Law and Justice in a Globalized World

Editors

Harkristuti Harkrisnowo
Hikmahanto Juwana
Yu Un Oppusunggu

ROUTLEDGE

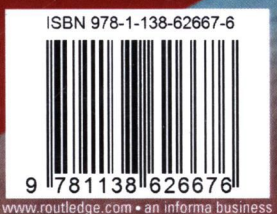
Proceedings of the Asia-Pacific Research in Social Sciences and Humanities, Depok, Indonesia, November 7—9, 2016:
Topics in Law and Justice

The book consists of a selection of papers presented at the Asia-Pacific Research Conference on Social Sciences and Humanities. It contains essays on current legal issues in law and justice, and their role and transformation in a globalizing world. Topics covered include human rights, criminal law, good governance, democracy, foreign investment, and regional integration. The conference focused on Asia and the Pacific, two regions where law has taken an important position in creating and shaping the regional integrations, new legal institutions, and norms. This reconfirms the idea that the legal system is extremely important in the global world. This book provides new insights and new horizons on how law and justice took part in globalizing human interaction, especially in the Asia-Pacific region.

UNIVERSITAS INDONESIA | SOCIAL SCIENCES AND HUMANITIES | LAW

Routledge
Taylor & Francis Group

ISBN 978-1-138-62667-6



www.routledge.com • an informa business

Editors

Harkrisnowo

Juwana

Oppusunggu

Law and Justice in a Globalized World

PROCEEDINGS OF THE ASIA-PACIFIC RESEARCH IN SOCIAL SCIENCES AND HUMANITIES, DEPOK, INDONESIA, 7–9 NOVEMBER 2016: TOPICS IN LAW AND JUSTICE

Law and Justice in a Globalized World

Editors

Harkristuti Harkrisnowo, Hikmahanto Juwana & Yu Un Oppusunggu

Faculty of Law, Universitas Indonesia, Indonesia

Routledge
Taylor & Francis Group

LONDON AND NEW YORK

Routledge is an imprint of the Taylor & Francis Group, an informa business

Typeset by V Publishing Solutions Pvt Ltd., Chennai, India

Published by: CRC Press/Balkema
Schipholweg 107C, 2316 XC Leiden, The Netherlands
e-mail: Pub.NL@taylorandfrancis.com
www.crcpress.com – www.taylorandfrancis.com

ISBN: 978-1-138-62667-6 (Hbk)
ISBN: 978-1-315-22329-2 (eBook)

LAW AND JUSTICE IN A GLOBALIZED WORLD

Law and Justice in a Globalized World – Harkrisnowo et al. (Eds)
© 2018 Taylor & Francis Group, London, ISBN 978-1-138-62667-6

Foreword

Law and Justice is one of the umbrella topics of the APRISH Conference held by Universitas Indonesia in November 2016. This academic undertaking is designed to provide a forum for researchers to disseminate and exchange their research findings and reports on this topic within and around Asia-Pacific countries.

It is well understood that there is a growing role of the Asia-Pacific region in the world, in particular in terms of global economy and politics. At this juncture, it is only natural that law plays a very significant role in the shaping and maybe transformation in each country, in the sub region and in the region itself. In addition, the number of Asia-Pacific countries, the diversity of countries and also the different historical background as well as their legal development and challenges provide a fertile avenue for critical analysis and research. It is the expectation of Universitas Indonesia that this conference would serve as a forum to reflect upon important developments in the region in various areas of law and justice.

It is important to note that in this book, the collection of information and analysis on the existence, clarity, and implementation of law on particular issues in one country is intended to provide detailed explanation to readers in conjunction with the specific issue addressed. It is the intention of the conference holder to facilitate a venue for interaction and interconnection among researchers, in particular to forge further collaboration in future legal research and publishing.

In this book readers would be able to find vast knowledge both on theoretical and empirical perspectives as to the working of laws aimed to achieve justice for the people. The role of law in the countries in this region has been demonstrated to shape not only the system of governance in each country, but also the well being of its people through the implementation of such law. As such, a number of articles in this book have also studied and revealed the historical antecedents on how legal rules and legal institutions were established in certain countries. Challenges found both in legislations and its implementation may be worth noting, for these could serve as lessons learned in other countries experiencing similar conditions.

Many fields of law are covered in this book which include not only public law, but also private law and transnational laws. Articles in public law vary from criminal law to criminal procedural law and environmental law. With regard to private laws, there are articles on inheritance law, adoption law, investment law and banking law, including those operated in line with Islamic law. In addition the importance of law in connection with other discipline is also discussed under the issues of human rights, good governance and democracy, which to some extent also indicated the degree of development of each of these three concept in the respective country. Since interconnection among countries in the region and worldwide has become a rule in today's globalized world, there are also articles on regional and transnational issues having significant parts not only in each country but also in the region, and maybe in the world as well.

It is to be noted however that most of the articles are related to legal development in Indonesia, a country which during the past two decades has experienced significant challenges in politics and social issues, where laws were repealed and amended, new laws were introduced, borrowing many conceptual frameworks from around the world, and adjusted to the Indonesian condition and structures.

May the readers find this book interesting and may it inspire new interests in various fields of law and justice.

The Editorial Board of the 1st APRISH Proceedings for Topics in Law and Justice

Prof. Harkristuti Harkrisnowo, Ph.D.
Prof. Hikmahanto Juwana, Ph.D.
Yu Un Opposunggu, Ph.D.
Faculty of Law, Universitas Indonesia

Law and Justice in a Globalized World – Harkrisnowo et al. (Eds)
© 2018 Taylor & Francis Group, London, ISBN 978-1-138-62667-6

Organizing committee

STEERING COMMITTEE

Rosari Saleh, *Vice Rector of Research and Innovation, Universitas Indonesia, Indonesia*
Topo Santoso, *Dean, Faculty of Law, Universitas Indonesia, Indonesia*
Ari Kuncoro, *Dean, Faculty of Economics and Business, Universitas Indonesia, Indonesia*
Adrianus L., G. Waworuntu, *Dean, Faculty of Humanities, Universitas Indonesia, Indonesia*
Arie Setiabudi Soesilo, *Dean, Faculty of Social and Political Sciences, Universitas Indonesia, Indonesia*

INTERNATIONAL ADVISORY BOARD

Peter Newcombe, *University of Queensland, Australia*
Fred Piercy, *Virginia Tech University, Australia*
Frieda Mangunsong Siahaan, *Universitas Indonesia, Indonesia*
James Bartle, *University of New South Wales, Australia*
Elvia Sunityo Shauki, *University of South Australia, Australia*

SCIENTIFIC COMMITTEE

Manneke Budiman
Isbandi Rukminto Adi
Beta Yulianita Gitaharie
Surastini Fitriasih
Sri Hartati R. Suradijono
Elizabeth Kristi Poerwandari

CONFERENCE DIRECTOR

Tjut Rifameutia Umar Ali

CONFERENCE VICE-DIRECTOR

Turro Wongkaren

ORGANIZING COMMITTEE

Dewi Maulina, *Faculty of Psychology, Universitas Indonesia, Indonesia*
Intan Wardhani, *Faculty of Psychology, Universitas Indonesia, Indonesia*
Elok D. Malay, *Faculty of Psychology, Universitas Indonesia, Indonesia*

Josephine Rosa Marieta, *Faculty of Psychology, Universitas Indonesia, Indonesia*
Teraya Paramehta, *Faculty of Humanities, Universitas Indonesia, Indonesia*
Nila Ayu Utami, *Faculty of Humanities, Universitas Indonesia, Indonesia*
Priskila Pratita Penasthika, *Faculty of Law, Universitas Indonesia, Indonesia*
Efriyani Djuwita, *Faculty of Psychology, Universitas Indonesia, Indonesia*
Destri Widaya, *Faculty of Economics and Business, Universitas Indonesia, Indonesia*

WORKSHOP COMMITTEE

Corina D.S. Riantoputra, *Faculty of Psychology, Universitas Indonesia, Indonesia*
Fithra Faisal Hastiadi, *Faculty of Economics and Business, Universitas Indonesia, Indonesia*
Mirra Noormilla, *Faculty of Psychology, Universitas Indonesia, Indonesia*

TREASURERS

Robby Oka Yuwansa, *Faculty of Psychology, Universitas Indonesia, Indonesia*
Nurul Husnah, *Faculty of Economics and Business, Universitas Indonesia, Indonesia*

Law and Justice in a Globalized World – Harkrisnowo et al. (Eds)
© 2018 Taylor & Francis Group, London, ISBN 978-1-138-62667-6

Table of contents

Law and Justice in a Globalized World – Harkrisnowo et al. (Eds)
© 2018 Taylor & Francis Group, London, ISBN 978-1-138-62667-6

Keynote speech: On local wisdom and the pursuit of justice through criminal law reform: The Indonesian experience in deliberating the Bill of the penal code

H. Harkrisnowo
Faculty of Law, Universitas Indonesia, Depok, Indonesia

ABSTRACT: The problem of crime and punishment has existed for as long as human history. Nevertheless, it continues to be debated and remains controversial. The most significant question relevant to punishment is its philosophy or main purpose. Joining this debate, this paper elaborates on the undertakings of the legal drafters of the Indonesian Bill on the Criminal Code (or the Bill), who stipulated the aims of punishment in the Bill, while most penal code drafters in other countries appear to elude such stipulation. Furthermore, while the global trend is to consider only the aims developed in the Western hemisphere, such as retribution, deterrence, rehabilitation and restorative justice, the Bill's legal drafters also considered Indonesian local wisdom related to punishment. The incorporation of such local wisdom changes the paradigm of the existing penal code—which is the legacy of the colonial regime—into one that represents the core norms and values of the Indonesian people.

1 INTRODUCTION

Punishment has existed in all communities and nations worldwide, not only today but also in ancient times, as proven by old manuscripts and even various holy books addressing various misdeeds, religious or otherwise. Many would begin by theorising about why the state (or kingdom) is accorded the legal right to inflict punishment on the perpetrator of a crime and why it is permitted by moral judgement to treat such people in a different manner than those who have not violated a criminal law. Such is the importance of the social control mechanism in a society that Fyodor Dostoyevsky encapsulated it as follows: 'A society should be judged not by how it treats its outstanding citizens but by how it treats its worst criminals' (Dostoyevsky, 1915).

While the question of punishment has existed for as long as human history, its origin is difficult to trace. Rarely do we find any book depicting laws in any country at any time that does not address the issue of crime and punishment, although their conceptualisation might differ from one country to another and from one time to another. Despite its long history, punishment remains a debatable issue that generates vast volumes of literature on the aims of punishment.

Research on punishment is usually based on theories developed in the Western hemisphere, for the simple reason that Western literature is readily accessible. However, this study attempts to look at Indonesian local wisdom and ancient law books to enrich the understanding of our past and to examine how ancient patriarchs thought about, decreed and implemented punishments in their reigning periods. Discovering the content of old laws that once governed the land of Indonesia is an important task for the current Indonesian government and the parliament, who are deliberating the Bill on the Criminal Code to replace the existing criminal code, which is a legacy of the colonial regime.

This documentary research poses the following questions:

a. What are the purposes of punishment as found in the ancient law books in Indonesia, and how are they used in the drafting of the Bill on the Criminal Code today?
b. Which criminal principles found in such books could be incorporated into the Bill?
c. How different are the books from modern criminal law?

2 METHODOLOGY

Based on a qualitative study, this documentary research looked in depth at numerous documents and manuscripts. In addition to various books, journals and published research reports, the primary source examined for this study was ancient law books in Indonesia that have been translated into Indonesian.

3 DEFINING PUNISHMENT

From a legal point of view, punishment is the infliction of pain, deprivation or some other form of suffering and even the taking of a person's life. According to Foucault, punishment is just one manifestation of power. In essence he is of the opinion that punishment is a functioning of power that is exercised on the people being punished (in prison) by those supervising the punishment (Foucault, 1975). Naturally, such functioning of power carries legal attributes. David Garland, for example, underlined that punishment is a legally approved method designed to facilitate the task of the state in conducting crime control (Garland, 1990). With regards to the impact of punishment, Nietzsche (1956) believes that the broad effects of punishment in man and beast are the increase of fear, the sharpening of the sense of cunning and the mastery of the desires. Hence, punishment tames man, but does not make him better. In this context, Hart (1968) proposed that five elements could be found in the concept of punishment: 1) it must involve pain or other consequences normally considered as unpleasant; 2) it is imposed due to an offence against legal rules; 3) it must be imposed on an actual or supposed offender for his offence; 4) it must be intentionally administered by human beings other than the offender; and 5) it must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

4 THEORETICAL BACKGROUND

Discourse on the theory of punishment addresses the rationale for why a person should be punished for violating a law. Also known as the philosophy of punishment, this discourse primarily aims to find a justification for the state to inflict suffering or pain on a person who has been proven guilty of committing a crime. Why is punishment considered a necessity in social interaction? Does the public need punishment against perpetrators of legal violations? Is it needed by the community to reassert societal values 'destroyed' by the perpetrator? In this regard, Jean-Paul Sartre (1948), the existentialist, argued that punishment does not have any benefit, but rather it is a limitation of freedom and a limitation on human rights. The earliest theory of punishment, known as the absolute theory, contended that a punishment is inflicted merely because a transgression of the law has been committed. In Latin, this is known as *punitur quia peccatum est*, which means 'a punishment is due for a crime committed'.

There are at least two major groups of theories relating to the justification of punishment: retributive and utilitarian. The retributive, retaliation or *lex talionis* school holds that an offender should be punished in payment for his or her transgression. In other words, this school of thought believes that there should be a moral connection between the criminal act and the punishment imposed. The emergence of social reaction to such transgressions is a reflection of disapproval, of morally blaming the perpetrator for the transgression, as well as