**International Journal of Social Science And Human Research**

**ISSN(print): 2644-0679, ISSN(online): 2644-0695**

Volume 05 Issue 01 January 2022

DOI: 10.47191/ijsshr/v5-i1-04, Impact factor-5.586

Page No: 20-24

# Principles of Legality in Criminal Law from Perspective Fair Enforcement

**R. Sugiharto[1], Sri Endah Wahyuningsih[2], Gunarto[3]**

[1]Doctoral Program Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

[2,3]Faculty of Law, Sultan Agung Islamic University Semarang, Indonesia

**ABSTRACT:** This study discusses the principle of legality in criminal law from the perspective of fair law enforcement. The formulation of the problem put forward is how to regulate the principle of legality in current criminal law and how the principle of legality in criminal law is currently from the perspective of law enforcement that is just. The conclusion of this study is that the regulation of the principle of legality in criminal law is currently regulated in Article 1 paragraph (1) of the Criminal Code which is the principle of formal legality, which requires an act committed to be determined as a criminal act if it is first stated in the legislation that valid at the time the act was committed, from the perspective of fair law enforcement, the legality principle in criminal law currently cannot be used as a basis for carrying out fair law enforcement, because in this legality principle it implies that an act is qualified as a mere criminal act. only based on legislation (written legal regulations). In the opinion of the author, that law enforcement that adheres to the principle of legality can only achieve legal certainty, but has not been able to realize justice. Justice should be realized through law enforcement which is not just formal justice according to the formulation of the law, but also substantial justice, namely justice that is truly in accordance with the sense of community justice based on the living law.

**KEYWORDS:** The Principle of Legality, Criminal Law, Law Enforcement, Justice

## I. INTRODUCTION

Lawrence M. Friedman, argues that the components in the legal system consist of legal structure, legal substance, and legal culture. The problem of law enforcement is a problem related to the legal system as a whole. Enforcement Law is influenced by the legal structure, legal substance, and legal culture. The operation of the law as expected is very dependent on the existence of the institution judiciary and the people involved in it, the conditions of the rule of law applicable, as well as the legal culture of the community [1].

The principle of legality is included in one of the components of the legal system, namely substance law. As a principle, the principle of legality is a basic principle that will affect the application and enforcement of laws. According to Moeljatno, the principle of legality (Principle of legality), the principle that determines that there are no prohibited acts and is threatened with criminality if it is not determined in advance in the legislation. Usually it is known in Latin as nullum delictum nulla poena sine praevia lege. (no offense, no criminal without prior regulation).

The principle of legality is primarily intended to provide guarantees to individuals, so that individuals are not arbitrarily brought to justice and sentenced by the court without being based on the rule of law relating to the act that has been committed done [2].

According to Barda Nawawi Arief, there are 4 problems related to enforcement law, namely: the problem of the quality of human resources for law enforcement; enforcement quality problems the law "in abstracto" (the process of establishing a statutory product; problems law enforcement "in concreto"; and the problem of the quality of the legal culture (knowledge and legal awareness) of the community. The principle of legality and the realization of justice in enforcement. The law concerns two of the four problems, namely the problem of law enforcement "in concreto", namely how the rule of law is applied to solve the problem concrete cases; and problems of the quality of the community's legal culture, which in this case, it is a matter of whether the community feels it is fair or unfair.

When the principle of legality is applied, and the law is equated with meaning, law, it is easier for legal certainty to be realized. Is an act is said to violate the law or not, the size is clear namely the formulation in the law. However, legal certainty is not synonymous with justice, and legal certainty does not automatically guarantee fulfillment of justice. Social life is not only regulated by law, but must also be guided by religion, morals, decency and other social rules. Law is closely related to social

rules. Law as a social rule cannot be separated from the values that apply in a society. Law as a mirror of the values that live in society. The law is called good if it is in accordance with the living law in society [3].

Indonesia is a state of law as stated in Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia. Law comes from values that live in society, both written and unwritten, where there are many sources of unwritten law. found in Indonesia. The form of this unwritten law can be in the form of customary law or local wisdom whose existence is still recognized as a norm and has binding power and sanctions. Settlement of legal cases that have attracted public attention, such as that experienced by Mbok Minah who committed the act of "stealing" three cocoa beans, the case of the theft of a watermelon in Kediri, East Java; In the case of the theft of sandals by a child in South Palu, Central Sulawesi, all of this cannot be separated from the application of the principle of legality in law enforcement [4].

The presence of law in the midst of society, among others, is to realize justice. However, in reality the judges' decisions are a form of implementation Law in concrete cases in society often causes controversy. Not support for the judge's decision because the perpetrator has been punished, but rather the attitude of "regret" why such a sentence must be handed down. The question that arises as stated above is what kind of justice is to be realized, justice according to the sense of community justice or justice according to the formulation of the law [5].

From the things that the author describes in the background above, the problems raised in this study are:

1. How is the regulation of the principle of legality in the current criminal law?
2. How is the regulation of the principle of legality in criminal law today from the perspective of just law enforcement?

## II. RESEARCH METHOD

This research is classified as normative or literature research. Data which will be used in this study is secondary data. Secondary data is a type of data obtained indirectly from the source, such as reading materials in the form of books, papers or research results, documents, laws and regulations, court decisions, statistical data and so on.

The research tool that will be used in this research is a literature study search, namely examining legal materials, both primary legal materials, secondary legal materials and tertiary legal materials related to the problems to be studied and researched in order to strengthen secondary data analysis.

The data analysis method used is descriptive qualitative method, which is to find and collect data that has to do with the objects and problems to be studied which are then taken and arranged systematically to get a clear and complete picture. After obtaining secondary data, namely legal materials in the form of primary, secondary and tertiary legal materials, they are then processed and analysed with a qualitative method, namely re-exposure with systematic sentences to

provide a clear description of the answers to existing problems, which are finally stated and presented in the form of a description (descriptive), which then draws a conclusion on the problems and research results.

## III.DISCUSSION

### *A. Regulation of the Principle of Legality in Current Criminal Law*

According to Dupont, the principle of legality is the most important principle in criminal law and according to Lilik Mulyadi, studied from the perspective of positive law (ius constitutum) the principle of legality is regulated in the provisions of Article 1 paragraph (1) of the Criminal Code which is the principle of formal legality. Theoretically, based on the meaning of the principle of legality by several criminal law experts, among them are that: a criminal act must first be regulated in laws and regulations; punishment of living law, custom, or customary law/unwritten law is not allowed or prohibited. Based on the meaning of the legality principle, the basis for determining a criminal act is that an act is said to be a criminal act, which must be determined in advance in the legislatio [6].

Determining which acts are considered as criminal acts, according to Moeljatno, we know a principle called the principle of legality or the principle of legality, namely the principle that determines that every criminal act must be determined as such by a rule of law (Article 1 paragraph (1) of the Criminal Code). The same thing was also conveyed by Roeslan Saleh that regarding the determination of criminal acts, everything is regulated by law [7].

The principle of legality is seen as the most important principle in Indonesian criminal law, therefore it is regulated in the Criminal Code, as a baboon or parent of criminal law. The regulation of the principle of legality in Book I (one) of the Criminal Code concerning General Provisions has the consequence that the provisions of the principle of legality apply to crimes regulated in Book II as well as violations in Book III of the Criminal Code. The same applies to all criminal laws and regulations regulated outside the Criminal Code, unless the Act makes deviations (lex specialist derogat lex generalis) [1].

The principle of legality is essentially about the scope for the application of criminal law according to the time and source/legal basis (legalization basis) can be punished. an act (so as a basis for criminalization or a juridical basis for punishment).

The formulation of the principle of legality in Article 1 of the Criminal Code (WvS) consists of 2 paragraphs which are complete as follows:

1. No act can be punished except by the force of the rules criminal law in pre-existing legislation the deed is done.

2. If after the act has been committed there is a change in the legislation, the lightest (favorable) rule is used for the defendant.

Regarding the meaning of the principle of legality as formulated in the Criminal Code/WvS mentioned above, according to Sudarto, it brings 2 consequences, namely:

a) That someone's actions that are not listed in the law as a crime cannot be punished. So with this principle there is no unwritten law power to apply.
b) There is an opinion that there is a prohibition on the use of analogies to make an act a criminal act as formulated in the law.

According to Groenhuijsen quoted by Komariah Emong Sapardjaja, there are four meanings contained in this principle. Two of the first are addressed to legislators and the other two are guidelines for judges. First, legislators may not enforce a criminal provision with retrograde effect. Second, all prohibited acts must be contained in a clear formulation of the offense. Third, judges are prohibited from stating that the defendant committed a criminal act based on an unwritten law or customary law. Fourth, it is forbidden to apply analogies to criminal law regulations [8].

According to Moeljatno, there are three meanings contained in the principle of legality. First, there is no action that is prohibited and threatened with a criminal if it has not been stated in a statutory rule. Second, in determining the existence of a criminal act, analogies should not be used. Third, the rules of criminal law are not retroactive [9].

### *B. The Principle of Legality in Current Criminal Law from the Perspective of Fair Law Enforcement*

Gustav Radburch argues that basically, the law aims to realize legal certainty, justice and expediency. When all these goals collide, then what is put forward is expediency. The goal to be achieved in criminal law is not only legal certainty but justice, especially expediency [10]. Furthermore, in interpreting and realizing justice, the theory of Natural Law from Socrates to Francois Geny still maintains justice as the crown of law. Natural Law Theory prioritizes "the search for justice".

The characteristic of Pancasila justice is to humanize humans in a fair and civilized manner according to their human rights. The characteristics of Pancasila justice are moral rules and values about truth, namely justice which serves as the basis for establishing legal justice in the formation of legislation that adopts the values of justice based on Pancasila as the nation's ideology (rechtsidee). According to von Savigny's opinion, society is constantly evolving as well as laws that are created rhythmically following the development of humans and providing their regulations in life. Therefore, according to the historical flow, the codification or formulation of a norm in the law will have a negative effect on the protection of society, which in fact continues to grow [11].

The historical school firmly rejects the principle of legality because it hinders the development and recognition of customary law that has already existed in society. In addition, arguments are often given because the law itself has proven to be unable to accommodate every need of the community, especially criminal law when it comes to the modus operandi of crimes that are constantly evolving.

In every society there is always a law that serves to regulate their behavior. Even the law is part of the cultural development of society. No wonder it is said that law is a product of culture (law as a product of culture). Martin Kryger states that "law as tradition". Therefore, the development of culture is always followed by the development of law or vice versa the law develops and grows along with the development and growth of the culture of the people. This indicates that the law cannot be separated from the community. Society is the main source of law. No wonder Ronald Dworkin stated that society is the fabric of rules. A cultured society always produces its own laws. Every society produces its own types and kinds of laws. Every society always image the law according to the culture of each society [12].

Therefore, every society always produces legal traditions that are different from other communities, for example, the civil law and common law legal traditions have different characteristics because the two legal traditions develop and grow in the cultural life of different communities. From this premise, every society has the living law that has developed and grown since society was formed. The living law is born from the social life of the community which is materially practiced continuously and then the community obeys it based on moral duty, not because of the coercion of the sovereign. The living law can be sourced from customs/traditions, religion, and others. Therefore, it is a wrong view if there is a view which states that in traditional societies there are no rules of behavior called laws [13].

Humans are culturally rational creatures, so they will always form cultural institutions to prevent chaos and conflict between them. Humans are not only created with a desire to hate, be hostile, and destroy each other, but humans are also given a sense to love each other, love each other, and love peace. The law was born to balance the two characters that exist in humans. Indeed, the law cannot eliminate human vices as a whole, but the law controls so that humans do not become demons. Likewise, the law cannot make humans into angels, but at least the law directs humans to become better social beings. On this basis, the law has been born since humans were in groups, not since the state existed [14].

In every society there are always laws that grow and develop which serve as guidelines for behavior. The law is known as the living law in the form of customs, customs, beliefs, and so on. The living law has a role that is not inferior to positive law in managing human relationships. The term the living law was first put forward by Eugen Ehrlich as the opposite of the word state

law (law made by the state / positive law). For Eugen Ehrlich the development of law is centered on the community itself, not on the formation of law by the state, judges' decisions, or on the development of legal science. Eugen Ehrlich wants to convey that society is the main source of law. Law cannot be separated from society. On this basis, Eugen Ehrlich states that the living law is the law that dominates life itself even though it has not been included in a legal proposition [15].

From the opinion above, it can be seen that the living law is a set of provisions whose birth coincided with the birth of society. Law cannot be separated from society. Law is formed by the community, and the law functions to serve the interests of the community. Therefore, for Eugen Ehrlich, state law is not something that is independent from social factors. State law must pay attention to the living law that has lived and grown in people's lives. In this regard, Eugen Ehrlich stated: "The rules of law were not lifeless constructions which existed independently of the social reality. On the Contrary, they are parts of the "living", i.e. functioning and effective order of social communications, which protect certain interests privileged by society and discriminates those interests that are denied and disapproved by society. Society itself engenders a general order of societal relations, which later is put into legal forms by social groups and individuals who act thereby in the capacity of lawmakers (in the broader meaning, as specified above)".

In addition to the opinion of Eugen Ehrlich above, the concept of the living law can also be seen from the historical school with its main exponent Friedrich Karl von Savigny. F.K. von Savigny put forward his theory as a rebuttal to the transplantation of Roman law and the codification of German law into French law. To that end, F.K. von Savigny put forward the theory of Volksgeist (national character, nationelgeist, volkscharacter, soul of the nation) which states that law is born from the beliefs of the nation [16].

Furthermore, F.K. von Savigny stated that law is one aspect of culture that lives in society. Therefore, the law is found in society, not created by the powerful. Law is a reflection of the soul of a nation that is unique and fundamental which differs from one nation to another. Law is not made by nature or God, but the law can be traced in the pulse of people's lives. Law is the most important part of the life of society and the nation. Law exists, develops, weakens and strengthens according to the conditions of society. This indicates that the law cannot be separated from society.

From the opinion of F.K. von Savigny, it can be seen that the ideal law is the law extracted from the community, not the law formed and separated from the context of the society in which the law lives. Such law is referred to as the living law, namely the law that lives, grows and exists together in social life. The state must not only transplant laws that are not from the soul and culture of its people, but the state must explore the living law [17].

Some of the characteristics of the living law, namely the law is not written; non-autonomous nature (responsive or progressive); forms of legislation, customs, religious norms, and others; found in society; sanctions are not mandatory; the source of the formation of the social life of the community; the aim of justice; coercion of public awareness; sociological behavior.

When viewed from the sociological and anthropological aspects, Indonesian society is a pluralistic society with diverse cultures, religions, customs. Therefore, there are various laws that live in Indonesian society, for example customary law and Islamic law. So before Indonesia's independence, the Indonesian people already had the living law. In fact, there has been a legal pluralism in which every legal community has its own laws with their own style and characteristics [18].

Indonesia is not a country that adheres to civil law, but has its own legal system, namely the state of Pancasila law. For this reason, in addition to the law as the main source of law, Indonesia also still recognizes the living law as one of its legal sources. This can be seen in several provisions, namely in:

1. Article 18B paragraph (2) of the Indonesian Constitution which contains the recognition of indigenous peoples and the rights they have. These provisions indirectly acknowledge and respect the existence of the living law in the life of the nation and state. This is marked by the recognition of traditional villages and villages along with their rights that come from their respective living laws.
2. Article 5 of the Law on Judicial Power requires a judge to explore the sense of law that grows and develops in society. This means that judges in deciding cases are not limited to being the speaker of the law as in the civil law tradition. Judges are given the freedom to explore the living law for the creation of justice. Even in the event of a legal vacuum, legal discovery by judges uses existing laws in society.

According to FC von Savigny, there is an organizational relationship between law and the character or character of a nation. The law is only a reflection of the volkgeist. Therefore, the customary law that grows and develops in the womb of the volkgeist must be seen as the true law of life. The true law is not made, it must be found.

The existence of the Legality Principle leaves a polemic in terms of law enforcement. In the conception of the rule of law, the existence of the principle of legality is a priority in nature, but the principle of legality must have exceptions in looking at crime. On the basis of the limitations of the legality principle, it is deemed necessary to reconstruct the formula into "no criminal act without any crime according to criminal legislation and the law that lives in society (living law)". This formulation is ideal because it accommodates the nature of violating formal and material laws [19].

## CONCLUSIONS

1. The Regulation of the principle of legality in the current criminal law

The regulation of the principle of legality in criminal law is currently regulated in Article 1 paragraph (1) of the Criminal Code which is the principle of formal legality, which requires an act committed to be determined as a criminal act if the act is first stated in the legislation in force at the time. the deed is done. Thus, the principle of legality implies that there is no act that is prohibited and is threatened with a criminal if it has not been stated in a statutory rule; in determining the existence of a criminal act, analogies may not be used; and the rules of criminal law are not retroactive.

2. The principle of legality in current criminal law from the perspective of fair law enforcement.

From the perspective of law enforcement that is just, the principle of legality in the current criminal law as regulated in Article 1 paragraph (1) of the Criminal Code cannot be used as a basis for carrying out fair law enforcement, because the principle of legality states that an act is qualified as a crime. criminal acts are solely based on legislation (written legal regulations). Law enforcement that adheres to the principle of legality can only realize legal certainty, but has not been able to realize justice. Justice should be realized through law enforcement which is not just formal justice according to the formulation of the law, but also substantial justice, namely justice that is truly in accordance with the sense of community justice based on the living law.

## REFERENCES


1) I. K. Seregig, T. Suryanto, B. Hartono, E. Rivai, and E. Prasetyawati, "Preventing the acts of corruption through legal community education," J. Soc. Stud. Educ. Res., vol. 9, no. 2, pp. 138–159, 2018.
2) D. Koenig, "The Enforcement of the International Law of the Sea by Coastal and Port States," ZaöRV, vol. 62, pp. 1–16, 2002.
3) S. Isra, Yuliandri, F. Amsari, and H. Tegnan, "Obstruction of justice in the effort to eradicate corruption in Indonesia," Int. J. Law, Crime Justice, vol. 51, pp. 72–83, 2017.
4) S. E. Wahyuningsih, A. Indah, and M. Iksan, "The implementation of restorative justice to children as perpetrator in criminal investigation in Indonesia," Test Eng. Manag., vol. 83, no. 2746, pp. 2746–2752, 2020.
5) R. Bukido, "Paradigm and Reality of Law Enforcement," Junal Ilm. Al Syir'ah, vol. 4, p. 11, 2006.
6) R. A. Wibowo, "When anti-corruption norms lead to undesirable results: learning from the Indonesian experience," Crime, Law Soc. Chang., vol. 70, no. 3, pp. 383–396, 2018.
7) S. E. Wahyuningsih, "Islamic Law Values Transformation in the Reconstruction of the Legality Principle of Indonesian Criminal Code," pp. 145–156.
8) A. Maksum and Surwandono, "Suffer to survive: The Indonesian illegal worker's experiences in Malaysia and Japan," J. Soc. Res. Policy, vol. 8, no. 1, pp. 101–123, 2017.
9) D. Mulyadi, "Concurrent Regional Elections Phenomenon as a Political Recruitment in Indonesia," J. Din. Huk., vol. 18, no. 1, p. 87, 2018.
10) R. Lovell, M. Luminais, D. J. Flannery, R. Bell, and B. Kyker, "Describing the process and quantifying the outcomes of the Cuyahoga County sexual assault kit initiative," J. Crim. Justice, vol. 57, no. May, pp. 106–115, 2018.
11) D. Sudaryanti, E. G. Sukoharsono, Z. Baridwan, and A. D. Mulawarman, "Critical Analysis on Accounting Information Based On Pancasila Value," Procedia - Soc. Behav. Sci., vol. 172, pp. 533–539, 2015.
12) B. Latzer, "Subcultures of violence and African American crime rates," J. Crim. Justice, vol. 54, no. December 2017, pp. 41–49, 2018.
13) J. Yang, E. C. McCuish, and R. R. Corrado, "Foster care beyond placement: Offending outcomes in emerging adulthood," J. Crim. Justice, vol. 53, no. September, pp. 46–54, 2017.
14) Y. F. Wismayanti, P. O'Leary, C. Tilbury, and Y. Tjoe, "Child sexual abuse in Indonesia: A systematic review of literature, law and policy," Child Abus. Negl., vol. 95, no. June, p. 104034, 2019.
15) K. Pistor, "The value of law," Theory Soc., 2020.
16) A. T. Vazsonyi, M. Javakhishvili, and A. J. Ksinan, "Routine activities and adolescent deviance across 28 cultures," J. Crim. Justice, vol. 57, no. January, pp. 56–66, 2018.
17) L. Roy, A. G. Crocker, T. L. Nicholls, E. Latimer, and C. A. Isaak, "International Journal of Law and Psychiatry Predictors of criminal justice system trajectories of homeless adults living with mental illness," Int. J. Law Psychiatry, vol. 49, pp. 75–83, 2016.
18) B. Kingsbury et al., "International Law and Justice Faculty Advisory Committee:" Law Contemp. Probl., vol. 68, p. 15, 2004.
19) L. Tibaka and R. Rosdian, "The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of The Republic of Indonesia," Fiat Justisia, vol. 11, no. 3, pp. 268–289, 2018.