Journal of Law and Legal Reform
Vol. 4 Issue 1 (2023) 109–122
DOI: https://doi.org/10.15294/jllr.v4i1.64078
Online since: January 22, 2023

Journal of Law & Legal Reform

journal.unnes.ac.id/sju/index.php/jllr/index

Dynamics of Legality Principles in Indonesian National Criminal Law Reform

Beni Puspito
Balai Pemasyarakatan Kelas I Semarang
(Penitentiary Institution of Class I of Semarang),
Kota Semarang, Indonesia

Ali Masyhar
Department of Criminal Law, Faculty of Law
Universitas Negeri Semarang, Semarang, Indonesia

✉ beni_puspito@students.unnes.ac.id

Abstract

The renewal of the Criminal Code is intended to update/build the national criminal law system. The national demand and need to renew and at the same time change/replace the old Criminal Code is the background for the drafting of the new Criminal Code Concept. The principle of legality according to Paul Johan Anslem von Feuerbach is nulla poena sine lege; nulla poena sine crimine; nullum crimen sine poena legali. These three phrases then become the adage Nullum delictum, nulla poena sine praevia legi poenali, which means that no act can be punished except for the strength of the criminal rules in the legislation that existed before the act was committed. The type of research used is doctrinal research. All data obtained were analyzed qualitatively juridically. This study examines and examines secondary data about the dynamics of the legality principle in reforming criminal law laws in Indonesia. The results of

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this study states that if an act does not meet the formulation of an offense in a written law, the judge can impose a sentence if the act is considered disgraceful, contrary to justice and other social norms in people's lives. So that implicitly the criminal law in Indonesia has recognized the teaching of material lawlessness in a positive function.

Keywords
Criminal, Principle of Legality, Law

Introduction

Reform of the Criminal Code is a "*Build Plan*" of the National Criminal Law System which aims to "build/ create/ update a new system". Thus, if you want to explore the Renewal of the Criminal Code, then it is better not to just discuss the issue of the formulation or formulation of the articles. The textual discussion on the Reform of the Criminal Code needs to be understood and accompanied by conceptual and contextual discussion. In this case, in the context of the basic ideas of the national criminal law system which depart from the signs and fundamental values of the national legal system or the conceptual reconstruction of the main points of thought, the development of factual problems and conceptual/scientific problems, both from national and international aspects. In addition, it needs to be understood that it is not just updating/changing the formulation of articles textually but building or carrying out legal reforms ("*law reform*", especially "*penal reform*") because in essence the main thing is to build or update the main concepts, basic ideas, and thoughts.

The thoughts above want to emphasize that discussing the Reform of the Criminal Code is basically intended to update/build the national criminal law system. The big conceptual problems that have long been expressed and discussed in various national documents as well as in various scientific activities are the Grand Design of the National Criminal Law System which we aspire to build. Therefore, in discussing the Reform of the Criminal Code, it is better to explore and understand in advance the various series of scientific activities and the series of ideas and thoughts that have developed. This is intended because "development/legal renewal" is basically "renewal/sustainable

development".[1] Next, Law reform and development which is defined as renewal and legal development is closely related to sustainable/sustainable community development, including activities of sustainable/sustainable basic ideas/concepts/ideas.

The implementation of legal renewal becomes one unit in legal politics. This is based on the fact that the nature of legal politics is closely related to the background and importance of legal politics or legal reform itself. According to Satjipto Raharjo in his writing entitled "Legal Development Directed to National Goals" that there was no difference between the functions of law before and after independence. The difference lies in the political decisions taken by the two masses and implementing them into their respective legal systems. If the political decisions taken after the independence of August 17, 1945 were to prioritize the greatest prosperity of the people, then such decisions must be formulated in legal principles, and the legal structure must also provide for the possibility of doing so.[2]

The national demand and need to renew and at the same time change/replace the old Criminal Code (*Wetboek van Strafrecht*) inherited from the Dutch colonial era was the background for drafting the concept of the new Criminal Code. Efforts to reform criminal law in essence include the field of criminal law policy which is part of and is closely related to "law enforcement policy", "social policy" and "criminal policy". Based on the above thoughts, it can be interpreted that criminal law reform is essentially: 1) It is part of a policy (rational effort) to renew legal substance in order to make law enforcement more effective; 2) Is part of a policy (rational effort) to eradicate/overcome crime in the context of public protection; 3) is an effort to review and re-evaluate (reorientate and re-evaluate) main ideas, basic ideas, or socio-philosophical, socio-political, and socio-cultural values that underlie criminal policies and criminal law enforcement policies so far. Because it is not a renewal/reform of criminal law, if the value orientation of the criminal law that aspires to is the same as the value orientation of the old criminal law inherited from the colonialists (the old Criminal Code or WvS); and 4) is part of a policy (rational effort) to overcome social problems and humanitarian problems in order to achieve/support national goals, namely social defense and social welfare.

Taking a value-oriented approach, both human values and cultural identity values and religious moral values, is an interesting thing in making efforts to rethink and explore law in order to strengthen an integrated crime prevention strategy. So that there is a call for a cultural approach, a humanist approach,

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1 Barda Nawawi Arief, "Beberapa Aspek Pengembangan Ilmu Hukum Pidana (Menyongsong Generasi Baru Hukum Pidana Indonesia)" (Pustaka Magister, 2011).

2 Nyoman Serikat Putra Jaya, *Politik Hukum*, 2018.

and a religious approach that is integrated into a policy-oriented rational approach.

In addition to comparative and harmonization studies from the point of view of customary law and religion, the renewal of national criminal law is also required to carry out comparative and harmonization studies with the latest developments in thoughts and ideas in theory/science of criminal law and in global/international agreements. These ideas include the idea of a balance between crime prevention, treatment of perpetrators, and treatment of society; balance between social welfare and social defense; orientation balance between criminal and victim individualization; the idea of using a "double track system" (between punishment and treatment/measures); the idea of selective and limited use of imprisonment, which is synonymous with the idea of the principle of austerity and the principle of restraint in using imprisonment; also synonymous with "the ultimo-ratio character of the prison sentence" or "alternative to imprisonment or custodial sentence"; the idea of "elasticity/flexibility of sentencing"; the idea of "judicial corrective to the legality principle" to break through rigidity; the idea of criminal modification; and the idea of pardoning/pardoning the judge, and the idea of settling cases outside the process or the idea of not continuing a criminal case formally (known as the idea of diversion), among others through peace or penal mediation.

Method

The type of research used is doctrinal research. Doctrinal research is research that uses a qualitative legal research approach with a normative juridical research type. All data obtained were analyzed qualitatively juridically. In this case testing and reviewing secondary data about the dynamics of the principle of legality in the renewal of the national criminal law law in Indonesia. This analysis technique is a technique in which the legal literature or materials will be studied. With this technique, it is hoped that it can provide descriptions of the research topic so that it helps the writer make a correct conclusion.

A Discourse of Legality Principle

The principle of legality was created by a German Criminal Law Scholar in his book: *Lehrbuch des penlichen recht* in 1801 named Paul Johan Anslem von Feuerbach (1775-1833). In Latin it reads: nulla poena sine lege; nulla poena

sine crimine; nullum crimen sine poena legali.[3] These three phrases then become the adage *Nullum delictum, nulla poena sine praevia legi poenali*, which means that no act can be punished except for the strength of the criminal rules in the legislation that existed before the act was committed.[4] What Feuerbach formulated above contains a very basic meaning. When viewed from the situation and conditions in which the principle of legality was born, it is difficult to deny that this principle is to protect individual interests as the main characteristic of the objective of criminal law according to the classical school.[5]

Frank von Liszt, a well-known criminal expert from Germany, wrote, "the nullum crimen sine lege, nulla poena sine lege principles are the bulk of the Citizen against the state's omnipotence; they protect the individual against the brutal force of the majority, against the Leviathan."[6] Next, according to Fletcher, protecting individuals from the arbitrariness of the State is the negative principle of the legality principle, while the positive principle of legality is protecting the community from crime by punishing the perpetrators of crimes that are guilty by the state.[7]

Moeljatno writes that the principle of legality contains three meanings: 1) No act is prohibited and punishable by crime if it has not been stated in a statute beforehand. 2) To determine the existence of a criminal act, an analogy (*kiyas*) should not be used. 3) Rules of criminal law are not retroactive.[8]

The legality principle is closely related to the legal positivism school of thought. Legal positivism states that the law is synonymous with the law, which is outside the law is not a law. Law must be separated from morals, politics, culture, economy, and others. The view of legal positivism is related to the philosophical thought of positivism which states that everything is considered true if it can truly be ascertained as reality. In legal positivism there must be a clear separation between law and morals.[9]

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3 Bambang Poernomo, "Manfaat Telaah Ilmu Hukum Pidana Dalam Membangun Model Penegakan Hukum Di Indonesia," *Pidato Pengukuhan Jabatan Guru Besar Pada Fakultas Hukum Universitas Gajah Mada* (1989).

4 Jan Remmelink, *Hukum Pidana: Komentar Atas Pasal-Pasal Terpenting Dalam Kitab Undang-Undang Hukum Pidana Belanda Dan Pandanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia* (Jakarta: Gramedia Pustaka Utama, 2003).

5 Remmelink.

6 Antonio Cassese, International Criminal Law (Oxford University Press, 2003).

7 George P. Fletcher, Basic Concept of Criminal Law (New York – Oxford: Oxford University Press, 1998).

8 Fitri Yani et al., "Penerapan Asas Legalitas Dalam Praktek Sistem Peradilan Pidana Indonesia Menghadapi Perkembangan Tindak Pidana Korupsi," *Jurnal Lex Justitia* 4, no. 2 (2022): 118–34.

9 Ateng Sudibyo and Aji Halim Rahman, "Dekonstruksi Asas Legalitas Dalam Hukum Pidana," *Journal Presumption of Law* 3, no. 1 (2021): 55–79, https://doi.org/10.31949/jpl.v3i1.985.

The existence of the principle of legality is related to the development of state life which is related to the legal position in the country. Initially, criminal law originated from unwritten law. In ancient Rome most criminal laws were unwritten. In the Middle Ages when Ancient Roman law was accepted 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 it is not contained in the law, the ruling king acts arbitrarily with the power he has in absolute terms. Society or residents cannot know for sure which actions are prohibited and which actions are not prohibited.[10]

Het eerste lid van het eerste article van het WvS, dat inhoudt, dat geen feit strafbaar is dan uit kracht van een daaraan voorafgegane wettelijk straafbepaling, is een beginsel – article,[11] so Jonkers. Jonkers' statement means that Article 1 paragraph (1) of the Criminal Code, no act can be punished except for the strength of the criminal law that existed before the act was committed is an article on principles. Unlike other legal principles, this legality principle is stated explicitly in the law. In the opinion of legal experts, a legal principle is not a concrete legal regulation. Presumably there is a common view among criminal law experts that the notion of the principle of legality is that no act can be punished except on the basis of the strength of criminal provisions according to existing laws.[12]This is in accordance with an adage which reads *non obligat lex nisi promulgate* which means a law is not binding unless it has been enacted. The provisions as set forth in Article 1 paragraph (1) of the Criminal Code are the standard definition of the principle of legality.

According to Groenhuijsen as quoted by Komariah Emong Supardjaja, there are four meanings contained in the principle of legality. The first two are addressed to legislators and the other two are guidelines for judges. 1) legislators may not apply a criminal provision retroactively; 2) all prohibited acts must be contained in the clearest possible formulation of the offense; 3) Judges are prohibited from declaring that the accused committed a criminal act based on unwritten law or customary law; and 4) it is forbidden to apply analogies to criminal law regulations.[13]

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[10] Warih Anjari, "Kedudukan Asas Legalitas Pasca Putusan Mahkamah Konstitusi Nomor 003/PUU-IV/2006 Dan 025/PUU-XIV/2016," *Jurnal Konstitusi* 16, no. 1 (2019): 1, https://doi.org/10.31078/jk1611.

[11] J.E Jonkers, *Handboek Van Het Nederlansch – Indische Strafrecht* (Leiden: E.J. Brill, 1946).

[12] Eddy O.S Hiariej, "Pemikiran Remmelink Mengenai Asas Legalitas," *Jentera Jurnal Hukum* IV, no. 16 (2007).

[13] Komariah. Sapardjaja, *Ajaran Sifat Melawan Hukum Materiel Dalam Hukum Pidana Indonesia : Studi Kasus Tentang Penerapan Dan Perkembangannya Dalam Yurisprudensi*, 2002.

Paradigm interprets the principle of legality, and the principle of justice must occur with a shift in insight or paradigm with respect to retroactive enforcement of criminal law as follows:

1. The principle of legality which essentially contains the principle of lex temporis delicti only provides protection to individual perpetrators of criminal acts and does not provide protection to the community/community groups who are victims of criminal acts, so that access to justice for victims, especially collective victims, is hampered.
2. Although the principle of legality is recognized as a fundamental principle by countries that use criminal law as a means of dealing with crime, its application is not absolute in the sense that the legislator can declare an act that has occurred as a crime and can be punished as long as the act is contrary to law. with unwritten law which in international criminal law is called "general principles of law recognized by the community of nations" (the general principles of law recognized by the community of nations)
3. Retroactive application of criminal law is an exception to the principle of legality on the basis of extra ordinary crimes, such as gross violations of human rights.
4. The application of criminal law in a "retroactive" manner based on the principle of justice for all in the sense of justice for perpetrators of criminal acts and justice for victims of criminal acts is a counterweight to the principle of legality which is solely based on "legal certainty" and the principle of "justice for all".
5. "Retroactive" application of criminal law under certain conditions such as collective interests, both the interests of the nation's community and the state, which so far have received little protection from the principle of legality, is acceptable in order to meet the moral demands of public retaliation.[14]

Still related to the principle of legality, according to Machteld Boot citing the opinion of Jescheck and Weigend, there are at least four conditions included in this principle. Further Boot states:

> *The formulation of the Gesetzlichkeitsprinzip in Article 1 StGb*[15] *is generally considered to include four separate requirements. First,*

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[14] Arista Candra Irawatu, "Politik Hukum Dalam Pembaharuan Hukum Pidana (Ruu Kuhp Asas Legalitas) Arista," *Adil Indonesia Jurnal* 2, no. 1 (2019): 1–12.

[15] "*Strafgesetzbuch*" (nd) or the German Criminal Code. In Article 1, it states, Eine tat Kann nur bestraft warden, wenn die starfbarkeit gesetzlichbestimmt war, bevor die tat begangen wurde" (A person can only be convicted, if the legal provisions regarding what he can be punished for already exist, before the act is committed).

> *conduct can only be punished if the punishability as well as the accompanying penalty had been determined before the offense was committed (nullum crimen, noela poena sine lege praevia). Furthermore, these determinations have to be included in statutes (Gesetze): nullum crimen, noela poena sine lege scripta. These statutes have to be definite (bestimmt): nullum crimen, noela poena sine lege certa. Lastly, these statutes may not be applied by analogy, which is reflected in the axiom nullum crimen, noela poena sine lege stricta.*[16]

Based on what Boot stated above, there are several things related to the principle of legality which consist of: 1) the principle of nullum crimen, noela poena sine lege praevia, that there is no crime, there is no crime without a previous law. The consequence of this meaning is that criminal law provisions may not apply retroactively; 2) the principle of nullum crimen, nulla poena sine lege scripta, that there is no crime, there is no crime without a written law. The consequence of this meaning is that all criminal provisions must be written; 3) the principle of nullum crimen, nulla poena sine lege certa, that there is no crime, there is no crime without clear laws and regulations. A further consequence of this meaning is that the formulation of a criminal act must be clear so that it does not have multiple interpretations which could be harmful to legal certainty; 4) the principle of nullum crimen, noela poena sine lege stricta, that there is no crime, no crime without strict laws. The consequence of this meaning implicitly does not allow analogy.

The Principle of Legality in the Reform of the Criminal Law Act

In the context of national law, particularly in Indonesia, the following will review the principle of legality relating to the Reform of the Criminal Law Act. When referring to the Reform of the Criminal Code in Indonesia, it seems that the principle of legality does not apply in absolute terms. In more detail citing article 1, article 2 and article 3 in the reform of the National Criminal Law:

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[16] Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of The International Criminal Court: Genocide, Crimes Against Humanity, War Crimes* (Antwerpen – Oxford – New York: Intersentia, 2001).

Article 3

(1). No one can be punished or subject to action, unless the act committed has been determined as a criminal offense in the laws and regulations that were in effect at the time the act was committed.

(2). In determining the existence of a crime, it is prohibited to use analogies.

Article 3

(1). The provisions referred to in Article 1 paragraph (1) do not reduce the validity of the law that lives in society which determines that a person should be punished even though the act is not regulated in statutory regulations.

(2). (1) The law that lives in society as referred to in paragraph (1) applies as long as it is in accordance with Pancasila values and/or general legal principles that are recognized by the people of nations.

Article 3

(1). In the event that there is a change in the laws and regulations after the act has occurred, the new laws and regulations are enforced with the provisions of the old laws and regulations in effect if it is profitable for the maker.

(2). In the event that after the sentencing decision has obtained permanent legal force, the act that occurred is no longer a criminal act according to the new laws and regulations, then the implementation of the sentencing decision will be abolished.

(3). In the event that after the sentencing decision has obtained permanent legal force, the act that occurred is punishable by a lighter sentence according to the new laws and regulations, then the implementation of the sentencing decision is adjusted to the limits of the crime according to the new laws and regulations.[17]

Regarding the Reform of the Criminal Law Act mentioned above, there are several important things including: First, in the future, the legality principle adopted in Indonesia is not absolute because of the provisions of Article 2 which implicitly recognizes unwritten law in society; Second, the limitation

[17] Departemen hukum dan Hak Asasi Manusia Republik Indonesia, "Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana" (2013).

on the principle of legality or lex temporis delicti is not only related to changes in legislation as stated in Article 3 above, but also related to social life.

Third, the provision regarding the prohibition of applying analogy is a contradiction interminis when connected with Article 2 in which a person can be punished even though his actions are not regulated in statutory regulations. This is because, in order to convict an act that is not regulated in statutory regulations, the judge must use an analogy or at least an extensive interpretation. In fact, in essence there is no difference in principle between extensive interpretation and analogy.

Fourth, based on the provisions of Article 2 paragraph (2) above, the unwritten law is not only related to the situation and condition of the Indonesian people and local wisdom alone, but can also originate from general principles that are recognized by civilized nations in the world. This means that the principle of legality can also be distorted by customary law practices that have taken place and are recognized by the international community.

Fifth, the limitations on the principle of legality as set forth in the articles above, presumably in accordance with the third amendment to the 1945 Constitution article 1 paragraph (3) which states, "Indonesia is a country of law". According to Mahfud MD, the formulation of Article 1 paragraph (3) without the 'rechsstaat' frill as in the elucidation of the 1945 Constitution before the amendment was intended so that the concept of a rule of law in Indonesia today is a prismatic rule of law state. That is, combining the positive aspects of rechtsstaat and the rule of law. The no-frills formulation was actually done deliberately with the intention of giving a broad place to the fulfillment of a sense of justice. That is, for the sake of upholding justice, it is appropriate that an unnatural act should be[18]

Sixth, the limitations on the principle of legality as set forth in the articles above, show that implicitly the criminal law in Indonesia has recognized the teaching of material lawlessness in a positive function. That is, even though an act does not meet the formulation of an offense in a written law, a judge can impose a sentence if the act is considered disgraceful, contrary to justice and other social norms in people's lives; and

Seventh, that the provisions in Article 3 paragraph (2) and paragraph (3) are in accordance with the results of the debate in the international congress regarding criminal law and prisons in 1935 in Berlin, Germany. In the

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[18] Mahfud MD, "Beberapa Catatan Tentang Putusan Mahkamah Konstitusi Nomer 003/PUU-IV/2006 Tentang Perbuatan Melawan Hukum Secara Materiil"," *Eksaminasi Putusan Mahkamah Konstitusi Dengan Perkara Nomor 003/PUU-IV/2006 Tentang Pengujian Undang-Undang Nomer 31 Tahun 1999 Sebagaimana Yang Telah Diubah Dengan Undang-Udang Nomer 20 Tahun 2001 Tentang Pemberantasan Tindak Pidana Korupsi* (2006).

congress there was a debate whether there was an effect of a change in statutory regulations on the decisions of judges who had obtained permanent legal force (kracht van gewijsde). To this question, Pompe answered that a judge's decision which has permanent legal force can only be challenged with *buitengewone rechtsmiddelen* (extraordinary legal instruments). In this case, if there is a change in the law against a judge's decision that already has permanent legal force, then the change in law is considered as a novum as a basis for submitting a review.[19]

Next is the principle of legality in the context of international criminal law. According to Machteld Boot, the principle of legality in the context of international criminal law must be applied differently from national criminal law relating to individual criminal responsibility for international crimes. International criminal law is not codified like national criminal law but is also sourced from customary international law. Therefore, the principle of legality is not entirely binding in the context of crimes under international law.[20]

In line with Boot is M. Cherif Bassiouni who stated that in the context of national criminal law, the principle of legality adheres to a fundamental principle, namely ex post facto prohibition in criminal law. In addition, there is also a prohibition on retroactive application of criminal sanctions and analogies in judicial interpretation. Therefore, the rules of criminal law should not be ambiguous.[21]However, in the context of international criminal law, where the source of law comes from international custom, the principle of legality cannot be applied like the national criminal law system.

The measure of the validity of the principle of legality in international criminal law cannot be equated with the measure of the validity of the principle of legality in national criminal law. Apart from the fact that international criminal law is not as codified as national criminal law, international criminal law also originates from international customs. In fact, in the context of national criminal law, the measure of the application of the legality principle includes, among others, lex scripta and lex certa or based on written law and clear rules so that the application of the legality principle is not justified based solely on customary law. Likewise, in the context of national criminal law, criminal provisions must be interpreted strictly as the embodiment of the lex stricta principle.

Apart from being unclear, the formulation of criminal provisions in international conventions also overlaps with one another. This is intended to

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19 E. Utrecht, *Hukum Pidana I* (Bandung: Penerbitan Universitas, 1960).

20 Boot, Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of The International Criminal Court: Genocide, Crimes Against Humanity, War Crimes.

21 M. Cherif Bassiouni, Introduction to International Criminal Law: Second Revised Edition, International Criminal Law Series, vol. 1, 2013, https://doi.org/10.1163/9789004231696.

facilitate the prosecution of perpetrators of international crimes. In addition, criminal provisions in international conventions do not contain criminal threats by assignment.[22]The principle of legality in international criminal law is universal which focuses more on justice and not on legal certainty. Therefore, the principle of legality in the context of international criminal law can be applied retroactively and application by analogy is permitted.

Conclusion

The dynamics of the legality principle in reforming the criminal law law refers to the legality principle adopted in Indonesia which is not absolute. There are provisions in Article 2 which implicitly recognize unwritten law in society, restrictions on the principle of legality or lex termporis delicti are not only related to changes in legislation alone, but provisions regarding the prohibition of also applying analogies are a contradiction interminis when connected with Article 2 where one can punished even though the act is not regulated in the law. Judges to convict an act that is not regulated in statutory regulations, need to use an analogy or at least an extensive interpretation, unwritten law is not only related to the situation and conditions of Indonesian society and local wisdom alone, but can also originate from the principles general principles recognized by civilized nations of the world. Even though an act does not meet the formulation of an offense in a written law, a judge can impose a sentence if the act is considered disgraceful, contrary to justice and other social norms in people's lives. So that implicitly the criminal law in Indonesia has recognized the teaching of material lawlessness in a positive function. The concept of a rule of law in Indonesia today is a prismatic rule of law, which combines the positive aspects of the rechtsstaat and the rule of law, with the intention of giving a broad place to the fulfillment of a sense of justice (the rule of law) which means that for the sake of upholding justice, then supposedly actions that are inappropriate, disgraceful or that are not in accordance with the values in society can be punished even though formally there is no written law that prohibits it. This means that the limitation on the principle of legality is in accordance with the third amendment to the 1945 Constitution article 1 paragraph (3) which states, Indonesia is a country of law.

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[22] Eddy O.S Hiariej, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma, 2019).

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Acknowledgment

None

Funding Information

None

Conflicting Interest Statement

There is no conflict of interest in the publication of this article.

Publishing Ethical and Originality Statement

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