



Journal Homepage: -www.journalijar.com
**INTERNATIONAL JOURNAL OF
 ADVANCED RESEARCH (IJAR)**

Article DOI:10.21474/IJAR01/7687
 DOI URL: <http://dx.doi.org/10.21474/IJAR01/7687>



RESEARCH ARTICLE

TOWARDS A NEW INDONESIAN CRIMINAL LAW.

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Manuscript Info

Manuscript History

Received: 18 July 2018
 Final Accepted: 24 August 2018
 Published: September 2018

Keywords:-

Pancasila Legal System, Bill, Reform
 Criminal Law.

Abstract

In this article we describe underlying values and virtues unearthed from researching the criminal policy of reforming Indonesian existing criminal law towards a new Indonesian Criminal Law as manifested in the Preliminary Criminal Law or the Bill 2018. At the time of writing this article, the Bill is still under deliberation by the Indonesian People Representative (DPR-RI). The drafting of this Law, called the Draft Criminal Code or we will name it the Bill for this article, is to replace Law¹ No. 1 of 1946 concerning Regulation on Criminal Law (KUHP²) with all changes. This design is one of the efforts to realize an idea of a developing national criminal law (code) of the Republic. From the perspective of Dignified Justice Theory the reform effort is carried out in a directed and integrated manner (systemic) so that it can support national development in various fields, in accordance with the demands and the level of legal awareness and dynamics that have been emerged in the community or the nation.

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¹ To replace a law is a dimension of the law reform. See, Teguh Prasetyo, *Pembaharuan Hukum: Perspektif Teori Keadilan Bermartabat*, Cetakan Pertama, Setara Press, Malang, 2017. Cf., Jeferson Kameo, *Mens Rea Tindak Pidana Siber dalam Perspektif Keadilan Bermartabat*, (Disertasi), Program Studi Doktor Ilmu Hukum, Fakultas Hukum Universitas 17 Agustus 1945, Surabaya, 2017.

² An acronym (KUHP) generally used in the Pancasila Legal System to mean the Indonesian Criminal Code.

Introduction:-

In its development, the renewal of the Indonesian Existing Criminal Code Law was originally and solely directed on a single value which is the “decolonization”. The form chosen to realise this single idea is to make a “recodification”. In the course of the nation’s history, in the end, from the perspective of the Dignified Justice theory, reform has also contained a variety of broader virtues related to national and international developments. Therefore the second values is the mission of “democratization of criminal law” which, among others, is marked by the entry of criminal acts to give respect to human rights and the abolition of criminal acts that sowing hostility or hatred (*haatzaai-Articleen*) which are formal criminal acts has been reformulated as criminal acts of humiliating the people in power which are material criminal act.

The third mission is the “consolidation of criminal law”. Since independence, criminal law legislation has experienced rapid growth both inside and outside the Existing Criminal Code (KUHP) with its various peculiarities, so it needs to be reorganized within the framework of the Criminal Law Principles that regulated in Book I of the Bill.

In addition, the drafting of this law was carried out on the basis of the fourth mission, namely the mission of adaptation and harmonization of various legal developments that occurred both as a result of developments in the field of criminal law science and the development of values, standards and norms recognized by the nation and civilized nations in the international world.

Framework of Legal Politics or Criminal Law Policy:-

These various missions as mentioned above were placed within the framework of legal politics or criminal law policy by formulating this Bill (formulative Policy)³ in the form of codification and unification intended to create and enforce values and virtues within the Dignified Justice: consistency, justice it self, truth, order, expediency and legal certainty and taking into account the balance between national interests or the interests of society or the nations with individual interests in the Republic of Indonesia which according to the Indonesian Jurisprudence⁴ i.e. the Dignified Justice Theory/Philosophy have to be based on the Indonesian *Volkgeist* or the so called Pancasila and the 1945 Constitution of the Republic of Indonesia.⁵

Tracing the history of criminal law in Indonesia, it can be argued that the existing Indonesian Criminal Code is almost similar to the *Wetboek van Strafrecht voor Nederlandsch-Indie* (Staatsblad 1915: 732). The Indonesian Constitution, i.e. under Article II of the Transitional Rules of the 1945 Constitution contained a stipulation that on the declaration of Indonesia in 1945 as the utility required, and based on the spirit of the Proclamation of the Independence of Indonesia itself the content of the *Wetboek van Strafrecht* was still a valid law.

Appart from the Constitution, based on Law Number 1 of 1946 concerning Criminal Law Regulation (State Gazette of the Republic of Indonesia II Number 9), *Wetboek van Strafrecht voor Nederlandsch-Indie* is referred to as the Indonesian Criminal Code and is declared valid for Java and Madura, while for other regions will be determined later by the President. Efforts to realize a unity of criminal law for the entire territory of the Republic of Indonesia have not yet been realized *de facto* because there are areas of Dutch occupation as a result of Dutch military actions I and II which made still valid for these areas *Wetboek van Strafrecht voor Nederlandsch-Indie* (*Statute Book of 1915: 732*) with all changes.

³ Otto Yudianto used this legal term in his book: *Kebijakan Formulatif terhadap Pidana Penjara Seumur Hidup dalam rangka Pembaharuan Hukum Pidana Indonesia*, Cetakan Pertama, Menuju Insan Cemerlang, Surabaya, 2015.

⁴ Reference to this philosophy could be found in among others: Said Gunawan, Teguh Prasetyo, Anis Mashdurohatun, *Reconstruction on the Regulation Governing the Non-Primary Weapon System as an Effort to Achieve Legal Protection for the Indonesian Military Based on The Legal Certainty and Dignified Justice Principles*, Int. J. Adv. Res. 5 (9), 666-671; Cf., Teguh Prasetyo, *Keadilan Bermartabat: Perspektif Tori Hukum*, Cetakan Pertama, Nusa Media, Bandung, 2015.

⁵ Teguh Prasetyo, *Sistem Hukum Pancasila (Sistem, Sistem Hukum dan Pembentukan Peraturan Perundang-Undangan di Indonesia)*: Perspektif Teori Keadilan Bermartabat, Cetakan Pertama, Nusa Media, Bandung, 2016.

Since then, it can be said that after independence in 1945 there was a dualism of criminal law in force in Indonesia. This condition lasted until 1958 with the promulgation of Law Number 73 of 1958. The Law stipulated that Law Number 1 of 1946 concerning Regulations on Criminal Law with all changes and additions applicable to the entire territory of the Republic of Indonesia. Thus, a uniform material criminal law applies to all of Indonesia originating from the law in force on March 8, 1942 namely "*Wetboek van Strafrecht voor Nederlandsch-Indie*", which is referred to in this article as the Existing Criminal Code.

Since independent Indonesia there have been many attempts to modifying the Existing Criminal Code which for some it has been considered as a colonial heritage. The attempts were made to fit the Spirit of the Law in Indonesia or the Indonesian *Voksgeist* (the Spirit of the People) derive from Pancasila, the five Indonesian Tenets; so that all laws are in accordance with the development of its social life, both nationally and internationally.

Therefore, in addition to the various changes made through Law No. 1 of 1946 *Jo.* Law Number 73 of 1958, the Existing Criminal Code has undergone several updates or changes as follows: (1). Law Number 1 of 1960 concerning Amendments to the Existing Criminal Code, which increased the threat of punishment in Articles 359, 360 and 188 of the Existing Criminal Code; (2). Law Number 16 Prp., on the year of 1960 on some changes to the Existing Criminal Law, one of it was replacing the Dutch phrase "*vijf en twintig guilders*" in Articles 364, 373, 379, 384 and 407 paragraph (1) of the Existing Criminal Law or the Penal Code with "two hundred and fifty rupiahs"; (3). Law Number 18 Prp of 1960 concerning Amendments to the Amount of Fines in the Penal Code and other Criminal Provisions issued before August 17, 1945; (4). Law Number 2 PNPS of 1964 concerning Procedures for the Implementation of Death Penalty (Capital Punishment) Imposed by Courts in the General and Military Courts; (5). Law No. 1 of PNPS in 1965 concerning the Prevention of Abuse or Blasphemy of Religion, which among other things has added to the Existing Criminal Code Article 156 a; (6). Law Number 7 of 1974 concerning Control of Gambling, which changes the criminal sanction in Articles 303 paragraph (1), 542 paragraph (1) and 542 paragraph (2) of the Existing Criminal Code and changes the designation of Article 542 to Article 303 bis; (7). Law Number 4 of 1976 concerning Changes and Additions of Several Articles in the Existing Criminal Law Code Related to the Expansion of the Applicability of Criminal Law, Aviation Crimes and Crime against Aviation Facilities/Infrastructure; (8). Law Number 27 of 1999 concerning Amendments to the Criminal Code relating to Crimes against State Security, especially relating to criminalization of the spread of the teachings of Marxism and Leninism; (9) Law Number 3 of 1971 which was later replaced by Law Number 31 of 1999 *Jo.* Law Number 20 of 2001 concerning Eradication of Criminal Acts of Corruption, which basically stipulates several articles in the Indonesian Criminal Code relating to the Bribery and Criminal Position to be Corruption Crimes.

Various updates and/or changes which has been stated above are essentially *ad hoc* and nuanced evolutionary and can not meet the demands of the four missions to reach fundamental changes described above i.e.,

1. decolonization,
2. democratization,
3. consolidation and
4. harmonization, so that the criminal law formulation must be carried out thoroughly and codified.

Content and Structure of the Bill:-

The First Book of the Bill contains general rules as a guideline for the application of the Second Book and the Regulations outside this Bill i.e., Provincial Regional Regulations, and Regency/City Regional Regulations, unless otherwise stipulated not according to the Bill. As a result the First Book of the Bill is a *generic* law for all of the regulations governing criminal law outside the Bill. "Definition of Terms" in the First Book is placed in Chapter V because the meaning of the term does not only apply to the Criminal Law but also applies to laws that are *lex specialis*, unless otherwise specified not according to the Bill. Therefore "Definition of Terms" in the Criminal Law is different and broader in scope compared to "General Provisions" as commonly found in Chapter I of all the legislation in general.

The First Book of the Bill contains the substance, among others, the scope of the enactment of criminal law, the definitions of criminal acts and criminal liability, criminal, and action, as well as the objectives and guidelines for criminal, criminal and acts, diversion, action, and crime for children, criminal acts of corporations, mitigating factors, factors of increasing criminal penalties, overlapping, and decreasing the authority to prosecute and execute crimes, all the meaning of terms, and closing rules.

The Underlying School of Criminal Laws:-

Overall the basic difference between Law No. 1 of 1946 concerning Criminal Law and Criminal Law is the underlying philosophy. Law No. 1 of 1946 concerning the Regulations on Criminal Law as a whole is based on the thought of the Classical School which developed in the 18th Century which focused on criminal law on acts or criminal acts (*Daad-Strafrecht*). The New Criminal Code (the Bill) is based on the idea of Neo-Classicalism that maintains a balance between objective factors (actions/outwardness) and subjective factors (people/inner/inner attitude). This school of criminal law developed in the 19th Century that focused not only on the acts or criminal acts that occurred, but also on the individual aspects of the offender (*Daad-dader Strafrecht*).

It has been found out that a rather different fundamental thinking which affect the formulation of this Bill is the development of science about crime victims (*victimology*) that developed after World War II. This thinking pays great attention to the fair treatment of victims of crime and abuse of power. The philosophy of "*Daad-dader Strafrecht*" and vicimology will influence the formulation of three main problems in criminal law, namely the formulation of acts that are against the law, criminal liability or error, and sanctions (punishment and treatments) that can be imposed along with the underlying principles of criminal law.

The more humane or here we shall call the school or philosophy of Dignified Justice has also used. One principle in this school is the idea: "to make human humane". This school is similar to the Dutch phrase "*Daad-dader Strafrecht*"⁶, a character systemically colors this Bill. Among other things this nature is also expressly and impliedly exist in the various arrangements that seek to maintain a balance between objective elements (external actions) and elements or subjective factors (human or inner/inner attitude). This is reflected, among other things, by various arrangements regarding the purpose of prosecution, the terms of prosecution, the pair of sanctions in the form of criminal punishment and treatments, the development of alternative short-term independence punishment, criminal guideline or rule for implementing the punishment (fines) and treatment, capital punishment which is always alternative to life imprisonment or 20 years, and general minimum limit of punishment, imprisonment and treatment for children.

The material criminal law reform in this Bill does not distinguish between criminal acts (*strafbaarfeit*) in the form of crime (*misdrifven*) and violations (*overtredingen*). For both (the type of crimes) the term "criminal act" is used. Therefore, this Bill consists of only two Books, namely the First Book on General Provisions and the Second Book on Criminal Acts. The Third Book on Violations in Law Number 1 of 1946 or the Existing Indonesian Criminal Law is eliminated and their substance selectively accommodated into the Second Book of this Bill. The reason for the abolition is based on the fact that conceptually the difference between crime as "*rechtsdelict*" and violation as "*wetsdelict*" is not maintained, because in some developments some "*rechtsdelict*" are qualified as violations and on the contrary some actions which are supposed to be "*wetsdelict*" are formulated as crimes. The reality also proves that the problem of the severity of the quality and the impact of criminal acts and violations is also relative, so that such qualitative criteria in reality can no longer be maintained in the Bill.

In this Bill, there are also recognized criminal acts on the basis of law that live in society (the what so called Indonesian Living Law) or previously known as customary crimes (*Hukum Pidana Adat*) to better fulfill the sense of justice that lives in society or the *Volksgeist*. In reality in some regions of the country, there are still unwritten legal provisions that are alive and recognized as law in the area concerned, which determines that violations of the law are worthy of punishment. In this case the judge can stipulate sanctions in the form of "fulfillment of local customary obligations" that must be carried out by the maker of criminal acts. This implies that the standards of values and norms that live in local communities are still protected to better fulfill the sense of justice that lives in certain societies. This situation will not destabilize and still guarantee the implementation of the principle of legality and the analogy prohibition adopted in this Law.

Given the progress made in the fields of finance, economics and trade, especially in the era of globalization and the development of organized crime both domestic and transnational, the subject of criminal law cannot be limited to natural people (*natural person*) but also includes "corporation" in the Bill. The subject is called corporation to man a collection of organized people and/or wealth, whether it is a legal person or not a legal entity. In this case the corporation can be used as a means to commit a criminal act (corporate criminal) and can also benefit from a criminal act. Understand that corporations are the subject of a criminal offense, meaning the corporation either as a

⁶ Teguh Prasetyo, *Hukum Pidana Edisi Revisi*, Cetakan Pertama, RajaGrafindo Persada, Jakarta, 2013, hlm., 253.

legal entity or non-legal entity is considered capable of committing a crime and can be accounted for in the criminal law (*corporate criminal responsibility*).

In addition, it is still possible for criminal responsibility to be shared by the corporation and its administrators who have a functional position in the corporation or only the management can be accounted for in criminal law. By regulating corporate criminal liability in the Book I of this Bill, criminal liability for corporations which previously only applies to certain criminal acts outside of this Bill, also applies generally to other criminal acts both inside and outside the Bill. Sanctions on corporations can take the form of punishment (*straf*), but can also be in the form of disciplinary action or treatment (*maatregel*).

In this case the corporate error is identified from the fault of the management who has a functional position (has the authority to represent the corporation, take decisions on behalf of the corporation and the authority to exercise supervision of the corporation), which commits a crime by benefiting the corporation, either as the perpetrator, as the person who enforces it, as a person who participates in, as an advocate or as an aide of criminal acts committed by his subordinates within the scope of business or work of the corporation, including corporate controllers.

The principle of no crime without error (*geen straf zonder schuld*) remains one of the main principles in criminal law. However, in certain cases as an exception made possible the application of the principle of "*strict liability*" and the principle of "*vicarious liability*". In the first case, the maker of a criminal act can be convicted only because the elements of a criminal act have been fulfilled by his actions, while the second one is considered worthy of being extended to the actions of his subordinates who do the work or deeds for him or within the limits of his orders. In this Bill, it is regulated the type of criminal punishment in the form of principal, capital punishment and additional criminal.

The principal types of criminality consist of: a. imprisonment; b. closed detention imprisonment; b. criminal supervision; c. criminal fine; and e. criminal social work. In the principal punishment, new types of crimes are set in the form of closed detention, criminal supervision and criminal social work. Supervision and social work together with criminal penalties need to be developed as an alternative to short-term criminal deprivation of liberty that will be imposed by a judge, because with the implementation of these three types of criminal convicts can be helped to free themselves from guilt, in addition to avoiding the destructive effects of criminal deprivation of independence. Likewise, the community can interact and actively participate in helping the convicted person in carrying out his social life properly by doing useful things.

The order of the main types of crimes above determines the severity of the criminal (*strafmaat*). Judges are free to choose the types of crimes (*strafsoort*) that will be dropped among the five types, although in the Second Book of this Bill only three types of crimes are formulated, namely imprisonment, criminal fines, and capital punishment. Whereas the type of closed detention, criminal supervision, and criminal social work is essentially a method of criminal execution (*strafmodus*) as an alternative to imprisonment.

Death penalty is not included in the main criminal punishment. Death penalty is determined in a separate article to show that this type of crime is truly special as a last resort to protect society. Death penalty is the most severe crime and must always be threatened with alternatives with a type of life imprisonment or imprisonment for a maximum of twenty years. Death sentences can also be conditionally given, by giving probation periods, so that within the grace period the convicts are expected to improve themselves so that capital punishment does not need to be carried out, and can be replaced by criminal deprivation of liberty.

In the two-track system of punishment adopted (double-track system), which is in addition to the types of crime mentioned above, this Bill also governs the types of treatments (*maatregelen*). In this case, the judge can bring action to those who commit criminal acts, but are not or less able to account for their actions caused by suffering from mental disorders or mental illness or mental retardation. In addition, in certain cases treatments can also be applied to convicts who are able to account for their actions, with a view to providing protection to the community and fostering social order.

In this Bill also contain regulations for implementing new criminal sanctions relating to the severity of the criminal, namely in the form of a special minimum criminal threats with certain conditions to fulfill a sense of justice. The threat of special minimum criminal penalties is actually already known in criminal legislation outside this Bill.

Determination of the threat of special minimum criminal penalties is based on the following considerations: 1. to avoid the existence of a very significant criminal disparity for the same or more or less the same quality of crime ; 2. to make the effect of public prevention more effective, especially for criminal acts that are considered harmful and unsettling to the public; if in certain cases the maximum criminality can be increased, then as an analogue it is also considered that even a minimum amount of criminal matters can be exacerbated in certain matters.

In principle, special minimum criminal punishment is an exception, that is, only for certain crimes that are deemed to be very detrimental, very harmful, or very disturbing to the public and for crimes that are qualified or exacerbated by their consequences.

In this Law the threat of criminal penalties is formulated using a category system. This system is intended so that in the formulation of a criminal act there is no need to mention a certain amount of fine, but simply by pointing to the category of fine that has been specified in the First Book. The rationale for the use of this category system is that criminal fines are a type of criminal that changes in value more frequently due to the development of currency values due to the economic situation. Thus, if there is a change in the value of a currency, with a category system it will be easier to make changes or adjustments. Changes or adjustments are determined by Government Regulation. So, if there is a change or adjustment, the formator of the regulation does not need to change the criminal threat specified in a Law, but it is enough to change the provisions governing the category of fines in the First Book.

This Bill also contained regulation of the type of crime, the severity of the crime, and the way to carry out a special sentence against a child. This is due to the physical or psychological development of children who are different from adults. In addition, special arrangements for children relate to the fact that Indonesia has ratified the International Convention on the Rights of the Child in the framework of the promotion and protection of human rights.

The Formulation System of Criminal Acts

In the process towards producing a new Indonesian criminal law that is codified and unified there have been evaluation and selection of various criminal acts in Law No. 1 of 1946 or the Existing Indonesian Criminal Law, appreciation is also made for the various criminal acts that are Beyond Law Number 1 Year 1946. Among others, the Law concerning the Prevention and Eradication of Crime of Money Laundering, Combating Criminal Acts of Terrorism, Eradicating Criminal Acts of Corruption, Eradicating Criminal Trafficking in Persons, Human Rights Courts, Management Environment, Protection of Cultural Heritage Objects, and so on. Anticipatory and proactive, also included regulation on Pornography and Porn Action Crime, Elimination of Domestic Violence, Cybercrime and Crimes concerning Information and Electronic Transactions, and others.

In addition, adaptation to the development of international criminal acts originating from the sharing of international conventions both ratified and which have not been ratified is also carried out, including the Criminal Act of Torture based on Law Number 5 of 1998 concerning the Ratification of the Convention Against Torture and Treatment or Punishment Other Cruel, Inhuman or Degrading Human Dignity, 1984. In addition, anticipatory war crimes were also arranged originating from the 1998 Rome Statute of "International Criminal Court" , and the expansion of Corruption Crimes originating from the "United Nations Convention Against Corruption (2003) ".

Towards the formulation of a new system of criminal acts in the Bill, for special crimes are placed in separate chapters, while for certain other crimes are placed in their respective Chapters. For example, for a criminal offense against the Judicial Process is placed in a separate Chapter, while for criminal acts against human rights, criminal acts of narcotics and psychotropic abuse, corruption, money laundering, terrorism acts are made in one Chapter entitled "special crime" Placements in separate Chapters are based on specific characteristics, namely:

1. the impact of victimization is great;
2. often transnationally organized;
3. the procedural arrangement of specialists;
4. often deviate from the general principles of material criminal law;
5. the existence of special supporting law enforcement agencies with special authority;
6. supported by international conventions;
7. is a "*super mala per se*" and the magnitude of people condemnation.

In line with the process of globalization, the pace of development and social development accompanied by rapid social mobility and the advancement of advanced science and technology, it is estimated that new types of criminal

acts will still emerge in the future. Therefore, against the new types of criminal acts that will appear and have not been regulated in the Bill, the regulation can still be made through an amendment to the Bill or regulate it in a separate Law due to its specificity .

Conclusion:-

It has been found out that a rather different fundamental thinking and aspects which affect the formulation of this Bill is the development of knowledge about crime victims (*victimology*) that developed after World War II. This thinking pays great attention to the fair treatment of victims of crime and abuse of power. The philosophy of “*Daad-dader Strafrecht*” and vicimology will influence the formulation of three main problems in criminal law, namely the formulation of acts that are against the law, criminal liability or error, and sanctions (criminal and acts) that can be imposed along with the underlying principles of criminal law.

A point for drawing a conclusion, the more humane or in the philosophy of Dignified Justice was termed “to make human humane” or in its Dutch term “*Daad-dader Strafrecht*” character systemically colors this Bill. This philosophy, as indicated in the description above, among other things is also expressed and implied from the existence of various arrangements in the law reform towards a New Indonesian Criminal Law which among others, seek to maintain a balance between objective elements (external actions) and elements or subjective factors (human or inner/inner attitude).

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