian Criminal Law position.

RESEARCH METHOD

The method used in this paper is a normative juridical method, through a study of laws and regulations applicable in Indonesia. This normative juridical method utilizes two instruments in its application: primary and secondary legal sources. Primary legal sources are applicable laws and regulations. Secondary legal sources include books and scholarly articles related to the discussion (Marzuki, 2005).

RESULT AND DISCUSSION

Criminal law in determining an act is considered a mistake, the parameter used is whether the act has been determined guilty by positive law. This principle is called legality, in the sense that all acts are considered permissible unless regulated otherwise. *Nullum delictum nulla poena sina previa lege poenali* (no crime without a rule that regulates it first) not only provides a norm for determining an act can be said to be a mistake, but also protects civilians from receiving arbitrary treatment from the authorities. The principle of legality itself is affirmed in criminal law, contained in Article 1 paragraph (1) of the Kitab Undang-Undang Hukum Pidana (KUHP) " tiada suatu perbuatan yang dapat dipidana kecuali atas kekuatan aturan pidana…" and is also contained in Article 1 paragraph 1 of Law no. 1 of 2023 concerning the Kitab Undang-Undang Hukum Pidana (National Criminal Code). The principle of legality only carries out 2 (two) functions, namely the protection function, protecting citizens from arbitrary power of the authorities and/or the authority of judges and the limitation function, limiting the power of the authorities and/or the authority of judges (Sudibyo & Rahman, 2021). The application of the principle of legality in substantive criminal law provides legal certainty for everyone, so that to determine whether someone can be said to have committed a wrongful act, one must refer to the applicable rules and must see whether this constitutes a mistake (*schuld*).

In criminal cases, the elements of a crime must be met to determine whether a person has actually committed an act prohibited by law. For example, in Article 362 of the KUHP concerning theft, it must be proven that the person has taken something that does not belong to them in an unlawful manner. In this case, criminal law divides it into two elements: objective elements and subjective elements. The objective element concerns the act according to the circumstances, and on the other hand, the subjective element concerns the perpetrator's inner state. Thus, it can be said that the perpetrator committed a crime based on the element of intent (*dolus*) or due to accident (*culpa*) (Marentek, 2019). So in this case, the proof does not only depend on whether the act is something that can be categorized as a crime, but also on what basis the perpetrator ultimately committed the act.

Dolus not only questions whether an action is wrong, but also looks at the basis on which the action was taken (Wulandari, n.d.). When a group is trapped on an island far from the main territory, survival under certain conditions requires them to kill each other. The act of killing is a legal event, but

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how the decision to ultimately take that action is based on urgency is another matter that needs to be examined. In Islamic law, for example, a person is considered sinful when committing an act that violates Sharia. From an Islamic perspective, such an act is wrong, so the person who committed it will be punished in the form of sin, and ultimately the execution of the case is resolved by placing the person in the worst possible situation. In this context, if we look back, what if the act that violates Sharia was committed under duress, such as a Muslim being prohibited from consuming pork, and returning to the analogy of being placed in the same place as that group of people, and their only option for survival is to violate Sharia, then this is an examination of an action. Was the action done intentionally, accidentally, or through coercion.

Often, when examining such matters, we discuss not only the rules but also the intent and implementation of an action. Therefore, law cannot stand alone in its process; it is assisted by branches of science appropriate to the circumstances. In almost every formulation and determination of a criminal offense, looking solely at positive law is a mistake. This must also be based on logic and science related to the study of human behavior. Therefore, the law enforcement process relies not only on positive law but also on other branches of science. The formation of law itself is not only based on the provisions of a sovereign government but also takes into account the values that have developed within society (the living law).

Legal dogma plays a crucial role in the formation of legal concepts. Its doctrine encompasses numerous concepts of application, and error in persona and aberatio ictus are part of these legal concepts. These concepts are not only instrumental in legal formation but also in ensuring procedural fairness and protecting the rights of the parties. The application of the error in persona concept often involves errors in identifying the perpetrator of an act (Haniyah, 2024). The focus of the practice is on whether the perpetrator is truly the perpetrator, so identification is related to the identity of the person being charged. The concept of error in persona goes beyond simply identifying the perpetrator; it also concerns identifying the victim and the perpetrator's actions based on intent. Error in persona is a mistake about the person who is the target of a crime (Utoyo, 2020). This concept emphasizes the victim as the wrong target, but the act was planned for someone else, or specifically for someone else (Respicio & Co, 2025). This error is understandable because, conceptually and practically, both are about humans. However, their focus of study is very different: one conceptually focuses on the victim, while the other focuses on the perpetrator. However, based on this, it can be assumed that this concept further examines the culpability of the parties involved.

Regarding this matter, viewing it from the perpetrator's perspective does not erase the legal event that has already occurred. The mistake already exists, so intent cannot be erased. However, this study is within the framework of the doctrine of fault. This intent cannot be transformed into culpa, and the fact that a mistake has occurred cannot be erased either. From the existing understanding of negligence, there is a meaning of blame for the perpetrator's behavior because he worked carelessly, was not careful, did not think about the consequences, acted carelessly, and so on, so that he harmed other people and was considered guilty (Muhailing, 2019). The difference in carrying out an action is a form of negligence or carelessness, so that the action is not a form of the perpetrator's desire, but the result of not paying attention to a condition that causes an event. Intention and purpose cannot be equated,

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because intention does not fulfill the elements in carrying out an action, but the action comes and is present because of negligence in not paying attention. Article 359 of the KUHP in it provides punishment for death or injury caused by someone's negligence, but in this case death is not seen as intentional, as well as if looking at Article 188 of the KUHP negligence resulting in fire, explosion or flood. If looking at the KUHP Nasional there is also a criminal *culpa*, regarding negligence resulting in fire, explosion and flood is in article 311 with a maximum prison sentence of 5 years and a maximum fine of category V, regarding death and injury due to someone's negligence is in article 474 and added 1/3 if based on profession (KUHP Nasional). To clarify this, what is meant by *Error in Persona* cannot be equated with *culpa* because there is a fundamental difference between the two, namely their intentions and goals.

Aberration Ictus is a different concept from error in persona and is not included in *culpa* but rather in the realm of *dolus*. The difference between these concepts is that the concept of *Aberration Ictus* concerns what constitutes a legal event. When someone commits an act against a specific target, but the perpetrator makes a mistake in identifying the potential victim, resulting in the intended intention not being realized and impacting others. Aberration Ictus in this case is what is intended to be directed at a certain thing, but due to external factors, it actually creates a condition that is undesirable for the perpetrator. The implication can be that the event that later becomes a reality has greater consequences or unexpected consequences than the perpetrator's intentions. These consequences can be events beyond the scope of the perpetrator's plan or result in changes to the object of the action. The existence of unforeseen circumstances is the basis of this concept, according to Satochid, namely the consequences arising from an act prohibited by law, thus threatening punishment and requiring the perpetrator to be held accountable. This understanding is better known as *versasi in realicta* (Sofyan & Munandar, 2021).

Mind Concept	Study	Object	Intention and Reality
Error in Persona	*Persoon*	Spesifict	Actions are carried out deliberately, considering the consequences of actions and considering internal aspects.
Aberatio Ictus	*Persoon*	Spesifict	Actions are done intentionally, but the reality of the consequences of those actions is beyond the intention.
Culpa	*Persoon*	Not Spesifict	An incident occurs due to negligence or carelessness.

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Both concepts, as outlined in the table, cannot be categorized as negligence; these considerations stem from the intentionality of the act. *Error in persona* focuses on the legal responsibility of the person who is the ultimate object of the act, while the subsequent concept of *aberatio ictus* focuses not only on the specific object of the perpetrator but also on other objects who suffer losses resulting from the act. From a comparative legal perspective, the doctrine of *Error in Persona* is consistently recognized in various civil law systems (the Netherlands, Germany, Italy) as a mistake in the identity of the victim that does not eliminate intent. Deviations in the use of this term in practice, such as in Indonesia and the Philippines, reflect the dynamics of law enforcement rather than a correction of the doctrine. Therefore, the use of this concept in this article is not a form of methodological inconsistency, but rather a precise placement of the doctrine based on global sources that are the foundation of the Indonesian KUHP.

From a comparative positive law perspective, the application of the concepts of *error in persona* and *aberratio ictus* shows a relatively uniform pattern among countries with a civil law system, although the form of regulation is not always explicit in the law. In the Dutch legal system, which is the origin of the Indonesian KUHP, *error in persona* is not formally regulated in the *Wetboek van Strafrecht*. However, the Dutch Supreme Court (*Hoge Raad*) consistently applies this doctrine in important jurisprudence such as the Hoornse Taart and Kofferschot cases. Through these decisions, Dutch courts emphasized that a mistake regarding the victim's identity does not eliminate the intention (*opzet*), so the perpetrator is still punished according to the original intention. This model of judicial application is relevant to Indonesia because of the similar nature of the Criminal Code as a criminal law originating from the continental tradition. Meanwhile, Germany applies error in persona through a positive legal construction that places the mistake of the victim's identity as part of the Vorsatz (intentional) analysis in Articles 15 and 16 of the StGB (*Strafgesetzbuch*). The German Supreme Court (*Bundesgerichtshof*) introduced the *Gleichwertigkeitstheorie* (normative equality theory), a doctrine that holds that as long as the actual victim has the same normative value as the intended victim, the intent remains intact. Thus, if a perpetrator intends to kill A but instead kills B due to mistaken identity, criminal liability remains based on intentional homicide. This German approach is one of the most methodologically valid and can be used as a reference to strengthen dogmatic arguments in the Indonesian legal system.

Unlike the Netherlands and Germany, Italy is one of the civil law countries that explicitly regulates the concept of mistaken identity in its positive law. Article 82 of the *Penal Code* explicitly defines *errore sulla persona* as an error that does not eliminate intent. Furthermore, Article 83 regulates the situation of *evento diverso da quello voluto*, which is equivalent to *aberratio ictus*. This written regulation allows Italian judges to draw a clear distinction between mistaken identity and systematic error in directing an attack. The existence of this explicit norm can serve as an example of how national law can provide conceptual certainty through more comprehensive codification. The Spanish legal system also contains positive provisions regarding mistaken identity through Articles 14 and 16 of the *Penal Code*. In practice, when a perpetrator shoots A but hits B, Spanish courts consider that the error does

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not eliminate the element of intent against B, while against A the perpetrator can still be punished for an attempt (tentatively). This Spanish approach results in a more layered structure of criminal liability and demonstrates how the positive legal system can accommodate both forms of error simultaneously. The Philippines, as a jurisdiction that often experiences similar misunderstandings to Indonesia, explicitly regulates error in persona in Article 4 of the *Revised Penal Code*. Philippine courts in several decisions, such as People v Ganal, emphasize that intent remains inherent even if there is a mistake in the victim's identity. Interestingly, in the Philippines, this term is often used inappropriately in public discourse to refer to mistaken arrest, a phenomenon paralleled in Indonesia. However, in positive law, the Philippines provides a clear demarcation that mistaken identity of the victim falls under the realm of material criminal law, not procedural errors by officials.

This comparison of positive law demonstrates that the majority of civil law countries, through both legislation and jurisprudence, treat fault in persona as a form of intent that still gives rise to full criminal liability. Meanwhile, *aberratio ictus* is clearly distinguished as a fault in the direction of the attack. Indonesia, although not yet explicitly regulating these two concepts in its both KUHP, can refer to their application in these countries to strengthen dogmatic arguments and provide consistency in assessing the form of fault in criminal acts. Thus, this comparison of positive law provides an important foundation for encouraging reform of the system of defining fault in national criminal law.

CONCLUSION

The concepts of *error in persona* and *aberatio ictus* are not explicitly mentioned in the Criminal Code (KUHP), but its text clearly divides an act into two aspects of intention: intentional and unintentional. The provisions regarding unintentional acts are clearly regulated and have limitations on how something can be caused as an accident. Meanwhile, in the realm of intention (*dolus*), it is implicitly explained how something can be said to be an unlawful act if it meets the elements of intention. However, in this case, it seems that the division of intentional acts into intentional and unintentional has not been given explicit boundaries.

RECOMMENDATION

Given that criminal law holds the principle of legality as a crucial element in shaping law, it is necessary to clarify this distinction in the law. Although judges can be an extension of the law, this need not always be maintained. This allows one of the three objectives of law to be achieved: legal certainty.

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