Faculty of Law
University 17 Agustus 1945 Semarang

PROCEEDING

INTERNATIONAL CONFERENCE ON LAW, ECONOMY, AND HEALTH

ICLEH 2018

“HARMONIZATION ON LAW, ECONOMY, AND HEALTH TOWARDS SOCIAL JUSTICE SOCIETY”

Grasia Hotel Semarang - Indonesia
January 29th - 30th, 2018
Proceeding Book
International Conference on Law, Economy and Health
(ICLEH 2018)

Theme:
“Harmonization of Law, Economy and Health Towards Social Justice Societ

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First time published by:
Faculty of Law University 17 Agustus 1945 Semarang
Pawiyatan Luhur Bendan Dhuwur, 50233
Semarang, Indonesia
Phone: 024-8446280
Email: icleh@untagsmg.co.id
Website: http://conf.fakhukum.untagsmg.ac.id

1st Printed: 2018

ISBN 1234-678-90-12-1

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FOREWORD

The growing public awareness of health at this time has an impact on the increasing need of available resources, especially funds, which so far the economic sector associated with planning, implementation and evaluation in health services is still rarely or slightly gained attention. Economic sectors therefore need to be included in the planning, implementation and evaluation of the health sector through arrangements that provide certainty, benefit, and justice. In the sense that there is a harmonization between Law, Economy and Health that provides Social Justice for Society.

Based on that thinking, Faculty of Law UNTAG Semarang on 29 - 30 January 2018 held an international conference as well as holding Call for paper, inviting scientists both in law, economy, and health at the national and international level with the theme of "Harmonization of Law, Economy and Health to Social Justice Society". This International Conference is a valuable opportunity for academics, researchers and practitioners so that 120 papers are formed in the development and delivery of ideas, research results and experience related to the issue of harmonization between law, economy and health of social justice in the global society.

As guest speakers include Prof. Vugar Mamadov, European WAML President from Azerbaijan, Prof. Irene Calboli from Singapore College, Prof. Agus Sardjono from University of Indonesia, Prof. Park Ji Hyon from Youngsan University South Korea, Prof. Seo Jo Hwan from Dong A University South Korea, Dr. Haniff Ahamat from Malaysian SMEs, Dr. Nasser, SpKk.D.Law, President of W AML Asia Pacific Region, Prof. Dr. Liliana Tedjosaputro, SH, MH.MM from Master of Law UNTAG Semarang.

On this occasion, the organizing committee would like to thank:
1. Dean of the Faculty of Law UNTAG Semarang (Dr Edy Lisdiyono, SH.MH), who gives much encouragement, encouragement and trust to the committee.
2. Dean of Faculty of Economy and Business Untag Semarang (Dra Nur Chayati, SE.MM.Ak.Ca)
3. Rector of the University of 17 August 1945 Semarang (Dr. Drs. H. Suparno, Msi)
4. World Medical Law Association (WAML), Intellectual Property Law Teachers Association (APHKI), Persatuan Perakit Indonesia (PERSI) Central Java, Kariadi Hospital Semarang, PDAM Jember
5. All members of the committee as well as the parties who contribute to the contribution of the event.

Finally, we thank you for the attention of all readers. Hopefully this Proceeding International Conference on Law, Economics and Health (ICLEH 2018) can provide benefits to advance the Indonesian nation and our education in particular.

Semarang, February 2018
Committee

Dr. Anggrani Endah Kusumaningrum, SH., MHum
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ABSTRACT

Constitutionally, state’s policy of political law is based on the provision of Article 1 (3) of the 1945 Constitution of the Republic of Indonesia stating “The state of Indonesia should be based on the rule of law”. It is implied in the Article that Indonesia as a State of law no longer exists as rechtsstaat state which only complies with Law (the law of a state) but the state of law in Indonesia exists as a pro-Indonesia State of law. In reference to the provision of Article 1 (3) of the 1945 Constitution of the Republic of Indonesia, the state of law of Indonesia embraces and put together the plurality of law in Indonesia in which not only does it settle the nation with the existence of law, but it also encourages the plurality of living law to coexist. According to what is stated in Article 1 (3) of the 1945 Constitution of the Republic of Indonesia, it is concluded that the era of positivism accepting only law as social control has, as a matter of fact, faded. The awareness of the importance of social orders outside the law of a state is inevitable, especially in Indonesia in which the existence of this nation is supported by cultural, ethnic, and religion diversity. Moreover, the provision of Article 1 (3) of the Constitution also marks the end of the monopoly of the law of a state in putting the law to work and the compliance with it. It means that in constitutional perspective, the state of law of Indonesia is not a regime which only acknowledges the law as social orders, but it is a nation that also accepts living law as a source of positive law.

Keywords: traditional values, counteracting criminal act

Introduction

An essential role of the state in tackling criminal has not brought satisfaction. Although it fluctuates, the incidence of crime tends to increase every year. Law Number 8 Year 1981 on Criminal Code which plays an important role in the nation and highlights the participation of society in tackling criminal act has put the nation in dilemma. On one hand, the incapability of the nation in combating criminal act has received lots of criticism from society. On the other hand, the nation does not acknowledge the participation of society in combating the crime. Law Number 8 Year 1981 agrees that a state is the only institution that monopolistically holds an authority to counteract crime.

Studies on valid Laws have brought a result showing that juridically, the contribution of traditional values to combating criminal act is possible to do. Laws themselves justify the possibility of this contribution. Generally, the contribution of traditional values to combating criminal act can be seen from material and formal perspective.

In material perspective, several Laws give justification of traditional values related to combating criminal act. Based on the context of material criminal law, there is possibility that making use of traditional values for combating criminal act is likely to be linked with the doctrine of acting against the material law in criminal law. This doctrine has given wider access to the contribution of traditional values to combating criminal act either in its positive or negative function. To seek for answers to the problems in this research, two research problems are presented: 1) how is criminal law utilized to combat criminal act by contributing traditional values? 2) What concept is applied in counteracting criminal act through traditional values-based criminal law?

Research Methods

Qualitative research was employed in this research, and no population was required in the research. However, there were some key informants with no certain numbers decided but this technique was used based on snowball principle.

This research was based on initial assumption in which constructivism paradigm was developed to find out the true knowledge about the concept of counteracting criminal act through criminal law which is based on traditional values seen from ontological, epistemological, methodological, and axiomatic aspect. This research also involved socio-legal approach with the analyses by Strauss and J. Corbin.

1 The incidence of crime, looked at the number of criminals sent to jail, tends to increase every year.

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analysis model. Secondary data was presented systematically for further analysis done descriptively and deductively. The whole research activity took two years, in which in the first year, it was focused on constructing framework (body of knowledge) regarding counteraction done to tackle criminal act by contributing traditional values. In the second year, the focus moved to development of traditional values-based model used to counteract criminal act in the second year.

Theoretical Framework
Conceptually, counteracting criminal act could be conducted through several different ways: the application of criminal law, prevention without punishment, influencing views of society about crime and punishment/mass media. Counteracting criminal law by applying the law is also known as penal effort, while counteracting it without involving criminal law (prevention without punishment) and by influencing the views of society about criminal act and punishment through mass media is categorized as non-penal.

While the concept of Hoefnagels concerning criminal act can be reached through penal and non-penal, the policy putting together these two ways is not yet made. In Indonesia, counteracting criminal act was distinguished diametrically. The counteraction of criminal act by using criminal law is only based on the law of the state, which not only abolishes the role of traditional values (living law), but it also eclipses other forms of power apart from the state power to participate in the counteraction of criminal act, especially in the context of resolving criminal cases. Enforcing law by relying on the state law is only based on the doctrine of positivism, while Werner Menski agrees that positivism/legality—assuming that the state law is the only tool that can be used to settle disputes in society—is insufficient or unsatisfactory perspective.

Discussion
Contribution of traditional values to counteracting criminal act through criminal law seen from material and formal aspects.

a) Contribution of traditional values to counteracting criminal act through criminal law seen from material aspect
Studies on several Laws that are valid bring results implying that juridically, contribution of traditional values to counteracting criminal act is more likely to be given. There are several Laws which give access to justification of the contribution of traditional values to counteracting criminal act. Generally, the contribution to counteracting criminal act can be viewed from both material and formal aspect.

In terms of material, there are several Laws which justify the traditional values given to counteract criminal act. In the context of material criminal law, involving traditional values in an attempt to counteract criminal act is more likely to be linked with the doctrine that is against the material law in criminal law. Embracing this doctrine has brought to more possibility of contribution of traditional values to counteracting criminal law either in positive or negative function.

Substantially, the doctrine that encourages any conducts against the material law with its positive function implies that a conduct done by an individual can be qualified as a conduct that is against the law (delict or criminal act) since it is not in line with the value of decency, compliance, custom, religion and others although the conduct is not explicitly provided in Laws and not punishable by law. In short, although an inappropriate conduct is not explicitly stated in Laws, the conduct is still considered against the law because it does not comply with values growing in society. In such a context, these growing values involve traditional values.

With such an understanding, the doctrine that is against the material law in its positive function acknowledges what is not regulated in Laws; it acknowledges the values growing in society as a positive source of law.

Positive function related to social values, including traditional values, is legitimated by the issuance of Emergency Law Number 1 Year 1951. The provision of Article 5 Paragraph 3 point b of Emergency Law Number 1 Year 1951 suggests: “Civil material law and temporarily material civil criminal law (material

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Suteki, op. cit., p. 3.
criminal law) that are valid till now for local youth in self-governed regions and former people judged at customary court will still be valid for those people with the following conditions:\(^{11}\)

1. When a conduct may be seen as a criminal act in the perspective of living law but it is not equal to the provision of Civil Criminal Code, whoever commits a wrongful conduct is sentenced with not more than three-month imprisonment or to be fined as much as IDR 500. It is given as a substituting punishment when customary law applied is not obeyed by the defendant and this punishment is seen equal by the judge as measured based on the conduct committed.
2. In the perspective of the judge, when the punishment given based on customary law involves imprisonment, the defendant can be sentenced for ten-year imprisonment as a substituting punishment. This is based on the view of the judge that the punishment made by customary law is no longer valid and it deserves to be modified.
3. When a conduct is seen as criminal act according to living law and it is equal to what is stipulated in Civil Criminal Code, the defendant will be punished with a sentence closely equal to the act done.

Seen from material perspective, counteracting criminal act through criminal law is based on the provision of Article 1 (1) Criminal Code which asserts “No act shall be punished unless by virtue of a prior statutory penal provision.” From positivism perspective, which is still dominant and becomes hegemony to date, counteracting criminal act by means of criminal law can be executed when there is a Law that regulates it, involving both determining element that is considered against the law and determining criminal sanctions. Schaffmeister, Keijzer, and Sutorius\(^{12}\) agree that legal construction Article 1 (1) of Criminal Code largely known as legality, actually asserts that counteracting criminal act by means of criminal law is based on the following provisions:

1. A person must not be punished only according to custom
2. Unclear formulation of delict must not be allowed (lexcerta)
3. Punishment must not be made unless it is according to what is stipulated in the Law.
4. Punishing a defendant must be only based on what is stipulated in the Law.

The domination and hegemony of positivism are embedded in criminal law through the principle of legality. The principle of legality in Article 1 (1) asserts that statute issued from State’s power serves as the only measure to determine whether there is a conduct seen as against the law. As a consequence, the provision of Article 1 (1) of Criminal Code gives no access to punishment which is only based on custom (traditional values). Punishment should be given based on what is clearly stipulated in the Law (to meet lexcerta principle) and the procedures in the Law. Seeing several principles found in Article 1 (1) of Criminal Code, it seems that there is the need to realize law that could provide legal certainty, recalling that positivism and legal certainty are both the main goal to be achieved.

b) Contribution of traditional values to counteracting criminal act through criminal law seen from formal aspect

As what is in material criminal law, formal criminal law also gives a chance to the contribution of traditional values to counteracting criminal act. Contribution of traditional values to counteracting criminal act is seen possible with the issuance of Law on the Principles of Judicial Authorities or Law Number 14 Year 1970.\(^{13}\) Article 23 and 27 of Law Number 14 Year 1970 was also maintained and amended. It shows that there is a commitment given to traditional values involved to counteract criminal act, not to mention the last amendment made in 2009. In Law Number 48 Year 2009 on Judicial Authorities, traditional values are given more chance to be acknowledged. Some provisions in Law Number 48 Year 2009 on Judicial Authorities which give acknowledgement to traditional values related to counteracting criminal conduct comprise Article 5, 10, and 50 explicitly stating that:

1. Article 5 (1): “Judges and constitutional court judges are responsible to investigate, follow, or understand legal values and the sense of justice that grows in society”.
2. Article 10 (1): “courts cannot reject to investigate, judge, and decide a case proposed because law is taken as inexistent and unclear, but they have responsibility to investigate and judge”.
3. Article 50 (1): “the decision made by a court must contain certain Articles of related Laws or unwritten sources of law (coercion from the writer), which serves as the basis of judgment”.

The responsibility of judges to find out, follow, or understand legal values and sense of justice in society assertively implies that traditional values have to be taken into account by judges in deciding a case. Judges should not only refer to Law in deciding a case. This responsibility is meant to realize justice in society. The

\(^{11}\)Ibid., p. 35 et seq.
\(^{13}\)see Article 23 and 27 of Law No. 14 Year 1970. Article 23 (1) stating: “All court ruling...must consist of particular Articles of related regulation or unwritten source of law.”, while the provision of Article 27 of Law Number 14 Year 1970 states: “Judges as law and justice enforcers are responsible to investigate, follow and understand the values of living law.”
judges’ decision that does not reflect any justice in society are usually opposed by the members of society and it often encounters dead end.

The provision of Article 10 (1) of Law Number 48 Year 2009 on Judicial Authorities holds the same purpose in terms of reinforcing traditional values to counteract criminal act. The absence of possibility to reject to investigate, judge, and decide a case proposed because law is seen inexistent or unclear also implies that Judges are given an authority to figure out their own way to enforce law. To find out the way, traditional values also serve as a source the judges should refer to, meaning that when judges encounter dead end in handling a case with the Law used as the basis for the decision, the judges are then suggested to refer to unwritten sources of law, including traditional values. Therefore, in the provision of Article 50 (1) of Law Number 48 Year 2009 on Judicial Authorities, there is likelihood for unwritten source of law to be used as a basis of judging by judges.

It can be said that contribution of traditional values to counteracting criminal law has wider access to realization, but in reality, the involvement of traditional values used to counteract criminal act often raises some issues, such as the one caused by irrelevance of Laws used to counteract the criminal act. Moreover, the existing regulation of criminal law related to counteracting the act is not properly provided in the Legislation which should serve as the basis of law enforcement. In other words, Legislation needs to be strengthened and made more explicit in terms of to what extent traditional values function as the basis of the application of law enforcement.

Concept Reconstruction required to Counteract Criminal Act by Means of Traditional Values-based Criminal Law

Urgency of Concept Reconstruction required to Counteract Criminal Act by Means of Traditional Values-based Criminal Law

This paper follows a perspective implying that law is not a finite scheme, but it is a process. As a consequence, the reconstruction of law is inevitable. It is an urgency to reconstruct concept of counteracting criminal act by using criminal law because of some reasons. Firstly, urgency is related to using criminal law as a tool to counteract criminal act. In this context, urgency of the reconstruction of criminal law is based on reality implying that criminal law has failed to counteract criminal act. This is marked by sharp criticism regarding its use and negative impacts. Secondly, urgency is related to the need of reconstruction itself. In terms of the need, urgency of the reconstruction of criminal law is mainly based on political and sociological reasons.

Politically, the reconstruction of criminal law is an effort done to put the criminal law in line with the idea of national law which is according to Pancasila and the 1945 Constitution of the Republic of Indonesia. In other words, the reconstruction is aimed at realizing national criminal law coming from the perspective of the nation, while sociologically, this reconstruction is based on the demand which encourages the criminal law to become a reflection of values of life that grow in society; criminal law should become a tool to help to maintain the values of life growing in society. In a Vago language, Tamanah cited “Every legal system stands in a close relationship to the ideas, aims, and purposes of society.” Law that fails to reflect the idea and the intention of society will lose its essence as a law. It can be worse when in this condition law will only come as a burden and becomes counter-productive.

New Construction of Counteracting Criminal Act by Means of Traditional Values-based Criminal Law

Previously, it was mentioned that the state law has opened more possibilities for living law to be used to counteract criminal act, but in Law Number 8 Year 1981 on Criminal Procedure Code, the concept used to counteract criminal act by means of criminal law is only monopolized by the law of state. As a result, according to Law Number 8 Year 1981, the case is only handled based on Laws. The monopoly done by the law of state in the process required to settle criminal cases is clearly stated in the provision of Article 3 of Criminal Procedure Code: “Justice is only executed according to what is regulated in this Law”. The monopoly of State law in the process of settling criminal cases is also strengthened by the provision of Article 284 of Criminal Procedure Code, stating:

1. Related to any conduct that broke the law before the Law Number 8 Year 1981 was stipulated, this Law was already applied earlier.
2. Within two years after this Law was issued, all cases must comply with this Law, except temporarily for special provisions of criminal procedure involved in certain Laws until amendment or the Law is declared no longer valid.

From the provision of Article 3 in conjunction with Article 284 of Criminal Procedure Code, it is clearly reflected that counteracting criminal act using criminal law by complying with the mechanism of criminal justice can only be done in the compliance with the state law: Law Number 8 Year 1981 which does not give...
any possibility for living law as a means of counteracting any criminal cases. When the provision of Article 3 of Criminal Procedure Code is related to other Articles regulating the stages required to resolving criminal cases,17 the counteraction of existing criminal act which complies with the Law Number 8 Year 1981 is described as follows:

Figure 1. Counteracting Criminal Act by Means of Existing Criminal Law

In terms of paying attention to international tendency in the form of settling the criminal case based on restorative justice and the negative consequence of criminal justice and social issues among society in Indonesia, the concept of counteracting criminal act in the future can be realized by reconstructing the provision of Article 3 of Law Number 8 Year 1981 by adding one Paragraph, so that the new formulation of the provision of Article 3 of Criminal Procedure Code is presented as follows:

Article 3 of Law Number 8 Year 1981 on Criminal Procedure Code:
1. Justice complies with the provisions of Law Number 8 Year 1981.
2. Each process required in the criminal justice must proceed with the process of reconciliation between the criminal and victim or anyone as a representative.

Based on the reconstruction of the provision of Article 3 of Criminal Procedure Code, the new reconstruction needed to counteract criminal act by means of criminal law is described in Figure 2:

Figure 2. New Construction of Counteracting Criminal Act by Means of Traditional-values Criminal Law

According to the provision of Article 3 (2) of Criminal Procedure Code that has been constructed, counteracting criminal act by means of criminal law does not only involve investigation/enquiry, charges, and investigation in courts, but reconciliation that involves parties, especially the criminal and victim, needs to take place before each stage. The concept of counteracting criminal act is actually based on basic assumption that implies that criminal act is a conduct that breaks the law individually and it also breaks the state law. As a consequence, reconciliation between the involved parties is highly recommended, while bringing the case to court is secondary.

Theoretically, the concept of counteracting criminal law by encouraging reconciliation between parties is relevant to the characteristic of criminal law itself, or it is known as remedial (the last solution). It means that criminal law must be used when no other solutions are effective to counteract criminal act. When the reconciliation which precedes each stage is considered effective, as mentioned previously, criminal law is just seen as secondary.

Closing
Conclusion
Based on the results of the research, it can be concluded that:

a) Contribution of traditional values to counteracting criminal act is given wider chance, but regulation should be made clearer to avoid any possible conflict when it is implemented.

b) New construction related to counteracting criminal act by means of criminal law is done by reformulating Criminal Procedure Code as an operational norm in counteracting criminal act.

Recommendation

a) There must be a clearer and more systematic regulation at operational level to counteract criminal act.

b) The existence of criminal justice should be acknowledged and its negative impacts should also be minimized. Criminal justice as a tool to counteract criminal act needs to be supported by the existence of traditional values as a basis of resolving criminal cases. It implies that in the mechanism of new criminal justice, efforts to resolve criminal act based on traditional values are still required, one of which is the reconciliation that has to be performed between two parties through discussion.

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