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Is it Possible to do Legal Revolution in Indonesia

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Abstract

Is it possible to conduct a revolution in criminal procedure law in Indonesia, the answer is possible, but whether or not to come back again becomes a debate in the discussion of the Criminal Procedure Code Bill. Displacement of legal traditions is not prohibited. Humans and the complexity of their legal culture continue to grow, so the law is there for humans, not the developing human being forced in such a way as to enter into certain legal schemes, which of course are incompatible and will always be left behind from civilization. When there is a problem in criminal procedure, the law must be reviewed and corrected, not humans who are forced to be included in the criminal procedure law scheme in certain legal traditions. Japan, France and Italy are examples of countries that have revolutionized the procedural law for speeches to get the right formula and be close to the truth. The revolution is carried out in a flowing way, not limited to a certain form and not stop at a certain point. For example, Japan does not directly apply the adversarial system, but it first applies continental European laws that are inquisitive and akusatoir. Likewise Italy where the Constitutional Court that was formed at that time actually ruffled the concept of the speech justice system, but Italy still found a format of criminal justice that was suitable for the country.

Keywords
revolution; criminal procedure; Indonesia

I. Introduction

The law always follows and develops with the community. Where there is a society or civilization there are always laws that govern it. Civilization in Indonesia long existed before the name of Indonesia. Indonesia was not yet united and formed many kingdoms. The kingdoms fought with each other, waged war and occupied each other's territory for power. The Dutch who were aware of the situation then tried to exploit the politics of sheep fighting to divide the kingdom in Indonesia. The Dutch colonialism ended, then Japan brought a new order for the people of Indonesia. According to Pratiwi (2020) in social life, law and society are two interrelated things that can never be separated. Through instruments, unlawful behavior is prevented and repressive measures are pursued (Tumanggor, 2019). From the aforementioned provisions, it proves the existence of new developments regulated in this Law (Purba, 2019).

In the Dutch East Indies in power there was known dualism in the court system in Indonesia. Because of the separation of the Court for different classes with the court for the Indigenous group (the Indonesian people). But at that time there was already a classification of types of justice based on the jurisdiction of the case being handled. In 1602 the Netherlands established a trade union for the Far-East called the VOC (De Vereenigde Oost-Indische Compagnie) with the aim of trading, then through the VOC the Dutch entered Indonesia.

II. Review of Literature

2.1 International Law Traditions

John Henry Merryman in his book The Civil law Tradition (1969), in this contemporary world born before us three main legal traditions, namely the continental legal tradition (civil law), the tradition of customary law (common law), and the tradition of socialist law (socialist law) (Taher, 1978). Roman law is the forerunner of the Continental European legal system, although Roman law is the spirit of the Continental European legal system, but the influence of Roman law is also very strongly felt in the development of the Anglo Saxon legal system. Because many creators of rules in the Anglo Saxon legal system had already studied Roman legal systems or Continental European legal systems. From there, finally the Continental European legal system is commonly referred to as the Romano-Germania legal system, or also often called the civil law system (Fuady, 2007). Continental European legal systems developed in European countries, such as France, Germany, Italy, Switzerland, Austria, Latin American countries, Turkey, several Arab countries, North Africa, and Madagascar (Cruz, 1999). This legal system also spreads to Asia because it was brought by invaders, such as the Netherlands, which finally made Indonesia also use this legal system.

The Continental European legal system uses the statutory book as the main source of law (Fuady, 2007). Even though the source is based on the law written in the law made by the legislative body, in some countries that adheres to this legal system, decisions are sometimes also used as a reference for legal sources even though only as a complement to what is already in the law. Changes and legal developments in the Continental European legal system in principle are very dependent on parliament. This then makes the existing law in the countries adhering to the Continental European legal system cannot be separated from strong political elements although it also becomes more theoretical, coherent, and structured (Fuady, 2007). The development of the Continental European Legal system occurred in several phases, namely (Fuady, 2007):

1. The Phase of Roman Legal Formation
2. The Maturity Phase of Roman Law
3. The Revival Phase of Roman Law
4. Reception phase of Roman law
5. Legal Codification Phase
6. Codification Reception Phase

2.2 Continental European Legal System

Continental European legal systems tend to be axiomatic to laws made consciously by humans or statutory law. This legal system first applied in mainland western Europe, namely in Germany, then to France and then to the Netherlands, then in the surrounding countries. The Dutch who had colonized the Indonesian people brought this legal system and applied it throughout their colonial territories (the principle of concordation).

Civil law is a legal system that uses the book of law or the law as the main source of law. This of course affects the characteristics of thinking in the Continental European legal system. The existence of regulations that were made before the case makes abstract, conceptual and symmetrical patterns of thinking (Cruz, 1999). The Continental European legal system tends to plan, systematize, and regulate daily matters as comprehensively as possible by establishing legal rules as a product of legislation. The Continental European legal system moves from one general principle to another. In handling a case, the judge will look for references to the rules in accordance with the case being handled. Judges in

the Continental European legal system must be active in finding facts and carefully assessing evidence so that they can obtain a complete picture of the case. After that, the judge can choose what rules apply to the case he is handling.

Law in Indonesia was handed down from its colonizers, namely the Netherlands. While the Netherlands and France have changed their legal systems many times, then what about Indonesia. Is it forbidden if there is a reform and revolution in criminal procedure law. If not, it seems as if there is a legal rigidity which assumes that, Indonesian civil law traditions must not use common law traditions, and vice versa because the two systems tend to be different but not meaningful, neither of them can be applied.

France at least has implemented various criminal justice systems in its country. In 1200, Raymond K. Berg stated that:

France adopted a facsimile of Church procedure in the 1200's. Such proceedings were known as an "aprise" and allowed the judge to be in the hierarchy of the accused and witnesses of a crime of public notoriety. The accused would be punished under a theory which was merely an extension of the older principle which allowed summary execution when the accused was caught in the act. (Berg, 1959)

In 1200 the influence of the Church was quite large, so it was very natural that the spread of Christianity, namely France, implemented the facsimile of Church procedure. The process allows judges to try suspects and witnesses of notorious crimes in public. In this system there are very characteristics of the inquisitor, which Raymond K. Berg also explains:

> In a short time, torture was introduced into these inquests. Why torture was used is hard to explain. The fact that the later Romans had used torture was of great influence. Also, the "aprise" had been primarily based on the testimony of a sufficient number of witnesses. If these witnesses fail, the only manner left of convicting the prisoner was his own confession and thus, torture could have been used primarily for this purpose. A confession by the accused had always been looked upon as the highest form of conviction and perhaps the extreme desire to gain a confession, even by torture, was the result of a psychological necessity upon the part of the judge to be sure that the accused, whom he felt was guilty, was in fact guilty (Berg, 1959).

Torture is always included in the examination stage in France. The Romans apparently also used torture and this had a profound effect. Torture was directed at the testimony of both the suspect and witness. If these witnesses fail, the only way left to punish prisoners is their own confession and as such, torture can be used primarily for this purpose. Recognition by the defendant is always seen as the highest form of punishment and perhaps the extreme desire to get a confession, even with torture, the judges ensure that the defendant, who he feels guilty, is actually guilty.

III. Discussion

3.1 Criminal Procedure Revolution in Several Countries

Frederic R. Coudert stated that, the revolution completely overhauled French procedures, made them more open to the public, simplified them and gave jury trials, and made citizens sit with the judges. The law was temporarily in very uncertain conditions until Napoleon did a comprehensive codification. The legal habits of the centuries cannot be changed permanently by the revolution and the Code d 'Criminelle's instructions are still largely based on regulations of 1690. This code has changed from time to time, and was revised in 1834, although the changes were not very material (Coudert , 1910).

Moris Ploscowe saw that the French criminal procedure had two main characteristics, namely the old regime's inquisitive procedure and the British accreditation system introduced by the Revolution of procedural law in France. Its development from these two sources presents a fundamental problem of all modern criminal procedures, the problem of how to facilitate effective crime suppression and at the same time protect individual freedom (Ploscowe, 1933).

The French revolutionary took a decisive step back to the past criminal procedure by Pluviose's seventh law, An IX. It's rebuilding the Prosecutor on an old basis. It guarantees most of the functions of protecting the rights of perpetrators and submits them to the Director of Jury. The new law broadens the Director's function, empowering him to carry out secret investigations that are not contradictory, in which the indictment by Grand Jury is a prerequisite needed for trial (Ploscowe, 1933).

France is not the only country that has conducted a revolution in procedural law, Italy as a neighboring country that also has a tradition of civil law that conducted a legal revolution, the event became an adversarial system of procedural law. Julia Grace Mirabella stated that, The Nuovo codice in the penale procedureura currently focuses on the adversarial / adversarial procedure into the Italian judicial structure. Under the previous code, the Italian criminal process is a classic inquisitorial system similar to France or Germany. In an inquisitorial system, the judge presides over the development of the case and "the involvement of public prosecutors and public defenders is limited to asking occasional follow-up questions or suggesting other lines of inquiry (Mirabella, 2012)."

Besides France and Italy, the revolution implemented in Japan is no less interesting. In Japan, a feudalistic system of government which had lasted for around 700 years ended in 1867 and the development of a centralized political structure as a modern unitary state was carried out. The Meiji Government promotes Japanese modernization, which leads to revolutionary changes in the criminal justice process; the justice system in general shifts closer to the western style (Supreme Court of Japan, 2019).

Transplants through the modernization process took place in Japan after the Meiji Constitution (1889) which adopted the German model Rechtsstaat concept contained in the Prussian Constitution. Of course transplants that occur through colonialism and modernization have different consequences. Even though countries that have experienced colonialism are inevitably also undergoing a process of modernization, countries with colonialism experience naturally have different responses in dealing with legal transplants compared to countries that have never experienced colonialism (Azhari, 2017).

In Japan, the transplantation of the concept of Rechtstaat (hochi-koku or hochi kokka) gave birth to a different meaning from a similar concept prevailing in Europe. The central meaning of Rechtstaat in the Meiji Constitution is that the people must obey the Emperor's orders. This is rule by law (Rule by Law) which is far from the meaning of rule of law (Rule of Law). The meaning of Rechtsstaat as such is a consequence of the construction of the government system under the Meiji Constitution which is wholly owned by the Emperor. Parliament is not a representative of the people, but a supporting organ of the legislative power possessed by the Emperor. All laws are orders from the Emperor. Therefore, in certain situations the Emperor can issue regulations without the participation or approval of Parliament. Consequently, "citizens' rights" are limited by provisions protecting those rights only insofar as they are regulated by law. If it is not regulated in the law, then "citizens' rights" are not guaranteed (Azhari, 2017).

In 1880, the government announced Chizaiho, the Criminal Procedure Code, modeled on Napoleon's criminal law from France. In 1890, the Criminal Procedure Code was revised to the Criminal Procedure Code, the first western-style comprehensive

criminal justice system adopted in Japan. In 1922, the new Criminal Procedure Code was announced at that time, influenced by German Law. Thus, the Criminal Procedure Code from the Meiji era onwards can be said to be entirely based on the Continental European system. The current Criminal Procedure Code was formally announced in accordance with the principles of the new postwar Constitution in 1948 to fully protect basic human rights (Supreme Court of Japan, 2019).

Criminal justice procedures in Japan begin with an investigation by the authorities. There are various triggers for an investigation, such as reports and notices from victims or witnesses to crime, police interviews and questions, complaints, and accusations, depending on the type and nature of cases and violations. The main investigative authority consists of police officers and public prosecutors. The task of the police officers is to maintain social security, but in the case of an investigation, they are the main investigative authority as a judicial police officer, and thus represent the main force. The public prosecutor accepts the case referred to by the police and takes over the police officer who was investigated before considering whether the case is detaining, or if deemed necessary, and carrying out additional investigations. Police officers and public prosecutors cooperate with independent authorities, not hierarchically related, who handle such investigations cooperatively. However, the public prosecutor can provide advice or instructions to police officers if necessary (Japan Code of Criminal Procedure article 193) (Supreme Court of Japan, 2019).

3.2 Changed towards Progressive Law or the Road in Place

Why this nation does not want to change, is there no reliable legal scholar in giving birth to a good law. J E Sahetapy said that Bung Karno, as President of the Republic of Indonesia, continued to rhetoric about Pancasila and the 1945 Constitution. Regarding legal scholars, he "donder": "met de juristen kunnen wij geen revolutie maken". It means: "with legal scholars we cannot make a revolution". Mochtar Lubis later added to the scorn that the S.H. is "stomme honden", which means "stupid dog". Moreover, at that time many law graduates graduated from high school after Indonesian independence with a few exceptions, unable to read Dutch books, let alone recite W.v.S. and B.W (Judicial Commission Drafting Team, 2012).

Law graduates in Indonesia seem to be bound by two paradigms that, if civil law is not allowed to be brazen, while civilization is alive, hybrid theories have developed, but the Criminal Code and Criminal Procedure Code are still the same, either because they do not want to change, even though many problems, or fear of accepting change, would certainly be relevant to Bung Karno's term "donder": "met de juristen kunnen wij geen revolutie maken"

Charles Stamford states that, law must flow or melt. Law must exist and develop to flow according to human needs. According to Charles Sampford's theory of legal disorder in his book "The Disorder of Law, A Critique of Legal Theory, the basic assumption of this theory is that social relations are asymmetrical. This happens because these relationships are based on the strength and authority of individuals or parties. The parties perceive differently about social relations including legal relations. Therefore, the surface that appears to be orderly, orderly and certain when examined turns out to be full of disorder, disorder and uncertainty.

Circumstances that do not have formal or definite structures which Sampford termed melle. On the basis of such assumptions according to Sampford, law is not actually a systematic, logical-rational institution but rather a liquid reality (legal melee). Based on this, the meaning of a law is not solely determined by what is written in the formal rules,

but is determined by the position of individuals or parties who have legal relations (Nugroho 2015).

Satjipto Rahardjo also said in his book entitled Let the Laws Flow that:

... , both factors; the role of humans, and society, is displayed in the future, so that the law appears more as a field of struggle and human struggle. Law and the operation of law should be seen in the context of the law itself. The law does not exist for themselves and their own needs, but for humans, especially human happiness (Rahardjo, 2007).

Progressive law does not understand law as an absolute final institution, but is largely determined by its ability to serve humans. In the context of such thinking, the law is always in the process of continuing to be. The law is an institution that continuously builds and changes itself towards a better level of perfection. The quality of perfection here can be verified into factors of justice, welfare, concern for the people and others. This is the essence of "law which is always in the process of becoming (law as a process, law in the making) (Rahardjo, 2006).

The law needs a change, as well as written law which is still being used from colonial times, after independence until today. Indonesia is currently trying to change the criminal procedure code to suit the needs of the community. Changes to the procedural law basically have started long enough.

In the legal system anywhere in the world, justice has always been the object of hunting, especially through its judiciary. Justice is fundamental to the operation of a legal system. The legal system is actually a structure or completeness to achieve the concept of justice that has been mutually agreed upon (Rahardjo, 2006).

Ma'ruf Cahyono as the Secretary General of the MPR related to the influence of the legal tradition in Indonesia states that:

Indonesia, as a Dutch colony, is still heavily influenced by the civil law system in the implementation of its legal system. Codification of laws and regulations is seen as a vital thing in the process of law enforcement in Indonesia. Judges and other law enforcers are still fixated on the law. What the law says is the law. Judges are seen as mere mouthpieces for the law (la bouche de la loi).

In such a context, the law will always seem to move, change, following the dynamics of human life. As a result this will affect the way we judge, which will not just be trapped in the rhythm of "legal certainty", the status quo and the law as a final scheme, but a legal life that is always flowing and dynamic both through changes in the law and the legal culture. . When we accept the law as a final scheme, the law no longer appears as a solution to the problem of humanity, but human beings are forced to fulfill the interests of legal certainty.

Based on interviews with PERADI Deputy Chairperson Jamaslin James Purba related to the history of legal traditions in Indonesia, he stated that:

When viewed from its history, the Indonesian legal system is characterized by a civil law system because Indonesia is a colony from the Netherlands that uses the civil law system as a result of the adoption of the French civil law legal system. However, in reality, the Indonesian legal system does not purely adhere to the civil law system because simultaneously Indonesia also adheres to the common law system.

Forming legislations namely the President of the Republic of Indonesia / Executive / Head of State and DPR RI / Legislature indeed gives the Judge / Judiciary the authority to make legal discoveries when there is no legal basis in the laws and regulations. This can be seen in the provision of Article 10 paragraph (1) of Law No. 4 of 2004 concerning Judicial Power, which asserts "the court must not refuse to examine and try a case that is filed on the pretext that the law is not clear or unclear, but it is obligatory to examine and try it".

Judges in Indonesia in general must refer to the legislation as the main source of positive law in Indonesia, but if there is no legal basis, the judge must conduct a rechtfinding. So in fact the main source of law in Indonesia is the legislation, but in order to fill the legal vacuum, the legislators form the authority of the judiciary to give the judge the authority to conduct rechtfinding if there is no legal basis for the case. Nevertheless the judge's decision is still different from the laws and regulations. The legal system in Indonesia follows a mixed legal system between civil law and common law. This is an attempt by the state administrators to combine the advantages of each legal system, namely legal certainty (civil law) and the discovery of responsive law (common law). Basically this is indeed permissible, because even though our legal system adheres to the Dutch colonial heritage which is characterized by civil law, but there is no obligation we must adhere to the civil law system absolutely because of course each State has a history and needs of people that are different from each other. Not necessarily a suitable legal system applied in a country is also suitable when applied in Indonesia (Results of interviews with Informants).

The philosophical basis of progressive law is an institution that aims to bring people to a just, prosperous life and make people happy (Kusuma, 2009). Progressive law departs from the basic assumption that law is for humans and not vice versa. Based on that, then the birth of law is not for itself, but for something broader, namely; for human dignity, happiness, welfare and human dignity. That is why when there is a problem in the law, the law must be reviewed and corrected, not humans who are forced to be included in the legal scheme.

Based on this, it is clear that the transfer of legal tradition is not a prohibition. Humans and the complexity of their legal culture continue to grow, so the law is there for humans, not the developing human being forced in such a way as to enter into certain legal schemes, which of course are incompatible and will always be left behind from civilization. When there is a problem in the criminal procedure code, the law must be reviewed and corrected, not humans who are forced to be included in the criminal procedure law scheme in certain legal traditions.

There is no one prohibition in this world that states that in one country may only use one legal system (for example, only civil law), but we can do the elaboration (development) or maybe combine (hybrid) of two existing systems into one legal system which is characterized by Indonesian nationalism. The United States can be used as an example of a country that combines two systems, namely in its states there are those that use the continental system and there are those who use the common law / anglo saxon system. Indonesia as a state of law (rechtsstaat) does not mean only applying laws in the sense of being written (wet), but rechts in a broad sense (written and unwritten). This shows that it is possible for Indonesia to use a common law system in addition to using civil law.

Taking a legal system originating from other countries which was developed into a legal model in their own country, is not something new for the Indonesian State. This was strongly influenced by the principle of concordance that was adopted as Indonesian legal politics during the Dutch East Indies and continued to be developed during the independence era to make a real example, legal transplants that continued from pre-Dutch colonial times, until now.

Globalization enables the transformation of law in the world of continental Europe towards the Anglo-Saxon. Globalization also affects the law in one country with another country. A Professor named Reinhard Zimmermann from the University of Hamburg stated that:

All our national private laws in Europe today can be described as mixed legal systems. None of them has remained "pure" in its development since the Middle Ages. They all constitute a mixture of many different elements: Roman Law, indigenous customary law, canon law, mercantile custom, and Natural Law theory, to name the most important ones in the history of the law of obligations (Zimmermann, 2001).

Zimmermann states that, the world legal systems can all be described as a mixture of diverse materials: they can include chthonic law, customs, exogenous customs, religious law (Judaism, Hinduism, Islam, or Canon), commercial law, natural law, Roman civil law, customary law, and various statutes and regulations. None of them (countries in Europe) have remained "pure" in their development since the Middle Ages. They are all a mixture of many different elements.

The phenomena of hybrid law, mix legal systems and legal pluralism are possible and will occur. This is influenced by the influence of law from outside into a country, which in the end the law in that foreign country is transplanted to replace the law in a country through legal politics.

Alan Watson argued that Legal Transplantation is "the borrowing and transmissibility of rules from one society or system to another". Such a definition can be called a broad definition, which considers not only the formation of law as an inter-state relationship but also the influence of the inter-community legal tradition (Budiyono, 2009). Alan Watson, introduced the term Legal transplants or legal borrowing, or legal adoption to mention a process of borrowing or taking over or transferring the law from one country or from one nation to another, another country or nation then the law was applied in a new place together. the same as existing laws (Watson, 1974).

Tri Budiyono also stated that, Legal Transplantation is the taking over of legal rules, doctrines, structures, or legal institutions from another legal system or from a jurisdiction to another jurisdiction. . A legal transplant can lead to harmonization of the law if there is a conformity which includes the rule of law, the legal teachings, the legal structure, or the legal institution. Everything depends on the substance transplanted (Budiyono, 2002).

Law Transplantation as a national legal development policy is a political choice that is in accordance with the spirit and spirit of Indonesian law, the soul and personality of the Indonesian nation, the ideological-philosophical basis of Pancasila which is the original paradigmatic value of Indonesian culture and society, is a political choice in the activities of making legal norms concrete (basic policy) without having to ignore the position and existence of Indonesia in the midst of international relations. Thus the law that is born is a law that commits nationally, think globally and act locally (Hartoko W, 2002). The policy of making laws (basic policy) that combines elements originating from foreign law with laws sourced from the original paradicmatic values of Indonesian culture and society must be carried out carefully and with full calculations, so that the law that will be enforced in this country is not upheld from ideological-philosophical roots of the Indonesian state and nation (Hartoko W, 2002).

In the context of legal transplants, of course it cannot just be that a law from one country can be carried out in another country, moreover the two countries have different legal traditions. Bambang Santoso uses the theory of Robert B. Seidman in explaining the law of a nation that cannot be transferred to another nation. In his theory, Robert B. Seidman concluded that the law of a nation cannot be transferred to another nation. In his research, Seidman took the example of the application of British administrative law in his former African colony. It turns out that British administrative law cannot be applied just like that in African countries. There are several obstacles that hinder the application of the administrative law (Santoso, 2007).

One of the problems faced by African countries in implementing British administrative law is the problem of an ethos that is not supportive. Ethics owned by the British colonial white were apparently not owned by native African countries. The result was a failure to implement the British administrative legal system in its former African colony. From what has been stated by Robert B Seidman through his thesis, then in the framework of the development of Indonesian national law, it is necessary to be fully understood the meaning of Robert B Seidman's thought (Santoso, 2007).

In the development of Indonesian national law, the law must not simply pass over the legal systems of other countries, even though they are already advanced. As a former Dutch colony, in establishing national law, we do not simply adopt the Dutch legal system. With all the deficiencies that exist the writer tries to formulate his own model and legal material that fits the original values of the Indonesian nation.

Ma'ruf Cahyono, as the Secretary General of the People's Consultative Assembly in relation to the conditions of justice in Indonesia, stated that:

The renewal of the criminal justice system in Indonesia does not mean that it has to radically change the legal system in Indonesia. The civil law system that has taken root in Indonesia is actually also a good legal system. The intended reform must be carried out in stages by always prioritizing the values of Pancasila in each of its solutions (Interview with Informants).

Law is the identity of a nation, thus it needs a struggle to radically change the legal system in Indonesia and the civil law system that has taken root in Indonesia. Therefore, the reforms carried out are not reforms carried out by changing all criminal procedures in Indonesia, but analyzing and limiting law enforcement authorities which are feared to obscure the essence of justice proportionately. Thus the renewal that will be obtained will show a mixed / hybrid flavor, but prioritizing the values of Pancasila in each solution.

IV. Conclusion

It Is Possible to Conduct a Criminal Procedure Revolution in Indonesia, it is possible, but whether or not to return is the subject of debate in the discussion of the Criminal Procedure Code Bill. Displacement of legal traditions is not prohibited. Humans and the complexity of their legal culture continue to grow, so the law is there for humans, not the developing human being forced in such a way as to enter into certain legal schemes, which of course are incompatible and will always be left behind from civilization. When there is a problem in criminal procedure, the law must be reviewed and corrected, not humans who are forced to be included in the criminal procedure law scheme in certain legal traditions. Japan, France and Italy are examples of countries that have revolutionized the procedural law for speeches to get the right formula and be close to the truth. The revolution is carried out in a flowing way, not limited to a certain form and not stop at a certain point. For example, Japan does not directly apply the adversarial system, but it first applies continental European laws that are inquisitive and akusatoir. Likewise Italy where the Constitutional Court that was formed at that time actually ruffled the concept of the speech justice system, but Italy still found a format of criminal justice that was suitable for the country.

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