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Tension Between Digital Legality Principle and Humanistic Punishment in Indonesian Criminal Code

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Abstract: The Indonesian National Criminal Code (Law No. 1 of 2023) introduces two fundamental changes to Indonesian criminal law: the expansion of the legality principle from a purely formal dimension to a material one by recognizing living law within society (Article 2), and the formulation of humanistic sentencing purposes that place human dignity as the ethical boundary of punishment (Articles 51–52). This article examines the tension between these two pillars in the context of digital crimes including personal data misuse, doxing, deepfake exploitation, and online gender-based violence which inherently evolve faster than legislative responses. Employing a normative legal research method with statutory, conceptual, and limited comparative approaches, this study finds that the expansion of the material legality principle does not automatically address cross-border and highly technical digital crimes, while the strict prohibition of analogy risks rendering criminal law unable to keep pace with emerging cyber-criminal modalities. To resolve this tension, this article proposes the concept of "humanistic digital legality principle," which rests on three dimensions: the protection of human dignity as a guiding principle for teleological-protective interpretation, technology-neutral norm drafting that meets the standard of foreseeability, and the integration of the National Criminal Code's value framework with special legislation on digital crimes.

1. Introduction

The enactment of the National Criminal Code through Law Number 1 of 2023 marks one of the most significant milestones in the history of Indonesian criminal law, as for the first time the state possesses a nationally codified criminal law that is no longer dependent on the Dutch colonial-era *Wetboek van Strafrecht*.[1] This reform is not merely a replacement of old provisions; rather, it

[1] Undang-Undang Republik Indonesia Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP Nasional) (Lembaran Negara Republik Indonesia Tahun 2023 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor 6842). Lihat juga: A. Zein *et al.*, "Fenomena Penerapan Hukum Pidana Modern Tahun 2026," *Al-Daulah Law Review*, Vol. 16, no. 2, (2024), hlm. 58–75, https://doi.org/10.31602/al-adl.v16i2.12161. yang menjelaskan bahwa KUHP Nasional menggantikan *backbone* pengaturan hukum pidana warisan kolonial.

fundamentally shifts the paradigm of punishment through the explicit formulation of the purposes and guidelines of sentencing in Articles 51 and 52 of the National Criminal Code.[2] Under these provisions, sentencing is no longer positioned solely as a means of retribution, but as an instrument to prevent criminal acts, to reintegrate offenders into society, to resolve conflicts, and to restore social equilibrium with the ethical boundary that punishment is not intended to degrade human dignity. This formulation conceptually marks a shift toward a more integrative and humanistic model of punishment, as affirmed in various studies on the transformation of sentencing policy in the National Criminal Code.

At the same time, another fundamental change in the National Criminal Code touches the very heart of classical criminal law dogmatics: the legality principle. The National Criminal Code does not merely retain the formal legality principle that no act may be punished except on the basis of statutory provisions that preceded it (*nullum crimen, nulla poena sine lege*) but expands it into a material legality principle that recognizes living law within society, including customary law, as set forth in Article 2 of the National Criminal Code. This expansion is seen as an effort to accommodate the plurality of legal sources in Indonesian society and to bridge the tension between legal certainty and substantive justice.[3] Nevertheless, the National Criminal Code also reaffirms the prohibition on the use of analogy in criminal law, reflecting the effort to strengthen legal certainty while simultaneously limiting the interpretive authority of judges.

This reconstruction of the legality principle is taking place against the backdrop of rapid social transformation driven by digitalization. Advances in information technology have given rise to new forms of deviant and harmful behavior, such as personal data misuse, cross-border cybercrime, digital platform-based fraud, and online child sexual exploitation.[4] On the other hand, the positive criminal law framework is consistently in a reactive position: new regulations almost always arrive too late in relation to the evolving modus operandi of perpetrators in the digital space. This phenomenon is known in international literature as *regulatory lag* the delay of regulation in responding to technological developments and constitutes one of the primary challenges in combating digital crime globally. In this context, the legality principle becomes a contested terrain between the demand for strict legal certainty and the need for rapid and effective protection for victims and society.

A number of recent studies on the legality principle in the National Criminal Code have highlighted that the expansion from formal to material legality holds positive potential for bridging the gap between written norms and social reality. However, when this change is applied to the domain of digital crime, the problem becomes far more complex. Customary law and the living law within

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2 Pasal 51 dan Pasal 52 Undang-Undang Nomor 1 Tahun 2023 tentang KUHP. Lihat juga: Benny Satrio Wicaksono, et al., "Rechterlijke Pardon Sebagai Penyeimbang Asas Legalitas Dalam Pembaharuan Hukum Pidana Indonesia." *Ranah Research: Journal of Multidisciplinary Research and Development* 7(4), 2025, 2658–65. https://doi.org/10.38035/rrj.v7i4.1574., yang membahas bagaimana Pasal 51 dan 54 ayat (2) KUHP Nasional merefleksikan tujuan pemidanaan yang berorientasi pada keadilan dan kemanusiaan.

3 Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, Edisi Kedua, (Jakarta: Kencana, 2010). Lihat juga: Eddy O.S. Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana*, (Jakarta: Erlangga, 2009), tentang perluasan asas legalitas dari dimensi formal ke materiil.

4 Mohd Irwan Abdul Rani, *et al.*, "A Systematic Literature Review on Cybercrime Legislation," *Journal of Financial Crime,* 31(2): 347–361, 2024, https://doi.org/10.1108/JFC-10-2022-0243., yang menunjukkan bahwa legislasi kejahatan siber selalu tertinggal (*regulatory lag*) dibanding perkembangan teknologi.

society recognized by the National Criminal Code do not always have clearly defined conceptions regarding personal data, domain names, crypto assets, or digital platforms.[5] Consequently, the expansion of the legality principle, originally intended to enrich the sources of substantive law, does not automatically prove capable of addressing the need to combat digital crime, which is inherently cross-border and highly technical in nature. In this situation, legislators and law enforcers are once again confronted with the classic dilemma: to what extent can the legality principle be "stretched" to reach new forms of behavior without sacrificing legal certainty?

At the international level, a similar problem has emerged in the discourse on cybercrime and personal data protection. Many countries have adopted a *lex specialis* approach through special regulations, such as the General Data Protection Regulation (GDPR) in the European Union, the Computer Misuse Act in the United Kingdom, and various computer crime laws across Asian jurisdictions. Nevertheless, even with such special regulations, judicial interpretation of criminal provisions in the context of continuously evolving technology continues to generate debate about the permissible limits of analogical reasoning, extensive interpretation, and the meaning of open-ended provisions. In the Indonesian context, the National Criminal Code has chosen to firmly maintain the prohibition on analogy, thereby narrowing the space for overly creative interpretation of criminal provisions. This policy strengthens legal certainty, but simultaneously risks leaving criminal law unable to keep pace with innovative forms of digital crime.

At the same time, Indonesia's sentencing policy continues to move toward a more humanistic model oriented toward human dignity. Harefa demonstrates that the National Criminal Code conceptually shifts the emphasis of punishment from *retribution-centered punishment* toward a paradigm of just and humanistic sentencing, grounded in the values of Pancasila and the principles of *restorative justice*. This shift places human beings both offenders and victims as subjects whose dignity must be preserved.[6] Punishment is no longer viewed solely as a tool of retribution, but as a means of restoring damaged social relations, correcting behavior, and reintegrating offenders into society. A comparative review between Indonesia's 2023 Criminal Code and the German *Strafgesetzbuch* reveals that the National Criminal Code expands the types of principal penalties, including supervisory sanctions and community service, in order to diversify sentencing, reduce dependence on imprisonment, and support social reintegration.

Furthermore, just and humanistic sentencing requires individual assessment of the offender and serious consideration of the impact on victims, so that criminal judgments must take into account the social context and the vulnerability of the aggrieved parties.[7] Research on restorative justice in the context of victims of cybercrime affirms that the manifestation of victim rights protection in cyber criminal cases, based on restorative justice principles, can be realized through assistance, facilitation, and compensation approaches considered more relevant and essential in meeting the rights of victims.

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[5] Vincentius Patria Setyawan, "Pemaknaan Asas Legalitas Materiil Dalam Pembaruan Hukum Pidana Indonesia." *Gudang Jurnal Multidisiplin Ilmu* 1(1), 2023, 13–15. https://doi.org/10.59435/gjmi.v1i1.3., yang menegaskan bahwa perluasan asas legalitas ke arah materiil bertujuan memperluas daya jangkau asas legalitas dalam memberikan perlindungan masyarakat.

[6] Safaruddin Harefa, et al., "Transformasi Kebijakan Pemidanaan dalam KUHP Nasional: Menuju Sistem Pemidanaan yang Berkeadilan dan Humanis," *Simbur Cahaya*, Vol. 32, No. 2, 2025, DOI. 10.28946/sc.v32i2.5050, yang menjelaskan pergeseran paradigma pemidanaan dari retributif ke humanis berdasarkan nilai-nilai Pancasila dan *restorative justice*.

[7] Muladi dan Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana*, (Bandung: Alumni, 2010). Lihat juga: I.K. Dewi *et al*., "Keadilan Restoratif dalam Melindungi Hak Korban Tindak Pidana Cyber: Manifestasi dan Implementasi," *Jurnal Ius Constituendum*, Vol. 8, No. 2, (2023): 224–243, DOI: https://doi.org/10.26623/jic.v8i2.6365.

It is at this juncture that the normative tension that forms the central focus of this article emerges: on one hand, the legality principle (in its newly reconstructed form under the National Criminal Code) serves as a limiting fence that safeguards legal certainty and prevents arbitrary criminalization; on the other hand, humanistic sentencing purposes demand that criminal law be capable of responding effectively and adaptively to new forms of crime, particularly those involving violations of human dignity in the digital space such as breaches of sensitive personal data, *doxing*, *revenge porn*, and forms of online gender-based violence. If the legality principle is interpreted too narrowly and formalistically, many harmful behaviors in the digital space risk falling outside the reach of criminal law, leaving victims without adequate protection. Conversely, if the legality principle is "stretched" too far in order to respond to digital crime, there is a risk of violating the principle of *nullum crimen, nulla poena sine lege* and of enabling the abuse of the state's repressive power.

The Indonesian context adds yet another layer of complexity: the development of digital crime is not only related to individual conduct, but also to the practices of corporations and digital platforms that accumulate and exploit users' personal data on a massive scale. Law Number 27 of 2022 on Personal Data Protection (PDP Law) has attempted to address part of this problem, including by introducing relatively strict criminal sanctions. A comparison between Indonesia's PDP Law and Singapore's Personal Data Protection Act (PDPA) shows that Indonesia has adopted a stricter approach, with heavier criminal prison sentences and financial penalties. However, the criminal provisions contained outside the Criminal Code must be read together with the principles and purposes of sentencing under the National Criminal Code as the general codification.[8] The question is: to what extent can the new legality framework and the humanistic sentencing purposes of the Criminal Code serve as a coherent conceptual umbrella for the entire sentencing regime in the domain of digital crime? Integration between the Criminal Code and special legislation becomes crucial to avoid normative fragmentation and disparities in protection.

Prior studies on the legality principle in the National Criminal Code have generally focused on the expansion of legality through the recognition of living law in society and the debate over its potential threat to legal certainty. More recently, several writings have examined how the National Criminal Code expands the legality principle from formal to material including through comparisons with the Dutch legal system but relatively few have specifically analyzed its implications for digital crime and its relationship with humanistic sentencing purposes. On the other hand, the literature on humanistic sentencing in the National Criminal Code has largely emphasized the shift from retributive to rehabilitative and restorative approaches, as well as the introduction of community service and supervisory sanctions, without directly linking these developments to the problem of legality in the digital space. In other words, a *research gap* exists in the academic discourse for a deeper examination of the tension between the digital legality principle and humanistic sentencing purposes within the framework of the National Criminal Code.

Departing from this gap, this article sets forth two main research questions. *First*, how is the legality principle constructed in the National Criminal Code when read in the context of digital

[8] Dian Purwaningrum Soemitro, Muhammad Arvin Wicaksono, and Nur Aini Putri. "Penal Provisions in the Personal Data Protection Law: A Comparative Legal Study Between Indonesia and Singapore." *SIGn Jurnal Hukum* 5(1), 2023, 155–67. https://doi.org/10.37276/sjh.v5i1.272., yang menunjukkan bahwa UU No. 27 Tahun 2022 mengadopsi pendekatan yang lebih ketat dibanding PDPA Singapura.

crime and related regulations, and where lies the potential tension with the need to adapt to new forms of crime in cyberspace? *Second*, how can the humanistic sentencing purposes in Articles 51–52 of the National Criminal Code serve as the basis for formulating the concept of a "humanistic digital legality principle" that still preserves legal certainty while simultaneously enabling effective protection of human dignity in the digital space? Through these two questions, this article does not merely describe positive legal norms, but also offers a new conceptual construction that is expected to enrich the discourse on sentencing theory and criminal policy in the digital era.

2. Method

This study constitutes a prescriptive *normative legal research*, examining positive legal norms and the theoretical concepts underlying them in order to subsequently offer a new conceptual construction.[9] The primary legal materials consist of the National Criminal Code (Law No. 1 of 2023), particularly Articles 1–2 concerning the legality principle and Articles 51–52 concerning the purposes of sentencing, as well as Law No. 27 of 2022 on Personal Data Protection, Law No. 19 of 2016 on the Amendment to the Electronic Information and Transactions Law (ITE Law), and other relevant statutory regulations. Secondary legal materials comprise recent scientific journal articles (2018–2025) addressing the legality principle, humanistic sentencing, and digital crime, as well as criminal law reference books.

The study employs three approaches. *First*, a *statute approach*, used to examine the coherence between the National Criminal Code and special legislation in the fields of cybercrime and personal data protection. *Second*, a *conceptual approach*, used to analyze the meanings of the legality principle, humanistic sentencing, and human dignity within contemporary criminal law theory. *Third*, a *limited comparative approach*, involving an examination of the regulatory frameworks in several jurisdictions facing similar challenges, such as the European Union (GDPR), the United Kingdom (*Computer Misuse Act*), and Singapore (PDPA). The analysis is conducted in a qualitative-prescriptive manner by interpreting and constructing the relationship between the legality principle and the purposes of sentencing in the context of digital crime, before ultimately formulating the conceptual proposal of a "humanistic digital legality principle."

3. Results and Discussion

3.1. The Construction of the Legality Principle and Its Development in the National Criminal Code in the Digital Era

Classically, the legality principle is formulated in the maxim *nullum crimen, nulla poena sine lege praevia, scripta, certa, stricta*, which demands that an act may only be punished if it is regulated in written form, with clarity, without retroactive effect, and interpreted strictly.[10] These four elements *lex praevia* (non-retroactivity), *lex scripta* (written law), *lex certa* (clarity), and *lex stricta* (strict interpretation) are mutually reinforcing pillars designed to protect citizens from the arbitrariness

[9] Peter Mahmud Marzuki, *Penelitian Hukum*, Edisi Revisi, (Jakarta: Kencana, 2017), hlm. 35. Lihat juga: Jonaedi Efendi dan Johnny Ibrahim, *Metode Penelitian Hukum: Normatif dan Empiris*, (Depok: Prenadamedia Group, 2018), hlm. 124.

[10] Eddy O.S. Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana* (Jakarta: Erlangga, 2009), hlm. 4–7. Lihat juga: T. Sitorus *et al.*, "Development of the Principle of Legality in Indonesian Criminal Law," *International Journal of Multidisciplinary Approach Research and Science*, Vol. 2, No. 1, (2024): 278–285, DOI: 10.59653/ijmars.v2i01.418.

of state authority in the exercise of criminal law. This principle emerged as a reaction to state absolutism and became the primary foundation of the modern rule of law, as affirmed in constitutions and criminal code codifications in virtually every country in the world.[11] Barda Nawawi Arief, across his various works, explains that the legality principle is not merely a technical formulation, but a reflection of the fundamental idea of balance between the interests of the state and the interests of the individual a dialectic that constitutes the spirit of Indonesian criminal law reform.[12]

In the context of the old Criminal Code (*Wetboek van Strafrecht*), the legality principle was reflected in Article 1(1), which broadly affirmed the prohibition on punishment without prior written statutory provisions. This formulation was formalistic in character, recognizing only written statutes as the sole source of criminal law. As a consequence, acts regarded as morally reprehensible by society but not yet regulated in national written legislation could not be punished, however harmful they might be. Umi Rozah, in her study on criminal policy and the formulation of criminal offenses, affirms that such a formalistic approach carries the risk of creating a *legal vacuum* a normative gap that is detrimental to society, particularly when written law is unable to keep pace with the development of reprehensible conduct.[13] This weakness of the formalistic approach became one of the primary driving forces behind the reform of the Criminal Code.

The National Criminal Code took a historic step by expanding the legality principle from a purely formal dimension to a material one. Article 1(1) of the National Criminal Code retains the formal legality principle no punishment without prior statutory law but Article 2(1) opens a new door by providing that the provisions of Article 1(1) shall not diminish the applicability of living law within society, which determines that a person deserves to be punished even though the act is not regulated in statute.[14] This expansion reflects what Barda Nawawi Arief refers to as the "legality principle in its material sense" an effort to modernize Indonesian criminal law to be more contextually attuned to the plurality of legal orders within society.[15]

Research by Sihotang et al. demonstrates that the recognition of living law within society through the National Criminal Code is intended to bridge the gap between written norms and societal needs, particularly in accommodating customary law that had long been marginalized by the formalistic approach of the colonial-era Criminal Code.[16] A similar point is emphasized by Widiatama et al., who, in a comparative study between Indonesia and the Netherlands, found that the expansion of the legality principle toward the material dimension constitutes a response to the limitations of *lex scripta* and *lex certa* in capturing dynamic social realities.[17] In the same vein, Setyawan affirms that the interpretation of material legality in the National Criminal Code is aimed at broadening the reach of criminal punishment to cover acts that, according to living law within society, are deemed deserving of punishment.[18]

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[11] B. Puspito dan A. Masyhar, "Dynamics of Legality Principles in Indonesian National Criminal Law Reform," *Journal of Law and Legal Reform*, Vol. 4, No. 1, (2023): 129–148, DOI: 10.15294/jllr.v4i1.

[12] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, Edisi Kedua (Jakarta: Kencana, 2010), hlm. 77–85.

[13] Umi Rozah, "Kebijakan Kriminal Mengenai Pemberian Ganti Kerugian terhadap Korban Salah Tangkap," *Jurnal Pembangunan Hukum Indonesia*, Vol. 2, No. 1, (2020): 117–131, DOI: 10.14710/jphi.v2i1.7214.

[14] Pasal 2 ayat (1) Undang-Undang Nomor 1 Tahun 2023 tentang KUHP Nasional.

[15] Barda Nawawi Arief, *Pembaharuan Hukum Pidana dalam Perspektif Kajian Perbandingan* (Bandung: Citra Aditya Bakti, 2011), hlm. 9–15. Lihat juga: R.A. Sihotang *et al.*, "Akomodasi Hukum Yang Hidup Dalam KUHP Nasional Menurut Perspektif Asas Legalitas," *Recital Review*, Vol. 5, No. 2, (2023), DOI: 10.22437/rr.v5i2.14162.

[16] R.A. Sihotang *et al.*, *Ibid.*

[17] Widiatama et al., "Pengakuan Hukum yang Hidup dan Asas Legalitas dalam KUHP Nasional: Kajian Perbandingan antara Indonesia dan Belanda," *Arde Jaya Journal of Social and Humanities*, 2025. DOI: 10.69980/ajsh.v3i4.1567.

[18] Vincentius Patria Setyawan, *Op.Cit.*

Nevertheless, this expansion is not without problems. The National Criminal Code stipulates that living law within society may only be recognized insofar as it is consistent with the values of Pancasila, the 1945 Constitution, human rights, and the general principles of law recognized by civilized nations.[19] This condition is intended as a control mechanism to ensure that the recognition of living law does not become a means of justifying practices that are, in fact, contrary to human rights. However, a critical question remains: how can one objectively identify "living law within society" in the context of an increasingly pluralistic and digitalized society? Basri underscores that the implications of applying customary criminal law under Article 2 of the Criminal Code pose serious challenges in terms of evidentiary standards and objectivity, given that customary norms are often local, unwritten, and susceptible to multiple interpretations.

On the other side, the National Criminal Code explicitly maintains and even reinforces the prohibition on the use of analogy in criminal law. This prohibition is a logical consequence of the *lex stricta* element of the legality principle, which demands that criminal provisions be interpreted strictly and not extended through resemblance (*analogy*) to other acts that are not in fact regulated. A comparative study by Suardana et al. shows that the prohibition on analogy in civil law traditions such as Indonesia is far stricter in character compared to common law systems, where judges have considerably wider latitude to develop criminal law through *judicial precedent*.[20] Even compared to Islamic criminal law (*jinayah*), which in certain respects permits limited *qiyas* (analogical reasoning), the approach of Indonesia's National Criminal Code is exceptionally restrictive.

From a theoretical perspective, Eddy O.S. Hiariej explains that the prohibition on analogy serves a dual function: first, as a guarantee to citizens that they will not be punished for acts that are not clearly regulated; and second, as a limitation on judicial authority to prevent the creation of new criminal norms through interpretations that exceed the linguistic boundaries of the statute.[21] This reinforcement of the prohibition on analogy demonstrates that the National Criminal Code seeks to balance the material expansion on one hand with the strengthening of formal certainty on the other a balance that Barda Nawawi Arief refers to as the *balance idea* in criminal law reform.[22]

Sitorus et al., in their study on the development of the legality principle in Indonesia, affirm that sound application of the legality principle in national criminal law is indeed not rigid in character, particularly in addressing crimes against human rights.[23] However, such flexibility is only justified in cases of necessity and must remain within the framework of the protection of citizens' fundamental rights. Beyond such conditions, the legality principle must continue to be strictly upheld as a fundamental principle.

When the construction of the legality principle with its material expansion and reinforced prohibition on analogy is confronted with the phenomenon of digital crime, the tension becomes plainly apparent. Digital crime possesses characteristics that fundamentally challenge nearly all of the classical assumptions of the legality principle. Its *borderless*, *rapid*, *technical*, and *novel* nature continuously presenting new modus operandi ensures that the statutory formulation of criminal offenses is almost always lagging behind.

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[19] Pasal 2 ayat (2) Undang-Undang Nomor 1 Tahun 2023 tentang KUHP Nasional.

[20] I.K. Suardana *et al.*, "Studi Komparatif Penggunaan Analogi dalam Hukum Pidana Indonesia dengan Sistem Hukum Common Law dan Syariah," *Jurnal Interpretasi Hukum*, Vol. 5, No. 1, (2024), DOI: 10.22225/juinhum.5.1.2024.

[21] Eddy O.S. Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana* (Jakarta: Erlangga, 2009), hlm. 42–48.

[22] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Edisi Kedua (Jakarta: Kencana, 2010), hlm. 28–31.

Phenomena such as *phishing*, *ransomware*, biometric data misuse, algorithmic manipulation, and the creation of *deepfake* content cause real harm to victims and society, yet cannot always be clearly categorized under existing criminal offense formulations.[24] A systematic review by Mohd Irwan Abdul Rani et al. of cybercrime legislation across various countries confirms that *regulatory lag* the delay in legislation in responding to technological development is a universal phenomenon experienced by virtually all jurisdictions, including advanced nations.[25] In this context, Indonesia is no exception: the enactment of the ITE Law (Law No. 11/2008 as amended by Law No. 19/2016) and the Personal Data Protection Law (Law No. 27/2022) reflects legislative efforts to close the gap, yet the speed of technological innovation has consistently remained one step ahead of legislative capacity.

The problem that arises is twofold. *First*, if the legality principle of the National Criminal Code is read strictly and formalistically, then any harmful conduct in the digital space not yet explicitly formulated as a criminal offense will lie outside the reach of criminal law regardless of the extent of harm caused to victims. Syahidah, in her study on the legality principle and the combating of online radicalism, emphasizes that an overly rigid formal legality approach can hamper efforts to address crime in the digital space, which demands a rapid response. *Second*, if the legality principle is "loosened" through excessively broad analogical or extensive interpretation, the fundamental principle of protecting citizens from arbitrary punishment becomes threatened. This is where the genuine dilemma emerges: criminal law is needed to protect society from digital crime, yet the legality principle constrains its reach.

The expansion of the legality principle into the material dimension through the recognition of living law within society was initially regarded as a potential way out of the impasse of formal legality. Theoretically, if living law within society can be recognized as an additional source of criminalization, then conduct regarded as reprehensible by society but not yet regulated by statute should be reachable. However, when applied to the context of digital crime, this expansion reveals a paradox.

Customary law and social practices recognized by the National Criminal Code have historically developed in the context of local and traditional life they carry conceptions of theft, physical assault, or decency violations in the physical realm, but do not possess settled conceptions concerning personal data, domain names, crypto assets, *cloud computing*, or digital identity. Widiatama et al. demonstrate that even in comparison with the Netherlands the country of origin of the *Wetboek van Strafrecht* the expansion of the legality principle toward the material dimension still faces significant challenges when confronted with digital realities, as societal norms regarding conduct in cyberspace have not yet crystallized clearly.

Furthermore, the "living law" in digital society is often ambiguous and dominated by market logic and technological architecture, rather than by normative societal reflection. The practice of personal data collection by digital platforms, for instance, is widely accepted by users who click "agree" without reading the terms and conditions yet from a human rights protection perspective, it poses serious risks to individual dignity and privacy. A comparative study by Ridho et al.

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[23] T. Sitorus *et al.*, *Op.Cit.*
[24] Mohd Irwan Abdul Rani, *et al.*, *Op.Cit.*
[25] *Ibid.*

between Indonesia's PDP Law, the EU GDPR, and Singapore's PDPA shows that even jurisdictions with mature personal data legislation continue to face gaps between legal norms and rapidly evolving technological practices.[26]

Under such conditions, the "living law" of digital society is not always identical to "just law" for the individual. *Social acceptance* of a digital practice cannot serve as a benchmark for determining whether that practice is consistent with the values of justice and human dignity. Umi Rozah, within the framework of criminal policy theory, demonstrates that crime control policy must always refer to the objectives of *social defence* and *social welfare* not merely to social acceptance, which is fleeting and subject to change.[27]

To address the gap between the legality principle and the demands of digital crime, Indonesia has adopted a *lex specialis* approach through various special statutes. The ITE Law regulates illegal access, interception, disruption of electronic systems, and the distribution of prohibited content. The PDP Law (Law No. 27/2022) regulates the unlawful processing of personal data, with relatively strict criminal sanctions including imprisonment of up to 5 years and fines of up to IDR 5 billion for certain violations. Khairani and Nurhidayatuloh, in a comparative study, demonstrate that Indonesia's approach under the PDP Law is even stricter than Singapore's PDPA in terms of the magnitude of criminal sanctions.[28]

However, all criminal provisions outside the Criminal Code cannot be separated from the general framework of the legality principle and sentencing purposes under the National Criminal Code. Article 187 of the National Criminal Code affirms that the provisions in Chapters I through V of Book One of the Criminal Code including the legality principle and sentencing purposes also apply to acts punishable under other statutory regulations, unless otherwise stipulated.[29] This means that the National Criminal Code functions as an *umbrella code* a normative canopy providing the framework of values and principles for the entire sentencing regime, including that regulated under special legislation in the field of digital crime.

At this juncture, the contribution of Barda Nawawi Arief's thinking on *penal policy* becomes highly relevant. Barda affirms that criminal law reform must not be *ad hoc* and fragmented, but must be grounded in integral and systematic policy encompassing the policy of formulation (norm creation), the policy of application (enforcement by law enforcers and courts), and the policy of execution (implementation of sentencing decisions).[30] In the context of digital crime, this integration demands that the ITE Law, the PDP Law, and other sectoral regulations be interpreted and applied by reference to the framework of principles and sentencing purposes of the National Criminal Code not as self-contained regimes that stand apart from one another.

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[26] A. Ridho *et al.*, "Analisis UU No. 27 Tahun 2022 tentang Perlindungan Data Pribadi dalam Perspektif Kepentingan Umum: Studi Banding dengan GDPR Uni Eropa, PDPA Singapore, dan DPA Filipina," *Research Journal of Law and Islamic Jurisprudence*, (2025), DOI: 10.47467/reslaj.v7i4.7544.

[27] Umi Rozah, dalam kerangka kebijakan kriminal sebagaimana dikembangkan oleh Barda Nawawi Arief. Lihat: Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan* (Jakarta: Kencana, 2007), hlm. 77–80; Umi Rozah dan Barda Nawawi Arief, "Kebijakan Formulasi Pertanggungjawaban Pidana Korporasi...," *Diponegoro Law Journal*, Vol. 5, No. 3, (2016), DOI: 10.14710/dlj.2016.12756.

[28] J.A. Khairani dan N. Nurhidayatuloh, "Penal Provisions in the Personal Data Protection Law: A Comparative Legal Study between Indonesia and Singapore," *Sriwijaya Journal of Law*, Vol. 7, No. 1, (2023), DOI: 10.28946/slrev.Vol7.Iss1.

[29] Pasal 187 Undang-Undang Nomor 1 Tahun 2023 tentang KUHP Nasional.

[30] Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara* (Semarang: Badan Penerbit Undip, 2000), hlm. 23–28.

Thus, the analysis of the construction of the legality principle in the National Criminal Code reveals a complex and multi-layered normative architecture. On one side, the National Criminal Code expands the reach of legality through the recognition of living law within society, which potentially enriches the sources of criminal law. On the other side, the strict prohibition on analogy and the absence of settled customary or societal conceptions regarding digital realities make this expansion difficult to operationalize in the domain of cybercrime. Added to this, the structurally entrenched *regulatory lag* ensures that even special legislation is not always capable of keeping pace with evolving digital crime modalities. Under these conditions, another normative foundation the humanistic sentencing purposes in Articles 51–52 of the National Criminal Code becomes critically important as an interpretive guide that enables criminal law to respond to digital challenges without sacrificing legal certainty. The discussion of the tension between the legality principle and humanistic sentencing purposes in this context will be elaborated in the following section.

3.2. Tension with Humanistic Sentencing Purposes and the Proposed "Humanistic Digital Legality Principle"

Article 51 of the National Criminal Code formulates that sentencing is aimed at: (a) preventing the commission of criminal acts by enforcing legal norms for the protection and safeguarding of society; (b) reintegrating convicts through guidance and mentoring so that they become good and productive members of society; (c) resolving conflicts arising from criminal acts, restoring social equilibrium, and bringing a sense of security and peace to the community; and (d) fostering remorse and liberating the convicted person from guilt.[31] Meanwhile, Article 52(1) affirms that sentencing is not intended to degrade human dignity a formulation that explicitly embeds the principle of *human dignity* as the ethical boundary of the state's punitive power.[32] Such a formulation marks a significant turning point in the history of Indonesian criminal law. For more than a century, the colonial-era Criminal Code contained no explicit formulation of the purposes of sentencing, causing sentencing practice to remain trapped in the narrow logic of retribution inflicting suffering as repayment for wrongdoing, without a clear vision of what was to be achieved through punishment. Barda Nawawi Arief consistently criticized this void and advocated that the new Criminal Code explicitly articulate sentencing purposes as part of the *balance idea* in criminal law reform an idea that integrates the interests of societal protection, behavioral correction of offenders, and victim restoration.[33]

This shift from the retributive paradigm toward a more integrative and humanistic model of sentencing reflects what Muladi terms the *integrative theory of sentencing* an approach that rejects the dominance of any single sentencing purpose and instead demands that all sentencing objectives (prevention, rehabilitation, societal protection, and restoration) be considered simultaneously and proportionally in accordance with the context of each case.[34] Harefa, in his comprehensive study

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[31] Pasal 51 Undang-Undang Nomor 1 Tahun 2023 tentang KUHP Nasional.

[32] Pasal 52 ayat (1) Undang-Undang Nomor 1 Tahun 2023 tentang KUHP Nasional.

[33] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, Edisi Kedua (Jakarta: Kencana, 2010), hlm. 28–35. Lihat juga: Barda Nawawi Arief, *Tujuan dan Pedoman Pemidanaan: Perspektif Pembaharuan Hukum Pidana dan Perbandingan Beberapa Negara* (Semarang: Badan Penerbit Undip, 2009), hlm. 11–18.

[34] Muladi, *Lembaga Pidana Bersyarat* (Bandung: Alumni, 2002), hlm. 49–51. Lihat juga: Muladi dan Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana* (Bandung: Alumni, 2010), hlm. 10–16.

on the transformation of sentencing policy in the National Criminal Code, confirms that this shift is grounded in the values of Pancasila and the principles of *restorative justice*, so that sentencing is no longer positioned merely as an instrument of punishment, but as a means of restoring social relations damaged by criminal conduct. This is further reinforced by the findings of Saputra et al. in a comparative review between Indonesia's 2023 Criminal Code and the German *Strafgesetzbuch* (StGB), which demonstrates that the National Criminal Code expands the categories of principal penalties including supervisory sanctions and community service as an effort to diversify punishment, reduce reliance on imprisonment, and support the social reintegration of offenders. The optimization of community service and compensation is also emphasized by Widodo and Galang as a concrete step toward realizing just sentencing, although in practice it remains constrained by the absence of technical regulatory guidance and the lack of supervisory institutions.

Umi Rozah, within the framework of *criminal policy* theory, affirms that crime control policy must always integrate two dimensions: *social defence* and *social welfare*.[35] This approach demands that sentencing not merely impose sanctions, but also ensure that the impact on victims is given serious attention and that normative gaps do not become barriers to the protection of citizens' fundamental rights. In this context, the humanistic sentencing purposes as formulated in Articles 51–52 of the National Criminal Code do not stand alone; they function as an axiological framework that should permeate every aspect of criminal law application from the formation of norms (formulation policy), through enforcement by law enforcers and courts (application policy), to the implementation of decisions (execution policy) as argued by Barda Nawawi Arief in his concept of integral penal policy.[36]

When these humanistic and integrative sentencing purposes are confronted with the reality of digital crime, a tension emerges that is not easily bridged. Digital crime particularly that which targets victims' personal data, reputation, and psychological integrity inflicts profoundly destructive harm on human dignity. A breach of sensitive health data, for instance, can permanently destroy a person's career and social life. The practice of *doxing* the deliberate dissemination of a person's personal data for the purpose of intimidation or harm has been examined by Dita and Safiranita as a serious violation of human dignity, though the classification of its criminal penalties under Law No. 27 of 2022 still requires differentiation between *doxing* for *malicious purposes* and *doxing* for *political purposes*. Furthermore, the phenomenon of *deepfake* pornography in which artificial intelligence technology is used to fabricate sexual content featuring a victim's likeness constitutes a form of online gender-based violence (OGBV) whose effects are deeply destructive to the dignity and psychological health of victims. Research by the Department of Communication Studies at Universitas Gadjah Mada affirms that *deepfake* pornography is an escalating trend of OGBV in the digital era, yet existing regulations have not yet been fully able to address the complexity of this technology.

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[35] Umi Rozah, dalam kerangka kebijakan kriminal sebagaimana dikembangkan oleh Barda Nawawi Arief. Lihat: Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan* (Jakarta: Kencana, 2007), hlm. 77–80. Konsep *social defence* dan *social welfare* sebagai tujuan ganda kebijakan kriminal juga dikembangkan dalam: Umi Rozah, "Kebijakan Kriminal Mengenai Pemberian Ganti Kerugian terhadap Korban Salah Tangkap," *Jurnal Pembangunan Hukum Indonesia*, Vol. 2, No. 1, (2020): 117–131, DOI: 10.14710/jphi.v2i1.7214.

[36] Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara* (Semarang: Badan Penerbit Undip, 2000), hlm. 23–28.

The humanistic sentencing purposes of Articles 51–52 of the National Criminal Code, which emphasize societal protection and the restoration of equilibrium without degrading human dignity, imperatively demand that criminal law be able to reach and respond to such forms of dignity violations. Yet it is precisely here that the tension with the legality principle becomes most acute. When novel digital crime modalities such as *deepfake* or algorithmic manipulation have not yet been explicitly regulated in criminal offense formulations, victims frequently fail to receive adequate criminal law protection.[37] Recent research by Perdana et al. on the application of the principle of *geen straf zonder schuld* to *deepfake* crimes demonstrates that Indonesian criminal law does in fact possess the capacity to respond adaptively the construction and substance of *deepfake* crime fundamentally resembles previously recognized criminal offenses, but is shaped by technological development. This indicates that careful interpretation of existing norms, without violating the legality principle, can still provide protection to victims, provided it is conducted within the corridors of legally justifiable interpretation.

Law enforcers and judges face a concrete dilemma: they feel compelled to respond in order to protect victims, yet they are bound by the boundaries of existing criminal offense formulations. If they force an analogical interpretation upon norms not designed for the digital context, they risk violating the legality principle. If they restrain themselves, victims are left without recourse through criminal law channels. This dilemma is not merely a technical-juridical problem; it is also an ethical one that touches the very essence of criminal law's function: to protect human dignity. Research by Dewi et al. on the protection of cybercrime victims through a restorative justice approach demonstrates that the manifestation of victim rights protection in cybercrime cases through assistance, facilitation, and compensation is in fact more relevant and essential for fulfilling victims' rights than mere punitive sentencing. This finding is fundamentally aligned with the spirit of humanistic sentencing that places victim restoration above retribution.

To resolve this impasse, this article proposes the concept of the "humanistic digital legality principle" as a conceptual construction resting upon the two main pillars of the National Criminal Code: the legality principle and humanistic sentencing purposes. This concept is not intended to abolish or weaken the legality principle, but rather to guide the manner in which it is interpreted in the context of digital crime, so that the tension between legal certainty and the protection of human dignity can be bridged in a proportionate manner. The concept is built upon three interrelated dimensions.

The first dimension is the protection of human dignity as an *overriding principle*. In the digital context, the interpretation of criminal offense elements must be directed in such a way as to avoid ignoring substantive harm to the victim's dignity merely because the technological form was unknown at the time the statute was drafted.[38] Eddy O.S. Hiariej explains that there is a fundamental difference between extensive interpretation and analogy: extensive interpretation still operates within the corridor of the linguistically possible meaning (*de mogelijke bewoordingen*) of a provision, whereas analogy surpasses that boundary and creates a new norm.[39] As long as the interpretation

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[37] Y.L. Perdana *et al.*, "Penerapan Asas *Geen Straf Zonder Schuld* dalam Penindakan terhadap Kejahatan Penyalahgunaan Teknologi Deepfake," *Jurnal USM Law Review*, Vol. 7, No. 3, (2024): 1102–1118, DOI: 10.26623/julr.v7i3.9686.

[38] Barda Nawawi Arief, *Pembaharuan Hukum Pidana dalam Perspektif Kajian Perbandingan* (Bandung: Citra Aditya Bakti, 2011), hlm. 14–19.

[39] Eddy O.S. Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana* (Jakarta: Erlangga, 2009), hlm. 61–67.

of offense elements for instance, expanding the meaning of "distribution of pornographic material" to include *deepfake* pornography remains within the corridor of linguistically possible meaning and the clearly evident protective purpose of the relevant norm, such teleological-protective interpretation may be justified as an implementation of material legality that is consistent with humanistic sentencing purposes. Barda Nawawi Arief affirms that criminal law interpretation must not be static; it must be responsive to social development, while remaining within the framework of human rights protection and the principles of the rule of law.[40]

The second dimension is *predictability* and *foreseeability* in the digital era. The humanistic digital legality principle demands that criminal norms be formulated in a manner that allows citizens to reasonably predict that certain conduct even if employing new technology falls within a prohibited category.[41] Sitorus et al. demonstrate that the development of the legality principle in Indonesia is indeed not rigid in character, particularly in addressing crimes against human rights, yet such flexibility is only justified within the bounds of *necessity* and must continue to respect citizens' fundamental rights.[42] If criminal offense formulations employ general language describing the nature of the attack against dignity, privacy, or data integrity rather than specifying a particular technology then an interpretation that encompasses a new digital modus operandi still falls within the limits that a rational actor could reasonably foresee. A comparative study by Sihotang et al. confirms that the expansion of material legality in the National Criminal Code can strengthen this *foreseeability*, provided that the recognition of living law within society is framed by clear and measurable parameters. This approach is fundamentally distinct from pure analogy, which creates a new prohibition without any predictable normative basis a distinction that is critically important in the context of criminal law.

The third dimension is the integration of the Criminal Code and special legislation. As analyzed in the preceding discussion, Article 187 of the National Criminal Code affirms that the general principles of the Criminal Code including the legality principle and sentencing purposes also apply to criminal acts regulated under other statutory regulations.[43] The humanistic digital legality principle presupposes that the National Criminal Code, with its humanistic sentencing purposes, functions as an *axiological framework* for the formation and interpretation of special legislation in the field of digital crime. Thus, when courts interpret criminal provisions under the ITE Law or the PDP Law, they do not merely refer to the formal formulation of the offense, but also to the humanistic sentencing purposes of the Criminal Code as a standard for assessing whether a given interpretation remains justifiable. Khairani and Nurhidayatuloh, in their comparative study, demonstrate that the criminal provisions of Indonesia's PDP Law are sufficiently stringent in terms of sanction severity, yet their effectiveness is highly dependent on the coherence of their application with the general principles framework of the National Criminal Code.[44] This enables consistency between the protection of legal certainty and the protection of human dignity across various sen-

[40] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, Edisi Kedua (Jakarta: Kencana, 2010), hlm. 45–52.
[41] T. Sitorus *et al.*, "Development of the Principle of Legality in Indonesian Criminal Law," *International Journal of Multidisciplinary Approach Research and Science*, Vol. 2, No. 1, (2024): 278–285, DOI: 10.59653/ijmars.v2i01.418.
[42] T. Sitorus *et al.*, *Op.Cit.*
[43] Pasal 187 Undang-Undang Nomor 1 Tahun 2023 tentang KUHP Nasional.
[44] J.A. Khairani dan N. Nurhidayatuloh, *Op.Cit.*

tencing regimes. Umi Rozah and Barda Nawawi Arief, within the framework of criminal law formulation policy, demonstrate that coherence between the general codification and special legislation is a prerequisite for the creation of an integral, non-fragmented sentencing system.[45]

The concept of the "humanistic digital legality principle" carries several important implications. Conceptually, it shifts the perspective on the legality principle from merely serving as a *shield* protecting individuals against state power, to also serving as a *framework* ensuring that the state uses criminal law to genuinely protect human dignity in the digital space.[46] This shift does not abolish the protective function of the legality principle for individuals that function remains fundamental but it adds a new dimension: the legality principle must also be evaluated based on the extent to which it enables or impedes protection for victims of digital crime. Normatively, this concept can serve as a basis for reformulating certain criminal provisions that are overly technical and technology-centric those that specify only particular devices or methods to be reoriented around the type of value protection sought, such as the protection of sensitive data, the protection of digital identity integrity, and protection from online gender-based violence.

On the other side, this concept also demands enhanced judicial capacity, particularly with respect to the digital literacy of judges and law enforcers. Without adequate understanding of how digital technology operates how personal data is processed, how *deepfakes* are created, how algorithms can be manipulated judges will struggle to translate the principle of *human dignity* into the interpretation of criminal norms in the digital space without transgressing the boundaries of the legality principle.[47] This need is consistent with research findings on the role of law enforcers in addressing digital crime, which demonstrate that the technical capacity of enforcement officials constitutes a crucial factor in the effectiveness of cybercrime enforcement. Without such capacity, there is a risk that the idea of a humanistic digital legality principle will remain nothing more than normative jargon, devoid of practical force. Accordingly, this article also implies the need for ongoing training policies for law enforcers and the updating of sentencing guidelines for instance, through Supreme Court Regulations that explicitly integrate a humanistic sentencing perspective into the handling of digital crime cases. A similar step has in fact been initiated in the context of restorative justice, where the Supreme Court has issued guidelines for applying a restorative approach in the resolution of certain criminal cases a precedent that can be extended to the realm of digital crime.

4. Conclusion

The analysis of the construction of the legality principle and the humanistic sentencing purposes in the National Criminal Code (Law No. 1 of 2023) demonstrates that the expansion of the legality principle from a formal to a material dimension through the recognition of living law within

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[45] Umi Rozah dan Barda Nawawi Arief, "Kebijakan Formulasi Pertanggungjawaban Pidana Korporasi Penerbit Alat Pembayaran dengan Menggunakan Kartu (APMK) Terkait Tindak Pidana Sistem Pembayaran Elektronik," *Diponegoro Law Journal*, Vol. 5, No. 3, (2016): 1–16, DOI: 10.14710/dlj.2016.12756.

[46] Eddy O.S. Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana* (Jakarta: Erlangga, 2009), hlm. 4–7. Bandingkan juga: S. Harefa, "Transformasi Kebijakan Pemidanaan dalam KUHP Nasional: Menuju Sistem Pemidanaan yang Berkeadilan dan Humanis," *Simbur Cahaya*, Vol. 32, No. 2, (2025), DOI: 10.28946/sc.v32i2.5050.

[47] A.G. Larasari dan T. Safiranita, "Perlindungan Hukum terhadap *Artificial Intelligence* dalam Aspek Penyalahgunaan *Deepfake Technology* pada Perspektif UU PDP dan GDPR," *Law and Policy Journal*, Vol. 1, No. 3, (2023): 1–15, DOI: 10.46839/llp.v1i3.7386.

society (Article 2), while positive in accommodating the plurality of Indonesia's legal order, does not automatically prove capable of addressing the challenge of digital crime, which is cross-border, highly technical, and evolves far more rapidly than legislative capacity. The strict prohibition on analogy, firmly maintained by the National Criminal Code, strengthens legal certainty, yet simultaneously narrows the space for criminal law to adapt to new modus operandi in cyberspace. On the other hand, the humanistic sentencing purposes of Articles 51–52 which place human dignity as the ethical boundary of punishment imperatively demand that criminal law be capable of providing effective protection for victims of digital crime, including victims of personal data breaches, *doxing*, *deepfake* exploitation, and online gender-based violence.

To reconcile the tension between these two pillars, this article proposes the concept of the "humanistic digital legality principle," which rests upon three dimensions: (1) the protection of human dignity as a guiding principle for teleological-protective interpretation within the boundaries of linguistically possible meaning; (2) the formulation of criminal norms based on *technology-neutral drafting* that meets the standard of *foreseeability*; and (3) the integration of the National Criminal Code's value framework with special legislation on digital crime through Article 187 of the Criminal Code as an *umbrella provision*. This concept does not weaken the legality principle; rather, it directs its interpretation to operate in synergy with humanistic sentencing purposes, so that Indonesian criminal law may respond to the challenges of digital crime in a just, humane, and constitutional manner.

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