

Analysis of the Implementation of the Principle of Legality in the Enforcement of General Criminal Law in Indonesia

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Abstract. *Indonesia, as a state governed by law, emphasizes that every criminal act may only be subject to sanctions based on provisions established beforehand. As a result, the principle of legality becomes a fundamental doctrine for ensuring legal certainty, protecting human rights, and preventing arbitrary criminalization. However, the development of modern crimes and the evolving dynamics of legal interpretation pose new challenges to its application, making it necessary to conduct an evaluation to ensure that the principle of legality remains effective as a core pillar of general criminal law enforcement in Indonesia. The objectives of this research are to identify and analyze the application of the principle of legality in the current enforcement of general criminal law in Indonesia, and to examine and analyze the ideal concept for implementing the principle of legality within Indonesia's general criminal law framework. The methodological approach used in the preparation of this thesis is normative juridical research. The research specification is descriptive-analytical. The theories employed include the theory of legal certainty and the theory of progressive law. The findings of this research indicate that the principle of legality remains the primary foundation of general criminal law enforcement in Indonesia because it ensures legal certainty, as regulated in the old Criminal Code (KUHP), the 1945 Constitution, and further reinforced by the 2023 New Criminal Code. Its implementation, however, encounters various challenges, such as ambiguous statutory provisions, the use of analogy by law-enforcement authorities to fill legal gaps, and the emergence of modern forms of crime—such as cybercrime—that evolve more rapidly than the legislative process. The research finds that the recognition of “living law” in Article 2 of Law No. 1 of 2023 represents a compromise between the need for legal certainty and social justice, but still requires strict limitations to avoid undermining the principle of *lex certa*. A comparative analysis with Korea and Thailand shows that both countries provide stronger protection for defendants through the application of *lex mitior*, which allows the elimination of punishment even after a decision has obtained*

permanent legal force, whereas Indonesia still restricts its application to the period before a final judgment is rendered. Jurisprudential studies, such as Supreme Court Decision No. 964 K/Pid/2015, demonstrating the judiciary's role in safeguarding the legality principle through rigorous examination of criminal elements, particularly the element of unlawfulness. The ideal concept for implementing the legality principle requires clearly formulated offenses, consistent prohibition of analogy, and adequate understanding among law-enforcement officers, in line with Satjipto Rahardjo's theory of progressive law, so that the law does not merely operate as written regulations but also promotes justice and societal benefits.

Keywords: Crimes; Criminal; Law; Legality.

1. Introduction

Indonesia affirms itself as a state of law as stated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states "The State of Indonesia is a state of law". This means that the administration of the state must be based on law (*rechtsstaat*), not on power alone (*machtstaat*).¹Indonesia's concept of a state based on law is not only oriented toward legal certainty, but also encompasses the values of justice and the benefit of law for all citizens. Law serves as the primary foundation for regulating life in society, the nation, and the state.²

With the affirmation of Indonesia as a country of law, every action of state administrators and citizens must comply with applicable laws.³Law is not merely a tool of social control, but also an instrument for protecting human rights, creating order, and ensuring a balance between individual and public interests. Within this framework, criminal law serves a strategic function as a last resort (*ultimum remedium*) to address actions deemed to endanger social order and harm the wider community.⁴

One of the main characteristics of a state based on the rule of law is the recognition of the principle of legality in the constitution. Reflected in the 1945 Constitution of the Republic of Indonesia after the fourth amendment, Article 28I

¹Tubagus Muhammad Nasarudin, The Conception of the Pancasila Legal State and Its Implementation in Indonesia, *Legal Institutions*, Vol. 15, No. 1, 2020, pp. 43-52.

²Ade Azharie, Utilizing Law as a Means to Achieve Social Justice, *Lex Aeterna Law Journal*, Vol. 1, No. 2, 2023, pp. 72-90.

³M. Tasbir Rais, The Indonesian Legal State: Ideas and Its Implementation, *Unsulbar Law Journal*, Vol. 5, No. 2, 2022, pp. 11-31.

⁴Asti Dwiyantri et al., *Introduction to Criminal Law: Theory, Principles, and Implementation*, Green Pustaka Indonesia, Yogyakarta, 2024, p. 4

Paragraph (1) affirms that the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive laws are human rights that cannot be reduced under any circumstances.⁵

The Indonesian Criminal Code (*Wetboek van Strafrecht*), as a codification of criminal law in Indonesia, plays a crucial role in realizing the principle of a state based on the rule of law. The old Criminal Code is essentially a legacy of the Dutch colonial era, which was later adopted as positive law in Indonesia after independence. Despite its colonial origins, the old Criminal Code remains the primary reference for enforcing general criminal law to this day, even before the enactment of the new Criminal Code through Law Number 1 of 2023. The existence of the old Criminal Code demonstrates the consistency of the Indonesian legal system in using written rules as the primary basis for determining an act as a crime and for imposing sanctions on the perpetrator.⁶

The principle of legality is one of the most fundamental principles in criminal law, ensuring that an act can only be punished if there is a prior legal provision governing it. This principle is known as the adage *nullum delictum nulla poena sine praevia lege poenali* (there is no crime, no punishment without a prior law).⁷ This principle is stated in Article 1 Paragraph (1) of the Criminal Code which states, "An act cannot be punished, except based on the strength of existing criminal law provisions." The Criminal Code not only functions as a regulatory legal instrument, but also as a protector of citizens' human rights so that they are not punished arbitrarily or through retroactive regulations. Through the principle of legality, the Criminal Code provides legal certainty, protects individual freedom, and ensures that the state's authority to impose criminal penalties is always limited by applicable law.⁸

The principle of legality is a fundamental principle in criminal law, encompassing three main principles: *nullum crimen sine lege* (no crime without law), *nulla poena sine lege* (no punishment without law), and *lex temporis delicti* (the applicable law is the law at the time the act was committed). These three principles guarantee citizens against retroactive criminalization or the imposition of unclear legal regulations.

⁵Mohamad Hidayat Muhtar et al., *Constitutional Theory & Law: Basic Knowledge and Understanding and Insight into the Implementation of Constitutional Law in Indonesia*, Sonpedia Publishing Indonesia, Jambi, 2023, p. 5

⁶National Legal Development Agency, Human Rights, and the Republic of Indonesia, *Draft Academic Paper on the Draft Law on the Criminal Code (KUHP)*, National Legal Development Agency, Jakarta, 2015, p. 4

⁷Fikriya Anika Fitri et al., *A Theoretical Review of the Principle of Legality in Indonesian Criminal Law*, Jimmi: Multidisciplinary Student Scientific Journal, Vol. 1, No. 2, 2024, pp. 202-209.

⁸Junaidi et al., *Introduction to the Basics of Criminal Law*, Cendikia Mulia Mandiri, Batam, 2023, p. 7

The primary objective of implementing the principle of legality is to guarantee legal certainty and protect human rights. By adhering to this principle, every individual is protected from potential arbitrary criminalization by authorities or law enforcement officials. This principle also creates clear boundaries between prohibited and permitted acts, allowing society to adapt its behavior in accordance with applicable legal regulations.⁹

In general criminal law enforcement, the principle of legality serves as a guideline for law enforcement officials, from the police and prosecutors to the judiciary, where criminal case handling must be based on written legal regulations, both in the Criminal Code and specific legislation. Officials may not impose penalties based on morality, custom, or personal opinion, but solely on established legal provisions.¹⁰

The principle of legality provides legal certainty and protects citizens' rights, but sometimes clashes with the need to enforce the law against new, rapidly developing acts in society. Phenomena such as cybercrime, digital economic crime, and transnational crime often cannot be immediately addressed by positive law, thus creating a legal vacuum (*rechtsvacuum*), where acts that are clearly detrimental to society are difficult to address by applicable criminal law instruments. Here, the principle of legality is tested because the principle of legal certainty does not always align with the need to immediately take action against harmful acts, thus creating a dilemma between maintaining legal certainty and fulfilling society's sense of justice.¹¹

The application of the principle of legality also faces challenges in terms of interpretation and the quality of law enforcement officers. Many criminal cases fall into a gray area or are open to multiple interpretations, leaving judges with ample latitude to interpret articles according to the context of the offense. While intended to fill a legal vacuum, this often creates uncertainty by resulting in differing verdicts in cases with similar characteristics. This situation is exacerbated by a limited understanding of criminal law principles on the part of some officials, limited facilities and infrastructure, and a lack of transparency in the judicial process. This results in disparities in law enforcement, where an act may be

⁹Ach Tahir, Exploring the Meaning of the Principle of Legality and Its Development in Indonesia, *Journal of Comparative Law*, Vol. 6, No. 2, 2018, p. 175

¹⁰Mia Amalia et al., *Criminal Law: Principles, Theories, and Cases*, Sonpedia Publishing Indonesia, Jambi, 2025, p. 11

¹¹Sitta Saraya et al., *Legal Dynamics in Indonesia: Developments & Challenges*, Star Digital Publishing, Yogyakarta, 2025, p. 7

prosecuted in one jurisdiction while not receiving the same treatment in another.¹²

Example of a case in a general crime, Supreme Court Decision No. 964 K/Pid/2015 is a cassation case against the Decision of the Lubuklinggau District Court (PN) No. 794/Pid.B/2014/PN.Llg with defendant IS who was charged with murder as per Article 338 or assault resulting in death as per Article 351 Paragraph (3) of the Criminal Code. This case started from a fight at Bukit Sulap Market, Lubuklinggau City, when the victim attacked the defendant with a knife so that the defendant was injured, then in a desperate situation the defendant fought back with a knife that was stuck in his body causing the victim to die. The Lubuklinggau District Court initially issued a pure acquittal (*vrijspraak*), on the grounds that the Prosecutor's charges were not legally and convincingly proven. The PN considered that the elements of the crime as per Article 338 of the Criminal Code or Article 351 Paragraph (3) of the Criminal Code were not fulfilled.

The prosecutor filed an appeal and the Supreme Court considered that the defendant's actions were indeed proven, but were carried out in the context of forced defense (*noodweer*) according to Article 49 Paragraph (1) of the Criminal Code, so that the actions lost their unlawful nature. The Supreme Court overturned the decision of the *judex facti* (the judge who examined and tried the case at first and appeal levels) and issued a decision to acquit the defendant of all legal charges (*ontslag van rechtsvervolging*). This decision confirms the application of the principle of legality that a person cannot be punished if the elements of a criminal act, especially the unlawful nature, are not fulfilled.¹³

The Supreme Court corrected the District Court's decision by changing it to a release from all legal charges (*ontslag van rechtsvervolging*), not a pure acquittal. This is important because acquittal means the act has not been proven, while acquittal means the act has been proven but is not a criminal act because it has lost its unlawful nature. The principle of legality also requires that in addition to clear criminal provisions, the elements within them must also be fulfilled, including the element of unlawfulness. In this case, although the elements of the act and the result (the victim's death) are fulfilled, the unlawful element is eliminated because the defendant acted in self-defense against the victim's attack. The principle of legality works not only on the existence or absence of a regulating article, but also on the completeness or incompleteness of the elements of the crime.¹⁴

¹²Dedi Iskandar et al., "Development of Theory and Application of the Principle of Legality in Indonesian Criminal Law, Jimmi: Multidisciplinary Student Scientific Journal, Vol. 1, No. 3, 2024, pp. 293-305.

¹³Rezi Rukdiana, Decision of Acquittal (*Onslag Van Alle Rect Vervolging*) on the Grounds of Wrong *Judex Factie* in Applying the Law in a Murder Case, *Verstek*, Vol. 6, No. 3, 2018, pp. 242-247

¹⁴Andi Hamzah, Indonesian Criminal Law, Sinar Grafika, Jakarta, 2017, p. 22

The principle of legality not only protects citizens from new, unregulated offenses, but also protects them when positive law states that their actions are not criminal due to justification. This decision demonstrates that the principle of legality does not stop at the *lex scripta* stage (written rules must exist), but also includes *lex stricta* (rules must be interpreted strictly) and *lex certa* (rules must be clear). Without the principle of legality, criminal law enforcement will be vulnerable to arbitrary action because law enforcement officials can interpret actions as criminal even though there are no express rules governing them. The principle of legality also ensures that every individual has legal certainty regarding what actions are prohibited and what penalties can be imposed, thereby creating a sense of security in community life.¹⁵

2. Research Methods

Research methods are essentially a function of the research problem and objectives. They cannot be separated from, and must always be closely related to, the research problem and objectives.¹⁶ The methods used in this research consist of approach methods, research specifications, data sources and types, data collection techniques and data analysis techniques. The method used by the author in compiling this thesis is a normative legal approach or doctrinal legal research, a type of legal research that relies on secondary data. This research was conducted with an emphasis on normative legal aspects. Normative legal research is essentially library research, as the primary sources used are secondary data. This secondary data includes various forms of legal materials, such as archives, literature, and official documents published by the government and judicial institutions.¹⁷ This normative approach will focus on legal issues regarding the Analysis of the Application of the Principle of Legality in Enforcing General Criminal Law in Indonesia. This research is descriptive and analytical, meaning that it not only describes the object under study in detail but also analyzes it in depth to discover its meaning, relationships, and legal implications. The descriptive approach aims to provide a systematic, factual, and accurate picture of a legal phenomenon, both in terms of legislation and its practical application. The analytical approach aims to describe, examine, and evaluate existing legal issues using relevant legal theories and principles, so that argumentative and logical answers or solutions can be found. Descriptive and analytical research does not

¹⁵A. Widiada Gunakaya, The Position of “*Lex Ne Scripta*” in the Indonesian Legal System, *Jurnal Wawasan Yuridika*, Vol. 22, No. 1, 2010, pp. 1-29.

¹⁶Sandu Siyoto and Muhammad Ali Sodik, *Basic Research Methodology*, Literacy Media Publishing, Yogyakarta, 2015, p. 9

¹⁷Kornelius Benuf and Muhamad Azhar, *Legal Research Methodology as an Instrument for Analyzing Contemporary Legal Problems*, Gema Keadilan, Vol. 7, No. 1, 2020, pp. 20-33.

stop at simply presenting data; it goes further by conducting critical analysis to gain a more comprehensive understanding of the legal issues discussed.¹⁸

3. Results and Discussion

3.1. The Application of the Principle of Legality in the Enforcement of General Criminal Law in Indonesia Today

The word principle comes from the Arabic *asasun* which means basis or principle, while the term "legality" comes from the Latin *lex* which means law, or from the word *legalis* which means legal and in accordance with the provisions of the law.¹⁹ The meaning of legality indicates validity according to law. The principle of legality refers to the provision stating that no act is considered a violation and no punishment can be imposed until a law governing it is in place.

According to Moeljatno, the principle of legality is the principle that determines that no act is prohibited and punishable by law unless it is first stipulated in legislation. In Latin, it is called *nullum delictum nulla poena sine praevia lege* (there is no crime, no punishment without prior regulation). According to him, the formulation of the principle of legality contains at least three meanings:²⁰

- 1) There is no act that is prohibited and punishable by law if it has not been stated in a statutory regulation.
- 2) Analogy may not be used to determine whether a criminal act has occurred.
- 3) Criminal law rules may not be applied retroactively.

Meanwhile, Peter Mahmud Marzuki defines it as no one can be punished for committing an act if there is no statutory regulation that regulates it before the act is committed. Both of the above definitions have the same substance, namely that a person's actions are basically not punishable by law if there is no statutory regulation that regulates it before the act is committed. More explicitly, according to Wirjono Prodjodikoro, the Latin word for the Principle of Legality, which reads *nullum delictum, nulla puna sine praevia lege punali*, means there is no crime, no criminal punishment without prior criminal law. The three meanings of the principle of legality result in two implications, namely:²¹

¹⁸Hari Sutra Disemadi, *Lenses of Legal Research: A Descriptive Essay on Legal Research Methodologies*, Journal of Judicial Review, Vol. 24, no. 2, 2022, p. 289-304.

¹⁹H Zulkarnain Lubis et al., *Basics of Criminal Procedure Law*, Prenada Media, 2016, p. 27

²⁰Lidya Suryani Widayati, *Expansion of the principle of legality in the Draft Criminal Code, State of Law: Building Law for Justice and Welfare*, Vol. 2, No. 2, 2016, pp. 307-328.

²¹Derry Angling and Yuli Asmara, *Deconstructing the Principle of Legality, Balancing Protection of the Interests of Perpetrators and Victims of Criminal Acts*, Viva Themis: Journal of Law and Humanities, Vol. 1, No. 1, 2018, p. 21

- a. Prohibition on using analogies (non-analogy principle).
- b. The requirement to use the criminal law in force at the time the act was committed. This means that retroactive application of criminal law is prohibited (the principle of non-retroactivity).

According to Feuerbach, the principle of legality is divided into three major concepts, namely:²²

- 1) *Nulla poena sine lege*, which means that every sentence imposed must be based on criminal law.
- 2) *Nulla poena sine crimine*, which means that a punishment can only be imposed if the act in question is threatened with punishment by law.
- 3) *Nullum crimen sine poena legali*, which means that if an act that is threatened with punishment by law is violated, it will result in the punishment as threatened by law being imposed on the violator.

The principle of legality in Indonesia is embodied in legal regulations, namely Article 1 Paragraph (1) of the Criminal Code (KUHP), which states, "An act cannot be punished, except based on the strength of existing criminal law provisions." Based on the formulation of Article 1 Paragraph (1) of the Criminal Code, there are 4 (four) things which consist of:²³

- a. *Lex scripta*, a person can only be punished for actions that are regulated by law.
- b. *Lex praevia*, that the law which is the basis for imposing a criminal penalty existed before the act was committed.
- c. *Lex certa*, the acts prohibited in the law must be clearly stated.
- d. *Lex stricta*, the act cannot be interpreted analogously.

The principle of legality plays a crucial role in the criminal law system because it guarantees the public that they cannot be punished for acts not regulated by law. This guarantee fosters a sense of security and justice, while also encouraging people to comply with applicable regulations. This principle allows each individual to clearly understand what actions are categorized as crimes and the types of punishments that may be imposed.

²²Danel Aditia Situngkir, The Principle of Legality in National Criminal Law and International Criminal Law, *Soumatra Law Review*, Vol. 1, No. 1, 2018, pp. 22-42.

²³Doly Febrian Rizki Harahap and Andi Rachmad. "Expansion of the Principle of Legality in Criminal Law Reform, Meukuta Alam: Student Scientific Journal, Vol. 6, No. 1, 2024, pp. 116-133.

The principle of legality in law enforcement practices requires officials to act in accordance with statutory provisions. This provision emphasizes that every law enforcement action must be based on established norms and must not be carried out arbitrarily. If an action is not regulated by law, it cannot be subject to criminal sanctions.

The principle of legality is also closely related to the protection of human rights. This principle ensures that individuals have the right to know and understand applicable laws, as well as the right not to be punished without a clear legal basis. This aligns with human rights principles that prioritize justice and protect individuals from arbitrary action.

While the principle of legality is crucial, its implementation often faces challenges. One major challenge is unclear or ambiguous laws, which can lead to differing interpretations by law enforcement officials. Technological developments and social changes also create the need to update laws to maintain their relevance to societal conditions.

Overall, the principle of legality is a crucial pillar of the Indonesian criminal law system. By ensuring that no crime or punishment occurs without law, this principle protects individuals from arbitrary law enforcement and ensures that justice is served. Despite challenges in its implementation, it is important for all parties to continue to strive to maintain and strengthen the principle of legality to create a just and transparent legal system.

The principle of legality, or in Latin, “*nullum crimen, nulla poena sine lege*,” means there is no crime and no punishment without law. In the context of Indonesian criminal law, this principle is one of the fundamental principles that guarantees legal certainty for every individual. This principle is stated in Article 1 Paragraph (1) of the Criminal Code (KUHP), which states that no one can be punished except based on the provisions of the law in force at the time the crime was committed. Thus, the principle of legality functions as a protector of human rights and prevents arbitrary actions by law enforcement officers.²⁴

The principle of legality in Indonesian criminal law also requires that any act deemed a crime must be clearly and firmly defined in legislation. This aims to provide legal certainty to the public so they can understand the boundaries of permissible and impermissible behavior. With clear provisions, individuals can make better decisions about their actions and avoid the risk of criminal sanctions for actions they do not know violate the law.

²⁴Prianter Jaya Hairi, *The Contradiction of “Living Law” Regulation as Part of the Principle of Legality in the Indonesian Criminal Law*, *State of Law: Building Law for Justice and Welfare*, Vol. 7, No. 1, 2017, pp. 89-110.

The principle of legality plays a crucial role in maintaining social justice. By implementing this principle, people can feel more secure because they know that the law cannot be applied arbitrarily. Every criminal act must be based on pre-established laws, so that no individual can be punished without a clear legal basis. This also encourages transparency and accountability in the legislative process, where the public has the right to know and understand the laws that govern their behavior.²⁵

The principle of legality also has implications for the retroactive application of laws. In criminal law, retroactive application of laws is prohibited, meaning that new laws cannot be applied to crimes that occurred before the law was enacted. This is a measure to protect individuals from the possibility of unfair and unexpected punishment. This principle also serves to maintain legal stability, so that the public does not feel anxious or worried about sudden changes in the law that could harm them.

The principle of legality also contributes to the development of criminal law in Indonesia. This principle requires lawmakers to be more careful in formulating criminal provisions. They must ensure that each article is not only clear and firm but also reflects societal values. This presents a unique challenge for legislators, namely maintaining a balance between the need for law enforcement and the protection of human rights.

Overall, the principle of legality in Indonesian criminal law serves not only as a legal basis but also as a guarantee for the public to receive fair and transparent legal protection. This principle emphasizes that the law must be obeyed and applied consistently, so that society can live in a safe and orderly environment. Thus, the principle of legality plays a crucial role in building a just and integrated legal system in Indonesia.

The application of criminal law or criminal legislation is related to the time and place where the act was committed. The application of criminal law according to time concerns the application of criminal law from another aspect. If an act (feit) that fulfills the formulation of a crime is committed before the relevant provisions come into force, then not only cannot it be prosecuted but the person concerned cannot be punished at all, that is the legality that binds the act which is expressly determined by law. The meaning of the Principle of Legality as stated in Article 1 Paragraph (1) of the Criminal Code is formulated in the principle of *Nullum delictum nulla poena sine praevia legi poenali* which can be interpreted literally in Indonesian as: there is no crime, there is no punishment that precedes it.

²⁵Fikriya Anika Fitri et al., A Theoretical Review of the Principle of Legality in Indonesian Criminal Law, *Jimmi: Multidisciplinary Student Scientific Journal*, Vol. 1, No. 2, 2024, pp. 202-209.

Nullum crimen sine lege stricta, which can be interpreted as there being no crime without clear provisions using There are two things that can be drawn as conclusions from this formulation:²⁶

- 1) If an act is prohibited or the neglect of something that is required and is punishable by law, then the act or neglect must be stated in criminal law.
- 2) These provisions may not be applied retroactively, with one exception stated in Article 1 paragraph (2) of the Criminal Code.²⁷

Moelyatno wrote that the principle of legality has three meanings:

1. There is no act that is prohibited and punishable by law if it has not been stated in a statutory regulation.
2. Analogy (qiyas) may not be used to determine the existence of a criminal act. 3) Criminal law rules are not retroactive. Although the formula is in Latin, according to Andi Hamzah, the provision does not originate from Roman law.²⁸

In 2023, Indonesia reached a significant milestone with the enactment of the new Criminal Code through Law No. 1 of 2023, a national codification replacing the old Criminal Code. This new Criminal Code emphasizes the principle of legality as its primary foundation. Article 1 of Law No. 1 of 2023 contains an even more comprehensive formulation of the principle of legality: Paragraph (1) of the article states that “No act may be subject to criminal sanctions and/or action except for criminal acts in laws and regulations that existed before the act was committed.” and Paragraph (2) states “In determining the existence of a crime, the use of analogy is prohibited.” The new Criminal Code explicitly prohibits the use of analogy in interpreting the existence or absence of a crime, reinforcing the principle of *lex stricta* (strict interpretation of criminal law according to the wording of the law). In addition, the new Criminal Code maintains the provisions regarding the principle of non-retroactivity with the exception of *lex mitior*, namely if there is a change in laws and regulations after an act is committed, then the provisions that are most advantageous to the accused apply.²⁹

²⁶Deni SB Yuherawan et al., The Principle of *Nullum Crimen Sine Poena* in the Draft Criminal Code, *Journal of Criminal Law and Criminology*, Vol. 2, no. 1, 2021, p. 1-19.

²⁷H. Christianto, Renewing the Meaning of Legality in Indonesian Criminal Law. *Journal of Law and Development*, Vol. 39, No. 3. 2009, p. 109

²⁸Danel Aditia Situngkir. The Principle of *Pacta Sunt Servanda* in the Enforcement of International Criminal Law, *Jurnal Cendikia Hukum*, Vol. 2, No. 3, 2018, p. 37

²⁹Mia Amalia et al. *Introductory Reference Book of Indonesian Law*. Sonpedia Publishing Indonesia, Jambi, 2025, p. 15

The new Criminal Code regulations also accommodate the concept of customary criminal law through provisions on "living law in society." Article 2 of Law No. 1 of 2023 states that the provisions of the principle of legality in Article 1 Paragraph (1) "do not reduce the validity of living law in society which determines that a person should be punished even though the act is not regulated in this Law." This living law can be applied as long as it meets the requirements, applies in the relevant customary community, is not regulated in the national Criminal Code, and does not conflict with the values of Pancasila, the 1945 Constitution, human rights, and general legal principles. This provision indicates a limited exception to the principle of classical legality, because it allows the enforcement of non-codified (customary) criminal norms through the support of written regulations (the new Criminal Code) itself. In other words, the previously unwritten customary criminal law can now be legally enforced as long as it refers to Article 2. This policy has sparked debate among legal experts: on the one hand, it is considered to respect local wisdom, but on the other, it is seen as a potential deviation from the principle of legality because it opens up the possibility of criminalizing acts not expressly regulated by national law. However, this recognition of "living law" is framed with strict conditions, ensuring it remains within the rule of law and does not diminish the essence of legal protection for the accused.³⁰

Problems often arise in the application of the principle of legality as society evolves. Rapid social change and technological advancements often give rise to new forms of conduct not initially regulated by positive criminal law. A clear example is the rise of cybercrime and digital activity in the past two decades. When the law does not explicitly regulate such conduct, a legal vacuum exists that criminals can exploit. This situation creates a dilemma for law enforcement officials: on the one hand, they are bound by the principle of legality and cannot punish perpetrators without a written legal basis; but on the other hand, there is a growing sense of justice from the public that demands prompt action against such harmful acts. The Indonesian government's approach to addressing this obstacle generally involves enacting new laws or revising regulations to keep pace with current developments. For example, the enactment of the Electronic Information and Transactions Law (UU ITE) in 2008 provided a criminal legal basis for cybercrime, and various other regulatory changes continue to be made to address new criminal acts. This legislative step is in line with the principle of legality, rather than allowing the authorities to "close loopholes" in the law informally.³¹

Before new regulations were enacted, law enforcement officials often attempted to broadly interpret existing criminal laws to cover acts that were not yet clearly

³⁰Ahmadulil Ulil, *Resolving Minor Crimes Through Local Wisdom in the Development of the National Legal System*, Jurnal Rechts Vinding: Media for National Legal Development, Vol. 8, No. 1, 2019, pp. 113-126.

³¹Mahrus Ali, *Basics of Criminal Law*, Sinar Grafika, Jakarta, 2022, p. 36

regulated. This effort could essentially veer into the use of analogy, which is prohibited by the principle of legality.

Before the ITE Law was enacted, law enforcement used Articles 310 and 311 of the Criminal Code concerning insults (which were previously designed for print media or verbal utterances) to prosecute perpetrators of insults on digital platforms such as Facebook or Twitter. At that time, there were no clear regulations regarding insults via electronic media, so the phrases "broadcasting writing" or "saying something in public" in the Criminal Code were interpreted broadly to include activities in cyberspace. Logically, this approach may appear to fill a gap, but from a legal standpoint, it constitutes an analogy because it expands the scope of criminal norms beyond those explicitly regulated by law.³² Another example is an attempt to charge perpetrators of hacking or electronic data theft with Article 362 of the Criminal Code concerning ordinary theft, before there were specific regulations regarding cybercrime. In such cases, digital data is likened to "movable objects" as referred to in Article 362. However, legally, the definition of "object" in the Criminal Code refers to objects that are physically tangible; digital information or data is not a tangible object that falls within the scope of Article 362. Applying the theft article to cases of data breaches is clearly a form of analogical reasoning that is contrary to the principle of legality, because it expands the definition of "object" without a written legal basis.

The practice of overreaching interpretation (analogy) as described above demonstrates the conflict between the need to enforce the law against new behavior and the principle of legal certainty. On the one hand, society demands a legal response to harmful acts, but on the other hand, imposing existing criminal regulations on unregulated matters risks disregarding the rights of suspects/defendants. The use of analogy in criminal law can blur the boundaries of legality and open up opportunities for arbitrariness. Many experts emphasize that solutions to legal vacuums should be pursued through democratic legislation, not through analogical interpretation by law enforcement. The continued existence of officials or groups who view analogy as a shortcut to filling the legal vacuum indicates the need for a more comprehensive understanding of the urgency of the prohibition on analogy.

The analogical approach not only has the potential to violate human rights (because someone could be convicted for an act that isn't clearly regulated), but also creates legal uncertainty if different law enforcement agencies take different steps. This leads to disparities in law enforcement, where similar cases may be prosecuted in one place but ignored in another due to differing interpretations. Strengthening the quality and understanding of legality among law enforcement

³²Brian Obrien Stanley Lompoliuw, Analysis of Criminal Law Enforcement Regarding Insults on Social Media Reviewed from the ITE Law and the Criminal Code, *Lex Crimen*, Vol. 8, No. 12, 2019, p. 89

officials is crucial to ensure consistent criminal law enforcement across Indonesia.³³

Indonesian criminal justice in principle strives to uphold the principle of legality in every decision. The role of jurisprudence (judge's decisions) has proven strategic in correcting the application of the law to align with the principle of legality. One concrete example is Supreme Court Decision No. 964 K/Pid/2015 in a general criminal case involving forced defense (*noodweer*). In this case, the defendant was charged with murder (Article 338 of the Criminal Code) or assault resulting in death (Article 351 paragraph (3) of the Criminal Code) for his actions injuring to death a person who attacked him first. The District Court initially acquitted the defendant due to lack of evidence, but the Prosecutor filed an appeal.

The Supreme Court then declared that the Defendant's actions were proven to have been committed, but in self-defense (in accordance with Article 49 paragraph (1) of the Criminal Code regarding forced defense), so that the actions lost their unlawful nature and could not be punished. The Supreme Court annulled the pure acquittal and replaced it with a verdict of acquittal from all legal charges (*onslag van alle rechtsvervolging*), meaning that the defendant was released not because his actions did not occur, but because his actions did not constitute a crime considering the existence of justification. This decision emphasized the application of the principle of legality to the core: if the elements of a crime in the law are not completely fulfilled, including the element of unlawfulness, then there may be no punishment. Even though the consequences of the actions are serious (there are victims who die), the court complies with the principle of legality by not imposing a sentence when positive law states that there is justification that eliminates the criminal nature of the actions.³⁴

According to the author, the application of the principle of legality plays a central role in the enforcement of general criminal law in Indonesia. This principle ensures that the Indonesian rule of law operates on the track of legal certainty and justice, by placing written law as the commander in command in prosecuting crimes. Various laws and regulations, from the 1945 Constitution and the old Criminal Code to the new 2023 Criminal Code, all emphasize the importance of adhering to the principle of legality. In judicial practice, this principle acts as a filter that prevents arbitrary punishment and encourages judges and law enforcement officials to continuously examine the fulfillment of the elements of a crime according to the law before issuing a verdict. Although challenges such as the development of new crimes, multiple interpretations of articles, and disparities in enforcement in the field still exist, solutions must remain within the corridor of

³³Muhammad Nurohim et al, *Criminal Law Reference Book: Principles, Theory and Practice*, Sinar Grafika, Jakarta, 2025, p. 17

³⁴Rani Angela Gea et al., *Application of Noodweer (Compelled Defense) in Judge's Decisions/Court Decisions*, *USU Law Journal*, Vol. 4, No. 4, 2016, 16-38.

legality, for example through responsive legal reform (legislation) and improving the competence of officers. Thus, the principle of legality is not merely a normative principle, but is truly applied in the criminal justice system to achieve the goals of criminal law: legal certainty, justice, and benefit for society. Consistent enforcement of the principle of legality will strengthen public trust in the criminal justice system and affirm Indonesia as a state of law that respects human rights.

3.2. Ideal Concept Implementation of the Principle of Legality in Enforcing General Criminal Law in Indonesia

The existence of the principle of legality is related to the development of national life, which is related to the legal status within the state. Initially, criminal law was derived from unwritten law. In ancient Rome, most criminal law was unwritten. In the Middle Ages, when Ancient Roman law was adopted in Western Europe, there were acts of "crimine extra ordinaria," or "crimes not mentioned in the law," which were accepted by the ruling kings. Because they were not included in the law, the ruling kings acted arbitrarily with their absolute power. The public or citizens could not know for certain which actions were prohibited and which were not.³⁵

The principle of legality is often viewed as a provision that is considered absolutely correct and thus formally represents society's sense of justice. The provisions of the law must be enforced at all costs and must be treated as a representation of the values of justice. The consequence of this mindset and paradigm is, of course, an exaggerated perception that law is law and law is the same as law. This formalistic paradigm in viewing law has made it increasingly difficult to find true justice. What exists is a formal, narrow, and rigid justice—one that does not represent all rights and interests, including those of victims, perpetrators, the state, and society. Various discourses have emerged to explore the principle of legality that can represent the legal norms that exist and develop in society.

The principle of legality, as manifested in the current Criminal Code, reflects Dutch cultural preferences, a framework that fosters individualism and liberalism. Not only does the principle serve as a guideline for defining reprehensible acts with sanctions, but it also perpetuates a system of cultural domination, with a shift in legal methods that are completely devoid of the Indonesian culture of forgiveness, tolerance, pluralism, kinship, conscience, and religion, or, more importantly, the spirit of Pancasila.³⁶

Another view related to the principle of legality was put forward by Montesquieu, who stated: "In a moderate government the judge must be separate from the ruler

³⁵Warih Anjari, The Position of the Principle of Legality Following Constitutional Court Decisions Number 003/PUU-IV/2006 and 025/PUU-XIV/2016, *Constitutional Journal*, Volume 16, Number 1, March 2019, Jakarta, p. 7

³⁶Barda Nawawi Arief, *Several Aspects of Criminal Law Enforcement and Development*, PT. Citra Aditya Bakti, Bandung: 2011, pp. 122-123.

and must impose punishments as precisely as possible according to the literal provisions of the law. The judge must act carefully to avoid unjust accusations against innocent people."

Based on the historical development of the principle of legality, its goal is to provide legal certainty regarding which acts are and are not punishable. This legal certainty will prevent authorities from arbitrarily imposing punishments on perpetrators of crimes.

The principle of legality states, "Nullum crimen nulla poena sine praevia lege poenali," as coined by Paul Johann Anselm Von Feurbach. In criminal law, it is known as the "leer van de psychologische dwang" or "the doctrine of psychological coercion." According to Anselm Von Feurbach:

"The primary goal of criminal law is to psychologically coerce citizens to prevent them from committing unlawful acts. This psychological coercion can be achieved by threatening punishment for those who have committed violations and by imposing penalties on those who violate them. This principle is established for the public interest and to better guarantee the rights of all citizens, not as a recognition of individualism."³⁷

Based on this view, the imposition of criminal penalties by judges must be stipulated in the law, thus becoming a consequence of the existence of criminal provisions in the legislation. The principle of legality is closely related to the school of legal positivism, which views law as identical with statutes, while anything outside of statutes is not considered law. Law is separated from morals, politics, culture, economics, and other aspects. This thinking aligns with the philosophy of positivism, which asserts that something is considered true if it can be proven to be true, and this principle demands a clear separation between law and morals.

Based on this description, the influence of positivism on legal positivism is evident in two main aspects. First, law is viewed as having a causal relationship, so that punishments imposed are the result of the cause in the form of the existence of the law, which is the core principle of legality. Second, legal rules are considered to exist, while unwritten rules are not recognized as law but rather viewed as moral.

The weakness of legal positivism lies in its understanding, which equates law solely with statutes. This pattern has the potential to foster authoritarian state power because, first, laws are the sole means of exercising state power, neglecting the process of law formation and implementation. Second, legal rules are created

³⁷Ateng Sudibyo and Aji Halim Rahman, Deconstructing the Principle of Legality in Criminal Law, Presumption of Law, Vol. 3 No. 1, 2021, pp. 55-79

suddenly and enforced based on state coercion. Third, lawmaking rests with the state, and its interpretation is directed toward the interests of the powerful.

The opposing view of legal positivism is sociological jurisprudence. This view considers that ideal law is law that is in accordance with the life of society (the living law). This thinking grew in Indonesia and America, partly because of the diversity of customary law as the basis of this school of thought. Its normative basis is found in Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power, which requires judges and constitutional judges to explore, follow, and understand the legal values and justice that exist in society. Article 10 paragraph (1) of the same law emphasizes that the court may not reject a case due to the absence of law, but is obliged to examine and try it. The legality of the use of customary law in criminal law is stated in Article 5 Paragraph (3) letter b of Law No. 1 of 1951 concerning temporary measures to realize the unity of the structure, authority, and procedures of civil courts.³⁸

Regarding the concept of legal culture, Werner Menski proposed the triangular concept of legal pluralism, which emphasizes the diverse nature of cultures and legal systems. This diversity encompasses variations in positive law, legal system structures, judicial systems, and even individual or group legal behavior. This pluralistic nature necessitates a more nuanced approach. This is reflected in Indonesia, which has distinct customary legal systems across regions and has experienced the influence of globalization on law. This situation renders a purely positive or sociological approach inadequate, necessitating normative, empirical, and philosophical approaches, as outlined in the triangular concept of legal pluralism.

According to Werner Menski, there are three main elements of law: ethical values, social norms, and state regulations. The ideal type of law is one that fosters harmonious interaction between these three elements. Menski's proposed model shares similarities with the democratic character of the Pancasila state based on law. The Pancasila state based on law recognizes general principles of the rule of law, such as the protection of human rights, an independent and impartial judiciary, and the application of the principle of legality. It also recognizes other principles such as a harmonious relationship between the government and the people, proportional functional relationships between state organs, dispute resolution through deliberation before resorting to the courts, and a balance between rights and obligations. These characteristics are the hallmarks of the Pancasila state based on law in Indonesia:³⁹

³⁸Yulianto Syahyu and Diana Fitriana, "Seeking Legal Knowledge (Theory) with Indonesian Characteristics Based on the Sociological Jurisprudence School," *Jurnal Hukum Sasana*, Vol. 7, No. 1, 2021, pp. 140-148.

³⁹Belinda Pudjilianto and Emy Handayani, "The Application of Legal Pluralism in Society," *Diponegoro Law Journal*, Vol. 11, No. 2, 2022, p. 102

- 1) Close relationship between religion and state;
- 2) Relying on the Almighty Godhead;
- 3) Freedom of religion in a positive sense;
- 4) Atheism is not justified;
- 5) Communism is prohibited;
- 6) The principle of harmony and kinship.

Within the characteristics of a Pancasila state based on the rule of law, the recognition of the rule of law generally refers to rules made by the state (state-made rules). Other characteristics include ethical values and social norms.

According to Barda Nawawi Arief, the reform of criminal law essentially contains the meaning of an effort to implement the reorientation and reform of criminal law in accordance with the central socio-political, socio-philosophical, and socio-cultural values of Indonesian society that underlie social policy, criminal policy, and law enforcement policy in Indonesia. Thus, in the reform of criminal law (including formal criminal law), it must be taken with a policy-oriented approach, because in essence it is only part of a policy step or namely part of legal politics/law enforcement, criminal law politics, criminal politics, and social politics), and at the same time a value-oriented approach.

The principle of legality is the main foundation in Indonesian criminal law, stating that "No act can be subject to criminal sanctions and/or action, except by virtue of criminal regulations in existing laws and regulations before the act is committed." This provision is in accordance with the principle of *lex stricta* which requires the existence of written criminal regulations before an act is committed to provide legal certainty. In the new Criminal Code, Article 1 paragraph (2) of Law No. 1/2023 expressly prohibits analogy in determining criminal offenses. Thus, only explicit criminal articles can be used as a basis for punishment, and analogical interpretation of new acts is not permitted.⁴⁰

The principle of *lex stricta* requires that criminal provisions be formulated narrowly and firmly. This prevents law enforcement officials from expanding the meaning of criminal articles beyond their written meaning. Consequently, only elements explicitly stated in the law are punishable, preventing the scope of the offense from expanding beyond its established limits. In other words, a clear and literal formulation of criminal articles is crucial to limiting the power of law

⁴⁰Annisa Hafizah et al., *The Principle of Legality in Indonesian Criminal Law and Islamic Criminal Law*, Mahadi: Indonesia Journal of Law, Vol. 1, No. 1, 2022, pp. 1-10.

enforcement, ensuring that individuals can only be punished for acts explicitly prohibited by law.

The principle of *lex certa*, which emphasizes legal certainty, requires that each criminal article be formulated clearly and without ambiguity. The public must be able to clearly understand what actions are prohibited and what sanctions await them. The absence of ambiguous provisions in criminal articles is crucial to avoid multiple interpretations and allow for consistent and predictable law enforcement. If articles are too vague, confusion and potential abuse of authority by law enforcement officials are easily created.

Within the corridor of this principle, the application of analogy is strictly prohibited. The prohibition on analogy is a logical consequence of *lex stricta* and *lex certa*, because allowing analogy would erode legal certainty. If judges use analogy to expand the definition of crime, the public cannot know for sure which actions are punishable because the legal provisions become dependent on the judge's subjective interpretation. Therefore, Article 1 paragraph (2) of the new Criminal Code firmly states that analogy is not permitted in determining criminal acts. With this prohibition, criminal law remains only based on clear and explicit provisions in the law, avoiding the expansion of the meaning of norms that are not based on written law.⁴¹

The ideal criteria for applying the principle of legality also place significant responsibility on the drafters of laws. Article 1 Paragraph (2) of the New Criminal Code not only prohibits analogies, but also reminds the team drafting criminal laws to produce quality legal products to ensure certainty, justice, and the protection of citizens' human rights. In other words, if there are new acts that harm society, the appropriate solution is to update or add to the criminal law, not to interpret the old law analogously. Democratic legislative updates are essential to ensuring that the criminal law system remains responsive to developments while still adhering to the principle of legality.

The ideal concept of implementing the principle of legality in modern Indonesia also includes recognition of living law in society. Article 2 Paragraph (1) of the new Criminal Code states that the principle of legality "does not reduce the validity of living law in society" (customary law) which according to certain customs states that a person should be punished even if their actions are not regulated in the Criminal Code. The introduction of the concept of living law is based on the view that social norms and local values of justice need to be respected in the formal legal system, as long as they remain within constitutional limits. Thus, recognition

⁴¹Aris Hardinanto, *The Benefits of Analogy in Criminal Law to Overcome Modernized Crimes*, *Yuridika*, Vol. 31, No. 2, 2016, p. 229.

of customary law is positioned as part of criminal law as long as it meets certain requirements.⁴²

This recognition of customary law is framed with strict conditions. Article 2 Paragraph (2) of the National Criminal Code stipulates that customary norms may be enforced if the elements of the crime are not yet regulated in the national Criminal Code, and the values in the customary law do not conflict with Pancasila, the 1945 Constitution, human rights, and general legal principles. This provision ensures that only customary norms that are in line with the constitutional framework and international human rights principles can be recognized, so that the principle of legality remains fully protected. This means that customary law that is considered a source of criminal law must not conflict with the foundations of the rule of law and human rights norms, ensuring that local justice does not sacrifice certainty and true justice.

Furthermore, Article 2 paragraph (3) of the National Criminal Code requires that the guidelines and criteria for customary law be regulated in government regulations and incorporated into regional regulations. Thus, even though it is essentially unwritten, the application of customary criminal law must first be produced through formal institutions (for example, regional regulations). This approach shows that every norm that will be used as a basis for criminal law must be in written form, so that the essence of the principle of legality is still fulfilled. Customary law is still given a formal legal form before being enforced as a criminal provision, making the principle of legality a guard so that living law runs orderly within the national legal structure.

This regulation emphasizes that the recognition of customary law does not negate the principles of *lex stricta* and *lex certa*. The affirmation of *lex stricta* also encompasses customary legal norms: even though they are considered "living" in society, customary criminal law must still be formulated clearly and firmly. This avoids inconsistencies in the application of the law and ensures that the customary law applied remains measured, in accordance with the principle of legality. With these formal limitations, the flexible characteristics of customary law can be maintained without sacrificing the certainty of norms: customary law used as the basis for criminal law must also be ensured to be structured in official regulations to avoid ambiguity.

⁴²Andri Yanto and Faidatul Hikmah, *Legal Accommodation Living in the National Criminal Code from the Perspective of the Principle of Legality*, *Recht Studiosum Law Review*, Vol. 2, No. 2, 2023, pp. 81-91.

The principle of legality in the Korean Criminal Code is formulated in Article 1 with the subtitle Criminality and Punishment which consists of three paragraphs as follows:⁴³

(1) What constitutes a crime and what punishment is to be imposed therefore, shall be determined in accordance with the law in force at the time of commission. (The criminality and punishment of an act must be determined from the law that preceded the time the act was committed).

(2) *Where statute is changed after a crime has been committed with the effect that the conduct no longer constitutes a crime or that the punishment imposed upon it is less severe than provided for by the old statute, the new statute shall be applied.* (If the law is changed after the commission of an offense and therefore the act is no longer an act (based on the new law) and is less severe than under the previous law, then the new law shall be applied).

(3) *Where a statute is changed after a sentence after being imposed under it, a criminal conduct has become final, with the effect that such conduct no longer constitutes a crime, the execution of the punishment shall be remitted.* (If a law is amended after the imposition of a sentence under the old law and has permanent force, where the act is no longer a criminal offense, then the sentence may be reduced).

The formulation of paragraph (1) of the Korean Criminal Code above is in principle the same as Article 1 paragraph (1) of the Indonesian Criminal Code which contains the principle of *lex temporis delicti*. Paragraph (2) is also in principle the same as Article 1 (2) of the Indonesian Criminal Code which regulates the issue of retroactivity in the event of changes to the Law. According to the Korean Criminal Code, a new Law can be applied retroactively if:

- 1) There was a change in the law after the crime was committed.
- 2) This change means that the act in question is no longer a crime or the punishment is now lighter.

So the difference with Indonesia lies in its formulation. The Indonesian Criminal Code doesn't explicitly define the meaning or scope of "statutory changes," whereas the Korean Criminal Code does, emphasizing this, encompassing two aspects:

- 1) Changes to "criminal acts", which were originally criminal acts (crimes) then changed to "not criminal acts/crimes".

⁴³Helen Sondang Silvina Sihalohe, "Comparison of the Legality Principles of the Criminal Code (KUHP) and Islamic Law," *Jurnal Hukum Respublica*, Vol. 21, No. 1, 2021, pp. 18-31.

2) Changes to the "threatened penalties", namely from heavier to lighter

Article (3) above regulates the existence of changes to the Law after a criminal decision has permanent force. If according to the new Law, an act that has been punished based on the old Law is no longer a criminal act (crime), then the implementation or execution of the punishment is cancelled/abolished. Provisions like this do not exist in the Indonesian Criminal Code. According to the Indonesian Criminal Code, the scope of application of Article 1 (2) of the Criminal Code only extends to decisions that have permanent force.

Although this is not explicitly stated, it is clearly evident in the practice of jurisprudence to date, namely that Article 1 (2) can be used at the appeal level in the High Court or at the cassation level in the Supreme Court. If after the decision of the District Court, High Court or Supreme Court has permanent force, then a new law is issued stating that the act that was previously decided is no longer a crime, then the sentence that has been imposed and has permanent force must still be imposed or executed. So the convict who is currently serving his sentence is not released. In Korea, on the other hand, the person must be released.⁴⁴

The provisions regarding the Principle of Legality in the Thai Criminal Code are regulated in Article 2 of the General Rules Book I which reads as follows:

"A person shall be criminally punished only when the act done by him is provided to be an offense and the punishment is determined by the law in force at the time of the doing such act, and the punishment to be inflicted upon the offender shall be that provided by the law, if according to the law provided afterward, such act is no more an offense, the person doing such act shall be relieved from being an offender, and, if there is a final judgment inflicting the punishment, such a person is deemed to have never been accused by the judgement. for committing such offense. If, however, he is still under going the punishment, the punishment shall forth with termination." (A person will only be punished if the act committed by him is determined to be an offense and the penalty is determined by the law in force at the time the act was committed, and the penalty imposed for the offense is determined by law).

The formulation of Article 2 Paragraph (1) shows that the Thai Criminal Code also applies the principle of *lex temporis delicti*. Paragraph (2) regulates the situation when there is a change in the law, especially if the new law determines that an act

⁴⁴Aidil Firmansyah et al., Court Decisions as a Source of Jurisprudential Law, Wathan: Journal of Social Sciences and Humanities, Vol. 1, No. 2, 2024, pp. 136-146.

previously considered a crime under the old law is no longer punishable under the new provisions. In such a case, there are two possibilities:⁴⁵

- 1) If no decision has been made based on the previous law, the defendant must be released from criminal responsibility because according to the new law his actions are no longer categorized as a criminal act.
- 2) If there is a criminal decision which is final and has permanent legal force according to the old law, these provisions still apply to the convict, therefore;
 - a. If the sentence imposed has not yet begun to be served, then the defendant is treated as if he has never been sentenced; or
 - b. If the convict is still serving his sentence and has only completed part of it, then the remaining sentence that has not been served must be immediately stopped or terminated.

A comparison of the legality principles between Indonesia, Korea, and Thailand shows that all three countries place the principle of *lex temporis delicti* as the primary foundation, where a person can only be punished based on the law in force at the time the act was committed. However, the Korean and Thai Criminal Codes present a much more stringent formulation. The affirmation of two types of changes: changes to the unlawful nature of an act and changes to the criminal threat, which create doctrinal certainty in line with the demands of the principles of *lex stricta* and *lex certa*.

The openness of the Korean and Thai Criminal Codes to the principle of *lex mitior* is also closely related to *lex stricta*. By allowing the application of new, less stringent laws, even after a Korean verdict has become final, both countries demonstrate a strong commitment to substantive justice and normative consistency. This formulation demonstrates that legal certainty is not always synonymous with rigidity, but requires measured flexibility neatly framed in written provisions. In Korea, when a new law removes the unlawful nature of an act, the implementation of the criminal penalty must be halted. This is a form of legal protection that upholds not only certainty but also equality and rationality of punishment. In contrast, in Indonesia, the cancellation of execution after a final verdict has not been explicitly regulated, thus limiting the scope for individual protection.

The principle of legality ideally accommodates the principle of *lex mitior*, namely the application of the most lenient rule for the accused. Article 3 paragraph (1) of

⁴⁵Alensi Kusuma Dewi et al., Challenges and Developments in the Form of Contempt of Court: A Comparative Legal Study, *Tumou Tou Law Review*, Vol. 2, No. 1, 2023, pp. 30-49.

the National Criminal Code stipulates that if there is a change in legislation after the act is committed, the new legislation remains in effect unless the old provisions are more advantageous for the accused. In this way, legal changes can benefit the accused, in accordance with the principle of *lex favor reo*. The application of *lex mitior* shows that the Indonesian criminal law system prioritizes justice towards the individual: if the new law is deemed less lenient, the accused is entitled to receive the most favorable treatment for the crime committed.⁴⁶

The principle of legality also includes the prohibition on the retroactive application of criminal law to general crimes. The Constitutional Court emphasized that criminal law should be prospective, so that an individual is not punished by laws enacted after the act occurred. The Constitutional Court's decision emphasized that the retroactive application of criminal law can only be justified for extraordinary crimes (gross human rights violations), while ordinary crimes must be tried under the law in force at the time the act was committed. This protects the suspect's human rights to a fair and predictable trial and prevents the abuse of the law for revenge by those in power.

The ideal application of the principle of legality combines two main approaches: first, the strict requirement of explicit and non-interpretable criminal norms (legal certainty), and second, the recognition of localities with formal requirements (social justice). Both serve the same purpose: to ensure legal certainty and substantive justice. Lawmakers are encouraged to produce comprehensive criminal provisions to protect human rights, while customary law is recognized as long as it does not disrupt the consistency of the national legal system. By combining these two ideal concepts, the criminal justice system is expected to fulfill the objectives of the principle of legality: legal certainty and justice for all members of society.⁴⁷

Consistency in adherence to the principle of legality strengthens public trust in the justice system. Law enforcement officials and judges are required to continually improve their understanding to prevent arbitrary punishment. Ideally, the examination of every criminal case should always ensure all elements of the offense are met before issuing a criminal sentence. Furthermore, criminal legislation should be continuously updated to address the development of new forms of crime, while adhering to the principle of legality.

The ideal concept of the application of the principle of legality as described, when analyzed with Satjipto Rahardjo's progressive legal theory, must be understood not merely as a guarantee of rigid legal certainty, but as an instrument that is continuously reconstructed so that "the law serves humans," rather than humans

⁴⁶lin Pahlani, Application of the Non-Retroactive Principle in Court Decisions: A Criminal Law Perspective, *YUDHISTIRA: Journal of Jurisprudence, Law and Justice*, Vol. 2, No. 3, 2024, pp. 11-17.

⁴⁷Arbi Juniawan et al., The Urgency of Renewing the Principle of Legality in the National Criminal Code, *Justicia Sains: Journal of Legal Studies*, Vol. 10, No. 1, 2025, p. 68

being sacrificed for the sake of statutory texts. Progressive law rejects positivism that absolutizes laws and separates them from morality, justice, and social reality, thus criticizing the principle of legality that is too formal. The direction of reform that combines the principles of *lex stricta* and *lex certa* with the principle of *lex mitior*, recognition of living law and customary law filtered by Pancasila, reflects the character of progressive law that demands that the principle of legality not be a tool to justify the status quo, but rather a creative space for legislators and judges to produce substantively just decisions. Comparisons with Korea and Thailand, which are more daring in providing a beneficial retroactive effect for convicts, also show that legal certainty does not have to be synonymous with rigidity, but can be combined with humanitarian sensitivity, rational sentencing, and individual protection.

4. Conclusion

The current application of the principle of legality in general criminal law enforcement in Indonesia demonstrates that legal certainty remains a primary foundation, affirming that no act can be punished without a pre-existing written legal basis. The new 2023 Criminal Code reinforces this principle and continues to accommodate social developments, including the recognition of customary law, which is limited by constitutional requirements. Challenges such as legal vacuums due to technological advances, multiple interpretations of articles, and the tendency of officials to make expansive interpretations emphasize the importance of legislation that must adapt quickly to changing times. Through strengthened regulations, the principle of legality will not only become a formal norm but will truly serve as a guide for fair law enforcement in the Indonesian criminal justice system. The ideal concept of implementing the principle of legality in general criminal law enforcement in Indonesia demands legal certainty through written criminal regulations that are clear, firm, and not open to multiple interpretations, while simultaneously opening up space for substantive justice through measured recognition of living law and the values of Pancasila. The principle of legality must limit arbitrariness, guarantee that every act can only be punished based on pre-existing provisions, and accommodate the principle of *lex mitior* for the protection of individuals. Integration between state law, social norms, and ethical values is necessary so that the law is not merely formalistic, but able to reflect the justice that exists in society. The principle of legality will serve as a foundation that ensures the criminal justice system operates in accordance with the character of a state based on the rule of law of Pancasila. The government should expedite the renewal of criminal regulations to ensure they are always in line with developments in modern crime, thus preventing a legal vacuum that encourages the use of analogies that contradict the principle of legality. For law enforcement so that improve understanding in applying the principle of legality so that every law enforcement action is truly based on written provisions without broad interpretations that have the potential to violate the principle of legal certainty.

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