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THE IMPLEMENTATION OF ULTIMUM REMEDIUM PRINCIPLE IN ECONOMIC CRIMINAL LAW OF INDONESIA

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ABSTRACT

The ultimum remedium principle has been widely accepted as an idea to control the state in criminalization and to use criminal law since it has the most repressive and intrusive sanction. This research tries to find how the principle is implemented in economic criminal law in Indonesia. The research is used both normative and empirical legal research. The data is collected from criminal law enforcement agencies. The result of the research shows that the principle is not fully considered in the process of criminalization. However the principle is implemented by making available civil or administrative procedure beside criminal process which gives priority to choose administrative procedure. The court, both Indonesian Constitutional Court and Supreme Court and the courts underneath have supported the implementation of the principle through their decisions. It is recommended that principle should be formally placed in certain law as guidance for all criminal law institutions and agencies in conducting their authority.

Keywords: Ultimum Remedium Principle, Indonesian Criminal Law, Economic Criminal Law, Criminalization.

INTRODUCTION

The Ultimum Remedium Principle (URP) has since long become an academic discourse in criminal law. The principle often appears in several other terminologies such as ultima ratio, or last resort, or subsidiary principle and it usually refers to the same meaning. Some scholars also call it as minimum principle (Ashworth & Jeremy, 2013). It is sometimes also referred to the subsidiary or proportionality principle. The discussion over the principle also relates to some others disciplines, such as philosophy and ethics. (Jareborg, 2005). One scholar also approaches the principle from constitutional law (Wirjono, 2011).

The principle should be considered in the process of criminalization. Due to the intrusive and repressive characteristic of criminal law would not be applied as long as other laws, such as private or administrative procedure are available (Malander, 2013) Sometimes, the URP is aimed at limiting the power of legislature to enact a criminal law, except it is badly need to protect the public interest or in Germany is called as rechtsguter (Duff, 2013). However, there is also changing in understanding about the principle. Currently, the understanding of the URP includes how to minimize the implement criminal law.

In Indonesian, beside Criminal Code nowadays there are about 157 special criminal laws that still come into effect and more than half of them may be categorized as economic criminal law (ECL). The condition is quite worrying since economic activity mostly related to private relation or administrative policy of government. Therefore it is not necessarily a criminal conduct. Such a condition may also result in problems such as lack synchronization and harmonization in Indonesian Criminal Law System. There will be difficult to build good coordination among the law enforcement agencies in criminal law system. This article will discuss the issues related to the implementation of the URP. How legislature implements the principle in law making process and how criminal law enforcement agencies implement the principle in exercising their authority.

RESEARCH METHOD

The method applied in this research is both normative and empirical regal research. It also applied some court decisions, both general court and constitutional court. While the empirical legal research is used in understanding how the law enforcement agencies implement the URP in executing their authority. The data collected both primary and secondary data. Primary were collected through interview with criminal law agencies such as investigator, both police and special investigator and prosecutor. Secondary data was collected at some law enforcement institution. The data collected then analyze qualitatively.

RESULT AND DISCUSSION

Implements of the URP in Law Making Process

As a Latin terminology, (though some say that it does not have historical relation with Romanic law) (Dubber, 2011), in Dutch, ultimum remedium means *het laatste redmiddel* or Last resort. It is said that the concept of ultimum remedium was at the first time appeared in Dutch Parliament hearing in 1880 when Modderman, Justice Minister answering member of parliament about Dutch Criminal Code (Oleg, 2012). He said that criminal law had to be the last resort in anticipating various problems in society.

In Indonesia, the URP always appears in discussing the function of criminal law. There are some former Indonesia criminal law scholars that had discussed the URP such as Soedarto (Soedarto, 1987) and Ruslan Saleh (Saleh, 1981) in their books (BPHN, 2017). They seems to agree that the URP was as the guidance in law making process that criminal law should be the last choice in responding to wrongful Conduct. However, current criminal law scholars perceive that the URP is not only limited to the law making process but also in law enforcement (Muladi, 2013)

Even though it is accepted that the URP become one of principle in criminal, in practice it seems that in legislation it does not fully considered. It is proved from the increasing number of special criminal law enacted. Currently, there are almost 157 special criminal laws, and 73 of them can be classified as the ECL. Those laws can be classified in two categories. The first, there are laws that just contain criminal act and punishment. So, they do not contain regulation on criminal procedure and special law enforcement institution, such as special investigation institution. The second classification is that laws that also contain special procedure or criminal law agencies. There are also regulations regarding civil or administration measures. In custom

and duty violation for example, the official give priority to take administrative procedure before criminal procedures. Some investigators even may terminate the investigation as long as the offenders are willing compensation to states loss due to violation.

Then, how is the principle adopted in legislation? It seems that the URP never appears in legislation or formal statue. The only one statue place where the principle appears is in Environmental Law. They are Law No. 23 year of 1997 concerning Environment which is the replaced by Law No. 32 of 2009 concerning Environmental Protection and Management. Law No. 23 of 1997 uses the subsidiary principle terminology, while Law No. 32 of 2009, paragraph 7 of general explanation, uses the URP terminology.

Implementation the URP in Formulating the Sanction

Laws on economy is not necessarily pure criminal law (mala in se), but mostly they belong private or administrative law. Ideally, the violation should be solved through private or administrative law procedure. But in order to strengthen the enforcement, they should be strengthened with criminal sanction. According to the URP, civil or administrative procedure must become the first priority. However, not all laws adopt the principle. Law No. 11 of 2008 concerning The Electronic Transaction and Information for example does provide administrative procedure in case there is violation to the law. However it has civil and criminal procedure.

Another standard in evaluating the URP is regulation about treatments (*matregel*) that can be given by investigator or prosecutor. A treatment is a kind of measure can be taken by such officials before taking criminal procedure. Only few laws contain regulations on treatment, such as Law No. 7 1995 concerning Economic Crime Prevention. The treatments that can be ordered such as put a guilty company under trusty, and retain the profit of a company, or disclose the company. It means that the URP is not well adopted in formulating the system punishment and treatment (Zainal, 2010).

The availability of administrative procedure can also be a standard in evaluating the implementation of the URP. Tax Law, Custom and Duty Law and Law on Antimonopoly and Unfair Competition do gives board authority for investigator to take administrative procedure. Law on Copyright for example requires the parties firstly solve the case through alternative resolution. Law on Protection and Management of the Environment also gives authority to law enforcement official to take civil or administrative procedure firstly before criminal procedure. However it cannot be applied if the violation belongs to the so called certain formal criminal act which is relate to intentional violation of quality standard of waste water, emission and nuisance.

The URP in Court Decision

According to Indonesian 1945 Constitution, the judiciary power is divided into the power under the Supreme Court and Constitutional Court. The Supreme Court of Indonesia (The SCI) and the courts underneath have authority in hearing civil, administrative or criminal case, while Constitutional Court of Indonesia (The CCI) has the power mainly to review a law against the Constitution. Both branches of judiciary power in fact can play role in giving the meaning and shaping the implementation of the URP.

The CCI has delivered some decisions that support the existence the URP in it decision. At least there are 5 the CCI decisions that support the principle. All decisions have nulled the provision in the Laws that criminalized certain conducts that are not criminal offence before. Decision No.55/ PUU-VIII/2010 for example nulls article 21 and 47 paragraph (1) and (2) of

Law No.18, 2004 concerning Plantation that criminalized act that actually result from the dispute on the land (in this case dispute on traditional or so called adat right).

The SCI underneath has also strengthen the URP in their decisions. The Central Jakarta District Court in its decision No. 234/pid.B/2011 for example has ruled to acquitted the accused in tax evasion case. The consideration is that Tax Law makes possible that tax violation is settled first through administrative process. That decision then reinforced by Jakarta High Court. However, The SCI nulled the decision and punished the accused two years with three year probation. The consideration is that Tax Office has tried to settle the case through administrative procedure.

The Urgency of the Implementation

As the URP is function a tool to protect the state's policy and public from the harming conduct by criminalizing it. One of cornerstone in criminalization is the principle of ultimum remedium. Bassiouni for example has proposed criteria in criminalization and decriminalization. They are: the balance between sources used and goals planned, analyzing cost and benefit and the social impact of criminalization or decriminalization (Barda, 2008) meanwhile, in Indonesia, a National Symposium on Criminal Law Reform in 1980 had also proposed some criteria for criminalization. They are; the conduct condemns by the people because it harm the public; the cost for criminalization is in balance with the result achieved; the criminalization will not burden law institution and the conduct really hamper the national goal. Other criterion is that from economic perspective, such as the principle of utility and efficiency (Posner, 2003)

Even though there have been some criteria as guideline for criminalization, law is also a result of political process that much influenced by political consideration or interest in parliament. That is why the process of criminalization in Indonesia seems uncontrollable. The condition may result in difficulty to create synchronization and harmonization among those laws.

Another argument why criminalization should be scrutinized, is that with the more new law enacted, there will be people will be engage in criminal justice. There will be more arrest and detention. There will be more accusation and punishment. That can also be reason why overcapacity happens almost in all Indonesia prison. In the end, that will burden the state budget to facilitate hundred thousand of prisoners. While if such conducts solve through administrative of civil process so many sources and cost will not be needed. And there will be not so many citizens should be criminalized and be criminal.

CONCLUSION

The formal source of the URP is only found in general explanation of Law No.32 of 2009. Implicitly, the recognition to the principle can be found in several decisions of Constitutional Court of Indonesia. In economic criminal law the URP usually appears by providing civil and administrative law procedure beside criminal procedure. It authorizes the investigator to give priority in applying administrative procedure instead of criminal law procedure. Special investigator has broader authority to apply administrative procedure compare to police investigator. The court has not yet consistent in implementation of the URP in it decision. Since the URP is very urgent in controlling criminalization, penalization and overcapacity, all criminal law enforcement agencies should always take into account the URP in conducting their authority by giving priority to administrative instead of criminal procedure.

ENDNOTE

1. Decision of Central Jakarta District Court in its decision No. 234/pid.B/2011.
2. According to Institute for Criminal Policy Research Indonesia are number 9 in term of total number of inmate. See: www.icpr.org.uk
3. In Indonesia now there are about 224.402 prisoner and detainee. That number is about 101.000 above normal capacity. See: http://smslap.ditjenpas.goid/public/grl/current/monthly
4. Indonesian government should allocate 2.4 trillion IDR per year just to provide foods for all of inmates. See: http://nasional.harian terbit.com/nasional/ 2016/04/12

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