

# 8.Directions for development of national criminal law in Indonesia

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## Directions for development of national criminal law in Indonesia

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### Abstract

The direction of development of the national criminal law is directed at the development of written legal substance, namely replacing the KUHP inherited from the Dutch colonialists. The Criminal Code which is still valid in Indonesia is no longer relevant to the needs and development of the times. As a nation that is already independent and wants to be free from the shadow of colonialization. The purpose of this study is to examine the direction of the development of the national criminal law in Indonesia. This study uses a philosophical approach, which examines the law from the ideal side. The results of this study indicate that efforts to develop criminal law have started since Indonesia's independence. The policy direction for the development of national criminal law is to establish legal substance. Legal development is directed at the further realization of the National Legal System which is based on Pancasila and the 1945 Constitution. The priority for developing the national criminal law is to replace the KHUP inherited from the Dutch colonialists with a new KHUP of its product. The replacement of the KHUP is the implementation of the development of the national criminal law which is ideal for the nation.

**Keywords:** legal development, national, pancasila, Indonesia

### Introduction

The priority of the development of the national criminal law is directed at the development of written legal substance, namely replacing the Criminal Code (KUHP) inherited from the Dutch colonialists. The Criminal Code which is still valid in Indonesia is no longer by the need to solve problems along with the times. In addition, the Criminal Code which was initially from *Wetboek van Strafrecht voor Nederlands Indië* (WvS-NI) or the Dutch East Indies Criminal Code (KUHP-HB) is not from the perspective and legal awareness of the Indonesian people.

As a nation that is independent and wants to be free from the shadow of colonialization, the Indonesian nation needs a reorientation and re-evaluation of the main ideas, basic ideas or socio-philosophical, socio-political, and socio-cultural values that underlie criminal and criminal policies. Criminal law enforcement policies so far. The development of criminal law is essentially part of a policy (rational effort) to revitalize legal substance to make law enforcement more effective. In addition, the development of criminal law is also part of the policy to eradicate or overcome crime in the context of protecting the community.

Law itself is not a technical institution that is morally empty and sterile from morals (Rahardjo, 2002)<sup>[19]</sup>. As a state based on the law (*Rechtstaat*) and not based on power (*Machstaat*), Indonesia expresses the ideals or goals of the state through law. The position of law as the basis of development in all fields.

The rule of law makes law a means to achieve goals. The existing law in Indonesia according to its form is divided into written and unwritten law. One of the written laws is in the form of legislation (Fitriana, 2015)<sup>[6]</sup>. Unwritten law is customary law in the form of law or the law of religious teachings that are believed to be as long as they are not written.

Legal development is a series of processes from rule-breaking then followed by rule-making. This means that legal development is not only limited to formulating the text of the articles in the law. National law must reflect the spirit of the nation, namely Pancasila.

The nature of legal development in the context of criminal law means that it includes the field of penal policy which is part and closely related to law enforcement policy, criminal policy, and social policy. Legal development must be directed at the realization of a national legal system with the initial preparation of legal materials based on Pancasila and the 1945 Constitution. The resulting law must contain the morals of the Indonesian nation as a reflection of the legal awareness of the Indonesian nation.

The scope of legal development is wide-reaching and many parties are involved, so it is impossible to do without planning. An integrated National Law Development Strategy Plan has been prepared as a grand design. Legal development refers to the grand design as a guide and reference for all parties in long-term legal development efforts.

Some main ideas or signs must be considered in the renewal of the national criminal law. Apart from being carried out for sociological, political, and practical reasons, it must consciously be structured within the framework of the national ideology of Pancasila. Criminal law reform must not ignore aspects related to the human condition, nature, and Indonesian traditions while still recognizing the law that lives in society, both as a source of positive law and as a source of negative law (Burlian, 2014).

The reform of criminal law must be adapted to the universal trends that grow in a civilized society. Keeping in mind the harsh nature of criminal justice and one of the goals of preventive punishment, criminal law reform must also think about preventive aspects. In addition, criminal law reform must always be responsive to the development of science and technology to increase the effectiveness of its functions in society (Tongat, 2014).

National development that has been implemented so far has shown progress in various fields of community life. The scope of national development includes the fields of socio-cultural and religious life, economy, science and technology, politics, defense and security, law and apparatus, regional development and spatial planning, provision of facilities and infrastructure, and management of natural resources and the environment. Various advances that have been achieved by the Indonesian people will affect the social changes in society.

The problems that will be discussed in this study are the history of the development of national criminal law in Indonesia, the direction of the development of national criminal law, and the new Criminal Code as a priority in the development of national criminal law.

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### Research Methods

The approach used in this research is philosophical. The philosophical approach in legal research is to examine the law from the ideal side. This study uses a philosophical approach because the law being studied is at an ideal level. The source of data used in this study is secondary data. Secondary data is data obtained indirectly or has been provided by other parties. Secondary data is used as the main reference that is already available in written form in books, scientific journals, and other written sources. Data collection techniques are carried out through conventional and online searches. The conventional literature review is an activity to find library sources for data storage areas. While online writing is an activity to find library resources in cyberspace through the internet. Conventional literature searches are carried out by searching for library materials, purchasing books, and journals, and attending scientific activities (seminars). While the online search is done by searching on the internet. The data analysis method used is qualitative. Qualitative data analysis is the process of organizing and sorting data into patterns, categories, and basic units of description so that themes can be found that are presented in narrative form. This study uses qualitative data analysis because the data will be presented in a narrative-descriptive manner, not in the form of numbers or numeric.

### Discussion

#### 1. History of National Criminal Law Development

Efforts to develop criminal law have been started since the early days of the founding of the Republic of Indonesia, namely since the proclamation of Indonesian independence on August 17, 1945, in Jakarta. To avoid a legal vacuum, the 1945 Constitution contains transitional rules. It is stated in Article II of the transitional rules that "all state bodies and regulations are still in effect immediately, as long as new ones have not been made according to this constitution". This provision means that the criminal law and the criminal law in force at that time were still in effect before the new law was introduced.

In a planned manner, the development of national criminal law is based on several State Policy Guidelines (GBHN). The GBHN is the strategic direction on national development in outline as a statement of the people's will which is determined by the People's Consultative Assembly (MPR) every five years. During the Old Order era, the legal basis for the GBHN was contained in MPRS Decree Number VMPRS/1960 concerning "Political Manifesto of the Republic of Indonesia as Outlines of State Policy", and MPRS Decree Number IV MPRS/1960 concerning Outlines of the Universally Planned National Development Pattern. First Phase 1961 – 1969. However, in the GBHN there are no specific arrangements that can be used as a political-legal basis for the development of national law (Budianto, 2016).

The same condition also occurs in MPRS Decree Number IV/MPRS/1963 concerning Guideline for implementing the Outlines of State Policy and Development. This decree does not provide a specific legal basis for the politics of national legal development. The first MPRS decree that was directly related to the legal field was MPRS Decree Number XX/MPRS/1966 concerning the DPR-GR Memorandum regarding the Sources of Orderly Law of the Republic of Indonesia and the Order of Legislative Regulations of the Republic of Indonesia. Although it did not regulate or relate directly to the GBHN, this decree contained several foundations for the development of national legal politics for that period.

During the New Order, he tried to create a strong, clean and authoritative government system by implementing Pancasila and the 1945 Constitution purely and consistently. The New Order's determination was carried out with long-planned development (twenty-five years) by prioritizing economic development supported by political development. At the same level, to build the power of public power capable of generating and maintaining stability, which at the initial stage is necessary for the implementation of economic development.

Legal development is seen as one of the sectors in the development of the political field. This was seen explicitly in all of the New Order's GBHN until 1988. Ideally, legal development should also be part of policies to address social and humanitarian problems to achieve national goals, namely social defense and social welfare.

The objectives of the National Law Development based on the 1978 GBHN are: "National development aims to create a just and prosperous society that is materially and spiritually evenly distributed based on Pancasila within the unitary state of the Republic of Indonesia which is independent, sovereign, united and has sovereignty over the people in an atmosphere of safe national life, peaceful, orderly and dynamic and in an independent, friendly, orderly and peaceful world social environment". GBHN In 1978 and 1983, legal development was still conceptualized as the creation and certainty of law. The legal development program at that time focused on normative efforts through the implementation of legal codification and unification, controlling the functions of legal institutions, and increasing the ability and authority of law enforcement (Prabandani, 2022).

The implementation of legal development is more significant after it was stipulated in the 1993 GBHN that the targets of the legal sector in the sixth five years are national law reform, improvement of law enforcement, and development of legal apparatus, as well as improvement of legal facilities and infrastructure. Its main objective was to replace the products of Dutch colonial law with national laws based on Pancasila and the 1945 Constitution. Thus, the main laws, such as the Civil Code and the Criminal Code, became a top priority.

The concept of legal development during the New Order was heavily criticized. One of them was that legal development at that time did not receive much attention because the program was part of the Political Sector. There was no evaluative action from the MPR on the achievements of the previous legal development program on the GBHN. The emphasis on legal development is on the paradigm of realizing Indonesian human development as a whole, placing legal development as support or complement to economic development. The next GBHN even tends to be a form of repetition of the existing GBHN (Najib, 2021).

Meanwhile, the development of national law in the reform era showed a different face from the previous period. Legal development in the reform era was carried out by starting with strengthening the constitution as the basis for the formation of the legislation under it. The 1945 Constitution was amended successively, starting in 1999, 2000, 2001, and 2002.

As part of constitutional reform, the MPR is no longer the highest state institution. The position held by all state institutions is equivalent to emphasizing strengthening the system of checks and balances between state institutions. There is no highest state institution or one that is superior to other state institutions (Sukardi, 2016).

Legal development is also undergoing reforms as a continuation of demands for reform in various development fields. Development in the field of law in the reform era is an effort to realize the rule of law by making various changes to the legal substance, legal structure, and legal culture. The spirit of reform has given birth to ideas to restore several very urgent national legal development priorities (Zulfan, 2014) <sup>[26]</sup>.

Constitutional reform is the main basis for reform of national law development. Creating modern legal reforms that are pro-people, competition in the global market is free and open. Furthermore, national reconciliation with human rights violators, and entrepreneurs destroying the economy of the past except for extraordinary crimes. The most significant reform agenda is the establishment of an independent Corruption Eradication Commission (KPK) and the birth of the Anti-Money Laundering Law, the Law for the Protection of Witnesses, Victims, and the Law on Freedom of Information.

## 2. Direction of National Criminal Law Development

The policy direction for the development of national criminal law is the establishment of laws and regulations by TAP MPR Number IV/MPR/1999. Some of the main agendas in the development of national law are to organize a comprehensive and integrated national legal system by recognizing and respecting religious law and customary law. No less important agenda is the effort to reform the colonial legacy legislation and discriminatory national laws, including gender inequality and their incompatibility with the demands for reform through the legislation program.

Ratification of international conventions, especially those related to human rights by the needs and interests of the nation in the form of laws, also needs to be continued. Furthermore, developing laws and regulations that support economic activities in facing the era of free trade without harming national interests. The Law of the Republic of Indonesia Number 25 of 2000 concerning the National Development Program is enacted which states that the program for the formation of laws and regulations aims to improve the laws and regulations of colonial heritage and national laws that are no longer by the development of society.

The change in the 1945 Constitution of the Republic of Indonesia made a change in the line of legal politics regarding the concept of national development, with the issuance of Law no. 17 of 2007 concerning the National Long-Term Development Plan (RPJPN), the Outline of State Policy (GBHN) is no longer known as it had been previously practiced, so that a guide is needed to drive various development agendas at every level in the context of being coordinated with each other. Both the GBHN and the RPJPN are essentially the same guidelines for the direction of Indonesia's development, both for the central and regional governments.

Through the amendment to the 1945 Constitution, the concept of the rule of law in Indonesia has changed, no longer rechtsstaat or the rule of law, but the Indonesian rule of law (Hidayat, & Arifin, 2019). So in the attachment of Law Number 17 of 2007 concerning the National Long-Term Development Plan 2005-2025 Chapter II subchapter G that efforts to realize the national legal system include several things:

- a. development of legal substance, both written law, an unwritten law, already has a mechanism to form a national law that is better suited to development needs and community aspirations;
- b. Improvements to the legal structure that are more effective will continue; and

- c. Involvement of all components of society who have high legal awareness to support the formation of the aspired national legal system.

The 2005-2009 National Legislation Program states that "The development of national law is part of the national development system which aims to realize the state's goal to protect all the people and the nation, as well as the entire homeland of Indonesia, promote public welfare, educate the nation's life and participate in carrying out world order that is based on freedom, lasting peace and social justice, through a national legal system. The legal development program needs to be a top priority because of changes to the 1945 Constitution. The amendments to the 1945 Constitution have broad and fundamental implications in the constitutional system that need to be followed by changes in the field of law/legal system arrangement" (Marbun, 2014) [14].

The reference for Development Planning that replaced the GBHN is the 2005-2025 National Long-Term Development Plan (RPJPN) which is stipulated by Law Number 17 of 2007 the 2005-2025 National Long-Term Development Plan (RPJPN). Furthermore, the RPJPN mandates that each of the general conditions and challenges faced is formulated to realize the best conditions to be achieved. Legal development is carried out through the renewal of legal materials while still paying attention to the plurality of the applicable legal order and the influence of globalization as an effort to increase legal certainty and protection, law enforcement and human rights, legal awareness, as well as legal services with the core of justice and truth, order and welfare in society. the framework of an increasingly orderly, orderly, smooth, and globally competitive state administration (Mahanani, 2014) [13].

Legal development is directed at the realization of a stable National Legal System based on Pancasila and the 1945 Constitution. Its scope includes the development of legal materials, and legal structures, including legal apparatus, legal facilities, and infrastructure (Maerani, 2015). These goals contain several key goals for the next twenty years.

The National RPJP is an elaboration of the objectives of the establishment of the government of the State of Indonesia as stated in the 1945 Constitution, in the form of a vision, mission, and direction of National development. It is expressly stated that "Legal development is directed at the realization of a national legal system that is solidly rooted in Pancasila and the 1945 Constitution. Its scope is expanded to include the development of legal materials, legal structures including legal apparatus, legal facilities, and infrastructure; the embodiment of a society that has high awareness and legal culture in the context of realizing a rule of law; and the creation of a just and democratic society."

Changes in the legal basis in national development planning as a substitute for the GBHN after the amendment to the 1945 Constitution caused many pros and cons among the public. The GBHN is different from the RPJPN. The GBHN is a development ideological strategy, while the RPJPN is a development technocratic strategy.

The difference between the GBHN and the RPJPN is so basic that the state's direction is ideological while the RPJPN is technocratic. The urgency of the GBHN is as a direction for national development. Meanwhile, the RPJPN contains an elaboration of the direction of national development which contains development work priorities that are "technocratic and pragmatic".

As a state policy, the GBHN is holistic because it is discussed every five years by all members of the MPR who represent the entire Indonesian people. It is different from the RPJPN which tends to be static because it is in the form of a law. The RPJPN has the potential to shackle development planning for the next government period.

Furthermore, in 2015 the 2016 National Law Development Legal Document (DPHN 2016) was prepared, referring to the 2015-2019 RPJMN as a reference. The basis of the 2016 DPHN is used as a legal analysis and evaluation activity and emphasizes legal development that is based on Indonesian cultural values itself in the form of understanding the values of Pancasila (Isdiyanto, 2018). Thus, legal development continues continuously from period to period.

The development of national law carried out by the Indonesian nation today is continuous development stages to continue the nation's ideals to realize an increase in people's welfare to achieve the goal of a just and prosperous society based on Pancasila and the 1945 Constitution (Kamal & Bahar, 2019). Although there are ripples of dissatisfaction that are felt, especially the legal reform launched after the reform. Legal development policies only change in terms of regulatory changes that occur both at the central and regional levels.

### 3. The New Criminal Code as a Priority in the Development of the National Criminal Law

Replacing the KUHP inherited from the Dutch colonialists was a priority on the national criminal law development agenda. The development of criminal law will indeed be more effective if it starts from the substance of the law, namely the material of criminal law. Although it is not easy, with a strong determination and desire from all elements of the nation and state, both the government (executive, legislative, and judicial) and the community, the national law that has been aspired so far can be realized in the future (Hariyanto, 2006). 2018) [8].

Material criminal law is a criminal law that regulates prohibited acts (delict) and criminal sanctions. Another description is that the material criminal law is a rule that formulates actions that can be punished, the conditions that can be imposed on the criminal, and the provisions regarding the crime (Sudarto, 1990). National criminal law must reflect the moral norms of society which are appointed as legal norms that bind all citizens in the life of society and the state.

The development of national criminal law must also be by the value<sup>39</sup> and beliefs held by the people to whom the law will be enforced and continued (inclusive modernization<sup>16</sup> the living law (Arifin, 2001). The national criminal law must describe the spirit of Pancasila which can meet the needs of the Indonesian people in the present and the future. Pancasila as a whole as a "national guidelines", and "national standards, norms, and principles", is useful as a margin of appreciation. Thus, Pa<sup>21</sup>nsila must be used as reference material and guidelines for efforts to form regulations that remain grounded in the values of the nation's view of life.

Indonesian national law will not only revolve around the question of choosing parts between the living law and western law but must consist of newly created rules according to the need to solve new problems as well. The formation of national legal regulations should be determined functionally. The new rule of law must substantially meet the needs of the community. The rights or obligations to be created are also by our goal of achieving a just society in prosperity and prosperity in justice (Frenki, 2011)<sup>17</sup>.

One aspect that must be developed in the context of the development of criminal law is the development of the substance of the national criminal law. Because<sup>42</sup> the existing criminal law which is based on WvS-NI is irrelevant to continue to be enforced because it is not to the culture of the Indonesian nation. In general, the Criminal Code is "obsolete and unjust" (outdated and unfair) as well as "outmoded and unreal" (out of date and not by reality), so it is time to replace it with a National Criminal Code that is by the norms adopted by the Indonesian nation. (Rasyidi, 2021)<sup>20</sup>.

Indonesia has many criminal laws and uses the principle of *lex specialis derogate lex generali*, which means that special criminal law will defeat the general law, namely the Criminal Code. The criminal law contained in the Criminal Code raises concerns, especially about its dogmatic and substantial nature. Teaching the KUHP of Dutch heritage directly or indirectly means teaching and inculcating dogmas, concepts, and substantive norms adopted by the Dutch nation.<sup>14</sup>

The Criminal Code is motivated by individualism-liberalism and is strongly influenced by classical schools which greatly benefited the Dutch colonial interests in their colonized countries (Sulistia & Zurnetti, 2011). Inheriting several regulations and legal institutions from the colonial period meant maintaining the ways of thinking and acting based on individualistic understanding. This is not in line with the mindset of the Indonesian people which is based on collectivis<sup>28</sup> understanding.

Judging from the historical aspect, the history of Indonesian criminal law, in general, cannot be separated from the existence of the Indonesian people. Indonesian society is divided into many kingdoms before colonialism, the period under Dutch colonial rule, and the period after independence. Whereas WvS.-NI it was or<sup>10</sup>ally a King Decree dated October 15, 1915, which was promulgated under Staatblad Number 732 of 1915 and came into force on January 1, 1918.<sup>56</sup>

After Indonesia's independence the WvS-NI was still enforced to fill the legal vacuum as stated in the 1945 Constitution Article II Transitional Rules which stated "All existing state bodies and regulations are still in effect immediately as long as new ones have not been made according to this Constitution". Practically speaking, President Soekarno issued Presidential Regulation No. 2 of 1945 dated October 10, 1945, which consisted of two articles whose con<sup>27</sup>ts were more or less the same as the transitional regulations. Furthermore, it was reaffirmed with the issuance of Law No. 1 of 1946 concerning Criminal Law Regulations.

This Law Number 1 of 1946 became the legal basis for the change of WvS NI to WvS, which was later known as<sup>10</sup> KUHP, which applies to the Territory. Java and Madura. Subsequently, the Government issued Law Number 73 of 1958 concerning Declaring the Applicability of Law Number 1 of 1946 for the entire Territory of the Republic of Indonesia (Prasetyo, 2012)<sup>181</sup>. Since 1958, the Criminal Code has been enforced throughout Indonesia.

Since being enacted in 1918 until now, the Criminal Code or WvS has been in force for 104 years in Indonesia, and no changes have been made. So far, if there is a chance it is only a patchwork, not a change in t<sup>41</sup>c ideas, main ideas, changes in philosophical values, or changes in substance. Referring to the opinion of William J. Chambliss and Robert B. Seidman that the laws of one nation cannot simply be transferred to another nation.

The law t<sup>34</sup> is applied is finally "a history" and experiences "alienation" from the community (Suteki, 2013)<sup>123</sup>. Whereas the function of national law is directed not only as a problem solver, or social controller but also functions as a tool of social engineering. Operationally, it can be described, that the function of national law is not only to solve legal problems that have arisen, but instead are legal rules that can prevent various problems, legal conflicts, and social conflicts, and become a means of development (Atmadja, 2017)<sup>12</sup>.

The development of material on national criminal law is an urgent national agenda, in addition to having been studied in academic circles for a long time, it has also been a long process for a country that has been independent for quite a long time. According to Werner Menski, colonialism itself was not aimed at legal transplantation. They also "allow" the original customs.

Often colonial rulers felt that too much interference in local legal matters could lead to rebellion. After independence, the mindset of legal experts was still very strongly influenced by colonial law. The colonial experience gave rise to a strong enthusiasm for the superiority of Western law and many ex-colonial areas have deliberately grafted their laws through a process of acceptance and acculturation from their former colonial masters (Menski, 2006)<sup>115</sup>.

The Indonesian government has attempted to create a product national criminal law system. These efforts have been carried out since 1958 with the establishment of the National Law Development Institute, which drafted the new Criminal Code Bill (RUU KUHP). Various seminars and studies were also conducted. For example, the

National Law Seminar I held in 1963 resulted in various resolutions, including an urge to complete the National Criminal Code Bill in the shortest possible time (Fendri, 2019).

Efforts to develop a national criminal law are still ongoing and 54e produced several drafts of the Criminal Code Bill since 1964 until now. The development of criminal law from the point of view of the policy approach is:

- a. As part of social policy, the development of criminal law is essentially part of efforts to overcome social problems (including humanitarian problems) to achieve/support national goals (community welfare and so on);
- b. As part of the criminal policy, the development of criminal law is essentially a part of efforts to protect the community (especially efforts to combat crime); and
- c. As part of law enforcement policies, the development of criminal law is essentially part of efforts to renew legal substance to make law enforcement more effective.

The development of national law is closely related to the politics of national law. In legal politics, the government has tried to accommodate the values that live in a society (legal pluralism) in the formation of national law (accommodative statutory politics). Quoting the opinion of Von Benda-Beckman that the legal system that applies in society is divided into two, namely state law such as statutory law the one hand, and customary law such as customary law. The two legal systems both influence the behavior of citizens and interact with each other, which can be seen in the behavior of a person or group.

### Conclusion

Based on the discussion above, it can be concluded that efforts to develop criminal law have been started since the early days of the founding of the Republic of Indonesia, namely since the proclamation of Indonesian independence on August 17, 1945, in Jakarta. The policy direction for the development of national criminal law is to establish a legal substance, namely the formation of laws and regulations. Some of the main agendas in the development of national law are organizing the national legal system and efforts to replace colonial heritage legislation through a legislative program. The development of the law is directed toward the realization of a National Legal System that is based on Pancasila and the 1945 Constitution. The priority of developing a national criminal law is to replace the KHUP inherited from the Dutch colonialists with a new KHUP of its product. The replacement of the KHUP is the implementation of the development of a national criminal law which is the nation's ideal to realize a law that is by the norms adopted by the Indonesian nation which is summarized in Pancasila.

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