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Submission date: 27-Aug-2020 01:45PM (UTC+0700)
Submission ID: 1374771339
File name: riminal_Policy_in_Realising_Indonesian_Judicial_Independence.pdf (215.08K)
Word count: 4941
Character count: 26103

International Journal of Innovation, Creativity and Change. www.ijicc.net
Volume 12, Issue 12, 2020

Model for the Contempt of Court Criminal Policy in Realising Indonesian Judicial Independence

Bambang Ali Kusumo[a], Abdul Kadir Jaelani[b], [a,b]Faculty of Law, Universitas Slamet Riyadi, Surakarta, Indonesia, Email: [a*]alikusumobambang@yahoo.co.id

This research is motivated by a number of weaknesses in the formulation of the policy regarding the Contempt of Court criminal act which causes the independence and transparency of judicial power to be doubted. Whereas the philosophy of the Independence of Judicial Power views this as a state power that is free from all forms of intervention both from within and from outside the judiciary, except on the basis of the ideology of Pancasila and of the 1945 Constitution. The results show that historically and to date, forms of intervention on the functioning of judicial authority in Indonesia, both before and after the enactment of the one-stop justice system under the Supreme Court still exist, even with all the dynamics and changes. Before the enactment of the one-stop justice system, the power to intervene on the institution of judicial power came more from the power of executive institutions, so that the flow of reforms leading to the one-stop justice system under the Supreme Court was stronger. After the enactment of the one-stop justice system, forms of intervention on the one-stop justice system are mostly carried out by public forces, in the form of interventions by mass mobilization, interventions of mass pressure, interventions oby other figures and interventions of other regions.

Key words: *Penal Policy, Contempt of Court, Judicial Independence.*

Introduction

Indonesia is a country that has a high tendency towards the use of the criminal law policy. This tendency of Indonesia is greatly influenced by global dynamics in which several countries in various parts of the world also have the same tendency in the use of criminal law policy as a means of punishment and as a means to exercise social control over their people. This tendency has actually been predicted beforehand, as Miller stated, that most

governments in the world will develop more effective social control strategies to ensure overall control over society by placing criminal law at the core of the strategies. This opinion was corroborated by Garland who argued that "penal solutions are immediate, easy to implement, and can be claimed to 'work' as a positive end in themselves even when they fail in all other respects". Nevertheless, the use of these means of reasoning is not without problems, as one of the things that is feared about the use of this penal tool is overcriminalisation which then triggers high levels of punishment and incarceration. (Udiyo Basuki & Abdul Kadir Jaelani, 2018)

But once again, the urgency to exercise control over people's behaviour in the context of crime encourages several countries in various parts of the world, including Indonesia, to tend to use the means of penal punishment. This belief is based on the existence of a coercive system that is characteristic of the means of reasoning, and this coercive system is then considered effective in exerting control over the people in a country. It is this belief in the means of punishment that later underlies the motivation of the Indonesian government in pushing specifically for the contempt of court crime. There is an urgency to uphold the authority, dignity, and honour of the judiciary through a series of controls over all actions that can affect the process or administration of the judiciary. This urgency then encourages the government to formulate policy on contempt of court criminal acts. The urgency is inseparable from the consideration that in the administration of justice there are often interventions, disturbances, actions, speech, behaviour and/or publications that have either directly or indirectly the possibility of being inappropriate. In the end, the formulated policy will bring consequences to the judicial body's various actions and processes. (Bambang Ali Kusumo, Abdul Kadir Jaelani, 2018)

The government's decision to arrange a contempt of court policy within the national criminal policy scheme is an interesting matter to observe. This is because in historical terms, in the early Middle Ages the term contempt of court was born and developed in the common law tradition, not in the civil law tradition as now adopted by Indonesia. The term contempt of court is identified with contempt of the King because in the context of the common law in those days, especially Britain which adhered to a monarchical system, the highest authority holder is the king who is ordained to be God's representative in the world. Therefore any opposition or blatant contempt of the king's power ie. contempt of the King, will be punished by the king. (Sudarwanto, A.S., Handayani, I.G.A.K.R., 2019)

In addition, the actual regulation regarding contempt of court, especially regarding criminal offenses related to contempt of court, exists in several articles in the Criminal Code. These articles include Article 210, Article 216, Article 217, Article 221, Article 222, Article 223, Article 224, Article 225, Article 231, Article 232, Article 232, Article 242, Article 317, Article 417, Article 420 , Article 422, and Article 522. Even so, in reality the government

insisted on making regulations specifically regulating the contempt of court in which there were several provisions concerning criminal acts related to the contempt of court. This can be understood given that the enactment of a law that specifically regulates contempt of court actions will greatly support the government in realizing the independence of judiciary in which one of the pillars of the rule of law is in upholding the supremacy of law. The basis for the government in forming a law concerning contempt of court is an indirect mandate from the general explanation of number 4 of Law Number 14 of 1985 concerning the Supreme Court. (Abdul Kadir Jaelani, I Gusti Ayu Ketut Rachmi Handayani, Lego Karjoko, 2019)

It is interesting to observe further that there are two draft laws that specifically regulate the substance of contempt of court, namely the Draft Law on the Criminal Code, in Chapter VI regarding Criminal Acts Against the Judicial Process, and the Draft Law on Criminal Conduct, ie. Contempt of Court, of the Court of Justice. Interestingly, the two draft laws have always been one of the priorities in the national legislation program. Recorded Draft Laws on the Criminal Law Code always enter into the national legislation program for the period 2005 - 2009, 2010-2014, and 2015 - 2019. Whereas the Draft Law on Criminal Conduct re Contempt of Court entered into the national legislation program for the period of 2005 - 2009 and 2015 - 2019. This kind of thing clearly caused confusion among the public regarding the regulation of contempt of court in the future considering the two draft laws regulate the same substance. (Harimurti F, Jaelani A.K., 2019)

Apart from the various things that have been stated above, the presence of the two draft laws invites debate both among practitioners and academics. Arrangements regarding criminal acts against the impartiality of judges, regulated in Article 329 letters c and d of the Draft Law on the Criminal Code Book as well as Article 19 and Article 24 of the Draft Law on Criminal Conduct (Contempt of Court) of Judicial Administration, is one of the topics that is still being debated to this day. Both descriptions of the crime are still ius contituendum, therefore we need a study of the related aspects of criminal law policy (penal policy) to provide an assessment of the wording of the drafts.

Results and Discussion

Contempt of Court Criminal Formulation in Indonesia

In the common law literature, contempt of court refers to a general term to describe any action or non-action which in essence intends to interfere with and/or disrupt the system or process of conducting a judicial system that is a due process of law. Contempt of court in general can be divided into two, namely civil contempt and criminal contempt. Civil contempt refers to non-compliance with orders given by civil courts. In this context, the

actual actions taken are not intended to counter the court's dignity, but are detrimental to other parties who, at the request of the injured party, issue an order or determination so that those who refused to carry out the court's order can be made to carry out their obligations. Whereas criminal contempt refers to acts that do not respect the court and its judicial process and which aims to obstruct or disrupt the course of the judiciary or aim to cause the court not to be respected. (Algonin A.A, Shleag A.M, Handayani I.G.A.K.R, Setyono P., 2014)

Furthermore, Muladi stated that criminal contempt is all actions that tend to obstruct the administration of justice, ie. offenses against the administration of justice. The context of criminal contempt or the contempt of court crime can be divided into several forms, including; A. misconduct and inappropriate behaviour in court, ie. misbehaving in court; B. disobeying Court Orders; C. attacking the integrity and impartiality of the court, ie. scandalising of the court; D. obstructing the running of justice, ie. Obstructing Justice; E. actions of contempt of court conducted by means of notification or publication (Sub-Judice Rule).

The provisions, regarding contempt of court criminal acts in the Draft Law on the Criminal Code and the Draft Law on the Conduct of the Court regarding Contempt of Court, show the similarity in the formulation of the criminal acts. One of the criminal offenses that is equally regulated in the two draft laws is a criminal act against the impartiality of judges, which is for which the regulations are found in Article 329 letters c and d of the Draft Law on the Criminal Code and Article 19 and Article 24 of the Draft Law on Contempt of Court Crimes. (Rian Saputra, 2019)

If the forms of criminal contempt or contempt of court criminal acts that develop in a common law state as described previously are correlated with two different criminal acts against the impartiality of judges as regulated in the two draft laws above, then it can be concluded that Article 329 letter c Draft Law on the Criminal Code and Article 19 Draft Law on Contempt of Court is the formulation of an article based on the form of a criminal offense attacking the integrity and impartiality of the court ie. scandalising of the court. Whereas Article 329 letter d of the Draft Law on the Criminal Code Act and Article 24 of the Draft Law on the Contempt of Court constitutes the formulation of an article based on a form of criminal act of contempt of a court conducted by a court way of notification or publication (Sub-Judice Rule). (Rizda Ardyati, Evitha A Carollina, 2019)

Based on these conclusions it is known that the government really wants to try to introduce forms of criminal contempt or contempt of court crimes that develop from the common law arena into the Indonesian legal system which is civil law culture. The government's strong foundation for introducing such criminal acts into national criminal law policy is the urgency to uphold the authority, dignity and honour of the judiciary in order to realise and maintain an

independent judicial power. However, because the introduction of the crime is related to the criminal law policy ie. penal policy, then the formulation of the crime should have been through a series of studies on the policy of crime. This is because the nature of the penal policy is to tackle crime in law enforcement schemes as an effort to protect the community ie. social security. (Surachman A, Handayani I.G.A.K.R, Taruno Y., 2017)

Bearing in mind the formulation of a criminal offense against the impartiality of judges, as regulated in Article 329 letters c and d of the Draft Law on the Criminal Code Book as well as Article 19 and Article 24 of the Draft Law on Criminal Conduct of the Court of Justice, ie. Contempt of Court, is still an ius contituendum, the study of the formulation of the two criminal acts will focus on the formulation stage (legislative policy). This stage of formulation is closely related to the principle of legality which is the basis for implementing the penal policy. This principle emphasizes that "nullum delictum noella poena praevia legi poenale" which means that no act can be convicted except for the power of criminal law before the act is committed. The consequence of this principle is the necessity of formulating an act that is to become a rule or rather a law. In connection with the formulation of a criminal offense against the impartiality of judges, there is a criminalisation process carried out against the offense. The process of criminalisation refers to the process of determining a person's action as an act that can be convicted where the end of this process is the formation of a law where the act is threatened with criminal sanctions. Thus the criminalisation process is in this formulation stage very important and strategic because, if there are mistakes or weaknesses in the process it can hamper efforts to prevent and deal with crime at the application and execution stages. (Anugerah Rizki, 2015)

The initiation of the contempt of court criminal act as a whole, both in the Draft Law on the Criminal Code and in the Draft Law on Criminal Conduct of Justice, ie. Contempt of Court, comes from the legal practitioners themselves, specifically the judges. This can be seen from research conducted by the Indonesian Research Center for Law and the Supreme Court in the Academic Paper for the Contempt of Court Research in 2002. The research was conducted by distributing questionnaires to judges in several regions in Indonesia in the context of general justice, religious justice, judicial justice state effort, and military justice. The results of this study indicated the tendency for judges to want special arrangements regarding contempt of court. The most prominent reason for the specific regulation regarding the contempt of court is the interest to protect the judge as one of the parties who play a role in the judicial process. Judges need special rules that can guarantee the freedom and independence of judges in carrying out their profession. This is based on the reason that so far the judges are often unable to carry out their duties properly due to interference or threats to the judge in carrying out their duties. As a result, judges experience uncertainty in carrying out their duties or in giving decisions on a case. That reason also underlies the need for regulation regarding

contempt of court crime, especially those relating to criminal acts against the judge's impartiality. (Barda Arief Nawawi, 2007)

However, if explored further, the idea to regulate specifically in relation to the contempt of court crime, including criminal acts against the impartiality of judges, is a response to criticism of the judiciary in Indonesia, where the criticism is considered as not objective, which only looks for errors, that are then the judges responded with anger. Therefore, it can be concluded that there is a need to regulate the specific provisions regarding criminal acts of impartiality of judges not based on the urgent need to protect and restore the authority, dignity and honour of the judiciary, but rather a reaction to various criticisms of the judiciary, especially against judges. In other words, the background regarding the need for special provisions regarding criminal acts of the impartiality of judges is more a criminalization of criticism directed at judges rather than being based on improving the Indonesian justice system. (Indrastuti L, Jaelani A.K., Nurhidayatullah, Iswantoro, 2019)

By seeing that in the process of determining an action to be a criminal act it is required that the action be unwanted because it is detrimental to the community or in other words requires public support, it is clear that this was not fulfilled in the determination of acts against the judge's impartiality into criminal acts. There is no social agreement for determining the criminal act, as it is only an agreement of the majority of judges. Determination of these criminal acts can actually be seen as a means of retaliation by judges against people who have criticized them. Whereas in essence the determination of a criminal act must not be solely intended for retaliation. Because it seems to come out of retaliation, the determination of this criminal act has the potential to cause new opponents among the people, considering that in a democratic country social control of the people over state apparatus, including the judiciary, is very strong (Barda Arief Nawawi, 2008).

Model Contempt of Court Criminal Policy in Realising Indonesian Judicial Independence

The presence of the two draft laws governing contempt of court, namely the Draft Law on the Criminal Code precisely in Chapter VI regarding Criminal Acts Against the Judicial Process and the Draft Law on Criminal Conduct of the Court of Justice ie. Contempt of Court, cannot be separated from the concern over the declining authority, dignity, and honour of the judiciary. The declining authority, dignity, and honour of the judiciary is due to the intervention by a number of interested parties in a judicial process. The existence of these interventions then disrupts the implementation of the judicial process, and the further effect is that law and justice cannot be enforced as was the purpose of the exercise of judicial power. In the worst case of the intervention, it can be said that there is a kind of effort to delegitimize justice institutions. (Gumbira, S.W, Jaelani, A.K., Tejomurti, K, Saefudi, Y., 2019)

It is feared that interventions from various stakeholders in a judicial process will affect the independence of the judiciary in examining and deciding cases. In this case, the government then initiated the formation of a draft law concerning the contempt of court, specifically regulating criminal acts against the impartiality of judges. However, it must be observed whether the formulated policy regarding criminal acts against the impartiality of judges is in accordance with the concept of judicial independence and further whether the existence of the formulated policy will solve the problem regarding the independence of the judiciary which has so far been considered to have diminished their authority, dignity, and respect. Therefore it must be reviewed from the concept of judicial independence, which has two dimensions, namely the judiciary must be "free from" and "free to". (Eddy O. S. Hieriej, 2009)

To be free means that the judiciary must be free from various interventions from various parties in deciding a case. First, the judiciary must be free from all forms of direct and indirect intervention involving other branches of power such as the executive and legislative branches. Second, the judiciary must be free from internal intervention including other justice institutions, the lower judiciary is free from the intervention of the higher judiciary except through the mechanism of legal remedies and judicial guidance. Third, the judiciary must be free from the influence of litigants, interested parties, and the influence of the interests of the judges themselves. Fourth, the judiciary must be free from the intervention of social forces in society. With free to mean the judiciary is free to realize the objectives to be achieved by the judiciary in the existence of judicial independence. First, the judiciary strengthens checks and balances amongst other branches of state power with the judicial authority assessing the legal validity of statutory regulations so that the legal system can create justice and legal certainty. Second, the judiciary maintains that judges, as executors, have fair, honest and impartial attitudes and behaviour in examining, adjudicating, and deciding on cases submitted to them. Third, the judiciary guarantees that the judges exercise their authority based on legal events and applicable laws and regulations. Fourth, the judiciary protects the individual rights of every citizen to remain in accordance with the law. (Muladi & Barda Nawawi Arief, 2010)

In connection with the implementation of the independence of the judiciary, there are some rules which are of particular concern in the Basic Principles on the Independence of the Judiciary. By looking at these two arrangements, it can be concluded that the independence of the judiciary is an absolute independence, which must be guaranteed by the State, as in deciding on a court case the judiciary must be free from all kinds of interference, pressure, and threats both directly and indirectly for any reason. If related to the above, the formulated policy regarding criminal acts towards the impartiality of judges as regulated in Article 329 letters c and d of the Draft Law on the Criminal Code Book as well as Article 19 and Article 24 of the Draft Law on Criminal Procedures ie. Contempt) of Court, can be justified. This is because the formulated policy is directed at efforts to maintain the impartiality of the

judiciary in examining and deciding cases submitted to them by criminalizing acts that are judged to affect the impartiality of the judges themselves. (Karjoko L, Nurjanah Y, 2019)

Nevertheless, it should be noted that the principle of judicial independence cannot be separated from the principle of justice accountability. Accountability is needed to ensure the exercise of independence, bearing in mind the moral basis of accountability is the trust of the people so that both become instruments of strengthening trust from the giver of power to the holder of power. Judicial accountability can be used to ensure judges act independently, impartially and professionally in the adjudication process. The arrangement shows that judicial independence does not mean freedom from accountability to the public. However, it must always be considered for there to be potential conflicts between the two. This kind of potential conflict is most likely part of the formulation policy regarding criminal acts against the judge's impartiality. (Muladi dan Dwidja Priyatno, 2010)

However, as long as the formulated policy regarding criminal acts towards the impartiality of judges is still very limited and tends to be interpreted subjectively, then judicial accountability to the public will be very difficult to achieve because indirectly the formulation of the policy will further distance public access to the judiciary. The public will be increasingly confined and frightened to commit acts related to the judicial process. The more severe impact is that the public will be silent about all the processes that exist in the judiciary and this will actually be very dangerous for the survival of the judiciary in Indonesia. This kind of thing has been predicted by lawmakers by including two sentences in a general explanation of the Draft Law on Criminal Conduct ie. Contempt of Court, which state that: "From another dimension, the actual existence of contempt of court is like a double-edged sword. On the one hand, efforts to uphold the authority of the judiciary, will on the other hand backfire for the community." (Nurhidayatuloh, Febrian, Apriandi, M., Annalisa, Y., Sulistyaningrum, H.P., Handayani, I., Zuhro, F., Jaelani, A.K., Tedjomurti, K., 2020)

The big question is if it is predicted in such a way, why is it still forced to be regulated. Such a thing is very worrying considering the accountability of the judiciary to the public is largely determined by external pressures that force and condition the judge to serve the public interest. If there is no external control from the public, it is feared that the judge will not be independent in carrying out his/her duties. Accountability cannot be seen as a threat to independence, but rather fosters public confidence in judges and the judiciary. Thus, the emergence of the formulated policy regarding criminal acts against the impartiality of judges is clearly not in accordance with the concept of independence of the judiciary and also does not resolve the problem of the independence of the judiciary which has so far been considered to cause a decline in authority, dignity, and honour. (Teguh Prasetyo, 2013)

Conclusions

Based on the above discussion, it can be concluded that there are some weaknesses in the formulated policy regarding criminal acts against the impartiality of judges, both in the context of criminal acts attacking the integrity and impartiality of the court (Scandalizing in the Court) and criminal acts of contempt of the court conducted by means of notification or publication (Sub-Judice Rule) as regulated in the Draft Law on the Criminal Code and the Draft Law on Criminal Conduct (Contempt of Court). Weaknesses are mainly contained to the determination of criminal acts and establishment of criminal sanctions. In the context of determining a crime, a crime against the impartiality of a judge does not meet the general and specific criteria in the determination. In addition, the formulation of criminal acts also do not pay attention to the existing principles. This causes the determination and formulation to be very summary which is very dangerous because it can be interpreted subjectively. Whereas in the context of the determination of criminal sanctions, there is a disparity in the arrangement between the two draft laws in terms of the types of criminal sanctions and the selection of severity of criminal sanctions. This must then become the attention of future legislators if they still want to determine actions against the judge's impartiality as a criminal offense.

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