State Boundaries Based on Manifestations of Social Contract Theory in Indonesia

Novianto Sanjaya[1,*], Oemar Moechthar[1], Isyrofah Amaliyah Achmad[1], Millah Aldillah Achmad[1]

[1] Universitas Airlangga Indonesia

Corresponding author: novianto.sanjaya-2020@pasca.unair.ac.id

Abstract

This article aims to analyze the boundaries of legal language Mala in prohibita through the theory of social contract that have been proposed by JJ. Rosseau that the country essentially arises from the existence of contractual relationships between communities to trigger the will and form a system called the state (a unionic pactum). Regarding the concept of social will is one of the things that determine how the birth of mala in SE or mala in prohibitum in Indonesia. The legal language in this case is used to study the extent to which the findings of science in modern language are related to an act that is allowed or not allowed through the limitation of "Mala in Prohibita" in Indonesia manifested in a theory Social contracts.

Keywords: social will, legal language, Mala in Prohibita in Indonesia.

INTRODUCTION

In Indonesia, the grundnorm or staatsfundamentalnorm is Pancasila, which according to Hamid Attamimi is set out in the preamble of the 1945 Constitution of the Republic of Indonesia (hereinafter UUD NRI 1945). This is the basis for Indonesia to determine other legal rules that will be made by the State later. The term language emerges into the function of communication in society which is important in interacting. Interaction requires good communication skills and this also applies to legal sentences that must have meaning. Meaning is never separated from the relationship between semantics, syntax and pragmatics. The role of language becomes important with the existence of the state which is one of the objects in determining a law that lives in society so that harmony arises.

Broadly speaking, these legal rules are divided into two, namely private legal rules, namely civil law and public legal rules, namely criminal law and administrative law. Every rule of law,

both private and public, is created for the benefit of society and the state. In line with this, Mochtar Kusumaatmadja stated that the law was created with the aim of creating basic order from the creation of an orderly social structure. Law also aims to realise justice in accordance with society and the times. In short, the benchmark to determine whether a rule of law is successful or not is the creation of order itself. Mochtar Kusumaatmadja declares that the law is made with a purpose to make discipline from the well-organized social structure. The purpose of the law is to make good justice for human. In a word, the barometers to determine whether the rule of law was succeeded or not is the creation or failure of the discipline itself. Sudarto said that criminal law is the most fearsome instrument in the right of law enforcement. The punishment becomes the social control tool by repressing life significantly and it's like chemotherapy for cancer. Therefore, it was only used as the final weapon (ultimum remedium) if the cancer cells become worst and scattered. Seem like a doctor needs careful consideration, research, and care in determining if a cancer cell is inoperable and can only treat through chemotherapy. State also needs extra consideration, research, and caution to determine if a particular act can be construed as a crime or not. The action is like cancer that can only be treated with chemotherapy and must have devastating effects on human and countries.

The current issue in Indonesia is about the Criminal Code Bill that was just passed a year ago, which has caught the attention of the public that how the function of criminal law itself can be applied. The problem arises, if the drug intended to cure the disease is instead considered dangerous and gets rejected by antibodies. In this scenario, the author suspects that there could have been an error in giving the drug or perhaps there is actually no pain at all in the body, so that what is considered a drug, instead of healing, becomes a deadly poison for the body. This phenomenon is similar to what happened after the Criminal Code Revision Bill. The rejection from the public, which can be said to be massive, intrigues us as jurists to ask, in fact, what actions, what kind of actions, can be formulated by the State as a criminal offence. This is very fundamental, considering that just like a body, the state can be damaged if it misunderstands what is a disease, what is a medicine, and what is a poison for the state and all components in it itself.

In addition, there are many concepts on the order of language to the fundamental things in law. Since Indonesia's independence, many concepts have emerged regarding the legal language used in language learning, because basically the legal language itself is guided by Indonesian as the language of instruction. Many foreign terms are still used in legal language in Indonesia such as “strafbaarfeit” which means criminal offence, ‘mala in se’ and ‘mala in prohibita’ which are interpreted as a concept of the act included in the rule of law or legal language.

The things mentioned above are the background of the author in this research. Based on the background of the above problems, the author formulates an issue in determining the legal language in this study as follows the role of social contract theory in determining the limits of legal language on Mala in Prohibita in Indonesia.

RESEARCH METHODS

This research is normative legal research. According to professor Peter Mahmud Marzuki, legal research is a process for finding the rules of law, principles of law, and law doctrines to answer the legal issues. This research is reform-oriented research as expressed by Terry Hutchinson Reform oriented Research: “Research which intensively evaluated the adequacy of existing rules and which recommends changes to any rules found wanting.”

ANALYSIS AND DISCUSSION

Social Contract Theory

Rousseau explained that the contract clause may never be formally established, but they were the same everywhere and secretly recognized everywhere. Rosseau believed that the clause could be reduced to being the total removal of every individual with all his entitlement throughout the community. It meant every individual obligatory to strip of the rights without exception, because if someone still has superior rights in comparison to each other, then the stability of public condition and a social contract will never happen.

Rousseau declared that with the disengagement of these rights, everyone would be in the same position and equal rights, and every right that has been disengagement by the individual, it deliquesces into a social contract and they will get a new equal right. The similarity of Rosseau and Locke, Rosseau describes that Status Naturalis as a condition that human never sinning yet or safe and happily condition. Rosseau said that the condition of human's life is equal to each other, it happened because human made themselves and they made a satisfaction themselves. The act of the human was based on beliefs themselves and based on loving each other. In the Rosseau view, he put in higher component from humans and it is a mystic thing. Therefore, they made some social contracts that describe an agreement (volunte generalle). The agreement eventually will be an "entrance" for human to enter into State Era. Similarly, the state that is understood by Hobbes, Locke, and Rosseau is a different thing. The most significant of Hobbes's concepts are disembogue to absolutism. This thing is the same as what Hobbes said, Hobbes assumed that Human is brutal and doesn't know the value of the justice.

Plato's thought, in The Republic, describes a kind of agreement that made society in many ways influences the scholars thought in the west, such as Thomas Hobbes, Rawls, John Locke, and Rosseau. The social contract theories that they believe are different but are built upon the foundation of thought that human's life is essentially separated into two eras, an era in which human is still an individual and still into the normal condition that name status naturalis or zustand (state of nature) and the era when human is no longer an individual but banded in a powerful organization called a State, the Era is called staatzustand (state of civilization).

According to Prof. Notonagoro, there is two meaning of ideologies which is: in general and in the narrow. In the narrow, ideology is the idea of the state that provides the basis for the theories and practices for the state. In general, ideology means the science of national ideas. Pancasila then made the conception of the Law State of Indonesia to accept the principle of certainty of the law that becomes the primary in rechtstaat conception, as well as the sense of justice as the

main rule of law. In fact, the Law State of Indonesia also receives spiritual value from religious law. The law was written and all prescriptions are accepted but must be laid in order to do justice.

Based on the top explanation, the writer deduces that Pancasila is a social contract manifesto as Indonesia's People. Pancasila is not merely an Ideology that has the side of a conservative, it also has the side of the liberalistic inside. Pancasila also has a character that is not only for homogenous people but Pancasila also for heterogeneous people. Pancasila is a unique concept that has the value of godliness as the main basis of the higher law then combined with people and their desire as part of the higher law. It is different from the social contract concept that avowed by bachelors in the west because Pancasila is more sophisticated as the controller of people desire that manifested from the social contract, at the same time the social contract became a limit of the state in exercise the authority.

The Limit of The State to Define Mala in Prohibita in Indonesia

Harm Principle

Principles are values and goals that are above ideas, rules, and concepts.4 A legal principle is a guide to resolving a legal issue.5 Principles reveal the application of law through values and goals. General principles express the main values and purposes of questions of criminal law. Principles are ostensibly static when they express values and goals, but also dynamic and functional when they reveal the application of law through values and goals. Principles and rules are two different things. Principles are broader than rules and also more general. Rules in criminal law distinguish between the core offences of each criminal offence, principles on the other hand are the basic ideas that make up these core offences.

Then, regarding the Harm Principle, liberal political theories in the 19th century had a significant influence on general criminal law, and specifically on criminalisation. The very rigid criminal law requires a justification for the state to enter the autonomy of human beings as individuals. To provide that standard, John Stuart Mill first stated in his book on liberty (1859) that: “The sole end, for which men are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.”7 Mills' thinking is very much of the liberal variety. In his statement, Mills implicitly justifies state intervention in terms of criminalisation only if an act committed by another person is bad or will cause suffering to another person directly. Furthermore, Mills argues that the only legitimacy for the State to interfere with the autonomy of the individual is to prevent the individual from inflicting suffering on others. The next Harm Principle is also stated by Joel Feinberg. Unlike Mills Feinberg's thinking is less liberal. He states that8 : “It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no great cost to other values.”

From his opinion, the author concludes that Feinberg's Harm Principle is very different from Mills' view. While Mills' principle is exclusionary when compared to other principles, Feinberg's principle seems to coexist with other principles (for example, the offence principle). Where Mills argues that the only legitimacy for the State to intervene is if there is harm to another individual, Feinberg argues that the harm principle as a legitimising reason for the State is a good one, but certainly not the only justifiable reason. The harm principle concept, however, is not without its weaknesses. According to the author, the definitions presented by both Mills and Feinberg do not touch on what harm actually is. Of course, this concept, as Feinberg said, needs another concept to support it. It needs a formulation of harm itself. Therefore, the author moves on to the next concept, the offence principle.

Offence Principle

Legal theories based on liberalistic thinking find another principle besides the harm principle, which may be a good reason and foundation for criminalisation. In such cases, many people are subjected to an act that may not cause them physical suffering, but it is nevertheless very unpleasant for us and even interferes with our freedom, so it is justifiable when we seek legal protection from such acts. Feinberg thus introduced a concept that he called the offence principle. In his book, the moral limits of criminal law, he states: “It is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offence (as supposed to injury or harm) of persons other than the actor and would be an effective means to that end if enacted.”

From Feinberg's statement, the author draws the conclusion that the offence principle is a principle that justifies state intervention to criminalise acts that meet the conditions that, first, the act is an unpleasant act for the victim, and second, the act has a serious mental effect on the victim. However, Franberg also says that offence and harm cannot be treated the same. Both can be used as a measure to criminalise, but harm should have a more severe sanction than offence. However, it should be noted that Feinberg said that the measure of harm would be correct, if it is generally socially acceptable to do so.

Morality

Aristotle discussed moral virtue in his book "Ethica Nichomacea". In his book, Aristotles said that moral virtue is an attitude or disposition that allows humans to take the middle way of an opposing extremes. In addition, Plato in his book "Republic" states that there are four types of virtues, namely Selfcontrol (Temperance) which has a specific purpose and is addressed primarily to certain groups, second is Courage (Fortitude), addressed to knights, warriors, or those who fight, third is Wisdom (Prudence), addressed to those who apply a rule so that in doing so there is an element of wisdom in it, fourth is Justice (Justice), is a virtue that must exist in the other three virtues and serves to connect them. Morals, despite what Aristotle and Plato say about their virtues, are tentative and depend on two factors: internal and external

Internal Factors

Internal factors determining morality mean that morality originates from the individual human being. This basic idea is similar to the concept of natural law presented by Thomas Aquinas. According to him, natural law is a law that comes from natural values that are already embedded in humans. Since Aquinas was a theologian, he stated that these values came from God. In short, Aquinas stated that natural law is a law that comes from God and these divine values have been implanted in the human mind to be discovered, not created. But unlike morality, it is formed from the existence of moral values instilled by God in the human mind. Moral values are then determined by what and how humans live their lives. God does instil moral values in the human mind, but humans must discover them for themselves in the process. To find it, according to the author, the determining factor is related to what the purpose of human life is. Everything must start from a certain point, a conclusion is the same, it starts from a concept. Therefore, often in studying law, we often find the term ex falso quodlibet which means that the error of a concept will lead to a wrong conclusion. The concept itself contains the nature of the concept (Ontology), the purpose of the concept (Axiology), and finally where the concept comes from (epistimology). Morality is also a concept, so it must fulfil these elements. Epistimologically for example, it comes from God, Ontologically it contains moral values that God instils in humans, therefore it must be good. Finally, axiologically, it must have a good purpose. In short, the internal factor that determines morality is a purpose that exists in the mind and actions of humans. The goal itself is divided into two, namely the goal of what a human wants. Humans who have good desires will produce good morality. For example, someone who becomes a judge with the desire to provide justice for all parties will decide all court cases as fairly as possible. The second goal is what one wants to achieve. For example, a judge who has the desire to provide justice for everyone, has the ultimate goal of maintaining order in the life of society and the nation. Because when justice has been achieved, justice will be realised in society.

External Factors

Next, morality is not only determined by the existence of good intentions within humans, it is also influenced by external factors. This concept is well illustrated by Thomas Hobbes in his book "Leviathan". In his book, Hobbes describes humans as naturally free beings, meaning that humans are free. Furthermore, Hobbes also states that humans are essentially creatures who seek their own happiness (individuals), therefore humans can become wolves for other humans. Then to overcome this, humans agree to give up some of their freedom to form a social level that becomes a guideline regarding good and bad and what can be done or not, this is what is called a social contract. This social contract then becomes the foundation of a social community in running life. Those who do not behave according to the agreement (social contract) will be considered bad behaviour. Conversely, those who hold the principles outlined in the social contract will be considered good. This continues until the values of the social contract become a habit, then continues to become a moral standard, until it becomes a morality. External factors that affect morality, on a large scale, can be seen in Jeremy Bentham’s concept of mala in se and mala in prohibita. Bentham said that an act that is declared evil because it is basically evil

and contrary to universal moral values is called mala in se. Whereas mala in prohibita is an act that is declared evil because the State decides to criminalise it. For example, if an act is initially not an act that is contrary to morality, and then the State declares otherwise, then the act will become an act that is far from morality. In short, the environment is one of the important factors determining morality. This environment not only affects how the morality that has been formed internally in each individual is applied, but it can also form new moral standards in addition to those previously formed. The controversy over the Draft Criminal Code has intrigued us to think about what is the true basis and how the state should limit its criminalisation of human actions. In terms of process, this is clearly over. Law No. 12/2011 on the Establishment of Laws and Regulations has provided the right answer regarding the mechanism for making laws and regulations. Malum in se (a wrong itself) is a wrong act, it claimed because in naturalis it is against principles. Morality, natural law, and public law is some act like the describe ontop because, in essence, it is bad things indeed and that made injury to someone, even if without being admitted by the law of the state, whereas Mala In Prohibita (a wrong prohibited) is some wrong act because it is forbidden. The real acts of it do not contradict against moral, but it contradicted against moral because it is forbidden by the positivity of law or some illegal act as the result of the positivity of law.

By the histories, the first doctrine about Mala In Se and Mala In Prohibita be known in United Kingdon in the 1400s. The dichotomy between that was beginning from the theory about the divine rights of kings. The theory was dissociated criminal act by the king and eventhough the king. It can be said that Mala In Se is the concept that is not from the king except for an entity that is higher from the king and causes the king considered as representative of god in the world, so the concept of Mala In Se comes from the God itself. And the fact in 15th Century until 16th, the peoples has referenced that the top of the law is Eternal Law, Law of Nature, and Law of God.

Regarding the Mala In Prohibita, in the Contemporary Law State, it was received the progress from 3 cases that happened in the U.S about the ownership of alcoholic beverages and drugs. The 3 cases are In re Bimer, the United States v. Haynes, dan People v Pavlic. From the 3 Cases, just only one case that happened within the prohibition limit of Alcohol in the U.S, it is Pavlic. Based on 3 cases, the court declares that the seles and the ownership of Alcoholic Beverages were Mala In Prohibita. Haynes declares that the sales of Alcoholic Moonshine are not Mala In Se, but that is Mala In Prohibita. The act doesn't involve negligence against the moral value, but the only disavowal about responsibility against The Law.

The controversial case from dichotomy on Mala In Se and Mala In Prohibita is the crowd case against health protocol on Covid 19 Pandemic in Indonesia that considered as a Mala In Se act. To achieve a conclusion for deciding this case, the court determines the prosecutor must be able to prove the defendant's intentions while doing the behavior. Based on some cases that were described, the writer deduced that the real dichotomy about Mala In Se and Mala In Prohibita is something that has a "thin partition", on the case of Alcohol Beverages, the focus to decided an act including in Mala In Se or Mala In Prohibita were not focus on the act, but

focus on the object that becomes variable by the act. Whereas on crowd case and disobeying the health protocol, the prosecutor asked to investigate and prove the real intention from the crowd activity on the Covid 19 Pandemic. Based on that "thin partition", the final lead to the frequency of the disobeyed of the doctrine with the reason that Mala In Se and Mala In Prohibita don't have a gradient that can engage clearly.

Hans Kelsen declares that the concept of Mala In Se and Mala In Prohibita is just the only legacy of the concept of Natural Law that is very contradictory against the Positivism of Law value. He described that the dichotomy of Mala In Se and Mala In Prohibited is a wrong thing. Mala In Se that was described by him is some act that declared bad because of a concept that can not prove scientifically. And he said that there is no scientifically bad behavior, the bad behavior thing (criminal) happened if the legislative determine it. A rule of law comes from the collection of concepts, it comes from principles of law and it comes from Meta Theory as a foundation of the rule of law. The Meta Theory comes from Law Philosophy, because of that, the theory will be fall in while the theory was not legitimized by philosophy. By what does Hans Explanation, he explain that all of that problem must focus in declare by legislative as though forget about the higher law that becomes the Positivity of Law itself.

Mala In Se that is the nature bad act, it produced a concept that named Mala In Prohibita. It means the idea of Mala In Prohibita can't be disengaged as Mala In Se in higher of law that comes from by god and social agreement that written down in the state staatfundemental norm. This opinion comes from the philosophical idea that the state was built by social desire. Morality is not just decided by a good aim in the human self but also influenced by an external factor. This concept was described finely by Thomas Hobbes in his book "Leviathan". In his book, Hobbes describes that the human as naturally human is free, which means that the human indeed. Hobbes also said that the intrinsically of humans is a human being that finds their happily each other, because of that the human can become "a wolf" to another human, then to fix the problem, the human has been compromised to hand over the freedom to make the new social life that becomes the guidance about the good or bad, it called as Social Contract.

CONCLUSION

Based on the explanation of the discussion that has been described by the author above, conclusions are drawn, namely: The limitations of legal language through the state in determining mala in prohibita are only limited if it is in accordance with the harm principle and Offence Principle stated by Mills and Feinberg and also contrary to Morality, this can be justified because Indonesia is a democratic country with a liberalistic character. However, unlike the West, Indonesia is constrained by religious values as a consequence of Pancasila. However, actions that are 'divinely' bad, are mala in se, not mala in prohibita.

Advice

Therefore, the formulation of criminal offences must be sterile from things that can injure the freedom of the people in Indonesia, which is conservative (in the sense that it still relies on divine values), but also liberalistic and democratic. In addition, if the formulation of a criminal offence is strongly rejected by the people, then the government must immediately take action

to cancel it, because in fact sovereignty remains in the hands of the people, and the state is only a manifestation of that sovereignty.

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