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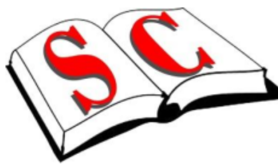

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Criminal Law Policy About Monetary Sanction In The Bill of Penal Code OF Indonesia

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Abstrak: Kebijakan hukum pidana mengenai pidana dan pemidanaan merupakan salah satu bagian penting dalam pembentukan dan pembaruan hukum pidana. Bahkan aturan mengenai pidana dan pemidanaan dipandang sebagai salah satu indikator dari kemajuan peradaban suatu bangsa. KUHP sekarang yang merupakan warisan Belanda, masih sangat dipengaruhi oleh pemikiran aliran klasik dan menempatkan pidana penjara sebagai primadona. Akibatnya adalah tingginya tingkat pemenjaraan, sekaligus berdampak kepada terjadinya kelebihkan kapasitas (over capacity) di lembaga pemasyarakatan, sehingga menimbulkan berbagai persoalan seperti dalam melaksanakan pembinaan dan pendanaan. Dalam perkembangannya, hukum pidana modern, dari aspek kemanfaatan, berupaya untuk mencari berbagai alternatif bagi pidana penjara, salah satunya adalah pidana harta kekayaan (Monetary punishment). Walaupun KUHP telah memuat ketentuan mengenai pidana harta kekayaan, yakni pidana denda, namun sistem yang dianut masih menempatkan pidana penjara masih sangat dominan. Dewan Perwakilan rakyat (DPR) yang pada saat ini tengah membahas RUU KUHP sebagai pengganti KUHP warisan kolonial, harus lebih mengedepankan pidana harka kekayaan, sehingga lebih membawa kemanfaatan. Tulisan ini membahas tentang bagaimana kebijakan hukum pidana tentang pidana harta kekayaan dalam RUU KUHP. Kajian ini menggunakan metode penelitian hukum normatif dengan menekankan kepada kajian isi (content analysis) terhadap RUU KUHP. Hasil kajian menunjukkan bahwa RUU KUHP belum menempatkan pidana harta kekayaan lebih berperan dalam penjatuhan pidana. Terdapat berbagai aturan yang tidak memungkinkan pidana harta kekayaan lebih dipilih dalam penjatuhan pidana. Oleh sebab itu RUU KUHP harus lebih mengkedepankan pidana harta kekayaan untuk mewujudkan sistem pidana dan pemidanaan yang lebih memberikan kemanfaatan.
Kunci: kebijakan hukum pidana, pidana dan pemidanaan, pidana harta kekayaan, RUU KUHP

Abstract: Criminal law policy about criminal punishment is one of the most important substances in Criminal law making and reform. Even, the regulation of criminal punishment is assumed as one of indicators in measuring the development and civilization of a nation. The current Penal Code of Indonesia (PCI) or KUHP that is the heritage of Dutch colonial is much influenced by Classical School and placed imprisonment as priority. The consequence is that in one hand the high rate of imprisonment and over-capacity in the prison on the other hand. Such a condition will result in problems such as the diffulties conducting rehabilitation and providing the budgeting. In its development, modern criminal law, especially from the the idea of utilitariansme, tries to find various alternatives to imprisonment, especially Monetary Punishment. Even though PCI has adopted regulation on monetary punishment, the existing system still places imprisonment very dominant. The Indonesian legislator which is currently hearing the Bill of PCI to replace the current PCI should foster the function of monetary punishment so that it results in the utility for the people. This article is discussing about how criminal law policy about the monetary punishment regulated in Bill of PCI. This study applies normative legal research and put stressing in (content analysis). The result of this study shoes that Bill of PCI has not yet placed monetary punishment as first priority in criminal

punishment. There are some regulations that make it is not possible for monetary punishment is more selected in criminal enforcement. Therefore, Bill of PCI should be more accommodative in optimizing financial punishment in realizing criminal punishment for the benefit of the people.
Key word : Criminal Law Policy, Criminal Punishment, Monetary Sanction, Bill of Penal Code of Indonesia

INTRODUCTION

Legal development and reform in criminal law cannot be separated from criminal law policy that taken in criminal law making process. Criminal law policy covers both formulation of substantive criminal law and procedural criminal law and so does with criminal law enforcement policy. Criminal law policy in criminal law reform covers both formulation of criminal act, criminal liability and criminal sanction or punishment, while criminal law policy in law making of criminal sanction includes types of criminal punishment, sentencing system and treatments.[1]

The sentencing and sentencing system as one of important part in criminal law always experiences from a dynamic process and development. The sentence and sentencing system is some time is viewed as reflection of development of criminal law of a nation. It even used as indicators of civilization development of a society.[2] The development of criminal punishment and sentencing system is always influenced by theory criminal law and punishment that try to provide a foundation for criminal punishment.

The history of criminal punishment that has been begun since the classical school tries to find reason and argument for criminal punishment and system. Generally speaking, the purpose of criminal punishment especially imprisonment are deterrence, retribution, rehabilitation and incapacitation.[3] If at the beginning, in classical school, sentences and sentencing system is generally aimed as revenge. However, in its development, criminal law scholars try to find the real purpose of criminal law and punishment. That is why then there

[1] All systems of criminal law represent a shared commitment to acquitting the innocent and Punishing the guilty. This shared commitment confers upon them a single unifying purpose that Centers on the institution of punishment. Without punishment and institutions designed to Measure and carry out punishment, there is no criminal law. It is fair to say, then, that the institution of punishment provides the distinguishing features of criminal law. George, P Fletcher. (1998). *Basic Concept of Criminal Law*, New York : Oxford University Press, p. 24.

[2] The urgen of criminal punishment in criminal law is reflected in what H. L. Packer says. He says that The criminal sanction is at one prime garantor and one threatener of human freedom. Used providently and humanely, it is guarantor. Used indiscriminately and coersively it is a threatener. Packer, H. L.. *The Limits of Criminal Sanction*. California : Stanford University Press. p. 9.

[3] Robert, Cooter and Thomas Ulen. (2004). *Law and Economy*. Boston : Pearson Education Inc.. p. 492.

comes theories such as of prevention and rehabilitation. The development still continuous with some more recent theories such as social defense and abolitionism theory.[4]

Various ideas and theories of sentences and sentencing systems then influence the development of criminal law, and in several countries and then it becomes the basis for criminal law reform and also becomes the basis for criminal law norm includes in sentences and sentencing system. The development of theory in criminal law has also brought impact to effort to find alternatives to criminal punishment. If at the beginning criminal punishment was mainly aimed at physical punishment, especially imprisonment then there are idea to look for alternatives to jail. There were also then appear idea to give sanction that was not classified as criminal punishment but classified as treatment.[5]

One of idea on alternatives to imprisonment, such as prison or jail is that punishment that aimed at property or asset of the wrongdoers, so called monetary punishment or financial punishment.[6] This idea was influenced by the utilitarianism.[7] There are also other idea that is based on economic consideration such as the study on economics and the law, or law and economics. Studies on economic aspect of law are based on economic utility of law, such as the principle of rational maximize,[8] principle efficiency,[9] and cost and benefit analysis of law.

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[4] Abilitionism may be interpretaed as the attempt to do away with punitive responses to criminalized problems. It is the first step in the abolitionist strategy, followed by a plea for dispute settlement, redress and social justice. The Sage Dictionary of Criminology, accessed on : https://www.sagepub.com › files › upm-binaries. Another view says that Abolisionism is fFormulation it can be suggested that abolitionists advocate new ways of dealing with undesirable behaviour, and in doing so they situate themselves in an original position within the debate around restorative justice. Vincenzo, Ruggiero. *An Abolitionis Vieuw of Restorative Justice*. International Journal of Law, Crime, and Justice 2011 p. 39.

[5] The difference between criminal sanction and treatment sometime it is difficult to introduce, however one of them is that from the purpose of them. Treatment is more aimed at rehabilitation. Joel, Samaha. *Criminal Law Tenth Edition*. Wardworth : Cengage Learning, p. 22.

[6] Monetary sanctions dapat diartikan sebagai: legal financial obligations (LFOs), include fines, fees, restitution, surcharges, interest, assessments, and other court costs imposed on people convicted of crimes ranging from traffic violations to violent felonies., lihat: Brittany Firedman dan Marry Pattilo (2019). "Statutory inequality : The Logic of Monetary Sancton in State Law", *The Russell Sage Foundation Journal of the Social Sciences February 2019, 5 (1) 174-196*; DOI: https://doi.org/10.7758/RSF.2019.5.1.08. p. 174 accessed on 9 September 2019.

[7] Jeremy Bentham, as the ponieer of utilitarianism introduced that the value of punishment must not less than any case then what is efficient to outweight that of the profit of the offense. Seet: Jeremy Bentham, 2000, An introduction to the Principles of Morals and Legislation 1781, dalam Kicthener, Botoche Book. *https://socialsciences.mcmaster.ca › econ › ugcm › bentham › morals*. *p. 141* accessed on 10 Septembet 2019.

[8] In This concept, it is said that human as *rational maximize*, then he will compare the benefit of each additional unit of illegal activity with the cost where the cost are weight by the probability of detection and conviction. Lihat: Nicholas, Mercuro dan Steven G. Medena. (1999). *Economics and the Law, From Postner to Post Modernism*, New Jersey : Princeton University Press. p. 58.

[9] Supporters of Chicago School that study legal aspect of economics, says for example that the legal decision making and evaluation of legal rule should be analyzed from the perspective economic efficiency. One criteria employed is Pareto efficiency that a situation is efficiency enhancing if at least one person can be made better off without making one else worst off. *Ibid*. p. 59.

Such an influence has also resulted in idea to set and to design the criminal punishment and its system that should also consider the economic aspect of law. Criminal punishment should try to find alternative to imprisonment, and punishment such as fines, fees and cost, surcharges and restitutions. The idea of monetary sanction has in fact been accommodated in current Penal Code of Indonesia (PCI) that is inherited from Dutch Colonial that has been first introduced one century ago. However, the idea of monetary sanction is still limited to fine and mostly it still as alternative to prison. Fine as an independent type of punishment just allocated for minor crime, so called contravention.[10]

Indonesia which is currently performing criminal law reform[11] in order to replace colonial Penal Code, is also designing a criminal law codification which is hoped in line with state philosophy that is Pancasila,[12] and also be based on the condition of the nation, based on the current development both internal and external. Therefore, sentence and sentencing system as part of criminal law system should also referred to the state philosophy of Indonesia. The new Penal Code should also fit with the current development on thinking and theory of criminal law, especially about the idea of alternative to physical punishment, especially incarceration. The problem is whether the Bill of the Indonesia Penal Code, which is nowadays under the hearing in Indonesia People Representative Body (DPR) has accommodate the new development of sentence and sentencing system, especially about the monetary sanction in its formulation. There is also question whether the Bill of the New Penal Code of Indonesia has been optimally incorporated in its formulation.[13] Considering that the phase of legislative or formulation policy is the most strategic phase in the process of operationalization or functionalization and concretization of criminal law, [14] the legislative body should collect and consider and pay attention much input, idea, thinking from various stakeholder in society in order to create a new and progressive Penal Code that responsive to

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[10] Generally, crime in Penal Codeof Indonesia is classified into tw chategories. They are seriouse crime (so called seriouse crime (kejahatan), and minor crime or contravention (pelanggaran). Or it may be classified into crime and contravention. Serious crime is placed in second chapter or book of PCI and contravention is place in third book. PCI consists of three books. The fist book is about general reles, second book is about crime and thir book is about contravention.

[11] Barda Nawawi Arief said that criminal law reform is essensially an endeavor to review and to evaluate law making (reorientation and reformation) of criminal law based on central value of socio-politic, socio-philosopny and socio-cultural of Indonesia society. Barda, Nawawi Arief. (2011). *Tujuan dan Pedoman Pemidanaan*, Semarang : Badan Penerbit Magister. p. 43.

[12] Endang Surisno. (2011). *Bunga Rampai Hukum dan Globalisasi*, Bandung : Genta Press. p. 90.

[13] The hearing on the Bill of Penal Code of Indonesia in Legislative body still facse some crucial issues. However due to some reservation of some parto of society, Legislative body failed to enact the Bill. Pembahasan *RUU KUHP dan PKS Diperpanjang*, https://www.cnnindonesia.com/nasional/20190725122505-32-415368/pembahasan-ruu-kuhp-dan-pks-di-dpr-diperpanjang accessed on 26 September 2019.

[14] Barda, Nawawi Arief. (2008). *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan*. Jakarta : Kencana. p. 222-223.

current condition of Indonesian society.[15] Therefore, this article is discussing the criminal law policy regarding the monetary sanction in the Bill of Penal Code of Indonesia.

METHOD

This article is written based on research on the criminal law policy concerning the monetary sanction in the Bill of Penal Code of Indonesia. This research applies normative legal research by studying or analysis (content analysis) of the formulation of sentence and sentencing system in the Bill. The analysis then discussed with the legal principle and theories in criminal law. The research is also study the synchronization of law both vertical and horizontal synchronization of law related to sentence and sentencing system.

DESCRIPTION AND ANALISYS

A. Criminal law Policy in Criminal Law Reform

The development of law and the system of law, include criminal law, cannot be separated from the politic of law or legal policy. M. Mahfud MD said that legal policy or legal direction taken by the state in order to achieve the purpose of the nation in the form of formation of new laws and renew the old law.[16] The above mentioned understanding is clearly limited to the formation of law or law making, especially by legislative body. Therefor he distinguished between legal policy and science of legal policy and not just related to formal direction of enforced law but also related to various circumstances and aspects related to formal direction of law, such as political, cultural and social background of designed rules.[17] Then, Mahfud MD divides the study of legal politic between: first, formal direction of implemented or unimplemented rules (legal policy) in order to achieve the goals of the nation that cover the replacement of old law, and the second is political background, other sub systems of society behind the birth of law; include the formal direction of the next applied law and unapplied law. Third, problems around the enforcement of law especially implementation of legal policy that has been decided. [18]

From the above mentioned understanding of legal policy, it is understood that the study of legal policy is not only related to law making activity but also related to the selection and enforcement of law in a state that in line with the purpose of that state. Through legal policy,

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[15] Ridwan. *Kebijakan Formulasi Hukum Pidana dalam Penanggulangan Tindak Pidana Korupsi*, *Kanun Jurnal Ilmu Hukum Fakultas Hukum Unsyiah*. Nomor 60 Tahun XV Agust 2013. p. 220.

[16] M., Mahfud MD. (2010). *Membangun Politik Hukum, Menegakkan Konstitusi*. Jakarta : Rajawali Pers. p. 5.

[17] *Ibid*.

[18] *Ibid*.

the formation and development of law will be harmonized with the need and development of a state base on the real condition of the state. As part of legal discipline or legal system, criminal law also has a legal policy. The term of criminal law policy is also known as *penal policy, criminal law policy* or *strafrechtpolitiek*.[19] Quote the idea of Sudarto, legal policy covers: a) Effort to realized good legislation based on the condition and situation of a certain time;) State policy through a competent institution to shape willed laws, that assumed can be applied to express what is exist in heart of society to achieve what are aspired.

From the understanding, Sudarto introduced that legal policy is an endeavor to realize criminal law legislation that in line with condition and situation in a certain time and for the future.[20] In the meantime A. Mulder introduced that criminal law policy (strafrecht politiek) is the policy to decide: a) How far is existing criminal law should be reformed or renewed; b) What should be done to avoid a criminal act; c) How the investigation, prosecution, trial and execution of punishment should be performed.[21]

From above discussion, it seems that criminal law policy as a process in selecting, deciding and enforcing criminal law always develops in line with the development of its society. Legal policy becomes basis for the formation of law formally. Therefore, criminal law policy of Indonesia is a long process and a long way in line with the history of Indonesia nation itself. However one thing that should always be scrutinized is criminal law policy how is the policy of that currently in the Bill of PCI since it is not only for current generation but it should also fits with the future generation.

The current criminal law policy of Indonesia is of course cannot be separated from the policy of Dutch administration that for hundreds of year occupied Indonesia. At first legal policy of Dutch government was the introduction of dualism policy in Dutch constitution in Indonesia, so called in article 161 Indisische Staatreegeling (IS) that separated the groups of citizen into several groups. For each group it was enforced different law. For Indonesia origin so called Bumi Putra or inlanders, for example, its own criminal law, so called Adat law was enforced. But then Dutch government tried to introduce unification policy in which one single criminal law was enforced for all Dutch citizens. The effort to draft a codification on criminal law was succeed in 1866. However, the effort had created two different codifications. The first was so called Codification for European groups of citizen (Het Wetboek van Strafrecht voor Europeanen (Stbl. 1866 No. 55), that enforced for European

[19] Barda, Nawawi Arief, *Bunga Rampai*., *Op cit*., p. 22.
[20] *Ibid*. p. 23.
[21] *Ibid*.

group of citizen and the second is codification for origin Indonesia citizen and those who categorized as Indonesia origin (Het Wetboek van Strafrecht voor Inlands en daarmede Gelijkgestelde. [22]

The Dutch government then tried to adjust the law which was enforced in Netherland with law that exists in occupied area. It then formed a single codification so called unification of law. The codification was formulated in a Queen Decision of Criminal law of East India (Koninklijk Besluit van Strafrecht voor Nederlandsch Indie (Stbl. 1915 No. 732) and the was fist applicable in 1 January 1918. That codification was applied for all groups of Dutch citizen in East India or Indonesia.[23]

After independence of Indonesia, with article II so called transitional rules of Indonesia Constitution so called the 1945 Constitution, the Penal Code was declared valid and applied in Indonesia. Then with Law No. 1 of 1946, the Dutch Penal Code was formally adopted as Penal Code of Indonesia. And at the same time Law No. 1 of 1946 had also amended some articles of the Penal Code. However, with the comeback of Dutch administration for several year in Indonesia, the policy of dualism of law happened again in Indonesia since Dutch government enforced its own Penal Code in areas occupied by Dutch administration, while in areas that were not occupied by Dutch, Penal Code of Indonesia was still applicable. The dualism policy comes to end on 29 September 1958 with the enactment of Law No, 73 of 1958 as the declaration of the enforcement of Penal Code of Indonesia in all of Indonesia territory.[24]

In its next journey, PCI has experienced some alteration either some additions or subtraction or with some law making outside the Penal Code. One of important issue is that Indonesia is eager to replace colonial criminal law regime with a new and adjusted criminal law regime in line with way of life of Indonesia people. That in the law making process, Pancasila as principle or basic norm (*groundnorm*), has provided abstract norm that give direction, measurements and opportunity to decide what is appropriate or not to be accepted as criminal law norm.[25]

Endeavor to nationalized laws includes criminal law, conceptually had been initiated by establishing the so called The National institute for legal Development In 1958. This body was assigned to develop a national legal system and a national criminal law system. In

[22] A Zainal Abidin, *Op. cit.*, p. 62.
[23] *Ibid*. p. 64.
[24] *Ibid*. p. 70.
[25] Rocky Marbun. *Grand Design Polik Hukum Pidana dan Sistem Hukum Pidana Indonesia Berdasarkan Pancasila dan Undang-Undang Dasar Negara Republik Indonesia 1945*. Pajajaran Jurnal Ilmu Hukum Fakultas Hukum Universitas Pajajaran. Volume 1 Nomor 3 Tahun 2014. p. 559.

achieving its mission, this institution holds a national conference from 11 to 16 March 1963 in Jakarta.[26] One of formulation of the conference is an exclamation to draft a bill of national Penal Code as soon as possible.

Even though the effort to establish a national criminal law legal system has been initiated quite long, due various problems of this nation, especially political and social problems this effort has not seems to be success in the near future.[27] However the effort has been success to draft a bill of Penal Code of Indonesia.[28] This draft has actually submitted to DPR to be discussed and debate in DPR. It has also included to National Legislation Program so called Prolegnas since 2009. It means that the bill become a priority in passing the new legislation in the time of service of current DPR.[29]

Besides trying to drafting a new codification, Indonesia is also trying to develop criminal law outside the codification through the enactment of special criminal law. However the special law has its specialty and deviation from general criminal law. The specialty of this special criminal law was also found in sentence and sentencing system, such as new type of criminal sanction such as restitution, revocation of license and prohibition to post special position.[30] In economic crime, for example some new type of criminal sanction such as accumulation system and minimum sanction is introduced to certain crime.[31] In Law No. 31 0f 1999 regarding Corruption Eradication as it is amended by Law No. 20 of 2002, is also adopted new type of criminal sanction especially related to monetary sanction.

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[26] Moeljatno. (1985). *Fungsi dan Tujuan Hukum Pidana Indonesia*. Jakarta : Bina Aksara. p. 15.

[27] The lates development, there was big domontration done by students and other element of society, to challenge the enactment of the Bill of Penal Code of Indonesia by legislative body. There are some reservations to the substance of the code. One of them is that some articles of the the Code will suppress the rights for freedom of speech, especially to critize the government or government officials.

[28] Effort to reform Criminal law is actually begun with a recommendation of The first National Seminar on Law 11-16 Mart 1963 in Jakarta that calles the codificarion of the new Penal Code could be finished as soon as possible. The First version of the draft of Penal Code is issued in 1964. The draft of 1999/2000 version then it was brought to the legislative body to be discussed and passed. http://www.academia.edu/8410855/Sejarah Pembentukan KUHP Sistematika KUHP dan Usaha Pembaharuan Hukum Pidana Indonesia, accessed on 2 Januari 2016.

[29] *DPR Setujui Daftar Prolegnas Dengan Catatatan*, http://www.hukumonline.com/berita/baca/lt54d8993156cb3/dpr-setujui-daftar-prolegnas-dengan-catatan accessed on 10 Januari 2016.

[30] Supanto (2010). *Kejahatan Ekonomi Global dan Kebijakan Hukum Pidana*. Bandung : PT Alumni. p. 262.

[31] Article 5 of Emergency Law No. 7 of 1955 also introduces a treatment so called tindakan tata tertib that directed to asset of offender. Article 7 of that law adopts some additonal sanctions suca aas liquidation of a company, confsiscation company's profit.

B. Sentence and sentencing policy in Indonesia Criminal Law System

Discussion on sentence and sentencing will not separate from discussion on criminal law in general, since sentence and sentencing is the end of criminal law and criminal justice system. Substance criminal law consists of three main elements. They are criminal act, criminal liability, and criminal sanction. Traditionally, criminal sanction can be understood as reaction to a criminal act, by imposing the suffering to the wrongdoer.[32]

The idea concerning the criminal sanction always experience development, started from the classical school with absolute theory up to the thinking of social defense movement that wants to eliminate criminal sanction and replace it with non-punitive sanction. However, criminal sanction still becomes the most important part of criminal law even though with some improvement and modification. This idea is supported with the reality as Packer said that: the criminal sanction is indispensable: we cannot now and in the foreseeable future get a long without it. Moreover, criminal sanction is still currently one of available means to face the danger of crime: "criminal sanction is the best available device we have for dealing with gross and immediate harms and threat of harms".[33]

Even though criminal sanction is real and unavoidable, it still needs adjustment with the condition and development of society. Such a need then resulted in criminal law reform especially in sentence and sentencing system. Such a development then is absorbed in criminal law substance, in codification and outside codification or in special criminal laws that form a criminal law system. According to Friedmann, law is just like a complex organism in which structure, substance and culture interact with each other. To clarify the background and effect of each part of system, the role of various elements of the system are needed.[34] Substantive aspect of criminal law covers substantive criminal law and procedural law.

Sentence and Sentencing in Penal Code of Indonesia

The regulation on sentence and sentencing in Indonesian Criminal Law System is currently reflected in Penal Code of Indonesia. Sentence and sentencing in codification which is still come from Dutch colonialism is much influenced by theories of classical school in

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[32] Jeremi Bentam for example define criminal sanction as an evil resulting to an individual from direct intention of another on account of s0me acts that appear to have been done or omitted, It is an evil, a phyisical evil: either a pain or a loss of pleasure. Joel Meyer. (1968). *Reflection to some Theories of Punishment*. Journal of Criminal Law and Criminology. Volume 59 (4) p. 595. Available at https://pdfs.semanticscholar.org › accesed on 5 September 2019.

[33] A.L., Packer. *Op.cit.,* p. 364.

[34] Lawrence, M. Friedmann. (2011). *The Legal System : A Social Science Perspective*. Terjemahan. M. Khozim, Bandung : Nusamedia. p.18.

criminology or criminal law with punitive orientation. But in its development PCI has been also much influenced by modern school with the idea *double track system* that has accommodated anther sanction beside criminal sanction the so called treatment (maatregel) that is more oriented on rehabilitation.

Sentence and sentencing system in PCI are basically covers types or form of sanction, usually called (*strafe soort)*, the size or measurement of sanction (*straf maat)*, the application of criminal sanction (*straf modus)* and structure of sentence or s*traf system*. Types of criminal sanction in PCI are found in article 10 that consists of main punishment and additional punishment, while rules on long or size of punishment is found in article 12 of PCI. The way to implement the punishment is regulated in article 11, and implementation of punishment is regulated in article 13 to 47.[35] The implementation of criminal punishment covers incarceration, detention, fines and additional punishment, while the implementation of imprisonment is also regulated in Law No. 12 of 1995 regarding Pemasyarakatan. The criminal punishment system is regulated in principle of punishment especially between main punishment and additional punishment. One of important principle in PCI is alternative principle[36] in imposing main punishment and accumulation principle[37] in imposing additional punishment.

Alternative principle in sentencing will result in that monetary punishment in Penal Code will not become first choice by prosecutor or judge since it just as second alternative after imprisonment. Monetary sanction just will become the choice if it place as independent punishment or become first choice, and that is only found in minor crime or contravention. With such formulation monetary sanction just has limited in application of sentence and sentencing system in Penal Code, and will always cause that incarceration (prison and detention) will always dominate the sentence and sentencing in Indonesian Criminal Law System.

The formulation regarding the sentencing in Penal Code there is also regulation in case of someone involves in frequent crime and the cases was tried in one occasion, so called *samenloop*. In this event the defendant jus will punish as he or she does one criminal act, but

[35] For juvenile who is not yet reach 16 years old according article 45 to 47 oc Penal Code, the judge has three alternatives. Intis case the judge may send him back to parent without any punishment, order the defendat send to follow obligatory education hold by government or private and as the last choice judge may gives punishment as long the it may not above that two third of it real punishment. However this provision has been replaced with Law No. 11 of 2012 regarding Juvenile Criminal Justice System. This new law obligates any juvenile case should be sove through diversion, as long the offfence is not punishable more than seven year.

[36] Alternative system just allows judge to choose onetype of available sanction.

[37] Cumulation system makes it possible for judge to apply more than one type of available punishment.

the punishment may be added as much as one third of its prime punishment. However, such a formulation will not bring mush influence on the application of monetary sanction, since monetary sanction, in this case fine, just function as alternative punishment.

Sentence and sentencing outside Penal Code

The development in society has also brought changing in people attitude and also has because same new criminal act. Such a development then brings impact on criminal law. It is considered that the existing law cannot afford the new condition and the need of the society. Such a condition has caused a need to create new norms by performing legal reform. Such a legal reform however should be based on the philosophical, socio-cultural of the nation.[38] Such a condition has also result in changing in the idea of criminal punishment, both type of punishment and size of punishment, or the purpose of punishment and implementation of punishment. To some, such a development has actually accommodated in the making of new criminal laws outside Penal Code. [39]

Of special criminal law that has brought some changing in sentence and sentencing is Emergency Law No, 7 of 1955 Prevention of Economic Crime. Different from general criminal law which exists in Penal Code or Procedural Penal Code that are regulated in different law, this Emergency Law No. 7 of 1955 regulates both substance law and procedural in the same law. This law has also criminalized some acts that were only categorized as administrative violation. One of important policy relates to sentence and sentencing system in this law is that it has introduced some new principle, type and approach in viewing criminal sanction. Such new development exists in this law then has been followed by many special law enacted after this law. Some new development relates to sentence and sentencing has been adopted in Emergency Law No. 7 of 1955 are: 1) This law has clearly adopted the concept of *double- track system* which introduce that there are sanctions in form of treatment or so called *maatregel* beside criminal sanctions; 2) This law adopts cumulative principle which makes it possible for judges to impose two kind of main criminal sanction in one verdict. It also means that the judge may give, and in some case must combine incarceration and fines in one decision. Article 6);[40] 3)This law adds additional

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[38] Randy Padiityo. *Menuju Pembaruan Hukum Pidana Indonesia: Suatu Tinjauan Singkat*, Jurnal Legislasi Indonesia. Badan Pembinaan Hukum Nasional, Volume 14 Nomor 02 Juni 2017. p. 142.

[39] The formation of new criminal law ouside Penal Code to some has been assumed that it has caused over criminalization. Until currently it was estimated that there are nearly 150 special criminal laws ouside Penal Code. Sime times it is also difficult to control wether such laws are harmonized with each others.

[40] In case the judges may give two primary punishments in one verdict, it is called as impure cumulative system. But, in case the judges must give two main punishments in one decision, it is called as pure cumulative system.

punishment from what exist in Penal Code by introducing new types of additional punishment, such as revocation of gain or profit by a company and order to close a company. (Article 7). 4) The introduction of treatment sanction, so called code of conduct sanction (tindakan tata tertib) such as order the company under supervision, order to pay some bail, ordering to do certain action or certain service or repair damages caused by action (Article 8). 5) This law introduces the concept of corporate crime and corporate liability which may possible to give criminal sanction to a company or a legal entity. The punishment is available for a company mostly in form of monetary sanction. (Article 15).

From the new development as mention above it can be concluded that there the shifting of legal policy in sentence and sentencing system in the special criminal law. The development mostly relates to the enhancement of the role of monetary sanction in special criminal especially crime relates to economic activity.[41] However the problem is that the formulation of the law still place monetary sanction especially fine as alternative sanction to incarceration such as prison or detention. Therefore the implantation of monetary sanction wholly depends on the judge consideration. However, such a new policy on sentence and sentencing system in the Law No. 7 of 1955, then followed by the next special law, such as in tax law, capital market banking law corruption, law in Forestry and many other special laws.

C. Criminal Law Policy on Monetary Sanction in the Bill of Penal Code

Endeavor of criminal law reform has actually initiated not long after the Independent of Indonesia. Transitional articles of 1945 Constitution has addressed that all of colonial rules should be adjusted with nation philosophy and constitution, includes criminal law. Concretization to the effort was realized by establishing an institution for law reform, which is now called National Law Development Agency or BPHN). This institution has been succeeding in drafting new Penal Code that is hoped to replace colonial criminal law. The draft has been experienced several improvements. It has then has been file to Legislative body to be hearing to be passed a law. The last development of the processes of legislating of this code is that the discussion about the Code was terminated due to some protest by same part of the people that reservation to some the substance of the Code. [42] The last development of the processes of legislating in the code was that the discussion was terminated due to some protest by same part of the people that has reservation to the substance of the code.

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[41] Such a monetary sanction, especially fine, according to law (Perpu) No. 21 of 1959 may be multiplied up to thirty times in case of the action cause disruption on economic activity.

[42] Institute for Criminal Justice Reform. (2015). *Melihat Rencana Kodifikasi Dalam RKUHP Tentang Upaya Pembaruan Hukum Pidana di Indonesia*. Jakarta : ICJR. p. 11.

One of great expectation to Bill of Penal Code is that it accommodates the new condition of the people.[43] One of the developments in criminal law is that reviewing the function of criminal law is that criminal law should be functioned in achieving the national goals especially to realize the social prosperity. Therefore, criminal law and criminal sanction should be functioned as the ultimum remedium not as premium remedium. [44] One of reform that can be found in the Bill of Penal Code is that it has contained the purposes of criminal punishment. Article 52 of the Bill (material internal hearing of Legislative Body on June 25 2019) states that:

(1) The criminal punishment is aimed at: a) Prevent the criminal offence by enforcing legal norm for the protection and shelter of the society; b) To rehabilitate the convicted by providing coaching and guiding for the convicted in order to be a good and useful people; c) To solve the conflict caused by the offence, to restore the balance, to bring in peace and tranquility in the society; and; d) To build the repentance and to free up the guilty feeling to the convicted.

(2) The punishment is not aimed at to degrade the human dignity.

The aims of the punishment above reflect the background of theories punishment, such as theory of social defense, rehabilitation, conflict resolution and the harmony or balance of society.[45] Even though it is not clearly formulated, some purposes of punishment can be related to the monetary sanction. The goal to restore the balance and to bring peace in the society is actually part of sanction of Adat or customary law,[46] such as to pay Adat compensation or hold an Adat ceremony. The most important thing in the purpose of punishment is that the criminal punishment is not mean to degrade the human dignity.

There are also some reforms in type of punishment, both in primary sanction and

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[43] Mudzakkir. (2008). *Perencanaan Pembangunan Hukum Nasisional Bidang Hukum Pidana dan Sistem Pemidanaan Politk Hukum dan Pemidanaan*. Jakarta : BPHN. p. 82 available at: *https://www.bphn.go.id › documents › pphn_bid_polhuk&pemidanaan*.

[44] The concept of ultimum remedium in Indonesia Criminal Law is formally accepted in Law No.32 regarding The Protection and Manajement of Environment. See: Yoserwan Hamzah. *Penerapan Fungsi Sekunder Hukum Pidana oleh Aparatur Penegak Hukum dalam Hukum Pidana Ekonomi*. *Nagari Law Review*, Volume 1 Nomor 1 Tahun 2017. p. 16-24.

[45] The goals of criminal punishment covers protection of social values and integration ed the convicted to society are reflected the adat (people) law , and it also adopts the spiritual value of Pancasila asa the way of life of the people. Eddy Rifai. *An Analysis of the Death Penalty in Indonesia Criminal Law*. Sriwijaya Law Review, Volume 1 Nomor 2 Juli 2017. p. 190.

[46] Koesnoe stated that Adat law is the law which comes from the root of Indonesian people who are not familiar with codification, while Snouck Hurgronye viewed that Adat law as *"taken for granted"* as the original itself without knowing the forms of separation, as in western law. If the western legal discourse separate between individual from the public, Adat law is not in this case. Because of that, Adat law is pervaded by a spirit of kinship, the individual subject obey and serve the community rules. Adat sanction is sanction given by adat community to those violates the adat law. Diah Pawesti Maharani. (2016). *A Logical Character of Indonesian Adat Law Based on Paul Scholten's Perspective.* Digital Paul Scholten Project. University of Amsterdam. Available at: https://www.paulscholten.eu/research/article/a-logical-character-of-indonesian-adat-law-based-on-paul-scholtens-perspective-2/ accesed on 10 September 2019.

additional sanction. The primary sanction is: a) imprisonment; b) confinement; c) surveillance; d) fine; and e) Social work.[47] From the primary sanction only fine that can be categorized as monetary sanction, while social working may be possible to be converted to monetary by comparing the work with the value of money.[48] The type of primary sanction is nearly the same with what exists in Current Penal Code. However, confinement is removed from primary sanction. There is new type of primary sanction. It is social work punishment.

Three are some reforms in additional sanction. The additional sanctions in the Bill of Penal Code are: a) The revocation of certain right; b) Confiscation of certain property and or claim; c) The publication of judge verdict; d) Restitution; e) Revocation of certain license; and f) Fulfillment of local adat obligation.[49]

There is also guidance in delivering additional punishment. They are: a) Additional sanction in case the judge assumes that the primary sanction will be not enough in achieving goals of punishment; b) Additional sanction may be given more than one in one occasion; c) Additional sanction in case of temptation and helping to criminal act the additional sanction is the same with the main crime; d) Additional sanction for an arm that involve in a crime with civilian is based on law for army.

Additional sanction such as confiscation of certain property or certain (financial) claim, the fulfillment of restitution, and fulfillment of adat obligation can be classified as monetary sanction. However, all of additional sanctions are entirely depending on the judge consideration to deliver it or not.

The subject of criminal law, as it has also accommodated in some special criminal laws, it is not only person but also corporation (corporate liability). In current Penal Code, it is only person assumed as legal subject based on the principle of *deliquere non potest* (only person is criminally liable). However in some special criminal laws it has been introduced that corporation is also criminally liable. Such a policy is also accommodated in the Bill of Penal Code.[50] Such a regulation will support the existence of monetary sanction, since a corporation only can be punished with monetary sanction.

One of important reform in term of monetary sanction is that so called capitalization of

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[47] Article 65 of The Bill of Penal Code.

[48] Theoritically fine has some weakness. Daniel S. Lev for example said that fine may result in hesitation. Eva Achjani Zulfa. *Pergeseran Paradigma Pemidanaan di Indonesia*. Jurnal Hukum dan Pembangunan, Volume 36 Nomor 3 Tahun 2016. p. 398.

[49] Article 66 of the Bill of Penal Code.

[50] The latest Indonesian drafted penal code affirms that person is human and corporation. Corporation is defined with broad meaning as organized group of persons and/or property, either has legal personality or no legal personality. Nani Mulyati, Topo Santoso dan Elwi Danil. *A Philosophical Analysis To Uncover The Meaning And Terminology Of Person In Indonesian Criminal Law Context*. Nagari Law Review, Volume 1 Nomor 1. p. 70.

criminal sanction. This policy actually may transfer incarceration to monetary sanction especially fines. This policy classified crime to several categories. Each category which is actually punished with prison may be replaced with fine. Such categories are: a) First Category may be replaced with fine up to Rp.1.000.000,00 (one million rupiah); b) Second category may be replaced with fine up to Rp10.000.000,00 (sepuluh juta rupiah); c) Third Category may be replace with fine up Rp.50.000.000,00 (lima puluh juta rupiah); d) Fourth Category may be replace with fine up to Rp. 200.000.000,00 (dua ratus juta rupiah); e) Fifth Category may be replaced with fine up to Rap. 500.000.000,00 (lima ratus juta rupiah); f) Sixth Category may be replaced with fine up to Rp.2.000.000.000,00 (dua millar rupiah); g) Seventh Category may be replaced with fine up to Rp.5.000.000.000,00 (lima millar rupiah); and h) Eight Categories may be replaced with fine up to Rp.50.000.000.000, 00 (lima puluh milliard rupiah).[51]

One again, even though most of type of crime may be punished with fine based on its own categorization, the position of fine is still as alternative to incarceration. As long the prosecutor and the judge prefers to choose fine there is more possibility to give fine. So it is now how to convince the judge to choose fine instead imprisonment. One of promising provision in PCI, categorization of fine may be applied to economic motive of crime such as corruption, narcotic/drug abuse, money laundering and human trafficking.[52] Besides as alternative sanction to imprisonment, fine can be applied as commutation to imprisonment.

The confiscation of certain property of any claim is also new types of additional sanction. The Bill of Penal Code also describes what property that may be confiscated. However there is no explanation about the allocation of the confiscated property, whether it is should be returned to the state or should be destroyed. In Current Penal Code, confiscated goods may be allocated to the state, or it should be destroyed or should be returned to the third party who has right to the property. The Bill of Penal Code has also rules that aimed at protection of victim of crime. That is restitution. It is written in Article 66. Whenever restitution cannot be applied, the offender just can be punished with fine.

From the analysis of each type of crime, it can be concluded that the fine is still as alternative to imprisonment. It is not limited to serious crime but also to minor crime, such as crime that threat with up to three months in jail. Therefore it was suggested that small crime, that is crime which is punishable up to one year in jail, should threat with fines as

[51] Article 88 of the Bill of Penal Code.

[52] For economic motivated crime, such as curroption a new approach of economic analysis of law should be Used to fight this type of crime which basic question is how to rise the cost of potential offender and how to reduce their benefits. Pokpong Srisanit, Use Effective Monetary Sanction to Deter Corruption in Thailand, in : Elfina L Sahetapy, A. Suhartati Lukito and Go Lisanawati. (2017). *Tackling Finacial Crimes, Various Internasional Perspective*. Surabaya : Genta Publishing. p. 353.

independent type of sanction, or it may be alternated with imprisonment whenever the convicted person cannot afford to pay the fine. However in some type of crime, fine has been threatened with fine as independent sanction, such as crime related to license or permit from government. (Article 283 (1), 284 and 285). There are still many crimes punishable less than six years in jail are threat with imprisonment with fine as alternative. For such crime it will be appropriate if the sanction is fine and imprisonment as alternative

Another issue that should be attention in the Bill of Penal Code is the regulation on accumulation system in primary sentences, especially accumulation between imprisonment and fine. This system just regulated in small amount of crimes that causes limitation the authority of judge to choose the sentences to be applied. Such regulation for example can be found in crime on human trafficking and corruption (Article 481, 483, 624 and 625 of the Bill). The formulation on accumulation sentence for primary sanction should be enlarged to another type of crime so that fine has more chance to be applied in rendering the sanction.

In addition, for certain crime, especially crime which the victim is individual, should the threatened with restitution as primary sanction and not only as alternative. His policy will be able to lessen the use of incarceration. However the restitution should always put incarceration of social work as alternative.

The regulation regarding the confiscation of certain asset or payment of compensation which is not optimally accommodated, will cause their implementation wholly depend on the judge. Therefore confiscation and compensation should be element of each sanction in every crime that must be applied in every delivering of its primary sanction. This will cause the monetary sanction will encourage optimization the implementation of monetary sanction. With this current formulation, the Bill of Penal Code would not be optimally accommodated the Philosophy of utilitarianism and the idea of double tract system. And the most important the criminal law policy in the Bill of Penal Code does not change much from the current Penal Code which still hold imprisonment as the main characteristic of criminal sanction, while monetary sanction is still function as alternative. From this phenomena it can be assume that criminal policy in the Bill of Penal Code will cause high number of imprisonment and then will cause over crowded in the correction institution.

CONCLUSION

Criminal Law Policy on sentence and sentencing in the Bill of Penal Code has not yet supported optimization of the role of monetary sanction beside the imprisonment. Criminal law policy still places imprisonment as the main option in sentence and sentencing system in the Bill of Penal Code. The accommodation of monetary sanction, especially fine in the primary type of punishment has not yet supports the optimization the implementation the sanction since it still function as alternative sanction to imprisonment. Even though the Bill of Penal Code has adopted several types of sentence that can be classified as monetary sanction, such as confiscation of certain goods or property and or claim, compensation, the fulfillment of Adat sanction and restitution, however since they still function as additional punishment, that will not guaranty optimization of its implementation since it implementation wholly depends on the willingness of prosecutor and judge to implement them. The regulation on categorization of fine as alternative to imprisonment is also not encouraged the role of monetary sanction in the Bill of Penal Code, because it is still functioned as alternative to imprisonment. There are only small numbers of crime that use fine as and single and independent sanction that prosecutor and judge must implement it.

It is recommended that the legislator will optimize the role of monetary sanction by placing fine as independent or single sanction or place it as the main option, and imprisonment as its alternative, especially for crimes with economic motive. The implementation of additional sanction should be placed in the formulation of each sanction of each crime as mandatory sanction beside the primary sanction. By accommodating such a policy, it is hoped that there will be optimization of the role of monetary sanction in the sentence and sentencing system in the next Indonesian Penal Code. In turn it will also help to decrease the use of imprisonment and over capacity in Indonesian's prison. At last, it is hoped that it will contribute in achieving the prosperity of Indonesian people.

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