Initiating of the Principle of Harmony in Criminal Law at the Community Relating to the Culture of Punitive Action based on the Perspective of Pancasila Law Philosophy

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Abstract: The culture of punishment in Indonesia is not only fertilized by law enforcers (Advocates-Investigators-Prosecutors), but also in line with the culture of reporting criminally, even to minor cases. The logical consequence of the adoption of the civil law system by Indonesia through the principle of concordance does bring up a positivistic-linier-mechanistic-closed mindset. However, the surprising thing is that the Dutch who are always blamed as the culprit of the nature of the criminal law, actually show remarkable legal achievements. At the moment, all the Penal Institution and House of Detention in Indonesia are overcapacity, in contrast to what is happening in the Netherlands. Where since 2004 until now has closed as many as 24 (twenty four) prisons. This is certainly quite surprising when compared between the Dutch who glorify the principle of individualism with Indonesia that has a principle of kinship.

1 INTRODUCTION

The emergence idea of the concept of the State of Welfare Law (welfare state) is a form of the concept based on the failure of the Classical Constitutional State / Formal / Liberal in relation to the prosperity of its citizens. The concept of welfare state is an expansion of the principle of the Constitutional State that is also embraced by the State of Indonesia through Article 1 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia (UUD NRI 1945).

Padmo Wahyono (1986:7) explained that the history of the state shows that the filling of understanding about the Constitutional State always evolves in accordance with the level of intelligence of a nation.

While Philipus M. Hadjon (1987: 72) did not agree with the term Constitutional State equated with the term rechtsstaat or rule of law. Moreover, if it is connected with the concept of recognition and the dignity of human beings. Philipus M. Hadjon adds that "the concept of rechtsstaat" rests on the basis of a continental legal system or usually called the Civil law, or Modern Roman Law. While the concept of Rule of Law is based on common law system. The civil law character is "administrative", while the character of the common law system is "judicial". Despite the duality of the terms of the rule of law, these two terms can be used in the meaning of the Constitutional State.

To answer that problem, then we should return to the view of the philosophy of life of the Indonesian Nation contained in the Fourth Paragraph of the Preamble of the 1945 Constitution, as a form of Indonesian Legal Politics which then gave rise to the Indonesian Legal System.

In the development of Criminal Law in Indonesia, classically using logic in the Criminal Code, explained by Eddy Djunaedi Karnasudirdja (1983 : 7-8) that the formulation of the criminal philosophy adopted is not so clear. The criminal philosophy embraced in Wetboek van Strafrecht of 1881 was "vengeance" (werking der vergelding). However, the philosophy was abandoned since WvS of 1886 as a result of the influences of the Neo-Classical School which have been influenced by Psychology Science, which wishes that the criminal sanctioned by the judge should be in accordance with the personality of the offender that is known as the Individualization Principle as contained in Individualization Principle as contained in Article 14a Criminal Code. The new Individualization principle entered Indonesia at 1927 through the enactment of Wetboek van Strafrecht

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voor Nederlandse Indie. However, the application at that time was in the interest of the mother country, i.e. Dutch, so, the philosophy of retaliation is the only paradigm that is established.

The consequence of the positivistic paradigm that was applied influence the failure of the Criminal Law to restore to its original condition (restitution in integrum) to the conflicts that occurs in society. The said failure was marked by the unavailability of Penal Institution (LAPAS) and House of Detention (RUTAN) or overcapacity (Marbun, 2017a:191-192)

More explicitly, the views of CFG. Sunaryati Hartono (in Sidharta, 2009 :1-2), in describing the factors that caused such neglectful conditions, among others, is the exploding demands, the egoism and individualism of Indonesians in the 21st century greatly increased, and the amount of the population increase rapidly.

2 RESEARCH METHOD

This is a library research which uses analytical descriptive, describing systematically a criminal law in details. The goal of this method is to collect data information through books, articles in journals, law magazine, and other supporting materials. The category of this research is a yuridical normative law or it is called as a library law research. Inductive method is used to discuss the special and concrete facts and then discuss in general.

There are two ways in discussing the facts: 1) status approach to describe law products in details, 2) conceptual approach to discuss the law products in the point of view of law experts and doctrines recently and develop it into a new law concept and law code.

Based on the above description, the Researcher filed the problem formulation as follows: "How is the role of Pancasila Law Philosophy in shaping the right philosophy of punishment in Indonesia?"

3 RESULTS AND DISCUSSION

Renewal of the Penal Code will be a waste and meaningless if only focused on the Criminal Law (Criminal Code) and Criminal Procedure Code (Criminal Code), if the criminal law paradigm is not also made a shift of perspective. Thus, a criminal law reform or legal substance reform must be accompanied by a renewal of the science of legal crime and the legal culture and the renewal of its legal structure reform. Therefore, comprehensive, systematic and holistic reform includes the renewal of material criminal law, formal criminal law and the law of criminal implementation. (Marbun, 2017b).

Criminal Law reform will become more difficult to realize when, according to Barda Nawawi Arief (1994:11-12), law scholars are entangled in old and static patterns of thought that it will be very difficult to accept a change, which will ultimately hamper the development of criminal law.

The phenomenon of overcapacity LAPAS throughout Indonesia mentioned above, is nothing but the product of the hegemony of Philosophy of Legal Positivism as the perspective of most of the Academics and Legal Practitioners. Against the way that view has been criticized by many Legal Experts who are beginning to realize the negative side of the Philosophy of legal Positivism. The view of Widodo Dwi Putro (211: 4) explains that the adherents of Legal Positivism really consider the truth of Legal Science and Legal Practice to be final on the line of legal positivism. Legal Positivism which wishes to purify the legal science by cleansing of non-legal elements leads to the legal science of tending to reduce complex legal problems into something simple, linear, mechanical, and deterministic that undermines the power of legal reasoning and legal anticipation the development of society.

As according to Moh. Mahfud MD (2006:23), that Indonesia does not adhere to the concept of rechsstaat or rule of law, but form a concept of a new Constitutional State, such as: The Pancasila law state, which is a crystallization of views and philosophy of life loaded with the noble values of ethical and moral of the Indonesian Nation, as stated in the preamble of the UUD NRI 1945 and implied in the articles of the 1945 Constitution of the Republic of Indonesia.

More explicitly expressed by Padmo Wahyono(1989:15-16), where the paradigm of the western world that begins from the assumption that human beings are born free and this free humans form a state with a covenant social (social contract). Before he forms a country he has natural rights that must be protected and become the limiting factor than the state he forms. The way of view, according to Padmo Wahyono, is called individualistic or individual principle. The way of view is not followed by Indonesia in living in groups, whether in the framework of nation, community and in the state.

Such a way of thinking, of course, would be a stranger to the legal scientists today. Concerning of this, Bernard Arief Sidharta (2009:173-174) asserted that the starting point of the Indonesian view of life is the belief that man is created in unity with his neighbour; the individual and the social unity of his

life (society) is a duality. So togetherness with each other or association of life it is an essential element in human existence. Elements, body, tastes and ratios together embody aspects of individualism of human being, and the element of harmony embodies the social aspect of man; aspects of individualism and aspects of sociality is a unity that can not be separated from one another.

The principle of harmony or "harmony", according to Soediman Kartodiprodjo (in Kartodiprojo, et.al. 2009 : 57-60) is a mean of completion for human being, in addition to Body, Sense and Sensibility, in group life, and not as being separate from each other, and then, for some reason to live together based on kinship which is the core soul of Pancasila. In the context of the Principle of Harmony, then because of the life in group there is new benefit when living with Rukun, then this tool of human equipment will be called Rukun Element in human life. Thus the human being consists of these four elements, namely: Body, Sense and Sensibility and Harmony. With this principle of Harmony man will achieve happiness in his life. If Indonesian people see the purpose of human life is the happy life as it was unfolded, then the manner to find a way to succeed a happy life, the way in using the equipment of life as well as possible, that is the way of deliberation, the way of consensus.

While Bernard Arief Sidharta (2009:9), explains through the concept of Pancasila Law which requires the existence of order and regularity in the inner sphere of peace, the joy of socializing among others, friendliness and welfare that allows the implementation of true inter-human interaction. Therefore, the law governed by the spirit of Pancasila is a law based on the spirit of harmony. Hence the law is directly directed to bring about social justice which gives the community as a unity and each citizen of the welfare society (materially and spiritually) equally in a proportional equilibrium.

Referring to the Principle of Rukun, which is the "handbrake" of the above-mentioned-taste-ratio principle, Philipus M. Hadjon (1987:90), defines the elements of the concept of Pancasila Law State as follows:

- There is a harmonious relationship between and the people based on harmony
- The existence of a proportional function relationship between state power;
- The principle of dispute settlement conducted by deliberation and the judicature is the last means if deliberation fails;
- Balance between rights and obligations.

Philipus M. Hadjon (1987: 87) further recommends, based on the characteristics of Pancasila Constitutional State, the form of legal protection as follows:

- Efforts to prevent the occurrence of disputes or to the extent possible reduce the occurrence of disputes; in this connection the means of preventive law protection should take precedence over the means of repressive law protection;
- Efforts to resolve disputes (laws) between the government and the people by means of deliberation;
- The settlement of disputes through the judiciary is the last resort, the judiciary should be an "ultimum remedium" and the judiciary is not a forum of confrontation so the judiciary must reflect a peaceful and peaceful atmosphere, especially through its procedural law.

In relation to the settlement effort through the judiciary which emphasizes ultimum remedium, it is worth noting the description of the judicial atmosphere by Roeslan Saleh (1983) that explains that trying not to do something about things outside the defendant. Trial is a process that has painstakingly taken place between humans and humans. Trial is a humanitarian quest for the realization of the law. Judging without a human relationship is essentially impossible. Therefore, judging without a human relationship between the Judge and the Defendant is often perceived as treating an injustice. And a penalty imposed after a settlement without regard to the litigants will be a destruction of the future. Such means of trial do not only harm the maker, but also harm the common good.

The phrase of Roeslan Saleh and Sudarto constitute the observation of every trial process, which in essence facing each other with human beings, where in the process does not display the human side but the sequence of the series of letter by letter, sentence by sentence, so that the loss of the spirit of dispute settlement between man who was awarded reason and common sense. So people face each other and hostile to each other.

According to the Researcher, any influence affecting the penal system in Indonesia should be through the process of filtering in values structure, principles, and norms contained in Pancasila, as the source of all sources of law. The said screening includes the infiltration of universal legal principles. That universal legal principles can not immediately apply to a country. Thus, it is clear that the enactment of a law, depends on the atmosphere of kebatinan (philosophy) that overshadow a nation.

Based on the above description, the philosophy of punishment within the framework of the Criminal Law System in Indonesia, its design is guided by Criminal Law Politics which is nuanced by the Paradigm of Pancasila Law. Where through the point of views of philosophers and jurists in Indonesia, has a very striking difference with views that have been grown. In the case of punishment, the Pancasila Legal Paradigm elaborates between the interests of victims, communities and perpetrators. Criminalization of the perpetrator, in the context of Pancasila Law Philosophy, is not primary but the main thing to do is to create peace in society.

4 CONCLUSIONS

Pancasila as a teaching system of philosophy, supported by 4 (four) main principles, namely the principle of group, the principle of taste, the principle of ratios and the principle of harmony. Group-taste-ratio principle is a manifestation of individualistic understanding, while the principle of harmony is a manifestation of socialist ideology. The principle of harmony in Pancasila Law Philosophy refers to the principle of kinship that promotes peace within the community. The use of the principle of harmony is one of the virtues in the Philosophy of Pancasila Law so that the criminal law is not focused on the natural appetite of every person who feels disadvantaged. The State, through the Harmony Principle, is forbidden to allow feelings of vengeful resentment within the victim and the community so as not to view the perpetrator as an Indonesian Man.

The Recognition of the loss of the victim-is individualistic, must be balanced with the interests of the perpetrator who in the shade of Pancasila is part of the Indonesian Man. In the Philosophy of Pancasila Law, Indonesian Man is a monoplural creature, which by nature is a social being and will always live in social interaction. Thus, in the Philosophy of Pancasila law wish form the establishment of the philosophy of punishment that reconcile the interests of the perpetrators, the interests of victims and the interests of society.

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