



## **Development of the Principle of Legality in Indonesian Criminal Law**

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*Received: 25-11-2023*

*Reviewed: 30-11-2023*

*Accepted: 06-12-2023*

### **Abstract**

Legality is the oldest principle of criminal law and is found in almost all national criminal laws worldwide. The existence of this principle is to protect citizens from the arbitrariness of the authorities. The principle of legality in criminal law has a central role in ensuring legal certainty for society because this principle requires the existence of written regulations regarding a criminal act to carry out a punishment. The aim is to understand the principles of legality according to criminal law in Indonesia. The research used normative juridical methods with data collection methods through a literature study. The principle of legality in Indonesian criminal law is a fundamental principle. The principle of legality in criminal law is essential to determine whether or not a criminal law regulation can treat a criminal act that has occurred. Applying the principle of good legality in national criminal law is not rigid, mainly to tackle crimes against human rights.

**Keywords:** *Principles, Legality, Law, Crime, Development*

### **Introduction**

Since independence, Indonesia has realized the urgency of renewing the criminal law left behind by the colonial government with criminal law based on the needs and legal awareness of the country and the Indonesian people who have become independent. The first step was to enact Law No. 1 of 1946 concerning implementing *Wetboek van Strafrech* Nederland Indie (WvS NI, now known as the Criminal Code with several amendments). This step is at least to avoid a legal vacuum in the criminal field before a new criminal law is created which is truly a product of the independent state of Indonesia, which is more in line with the aspects of its philosophy, values, principles, and norms with the values of Pancasila and Indonesianness. other(Rosa, 2022; Yani et al., 2022)

The rules regarding the strength of the enactment of criminal law according to time in the study of criminal law are fundamental (Berman, 1972). It is fundamental because this rule determines whether or not a criminal rule applies to a criminal act committed at a particular time. Therefore, it is natural that in a country's criminal law, this principle is mentioned first in its criminal law regulations (Ariyanti, 2022; Effendi, 2017; Muksan, 2017; Rosa, 2022).

Society is constantly changing, and the law always follows developments in society, so the conditions created are that the law is always lagging behind the development of society (Ranchordás, 2015). Events that act against the law cannot be overcome because the law that regulates them does not yet exist. This condition is created because the law being developed places more emphasis on written law, the creation and implementation of which must be carried out through specific procedures and takes a long time (Muksan, 2017; Wibowo et al., 2021).

Legal principles in a legal field are essential, considering that these are the basis and guidelines for the development of each legal field so that they do not deviate (Rosenbloom et al., 2022). In criminal law, this legal principle is emphasized to limit criminal justice's arbitrariness in determining whether or not a prohibited act exists. (Agustian, 2019; Ridwan & Achmad Sodik, 2023).

The principle of legality is one of the oldest legal principles in the history of human civilization. The existence of this principle is relatively easy to find in various national legal provisions of various countries. The principle of legality is maintained as protection against potential arbitrariness in the administration of criminal law. Roeslan Saleh emphasized that the main aim of this legal principle is to "normalize the supervisory function of criminal law" itself so that it is not misused by the government (court) in power (Christianto, 2009). In Indonesia, this principle of legality can be found in the formulation of Article 1, paragraph 1 of the Criminal Code in Dutch, which reads, "*Geen feit is strafbaar dan uit kracht van eene daaraan voorafgegane wettelijke strafbepaling*" which means "no act can be punished, except according to the provisions criminal punishment according to existing laws before the act itself. (Lamintang, 2007).

Criminal law experts generally agree on the existence of 3 (three) meanings of the principle of legality, namely: first, no act is prohibited and punishable by crime if this has not been previously stated in a statutory regulation; secondly, to determine the existence of a criminal act, analogies (*kiyas*) must not be used; and third, criminal law rules do not apply retroactively (Sudibyo & Rahman, 2021).

These three meanings provide several implications. First, the prohibition on analogies (non-analogy principle), and second, the requirement to use the criminal laws in force when the act was committed (*lex temporis delicti* or existing criminal laws). It is prohibited to apply criminal laws retroactively (non-retroactive principle). This implication is a logical consequence of the basic idea of the principle of legality, namely protecting individuals by limiting the authority of the authorities (including the authority of judges), where this limitation uses criminal law instruments. (Sudibyo & Rahman, 2021).

Positive law in Indonesia recognizes the principle of legality in Article 1 paragraph (1) of the Criminal Code that every act referred to as a criminal act/offense must be formulated in a law passed first, which stipulates a precise formulation of the acts in question. As a consequence, an act which, in society's opinion, is considered a disgraceful act because it violates the legal values that exist in society cannot be punished because it is not regulated in

writing in the law. This is because every criminal behavior must have criminal responsibility. This accountability is essentially an effort to return the situation to its original state and realize justice. Therefore, no matter how minor the crime, there must be accountability.

## **Literatur Review**

According to (Sudibyo & Rahman, 2021) (Sudibyo & Rahman, 2021), The principle of legality is often seen as a provision that is considered correct so that formally, it must represent society's sense of justice. Therefore, the provisions of the law must be enforced at all costs and treated as a representation of the values of justice. The consequence of this type of thinking and paradigm is an excessive perception of assuming that the law is the law and the law is the same as the law. This formalistic paradigm in viewing law has made it increasingly difficult to find true justice. Formal, narrow and rigid justice exists, namely justice that does not represent all rights and interests, including the rights of victims, perpetrators, the state and society. Therefore, various discourses have emerged to explore the Principle of Legality, representing legal norms that live and develop in society. Based on the results of data analysis, it was concluded that the position of the principle of legality, both formally and materially, is very much needed in enforcing criminal law in Indonesia (Nuarsa et al., 2023). The principle of formal legality is applied to prevent arbitrariness by the authorities towards innocent people.

Meanwhile, the principle of material legality accommodates unwritten laws that still apply in society. The concept of deconstruction regarding the principle of legality is that the primary guide for judges to qualify criminal acts outside those regulated by criminal law is unwritten criminal law, especially general legal principles (Saragih et al., 2023). If it does not find a basis in legal principles, what is used is the concept of moral values. Because the essence of law is morality, and morals are the primary substance of the law.

According to (Widayati, 2016), First, the principle of legality in Article 1 paragraph (1) of the Draft Criminal Code requires that criminal law be determined first through statutory regulations (written law). This provision is by the principle of legality, which provides legal certainty for the community. With the provisions that have been previously regulated, a person can be held responsible for actions they have committed that are expressly prohibited from being carried out. Second. The laws that live in society as an extension of the principle of legality in Article 1, paragraph (3) of the Draft Criminal Code are not laws formed by the makers of statutory regulations; they are unwritten laws. In other words, it contradicts the principle of legality, which requires provisions to be regulated in legislation using the principle of *lex certa*. Third, Article 1, paragraph (2) of the Draft Criminal Code stipulates the prohibition of analogies as a consequence of the principle of legality. However, with the expansion of the principle of legality, conflict occurs because to punish an act that is not regulated in statutory regulations, the judge will use an analogy or at least an extensive interpretation (Basrawi et al., 2023). Fourth, the principle of legality requires detailed and careful regulations (*lex certa*). The laws that live in society are not written laws. Therefore, there is no formulation regarding prohibited actions. Including laws that live in society can give rise to legal uncertainty. Fifth, from a human rights perspective, the expansion of the principle of legality is limited to severe human rights crimes (serious human rights violations). The provisions governing serious

human rights crimes clearly and in detail determine what severe human rights crimes mean and what crimes are included in these crimes.

According to (Setyawan, 2021), the principle of legality that applies in Indonesia has a long history, starting from enacting the Penal Code as a criminal law regulation in France. After investigating the emergence of the principle of legality, thinkers/philosophers from several countries, namely England, the United States, Italy, and France, had various thoughts. Thinkers/philosophers put forward the same idea behind the emergence of the principle of legality, namely limiting the power of rulers and judges to anticipate the occurrence of arbitrary criminal justice. This idea applies universally to almost all countries, including France, whose people want a change in their government. The French people long for a regulation that can guarantee and protect the human rights of their citizens. The principle of legality of criminal law is also based on the rule of law, including Indonesia as a state of law based on the written constitution of the 1945 Constitution of the Republic of Indonesia. A state of law has several distinctive characteristics, including the division of powers and the protection and guarantee of rights. Human Rights and all of this is achieved by implementing the principle of legality. Breakthroughs of the principle of legality are possible in Indonesia because they do not apply absolutely. However, breaching the principle of legality is only an exception, considering that the principle of legality is a fundamental principle in criminal law. Some practices that violate the principle of legality, both in the context of legal rules and legal practice, can only be carried out under circumstances of necessity and for the sake of realizing the human rights of citizens.

### **Research Method**

This research is a type of normative juridical research that examines library materials and secondary data. The approaches used are conceptual and statutory. Normative research is research carried out by examining library materials or secondary data alone. A normative juridical approach to problems is intended to clearly understand the subject matter regarding theoretical symptoms and objects based on literature and literature related to the problem to be discussed. An empirical juridical approach is carried out to study law in reality or based on facts obtained objectively in the field in the form of opinions, attitudes, and behavior based on legal identification and effectiveness.

### **Result and Discussion**

According to (Rahayu, 2014), The principle of legality, as formulated in each country's criminal law or constitution, is one of the fundamental principles that must be maintained for the sake of legal certainty. The meaning of the principle of legality must be interpreted wisely within the framework of law enforcement and justice. Let us look at the situation and conditions in which the principle of legality was born. This principle of protecting individual interests is the main characteristic of the objectives of criminal law, according to the classical school.

According to (MuIksan, 2017), The principle of legality (in Jinayah, it is called Qawa'id Usuliyah), which substantively means "a person may not be punished for committing a prohibited act or not carrying out an ordered act unless before the act is carried out it has been

regulated first in a general regulation that has been announced to the public (promulgated )," has become a fundamental principle in criminal law in Indonesia, Latvia and Jinayah.

According to(Hafizah et al., 2022), legality is one of the fundamental principles in criminal law. The existence of this principle is to protect citizens from the arbitrariness of the authorities. However, on the other hand, this principle makes it difficult to be written and to exist, which is natural in society. The objectives of the principle of legality are Protecting citizens from arbitrary actions from the state, protecting independent individuals against arbitrary actions of the state government, and protecting individual freedom against arbitrary actions. It is an expression of legal positivism in criminal law.

The principle of legality in criminal law is very fundamental. The principle of legality in criminal law is essential to determine whether a criminal law regulation can be applied to the criminal act that occurred. So, if a criminal act occurs, it will be seen whether there are legal provisions that regulate it and whether the existing regulations can be applied to the criminal act that occurred. Thus, following the principle of legality in criminal law, the first condition for taking action against a criminal act is that provisions in the (criminal) law formulate the criminal act and provide sanctions for it. This is because, in essence, a statutory regulation, especially criminal law regulations, only applies to the future. This means things that occur after the regulations are established. In the Criminal Code, which currently applies, this principle is contained in Article 1 paragraph (1), which states: "No criminal act can be punished except on the strength of the criminal provisions in existing laws and regulations before the act is committed." Since the principle of legality is fundamental in criminal law, understanding various aspects of the principle of legality is a must(Nurmala, 2021).

According to(BR et al., 2023), In Indonesia, the principle of legality is manifested in legal rules, namely Article 1 paragraph (1) of the Criminal Code (KUHP), which states: "No act can be punished except by the strength of the criminal provisions in existing legislation before the act is committed. "The provisions regarding "criminal regulations in existing laws" in Article 1 paragraph (1) of the Criminal Code have the understanding that there must be four essential elements in criminal law, namely: 1) qualification of criminal acts; 2) criminal laws that must be enforced; 3) sources of criminal law; and 4) criminal law system.

In its settings, both in Indonesia and in Islam, the principle of legality has a different character. In Indonesia, the principle of legality has been deviated by applying customary law/living law/unwritten law and deviations in retroactivity for several specific crimes, such as gross human rights violations and terrorism. Meanwhile, in Jinayah / Islamic Law, applying the principle of legality is more lenient in forgiving the perpetrators of Jarimah(Muhsan, 2017).

Reforming Indonesian criminal law, especially in regulating the principle of legality, should also consider comparisons with other countries as part of the civilized world community. Likewise, we must also pay attention to spiritual values, especially Islam as the morality of the majority of Indonesian society, as well as paying attention to the noble values of the Indonesian nation (Pancasila) so that the application of criminal law becomes more effective in achieving its goal of protecting the interests of the state, society, and individuals.(Christianto, 2022; Najih, 2018; Puspito & Masyhar, 2023).

The principle of legality is always given a formal meaning, namely everything that formally gives rise to normative rules for requiring an action. The only sources of criminal law are criminal laws and other criminal legislation. 36, which means that the application of the principle of legality in Indonesia is only intended for an act that has been determined, firmly and in writing in a law, the criminal act is prohibited, and there are sanctions for violators. (Sudibyo & Rahman, 2021; Wendel, 2019).

The principle of legality in Indonesian positive criminal law is very fundamental. The principle of legality in criminal law is essential to determine whether a criminal law regulation can be treated against a criminal act that occurred. So, if a criminal act occurs, it will be seen whether the legal provisions that regulate it and the existing regulations can be applied to the criminal act that occurred. So, by applying the principle of legality, judges cannot act as they please or arbitrarily.

### **Conclusion**

So, the principle of legality in Indonesian criminal law is regulated in Article 1 of the Criminal Code. To protect humans from the arbitrariness of those in power, the principle of legality does not require criminal punishment without prior regulations. Apart from containing provisions regarding the necessity to formulate criminal offense provisions in a written regulation, the principle of legality also regulates provisions regarding the prohibition of the use of analogies and the prohibition of the retroactive application of statutory regulation.

### **References**

- Agustian, S. L. (2019). Asas-Asas Umum Pemerintahan Yang Baik Sebagai Batu Uji Bagi Hakim Dalam Memutus Sengketa Peradilan Administrasi Negara. *Jurnal Hukum Magnum Opus*, 2(2), 149–161.
- Ariyanti, N. P. D. (2022). *Penerapan Asas Non-Retroaktif dalam Tindak Pidana Terorisme Di Indonesia*.
- Basrawi, B., Sukri, S., & Eka Mayasari, R. (2023). Law Enforcement of Narcotics Abuse: Case Study of Investigation Process in Narcotics Criminal Acts in The Kolaka District National Narcotics Agency. *Journal of Progressive Law and Legal Studies*, 1(02). <https://doi.org/10.59653/jplls.v1i02.150>
- Berman, H. J. (1972). *Soviet criminal law and procedure: the RSFSR codes* (Vol. 50). Harvard University Press.
- BR, E. J., Nainggolan, G. A., Bangun, D. Y. B., & Manalu, S. A. R. (2023). Analisis Strategi Pencegahan Korupsi Menurut Perspektif Hukum Islam Dalam Implementasi Asas Legalitas Tindak Pidana: Hukum Islam dalam konteks Pencegahan Korupsi. *Mandub: Jurnal Politik, Sosial, Hukum Dan Humaniora*, 1(4), 268–279.
- Christianto, H. (2022). *REKONSTRUKSI DALAM PERLINDUNGAN HUKUM TERHADAP KORBAN TINDAK PIDANA PERDAGANGAN ORANG DALAM SISTEM PERADILAN PIDANA YANG BERBASIS NILAI KEADILAN*. UNIVERSITAS ISLAM SULTAN AGUNG.

- Effendi, T. (2017). *Dasar-Dasar Hukum Acara Pidana*.
- Hafizah, A., Ablisar, M., & Lubis, R. (2022). Asas Legalitas Dalam Hukum Pidana Indonesia Dan Hukum Pidana Islam. *Mahadi: Indonesia Journal of Law*, 1(1), 1–10.
- Mulksan, M. (2017). Asas Legalitas Dalam Hukum Pidana: Studi Komparatif Asas Legalitas Hukum Pidana Indonesia Dan Hukum Pidana Islam (Jinayah). *Serambi Hukum*, 11(01), 1–26.
- Najih, M. (2018). Indonesian Penal Policy: Toward Indonesian Criminal Law Reform Based on Pancasila. *JILS*, 3, 149.
- Nuarsa, I. K. G., Paraniti, A. A. S. P., & Pidada, I. B. A. (2023). Effectiveness of Law Number 2 of 2002 Concerning Police Members Who Commit Alleged Violations or Criminal Acts in the Case of Ferdy Sambo. *Journal of Progressive Law and Legal Studies*, 1(03). <https://doi.org/10.59653/jplls.v1i03.251>
- Nurmala, L. D. (2021). Studi Komparatif tentang Asas Legalitas Berdasarkan Hukum Pidana Positif Indonesia Dan Hukum Pidana Islam. *Suloh: Jurnal Fakultas Hukum Universitas Malikussaleh*, 9(1), 50–66.
- Puspito, B., & Masyhar, A. (2023). Dynamics of Legality Principles in Indonesian National Criminal Law Reform. *Journal of Law and Legal Reform*, 4(1), 129–148.
- Rahayu, S. (2014). Implikasi Asas Legalitas Terhadap Penegakan Hukum dan Keadilan. *INOVATIF/ Jurnal Ilmu Hukum*, 7(3).
- Ranchordás, S. (2015). Sunset clauses and experimental regulations: blessing or curse for legal certainty? *Statute Law Review*, 36(1), 28–45.
- Ridwan, I. H. J., & Achmad Sodik, S. H. (2023). *Hukum Tata Ruang: dalam konsep kebijakan otonomi daerah*. Nuansa Cendekia.
- Rosa, N. (2022). *Studi Komparasi Double Track System dalam Sistem Pemidanaan pada KUHP dan Rancangan KUHP 2019*.
- Rosenbloom, D. H., Kravchuk, R. S., & Clerkin, R. M. (2022). *Public administration: Understanding management, politics, and law in the public sector*. Routledge.
- Saragih, Y. M., Armanda, W., & Novaisal, A. (2023). Juridical Study on Abuse of Authority in Corruption Crimes: Analysis of Law No. 19 of 2019 concerning the Corruption Eradication Commission. *Journal of Progressive Law and Legal Studies*, 1(02). <https://doi.org/10.59653/jplls.v1i02.92>
- Setyawan, V. P. (2021). Asas Legalitas Dalam Perspektif Filsafat Hukum. *Justitia et Pax*, 37(1).
- Sudibyo, A., & Rahman, A. H. (2021). Dekonstruksi Asas Legalitas Dalam Hukum Pidana. *Journal Presumption of Law*, 3(1), 55–79.
- Wendel, W. B. (2019). The rule of law and legal-process reasons in attorney advising. *BUL Rev.*, 99, 107.
- Wibowo, E. A., Hosnah, A. U., & Sihombing, L. A. (2021). ANALISIS HUKUM PADA KUHP PASAL 263 dan PASAL 378 DALAM PENANGGULANGAN TINDAK PIDANA PENYALAHGUNAAN KARTU KREDIT (CREDIT CAR. *Pakuan Justice Journal of Law (PAJOUL)*, 2(2), 82–103.

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- Widayati, L. S. (2016). Perluasan asas legalitas dalam RUU KUHP. *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan*, 2(2), 307–328.
- Yani, F., Gunawan, B. I., Simatupang, B. D., & Nurohim, A. (2022). Penerapan Asas Legalitas Dalam Praktek Sistem Peradilan Pidana Indonesia Menghadapi Perkembangan Tindak Pidana Korupsi. *Jurnal Lex Justitia*, 4(2), 118–134.