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Comparison of Several Criminal Law Provisions Between the Indonesian Criminal Code and the Criminal Code of Other Countries: A Brief Overview

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Abstract

The purpose of comparative law is to help trace the origins of the development of the same conception of law throughout the world. If examined further, the purpose of comparative law is not merely to find out the differences and similarities rather than the laws being compared, but what is important is to know the causes and background of these differences and similarities. With a comparative study of criminal law, Indonesia can take useful materials, especially in the formation of a quality national criminal law and of course in accordance with current conditions as well as Indonesian ideology and ideals. This is indicated by the material of the Indonesian Criminal Code which urgently needs improvement by incorporating various criminal law arrangements from various countries, of course adjusting to the conditions and ideology of Indonesia. This is reflected in various basic problems such as the principles and concepts of the criminal law. So it is necessary to progressively law enforcement officers in operationalizing the criminal law. In addition, a national legal development policy direction is needed that is oriented towards Indonesian ideology and ideals.

Keywords: *Comparative Law; Criminal Law; Indonesia*

Introduction

The discourse on comparative law according to Barda Nawawi Arief in foreign languages is translated as Comparative law (English), Vergleihende rechstlehre (Dutch), Droit compare (French).[1] [1]The term is often translated differently, namely as conflict law or translated into dispute law, which means something different for legal education in Indonesia. According to Barda Nawawi Arief in his

[1] Barda Nawawi Arief, Perbandingan Hukum Pidana, Raja Grafindo, Jakarta, 1990, hlm 3

book citing several opinions of legal experts regarding the term comparative law, among others, the first opinion quoted was Rudolf B. Schlesinger said that, comparative law is a method of investigation with the aim of obtaining deeper knowledge about legal materials. certain. Comparative law is not a set of rules and legal principles and is not a branch of law, rather,[2] it is a technique for dealing with foreign legal elements of a legal problem. The second opinion quoted is the opinion of Winterton who argues that comparative law is a method, namely the comparison of Systems. These laws and comparisons result in comparable legal system data.

The activity of comparing one legal system to another is not only carried out between nations, countries, and even religions, with the aim of finding and taking an inventory of differences and similarities by providing explanations and researching how the law functions and how its juridical solutions are in practice. as well as non-legal factors which influence the explanation can only be known in the history of law, so that a scientific comparison of law requires a comparison of the history of law. So, comparing laws is not just collecting statutory regulations and looking for differences and similarities.

From this legal comparison, it can be seen that in addition to the many differences, there are also similarities. Therefore, it is necessary to know or study because it has various benefits, among others, it can help in the formation of national criminal law in addition to having an important role in the context of relations between nations and so on. In short, comparative criminal law has an important role in all fields of legal studies. The statement above is the background of the importance of comparative criminal law in the legal order in Indonesia.

Some jurists have attempted to define the term comparative law, but some of them have only underlined the purpose and function of the comparative law. [43] In reality, comparative law is a subject of recent origins and growth in which there is still much controversy regarding its nature. Gutteridge has argued correctly in essence that the definition of law has been known to be unsatisfactory, therefore it is appropriate if this becomes a controversy that never produces any results. This, in particular, is a situation where every effort is made to define the term comparative law but since the main problem is not visible, it becomes one of the obstacles.[54] Despite all the difficulties in defining the term, legal experts have provided their definitions in their own way. respectively.

According to Polack, as quoted by R. Soeroso in Barda Nawawi Arief's book, the purpose of comparative law is to help trace the origins of the development of the same conception of law throughout the world. If examined further, the purpose of comparative law is not merely to find out the differences and similarities rather than the laws being compared, but what is important is to know the causes and background of these differences and similarities. The benefits of studying comparative law are to:[65]

1. Legal unification.
2. Legal harmonization.
3. Preventing national legal chauvinism (negatively) and pursuing international cooperation (positively).
4. Understanding foreign law.
5. National law reform.

From these definitions, in general, they state that they only include the functions and purposes of comparative law rather than their basic form and nature. Since comparative law is seen as a vague

[2] Ibid, hlm. 4.
[3] *Ibid*
[4] Gutteridge, Comparative Law, 2nd Edition, p. 2.
[5] Barda Nawawri Arief, Op. Cit., p. 7.

understanding with an indeterminate scope, the experts in their respective definitions only state the results achieved in various fields of social and international relations. This is agreed by Levy Ullman who states that comparative law has been defined as a branch of the science of law in which the aim is to establish a close, systematic relationship between the legal institutions of various countries.

Holland defines the term with the formulation that the comparative method is carried out by collecting, analyzing, and describing ideas, doctrines, regulations and institutions found in every legal system. developing, or at least almost the whole system, by paying attention to similarities or differences and looking for ways to build a system naturally, because it includes what society does not want but has agreed in the context of things that are considered necessary and philosophical because This brings under words and names and derives identity from substance under different descriptions and is useful, for these distinctions indicate in particular the final sense that all or most of the system pursues to implement the best system ever achieved.[76]

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Broadly speaking, comparative law seeks to find legal ideas in various existing legal systems. From several observations, there are similarities in the laws of various nations which have the same origin. In addition to the differences, comparative law teaches us that the similarity of direction between law and the legal development of various nations is caused by having the same origin. On the other hand, it turns out that the laws of ancestral nations are closely related to each other, even though their origins are the same, some have different directions.

If it is associated with the national criminal law that applies in Indonesia until now, which is a legal system inherited from the Dutch colonial period. Although there have been many changes, however, the legal system was structured in accordance with the colonial ideology which was definitely not in accordance with the ideology and ideals of the Indonesian nation. In addition, the Dutch colonial legacy legal system is outdated. With a comparative study of criminal law, Indonesia can take useful materials, especially in the formation of a quality national criminal law and of course in accordance with current conditions as well as Indonesian ideology and ideals.

Method

According to Soetandyo Wignjosoebroto, the 9 methods literally mean ways. Thus, what is called this research method is nothing but a way of searching (and finding the right knowledge that can be used to answer a problem). In this scientific activity, which is called a scientific activity, the search method is strictly controlled and disciplined. All This is for the sake of obtaining information results and conclusions that can be justified according to scientific standards. Then the methodology can also be

[6] "Branche seciale de la science juridque" as quoted by Gutteridge in Comparative Law.
[7] SoetandyoWignjosoebroto, Law: Concepts and Methods, (Malang: Setara Press) p. 97.

interpreted as a collection of methods collected to make research designs, determine the type and number of samples, collect data, and process or analyze data.[8]

The method used in this study is normative, through a comparative law approach. The term comparative law itself can be defined as the systematic study of parts of traditions and legal rules based on a comparison. To qualify something really as a comparative law, requires the existence of two or more legal systems, or two or more legal traditions (legal traditions) or certain parts, institutions or branches of two or more legal systems.[9] From this comparison, elements of similarities and differences between the two legal systems can be found.

Results and Discussion

1. Brief Overview of Legality Principles and Criminal Impositions: Comparison of the Indonesian Criminal Code and the Korean Criminal Code

Article 1 (3) of the Korean Criminal Code :13

> *"where a ststute is Changde Rafter a sentence imposed under it upon a criminal conduct has come final, with the effect that such conduct no longer constitutes a crime, the execution of the punishment shall be remitted".*

Article 1 paragraph (3) of the Korean Criminal Code stipulates that if a law is amended after the imposition of a crime based on the old law against a criminal act and has permanent legal force, where the act is no longer a criminal act, then the execution of the crime can be canceled or removed.

This provision is a regulation regarding the existence of a change in law due to a criminal decision that has permanent legal force, where an action which according to the old law which was used as the basis for the decision is considered a criminal act, but by the new law the action is is no longer considered a crime or crime, then the execution or execution of the crime can be canceled or abolished.

Article 1 paragraph (3) of the Korean Criminal Code shows that the Korean Criminal Code has adopted a modern flow, where punishment is oriented towards criminal individualization which is more inclined to repair or rehabilitation, which in this case contains the principle of modification of sanction, the alteration/ annulment/ revocation of sanctions or the idea of redetermining of punishment.

The provisions as referred to in Article 1 paragraph (3) of the Korean Criminal Code are not found in the Indonesian Criminal Code which is currently in force. Even if there are changes to the law regarding an act which is a criminal act, the scope does not extend to the abolition of the crime or the cancellation of the implementation of the crime, but only to the severity of the sanctions applied. That's not even the judge's decision which has permanent force. This is emphasized in Article 1 paragraph (2) of the Indonesian Criminal Code which states, if after the act has been committed there is a change in the law, the lightest rule is used for the defendant. [1410]

So even though there is a change to the new law which states that the act that was once decided is no longer a criminal act, and the judge has decided a case with permanent legal force based on the old law

[8] Mungin Eddy Wibowo dan Hartono Kasmadi (eds), Panduan Penulisan Karya Ilmiah, (Semarang: Badan Penerbit UNNES Press, 2009), halaman 49
[9] Peter de Cruz, Comparative Law in a Changing World, Second Edition, Cavendish Publishing Limited, Sidney, Australia, 1999, hlm. 3.
[10] Indonesian Criminal Code (KUHP).

which states that the act is a criminal act, then the judge's decision must remain executed or executed. Thus the convict who is serving his sentence cannot be released. This is different from in Korea, the convict must be released.

In addition, the researcher also examines Article 15 (2) of the Korean Criminal Code which is still related to the study above, with the following formulation:

> *"Where a more severe punishment is imposed upon a crime because of certain results, such higher punishment shall not be applied if these results Wet not foreseeable".*[11]

In the article it is formulated that, if a more severe punishment is threatened for certain consequences of a crime, the heavier punishment is not applied if the consequences were not previously imagined or suspected. Article 15 paragraph (2) of the Korean Criminal Code is an affirmation of the impure teachings of Erfolgshaftung (undergoing refinement or modification). This article would like to emphasize that in order to be accountable for one's actions for consequences that are actually not desired, it still requires an element of guilt (dolus or culpa) even in the lightest form.

In the Indonesian Criminal Code in force, this formulation is reflected in Article 187 which states that anyone who intentionally causes a fire, explosion or flood is threatened with:

2nd. with a maximum imprisonment of fifteen years, if as a result there is a danger to the goods;

The 3rd. with imprisonment for life or for a certain period of not more than twenty years if there is a danger to the life of another person and results in the death of another person.

Then in Article 333 paragraph (3) if it results in death, it is subject to a maximum imprisonment of twelve years, and in Article 354 paragraph (2) if the act results in death, the guilty person is subject to a maximum imprisonment of ten years. The articles in the Indonesian Criminal Code above show the formulation of offenses that are qualified or aggravated by their consequences

2. A Brief Overview of Legality Principle Arrangements: Comparison of the Indonesian Penal Code and the Polish Criminal Code

Article 2 of the Polish Criminal Code :[12]

(1) If at the time of adjudcation the law in force is other than that in force at the time of the commission of the offence, the new shaal apply, however, the former law should be applied if it is more lenient to the predator.

(2) If according to the law the act referred to in a sentence is no longer prohibited under threat of penalty, the sentence shall be expunged by operation of law.

In Article 2 paragraph (1) of the Polish Criminal Code, it is formulated that if at the time of the court's decision, the applicable law is different from the one in force at the time the crime was committed, then the new law will be applied, but the previous/old law should be applied, if it is easier for the perpetrator.

[11] Ibid
[12] 16 Poland Penal Code

In Article 2 paragraph (2) it is stated that if according to the new law, the act designated/threatened with a criminal offense is no longer prohibited by a criminal threat, the punishment will be abolished with the enactment of that law. This article is a regulation regarding changes in the law. There are two things that are regulated in this article, namely:

a. In the event that the new law still declares the act regulated by law as an act that can be punished, then the new law must be declared valid, but if the old law makes it easier for the defendant, then the old law which must be enforced.

In the event that the act according to the old law is no longer a crime according to the new law, then according to the old law it is declared null and void with the enactment of the new law.

a. In principle, the regulation regarding changes in the law as regulated in Article 2 of the Polish Criminal Code is almost the same as the regulation of Article 1 paragraph (2) of the Indonesian Criminal Code, namely that what is applied is a law that includes lighter sanctions for defendants. However, between the Polish and Indonesian Criminal Codes in terms of

there are differences regarding the changes to this law, namely:

a. In the Polish Criminal Code there is an affirmation that in principle new laws must take precedence or are declared valid, so there is no difference between the old law and the new law, here applies the principle of lex posterior derogat legi priori which means (in if the level of regulation is the same) then the regulations that are set later (the new regulations) urge the previous regulations.

b. In essence, Article 1 paragraph (2) of the Indonesian Criminal Code is a legal arrangement that applies during the transition period in the event of a change in legislation, which will be enforced which is beneficial to the defendant. So what is enforced when there is a change in the law is the old statutory regulation or the new statutory regulation if it is beneficial for the defendant.

3. A Brief Overview of Probationary Criminal Sanction Arrangements: Comparison of the Indonesian Criminal Code and the Norwegian Criminal Code

Article 51 Norway :[1713]

"An attempt shall be punished by a milder penalty than a completed felony. The penalty may be reduced to less than the minimum provided for such felony and to a milder form of punishment.

In Article 51 of the Norwegian Criminal Code it is formulated that the trial sentence is lighter than the completed crime; The punishment may be reduced to less than the minimum sentence stipulated for the crime in question or be subject to a lighter type of punishment.

Article 51 of Norway stipulates that this probationary criminal sanction is lighter than the completed crime, when compared to the Indonesian Criminal Code there are several differences regarding this probationary arrangement, namely:

a. In the Norwegian Criminal Code under Article 51, the length of the lighter sentence for probation is not determined with certainty

[13] Criminal Code of the Kingdom of Norway

in the law, while in the Indonesian Criminal Code it is determined that it can be reduced by one third as stipulated in Article 53 paragraph (2). So the Indonesian Criminal Code can be said to be more certain even though there is this word can according to the translation of Prof. Moeljatno.

b. Penalties regarding trials in the Norwegian Criminal Code regarding a reduction based on a special minimum are not recognized in the Indonesian Criminal Code, so sanctions for probation do not recognize reductions based on special minimum criminal sanctions.

c. In the imposition of sanctions based on article 51 of the Norwegian Criminal Code, not only on the number or duration of punishment but also on the type of crime, in the Indonesian Criminal Code only on the number of crimes.

4. A Brief Overview of Passive National Basic Arrangements: Comparison of the Indonesian Criminal Code and the French Criminal Code

Article 113-7 of the French Criminal Code :[1814]

"French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, Committee by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offense took place" .

Article 113-7 of the French Criminal Code is an arrangement for the protection of French citizens abroad or known as the principle of protection (passive national principle). The article asserts that French criminal law can be applied to every crime (felony), as well as to any offense (misdemeanour) punishable by imprisonment, committed by a French person or a foreigner outside France, if the victim is a French person at the time the offense occurred. .

So the protection of French citizens who are outside France based on the principle of protection (passive national principle) is firmly affirmed in the French Criminal Code. This arrangement is very different from the national protection (passive national) contained in the Indonesian Criminal Code, because in the Indonesian Criminal Code the regulation on the principle of protection (active national principle).

only in legal interest country Indonesia no on individuals regulated in the Indonesian Criminal Code as follows:

a. Crimes against state security and the dignity of the president (Article 4 paragraph 1).
b. Crimes regarding stamps or brands issued by the government (Article 4 paragraph 2).
c. Forgery of debt securities, debt certificates at the expense of Indonesia (Article 4 paragraph 3).
d. Offenses listed in title XXVIII book II committed by Indonesian civil servants outside Indonesia (Article 7)
e. Shipping crimes listed in the title XXIX Book II (Article 8)

Thus, the legal interests of Indonesian citizens (WNI) abroad are not included in the National Interest which is protected by national law. The protection of individual interests of Indonesian citizens abroad (ie as victims of criminal acts committed by foreigners) is left entirely to the law in force in the foreign country concerned.

[14] 18 France Penal Code

5. A Brief Overview of Material Illegality: Comparison of the Indonesian Criminal Code and the Bulgarian Criminal Code

Article 9 of the Bulgarian Criminal Code[1915]

(1) Crime shall bea an act dangerous to society (Action or inaction), whicg has been culpably Committee and Rich has been declared punishable by law.
(2) Criminal shall not bea an act which, although formally containing the elements of crime provided by law, because of its insignificance is not is not dangerous to society or its Sanger to society is obviosly insignificant.

Based on Article 9 of the Bulgarian Criminal Code, an act is categorized as a crime if the act endangers the community either by doing or not doing which the act deserves to be reproached and declared as punishable by law.

However, an act is declared not a crime if it does not endanger the community or the nature of the danger is very small.

even if the act has fulfilled the elements as stated in the law.

The criminal provisions as formulated in Article 9 of the Bulgarian Criminal Code are identical with materially against the law. When compared with the Indonesian Criminal Code, the formulation is not listed in the Indonesian Criminal Code. Because of the disgraceful nature of an act that can be categorized as a crime only those formulated in the law or formally, namely the legality principle (according to Article 1 paragraph (1) of the Criminal Code) regardless of whether the danger is large or small for the legal interests to be protected. Article 1 of the Indonesian Criminal Code also does not provide clear juridical limits regarding the definition of a criminal act, only providing a juridical basis for when an act can be said to be a criminal act.

Closing

1.Conclusion

Based on the results of the research and discussion that have been described previously, it can be concluded that the material of the Indonesian Criminal Code really needs improvement by incorporating various criminal law arrangements from various countries, of course adjusting to the conditions and ideology of Indonesia. This is reflected in various issues, such as in the principle of legality, criminal prosecution, criminal sanctions, passive national principles, materially against the law, and so on.

2.Suggestion

With the current condition of the Indonesian Criminal Code, it is necessary to have progressive law enforcement officers in operationalizing the criminal law. This is only a short-term solution and has potential weaknesses, for example, not all officials have the same understanding. To be more sustainable, a national legal development policy direction is needed that is oriented towards Indonesian ideology and ideals through concrete steps such as to immediately review and ratify the Draft Law (RUU) of the Criminal Code.

[15] 19 Criminal Code of the Republic of Bulgaria

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