

Implementation Idea of Balancing Between Offenders and Victims of Crime on Policy Formulation of Sentencing System Penal Code of New Draft Concept of 2012

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Abstract

Efforting to realize the ideal aims of the nation packed in national goals and achieved through the organization of the State . State enforcement is carried out through national development in all aspects of national life including the development of national legal systems. Development of the national legal system does not deny to release living law in the community. Draft Penal Code program aimed replacing KUHP/ WvS which due to differences in ideas or concepts of rationality , philosophy and value orientation. The idea and value of philosophy formulation of the Penal Code/ WvS was liberalism and individualism which based on the act of the criminal . The concept premise, the value of philosophy and formulation orientation concept, is Pancasila principles interwoven within each value reflects "the idea of balancing" oriented offenders and victims. This paper analyzes the implementation of the idea of balancing that compiled sentencing system between offenders and victims in Penal Code of New Draft Concept of 2012.

Keywords: The Idea of Balancing, Sentencing Systems, Penal Code of New Draft Concept of 2012

A. Introduction

Efforts to achieve national goals through the implementation of state with national development programs in all aspects of national life.¹ Including the development of national legal systems are programmed by the Indonesian government in the Long Term Development Plan (RPJP) in the Vision and Mission of the National Legislation Program 2005-2009 (Parliament Decision NO.01/DPR RI/III/2004-2005) (here in after used the word 'Prolegnas').

National legal systems development programs is a top priority because of changes to the Constitution of the Republic of Indonesia of 1945 had broad implications and fundamental the constitutional system that needs to be followed by reform in legal system structuring.²

Development of national legal systems aims at the estuary and the protection of the public welfare society with a wide variety of rules formulated by unification against legal certainty, either partially, or in the form of codification.³

In the framework of the development of the national legal system, Prolegnas 2005-2009, formulate a vision and mission as well as policy direction into the parameter determination, and the determination of priority bills. Vision development of national laws , namely the creation of a just rule of law and democratic development through national legal systems by establishing legislation aspirational, cored of justice and truth which serve the interests of the people and the nation in the frame of the Republic of Indonesia. Mission set Prolegnas in between realizing legal materials in varian fields in order to change the laws of the colonial heritage and national laws that were not in accordance with the development community changing, legal certainty, justice, and truth.⁴ Then attention to legal values which alive in the community. The mission is embodied in efforts to reform the legal system, including the penal system reform or sentencing system including; 'legal substance', 'legal structure' and 'legal culture'.⁵

Barda Nawawi Arief⁶ asserts that the three sub system is an integrated system of criminal law enforcement or sentencing system, because the criminal law may not operationalized or enforced concrete with only one sub system.

Policy formulation sentencing system is a system of authority a process chain of legal action from the competent authority, through a process of investigation, prosecution, until the criminal decisions handed down by the courts and implemented by the criminal conduct of officials.

¹ Conducted by GBHN, MPR RI Regulation Number IV/MPR/199, 1999-2004, basic thought. p. 8-9

² Nasional Legislation Program 2004-2009

³ Ibid

⁴ Ibid

⁵ Barda Nawawi Arief, *RUU KUHP BARU sebuah Restrukturisasi/Rekonstruksi Sistem Hukum Pidana Indonesia*, Penerbit Pustaka. Magister, Semarang 2007, p. 1-2

⁶ Ibid

Muladi the inauguration speech 'Professor of Criminal Law',¹ he said that the discussion of gravity 'Projection Material Indonesian Criminal Law In The Coming' on the operationalization of substantive criminal law and it goes to the formal criminal law and criminal law enforcement.²

Policy formulation 'Penal Code of New Draft Concept of 2012' by Barda Nawawi Arief, essentially an effort to reform or reconstruction or restructuring the entire system of substantive criminal law contained in the Penal Code (WvS) relic of the Dutch East Indies.³

Barda Nawawi Arief⁴ refers to the view Nils Jareborg who said that the overall structure of the penal system include: the problem of criminalization, the formulation of crime; issue of punishment or sanctions; and implementation issues or criminal sanctions of criminal law (execution of punishment). In all three systems the scope of the criminal law, covered three main problems of criminal law, namely: what conduct is duly punished; what requirements should be met to blame or account for someone who has done it; and criminal sanctions what is duly charged to criminals (the three basic issues of criminal law).

Policy formulation in the sentencing system principal provision of the Penal Code/ WvS as provisions on substantive criminal law, more oriented offender. Policy formulation in the sentencing system principal provision of Penal Code of New Draft Concept of 2012 based on 'the idea of balancing' oriented both on offenders and victims.

B. Research Question

After outlining the introduction' above, the formulation of problems that could be addressed:

1. How Implementation Idea of balancing between offenders and victims of crime in the sentencing system of policy formulation on Penal Code of New Draft Concept of 2012?

2. How Implementation Idea of balancing between offenders and victims of crime in the sentencing system regulatory policy formulation legislation of other State ?

C. Review Literature

The word is the basic policy of 'wise'⁵ which means always using his intellect, clever, adept, etc . Basic word 'wise' in English means eble, smart, experienced, wise, while the policy means wisdom and policy.⁶

Said policy as formulated above, the original meaning associated with:

1. The Government or polity, the political wisdom or cunning,
2. Wise, expedient or prudent conduct or management, conduct or management,
3. A principle, plan, or course of action, as pursued by a government, organization, individual, etc. (foreign policy).⁷

Understanding sentencing system proposed by the LHC Hulsman above includes 'General Rules' or 'General Rules' and 'Special Rules' or 'Special Rules'.⁸

Renewal of the penal system or sentencing system is part of the 'penal policy' founded on the concept of the basic ideas in mind; 'The principle of balancing'. The balance between the two main targets are 'public protection' and 'protection or individual coaching criminals'. The two main targets reflect the idea of balancing between offenders and victims.

Understanding About Victims In 'The Oxford English Dictionary' (Vol XII , 1961) , defines victim as:

a. A living creature killed and offered as a sacrifice to some deity or supernatural power. The concept has, for example, been applied to Christ as an offering for mankind.

b. A person who is put to death or subjected to torture by another; one who suffers severely in body or property

¹ Muladi, *Proyeksi Hukum Pidana Materil Indonesia Di Masa Datang* , Speech on Profeshorship, Semarang, 1990, p. 2

² Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Citra Aditya Bakti, Bandung, 2005 . p 31.

³ Barda Nawawi Arief, *Tujuan dan Pedoman Pemidanaan, Perspektif Pembaharuan Hukum Pidana dan Perbandingan Beberapa Negara*, Badan Penerbit Universitas Diponegoro, Semarang, 2009, p. 3.

⁴ Barda Nawawi Arief, *Pembaharuan Sistem Penegakan Hukum Dengan Pendekatan Religius Dalam Konteks Siskumnas Dan Bangkumnas*, p.10, in Nils Jareborg said that "the structure of penal system" (See : "THE COHERENCE OF THE PENAL SYSTEM" Dalam *Criminal Law in Action*, J. J. M. van Dijk, 1988, Arnhem, p. 329 – 340;

⁵ Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta 1989 hal. 115

⁶ John M. Echols dan Hassan Shadily, *Kamus Indonesia-Inggris*, Gramedia 2005 hal .437

⁷ Simon and Schuster , *Webster's New World College Dictionary* , Macmillan, Inc, Cleveland, Ohio, 1997, hal 1045.

⁸ Moeljatno, *Kitab Undang-Undang Hukum Pidana*, Bumi Aksara, Jakarta, 1999, halaman 40; Noted that chapter IX Book I KUHP/WvS actually contain from article 86 to article 102, however this is important to know that article 102 already deleted based on Staatsblad 1920 Number 382

through cruel or oppressive treatment; one who is reduced or destined to suffer under some oppressive or destructive agency; one who perishes or suffers in health, etc. from some enterprise or pursuit voluntarily undertaken. In weaker sense: one who suffer some injury, hardship, or loss, is badly treated or taken advantage of, etc¹.

In 'the word in English', the idea or notion of understanding the victims of which include:

1. *Victimize; to make a victim of; to cause to suffer inconvenience, discomfort, annoyance, etc. either deliberately or by misdirected attentions; to cheat, swindle, or defraud; to put to death as, or in the manner of, a sacrificial victim; to slougher; to destroy or spoil (plants) completely*
2. *Victimless; the absence of a clearly identifiable victim other than the doer ; for example, in a criminal situation.*²

Scope (Typology) by Hans Von Victims Hentig including the following:

The young-The weak specimen, in the animal kingdom and in mankind, is the most likely to be a victim of an attack; The female- Female sex is another from of weakness recognized by law; The old-The aging human being is handicapped in many ways; The mentally defective and the other mentally deranged-The feeble-minded the insane, the drug addict, and the alcoholic from another large class of potential and actual victim; Immigrants, Minorities, Dull Normals-An artificial disadvantage is imposed on these three groups of potential victim; The immigrant is likely to be poor and inexperienced in the ways of his new land;

*The Lonesome and Heartbroken-These victim lower their defences while they seek companionship. These types may be victims of crimes ranging from murder to fraud;The tormentor-The tormentor is generally found in "family tragedies";Blocked, Exempted, and Fighting Victims. –"The blocked victim (is)...an individual who has been so enmeshed in a losing situation that defensive moves have become impossible or more injurious than injury at criminal hand*³.

D. Theoretical Framework

The theory is used to analyze the problem is 'Combined Theory (*Verenigings Theorieen*)', between the Theory of Absolute and Relative Theory. The orientation of the actors reflected in the Theory of Absolute and Relative Theory, being oriented either offenders or victims reflected on the Combined Theory.

Pellegrino Rossi,⁴ who says, that the principle of retaliation as a criminal and the weight must not exceed a fair retaliation (the orientation of the perpetrator), but emphasized that the criminal has various influences, among others, 'repair something that is damaged due to criminal acts in society and general prevention' (orientation on the victims).

Safeguard the interests of the victim by R. Michael Latta, Vickie L. Bernhardt Pamela K. Hildebrand, and Arnold S. Kahn⁵ as follows;

When a person suffers and there by spares another person from having to undergo discomfort, is the victim of suffering liked more when the degree of suffering is mild or intense?. Also, is the beneficent victim of suffering liked more when compensation for suffering is great or small ? Balance theory (Heider, 1958) and the notion of a "just world" (Lerner, 1965) Make competing predictions about this situation.

According Muladi⁶ that the whole theory of punishment, criminal law is not true if only it noticed the offender, because it would spoil the impression of criminals and less attention to the interests of the society and the state, then specifically the interests of victims. Thus the operation of the criminal law should protect the various interests of both offenders and victims of crime.

E. Research Methods

Problems in the study included the central problem of penal policy, policy-oriented approach is normative legal research;⁷ statute approach, conceptual approach and comparative approach.⁸ Comparative law as a method, to analyze the various legal systems that apply a particular community or cross-sectoral differences.⁹ Johnny Ibrahim said, considering the method of comparative law with the regulations of other countries to assess

¹ *Victim and Society, Victimology: The Study of the Victim, Edited by Emilio C. Viano, Visage Press, Inc. / Washington D.C. USA, 1976, hal. XIV*

² Ibid.

³ Hans Von Hentig, dalam Robert A Silverman, *Victim Typologies; Overview, Critique and Reformation, Ibid, page. 56*

⁴ Muladi & Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana*, Penerbit Alumni, Bandung 1992, p. 10 - 25.

⁵ R. Michael Latta , Vickie L. Bernhardt Pamela K. Hildebrand, and Arnold S. Kahn, *Attraction to a Beneficent Victim : Balance Theory or "The Just World" ? Iowa State University, hal 107."*

⁶ Muladi, disari dari *Proyeksi Hukum Pidana Materiil Indonesia Di Masa Datang* , Pidato Pengukuhan Guru Besar Ilmu Hukum Pidana, Semarang, 1990, halaman 11 dan 12

⁷ Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*, Badan Penerbit Universitas Diponegoro Semarang, 1996, halaman 8

⁸ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, Surabaya, 2005, halaman 444. .

⁹ Soerjono Soekanto, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, PT Raja Grafindo Persada, Jakarta, 1985, halaman 86 dan 88

the adequacy of these provisions to the regulations of Indonesia.

F. Discussion

1. Implementation Idea of balancing between offenders and victims of crime in the sentencing system of policy formulation on Penal Code of New Draft Concept of 2012

New formulation of the Penal Code draft Concept or Concept New Penal Code Bill 2012, it will be evidence of an effort to reform the system of criminal law or sentencing system and an implementation idea of balancing between offenders and victims of crime.

A. Renewal of the penal system as a safeguard criminals in Penal Code of New Draft Concept of 2012; 1. Principle of Formal Legality, 2. Principle of Change, 3. Principle of Territorial, 4. Principle of National Active, 5. Principle of Universal, 6. Crime act, 7. Covenant Evil, 8. Preparation, 9. Experiment, 10. Investments, 11. Repetition/ Residiv, 12. Crime Complaint, 13. justification, 14. liability, 15. Errors, 16. Deliberate and negligence, 17. capability Responsible, 18. Reasons Forgiving, 19. Corporations, 20. Culpa in Causa, 21. changes or adjustments Criminal, 22. Implementation of Criminal Procedure, 23. Clemency.

B. Renewal of the penal system as efforts to protect victims Penal Code of New Draft Concept of 2012 implied in the provision of; 1. Compensation payments, 2. Fulfillment of obligations to local custom or obligations under the living law in society and the improvement due to criminal acts. 3. Principle of National Passive/ Principle of Protection; 4. Crime Complaint for victims not yet 16 years old and not married or are under protection, crime and victims complaint; 5. Resolving conflicts caused by criminal acts, Restoring balance, and Bringing a sense of peace in society; 6. Effects of a criminal offense against the victim or the victim's family and forgiveness from the victim his family; 7. Condition of the victim as a reason not to impose the judge judgment of imprisonment, such as, victims of crime led to the criminal act; 8. Lighten factors (provision of adequate compensation or repair damage voluntarily); 9 . Settlement outside the process as a reason Annulment Prosecution Authority.

C. Renewal of the penal system as offenders and safeguard victims of crime in the Penal Code draft concept implicit in the New 2012; 1. Objectives and Guidelines for Punishment, 2. Guidelines for the Application of Criminal Prison with Single Formulation and Formulation of Alternative 3. Principal Criminal (Criminal Social Work) and Crime Supplement (change Payments Losses), 4. Guidelines for Criminal Punishment Jail, 5. Crime and Measures for Child Actors Crime.

2. Implementation Idea of balancing between offenders and victims of crime in the sentencing system regulatory policy formulation legislation of other State

A. In the Material Albanian Criminal Law,¹ Article 60 of the Penal Code of Albania 'Sanctions against the convicted under probation' the court may compel the convicted under probation to meet one or some of the following sanctions : 1 . To pay family pensions in due time . 2 . To compensate for torts . Which can be attributed to the protection of victims in the criminal law is material ; payment of pension rights and compensation for loss of the victim's family .

B. In the Bahamas Material Criminal Law , Article 122 .² Sentencing system -oriented policy on the victim , seen from the provisions , 'the court convict to pay adequate compensation to the person or victim who suffered as a result of the act the perpetrator'. Terms of payment of compensation also for the offenders of a misdemeanor, set no more than 500 (five hundred) dollars or if it exceeds the limit , then set the rules relating to the crime and does not exceed the maximum limit .

C. In Criminal Law Material Iran ,³ policy oriented sentencing system associated with the victim ; Diyat defined as criminal in cash with the term 'ransom' or Blood Money assigned judge, Lévy as 'compensation' . Orientation on offenders and victims appear in the provisions concerning; qhishash or retaliation , or forgive, or criminal. (Article 261 Only the victim's husband or wife, however , shall have no say in either Retribution , pardon or execution of the punishment) .

G. Conclusion

I. Implementation Idea of balancing between offenders and victims in the sentencing system of policy formulation New Concept Draft Penal Code, can be understood from the model formulation; it could be imply in the protection of criminals, both implied in the protection of victims and it implied in the protection of the offenders and victims of crime.

II. Implementation of balancing between offenders and victims in the sentencing system regulatory policy formulation legislation in other countries, there are similarities with Indonesia, on the model of the protection of victims, such as the payment of damages or compensation or payment of charges and the difference of pension rights affected families.

¹ http://www.coe.int/t/e/legal_affairs/legal_cooperation/transnationalcriminaljustice/2pc-oc/Alban

² http://laws.bahamas.gov.bs/statutes/statute_CHAPTER84.html#Ch84s67

³ <http://www.iranhrcd.org/httpdocs/english/pdfs/Codes/ThePenalCode>.

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- <http://www.iranhrdc.org/httpdocs/english/pdfs/Codes/ThePenalCode>.

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