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Renewal of the national criminal law with the soul of the nation's cultural values

Renovación del derecho penal nacional con el alma de los valores culturales de la nación

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ABSTRACT

Each country has its legal system, which is not sourced from the cultural values of its people but was abandoned (the inheritance of its colony), especially countries that became independent after World War 3, as experienced by Indonesia. The purpose of this article is that future criminal law is in line with the development of international society, but still upholds the noble values and culture of the nation itself. Therefore, in carrying out reforms, one must pay attention to and fulfill the fundamental philosophical, juridical, sociological basis.

Keywords: Criminal Law, Renewal, Soul of the Nation.

RESUMEN

Cada país tiene su sistema legal, que no proviene de los valores culturales de su gente, sino que fue abandonado (la herencia de su colonia), especialmente los países que se independizaron después de la Tercera Guerra Mundial, como lo experimentó Indonesia. El propósito de este artículo es que el derecho penal futuro esté en línea con el desarrollo de la sociedad internacional, pero aún defiende los nobles valores y la cultura de la nación misma. Por lo tanto, al llevar a cabo reformas, se debe prestar atención y cumplir con las bases filosóficas, jurídicas y sociológicas fundamentales.

Palabras clave: Alma de la Nación, Derecho Penal, Renovación.

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1. INTRODUCTION

As it is known that the criminal law (KUHP) currently in force, originated from Wetboek van Strafrecht voor Nederlansch Indie (WvSNI) imposed by the Netherlands which has undergone several changes under Law No. 1 of 1946. WvSNI itself is sourced from the Code Penal (Code Napoleon Indie) France because since 1810, the Dutch had been colonized by France. From the origin of the Criminal Code that comes from foreign criminal law, of course, the value and soul contained in the law are encouraged by the national personality that makes it (Restuti: 2013).

The enactment of the Criminal Code is based on Law No. 1946 as a preliminary regulation that must be adjusted before the enactment of a new and national Penal Code. Therefore, Law No.1 Year 1946 is transitory, which must deliver the new Criminal Code as a national criminal law (Fajrin: 2019, pp.209-230). The formation of national criminal law is carried out through an effort to reform the existing criminal law, either by making changes, adding or deleting the existing provisions in the Criminal Code, including making provisions or new laws outside the Criminal Code (special criminal acts).

The reform that has been carried out in the Criminal Code so far can not be said to be a "Law Reform" in "total", but it is an attempt to patch up so that its form becomes a kind of "lappedeken" (Sudarto: 1983). Therefore the renewal effort that has been carried out is not a real desired renewal because it says there is a real renewal if there is a change in terms of soul, values, ideology. Thus there is renewal from the ground norm so that a comprehensive renewal of criminal law must include a renewal of material criminal law (substance), formal criminal law (criminal procedural law), and criminal implementation law. The process of actual reform of the material criminal law was only carried out in 1964. The effort was made by making a substantive concept to book I of the Draft Criminal Code Book (RKUHP).

One of the principles in the spotlight contained in the Criminal Code in the preparation of the RKUHP concept is the application of the principle of legality (The Principle of Legality) as the basis for achieving legal certainty. In the level of law enforcement practices so far, by prioritizing the application of the principle of legality, it is felt that it is not in line with the values prevailing in society, it is also often felt to injure a sense of justice in society. Weaknesses or shortcomings of the Criminal Code which prioritizes the principle of legality is to regulate provisions that threaten acts which the community does not consider to be a despicable act, but there are acts which are seen by the community as despicable acts, but the Criminal Code does not regulate them. Based on this, the view arises so that in preparing the RKUHP to pay more attention to the values prevailing in society, which are the cultural roots of the nation, which have always been embraced and respected by the Indonesian people, in this case, customary law or customary law.

The importance of developing a study of customary law or law that lives in the community is appropriate. That is because criminal law primarily functions to protect and at the same time to maintain the balance of various interests of the community, state, perpetrators of crime, and victims of criminal acts. To create a balance of various interests so that the creation of public welfare (welfare state).

The creation of community welfare is due to certainty and fairness that is in line with the values held by the community, which the regulation in criminal law is a reflection of the political ideology of a nation in which the law develops, and the entire legal structure must rest on sound and consistent political views. As a study and analysis of criminal law, reform is how the influence of national cultural values in society on the formation of the National Criminal Law.

2. METHODS

Criminal law, as a negative sanction system, threatens undesirable actions by the community. This relates to the worldview, moral code, and religious morals and the interests of the nation concerned. It is not wrong if, to a certain extent, it can be said that the criminal law of a nation can be an indication or reflection of the nation's civilization. As Muladi said, “Criminal law must pay attention to aspects related to the human condition, nature and tradition that have taken root in the culture of the Indonesian people” (Najih: 2018, p.149). It can be said that in carrying out reforms towards the formation of national criminal law, the starting point is the values that exist in their own country (the law that lives in the community or customary criminal law). However, as a civilized nation that lives in the world community must also see the development of international law. This is consistent with what Santayana said, "A man's feet must be planted in his country, but his eyes should survey the world" (Arief: 1994).

Starting from an effort to make a renewal in criminal law, then to arrive at the desired target, various strategies that can support are sought. A strategy in developing criminal law towards the new Indonesian criminal law era is the need for a study of alternative concepts. These strategies include providing lessons on criminal law reform and criminal law politics, as well as comparisons of criminal law. The problem that is closely related to the renewal of criminal law and comparison of criminal law is the need to develop a special study of “law that lives in society” in the field of criminal law (Arief: 1994).

Based on this fact, the view from a sociological perspective, as one of the reasons for the renewal of criminal law, is essential. This means that the measure for criminalizing (making an act a crime) depends on the values and collective views contained in society about the good, the right, the useful, or vice versa. Thus, people's views on decency and religion are very influential in the formation of law, especially criminal law (Sudarto: 1983). The crime itself, which is characteristic of criminal law, is, in essence, a gift of suffering or other unwanted consequences intentionally given by the competent authority as Hoefnagles revealed that the crime does not have to be suffering, reproach, and deterrence. Basically, a criminal is intended to call for order and is intended to influence behavior and conflict resolution.

3. RESULTS

The regulation in criminal law is a reflection of the political ideology of a nation, where the law develops, and the entire legal structure must rest on sound and consistent political views. Based on this, it is not surprising that, despite various changes in the Criminal Code, in its implementation, there were gaps or conflicts. On one side there are acts which according to the Criminal Code are included as criminal acts, but according to the opinion of the community not as a despicable act, on the other hand, there are acts which according to the community's view are despicable acts, but the Criminal Code does not regulate them as criminal acts. Gaps (discrepancies) or even differences in values or interests can be a factor of dissatisfaction in law enforcement practices. It can also be a factor causing the emergence of victims (victimogen), as well as the emergence of other crimes (criminogen). As disclosed in the 5th United Nations Congress funding “The Prevention of Crime and the Treatment of Offenders”, stated: “it was a contributing factor to the increased crime”. Furthermore, in the VI Congressional report, it was stated that: "the importation of foreign cultural patterns which did not harmonize with the indigenous culture had a criminogenic effect” (Arief: 1994).

This occurrence is an indication of how important it is to explore the laws that live in the community, especially customary criminal law or criminal law that is not written in the formation of national criminal law. Customary law is the fact that lives in the community, so it is a factor that determines both in terms of the formation and application of the law in Indonesia (Rahardjo: 2009).

The main thoughts of the need to pay attention to unwritten criminal law or customary criminal law have been legalized long ago. We can see this fact from several provisions contained in the legislation. In Article 5

paragraph (3), sub b of Law No.1/DRT /1951, it states that:

Civil and criminal law that still applies to people in certain regions and have always been used to try in traditional courts, still apply to determine an act of custom violation if there is no similarity to the written criminal law and to an act that is threatened with a maximum of three months imprisonment or a fine of five hundred rupiahs as a substitute punishment for customary law which is considered by the judge to be commensurate with the act. If the customary sanction according to the judge's view exceeds the sentence of imprisonment or a fine, then the defendant's mistake may be subject to a maximum of 10 years imprisonment with the understanding that if the conduct according to his appeal is in the Criminal Code, and is threatened with the same crime as the criminal act.

From the provisions of the article, it is evident that the customary criminal law can be applied to a criminal offense, as long as the criminal act has no equivalent/similarity/comparison in the Criminal Code. However, if the action is similar to those stipulated in the Criminal Code, then sanctions are imposed in the Criminal Code. Other provisions that give an indication of the validity of customary law can also be found in Law Number. 14/1970 concerning the Principles of Judicial Power, which is currently replaced by Law No. 48 of 2009 concerning Judicial Power. The law implies the existence of a law that lives in the community. Article 14 paragraph (1) states that: "The court may not refuse to examine and try a case that is filed under the pretext that the law is not clear or unclear, but it is obligatory to examine and try it".

Article 23 Paragraph (1) of Act No. 14 of 1970 concerning the Principles of Judicial Power, stipulates: "All court decisions must include the reasons and grounds for the decision, they must also contain certain articles of the regulation, for instance the relevant regulation or unwritten legal source which is used as a basis for adjudicating". Furthermore, in Article 27 paragraph (1) the same law also stipulates that: "Judges as law enforcement and justice are obliged to explore, follow and understand the values of law that live in a society".

From the provisions mentioned above, it shows that the Judicial Power Law, aside from being a guideline for judges in carrying out their duties, also provides a signal that the existing Criminal Code has shortcomings even in certain cases can be seen as incompatible with the legal needs of the community. Therefore, set on the judge to explore the values that live and develop in society.

The legal basis for the enactment of the law that lives in the community has also been formulated as a constitutional policy. As affirmed in Article 104 paragraph (1) of the 1950 Provisional Constitution, is a reaffirmation of Article 146 paragraph (1) of the RIS constitution, stating that: “All court decisions must contain the reasons and in the case of punishment mentioning the rules of the law and the rules of customary law which form the basis of the sentence”.

Recognition of customary criminal law as a law that lives in the community both criminal law with comparable and incomparable criminal code with the Criminal Code is more stable after being also applied in the form of jurisprudence. This is due to the existence of several Supreme Court (MA) decisions, including Supreme Court Decision of 19 November 1977 which strengthened the decisions of the District Court, the High Court and the Supreme Court, Banda Aceh No. 93 / K / Kr / 1976 for adultery that causes pregnancy. With reference to Article 5 paragraph (3) b of Law No.1 / 1951, the comparison with Article 284 of the Criminal Code according to the court is considered inappropriate, because adultery in Article 284 of the Criminal Code requires that the perpetrators have marital status, even though the two perpetrators do not or have not yet married according to law. Thus the act is an act that is contrary to customary law and religious law.

Likewise Supreme Court Decree No. 195 / K / Kr on October 8, 1979, who had rejected the appeal of cassation by the claimant of cassation, which had been declared wrong for committing the crime of Lokika Sangraha (Balinese custom). The rejection was addressed to the verdict of the Nusa Tenggara High Court in Denpasar, which did not accept the appeal of the accused against the decision of the District Court, which had decided to commit the crime of Balinese customary law Lokika Sangraha.

From the picture above it appears that the legal awareness of the community or law that lives in the community has really been recognized. This was proven not only to be legalized in legislation but also to be applied in the criminal justice process. This fact is increasingly encouraging and paving the way for criminal

law experts, especially the makers of national criminal law, to raise customary criminal law into national criminal law.

Benedict Alper said that crime is "The oldest Social Problem" (Changing Conception of Crime and Criminal Policy, Material Series No. 6 UNAFEI, Tokyo, 1975). Thus, the real crime problem is not solely a juridical problem, but a social problem faced by every nation. Therefore also, efforts to reduce crime are essentially efforts to protect the community against (social defense) to achieve social welfare (social welfare). Likewise, in conducting criminal law reforms, paying attention to the social conditions of the community, including the values that live and develop in society are a necessity.

The United Nations Congress on The Prevention of Crime and The Treatment of Offenders, states that the current criminal law system in some countries, especially criminal legacy from the colonizers, is generally outdated and unfair (outmoded and unjust), as well as outdated and incompatible with reality (outmoded and unreal). That is because it is not derived from the cultural values of the people; there is even conflict with the aspirations of the community and is not responsive to today's social needs.

On the basis of that also in the preparation of the Criminal Code, it is necessary to pay attention to four fundamental elements, namely the Criminal Code, which has a philosophical basis, a juridical basis, a sociological basis and uses correct design techniques (Manan: 1992). The preparation of the Criminal Code as a renewal of Indonesian Criminal Law must be following the values and ideals of the Pancasila law as the soul of the Indonesian nation.

So far, the legal basis for determining a crime or not is determined formally known as the principle of legality. Legality is used as a principle in criminal law in its history as a form of guarantee and protection of human rights. With the application of the principle of legality, the law limits what acts are prohibited and permissible and what sanctions will be imposed. On the one hand there are guarantees and protections against citizens from arbitrary actions of the authorities, but on the other hand, also limit to determine actions and sanctions which according to the view (values that live in the community) as acts that are prohibited and should be subject to criminal sanctions.

Responding to this reality in the Draft Penal Code from the 1982 Draft Concept to the 2019 Draft, there has been a shift in the regulation of legality principles. The draft Criminal Code formulates the application of the principle of legality, not only determined by formal criminal acts and sanctions (written law) but also materially determined (unwritten law).

Article 2 of the Draft Penal Code stipulates that:

> 1. Provisions, as referred to in Article 1 paragraph (1), do not reduce the application of the law that lives in the community which determines that a person should be sentenced even if the act is not regulated in the Law;
> 2. The validity of the law that lives in the community as referred to in paragraph (1) as long as it is following the values contained in Pancasila, human rights, and general legal principles recognized by the people of the nations.

The rationale for a shift in the principle of legality towards the basis of unwritten criminal law or customary law that develops in society, in addition to strengthening the recognition of the law that lives in the community as written and implied in the various provisions of existing laws, also the justification of Resolutions and reports on the results of the Legal Seminar The 19th National I of 1963, National Law Seminar IV of 1979, which recommended that an act is a criminal act not only because of the provisions of the law, but also originates from the provisions originating from community recognition (community legal awareness or criminal customary law) .

If related to the distribution of the legal system or family law, what is regulated in Article 2 of the Criminal Procedure Code is a mixed (mixed) Civil Law system with the Common Law system. This was also recognized by Rene David, that Indonesia was a combination of Civil Law or Romano Germania's legal family which was

an influence of the Dutch colony, but also included in the Common Law family who recognized the existence of customary law (Prasetyo & Handayani: 2018, pp.46-54).

Starting from the recognition of the principle of legality that is formal and material, then what is categorized as a criminal act is not only an act that is against the law/contrary to the law, but must also conflict with the unwritten law. Likewise, in the case of determining a crime, so that the act can be convicted, the act must be against the law. The concept explicitly outlines in Article 12 paragraph (2) of the Draft Penal Code, that to be declared a criminal act, an act that is threatened with criminal sanctions or actions by statutory regulations must be against the law or contrary to the law that lives in society.

The problem of acts that are against the law, the draft recognizes as an absolute element of a criminal offense, even though the Act is not formulated explicitly, there is an element against the law. The formal formulation in law is only an objective measure to declare an act that is illegal. These objective measures must be tested materially on the offender, whether there is a justification or not, and whether the act is actually contrary to the public's legal awareness. We can further see this in the provisions of Article 12 paragraph (3) of the Draft Penal Code, that every criminal act is always against the law unless there is justification (Aspinall: 2009).

From these provisions, it appears that there is a principle of balance between legal certainty and the value of justice as a manifestation of the truth recognized by the public. However, if in a concrete situation, the two values are mutually pressing, the judge, as far as possible, must prioritize the value of justice. This is in line with the provisions of Article 13 of the draft, which states that: Judges in prosecuting a criminal case consider the establishment of law and justice. If the two cannot be brought together, the judge can give priority to justice.

From the provisions of the article, it appears that the draft highly upholds the values of justice on the basis of the law that lives in the community (unwritten law/customary criminal law). Both to determine a criminal act, determine whether or not an act can be convicted, or to determine the existence of an unlawful nature, must not only refer to formal legal provisions so that there is a certainty but must be based on norms and a sense of justice that is recognized by the community.

The importance of developing a study of customary law or law that lives in the community is actually something that is appropriate. That is because criminal law essentially functions to protect and at the same time to maintain the balance of various interests of the community, state, perpetrators of crime, and victims of criminal acts. The aim to create a balance of various interests is none other than the creation of welfare. The creation of people's welfare is, of course, due to the certainty and fairness that is in line with the values held by the community. The regulation in criminal law is a reflection of the political ideology of a nation in which the law develops, and the entire legal structure must rest on sound and consistent political views (Utomo: 2018, pp.87-108).

Recognition of the law that lives in the community or customary criminal law can also be seen in the regulation of criminal and criminal matters. The provision is a new provision because there is no regulation in the current Penal Code. The provision that recognizes customary criminal law is a reflection of developments or policies in terms of criminal objectives and criminal law. From various theories regarding criminal objectives, as a whole, it is rooted in the general objectives of criminal and criminal law, where the criminal and criminal law goals are in the form of community protection (social defense) to achieve social welfare.

The draft also regulates the purpose of punishment, it is stated in Article 55, which states that Criminal aims to the first prevent the commission of a criminal offense by upholding legal norms in order to protect the community; second to popularize the convict by holding coaching so as to make him a good and useful person; the third resolve the conflict caused by crime, restores balance and brings a sense of peace in society. The fourth free the guilty person. Criminalization is not intended to tell and is not allowed to demean human dignity (Ishaq & Hum: 2017, pp.1201-1206).

Penalty objectives related to customary criminal law, as stated in Article 55, are further formulated in types of crimes that are included in additional types of criminal. In Article 68 the draft stipulates “payment of compensation” as well as “fulfillment of customary obligations or obligations according to the law that lives in the community”.

The inclusion of both types of custom sanctions into additional types of criminal sanctions, because in reality it is often revealed, that formal legal, juridical resolution by imposing only basic criminal sanctions on the defendant has not been felt by the community as a complete solution to the problem that can provide justice. The two types of custom sanctions are intended, among other things, to accommodate the types of custom sanctions that are not explicitly mentioned in the Act (Cobban: 2015).

Thus, the pattern of sanctions according to the concept consists of sanctions that have been stated concretely and explicitly according to the Act, and sanctions that live according to unwritten laws that are not concretely mentioned in the Act. Therefore, if a criminal act fulfills the provisions of Article 2 of the Draft, the criminal sanction in the form of fulfilling customary obligations is the main crime that must be prioritized. If sanctions for the fulfillment of custom obligations cannot be implemented, the compensation shall be imposed as a substitute. However, this does not mean that a criminal action that meets the provisions of the Act cannot be sanctioned with fulfilling customary obligations, the criminal act can be subject to customary sanctions, but only as an additional criminal (Norrie: 2013).

4. CONCLUSION

Law No.1 of 1946 is the legal basis for the enactment of the Criminal Code. The Penal Code is derived from Wetboek van Strafrecht voor Nederlansch IndieWetboek van Strafrecht voor Nederlansch Indie sourced from the French Penal Code. In its development to meet the development and needs of the community, the Criminal Code was updated. It is expected to have a new Penal Code, which is in line with the values and personality of the Indonesian people, which is an embodiment of community legal awareness (the law that lives in the community).

The values that live in the community have actually been recognized. This fact is evident from the express or implied in the provisions of the existing legislation outside the Criminal Code, both those that have been replaced or those that are still valid. In the draft Penal Code, the values that live in society as a reflection of the soul of the nation have filled in the drafting of the Penal Code so that national criminal law will come. Thus the coming Criminal Code is expected to be in line with the sense of community justice as embodied in the values of the Pancasila as the philosophical foundation of the Indonesian nation.

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