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Reform of Criminal Law and Implications for Law Enforcement in Indonesia

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Abstract. Criminal law reform is an attempt to bring law and order to suit the times and needs of the Indonesian nation. The update is done by the criminal law codification preparing the draft new Penal Code, in lieu of the Code of Criminal old. There are two drafts of the material in the book Criminal Justice Act which can lead to implications for criminal law enforcement in Indonesia is an exception to the principle of legality and still retained the death penalty. The results showed the whole of the respondents agreed conducted criminal law reform. The majority of respondents did not agree if any provision on the principle of legality exception because it can cause legal uncertainty and abuse of power, and the majority of respondents did not agree because of the retention of the death penalty is contrary to human rights.

Keywords: Reform-Criminal Law- Law Enforcement.

1. INTRODUCTION

The draft Criminal Law (Penal Code) is the main source of criminal law in Indonesia, which is a product of the Dutch colonial government enacted the Indonesian nation in the colonial period. During Dutch colonial rule, the Criminal Code that time was called *Wet Boek van Strafrecht (WvS)* has been implemented nationally to enter Indonesia's independence on August 17, 1945. According to Article II of the Transitional Provisions of the Constitution of the Republic of Indonesia Year 1945, all legal rules that have been prevailing in the colonial period does not contradict the spirit of the proclamation of Indonesian independence remains valid until the establishment of new laws, including the *WvS*.

As an independent state, the Republic of Indonesia has been trying to update all the rules of law which is a product of the Dutch colonial government, including in the Criminal Code. The law is very be based updates because as an independent state, it is not logical that still enforce the Criminal Code which obviously is a product of Dutch colonial government formation is certainly based on the legal values that live in the Netherlands at that time, especially the influence of the values of individualism, liberalism and positivism. In addition, the age of the Criminal Code, if traced to the time of its formation the first time in the Netherlands in 1881 and its enforcement in the Dutch East Indies (Indonesia) in 1918 is very old. Thus, the Criminal Code can be classified as outdated laws as no longer compatible with the values that stand in Indonesian society today.

Effort to update the Criminal Code has done post-independence Indonesia, but these efforts have not produced results. This efforts began to find a bright spot after the reform in 1998. After the reform, the demand to realize the development of national law, either in the form of legal reform legacy of Dutch colonial rule and the establishment of a new law that became the Indonesian people more incentive. One important agenda in the development and reform of national laws is to construct new Code. Through a long process, finally the draft Criminal Code prepared by a team of experts formed by the Ministry of Justice and Human Rights has been

realized, and has now been transferred ¹⁵ to the House of Representatives (Parliament) of the Republic of Indonesia for further processing.

According to the Inventory Problem (DIM) is conducted by members of Parliament to the draft Criminal Code, found many chapters formulation that need attention because it raises ²⁵ the pros and cons in the community, including the law enforcement agency and legal academics. Inventory of Problems encountered by members of the House of Representatives requires an explanation from the government before the draft Penal Code is processed. With this condition, the government and the Parliament should sit back together to make the perception that the next process to run well. Nevertheless, the promise of House members period 2009-2014 to form the new Criminal Code before the expiration of the term of office increasingly difficult to achieve, given the tenure of members of the House will end in October 2014. Condition is aggravated by the fact that many members of the House who has the passion and willpower high to realize a pure work of the Criminal Code of Indonesia no longer elected a member of Parliament from 2014 to 2019 period.

Based on the above, it is composed of ¹⁴ the formulation of the problem, namely: ²⁰ What is the implication of criminal law reform in law enforcement in Indonesia. The purpose of this study was to determine the implications of national criminal law reform to the criminal law enforcement in Indonesia. While the purpose of this study is as an input to the Government and the Parliament in national law reform efforts and also to be input to the researchers who want research more about legal reform in Indonesia.

2. METHODS RESEARCH

The study was conducted in Makassar South Sulawesi Indonesia in December 2013 to February 2014. Research is juridical-normative research is supported by empirical data. The study population includes legal academics, legal practitioners among police, prosecutors, judges and lawyers and law students. The samples were calculated using a stratified random sampling is done by arranging

the stratification of respondents. The total sample of 50 people. Data collection (primary) is done through questionnaires and interviews. Data obtained in this research qualitatively analyzed descriptively.

3. Results and Discussion

Legal reforms included in this reform of criminal law , entered politics in the study of law . Sudarto said the law is a political policy through the state bodies authorized to implement ¹³ regulations that are expected desired can be used to express what is contained in the community and to achieve what is aspired . Furthermore Sudarto said political criminal law (in the sense micro) as part of the political law (the macro level) , in the formation of legislation must know the prevailing value system in society , dealing with the situation in ways proposed and with the objectives to be achieved so that these matters can be taken into account and respected . Thus, according to Sudarto , criminal law means carrying out political efforts to establish criminal laws appropriate to the circumstances and the situation at a time and for the days to come (Prasetyo and Barkatullah , 2005) .

The results showed that all respondents or (100%), agree if the current Criminal Code immediately removed and replaced with the new Code. Criminal Code in force at this time, considered to be outdated and unable to answer the demands and needs of the people of Indonesia. Respondents also argued that as an independent nation, the Indonesian nation should no longer use the laws that are passed by the Dutch colonial government.

In this study analyzed two substance of the draft Criminal Code that if the draft is approved and accepted by the House, it will have implications for law enforcement in Indonesia.

a. ¹⁴ The existence Against Exclusion Principle of Legality (principle of legality)

Legality ⁹ principle *nullum delictum noellapoena sine praevia lege poenali* (no offense, no criminal without prior regulations), has been listed ²¹ in Article 1 paragraph (1) of the Criminal Code, which specifies: a no action except for the

strength of the criminal rules legislation existing before the deed is done. The legality principle contains three terms: 1) No act prohibited and punishable by advance if it is not stated in the rules of law; 2) To determine the existence of a criminal act should not be used analogy; 3) The rules of criminal law should not be retroactive.

The principle of legality is a universally accepted principle, especially in those countries that embrace the Continental European legal system such as the Netherlands, Germany, France. Indonesia, a former Dutch colony also adheres to the principle of legality, as referred to in Article 1 paragraph (1) of the Criminal Code. This principle is particularly important in enforcing state law, because this principle firmly implies, there will be no one who can be punished if the act committed is not set in advance in the criminal law. Thus, law enforcement officers such as the police, prosecutors and judges, are not allowed to take legal action against a person if that person acts not regulated and prohibited by law.

As a safeguard principles into state law, this principle is still maintained in Article 1 paragraph (1) of the Criminal Code draft. However, in Article 1, paragraph (3) there is a provision that gives the exception to the principle of legality. In Article 1 (3) draft Criminal Code, determined that, the provisions referred to in (1) without prejudice to any legal or customary law of life that determines that a person's worth according to local custom is liable even if such actions are not regulated in the legislation.

Provisions concerning the legality principle clear exception would create legal uncertainty, because it allows the existence of a criminal offense other than those defined in criminal law. Thus, this exception, as well as provide a "blank check" to law enforcement officials, which, if not strictly controlled can be abused, for example, be used as a means of extortion, bribery or other unlawful acts such as arrests and arbitrary detentions.

Research results, that as many as 40 or (80%) of respondents believed, if the provisions of the exceptions to the principle of legality is accepted there will be legal uncertainty. Each law enforcement officers can give their own interpretation of the

prohibited acts, can even lead to tort ruler. A total of 7 or (14%) agree that the existence of an exception to the principle of legality on the basis that the law needs to pay attention to life (customary law) in Indonesian society. While 3 (6%) respondents answered do not know.

Further examines the existence of an exception to the principle of legality as set forth in Article 1 paragraph (3) draft Criminal Code, the Criminal Code drafting apparently influenced by the teachings of unlawful material known in the science of criminal law. Doctrine unlawful material emphasizes, although a deed in accordance with the description in the criminal law, remains to be investigated about the community assessment whether the action is reprehensible and should be punished the perpetrators, or too lacking in character seen his blame so no need to impose sanctions perpetrators of criminal law , but enough penalized other legal norms or other social norms (Abidin, 2010).

Doctrine unlawful material known in the science of criminal law is very similar to the teachings of customary law in Indonesia. Customary law is the law of the original people of Indonesia, which has existed before colonization Netherlands. Customary law has a characteristic shape that is not written down and given legal sanction direct (cash). As an unwritten law, customary law does not require the complicated formalities, but prefer the effectiveness and efficiency in implementation. Although it has some advantages, in terms of rule of law, customary law is considered less guarantee of legal certainty because the shape is not written and very diverse forms. In either case the rule of law, should provide certainty and enactment in general (national), unlike the customary laws locally.

Back to the implications posed by the existence of an exception to the principle of legality, as set out in Article 1 paragraph (3) of the Criminal Code draft, then it should be with the House Government should really look in depth the implications that may arise if the provisions adopted by the House. Keep in mind that in Article 1 paragraph (3) of the Constitution of the Republic of Indonesia Year 1945, has confirmed that Indonesia is a country of law. The consequences of the receipt of the legal conception of the state, meaning everything that is done by the

state authorities, including law enforcement officers must be based on law and the law is the law is written such laws or type of other legislation.

b. Still Maintain the Death Penalty

The death penalty is the most severe type of punishment in the criminal law in Indonesia. Besides regulated in the Penal Code, there are also some laws and regulations that includes the death penalty. In the Criminal Code of the death penalty for perpetrators of rebellion that threatened to kill the president or vice president, the crime of premeditated murder, theft with violence. The threat of the death penalty are also regulated in the Law on Drugs and Psychotropic Substances, the Corruption Act, Terrorism Act and the Emergency Law No. 12 Year 1951 on Firearms and Explosives.

As the most severe punishment, the death penalty is considered the most cruel kind of punishment and inhumane. That is why many countries in the world have abolished the death penalty from the criminal law. European countries have abolished the death penalty, as well as in the United States most states have abolished the death penalty. In Indonesia, despite the existence of the death penalty is still recognized and regulated in the law, but the debate raises the pros and cons still exist.

Foundation for the parties to agree on the death penalty is no Article 28J of the Constitution of the Republic of Indonesia Year 1945, which determines: 1) every person shall respect the human rights of others in an orderly society, nation and state; 2) to exercise their rights and freedoms, everyone shall be subject to the restrictions set forth as well as respect for the rights and freedoms of others and to meet the demands of a fair accordance with moral considerations, religious values and public order in a democratic society. In addition, the death penalty is not prohibited by any religion and almost all ASEAN countries still apply the death penalty.

In the draft Penal Code was found about 13 articles containing the threat of the death penalty. With the continued retention of the death penalty, will lead to the realization of the implications of state law that is just and humane. The parties

agree that no death penalty, rests on two basic precepts-Pancasila state which reads: just and civilized humanity. According to the opponents of the death penalty, meaning contained in the 2nd basic precepts of Pancasila state that is the foundation of the Republic of Indonesia is the recognition of the dignity, and the dignity of human existence as creatures of God and no one should seize this most fundamental rights the right to life . Therefore, the imposition of the death penalty should not be done to anyone, and by anyone, including the state.

Further elaboration on the application of the death penalty ban , affirmed in Article 28A¹¹ of the Constitution of the Republic of Indonesia Year 1945 that : Everyone has the right to defend life and living . This provision further attests that all of the treatment that led to the revocation of the right to life is not justified . As a rule of constitutional basis , this provision reinforces the ban on the application of the death penalty to anyone and for any reason . In this connection ,RachlandNashidiq Impartial as the Executive Director said that there are four rights that can not be postponed , namely the right to life , the right not to be persecuted , the right not to be enslaved and the right not to be tried by a retroactive law . Similarly, Philip Alston opinion of a professor from New York University School of Law said , as a consequence of the ratification of the International Covenant on Civil and Political Right by the Indonesian Government by Law No. 12 of 2005 , the death penalty should be abolished in Indonesia (Renggong , 2007) .¹⁰¹²²³

The results showed that as many as 38 or (76%) of respondents who did not agree when the death penalty is still regulated in the Criminal Code on the basis that the death penalty is contrary to human rights as stipulated in the basic precepts of the 2nd state Pancasila and the Constitution of the Republic Indonesia Year 1945 and is a type of punishment that is no longer relevant in the era of globalization. A total of 12 or (24%) of respondents agree if the death penalty is still set in the new Criminal Code, on the grounds that the death penalty is applied in Indonesia is still relevant because it is often the case that violent crime and the death penalty can provide a deterrent effect to the perpetrators of the crime.¹⁸

Noting that the opinion does ¹ not agree to the arrangement of the death penalty in the Penal Code and other laws need serious attention of the Government and Parliament . Issue of the death penalty is not only limited to execute those convicted guilty of violating criminal law , but more than that the death penalty concerning the life , dignity of human beings as creatures of God . The reason often given by ¹⁰ the parties to agree the death penalty , ⁹ that the death penalty would provide a deterrent effect and can suppress crime , not entirely true . Already hundreds of people were put to death for the case of narcotics , terrorism and premeditated murder , but the crime rate in Indonesia is still quite high , especially crime that the perpetrator is punishable by death . Exactly proposal would J.E. Sahetapy , professor at the Faculty of Law, Airlangga University, Indonesia , that the death penalty be abolished and replaced with life imprisonment without the granting of pardon .

4. CONCLUSIONS AND RECOMMENDATIONS

a. Conclusion

Book of the Criminal Justice Act in force at this time it is time repealed and replaced with the draft Penal Code which were the work of the Indonesian people themselves that the material is in accordance with the values and culture of Indonesia, without forgetting the universal values that developed at this time. The results showed that the majority (100%) of the respondents agree to immediately do criminal law reform in particular the Penal Code. The majority of respondents (80%) disagree about the exception if there are provisions in the ⁹ Criminal Code and the principle of legality also the majority of respondents (76%) do not agree if the death penalty is still set in the new Code.

b. Suggestion

It is expected that the Government and the Parliament as soon as possible to realize the establishment of a new Criminal Code that address the needs of law and the development of Indonesian society today. Therefore, the principle of legality is maintained without any exception, and the death penalty no longer need to be set in the new Code.

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