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The Legality Principle in Protecting the Interests of Victims in Article 1, Paragraph (1) of the Criminal Code

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ABSTRACT

The principle of legality is needed to prosecute acts that cause extraordinary harm to victims, which the action have not been or are not prohibited by criminal law. In Indonesia, the legality principle contained in Article 1 paragraph (1) already has a draft for amendments to the previous article. In the 2010 Draft Law, the Criminal Code Bill still maintains the existence of the principle of legality as a fundamental principle for the enforceability of criminal law. This research aims to find out the implementation of legality principle in protecting the victims and perpetrators' interest along with the right justice for the criminals. This research is normative legal research that aimed at legal concepts, statutory regulations, and other legal materials. This research is conceptual and statutory approach through Criminal Code (WvS), Criminal Procedure Code, and the 1945 Constitution to understand the basic concept of legality contained in Criminal Code article on law enforcement and justice. In this research, it found that the existence of legality principle is very necessary to protect citizens' rights from arbitrary government in their decision-making. It can be concluded that the meaning contained in legality principle is to provide a protection for perpetrators from arbitrary authorities as well as a limiting function for government to not make decisions injudiciously. This means that the legality principle only regulates the relationship between the perpetrator and government, while the relationship between victim and government is not regulated in it that resulted in no protection for victims.

Keywords: Actors, Criminal Law, Legality principle, Victims, Weaknesses

INTRODUCTION

The rapid development of human way of thinking is accompanied by the advancement of law. This advancement of law can be some new issues for whom studied the law itself. In this context, in Article 1 paragraph (1) of the Criminal Code, it is questionable whether Article 1 paragraph (1) is able to protect human rights or not, both perpetrators and victims fairly when the accidents does not exist in defined laws yet. Schaffmeister stated that the principle of legality substantially only has 2 functions as follows:¹

1. Protection, to protects citizens from the arbitrariness of government power and authority.
2. Limitation, to limit the government powers and/or the authority of judges.

The principle of legality is needed to prosecute acts that cause extraordinary harm to victims, which the action have not been or are not prohibited by criminal law. This is unfair when the law only protects the interests of the perpetrators and ignored the interests of the victims. Since the current situation in Indonesia is very different from the situation during French Revolution, which became the culmination of the principle of legality because the arbitrary government that the law must be embodied into a concrete and real norm for the law itself is not interpreted differently since the law and justice are two things that cannot be separated. Article 1 paragraph (1) of the Criminal Code stipulates a very important issue for criminal law and criminal justice to what extent the criminal law can be implemented properly for not violate the *nullum delictum* principle. Based on the phenomena above, this research aims to find out the implementation of legality principle in protecting the victims and perpetrators' interest along with the right justice for the criminals.

RESEARCH METHODOLOGY

This research is normative legal research that aimed at legal concepts, statutory regulations, and other legal materials. Normative legal research is examining the legal and regulatory principles that are directly relevant to the research's topic.² In this research, the legal concept studied is the concept of the Legality Principle in the Criminal Code. Meanwhile, the laws and regulations used are the Criminal Code (WvS), Criminal Procedure Code, and the 1945 Constitution.

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¹ Danang Widoyoko, *Penemuan Dan Penalaran Hukum* (Surabaya: Ubhara Press, 2017).

² Rissa Dwi Novita and Muhammad Abdul Razak, "Personal Data Protection in Falsification of Covid-19 Vaccination: A Juridical Review," *YURIS (Journal of Court and Justice)* 1, no. 3 (2022): 25–37.

justice. This research also using a case approach to determine the application of legal norms or rules conducted in law enforcement. The literature study is characterized by finding and understanding criminal law works that discusses the principle of legality. This research uses primary and secondary legal materials by statutory law which is formally formed by the state institution (legislature).³ Meanwhile, secondary legal materials are all information about law such as academic works, books, research results and others.

RESULTS AND DISCUSSION

Legality Principle

Moeljatno stated that there was the existence of *crime stellionatus* which means evil acts in Roman times. When ancient Roman law was implemented in Western Europe during the Middle Ages, this *crimine extra ordinaria* was accepted by kings to use the criminal law arbitrarily according to their wishes and needs. Since that, it required the idea of a principle that could limit arbitrary actions, known as the principle of legality, which is a fundamental principle for the implementation of the criminal law itself.

In ancient times, the society are becoming victims as a result of arbitrary rulers, but at this time, especially in Indonesia, this principle is no longer relevant since those who are truly victims because of criminal acts.

According to Deni Setyo Bagus Yuherawan, the public opinion regarding the emergence of legality principle is always associated with French Revolution (1789) and the existence of sharp criticism and rejection stated by philosophers and criminal law in XVIII century against criminal justice *arbitrium judicis* (a system of criminal justice which the judges authorized to qualify an act as a criminal act) in France during the ancient regime which was implemented arbitrarily.⁴ Substantially, this opinion is not comprehensive since it only describes major events in XVIII century. Through historical records, the basic idea of the principle of legality has been initiated centuries before the French Revolution which was contained in the document 'The Great charter of English liberty granted (under considerable duress)' which was signed by King John in Runnymede, England on 15 June 1215. This document is known as *Magna Charta* (Grand Charter).

After the French Revolution, the principle of legality became a reference of criminal law and criminal justice. Criminal law and criminal justice based on criminal law are protecting the citizens' interests that conducted by limiting the powers of government and judges.

³ Tenri Wulan Aris, "Urgensi Judicial Review Satu Atap Oleh Mahkamah Konstitusi," *de Jure Jurnal Ilmiah Ilmu Hukum* 1, no. 2 (July 25, 2020): 142, <http://ejournal.unkhair.ac.id/index.php/deJure/article/view/1930>.

⁴ Deni Setyo Bagus Yuherawan, *Dekonstruksi Asas Legalitas Hukum Pidana, Sejarah Asas Legalitas Dan Gagasan Pembaharuan Filosofis Hukum Pidana* (Surabaya: Setara Press, 2014).

In Indonesia, the legality principle contained in Article 1 paragraph (1) already has a draft for amendments to the previous article. In the 2010 Draft Law, the Criminal Code Bill still maintains the existence of the principle of legality as a fundamental principle for the enforceability of criminal law. Article 1 paragraph (1) of the Criminal Code stipulates that no one can be convicted or prosecuted, unless the act has been stipulated in the criminal law. Then in Article 1 paragraph (2) it stipulates that it is prohibited to use analogy in determining the existence of a criminal act.

The principle of legality has an expansion that in Article 1 paragraph (3) the Criminal Code determines the difference provisions from the adage *nullum delictum nulla poena sine praevia lege*. In Article 1 paragraph (3) it determines that as the provisions in Article 1 paragraph (1) does not reduce the validity of the law that lives in society that a person should be punished even though the act is not regulated in the legislation. Then in Article 1 paragraph (4) determines that the law in society as referred in Article 1 paragraph (3) applies as long as it is in accordance with Pancasila values and/or general legal principles recognized by citizens.

The Definition of Legality Principle

The principle of legality has two derivative meanings, the obligation to implement the criminal law when the criminal act was committed is commonly referred as "lex temporis delicti or existing criminal laws" principle and the prohibition of criminal acts other than those formulated by the criminal law itself. The obligation to implement the *lex temporis delicti* or existing criminal laws is a "non-retroactive" principle.

Then, it is a necessity in applying the criminal law that when the criminal act was committed with the principle of "non-retroactive" since these two are interrelated. When one of them is violated, then other provisions will be contravened. For example, in the case of 2002 Bali Bombing, there was no law that clearly regulated terrorism at that time. After the issuance of a new law called Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism, and Number 15 of 2003 concerning Stipulation of Government Regulations of Laws that the law is implement retroactively, and the terrorist are punished according to their actions. There is a concept that allows legislation to enforce the law retroactively when the criminal act are violates human rights.

Apart from these meanings, the principle of legality substantially only performs two functions as a protector that defend the citizens from the government arbitrariness and judges' authorities and to limit the government and judges' power. The protection function is only intended for perpetrators that will not be prosecuted as long as their actions are not "mala prohibita". The limitation function is only aimed at the interests of the perpetrators because the authorities cannot prosecute perpetrators who commit "crimina extra ordinaria" even though they cause extraordinary losses to victims.

The Definition of Article 1 Paragraph (1) of The Criminal Code

The legality principle is the main fundamental principle in criminal justice since it comes from the basic idea of 'legal certainty' that aims to protect the legal interests and human rights of perpetrator. This principle must be embedded in the criminal justice system or in other words, the criminal justice system without the legality principle will not move even if it is forced and the criminal justice system will be like a 'living corpse' or 'zombie' that will frighten the human life.⁵

Then, it can be concluded that the existence of legality principle is very necessary to protect citizens' rights from arbitrary government in their decision-making. The legality principle protect the interest of perpetrators and the victims. In his book, M Sholehuddin explains that the meaning contained in Article 1 paragraph (1) of the Criminal Code is:

- a) Formal legality principle
- b) Lex temporis delicti principle
- c) Lex certa principle
- d) Non-retroactive principle

Which means that the formal legality principle has a very deep meaning that guaranteeing legal certainty. Then the principle of lex temporis delicti means that the applied law to a criminal act is the applicable law when the criminal act occurred.

In lex certa principle, it requiring that the formulation of statutory provisions be implemented as accurately as possible that the law must sharply and clearly limit the government's authority over its citizens that will relate to people's trust. When the government formulating laws carelessly, especially to realize the interests of the authorities, in this case, individuals and groups, then the citizens will not believe, not respect, and certainly will not obey to the government itself. Then non-retroactive principle emphasizes the prohibition of retroactive application of criminal law. This aims to uphold legal certainty.

The Legality Principle Weaknesses

The principle of legality is not only the development of philosophers and criminal law experts to answer legal and justice issues, but also as a correction or reaction to 'arbitrium judicis' criminal justice system during 'ancient regime' which was implemented arbitrarily. The basic idea of the principle of legality existed before the French Revolution (1789) which was considered the culmination of the emergence of legality principle which was the resultant philosophical thought that aims to protect the citizens' rights from arbitrary powers of government. It is necessary to analyse the legality principle critically from the perspective of place and time to obtain a comprehensive understanding.

⁵ Sholehudin and Bernard L. Tanya, *Etika Dalam Peradilan Pidana* (Surabaya: Perwira Media Nusantara, 2014).

To prevent arbitrary qualifications must be implemented by law. The impact of qualification through the law includes:

- a) There is no prosecution when the act is not 'mala prohibita', this means that 'crimina extra ordinaria' will not be prosecuted.
- b) The prosecution must be implemented against 'mala prohibita' because citizens are considered to know and are willing to accept the risks of their actions.

As written by Andi Hamzah Grotius, he develops a combined theory that emphasizes absolute justice which is manifested in retaliation that useful for society. The basis of each punishment is the severity of suffering according to act committed by the convict.⁶

Then, the imposition of criminal sanctions will be based from the applied norms and values. In making a decision on how severe the punishment for the perpetrator, the priority should be given to the objective of the law, called the expediency that the sanction must provide the benefits to the community and can contribute the personal benefits to the perpetrator himself. Apart from making criminal offenders afraid or deterrent from committing their crimes again, the aim of the punishment itself is to rehabilitate the perpetrators to become good individuals for they can return to society with a good personality and can be useful in general public.

Legality principle contains the relations between perpetrators, laws and government that there is no victim relationship contained in it. The relations contained in legality principle are only limited to protect the perpetrators from arbitrariness in solving a case that the government must be based on the law. The victims' interests are no longer seen as a necessity that must be fought for since the principle of legality only prioritizes legal certainty and forgets about justice and expediency. Indeed, a legal event cannot be generalized into one, each legal event has its own characteristics that must prioritize justice, benefits and certainty.

In another perspective from the side of victims oriented for and on behalf of protecting the victim's interests, all actions that harm the victim must be prosecuted and punished. The orientation towards the victims' interests is based on the the idea of "nullum crimen sine poena" that will form criminal law and criminal justice which will prosecute and punish all criminal acts either 'mala prihibita' or 'crimina extra ordinaria' with the reasons all of these actions demand and punish the perpetrator as the responsible for all their criminal act.

⁶ Andi Hamzah, *Hukum Pidana Indonesia* (Jakarta: Sinar Grafika, 2017).

CONCLUSION

Substantially, the meaning contained in legality principle is to provide a protection for perpetrators from arbitrary authorities as well as a limiting function for government to not make decisions injudiciously. This means that the legality principle only regulates the relationship between the perpetrator and government that the perpetrator greatly benefits in this case, while the relationship between victim and government is not regulated in it that resulted in no protection for victims. Based on the culmination of the emergence of legality principle during French Revolution, the legality principle existed because of its function to protect the people (victims) from the government arbitrariness at that time. However, the legality principle is no longer relevant nowadays because it cannot protect the victims, both individuals and the community from perpetrators of *extra ordinari* criminal acts. Therefore, it is necessary to restructure the legality principle in Article 1 paragraph (1) of the Criminal Code become more comprehensive, concrete and relevant to the present and the future. So, the legality principle is able to provide a balanced protection between the perpetrator and victims' interests.

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