

RECONSTRUCTION OF LEGALITY PRINCIPLES IN THE FUNCTION OF PROTECTION OF VICTIMS

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ABSTRACT

The principle of legality currently in effect in Indonesia still has weaknesses when faced with actions that are included in the Crimina Extra Ordinary which cannot be reached by the legality principle. The problem that arises is that the act causes harm to the victim, and the perpetrator cannot be convicted. This problem is formulated in the question: how are the limitations of the legality principle related to the protection function for victims? how is the construction of the ideal legality principle in providing protection for victims? The writing of this article uses normative legal research that discusses the legality principle as the basis for the implementation of punishment using a conceptual approach to the legality principle. The analysis technique used is deductive analysis technique, with the nature of prescriptive analysis. The result of this research is the concept of extending the legality principle that provides equal protection for the perpetrators and victims of crime to replace the current formulation of the legality principle, which does not have a protection function for crime victims.

Keywords: Limited of Legality Principles, Protection Functions, Crime Victims

INTRODUCTION

Studying law starts from the foundation of understanding the dogmatics of legal science. According to the classical view, legal dogmatics is a major part of legal science. The object of study of legal dogmatics is positive law (currently applicable law) in a country. This study of positive law is dynamic and follows the development of the application of law in the society of a country. Starting from the concept of legal dogmatics, it is clear that the development of law in society is an important part that cannot be ignored. The development of law in society is closely related to social phenomena that arise from the dynamics of legal practice in society. Responding to these dynamics, it is necessary to review the legal principles that underlie the formation of each rule of law. If the rule of law is analogous to the figure of a human person, then the principle of law is the soul and spirit of the formation of the rule of law.

WFC Van Hattum formulates criminal law as all legal principles/principles and legal regulations that are obeyed by a state or other general legal community, they as guardians of public law order determine the prohibition of committing acts that are contrary to the law and have attributed the violation of these rules to a special suffering known as punishment.

Based on this understanding, it is clear that criminal law is not understood as a law regarding criminal law norms and criminal sanctions. Criminal law also includes the principles that form criminal law norms, criminal law norms and their sanctions and the application of criminal law norms. The legal principle in criminal law occupies an important position in the legitimacy of imposing criminal sanctions on actions that are prohibited from being carried out, as well as the requirements to carry out actions, all of which are accompanied by consequences in the form of criminal sanctions.

When legal scholars study criminal law, from the start they are required to study one of the principles in criminal law, namely the principle of legality (principle of legality or legaliteit beginsel). The principle of legality of criminal law is formulated in several versions of the sentence which include: 'nullum delictum nulla poen`a sine praevea lege poenali' (no offense, no crime, without a criminal law first), 'nullum delictum nulla poena sine praevea lege ' (no offense, no crime without a law) or 'nullum crimen nulla poena sine praevea lege' (no crime, no crime, no law).

Based on several formulations of the legality principle, criminal law experts agree that there are 3 (three) meanings of the legality principle, namely:

1. There is no action that is prohibited and threatened with a criminal if it has not been stated in advance in a statutory regulation;
2. To determine the existence of a criminal act, analogies (kiyas) and cannot be used
3. The rules of criminal law are not retroactive.

The meaning of the principle of legality has implications, namely: the prohibition of using analogies (non-analogy principles) and the necessity to use the criminal law that was in effect at the time the act was committed (lex temporis delicti or existing penal law). It is forbidden to apply criminal laws retroactively (non-retroactive principle). These implications are used as guidelines for applying the rules of criminal law, when a violation occurs in the form of an act that is contrary to the prohibitions/requirements that have been regulated in the criminal law.

These implications are the consequences that arise from the basic ideas of the principle of legality, namely protecting the individual rights of citizens from the arbitrariness of the authorities (including the authority of judges), by limiting these powers and authorities by drafting laws and regulations. criminal law. The authorities (represented by law enforcement officers) can only impose criminal sanctions on acts that are included in the mala prohibita category (prohibited by the criminal law law). The enforcement of the criminal law laws is also limited to acts that have been regulated in the criminal law laws as criminal acts, at the time

the act was committed. So in this case it is not possible to apply the rules of the criminal law retroactively.

The meaning of the principle of legality also has implications for the functions performed by the principle of legality. According to Schaffmeister, the enactment of the principle of legality aims that criminal laws protect the people from the exercise of unlimited power from the government. This is called the function of protecting from criminal law. In addition to the protection function, the criminal law also has an instrumental function, namely that the exercise of government power is expressly allowed within the limits determined by law.

Based on Schaffmeister's opinion, it can be concluded that the principle of legality has 2 (two) functions, namely providing protection for citizens against the arbitrariness of the authorities (including judges) in imposing criminal sanctions and restrictions on the powers of the authorities (including judges) by determining actions that can be taken. sentenced (*strafbaar*) under the criminal law. Both of these functions if examined carefully, both are aimed at the interests of the perpetrators. The perpetrator cannot be prosecuted if the act he committed does not include acts that are prohibited by the criminal law (*mala prohibita*), and the prohibition for the authorities (including judges) to prosecute perpetrators who commit acts outside the criminal law law (*crimina extra ordinaria*).

The next problem that arises is what if an act that is categorized as a crime *extra ordinaria* causes harm to the victim? When in that position, the principle of legality cannot provide protection to the victim because there is a limit that the act that can be punished is an act that is included in the *mala prohibita*. This clearly shows the weakness of the legality principle in criminal law.

According to Nyoman Sarikat Putra Jaya, the principle of legality essentially contains *lex temporis delicti* only providing protection to individual perpetrators and does not provide protection to communities/community groups who are victims of criminal acts, so that access to justice for victims, especially collective victims is hampered.

The problem of not protecting the interests of the victim if it is associated with the theory of criminal objectives turns out to have a common thread and are in harmony with one another. The purpose of punishment according to criminal law that is currently developing has moved to contemporary theory that emphasizes the restoration of justice (restorative justice).

According to Leave, restorative justice is understood as a form of approach to resolving cases according to criminal law by involving criminals, victims, families of victims, perpetrators or other related parties to seek a fair solution by emphasizing restoration of the original situation and not retaliation. Based on the theory of the purpose of punishment, it is clear that the application of criminal law/imposition of criminal sanctions must also consider the interests of victims of criminal acts so as to realize justice which is the goal of criminal law.

RESEARCH METHOD

The writing of this article uses normative legal research methods, namely legal research that examines legal rules/rules as a building system related to a legal event. The object of this research is the principle of legality of criminal law. This study is intended to provide legal arguments to provide input for updating the weakness of the legality principle which does not have a protection function for victims of crime. The analysis technique in writing this article is done by looking for references from primary legal materials and secondary legal materials and analyzing them by conducting a literature study. The result of this study is to provide a prescription regarding the formulation of the principle of legality which has a protection function for victims of crime.

DISCUSSION

1. Limitations of the Legality Principle in the Function of Protection for Victims of Crime

The long history of establishing the legality principle of criminal law is actually aimed at protecting the rights of citizens in the criminal justice process. The limitations for providing such protection are as follows:

- a. The obligation to implement the criminal law in force at the time the act was committed (*lex temporis delicti/existing penal law*). The implication of this requirement is that there is a prohibition against applying the rules of criminal law after the act has been committed (retroactive). This prohibition is known as the non-retroactive principle.
- b. There is a prohibition to determine criminal acts outside those contained in the formulation of the criminal law. Determination of criminal acts based on analogy is not permitted. This prohibition is known as the principle of non-analogy.

The consequence of the limitations on the principle of legality is that the criminal law has a very vital role. The criminal law plays a role in providing limitations on the powers of rulers and judges. The criminal law is a pillar of the building of criminal law, apart from being a source of criminal law.

The existence of criminal law is a must to apply the principle of legality. There cannot be a criminal law and criminal justice system without a criminal law. Criminal law is the only manifestation of criminal law.

As is well known, the state has the authority to make laws (*ius poenale*) and punish perpetrators who commit crimes (*ius puniendi*). Although the *ius poenale* is the authority of the legislature, but practically (in law enforcement), it is very possible for this authority to be intervened by the executive power. If this happens, it is very possible that the making of criminal laws is not based on aspects of justice, and benefits for the people, but is based on political aspects, and maintains power.

The principle of legality was originally formulated on an assumption that the rules of the criminal law are good because they have considered aspects of justice and benefits for the people. However, if the reality is otherwise, then the principle of legality has lost its essential function to protect the rights of citizens. If you are in such a condition, then the principle of legality is only the basis for the legitimacy of the exercise of political power by the ruler alone.

Observing the formulation of the principle of legality which can only reach punishment for acts that are categorized as *mala prohibita* (regulated in the criminal law as prohibited acts), it can be understood a contrario that the principle of legality cannot reach *crimina acts extra ordinaria*. The problem that arises here is when an act that is categorized as a crime extra ordinaria has caused harm to the victim, but the perpetrator cannot be punished because it collides with the formulation of the legality principle.

The development of people's lives in modern times can of course be a potential for the emergence of *crimina extra ordinaria*, namely an act that deserves to be punished (*strafwaardig*), but has not or has never turned into a *mala prohibita* because it has not been regulated/prohibited according to criminal law. Considering the principle of legality which can only legitimize the imposition of criminal charges against acts that are categorized as *mala prohibita*, it is very possible that there will be more crimes that are not prosecuted and prosecuted. If this situation occurs, there will be more victims who are neglected.

Oemar Shapland, Jon Willmore and Petter Duff say that victims of crime have been forgotten in the criminal justice system. The lack of attention given to victims will weaken the workings of the criminal justice system. When the performance of the criminal justice system weakens, the goal of the criminal justice system, namely social welfare, will also be increasingly difficult to realize. In this regard, the principle of legality as a pillar of criminal law which is part of the criminal justice system should support the function of protecting victims of crime.

Based on the overall description in this discussion sub-chapter, it can be concluded that the limitations of the legality principle are as follows:

- a. The principle of legality can only be meaningful if it is supported by a good law, which creates justice and benefits for all people (including victims of crime). On the other hand, the principle of legality will lose its essential meaning when it is based on bad criminal law rules, let alone only as the embodiment of the political interests of the rulers and to maintain power alone;
- b. The principle of legality that cannot reach *crimina extra ordinaria*, will gradually lead to rampant *crimina extra ordinaria* because the perpetrators cannot be punished. If this happens, the social welfare of the community which is the goal of the criminal justice system will not be realized;
- c. The principle of legality that does not have coverage for *crimina extra ordinaria* will cause an imbalance in carrying out its functions to protect the interests of the people in the criminal justice system. The

principle of legality will only be able to protect people who are perpetrators of crime, while for people who are victims of crime tend to be ignored.

2. Construction of the Ideal Legality Principle in Providing Protection for Victims of Crime

Discussing the balance of protection for criminals and victims of crime must of course be done to realize the purpose of sentencing, namely to achieve public order and public welfare. The discussion regarding the interests of the individual perpetrators of crimes only, but also must pay attention to the context of the community outside the perpetrators of the crime because in essence the perpetrators are also members of the community. In public life, it does not only cover the individual interests of the perpetrators, but also the individual interests of the victims and the interests of the wider community also need to be considered.

Humans, apart from being individual beings, also act as social beings who live in society. The role of humans as social beings has a tendency to live together in social life. The tendency of humans as individual beings is to fight for their interests and fulfill their personal needs. The reality that occurs as a result of these two roles as individual beings and social beings is that humans often in fulfilling their needs harm the interests of other humans. So that conflicts of interest in meeting human needs are unavoidable and have become a common reality in common life.

Robert M. Unger argues that the human individual is controlled by his personal interests, and is determined by his assessment of efficient ways to fulfill his personal goals. Humans socialize with other humans, therefore it is considered profitable so that he gets a reward. The advantage in a relationship is the difference between rewards and costs, so human behavior is based on rational choice theory.

Human nature as individual beings and social beings, basically humans are monodualistic creatures. The tendency of humans as social beings causes humans to have a desire to live together with other humans or known as the desire for society. Humans may not be able to fulfill all their own interests and needs. The fulfillment of these interests and needs can only be obtained when humans are in society. The desire for society is human instinctive to be able to maintain its survival.

W. Friedman argues that the problems that have been formulated by Plato, Aristotle and the Stoics, have provided an unlimited description and variation of the pattern of human interaction. This is what philosophers, legal thinkers, and politicians have debated, namely regarding conflict resolution by realizing harmony between individual and community interests. However, all efforts to harmonize the two have not been completed either.

Philosophers agree that social interests have a higher order than individual interests. In this regard, Plato and Aristotle stated that humans can live and develop based on their nature through society. Humans are only part of society. This statement is the conclusion of Plato's opinion which states that life in society includes the whole of human life. According to this view, humans can live and develop according to their nature through society.

Aristoteles also argued that humans can experience development and gain happiness if they live in the polis (state). Humans are part of the polis, just as part of the whole. Humans are actually polis creatures (*zoon politicon*). The existence and role of humans only have meaning if they are in a society. Basically, humans are social creatures.

According to Cicero, society is a group of people/many people who are united through the rule of law based on common interests. However, to carry out these common interests properly, the state must be guided by natural law and advance the public interest. Based on Cicero's opinion, society is a collectivity and is aimed at advancing common interests. So it is clear that in a society, social interests are more important and higher level than personal/individual interests.

Based on several ideas put forward by the philosophers, it can be concluded that the social aspects of humans have levels/gradations that are prioritized to be fulfilled compared to individual interests. The implication of this conclusion is that the interests of society are more important than individual interests. What is essential to be studied is the relationship between the gradation of individual and community interests with the existence of the legality principle of criminal law.

One of the consequences of the principle of legality is the emergence of the right for criminals not to be prosecuted if the act they commit is not an act prohibited by criminal law (*mala prohibita*). Based on these consequences, a principle known as non-retroactivity emerged which states that the perpetrator cannot be prosecuted by the law that applies after the act has been committed. In addition, the perpetrators cannot be prosecuted using analogies (non-analogy principles).

Provisions regarding the inability to be prosecuted based on retroactive rules are not only contained in the Criminal Code (KUHP), but are also contained in the 1945 Constitution of the Republic of Indonesia and Law Number 39 of 1999 concerning Human rights. Article 28I paragraph (1) of the 1945 Constitution and Article 4 of Law Number 39 of 1999 contain the same formulation, that the right not to be prosecuted based on retroactive legal rules is one of the manifestations of human rights that cannot be contested, and is enforceable. under any circumstances. There is a slight difference in the formulation of Article 4 of Law Number 39 of 1999 with the addition of the words 'by anyone'.

But on the other hand, Law Number 26 of 2000 concerning the Human Rights Court determines the opposite, namely in the provisions of Article 43 paragraph (1) which states, "Severe human rights violations that occurred before the enactment of this law, are investigated and decided by the ad hoc Human Rights Court. This provision opens the opportunity for serious human rights violations that occurred prior to the enactment of the law to be tried, this is intended to provide a protection function for victims of serious human rights crimes who have suffered losses that cannot be taken lightly.

In addition to Law Number 26 of 2000 concerning the Human Rights Court, there are also several other laws which are evidence of a breach of the principle of legality in Indonesia, which include:

- a. Emergency Law (Drt) Number 1 of 1951 which provides regulation on the Swapraja Court and the Customary Court. Article 5 paragraph (3) point b of the law stipulates that: "the judge imposes a maximum penalty of 3 (three) months and/or a maximum fine of five hundred rupiahs for acts which according to living law are considered as offenses for which there is no equivalent in the law. Criminal Code;
- b. Government Regulation in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism (hereinafter referred to as Perppu Terrorism), which was issued by the government (executive) on October 18, 2002. Breakthrough of the legality principle in the Perppu on Terrorism can be found in the provisions of Article 46 which states The provisions in this Perppu may be applied retroactively to legal actions for certain cases prior to the entry into force of this Perppu, the application of which is determined by a separate Law or Government Regulation in Lieu of Law. Later in its development, the Perppu on Terrorism was enacted as Law Number 15 of 2003 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism as Law (hereinafter referred to as the Terrorism Law);

These two rules are proof that the principle of legality is not a principle of absolute criminal law. The absoluteness of the principle of legality has implications for the opening of opportunities to break through the principle of legality. However, the breach of the principle of legality as the principle that is the main pillar of criminal law is an exception. If observed carefully, the implicit meaning of the breach of the principle of legality is that it is intended to broaden the scope of the principle of legality for acts which are *mala prohibita* and even cause serious harm to the victim. Although this breach of the legality principle is a form of deviation from the *lex scripta* principle of criminal law, when it is aimed at a higher interest, namely the protection of victims of crime, then the breach of the legality principle should not be a problem anymore.

Based on the ideas/thoughts of philosophers regarding the position of the public interest above individual interests, the provisions of the law governing the principle of non-retroactivity, and deviations from the principle of legality in criminal practice, it can be concluded that the principle of legality should be reconstructed to expand the power of reach it. The principle of legality needs to be reformulated to be able to reach *extra ordinaria* criminal acts, especially those that have claimed victims. So the principle of legality should be able to reach not only the *strafbaar mala prohibita* act, but also the *strafwaardig crime extra ordinaria* act.

This expansion of the scope of the legality principle needs to be formulated lexically in the formulation of the new legality principle in the RUU-KUHP. One of the efforts that can be done in overcoming this problem is to accommodate the provisions of living law and add to the sound of the formulation of the principle of legality which includes actions that can be punished, not only those regulated in the criminal law alone, but can be added with living legal provisions (as formulated in the RUU-KUHP), and an act can be punished when it causes harm to the victim.

CONCLUSION

The limitations possessed by the principle of legality in principle cannot be separated from the history of the formation of the principle of legality which from the beginning was intended to protect the people from the arbitrariness of the authorities. Based on this historical fact, it can be seen that initially the people in the context of criminals were often victims of the absolutism of the rulers, so it was necessary to provide protection by determining the qualifications of actions that could be punished in the criminal law, and limiting the powers of the authorities (including judges) who could only convict perpetrators who commit acts regulated by criminal law as prohibited acts. Over time, this formulation of the legality principle is irrelevant, considering the emergence of new crimes that have caused crime victims. The current principle of legality is only ideal when the existing criminal law rules are adequate and can cover all prohibited acts and of course cause victims.

The formulation of the ideal legality principle to provide a balance of protection functions for perpetrators and victims is a formulation that accommodates living law and stipulates actions that cause victims as criminal acts (strafbaar).

Suggestion

Law enforcement officers: need to consider the principle of legality in applying the rules of criminal law for the interests of the perpetrator, but on the other hand it is necessary to also consider aspects of the interests of the victim.

Legislator : reformulating the principle of legality that can provide protection for perpetrators and victims in a balanced way.

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