



ISSN 2797-8508 (Print)  
ISSN 2807-8330 (Online)

**VOL. 4 NO. 1, JANUARY (2024)**

**Riwayat Artikel**

*History of Article*

Diajukan: 02 Desember 2023

Submitted

Direvisi: 5 Januari 2024

Revised

Diterima: 16 Januari 2024

Accepted

**Saran Perujukan**

*How to cite:*

Hafizhah, A., Leviza, J., & Mulhadi, M. (2024). An Overview of the Principle of Legality: Common Law VS Civil Law. *Ikatan Penulis Mahasiswa Hukum Indonesia Law Journal*, 4(1), 38-47. <https://doi.org/10.15294/ipmhi.v4i1.76875>

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## **An Overview of the Principle of Legality: Common Law VS Civil Law**

### *Potret Asas Legalitas dalam Hukum Pidana: Common Law VS Civil Law*

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**Abstract** The principle of legality stands as a fundamental cornerstone in upholding criminal law, necessitating a thorough and foundational comprehension. This study aims to present an overview of the principle of legality within the two predominant legal systems globally, namely common law and civil law. Employing a normative legal approach, through an examination of primary, secondary, and tertiary legal sources gathered via literature review. This research illuminates the differing applications of the principle of legality within common law and civil law. The result is, within common law, the principle of legality, epitomized by *Nulla Poena Sine Lege*, is practically reliant on precedents

established through judicial decisions. Conversely, in civil law, the principle is encapsulated by *Nullum Crimen, Nulla Poena Sine Praevia Lege Poenali*, emphasizing adherence to written regulations found within various criminal legal frameworks.

**Keywords:** *Civil Law; Common Law; Principle of Legality*

**Abstrak** Asas legalitas merupakan dasar fundamental dalam penegakan hukum pidana, sehingga diperlukan pemahaman yang mendasar dan mendalam mengenai hal tersebut. Adapun penelitian ini bertujuan untuk memberikan potret asas legalitas dalam dua sistem hukum utama di dunia, yaitu *common law* dan *civil law*. Menggunakan pendekatan hukum normatif, data-data yang digunakan dalam penelitian ini bersumber dari bahan hukum primer, sekunder, dan tersier yang diperoleh melalui studi kepustakaan. Penelitian ini menyoroti perbedaan penerapan asas legalitas di dalam *common law* dan *civil law*. Hasilnya, dalam *common law*, *Nulla Poena Sine Lege* menjadi rumusan asas legalitas yang pada praktiknya bertumpu pada preseden hasil putusan pengadilan. Sementara dalam *civil law*, rumusan asas legalitasnya adalah *Nullum Crimen, Nulla Poena Sine Praevia Lege Poenali*, yang menitikberatkan pada peraturan tertulis dalam berbagai regulasi hukum pidana.

**Kata kunci:** *Asas Legalitas; Civil Law; Common Law.*

## A. Introduction

Criminal law stands as a fundamental pillar within legal systems governing actions deemed violations of societal norms. The principle of legality<sup>1</sup> underpins the enforcement of criminal law across diverse legal systems worldwide, ensuring that all actions and decisions taken within the context of criminal law enforcement adhere to the existing legal framework. This principle plays a pivotal role in the two predominant global legal systems: common law and civil law.

Common law,<sup>2</sup> prevalent in nations with an English legal history, underscores the importance of legal precedents in shaping court verdicts. Legal legitimacy in common law hinges on court-established judgments from prior cases, forming the basis for future decisions. Courts have a crucial role in interpreting and evolving the

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<sup>1</sup> According to Moeljatno, the principle of legality embodies at least three interpretations:

1. No act should be prohibited and penalized unless it has been previously declared in a legal statute;
2. Analogies must not be used to determine the existence of a criminal act; and
3. Criminal law regulations should not have retroactive effects.

For further details, refer to Moeljatno, *Asas-Asas Hukum Pidana*, (Jakarta: Rineka Cipta, 2000).

<sup>2</sup> Praise Junta W.S.Siregar, "Perbandingan Sistem Hukum *Civil Law* dan *Common Law* dalam Penerapan Yurisprudensi Ditinjau dari Politik Hukum," *DHARMASISYA: Jurnal Program Magister Hukum Fakultas Hukum Universitas Indonesia* 2, no. 2 (2022): 1027-1036.

law through their rulings. Yet, within common law, legality also encompasses the need for clear, understandable laws for the public. Transparency is key, aiding individuals in comprehending their rights and responsibilities.

On the other hand, civil law,<sup>3</sup> embraced by countries with Roman legal origins, prioritizes codified written laws. Legal legitimacy in civil law rests upon meticulously formulated laws in books or statutes that are explicit and precise. These written laws are the primary reference point for legal determinations within this system.

Despite divergent approaches to interpreting legal legitimacy, both common law and civil law converge on safeguarding individual rights and obligations. While common law leans on precedents and court interpretations to evolve laws, civil law relies on written statutes and legal texts. The common ground lies in their shared objective of upholding justice, certainty, and legal transparency. This study aims to illustrate how legal legitimacy is implemented through diverse methods in both systems, striving for comparable goals.

This research<sup>4</sup> endeavors to offer insights into the portrayal of legal legitimacy within common law and civil law systems, specifically concerning criminal law. Legal education seeks to impart an understanding of prevailing legal norms, applied in resolving societal legal issues.<sup>5</sup> In the sphere of criminal law, legal legitimacy serves as a foundational basis crucial for legal experts to master and comprehend.

## B. Method

The method utilized in this article is based on normative legal research, focusing on the examination of prevailing legal norms.<sup>6</sup> Secondary data such as primary, secondary, and tertiary legal materials were used. All data were obtained through literature review and subsequently analyzed to provide an overview specifically concerning the depiction of the principle of legality within the

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<sup>3</sup> Farihan Aulia dan Sholahuddin Al-Fatih, "Perbandingan Sistem Hukum *Common Law*, *Civil Law*, dan *Islamic Law* dalam Perspektif Sejarah dan Karakteristik Berpikir," *Legality* 25, no. 1 (2017): 98-113.

<sup>4</sup> According to Jelly Leviza, research, stemming from the word itself, is the pursuit of rediscovering truth. Truth, fundamentally, resides within the context of space and time, being relative and not absolute. For further details, refer to YouTube: Jelly Lev, *Pengantar Metode Penelitian Hukum*, uploaded on March 17, 2022, accessed from <https://www.youtube.com/watch?v=OYtWXg5VaJs> on December 1, 2023 at 01.48 WIB. Also check YouTube: Jelly Lev, *3 (Tiga) Sikap Atas Kebenaran*, uploaded on March 29, 2022, accessed from <https://www.youtube.com/watch?v=33KLjfp7iQw> on December 1, 2023 at 02.03 WIB.

<sup>5</sup> Refer to YouTube: Jelly Lev, *Tujuan Pendidikan Ilmu Hukum di Fakultas Hukum*, uploaded on March 3, 2022, accessed from <https://www.youtube.com/watch?v=bgKt2iHuh0> on December 1, 2023 at 01.26 WIB.

<sup>6</sup> Further details can be found on YouTube: Jelly Lev, *Jenis Penelitian Hukum*, Uploaded on March 24, 2022, accessed from <https://www.youtube.com/watch?v=QbmYBsVZVXs> on December 1, 2023 at 01.59 WIB.

frameworks of common law and civil law systems, particularly in the context of criminal law.

### C. Results and Discussions

The principle of legality holds vital significance in criminal law, determining the legitimacy of an act as criminal. Under common law, the principle "*Nulla poena sine lege*"<sup>7</sup> asserts that no punishment can exist without a clear legal basis. This underscores the need for precise definition and certainty in establishing an act as criminal. In this system, law enforcement and interpretation primarily rely on precedents, where past court rulings guide the determination of criminal acts.

Conversely, civil law follows the principle "*Nullum crimen, nulla poena sine praevia lege poenali*"<sup>8</sup> which highlights the absence of crime or punishment without prior governing penal laws. While sharing a requirement for legal grounds with common law, civil law emphasizes written laws and various criminal regulations. It leans heavily on established legal texts while also considering judicial precedents.

The primary contrast between these legal systems lies in their treatment of legal precedents. Common law evolves through adjudicated cases, allowing the establishment of new precedents from previously unaddressed scenarios. In contrast, civil law sees changes in criminal law through legislative processes when laws are revised by authorized legislative bodies. These approaches significantly impact the evolution of criminal law within these systems.

#### 1. The Significance Of The Principle Of Legality

Both the common law and civil law systems have different approaches in applying the principle of criminal legality, reflected in their respective philosophical, sociological, and juridical perspectives. In common law, legality tends to emphasize the evolution of law through the courts and precedents created from previous court

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<sup>7</sup> According to Lamintang, the formulation of the legality principle by von Feuerbach (the formulator of the theory of punishment known as "psychologische zwang") in criminal legal science comprises three provisions:

1. *Nulla poena sine lege*, which implies that the imposition of punishment must be based on the law;
2. *Nulla Poena Sine Crimine*, meaning that punishment can only be imposed if the act in question has been threatened with punishment by the law; and
3. *Nullum Crimen Sine Poena Legali*, signifying that an act, when violated, can result in the imposition of punishment as stipulated by the law against the offender.

For further details, refer to P. A. F. Lamintang, *Dasar-Dasar Hukum Pidana*, (Bandung: Citra Aditya Bakti, 1997) and compare it with Adami Chazawi, *Pelajaran Hukum Pidana Bagian 1*, (Jakarta: PT. Raja Grafindo Persada, 2002).

<sup>8</sup> The legality principle in criminal law emphasizes that criminal sanctions can only be applied when an act has been explicitly stipulated as a criminal offense in legal regulations along with the corresponding penalty. This principle aims to ensure that criminal law serves the community by preventing legal violations by members of society. This concept is articulated in the adage formulated by Von Feuerbach as "*Nullum delictum nulla poena sine praevia lege*," or as identified by Van Bemmelen as "*Nullum crimen nulla poena sine praevia lege poenali*." For further reading, refer to Bambang Poernomo, *Asas-Asas Hukum Pidana*, (Jakarta: Ghalia Indonesia, 1985).

decisions. In this context, legality is viewed as the foundation for legal development that responds to societal needs and the dynamics of the times. Conversely, civil law focuses on creating legal certainty through clear and specific legal texts. The principle of legality in civil law is understood as a foundation to ensure measured justice, to avoid legal uncertainty within society.

From a philosophical perspective,<sup>9</sup> common law emphasizes the principle of legal evolution through interpretations of unique cases. The legality in common law is evolutionary and dynamic as it continually evolves according to societal needs and the development of the times. Meanwhile, the philosophy behind civil law leans more towards creating legal certainty through clear and specific legal texts. The principle of legality in civil law is construed as a basis to ensure proper justice.

From a juridical perspective,<sup>10</sup> common law applies legality with a casuistic approach, where precedents or previous court decisions are crucial in determining crimes and their punishments, as previous court decisions are the primary guide in sentencing. Conversely, civil law focuses on written laws and codifications established in criminal law. This principle makes legal text formulations the primary reference in defining crimes and their punishments.

From a sociological standpoint,<sup>11</sup> within the common law system, the role of the courts in shaping the law is significantly influenced by societal factors and values when decisions are made. The courts tend to reflect the existing social values and expectations. In contrast, within civil law, the legislative process plays a primary role in determining and amending criminal law. Legal interpretations are more based on established legal texts by the legislative body, although still considering the societal needs following the ongoing changes.

Both these legal systems, common law and civil law, display different approaches in applying or interpreting the principle of criminal legality. Depending on the goals, values, and legal needs desired within a society, both common law and civil law have their respective strengths and weaknesses concerning the

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<sup>9</sup> Read more at the University of Texas at Dallas. *Legal Philosophy: Civil Law and Common Law*, accessed from <https://personal.utdallas.edu/~mjleaf/legalphil.html> on December 1, 2023 at 20.37 WIB. Also, check The Robbins Collections, *The Common Law and Civil Law Tradition*, uploaded in 2010, accessed from <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf> on December 1, 2023 at 20.42 WIB.

<sup>10</sup> Read more at the James Chen, Julius Mansa, dan Kirsten Rohrs Schmitt, *Common Law: What It Is, How It's Used, and How It Differs From Civil Law*, uploaded on May 20, 2022, accessed from <https://www.investopedia.com/terms/c/common-law.asp> on December 1, 2023 at 21.06 WIB. Then, compare it with Bernadetha Aurelia Oktavira, *Mengenal Perbedaan Civil Law dan Common Law*, uploaded on October 6, 2023, accessed from [https://www.hukumonline.com/klinik/a/perbedaan-civil-law-dan-common-law-lt58f8174750e97?utm\\_source=website&utm\\_medium=internal\\_link\\_klinik&utm\\_campaign=civil\\_law\\_dan\\_common\\_law](https://www.hukumonline.com/klinik/a/perbedaan-civil-law-dan-common-law-lt58f8174750e97?utm_source=website&utm_medium=internal_link_klinik&utm_campaign=civil_law_dan_common_law) on December 1, 2023 at 21.08 WIB.

<sup>11</sup> Further more in PPPLRC (Public-Private Partnership Legal Resource Center), *Key Features of Common Law or Civil Law Systems*, uploaded on March 2, 2022, accessed from <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law> on December 1, 2023 at 20.52 WIB.

enforcement of the principle of legality in criminal law. Understanding these differences provides comprehensive insights into the actual complexities of the law occurring within societies.

## 2. The Application Of The Principle Of Legality

The application of the principle of legality in criminal law has significant implications for justice and legal certainty in society. Although these two legal systems have different approaches, their primary objective remains to ensure that crime enforcement and punishment are only established in accordance with clearly defined provisions in the prevailing law.

The common law system relies on legal precedents, also known as "*stare decisis*"<sup>12</sup>. One such example is the change in the concept of mens rea in *R v. Cunningham*<sup>13</sup> in 1957, demonstrating the court's interpretation of the subjective fault element in criminal law.

The case of *R v. Cunningham* (1957) occurred in England when Reginald Edward Michael Cunningham was charged with poisoning someone. In this case, Cunningham tampered with a gas meter to steal money from a house, resulting in a gas leak in a neighboring house. During the incident, the neighboring house was occupied by someone who was asleep, and that person subsequently suffered severe gas poisoning and fell ill. In the trial, Cunningham was charged under Section 23 of the Offences Against the Person Act 1861, which states that someone who intentionally and recklessly emits poisonous or noxious substances endangering another's life can be punished.<sup>14</sup>

The focus of the court's interpretation in this case was the subjective fault element or "mens rea." Although Cunningham did not directly intend to poison the

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<sup>12</sup> To put it simply, *stare decisis* holds that courts and judges should honor "precedent"—or the decisions, rulings, and opinions from prior cases. Further details on the American Bar Association, *Understanding Stare Decisis*, Uploaded on December 16, 2022, accessed from [https://www.americanbar.org/groups/public\\_education/publications/preview\\_home/understand-stare-decisis/](https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/) on December 1, 2023 at 16.33 WIB. Also, check Sneha Solanki, *What is stare decisis in simple terms?* uploaded on January 30, 2023, accessed from <https://legal.thomsonreuters.com/blog/the-doctrine-of-stare-decisis/> on December 1, 2023 at 16.36 WIB.

<sup>13</sup> In legal terms, 'R v' is an abbreviation of 'Rex v.' in Latin, which translates to 'The King against.' This abbreviation is used in the English legal system and some Commonwealth countries to denote cases brought forth by the government or prosecuting authorities against specific defendants. 'R' refers to the King or Queen, while 'v.' stands for 'versus,' meaning 'against.' This abbreviation signifies legal cases where the government acts as the plaintiff. Read more on Quora, *In the legal case R v, what does the "R" stand for?* accessed from <https://www.quora.com/In-the-legal-case-R-v-what-does-the-R-stand-for> on December 1, 2023 at 16.50 WIB.

<sup>14</sup> Read further more on Oxbridge Law Team, *R v Cunningham [1957] 2 QB 396*, Uploaded on August 8, 2023, accessed from [https://www.oxbridgenotes.co.uk/law\\_cases/r-v-cunningham](https://www.oxbridgenotes.co.uk/law_cases/r-v-cunningham) on December 1, 2023 at 17.22 WIB. Then compare it with the LawTeacher, *R v Cunningham - 1957*, uploaded on October 25, 2021, accessed from <https://www.lawteacher.net/cases/r-v-cunningham.php#citethis> on December 1, 2023 at 17.26 WIB.

sleeping person, the court ruled that when Cunningham intentionally<sup>15</sup> damaged the gas meter, he should have also known that this action could endanger others.

On the other hand, in the civil law system, the principle of legality is enforced through written texts in criminal laws. For example, in France, changes in criminal law often occur through the legislative process. The amendment to the French criminal law in 1994 is a concrete example of efforts to change criminal law through legislation, which is then implemented directly.<sup>16</sup>

Indonesia has also undergone reforms in national criminal law codification through Law Number 1 of 2023 concerning the Criminal Code.<sup>17</sup> Previously, the regulation regarding the codification of Indonesian criminal law was governed by Law Number 1 of 1946 concerning Criminal Law Regulations, which essentially originated from the *Wetboek van Strafrecht* with several adjustments.<sup>18</sup>

Understanding the differences in the application of the principle of legality between the common law and civil law systems provides not only additional insights into its legal aspects but also a comprehensive understanding of the context of criminal law implementation in various countries. The included case studies provide a concrete overview of how both legal systems operate and evolve in the context of applying the principle of criminal legality.

### **3. The Comparison of the Principle of Legality in Common Law and Civil Law**

In the common law system, the legality principle based on precedents has the advantage of flexibility in law enforcement by allowing courts to make independent decisions based on specific cases, making it more adaptive to changes in societal values. The system's ability to evolve through legal precedents enables a more dynamic law evolution that responds to changing times and situations. However, relying on precedents can potentially lead to legal uncertainty in its application if there are changes in the contemporary interpretations of similar cases previously ruled upon in court.

In the civil law system, the legality principle emphasizing clear and specific legal texts does provide higher legal certainty. Legal interpretations are based on

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<sup>15</sup> Read more about intent in criminal law at Marsudi Utoyo, Kinaria Afriani, Rusmini, Husnaini, "Sengaja dan Tidak Sengaja dalam Hukum Pidana Indonesia," *Lex Librum: Jurnal Ilmu Hukum* 7, no. 1 (2020): 75-85.

<sup>16</sup> For a more comprehensive overview of the historical evolution of criminal legislation regulations in France, refer to Jacques Borricand, *World Factbook of Criminal Justice Systems*, accessed from <https://bjs.ojp.gov/content/pub/pdf/wfbcjsfr.pdf> on December 1, 2023 at 18.00 WIB. Then compare with the Le Ministère de la Justice, *History of the Judicial System in France*, uploaded on May 2001, accessed from <https://www.legal-tools.org/doc/4d17d5/pdf/> on December 1, 2023 at 18.03 WIB.

<sup>17</sup> A significant change is notably observed in the explicit prohibition of analogy use as stated in Article 1, Paragraph (2) of the Republic of Indonesia Law Number 1 of 2023 regarding the Criminal Code. Previously, the prohibition of analogy was not expressly articulated in the Indonesian Criminal Code but rather existed as a doctrine, regarded as an inherent consequence of applying the principle of legality in Indonesia.

<sup>18</sup> For more details, refer to Articles 1 through 8 of the Republic of Indonesia Law Number 1 of 1946 concerning Criminal Law Regulations.

established legal texts. This system tends to have uniformity in law enforcement as it relies on the same legal texts across jurisdictions. However, the weakness of civil law lies in its lack of flexibility in handling unique situations due to rapid societal changes. The lengthy and complex legislative process may hinder adaptation to changes and potentially result in legal gaps.

Ultimately, the choice between common law and civil law often becomes subjective, depending on the context of its interests and needs. Both of these systems have their respective strengths and weaknesses that need to be carefully considered. It is challenging to decide between the flexibility in legal development and the high level of legal certainty, as each system offers different benefits depending on the specific goals and circumstances of a society. It cannot be conclusively determined which legal system is better than the other, as the evaluation and decision-making process are heavily influenced by societal preferences, cultural values, and the legal needs desired within a particular country or jurisdiction.

#### **D. Conclusion**

There are significant differences between the interpretation and application of the principle of legality in the common law and civil law systems, although both share the same goal of protecting society in the enforcement of criminal law. The principle of legality in the common law system is strongly influenced by precedents, allowing for continuous changes and development in criminal law alongside the evolution of cases in society. The judiciary plays a crucial role in dynamically interpreting the law to align with societal changes and evolving values due to the passage of time. Thus, the principle of legality in the common law system is considered more open, responsive, and adaptive to the needs of the times. In contrast, the principle of legality in the civil law system is more bound by statutory texts, requiring the development of criminal law to undergo a legislative process by legislators. The challenge for criminal law legislation is to accommodate the needs of contemporary times amidst the rapid pace of development. However, the strong attachment to statutory texts is seen as capable of ensuring higher legal certainty as the court decisions produced tend to be more uniform.

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