Advances in Social Science, Education and Humanities Research, volume 590
Proceedings of the 2nd International Conference on Law Reform (INCLAR 2021)

Responding to Legal Issues Regarding the Indonesian Criminal Code Bill of 2019

Yaris Adhial Fajrin[1*] Cindy Monique[2] Elvira Fitri Hasanah[3] Nurzakiah[4]

[1,2,3,4] *Faculty of Law (Univeristy of Muhammadiyah Malang), Malang, Indonesia*
**Corresponding author: Email: yaris@umm.ac.id*

ABSTRACT

The reform of Indonesia's criminal law has been started since the 1960s. The polemic arose when there was a massive wave of rejecting the ratification of the Indonesia Criminal Code Bill (RKUHP) in the form of demonstrations carried out by various elements of society to the Indonesia Parliament (DPR RI), especially the college student. The refusal was based on several substances of the RKUHP that were spread across various social media platforms, such as issues regarding the death penalty, the delict of insulting the president, *santet* (witchcraft), or obscenity which are briefly described in this article. Through this, the author will provide his views regarding legal issues related to the Indonesia Criminal Code Bill of 2019 which triggers action from student groups and the community. The purpose of this paper is expected to be able to provide an analysis of the legal issues that have developed related to some of the rejected substances of the RKUHP. To achieve this goal, this paper uses a normative legal research method, with a legal approach, an approach, and a conceptual approach. The legal materials used are various written regulations, legal books, expert opinions, and articles related to this theme.

Keywords: *RKUHP, KUHP, Indonesian Criminal Law.*

1. INTRODUCTION

The Indonesian Criminal Code Bill (RKUHP) has not yet been ratified, even in 2019, there was a large demonstration against the draft. The RKUHP is a necessary legal instrument because Indonesia as an independent country must have its own laws. The Indonesian Criminal Code that is currently in force is a translation of the Dutch Criminal Code which does not cause a slight difference in interpretation in its application.[1] Even the Dutch Criminal Code has been changed several times, in an effort to keep up with the times, human civilization, to the development of current crimes.

After going through a long process, the 2019 edition of the Indonesia Criminal Code Bill has arrived at the Indonesia Parliament table to be ratified and promulgated. On September 24, 2019, there was a massive demonstration against the ratification of the RKUHP carried out by various elements of society at the Indonesian Parliament Building, especially the college student. The action, which was attended by tens of thousands of people, was able to paralyze several sectors of life in the capital Jakarta.

The refusal was based on the rejection of several substances in the Indonesia Criminal Code Bill that were spread across various social media platforms, such as issues regarding the death penalty, the delict of insulting the president, *santet* (witchcraft), or obscenity.[2] Through this paper, the author will provide his views regarding legal issues related to the Indonesia Criminal Code Bill (as spread across various social media platforms) which triggered resistance actions from student groups and the public. Through this paper, it is hoped that it can provide an analysis of the legal issues that have developed related to several substances of the Indonesia Criminal Code Bill 2019 which were rejected.

2. METHOD

This research uses the normative method by using the approach legislation, case approach and conceptual approach. The legal materials used are various written

regulations, legal books, expert opinions and articles related to this theme.

3. RESULT AND DISCUSSION

I. THE HISTORY OF THE INDONESIA CRIMINAL CODE AND THE URGENCY OF ITS RENEWEL

Indonesia issued Law no. 1 of 1946 concerning the Criminal Law Regulations, which states that "... *the current criminal law regulations are the criminal law regulations that existed on March 8, 1942*". March 8, 1942, was the period of Japanese occupation in Indonesia, which imposed *Osamu Seirei* Number 1 of 1942, which essentially determined that the laws and regulations of the former government (the Dutch colonial period) were still legally recognized for the time being, as long as they did not conflict with the government military (Japan).[3] So what is meant by *Osamu Seirei* Number 1 of 1942 is *Indische Staatregeling* (IS) which is an update of the *Regeling Reglement* (RR) or basic regulations made jointly by the king and parliament to regulate the government of the colonized country. Article 131 and Article 163 IS confirms the application of the Dutch criminal law (*Wetboek van Strafrecht voor Netherlands Indie* WvS NI) which has been in effect since January 1, 1918, to all Indonesian residents.[3]

In 1963, the 1st National Law Development Seminar called for the codification of criminal law to be established immediately, because ideally for a newly independent country one of the aspects of national development is development in the field of law, including the field of criminal law.[3] As an independent country, it is time for Indonesia to have its own criminal law products, not laws from other countries/nations. As the opinion of William J. Chambliss, that the law of one nation cannot be transferred automatically to another country.[4]

Chambliss argument has a deep meaning, that there is a difference in the structure of society/nation so that it cannot apply the laws of other nations, because it will be difficult for laws from other countries to be applied if there is no conformity with the people.[5] Moreover, criminal law has an important role in social defense and social welfare efforts as national development goals as stated in the Preamble of the fourth alinea of the Indonesia constitution. According to Esmi Warassih, the application of a legal system that does not come from the community will be a big problem, especially in developing countries where there is often a mismatch between the values that support legal systems from other countries and the values that are lived by members of the community themselves.[6]

Criminal law reform will be related to national development efforts, considering that there is an integral relationship between criminal policy, penal policy, and national development goals. G.P Hoefnagels, explained that criminal law will function as an effort to overcome crime (through penal and non-penal means).[7]

The implementation of various laws outside the Indonesia Criminal Code (such as the Narcotics Law, the Law on the Eradication of Corruption, etc.) is seen as still not able to solve the problem of existing crimes. Moreover, the implementation of various criminal provisions outside the Indonesia Criminal Code has created many new problems, especially regarding the non-integration of one regulation with another. In fact, not a few regulations actually collide with other regulations so as to injure the purpose of legal certainty as the principle of Indonesia as a state of law. The author's example is the enactment of the Indonesia Pornography Law which in substance contradicts the objectives of the Child Rights Law.[8]

The process of discussing the drafting of the RKUHP has gone through several phases until various drafts have emerged, namely the RKUHP in: 1964, 1968, 1971/1972, 1977, 1979, 1982/1983, 1984/1985, 1986/1987, 1987/1988, 1989/1990, 1991/1992, 1997/1998, 1999/2000, 2010, 2013, 2015 and finally 2019. Not a few Indonesian criminal law experts were involved in the long discussion of the RKUHP. Such as Roeslan Saleh, Soedarto, Moeljatno, Oemar Senoadji, Satochid Kartanegara, J.E. Sahetapy, Mardjono Reksodiputro, Karlinah Soebroto, Andi Hamzah, Muladi, Barda Nawawi Arief, to Bagir Manan. For the 2019 draft RKUHP there were names such as Hakristuti Hakrisnowo, Eddy O.S Hiariej, Mudzakkir (and many other names), and even asked for opinions from the Netherlands such as D. Schaffmeister and N. Keijzer.

II. ANSWERING LEGAL ISSUES RELATED TO THE INDONESIA CRIMINAL CODE BILL OF 2019

It is undeniable that the complexity and difficulty of ratifying Indonesia's new Criminal Code is caused by the characteristics of criminal law itself as a law that has the characteristics of sanctions in the form of

suffering / sorrow for the perpetrators. There are several legal issues related to the RKUHP which the author will discuss in this section.

a. Regarding the Death Penalty

Harbert R. Packer who states that criminal law is the primary guarantor as well as the primary threater when using criminal law not properly, carefully and scrupulous.[9] In line with Packer, Jeremy Bentham also stated that criminal law is groundless, needless, unprofitable or inefficacious,[10] so that criminal law and its sanctions will intersect with human rights issues for perpetrators and victims. Especially regarding the issue of the death penalty, which raises pros and cons because it is seen as a sanction that robs a criminal of the right to life.

The death penalty is still regulated in the RKUHP, but the formula is different from that in the current Indonesia Criminal Code. The death penalty in the RKUHP is a form of special criminal sanction, which means that the sanction is threatened alternatively as a last resort to prevent criminal acts from being committed and to protect (protect) the community. The death penalty also recognizes the term "death penalty with probation" which opens the opportunity for the death penalty to be annulled if it meets the criteria, one of which is that the perpetrator shows regret and there is hope for improvement. At least the author describes that the death penalty is the last alternative to sanctions, and has several conditions to replace the sanctions with other forms of sanctions.

The author's note regarding the formulation of the death penalty is that it has not included it regarding the forgiveness of victims (including families and communities) to the perpetrators. The human rights dimension does not only acknowledge the existence of the perpetrator's human rights, but which is no less important is the victim's human rights.[11]

b. Delict of Insulting the President

Delict of insulting the president is not a new delict in the Indonesian Criminal Code, because the delict has been regulated in Article 134, Article 136 bis, and Article 137 which was later declared unconstitutional by the Indonesia Constitutional Court in its decision Number 013-022/PUU-IV/2006.[12] The Indonesia Constitutional Court views the article regarding the delict of insulting the president as threatening democracy and human rights in Indonesia. It became a problem when the delict of insulting the president reappeared in the Indonesia Criminal Code Bill of 2019, namely in Chapter II.

The difference in the formulation of the delict of presidential insult in the RKUHP with that in the formulation of the previous Indonesia Criminal Code, lies in the type of delict, which in the Criminal Code uses ordinary delict (*delik biasa*) while in the RKUHP uses complaint delict (*delik aduan*). A complaint delict is a delict that requires a complaint to be filed so that a perpetrator can be prosecuted.[9] Eddy O.S Hiariej, as a member of the drafter of the RKUHP, explained that the delict of insulting was still maintained because the insult was not by Indonesian culture which is full of etiquette and manners so that defamation is categorized as *rechdelicten* not *wetdelichten*.[9] The complaint offense, according to Von Lizt, is objectively due to a direct loss that is protected.[13]

c. Delict of Extramarital Relationship (*samen leven/Kumpul Kebo*)

The delitc concerning of extramarital relationship (*kumpul kebo/samen leven*) is the result of an extension of the delict of adultery (*zina*/*overspel*). The delict of adultery (as in the current Criminal Code) is still maintained as a crime that attacks the relationship/legal marital status of a spouse (crimes in marriage).

There are several reasons for the emergence of delicts of extramarital relationship. First, because the existing adultery delicts are unable to reach the acts of extramarital relationship (outside the legal marriage) so that there are many vigilante acts (*eigenrichting*) committed by the community against the perpetrators due to a legal vacuum. As a form of crime against marriage, the delict of adultery requires the existence of a legal marriage that is violated by the perpetrator, if there is no such condition then the delict of adultery cannot be imposed.

Second, the act of cohabitation is a reality that often occurs in Indonesian society today, even though these acts are seen as attacking the moral values of decency and religion that are embraced by most of Indonesian people. Crime is considered a-social because the community wants it,[14] including about extramarital relationship which is seen by the Indonesian community as an immoral act. Third, to protect the biological origin of the child, so that the rights of the child can also be protected.

Paying attention to the two formulations regarding the delict of adultery and the delict of extramarital relationship, then they both have different purposes. The delict of adultery is a delict that serves to protect marriage, while the delict of extramarital relationship serves to protect the moral values held by the Indonesian people.

d. Same-sex Obscenity Delict

There has been a change in the delict of same-sex sexual abuse. Same-sex sexual delict delicts in the RKUHP have expanded compared to the formulation in the Criminal Code.[15] The formulation in the RKUHP is about same-sex sexual abuse against anyone as a victim, not limited to children as victims (as in the current Criminal Code). The RKUHP determines that same-sex sexual abuse has three conditions, namely: it is carried out in public (public space), by coercion, or published as pornographic content. This means that if the same-sex relationship is carried out based on consensual consent, and does not meet the three conditions, it cannot be charged with a delict of sexual immorality.

e. *Santet* (Witchcraft)

Witchcraft or sorcery is black magic that is used to harm other people (victims). Witchcraft is a reality that occurs in Indonesian society, with many victims suspected of being the result of witchcraft. The difficulty in proving witchcraft is that the RKUHP stipulates that this witchcraft delict is limited to people who broadcast (promote) their ability to practice witchcraft. The formulation of the RKUHP lays on actions that can cause other people to believe and believe that the perpetrator has the ability to witchcraft.

f. The Law that Lives in the Indonesia Community (*adat's*/Indigenous Delicts)

Conditions for the act to be considered a criminal act (*strafrecht*) in addition to being contrary to the laws and regulations must also be contrary to the legal awareness that lives in society.[16] Provisions regarding the law that live in the community are contained and become an integral part of the legality principle in the RKUHP. The purpose of the inclusion of provisions concerning living law in society as part of the principle of legality is so that *adat's* delict (customary delict) can be accommodated for their validity in the Indonesian criminal law system. Considering that the law that lives in society (customary delicts) is unwritten so that by being included in the RKUHP it is expected to be able to provide an alternative for resolving criminal cases outside the court, as well as provide space for achieving justice that is felt by the community.

The law that lives in society must be in the form of customary criminal law and accordance with the values contained in Pancasila, the Indonesia Constitution, human rights, and general legal principles recognized by civilized society. The RKUHP also limits the form of customary sanctions, which are limited to sanctions in the form of fulfilling traditional obligations.

g. Abortion as a Crime

The issue of abortion that has surfaced in the public sphere is about abortion for rape victims. Abortion delicts in the Criminal Code are currently known as abortion delicts and infanticide delicts. There is a difference in the formulation of the RKUHP and the current Criminal Code, namely regarding the permitting of abortion by doctors for reasons of medical emergency indications or rape victims. The new provision is the reason for the abolition of the crime, as a justification for an abortion by a doctor. These provisions are contrary to the issues that arise and spread in society.

There are still many other legal issues related to the 2019 draft RKUHP, which are used as reasons for rejection by community groups, most of which are due to untrue information (*hoax*) from social media. However, it is undeniable by the author that the draft RKUHP needs to be refined again, including to accommodate the aspirations of the community and by making more efforts to socialize to raise public understanding of the new Indonesian Criminal Code. Indonesia's New Criminal Code will also need to be followed by efforts to reform other criminal laws and regulations, in order to integrate all criminal laws and regulations in an effort to overcome the problems of crime in Indonesia.

4. CONCLUSION

The massive demonstrations in Indonesia in 2019 to reject the Indonesia Criminal Code Bill (RKUHP) can be understood as an attempt to revise the existing draft law in the Indonesian Parliament. Issues related to the substance of the bill law are more a result of biased information about the RKUHP received by the public (college students are no exception). It is time

for Indonesia as an independent country to have its own Criminal Code, which reflects the values and needs of the Indonesian people. Therefore, the Indonesian government needs to be more optimal in discussing and socializing the RKUHP, especially among the public and college students to increase their understanding of the substance and urgency of the new Indonesian Criminal Code. As a human product, laws (including the Indonesian Criminal Code later) will not be a perfect product so it must be understood by all groups that the new Indonesian Criminal Code will open up opportunities to be improved through the existing constitutional mechanism.

REFERENCES

[1] P. M. Gunarto, "Asas Keseimbangan Dalam Konsep Rancangan Undang-undang Hukum Pidana," *Mimb. Huk.*, vol. 24, no. 1, pp. 84–97, 2012.
[2] H. P. Sari, "KALEIDOSKOP 2019: Kontroversi RKUHP, Demo Mahasiswa, hingga Penundaan Pembahasan," *Kompas.com*, 2019. [Online]. Available: https://nasional.kompas.com/read/2019/12/24/08431541/kaleidoskop-2019-kontroversi-rkuhp-demo-mahasiswa-hingga-penundaan?page=all. [Accessed: 30-Sep-2021].
[3] A. Bahiej, "Sejarah dan Problematika Hukum Pidana Materiel di Indonesia," *Sosio-Religia*, vol. 5, no. 2, pp. 1–21, 2006.
[4] W. J. Chambliss, "On Lawmaking," *Br. J. Law Soc.*, vol. 6, no. 2, pp. 149–171, 1979.
[5] Y. A. Fajrin and A. F. Triwijaya, "Pencegahan Korupsi Pasca Putusan MK Nomor 71/PUU/XIV/2016 Melalui Pendekatan Kebijakan. HUMANI (Hukum dan Masyarakat Madani)," *Humani*, vol. 9, no. 1, pp. 30–56, 2019.
[6] S. Supriyadi, "Penetapan Tindak Pidana Sebagai Kejahatan Dan Pelanggaran Dalam Undang-Undang Pidana Khusus," *Mimb. Huk. - Fak. Huk. Univ. Gadjah Mada*, vol. 27, no. 3, p. 389, 2016.
[7] I. N. P. Budiartha, "The Existence of Pancasila as a Basic Rule Toward the Dispute Settlement of Complaint Offence Through Penal Mediation Outside the Court of Indonesia," *J. Leg. Ethical Regul. Issues*, vol. 22, no. 2, pp. 1–5, 2019.
[8] Y. A. Fajrin and A. F. Triwijaya, "Problematika Yuridis dan Konsep Rekonstruksi terhadap Inkonsistensi Norma Undang-Undang Pornografi," *J. Wawasan Yuridika*, vol. 4, no. 2, p. 149, 2020.
[9] Y. A. Fajrin and A. F. Triwijaya, "the Concept of Penal Mediation for Defamation Delict in the Indonesia Ite Law As a Manifestation of Restorative Justice," *Yust. J. Huk.*, vol. 9, no. 3, p. 363, 2020.
[10] E. de Champs, "Constitution and the Code: Jeremy Bentham on the Limits of the Constitutional Branch of Jurisprudence," *Tocquev. Rev.*, vol. 32, no. 1, pp. 21–42, 2011.
[11] Y. A. Fajrin, A. P. Purnamasari, R. I. Rosyida, and D. F. Maulidiyah, "Death Penalty for Corruptors from a Human Rights Perspective in Indonesia," *Unnes Law J.*, vol. Vol. 6, no. 2, pp. 287–404, 2020.
[12] Y. A. Fajrin, A. F. Triwijaya, F. S. Prastyo, and M. Naufal, "Reformulasi Delik Makar Dalam Rancangan Kitab Undang-Undang Hukum Pidana Nasional Tahun 2019 (Sebuah Telaah Leksikal Terhadap Terminologi Aanslag)," *J. Huk. dan Pembang.*, vol. 51, no. 1, pp. 74–94, 2021.
[13] F. von liszt, "The Rationale for the Nullum Crimen Principle," *J. Int. Crim. Justice*, vol. 5, no. 4, pp. 1009–1013, 2007.
[14] S. L. Widayati, "Criminalization of Decency in The Criminal Code Bill from Moral Perspectives," *Negara Huk.*, vol. 9, no. 2, pp. 181–198, 2018.
[15] Y. A. Fajrin, A. F. Triwijaya, and M. A. Ma'ruf, "Double Track System for Criminals Against Homosexuality Background (Ideas in Criminal Law Reform)," *Negara Huk. Membangun Huk. untuk Keadilan dan Kesejaht.*, vol. 11, no. 2, pp. 167–190, 2020.
[16] Y. A. Fajrin and A. F. Triwijaya, "Arah Pembaharuan Hukum Pidana Indonesia di Tengah Pluralisme Hukum Indonesia," *Ekspose J. Penelit. Huk. dan Pendidik.*, vol. 18, no. 1, pp. 734–740, 2019.