August 29th 2018

THE 4th INTERNATIONAL AND CALL FOR PAPER

Legal Construction and Development in Comparative Study
The Role of Indigenous and Global Community in Constructing National Law

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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AND CALL FOR PAPER
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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.**

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fifth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, August 31th 2018

Chairman of the Committee,

Dr. AnisMashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

Thank to Allah is an abdolute act that we must say after conducting the International Conference and Call for Paper by theme : "Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)" wich was held by Faculty of Law Sultan AgungIslamic University (UNISSULA) Semarang, on August 29th 2018.

This conference tried to reviews different theories of legal development focusing on The Role of Indigenous and Global Community in Constructing National Law in order to highlight their similarities and differences. In the field of law, the substance of the discussion does not lie in 'whether the law is traditional because of the heritage of the past or not', but on the meaning of justice contained in the law. Often in discussing legal matters, we are caught up in the understanding of law in a procedural sense, not a law in a substantive sense-that satisfies the sense of justice. So it is not realized, there is a reduction of the meaning of the law substantively (which meets the sense of justice) becomes law procedurally. Especially when human life enters the era of globalization characterized by modern, as well as loaded with contemporary challenges and issues.

Globalization, in general people understand it is a process in the life of mankind to a society that covers the whole globe. This process is possible and facilitated by advances in technology, especially communication and transportation technology. Such understanding is not much different from the understanding of globalization as a process that refers to "a single interdependent world in which capital, technology, people, ideas, and cultural influences flow across borders". With such understanding, we are gradually going to live in a one world where individuals, groups and nations become more interdependent. In the global human society there will be patterns of social relationships that are different from before. And that too is a portrait of social life not found before.

Therefore, to discuss more about legal construction and development, Faculty of Law, Sultan Agung Islamic University was confidence to conduct a conference by the theme "Legal Construction and Development in Comparative study (The Role of Indigenous and Global Community in Constructing National Law)" focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who had contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, August 31th 2018

Dean,

Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

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THE IMPLEMENTATION OF FLEXIBILITY PUNISHMENT PRINCIPLES IN ISLAMIC LAW IN THE RENEWAL OF INDONESIAN'S CRIMINAL CODE[1]

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ABSTRACT

The Criminal Code applies in Indonesia today is a legacy of the Dutch colonial era, so that philosophically, sociologically, practically and adaptively must be renewed in accordance with the legal values that live and develop in society. In Islamic law, there are universal values, namely the principle of flexibility /elasticity of punishment in the form or number of criminal sanctions that are highly oriented to the victim and his heirs. It is as stated in al-Baqarah (QS.2) verse 178, 179. Surat al-Maidah (QS.5) verse 4. In the case of criminal acts, the victim and his/her family are the person who have right to determine the amount and form of sanctions to be imposed on the perpetrator. As the victim desire, it is permissible to reply in kind with the offender's actions, but more importantly is to forgive. It can be done by asking for *diat* or without asking for *diat*. Thus, the position of the judge is only as mediator and implementer of the court decision. In accordance with Islamic legal values, giving forgiveness (principle of *rechterlijk* pardon) should be permitted not only to perpetrators of criminal acts with very light classifications, but also possible to the perpetrators of criminal acts which constitute *adami* rights. Implication of the principle of flexibility and elasticity of punishment in the upcoming Draft Criminal Code should be formulated. "The personal state of the maker or condition at the time of the act or what happens later can be used as a basis for consideration not to impose a criminal or impose an action taking into account the aspects of justice and humanity".

Keywords: Principles of Flexibility, Islamic Law, Renewal, Criminal Code

A. BACKGROUND

Efforts to reform the law in Indonesia are directed to continue the reform of legal products. Further, it is also used to replace the laws and regulations of the colonial heritage that reflect the social values and interests of the Indonesian people and are able to encourage the growth of creativity and involve the community to support the implementation of national governance and development based on Pancasila and 1945 Constitution of the Republic of Indonesia. It includes legal planning, law formation, research and law development. [2]

[1] Presented in "The 4th International and Call Papers, Legal Contruction and Development in Comparative Study, Faculty of Law, Unissula Semarang, 29 August 2018.

[2] Law No.7 of 2007 concerning the 2005-2025 National Long-Term Development Plan.

As it is known, the positive law of Indonesia has not fully reflected the values of Pancasila and the 1945 Constitution, because it still consists of elements (1) Customary Law, (2) Islamic Law, and (3) Western Law.[3] Conditions of legal diversity as mentioned above are still ongoing and there are many colonial regulations that remain in force and have not been revoked. In fact, most or some of the regulations are no longer needed and are not in harmony with the development of Indonesian society. [4]

In the field of criminal law, up to now, the material criminal law in force in Indonesia still uses the KUHP/WvS (*Wetboek van Strafrecht voor Nederlandsch Indie*) relics of the Dutch colonial era and began to be implemented since January 1, 1918, with a different philosophical background with values views and concepts nation's life.

The above conditions can cause the goal of criminal law enforcement to obtain substantive justice as expected by the community, not fully realized. Since it still applies laws and regulations that do not originate in the values grow and develop within the community. [5]

Indications of failure of criminal law enforcement are mainly due to the application of outdated criminal law. It had been pointed out by P.A.F. Lamintang and Djisman Samosir in their book, they stated that the use of the outdated Criminal Code will lead to the wrong application of law, which in turn can reduce the authority of the law enforcers themselves. [6]

In addition to being outdated, the application of the Criminal Code in Indonesia is also forced to apply, not coming from the wishes of the public as stated by E.Utrecht, he stated that: "..... the criminal law that is now in force throughout Indonesia is a written criminal code (codified). But the codification of criminal law is not the will of the Indonesian people. It could be said that in the past century the codification of criminal law was forced by the Dutch on the Indonesian people (unwritten criminal law) ".[7]

According to Sudarto there is a close relationship between criminal law and the political ideology of a nation as stated in his book: "... The Criminal Code of Western

[3] BPHN, *Pola Pikir dan Kerangka Sistem Hukum Nasional*, Departemen Kehakiman RI, 1995/1996, page.16.

[4] Sri Endah Wahyuningsih, *Comparative Religious Approach In The Development Of National Criminal Law System* **,** The 3 International Conference and Call for Paper Faculty of Law 2017 Sultan Agung Islamic university. 2017. P.444.

[5] Esmi Warassih in her Inaugural speech as Professor argued that the application of a legal system that did not originate from or was grown from the content of the community was a problem, especially in countries that were changing because of discrepancies between the values that support the legal system of other countries with values that are lived by the members of the community itself, Esmi Warassih, Community Empowerment in Realizing Legal Purposes, Speech Inauguration of Associate Professor in Legal Studies at the Faculty of Law UNDIP, Semarang, 2001, p.12.

[6] P.A.F. Lamintang dan Djisman Samosir, *Hukum Pidana Indonesia*, Sinar Baru, Bandung, 1983, page.v.

[7] E. Utrecht in Majalah Hukum dan Masyarakat, Tahun II, No.I, Januari 1957, page.20, seperti dikutip Romli Atmasasmita, dalam *Perbandingan Hukum Pidana Kontemporer*, PT.Fikahati Anesta, Jakarta, 2009, page.33.

European countries which are individualistic in character are different from the Criminal Code of Eastern European countries which view socialist politics. In Indonesia, the views and concepts of value are based on Pancasila, while the views on criminal law are closely related to the general view of the law, about the state and society and about crime ".[8]

Historically the Criminal Code that applies in Indonesia currently is the *Wetboek van Strafrecht voor Nederlandsch Indie*, including the legal family of The Romano Germanic Family (Civil Law System), with the values of individualistic and liberalistic life values[9]. Therefore, the legal principles contained in it are a mirror of the point of view of their lives, [10] as the opinion of Rene David and John ECBrierley states[11]: "..... The Romano Germanic Family (Civil Law System) ... has undergone the influence of Christian morality and, since the Renaissance, philosophical teachings have given prominence to individualism, liberalism and individual rights. Henceforth, at the least for certain purposes, this reconciliation enables us to speak of a great family of western laws.

The Criminal Code which was born from the liberal legal system according to Satjipto Rahardjo centered on individual independence by arranging a life that the independence of individuals is guaranteed to exist and continue. Liberal values, individual independence, become a paradigm in the legal system. This has implications for legal thinking that is not designed to think about and provide broad justice to the community, but to protect individual independence. [12]

In relation to the above description, Sudarto stated that there are at least three reasons for the urgency to renew the Criminal Code, namely: political, sociological and practical reasons (needs in practice). Viewed from a political point of view, the independent Republic of Indonesia is naturally having its Criminal Code, which was created by itself. The Criminal Code which was created itself can be seen as a symbol and is a pride of a country that has been independent and escaped from the confines of political colonization. The Criminal Code of a country that is "forced" to be enforced in another country can be seen as a symbol of colonialism by the country that made the Criminal Code. While viewed from the sociological point of view, regulation in criminal law is a reflection of the political ideology of a nation in

[8] Sudarto, *Hukum Pidana dan Perkembangan Masyarakat*, Sinar Baru, Bandung, 2009, page.83.

[9] Satjipto Rahardjo, *Hukum Kita Liberal (Apa Yang Dapat Kita Lakukan)* Kompas 3 January 2001.

[10] According to Satjipto Rahardjo, the principles of law guard and provide nourishment to the law and parts or fields of law. Paton called it a means that made the law live, grow and develop, in Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban*, UKI Press, Jakarta, 2006, page. 128.

[11] Rene David dan John E.C.Brierley, *Major Legal Systems in the World Today*, An Introduction to the Comparative Study of Law, London, Stevens & Sons, 1978, page.24.

[12] Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban*, Op-Cit, page. 128.

which the law develops. This means that the social and cultural values of the nation have a place in the regulation in criminal law. Moreover, viewed from the standpoint of daily practice, the official text of our Criminal Code is still text written in Dutch. The text contained in the Criminal Code compiled by Prof. Mulyatno, by R. Soesilo and others is a "private" translation and not an official translation approved by a law. [13]

Islamic law as one of the laws that lives in the community has the potential to contribute to the effort to reform criminal law that is being pursued by the Indonesian people. According to Ichtiyanto[14], actually Islamic law is in national law, therefore in this paper we will discuss the implementation of the principles of elasticity and flexibility in punishment based on Islamic law in the reform of the Indonesian Criminal Code.

B. DISCUSSION

As it is known, in the Criminal Code (WvS) which applies in Indonesia so far there is no general guideline formulated in the law which regulates the forgiveness of judges. The formulation of the *rechterjik* pardon principle in the criminal guideline is important because according to the principle of flexibility/elasticity of punishment originates from the values of religious wisdom.

Based on the results of research in Islamic law, it is known that the principle of forgiveness of perpetrators of criminal acts is the right of servants (adami right), namely against criminal acts of *kisas-diat* and *takzir*, even though there have been proven criminal acts and errors.

According to Islamic law the principle of flexibility/elasticity of punishment in Jarimah Kisas and Diat is seen, among others, by the possibility of granting forgiveness by the victim or guardian of the perpetrators of crime (jarimah). Because Jarimah is a servant's right (individual), the victim or guardian has the authority to exercise his rights.

[13] Muladi argued that a comprehensive study no less important is an adaptive reason, namely that the national Criminal Code in the future must be able to adjust to new developments, especially international developments that have been agreed upon by civilized communities,Muladi, *Proyeksi Hukum Pidana Materiil Indonesia di Masa Datang,* Inaugural Speech as Professor of Law at UNDIP, Semarang, Feb. 24, 1990 page. 3.

[14] Ichtiyanto, dalam *Ensiklpopedia Hukum Islam*, Jilid III, Ichtiar baru van Hoeve, jakarta, 1997, page.713.

The forgiveness he gives, affects the perpetrator of the crime and therefore the victim can forgive the offender who is subject to punishment and replace him with a punishment or can even free him from punishment. The basis for the right to grant forgiveness to the victim or guardian to the perpetrator of the crime is the Word of Allah in the Sura al-Baqarah (QS.2) verse 178 which means: "O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment."

Another basis is also in Al-Qur'an Surat Al-Baqarah (Q.S.2) verse 179 which means; "And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous.."

Appropriate retaliation is permitted, which does not include the express boundaries in the Qur'an Surat Al-Isra (QS.17) verse 33 which means: "And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly - We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law]."**.**

In another verse, there is in the Qur'an Surat al-Maidah (QS.5) verse 45 Allah SWT says "And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers."

Another basis is the hadith narrated from Annas bin Malik which explains: "" As far as I know every qisas case was reported to the Messenger of Allah, he always ordered forgiveness "(Narrated by Ahmad bin Hanbal). **[15]**

[15] H.A Djazuli, Fiqh Jinayah (Upaya Menanggulangi Kejahatan Dalam Islam), Raja Grafindo Persada, Jakarta, 1997, page. 151

Abu Daud narrated a hadith that the Messenger of Allah (may peace be upon him) said: "" The intentional murder (the perpetrator) sued the Qishash, unless the guardian of the murder victim forgives[16] ". The Hadith of the History of Bukhari Muslim mentions the Messenger of Allah SAW having decided that the family of the murdered person had two choices: take a ransom or be sentenced to death. [17]

The amount of diat in a forgiven criminal act has been determined explicitly in Islamic law, and the diat is the right of the victim or his/her family and not the state's right. Besides having set a number of diat, Islamic law also allows diat whose amount is agreed between the victim and the perpetrator, and may even give forgiveness without demanding diat at all.

According to Islamic law, if the victim forgives and demands a number of diat to the perpetrator, if the offender is not from a capable family, then the judge has the right to ask the perpetrator's family to pay a specified amount of money. Further, if it is still not getting or the amount is less than their capability, the diat will be taken from Baitul Maal, which is then handed over to the victim or his family. This is according to Abdullah Kelib[18] called the limited accountability of jama'iyah, but what is more important is to forgive without demanding diat at all, and is a starting act and very favored by Allah SWT. This forgiveness is permissible in all criminal acts of kisas/diat and takzir which are the rights of adami. In the criminal acts of hudud which are the right of Allah, forgiveness is not permitted.

The concept of forgiveness in the provisions of Islamic law is different from the principle of *rechterlijk* pardon mentioned in the concept of the Criminal Code 2018, which reads: "The lightness of the act, the condition of the person making the act or the situation at the time of the act or what happens later, can be used as a basis for not imposing a penalty or put on actions taking into account the aspects of justice and humanity ". Furthermore, in the Explanation of the 2008 Criminal Code Bill stated: "The provisions in this paragraph are known as the principle of *rechterlijk* pardon which authorizes judges to apologize someone who is guilty of a mild crime (not serious). This apology is included in the judge's decision which must still be stated that the defendant was proven to have committed a criminal offense against him ".

The difference in the principle of *rechterlijk* pardon in the Criminal Code Concept with the concept of forgiveness in a criminal offense is that according to Islamic law the apology is merely the right of the victim or his family (which is the right of adami), while the

[16] Sayyid Sabiq, Jilid 10, Fikih Sunnah, PT Alma'arif, Bandung, 199., page. 30
[17] Ibnu Qayyim Al Jauziyah, *I'lamul Muwaqi'in, Panduan Hukum Islam*, Pustaka Azzam, 2000, page. 864
[18] Interview result with Abdullah Kelib, Sultan Agung Islamic University Semarang, 28 June 2016.

judge only offers to the litigant and then decides and carry out the decision based on the agreement of the litigants. [19]

In addition to the above forgiveness, according to Islamic law, it is permissible for all criminal acts to be committed and criminal acts which include adami rights such as: intentional murder, accidental murder, persecution and takzir crimes such as attempted murder and persecution. Thus, forgiveness is permitted not only to perpetrators of criminal acts with very light classifications, but also permitted to be given to perpetrators of criminal acts with a heavy classification such as criminal acts of persecution.

Based on the above description, the apology (rechterlijk pardon principle) should be permitted not only to the perpetrators of the crime with very light classification, but also possible to be given to the perpetrators of serious crimes which are limited to criminal acts which are the rights of adami.

The giving of forgiveness to the perpetrators is given by considering criminal guidelines such as those in the Criminal Code Concept 2088, namely:

a. the mistake of the criminal act maker;
b. motive and purpose of committing a crime;
c. the inner attitude of the criminal offender;
d. whether the crime is committed by planning;
e. how to commit a crime;
f. attitudes and actions of the perpetrator after committing a crime;
g. curriculum vitae and social and economic conditions of the perpetrators;
h. criminal influence on the future of the crime maker;
i. the influence of criminal acts against the victim or the victim's family;
j. forgiveness of the victim and / or his family; and / or
k. the public's view of the crimes committed

It is important to note that based on the circumstances at the time of the act or what happened later, (for example the perpetrator is willing to provide adequate compensation money for the crime committed) and by considering the willingness and forgiveness of the victim or the victim's family.

Consideration of willingness and forgiveness from the victim is a condition that must really be considered by the judge because if there has been a willingness and forgiveness will

[19] Sri Endah Wahyuningsih, *Judge's Considerations Analysis Toward Perpetrators Of Criminal Acts Of Sexual Violence To Underage Children In Demak District Court Reviewed With LawNumber 35 Year 2014 About Children Protection,* Jurnal Pembaharuan Hukum**,** Volume IV No. 3 September-December 2017, p.347.

be able to eliminate hostility and revenge from the victim, but still need to pay attention to the purpose of punishment.

Based on the description above, the construction of the 2018 Criminal Code Bill in CHAPTER III concerning Criminal, Criminal and Action, namely the provisions concerning the principle of rechterlijk pardon need to be expanded by deleting the sentence that states the deed, so as to complete the following: what happens later, can be used as a basis for consideration not to impose a criminal or impose an action taking into account the aspects of justice and humanity ".

C. CONCLUSION.

The rules of Islamic law are very flexible and elastic, it can be seen in the form and number of criminal sanctions that are highly oriented to the victim and his heirs. In the case of a crime which is the adami right of the victim or his/her family to be the person who determines the amount and form of sanctions to be imposed on the offender. If the victim wants it, it is permissible to reply in kind with the offender's actions, but more importantly is to forgive the good actor by asking for diat or without asking for diat. Thus, the position of the judge is only as mediator and implementer of the court decision.

In the Criminal Code (WvS) as a positive criminal law in Indonesia, so far the general guideline has not been formulated which regulates the forgiveness of judges. The formulation of the rechterjik pardon principle in the criminal guideline is important because it is in accordance with the values of religious wisdom. The giving of forgiveness (the principle of rechterlijk pardon) should be permitted not only to the perpetrators of the crime with a very light classification, but it is also possible to be given to the perpetrator of the crime which is the right of adami. Implication of the principle of flexibility and elasticity of punishment in the upcoming Draft Law on the Criminal Code should be formulated as follows: "The state of the person who is the perpetrator or the situation at the time of the act or what happens later, can be used as a basis for consideration not to impose a crime or impose an crime in consideration of justice and humanity".

D. SUGGESTIONS.

It is necessary to develop national legal education because the reconstruction of basic ideas is an immaterial aspect through the development of mental values/enthusiasm/attitude/insight/knowledge contained in the legal culture development

sector so that there is harmonization in the field of legal development between legal substance, legal structure and legal culture.

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