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The Legality Principle Application in Indonesian Criminal Law System

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ABSTRACT

The application of legality principle in Indonesia criminal law system is the main tool in the enforcement of criminal law. The nature of legal certainty attached to the principle of legality makes criminal law one of the fields of legal science that is certain in the eyes of the law. Because it attaches to clear and firm legal frames, it is an instrument of guidance and limitation in applying concrete cases. This paper analyzes how the principle of legality in criminal law can make the law a certainty. The principle of legality limits in detail and carefully what actions can be punished. The results of the study state that in Indonesia, based on the principle of legality, criminal acts must be regulated in writing. However, some areas still use customary law. Then the nature of criminal law may not apply retroactively.

Keyword: *Legality Principle, Criminal Law, Positive Law*

ABSTRAK

Realitas asas legalitas di Indonesia menjadi piranti utama dalam penegakan hukum pidana. Sifat kepastian hukum yang melekat pada asas legalitas menjadikan hukum pidana sebagai salah satu bidang ilmu hukum yang pasti dalam kacamata hukum karena melekat padanya bingkai-bingkai hukum yang jelas dan tegas,yang menjadikannya sebagai instrument pedoman dan pembatas dalam penerapan kasus konkrit. Tulisan ini merupakan analisa bagaimana asas legalitas dalam hukum pidana mampu menjadikan hukum sebagai kepastian. Asas legalitas membatasi secara rinci dan cermat perbuatan apa saja yang dapat dipidana. Hasil dari penelitian menyatakan bahwa di Indonesia berdasarkan asas legalitas bahwa perbuatan pidana harus di atur secara tertulis meski ada di beberapa daerah yang masih menggunkan hukum adat. Kemudian sifat hukum pidana tidak boleh berlaku surut.

Kata kunci: Asas Legalitas, Hukum Pidana, Hukum Positif

Introduction

The existence of legal principles in a legal field is very important, considering that these legal principles are the basis and guidelines for the development of each legal field so as not to deviate. In criminal law itself, the existence of this legal principle is emphasized as an effort so that criminal justice is limited in its arbitrariness in determining the presence or absence of prohibited acts. Roeslan Saleh emphasized that the main purpose of this legal principle is to "normalize the supervisory function of criminal law".[1]

Do not let it be misused by the government (court) in power. From here arise the principles of criminal law, such as the principle of legality, which requires that no act can be criminalized except under the provisions of the existing criminal legislation before the act was committed. The principle of equality requires eliminating discrimination in the judicial process— also the existence of the subsidiarity principle, the principle of proportionality, and the principle of publicity. The principle of legality in criminal law is so central and important, considering that this principle is the first door of criminal law to determine the presence or absence of a criminal act and accountability for the violator. *Het legaliteitbeginsel is een van de meest fundamentale beginselen van het strafrecht* (The principle of legality is a very fundamental principle in criminal law).[2]

Understanding the principle of legality correctly will determine whether or not criminal law enforcement is right, starting from the investigation process until the court decision is given. The existence of such a fundamental principle of legality has undergone several important changes in its understanding and the development of criminal law itself in facing the development of society. The principle of legality is no longer understood at the time of the formation of this principle, which was against the backdrop of the collapse of the King's absolutism. However, it is understood under the current context in which the principle of legality applies.

To better understand the legality principle, there is a common opinion among criminal law experts who state that no single act can be subject to a criminal offense without a criminal statute that regulates before the act is carried out. The problem is how to interpret the word *lege in nullum delictum nulla poena sine praevia lege poenale* Does it have to be understood formally as a law or legislation? Does it have to be understood materially as a law that lives in the community by ignoring the existing legislation because it does not provide a clear legal basis in one case? To answer this question, it is very important to discuss the philosophical, historical legality principle, starting from the history of the legality principle, the development of understanding the meaning of the legality principle, the meaning of the legality principle in Indonesian Criminal Law.

In Article 1 paragraph (3) of the 1945 Constitution, it has been affirmed that Indonesia is the State of Law. In the life of the state, one must be enforced a social life. This view is believed not only due to the adoption of the rule of law but rather to see critically the trends that occur in the life of the Indonesian nation, which is developing towards a modern society.

The originator of the Legality principle was Paul Johan Anslem Von Feuerbach (1775-1883), a German

[1] Roeslan Saleh, *Beberapa Asas-asas Hukum Pidana dalam Perspektif* (Jakarta: Aksara Baru, 1981). P. 14.

[2] Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Materiil dalam Hukum Pidana Indonesia: Studi Kasus tentang Penerapan dan Perkembangannya dalam Yurisprudensi* (Bandung: Alumni Bandung, 2002). P. 6.

criminal law scholar in his book Lehrbuch des Penlichen recht in 1801. According to Bambang Poernomo, what Feuerbach formulated has a very deep meaning, which in Latin reads: *nulla poena sine lege, nulla poena sineprae-via legi poenalli*". These three phrases were later developed by Feuerbach into *adagium nullum delictum, nulla poena sine praevia legi poenalli*.[3]

The principle of legality was formulated in Latin, so some may think that this formulation comes from ancient Roman law. In fact, according to Moeljatno, neither this adage nor the principle of legality was known in ancient Roman law. Likewise, Sahetapy stated that the principle of legality was formulated in Latin solely because Latin was the language of the 'legal world' used at that time. the act of law is formulated as an act that is prohibited from being carried out (*comisi* delict) or ordered to do (*omisi* delict) and as a consequence, anyone who does not comply with the order or prohibition will be subject to sanctions in the form of certain coercive crimes.[4]

Results & Discussion

1. History of Legal Principle

The importance of clear legal provisions for prohibited acts began the Emperor Justinian codified the superiors of legal provisions that applied to Roman citizens.

> "*Roman citizens enjoyed some of the benefits of a regulated and limited government; and a few protections even applied in Greek city-states. The principles blossomed slowly dan painfully in England, symbolized by the Magna Carta of 1215".*[5]

This is where understanding the importance of codification for law developed for European society as a form of legal certainty. The history of the formation and application of the principle of legality itself cannot be separated from the legal position in the state before the XVIII century. Criminal law in Europe at that time was only based on an unwritten law, namely customary law. Customary law requires full power over the law to be in the hands of only one ruler, namely the King. As a result, at that time, the state's power became absolute (state sovereignty), which was characterized by absolute monarchies. In the exercise of his power, the King appointed several state officials. King was given a very free power, so that it impacted arbitrary actions on the people, especially in the field of law. Although the King has appointed judges as representatives of the King to adjudicate every case, it turns out that in his decisions there is a lot of arbitrariness of judges, both in determining which actions are prohibited and which actions are not prohibited as well as what types of punishments can be imposed on people who commit crimes. violate.[6]

It was only at the beginning of the XVIII century that this situation began to be responded to by the French people who demanded legal certainty (*rechtszekerheid*) for the arbitrary actions of the King.[7] In response to this deteriorating legal condition, many legal figures and experts have called for fundamental changes or reforms so that this era is known as *de eeuw vande verlichtingatau* Aufklarung era.[8] In such conditions as a legal expert, Beccaria proposes:

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[3] Eddy O.S. Hiariej, *Asas Legalitas & Penemuan Hukum dalam Hukum Pidana* (Jakarta: Erlangga, 2009). P. 7.

[4] Eddy O.S. Hiariej. P. 8.

[5] Frank R. Prassel, *Criminal Law, Justice, and Society* (Santa Monica California: Goodyear Publishing, 1979). P. 70.

[6] Prassel. P. 181.

[7] Lamintang, *Dasar-dasar Untuk Mempelajari Hukum Pidana yang Berlaku di Indonesia* (Bandung: Citra Aditya, 1997). P. 181.

[8] Lamintang. P. 91.

> "*The Criminal Law was formed based on more rational principles, namely which on the one hand can limit the rights of the authorities to impose punishments, based on the idea that the personal freedom of citizens should be respected as far as possible, namely especially in the law. criminal law, a pre-existing criminal provision must be an absolute requirement to be used as a basis for judges in imposing a sentence, and on the other hand can complete the growth of criminal law as a public law.*[9]

Beccaria's opinion was finally stated in the Penal Code 1791 (KUHP in France), but because the content was too ideal and not following the post-revolutionary situation in France, this Penal Code did not last long. However, this idea became a very important initial thought for forming the formulation of Article 1 paragraph 1 of the Criminal Code. Thinking about this started when a French nobleman named Jean Jacques Rousseau in his famous Du Contract Social. He asserted that every human being in a state of natural status has full freedom and rights. So that the association that is formed does not experience conflict or conflict, the humans enter into agreements with each other (*maatschappelijk verdrag*).[10]

In entering into this agreement, every human being gives up some of his rights and freedoms to the society (state) that was formed earlier, with the intention that the state, by obtaining these rights and freedoms, can maintain public order in society by limiting human rights and obligations. To carry out its duties, the state establishes regulations that essentially limit the rights and freedoms of every human being. With this regulation, the state is also given the task of ensuring that humans obey its regulations, and therefore, these regulations must contain the threat of punishment. From Rousseau's teachings, Djokosutono concludes that this teaching is the source of criminal law because criminal law must be based on laws or, in general, written regulations.[11]

In further development in 1810, a new Penal Code was formed with the influence of an English figure named Jeremy Bentham. Jeremy Bentham is a British philosopher who gave birth to utilitarianism related to political and legal interests. Bentham's thinking further develops the theory of free competition from Adam Smith in his book The Wealth of Nations. In contrast to Beccaria and Blackstone in responding to the role of law as an effort to protect the law against two parties, both the state and the people (involuntary law reformers), by assuming that community unity is to pursue their interests. Jeremy Bentham emphasizes the principle of the usefulness or benefits of the law itself for society by emphasizing:[12]

> "*Institutions were to be judged by their utility, whether they were to be regarded as useful was to depend solely upon their capacity to produce a balance of happiness*".

This way of thinking began to consider the preparation of the new Penal Code in France. Moreover, it appears that the consideration will not be carried out if criminal law is applied if it is groundless, needles, unprofitable or inefficacious. The principles contained in the old Penal Code have all been taken and contained in Article 4 of the new Penal Code by considering the benefits of balanced legal protection between the interests of the State and the interests of the people.

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[9] Lamintang. P. 99.

[10] J.J. von Schmid, *Pemikiran tentang Negara dan Hukum* (Jakarta: Pembangunan & Erlangga, 1979).

[11] Nigel Walker, *Sentencing in a Rational Sosiety* (London: Press, 1972). P. 43.

[12] Walker. P. 100.

Article 4 of this Penal Code is an elaboration of the spirit of renewal that was echoed in the French Revolution by Lafayette through article 8 *Declaration Des Droit de l'home et du Citoyenyang* want legal certainty by providing an *idea Nul ne peut etre puni qu'en vertu d'une loi etablie et promulguee anterieurement au delit et legalement appliquee* (No one can be punished except based on the criminal provisions according to the existing law before the act itself).[13] Lafayette herself drew this inspiration from the legal provisions in sections 8 to 10 Bill of Rights Virginia 1776, which stipulates that no one will be prosecuted or will be detained except in events and accordance with the methods regulated by law. When examined from a historical point of view, this principle comes from the Habeas Corpus Act 1679, which directly mentions article 39 of Magna Charta 1215 as the source. Therefore, it can be said that the principle of legality has existed since Magna Charta 1215.

The regulation of criminal law in the Netherlands itself actually already exists *Crimineel Wetboek voor het Koninkrijk Holland* (1809), but when Napoleon united the Netherlands with France, Ciminineel Wetboek became invalid and replaced with Penal Code. In further developments, although the Netherlands had gained its independence in 1813, it turns out that this Penal Code is still in effect for a while up to 75 years while waiting for the formation of a new Criminal Code for the Netherlands. It wasn't until 1881 that the Netherlands had its own national Criminal Code, known as wetboek van strafrecht (Wvs). From the formulation of the law, This WvS turns out that Article 4 of the French Penal Code is still included in article 1, paragraph 1 Wetboek van Strafrecht to provide evidence of approval of legal certainty order to prevent the arbitrariness of the authorities that can harm the population. Simons explained the reason for this inclusion:

> *"De regel opgenomen in art.4 CP werd gehandhaafd bij art.1 lid 1 van ons wetboek van strafrecht. Naar mijne mening mag die regel, voorzover hij den eisch steit van het voorafgaan van verhods-of gebodsvoorschrift en voorzover hij vordert de voorafgaande berreiging van de straf, ook nu nog wordenbeschouwd als een te waarderen waarborg voor persoonlijk rechtszekerheid. (The legal provisions contained in Article 4 of the Penal Code are still maintained in Article 1 paragraph 1 of our Criminal Code. In my opinion, the regulation up to now can still be seen as an acknowledgment of the existence of a legal certainty for individuals that must be guaranteed, that is to the extent that the regulation requires that regulations that are obligatory or prohibitive must exist first and to the extent that it requires that the threat of punishment must have existed before the act itself)".*[14]

Clearly, Simons emphasized the importance of the inclusion of article 4 of the Penal Code in Wetboek van Strafrecht solely as a guarantee of legal certainty for individuals against regulations that require and prohibit the following sanctions. Implicitly, Article 4 of the Penal Code can regulate the necessity of having clear regulations in advance on what actions are categorized as prohibited acts so that people as individuals do not feel trapped when doing the prohibited acts. Article 4 of the Penal Code requires a guarantee of legal certainty for human rights not to be taken arbitrarily. Rather, it requires the regulation and deprivation of human rights clearly and definitely in statutory

[13] Lamintang, *Dasar-dasar Untuk Mempelajari Hukum Pidana yang Berlaku di Indonesia*.

[14] Lamintang. P. 130.

regulation. Pompe emphasizes the purpose of the criminal regulation *de strekking van de eerste regel was steeds, een waarborg te stellen voor de individuelle vrijheid tegen willekeur der overheid* (the purpose of the first regulation is permanent, namely protecting individual freedom from the arbitrariness of the ruler).[15] It can be clearly seen that the background of this legality principle cannot be separated from the reaction to the King's absolute power so that a clear legal guarantee is needed for what is required and prohibited.

2. Aspects of The Legality Principle

Some criminal law experts argue about various aspects of the principle of legality. There is an opinion that states that in the Civil Law System tradition, there are four aspects of the principle of legality that are strictly applied, namely:

a. Law

Prosecution and sentencing must be based on the law (written law). The law must regulate behavior that is considered a criminal act. Habits cannot be used as a basis for prosecuting and convicting someone.

b. Retroactivity

Laws that formulate criminal acts cannot be retroactively enforced. A person cannot be prosecuted based on retroactive laws. Retroactive enforcement is arbitrary and a violation of human rights. However, in practice, there are deviations from the application of this principle. According to Romli Atmasasmita, the non-retroactive law principle applies to ordinary criminal offenses. At the same time, human rights violations are not ordinary violations, so the non-retroactive principle cannot be used.

c. *Lex Certa*

Legislators must formulate a criminal act and define it clearly without being vague so that there is no ambiguous formulation. This is called the *lex certa* principle. It gives the meaning of the scope of actions that can be punished because it is seen as contrary to the principle of legal certainty and will trigger legal uncertainty. An analogy existed when an act was carried out, with no rules governing it as a criminal act. Still, a criminal provision applied to other acts that had the same nature or form as the act so that the two acts were seen as analogous to each other. The application of analogies in legal practice is triggered by the fact that the development of society is so fast that the dynamism of written criminal law does not accompany it so that sometimes the law lags what it regulates.

The reality of the principle of legality in Indonesia is the main tool in the enforcement of criminal law. The nature of legal certainty is attached to the principle of legality. The attachment makes criminal law one of the fields of legal science that is certain in the eyes of the law because it attaches to clear and firm legal frames, which make it an instrument of guidance and limitation in the application of concrete cases.

The principle of legality in the constitution in Indonesia is included in the second amendment of the 1945 Constitution Article 28 I paragraph (1) which states that:

> "*hak untuk hidup, hak untuk tidak disiksa, hak beragama, hak untuk tidak diperbudak, hak untuk diakui sebagai pribadi di hadapan hukum dan hak untuk tidak dituntut atas dasar hukum yang berlaku surut adalah hak asasi manusia yang tidk dapat dikurangi dalam keadaan apapun*".

Meanwhile, Article 28J Paragraph (2) states that:

> ''*Dalam menjalankan hak dan kebebasannya, setiap orang wajib tunduk kepada pembatasan yang ditetapkan dengan Undang-undang*

[15] Lamintang. P. 71.

> *dengan maksud semata-mata untuk mnjamin pengakuan serta penghormatan atau hak dan kebebasan orang lain dan untuk memenuhi tuntutan yang adil sesuai dengan perimbangan moral, nilai-nilai agama, keamanan dan ketertiban umum dalam suatu masyarakat demokratis".*

In Article 1 paragraph (1) of the Criminal Code it is stated that:

> *"Tiada suatu perbuatan boleh dihukum, melainkan atas kekuatan ketentuan pidana dalam undang-undang yang ada terdahulu daripada perbuatan itu"*

3. Definition of the Legality Principle

In the context of the aforementioned legality principle, it implies that (1) criminal legislation must be clearly formulated in written form, (2) criminal law legislation may not apply retroactively, (3). In criminal law, it is not permissible to apply analogies.

The reality in Indonesia is that the principle of legality is not strictly adhered to by looking at the following facts:

a. Criminal legislation must be formulated in writing

The fact is that in Indonesia the applicable law (positive law) includes laws made by the authorities, customary law and Islamic law (especially in civil law). In the field of criminal law, apart from being based on the Criminal Code and the Book of Laws outside the Criminal Code as the basis for the legality of punishable acts, in indigenous peoples it is also recognized that customary criminal law is generally unwritten but is a rule that survives, grows and develops in the community. indigenous peoples as living law. And as the basis for the exception to the enactment of unwritten law through customary criminal law, Emergency Law No. 1 of 1951 concerning Temporary Measures is stipulated to organize a unitary arrangement of powers and procedures for civil courts, Article 5 paragraph (3) sub b Emergency Law No. 1 of 1961 concerning the application of all emergency laws and all government regulations in lieu of laws that existed before January 1, 1961 became Laws.

In article 5 paragraph (3) sub b of the Emergency Law no. 1 of 1951 stated that:

> *"…..that an act which according to living law must be considered a criminal act, but which has no comparison in the Civil Code, is considered punishable by a sentence of not more than three months in prison and or a fine of five hundred rupiahs, namely as a substitute law, if the customary punishment handed down is not followed by the convicted party and the said replacement is deemed commensurate by the judge's amount of guilt; that if the sentence handed down according to the judge's opinion exceeds the above, for the fault of the defendant can be subject to a substitute sentence of up to 10 years in prison, with the understanding that customary punishment which according to the judge's understanding is no longer in harmony with the times must be replaced according to living law must be considered an act. criminal law and which has an appeal in the Criminal Code which is the same as the sentence in the Criminal Code which is the same as the most similar sentence in the appeal against the act.".*

In Bali, there is a customary offense of *Lokika Sangraha*, which is not regulated in the national criminal law (KUHP). However, this offense is still seen as a despicable act by the Balinese people and should not be done. The traditional offense of *Lokika Sangraha* occurs when a man in love with a woman persuades the woman to have sex with the promise of marriage. After that, the man breaks his promise and

breaks off relations with the woman. In the traditional Balinese community, this immoral act is very despicable and is classified as a customary offense with no equal in the Criminal Code.

b. Criminal Law Regulations may not apply retroactively

To guarantee legal certainty, it is necessary first to determine criminal provisions regarding a criminal act. Then any violation of these provisions can be subject to criminal sanctions as a logical consequence of the legal subject's free choice to commit a prohibited act. This is also in line with the general principle that law binds everyone since the law is declared effective and has been promulgated in the State Gazette.

Criminal law does not adhere to the principle of absolute retroactiveness, this is stated in Article 1 paragraph (2) of the Criminal Code, which states that if the law is amended after the act has been committed, then the suspect is subject to provisions that are favorable to the accused. This proves that the law can be applied retroactively as long as the provisions of the old or previous laws are more favorable to the defendant. According to R Soesilo, it is more advantageous to include light sentences regarding the elements of the criminal incident, regarding the offense of complaining or not, regarding whether or not the defendant is guilty, *et cetera*.

Likewise, in law enforcement practice in the East Timor Human Rights violation case and the Tanjung Priok case, the legality principle is violated by applying the retroactive principle. Article 43 paragraph (1) of Law No. 26 of 2000 states that gross human rights violations that occurred before the promulgation of this law were examined and decided by an ad hoc human rights court. This means that the law on human rights courts also applies to gross human rights violations that occurred before the promulgation of the law.

c. In the application of criminal law, it is not permissible to use analogies

Sometimes, in applying criminal law to concrete cases, judges must make legal discoveries through legal sources using the interpretation method in criminal law. Interpretation is needed in criminal law to find the meaning contained in a term or scope of a crime. The principle of legality limits in detail and carefully what actions can be punished. The principle of legality underlies the limitation of the meaning of a criminal act in its formulation, which includes the subject or perpetrator of a criminal act, the act or result, the object or victim of a crime, and other additional elements that are the nature of the crime (*in public, for example, Article 170 of the Criminal Code and Article 281 of the Criminal Code, the motive for committing a crime*). The crime of killing a child for fear of being caught will give birth to a child, for example, Article 341 of the Criminal Code and so on).

Everything must be interpreted in terms of the meaning and scope to provide legal certainty regarding a criminal act. One of the principles of legality is that in the application of criminal law, analogies may not be used. The analogy applied a criminal law provision (*which has the same resemblance or form*) to action when it was committed. There was no criminal law provision governing it. The application of analogy shows that the law lags what it should regulate. One example of the application of a very phenomenal analogy in the history of criminal law enforcement is the application of an analogy by judge Bismar Siregar in 1983, through the decision of the Medan High Court No. 144/ PID/1983/PN/Mdn Bismar Siregar analogized the elements of goods contained in Article 378 of the Criminal Code with women's virginity (female genitalia or "*bonda*" in the Tapanuli language) and at the same time sentenced to 3 years in prison. The case is

about a man named King Sidabutar's mother-in-law who promised to marry a girl after he had intercourse with her, but the man broke his promise so that the girl felt cheated. The decision raises pros and cons.

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