

Customary Law Analysis about Criminal Act of Unlawful Sexual Intercourse (Zina) According to the Article 284 of Criminal Code in the Renewal of Criminal Law

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Abstract: The criminal of zina in Article 284 of the Criminal Law based on customary law sanctions are too mild, just call for imprisonment for ever 9 months. It caused the law does not make the deterrent. In terms of the customary (adat) law offense of zina shake the public balance sheet, breaking the relative class privilege, violate moral norms, religious norms and legal interests of a person as a husband, so punished "swinging traps" that is inserted into a large fish traps filled with various kinds of thorns then swung in the river to death in Lampung. In Aceh zina punished muhsan torment each hit 100 times and exiled for an entire year for which no muhsin hit 50 times and exiled half years. The Dayaks, the husband killed his wife and the man allowed his partner, when the act was caught red-handed. Therefore, in order to reform the criminal law should pay attention to the law in accordance with the laws of life (the living law) in society, namely customary law, so the law can function properly.

Key words: Customary law, the crime of zina, Article 284 of the criminal code, criminal legal, reforms

INTRODUCTION

Law as social norm is representation from prevailed values in society (Kusumaatmadja, 2006). Therefore, a good law is law based on nation's belief. It is explained by Puchta in 1798-1846, a Germany scholar; pupil of Friedrich Carl von Savigny in 1779-1861 who concerns on history of law stated that: law is based on nation's belief, either its content or its material relation. It means that law established and prevailed by its relationship to the nation. That establishment occurred in three forms. Law established from nation's souls directly in its implementation (in custom or tradition); indirect law established (Huijbers, 1982) from nation's soul through legislation (established by state) and through science of law (which is thoughts from legal experts).

In line with Puchta's argument above, there is a statement from Mochtar Kusumaatmadja in his theory of "development law" who said that the established law must be appropriate and must be pay attention on people law awareness. Hence, the existence of law in society is integration and coordination of human needs in the society.

While, rule of law according Oemar Seno Adji is having Indonesian characteristic because it has Pancasila as state's view and Pancasila must be adopted as basis and legal source then Indonesia rule of law also named as Pancasila (Azhary, 2003) rule of law because it the rule of law comes from Pancasila and absolutely the established

law is an idea or value that adopted from societal living norms and also its culture. Based on the explanation above, then Notonagoro (1974) stated that: Pancasila is idea of law due to its position as state fundamental norm which has ground norm power. As idea of law, it becomes leading guidance to all national law products in which all law products purposed to achieve ideas that contained in Pancasila.

Moreover, it is stated by Koesnoe (1992) that a nation law is result from the nation culture which established by any related nation cultures with the aim to rule the nation living, in this case is customary law. Indonesian customary law, basically, is non-statutory law which mostly is folk law and the least part is religious law (Soekanto, 1993). Further, A. Ridwan Halim gives definition of customary law as follows:

Customary law, basically is the whole law regulations which contained the whole parts of Indonesian custom regulation, in which most of them are unwritten law, in its term of *bhineka* (various types), remembering that Indonesia consists of hundreds ethnic groups where each ethnic group has their own custom and tradition based on their view of life (Halim, 1987, 2009).

Customary law, in principle, is folk law. As folk law that rules the continuous and sustainable life and then the law maker is the people itself. Therefore, customary law keeps changing through decisions or solutions that established by people as the result of thoughts through

conference. It means that every single change always with any efforts, be placed in customary law regulation (Koesnoe, 1992) where in every people development, customary law will always be developed and affected by newly established norms. The regulation of people disciplinary by this customary law indicates that customary law contains sanction or punishment if the law violated. Every violation of customary law will result in imbalance society (Soemadiningrat, 2002) thus, there is customary criminal punishment. Customary criminal law according i made widnyana is living law, followed and complied by people continuously, from one generation to the next generation (Widnyana, 1993, 2013). Violations to those regulations are seen as mistake that can create imbalance society. Therefore, for the violator it will be given by customary reaction or customary punishment by people through its custom administrator.

Unlawful sexual intercourse (zina) according customary law is crime by accusation which interfering societal balance, an act that violates sibling honor and interfering society pureness, breaking the rule of life. The same thing in Islamic law, it is explained that unlawful sexual intercourse is in contradiction with moral, nobleness, breaking society and family living structure, breaking descent, breaking relationship between husband and wife and breaking child's education. In other words, the impact of unlawful sexual intercourse includes moral, religious, physical, societal and family aspect. Based on the explanation above, unlawful sexual intercourse seen as criminal act that needs to get seriously special attention in which this criminal act of unlawful sexual intercourse needs criminal law which able to protect and uphold by giving severe sanction or punishment. Besides that it is also necessary to uphold religious, moral, customary and well-ordered values.

MATERIALS AND METHODS

Related to the description above, then in this study, the writer tried to describe customary law analysis about criminal act of unlawful sexual intercourse (zina) according to Article 284 of criminal code in the renewal of criminal law. Research method that used was normative law research and literature law research where the research was conducted by studying literature or merely secondary data. It was in line with the statement of Soekanto and Mamuji (1993) that the data which obtained from literature study mostly called as secondary data. Primary law material that used in this research was law regulation which related to the research problem such as criminal code (Kitab Undang-Undang Hukum Pidana), criminal law books, Islamic criminal law books, fiqh books, Al-Quran

and its translation, researches and journals. Data was analyzed by using qualitative method and explained descriptively.

RESULTS AND DISCUSSION

Definition of unlawful sexual intercourse (zina): The term of unlawful sexual intercourse (zina) in customary law mostly called as illicit word. Unlawful sexual intercourse is an action that seen to break people morality. Unlawful sexual intercourse is crime by accusation which particularly violate siblings honor and violate one's law interest as husband. Unlawful sexual intercourse, according sociological concept is every sexual intercourse outside marriage relationship both sides love it between a man and a woman. Muslich and Wardi (2005) unlawful sexual intercourse is every sexual intercourse outside marriage relationship and threat that action with severe punishment, both married and unmarried actor, either both sides love it or not. In Indonesian great dictionary (KBBI), it mentioned that the definition of unlawful sexual intercourse as follows:

- Sexual intercourse between a man and a woman without any marriage relationship
- Sexual intercourse between a married man with a woman who does not his wife or a married woman with a man who does not her husband

Unlawful sexual intercourse is sexual intercourse between a man and a woman without any marriage relationship (Abdurraman, 1991). And then Syarani (2004) stated that unlawful sexual intercourse is sexual intercourse that done by a married man or married woman with a woman or man who does not his wife or her husband, both sides love it and no compulsion. It means that there is no zina term without sexual intercourse Hadikusumah (1984) argued that unlawful sexual intercourse according customary law is sexual intercourse between a man and a woman outside legal marriage relationship.

Whereas, criminal act of unlawful sexual intercourse in criminal law that formulated in Article 284 of criminal code is criminal act that must be acted with any intention. Thus, the intention element must be proved in the actor in order to proof the actor as wrong and fulfill intention element in conducting one of criminal acts of unlawful sexual intercourse which regulated in Article 284 Section 1 number 1e alphabet a or b and number 2e alphabet a or b of criminal code.

According to the definition of unlawful sexual intercourse (zina) above, then it could be differentiated

between unlawful sexual intercourse according to customary law and unlawful sexual intercourse according to criminal law. Unlawful sexual intercourse according to customary law is sexual intercourse between a man and a woman outside legal marriage relationship, both conducted by a boy with a girl or married man or married woman with both sides love it. While, unlawful sexual intercourse according to criminal law that ruled in Article 284 of criminal code is sexual intercourse that conducted by married man with a woman who does not his wife or a married woman with a man who not her husband and both sides loves it.

Customary law analysis to the criminal act of unlawful sexual intercourse (zina) in Article 284 of criminal code in the renewal of criminal law: Unlawful sexual intercourse in customary law is crime by accusation that shakes societal balance, violates siblings honor. In other words, unlawful sexual intercourse is an action which causes imbalance society and disturbing societal peace because unlawful sexual intercourse violates moral, religious norms and one's law interest as husband.

Unlawful sexual intercourse is in contradiction with universal rule that established to keep descent clarity, keep self-honor (self-esteem) and aware in something that leads into conflict as well as hatred among people caused by violating on wife's honor.

Besides that unlawful sexual intercourse (zina) according to customary people also can hurt feeling of that girl's or woman's parent, emerge shameful feeling and disturbing people around in which all of these will break the life order. Therefore, it needs restoration. In order to restore societal peace and balance due to that unlawful sexual intercourse then there should be custom reactions. These custom reactions according Wignjodipoero (1983) are actions that intended to restore magical peace and remove or neutralize unwanted condition that caused by customary violation. According to Soemadiningrat (2002) that customary sanction or punishment functioned as facility to restore the imbalance (customary cure).

Basic of law to the establishment of customary law, despite regulation in Article 5 Section 3 sub-b Emergency Law No. 1 year of 1951 about Temporary Actions to Establish Power Oder and Civil Courts of State Institution 1951 No. 9, also refers to the Act No. 48 years of 2009 about judge power. Explicitly or implicitly, regulations in Article 5 Section 1, Article 10 Section 1 and Article 50 Section 1 to the Act No. 48 years of 2009 are basis in the existence of customary criminal law. The study above can be explained as follow.

Article 5 Section 1: Judges and constitutional judges must explore, follow and understand law and justice values that live in society.

Article 10 Section 1: Courts are not allowed to refuse in observing, bringing justice and adjudicating a submitted case with the reason of no or unclear law, rather than courts have to observe and bring justice.

Article 50 Section 1: Adjudication, besides it must contains reason and basis, it must also contains certain articles from related Act or legislation or unwritten legal sources that made as basis to make adjudication.

There are many types of customary reaction to this crime by accusation of unlawful sexual intercourse (zina) in the custom society; it can be seen in many areas such as: in Lampung, if there is any unlawful sexual intercourse, then both sides are punished by "bubu ayun" which is entered into large cage with any kinds of thorn inside and then swung away into river until dead.

In Aceh, unlawful sexual intercourse called as "meumukah" and in the past, it was seen as great crime (fahisyah) where the actor must be tortured (had) and the actor was differentiated between muhsin people which are free people, mature and married with legal marriage and non muhsin people. Punishment for muhsin people was punched 100 times and isolated for 1 year while for non muhsin people such as slave, the punishment was punched 50 times and isolated for half year (Departman, 2005).

Around Dayak ethnic group, a husband is allowed to murder his wife and a man who have sexual intercourse with his wife if it gets caught directly. That husband who murders his wife can't be considered as wrong if he reports the murder case at that time to custom Leader. If the unlawful sexual intercourse conducted by a husband then it can get any helps from the siblings (Tameko, 1993).

In Batak land, it must be conducted by clearing ceremony for people around called as "pangurasian". Though, this unlawful sexual intercourse emerges defense (reaction custom) from family or husband side (Soepomo, 1993).

In Bali, the customary punishment called as "maprayascitta" which is a custom ceremony to clear the village/place of action if there is certain action that considered as magical balance disturber in societal living and then they will force to be married (Widnyana, 2013).

In Lombok (Sasak ethnic group), the customary punishment is moved away from the society and must pay a fine (Widnyana, 2013).

In Minangkabau, the punishment is given by “malalu”, loaned, means asking for forgiveness and given by advice, moved away (uang utang and uang sirih) means that the person who do unlawful sexual intercourse is isolated either by her/his family or nagari (Widnyana, 2013).

In Batak Karo, the punishment is forced to be married, paying a fine for “tanganan raja” in front of the headman, thrown away from the village and should pay “sumbang perempo” loan which is any costs that burdened to the male party becomes two or three folds for example, jugur cost, usually only IDR 100,000 and it will be IDR 200,000 and there will also be “cabut pinang”, means dissolution of any family relationship (Soemadiningrat, 2002).

In Kupang, the punishment is forced to marry that woman. If the man has no responsibility over his action, then the punishment will be: Nek nafani nesu, matan kotenn (close the door of back face), means a fine of cow with one adik age; toeb tais hae manak (close the shame feeling, image recovery for the woman side), means a fine of three cows, each with one adik age (Widnyana, 1993). Thus, customary punishment to the actor of unlawful sexual intercourse as with the description above can be functioned as stabilizer to restore physical and magical balance. The same opinion also stated by I Made Widnyana that the purpose of punishment (criminal) according to custom conception is to restore cosmic balance, balance between physical and magical world to bring peace among people.

While, reaction of criminal law to the actor of criminal act of unlawful sexual intercourse (zina) as what's been formulated in Article 284 of criminal code is really mild punishment it is only threatened by prison punishment for 9 months. As the result, this kind of punishment has no deterrent effect to do criminal act. Therefore, criminal punishment or sanction which included in Article 284 of criminal code cannot be functioned as it should be.

In this case, criminal punishment as what's been mentioned in Article 284 of criminal code according to, customary law analysis has no deterrent effect to the actors. Therefore, it is necessary to transform customary law elements. It is explained by Abidin (1987) as with Article 32 Constitution of the Republic of Indonesia and State Policy Guidelines of 1983 in order to formulate crime by accusation of unlawful sexual intercourse and also its criminal punishment and to construct the thoughts toward Article 284 of criminal code about criminal act of unlawful sexual intercourse in the renewal of Indonesian criminal law.

In the attempt of Indonesian criminal law renewal, especially Article 284 of criminal code about criminal act of unlawful sexual intercourse (zina), indeed, it cannot be separated from political law and customary law values to study any changes that need to be implemented to the existence law, thus in the future it can meet new needs in the society. That political law gives direction to the development of law discipline from “ius constitutum” which based on previous law principles “ius constituendum” or the idea of law.

Related to that case, it is mentioned (Arief, 1996) as follows: The renewal of criminal law, basically, contains meaning, an effort to do re-orientation and reformation to the criminal law that appropriate with central values of socio-politics, socio-philosophic and socio-cultures of Indonesia as foundation of social policy, criminal policy and law upholds policy in Indonesia.

Moreover, Soeroso (1996) explains that there are three reasons about why we need to renew the criminal code. They are political, sociological and practical reason. While Assiddiqie (1995) stated that the importance for renewal of criminal code based on political, philosophical, sociological and even practical reason. Political reason is that Indonesia Republic as a freedom state should establish its own criminal code that can be seen as symbol and pride of freedom state. Philosophical reason is that law principle in line with people idea about law as the highest positive value.

While, sociological reason proves that a state's criminal law is representation of cultural, customary and religious values that all of them can be concluded in that related state's civilization. Therefore, social, cultural and customary values from the state can take a place in criminal law regulation. Parameter to consider a criminal action depends on collective value and view in the society about what is good and bring benefit. In this case, people's view about moral and religious values really affected to the law establishment, mainly criminal law and particularly for criminal act of unlawful sexual intercourse.

Practical reason in which official text of criminal code is fixed that written in Dutch then, actually, if it will be implemented by appropriate criminal code then understanding Dutch is a must. In this case, it is impossible since Indonesia is freedom state and has its own national language. Besides that there is certain positive criminal law that not in line with morality and social values of society and its principle becomes state constitution. Thus, criminal code that prevailed today must be replaced by national criminal code that comes from customary law values as living law in the society.

Criminal law, basically is a facility to conduct people and individual protection. The purpose of criminalizing which prevailed this time according to Hamzah (1993) is

type of: deterrent effect, either pointed to the law violator itself or to those who have criminal potentials; protection to the people from any criminal acts; improvement (reformation) to the criminals.

Then, Herbert L. Packer stated that the purpose of criminalizing is giving misery to the criminal actors and to prevent any criminal acts. It can be seen from his writing as follows: "in my view there are two and only two ultimate purposes to be served by criminal punishment: the reserved infliction of suffering on evil doers and prevention of crime". According to Packer (1968) above every person that do criminal act must get appropriate punishment to prevent the same thing occurred.

A good law is law that appropriate with the living law in society which is law based on people's belief in a nation. Nation law is product of that nation's culture that built with any cultures that owned by the nation which aimed to rule that nation life which is customary law.

Criminal act of unlawful sexual intercourse (zina) according to customary law is crime by accusation that creates imbalance society, violates siblings honor. In other words, unlawful sexual intercourse is an action that shaking and interfering societal balance and peace because unlawful sexual intercourse violates moral, religious norms and one's law interest as husband.

Besides that unlawful sexual intercourse according custom people can also hurt the woman's parent (as unlawful sexual intercourse victim), emerging shame feeling in the society and shaking the people around thus it needs to do restoration.

CONCLUSION

Restoration to the violation of customary law will result in customary reaction that functioned as stabilizer to restore balance between physical and magical world, to bring peace among people. There are many types of customary reaction. For example, in Lampung, if there is any unlawful sexual intercourse (zina) then both of them will be punished by "bubu ayun" where they will be entered to the large cage with any kinds of thorn inside and then swung away into river until dead and in Aceh, this unlawful sexual intercourse called by "meumukah" where in the past it was seen as great crime (fahisyah) and the actor must be tortured (had) and the actor was differentiated between muhsin people which are free people, mature and married with legal marriage and non muhsin people. Punishment for muhsin people was punched 100 times and isolated for 1 year while for non muhsin people such as slave, the punishment was punched 50 time and isolated for half year. It showed that

in many areas, customary tradition or customary law still upholds to be the defense between the belief and social living.

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