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## SECTION 2: PARTICIPANTS' PAPERS

### Toward a Sound Sentencing Structure and Policy— Indonesia's Experiences

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#### Duality of Criminal Law

Many developed and developing countries are now being confronted with many inadequacies in the administration of criminal justice. They have been indicated by a number of factors: the significant and worrisome increase in serious crimes, the overburdening of the criminal justice system with long court delays, judicial rules and procedures that have become more complex, more time-consuming, and more costly, and the confidence in official services that is giving way to public expressions of doubt, hesitation, and sometimes open dismay as the incidence of crime soars beyond the reach of traditional controls. In addition to these factors, it should be pointed out that many countries in Asia have had problems in adjusting the criminal codes by colonial powers to their own societies.

In Indonesia, the Criminal Code made by the Dutch contains certain crimes which some Indonesian societies consider no crimes at all. On the other hand, there are some crimes in the *Adat Law* which are not described in the Criminal Code, or there are some crimes both in the eyes of the Dutch and the Indonesian, whose description in the Criminal Code is quite different than that in the *Adat Law*. For example, while "adultery" is a crime both according to the Criminal Code and the *Adat Law*, the definition of adultery in the *Adat Law* is far more extensive than in the Dutch-made Code. Adultery in the *Adat Law* can be committed by any physical contact, from the contact of the hands to the sexual intercourse. But article 284 of the Criminal Code provides that if a married man (woman) copulates with

a woman (man), who is not his wife (her husband), or an unmarried man (woman) copulates with a married woman (man), he (she) is punishable with imprisonment for nine months. Besides, Indonesian adultery is one of the heavy crimes and punishable by the death penalty in former times (in Aceh, South Celebes and Bali). Another example may be found in the "bigamy." While it is not a crime in *Adat Law*, article 279 of the Criminal Code provides imprisonment for five years to a married man who marries another woman, if he knows that his existent marriage (marriages) forms a lawful hindrance for his new marriage.

It is well known that, during the Dutch colonial period, there were two criminal law-systems in Indonesia, the *Adat Criminal Law* system and the *Criminal Law* system. Each region had developed its own *Adat Criminal Law* which was valid only for the Indonesians. The *Criminal Law* System was developed by the Dutch colonial government and valid for the Indonesians who lived as officials in the colonial administration and for the non-Indonesian people. The *Adat Criminal Law* was heavily curtailed by the *Inheemsche Rechtspraak Ordonnantie 1932* (the Indigenous Jurisdiction Ordinance of 1932) and the *Zelfbestuursregelen 1938* (the Self-Government Decree of 1938). The torture and the crippling punishments were banned, and the death sentence and the imprisonment could only be executed if approved by the "Resident" (Dutch administration officer).

Since the Proclamation of the Independence of the Republic of Indonesia, the system of the judicature is simplified by abolishing many kinds of courts by the Act of January 1951. The power of the Indigenous Courts and the Self-Government's Courts is given to the *Pengadilan*

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## PARTICIPANTS' PAPERS

*Negeri* (District Court), which receive the competency for the examination of crimes in the Adat Law under the Act of January 1951.

### Sentencing Measures

The Criminal Code by the Dutch colonial administration originally came into force on January 1, 1918. After several alterations by the Undangundang (the Act), the Criminal Code with the text on March 8, 1942, was stated still to be in force for the whole of Indonesia. This Criminal Code contains three groups of crimes: the heavy crimes and the lesser crimes (only nine) in the Second Book and the lightest crimes in the Third Book. The First Book contains the principles of the criminal law and the various kinds of punishments and regulates how to inflict them.

There are four principal penalties: (1) death penalty, (2) imprisonment, (3) detention (*hechtenis* or *kurungan*), and (4) fine. In addition to these penalties, there are three additional penalties: (1) the deprivation of some special rights, (2) the confiscation of some special goods, and (3) the publication of the sentence.

#### 1. Principal Punishments

The "death penalty" is limited to three crimes against the safety of the State, murder, larceny with violence causing death, robbery causing death, and piracy causing death. Formerly the death sentence was carried out by hanging, but nowadays by shooting. If the condemned person gets insane, the execution shall be postponed until his recovery, and if the woman condemned to death is pregnant, the execution shall be carried out after the birth of the baby. The petition for pardon also postpones the execution till after the refusal is in the hands of the execution officer.

The "imprisonment" is for life or for a certain period with a maximum of 20 years and a minimum for one day. The prison administrator divides the prisoners into four classes. The first class prisoners are the prisoners for life and those who are unmanageable or dangerous to

the prison personnel and to the fellow prisoners. The second class prisoners are the prisoners for more than three months, and when they behave well during six months, they come in the third class. In the fourth class are grouped the prisoners for three months or less. If the prisoner behaves very well, he will be promoted in a higher class and if he behaves badly, he will be set back in a lower class. The prisoners in the first class are separated from the other classes in a special prison with a strong guard. If the prisoner in the third class has served two-thirds of his sentence with a minimum of nine months with a very good behaviour, he will be proposed to be released on conditions. This conditional release will be licensed by the Director General *Bina Tuna Warga* in the name of the Minister of Justice and at proposal of the Director of the prison.

The "detention" penalty (*hechtenis*) is for a minimum of one day and for a maximum of one year, which can be heightened to a maximum of one year and four months in cases of aggravation, concurrence, or recidivism. In serving the imprisonment or the detention the convicts have to do the appointed labour. The labour in the prison is heavier than in the house of detention. The labour for prisoners can also be done outside the wall, except the prisoners for life, the women, and those who are unfit. Article 20 of the Criminal Code says that, under the decision of the judge, the convict can stay outside the prison or detention house except during the hours of labour, if it is approved by the *Kepala Kejaksaan Negeri* (Chief Prosecutor) and the sentence is not more than one month imprisonment or detention.

The fourth principal penalty is "fine," with the general minimum of 25 cents but with the general maximum of unfixed amount. Only the special maxima are fixed: for example, larceny is punishable not only by imprisonment for not exceeding five years or by fine not exceeding Rp. 300, embezzlement by imprisonment for not exceeding four years or by fine not exceeding Rp. 300, maltreatment by imprisonment for not exceeding two years and eight months or by fine not higher than Rp. 1,500. All the special maxima

## SENTENCING STRUCTURE AND POLICY: INDONESIA

of fine are raised 15 times in 1958 because of the inflation of rupiah. In default of payment of fine, the judge has to fix the term of detention not exceeding six months or eight months in cases of aggravation, concourse, or recidivism.

A system similar to the "probation" was introduced since 1927. It is called *voorwaardelijke veroordeling* in Dutch and *pemidanaan bersyarat* in Indonesian. If the judge inflicts the imprisonment not exceeding one year detention, or fine in case that the payment will cause a great trouble to the convict, he will suspend the execution and impose the conditions as a basis for possible revocation. There are two kinds of conditions: the general condition that the convict shall not commit any crime again during a period fixed by the judge not exceeding three years or two years, and the special conditions with regard to his behaviour at home or in the society. A special condition may include the order to pay compensation to the victim. It is the task of the probation officer to supervise the behaviour of the convict. If the convict fails to comply with any term of the conditions, the judge can order the *Jaksa* (Prosecutor) to reprimand the convict or to execute the suspended sentence.

The "conditional release" of prisoners because of their excellent conduct during two-thirds of their sentence with a minimum of nine months was also introduced in 1927. When the prisoners are released, the probation officers have to supervise them during the probation term. The release license given by the Director General in the name of the Minister of Justice can be withdrawn if the convict fails to comply with the term of the license and he has to serve the rest of his sentence.

The probation officers who assist the public prosecutor in supervising the convicts during the probation term have to visit them regularly and give them advice and help them in finding a solution of their problems, for example, by assisting them to find an employment. The work of the probation officer during the end of the Dutch colonial period was mostly done by the social workers of the *Dewan Reklasering* (After Care Society), a non-governmental organization under the supervision of and in cooperation with the

Minister of Justice, but is now under the supervision of the Minister of Social Affairs. However, the Society is now almost inactive because of the shortage of funds. Since 1975 there is a *Direktorat Bimbingan Sosial* (Directorate of Social Education) in the Ministry of Social Affairs, which has social workers in almost every Kabupaten in Java. In the other islands there are social workers only in some capitals of the province.

The *Direktorat Jendral Bina Tuna Warga* (Directorate General of Educating the Offenders) of the Ministry of Justice has three sub-directorates:

- (1) *Direktorat Pemasyarakatan* (Director of Educating the Prisoners),
- (2) *Direktorat Bimbingan Kemasyarakatan dan Pengantasan Anak* (BISPA) (Directorate of Educating the Adults Outside the Prison and Educating the Juvenile Offenders In and Outside the Prison),
- (3) *Direktorat Akademi Ilmu Pemasyarakatan* (Directorate of the Academic Training for Prison Personnels and Social Workers).

Throughout Java there are 13 BISPA-centers in operation and 14 more in preparation. Outside Java there are no BISPA-centers yet. These BISPA officials do mostly the work of probation officers. They do their work in coordination with the *Jaksa* (Public Prosecutor), the police, *Pamongpraja* (administrative officer), the *Kepala Desa* or *Kampong* (village chief or Kampong chief), and with the social workers of the Directorate of Social Education in the Kabupatens. There is no sharp line between the task and competence of the BISPA officials and the officials of the Directorate of Social Education. The number of probation officers, BISPA officials, social workers, and official of the Directorate of Social Education is far from sufficient.

### 2. Additional Punishments

The "deprivation of some special rights" as an additional punishment may include the following rights: (1) the right to assume posts or special posts, (2) the right to elect or to be elected, (3) the right to enter the armed forces, (4) the right to be

## PARTICIPANTS' PAPERS

a counsellor, to be appointed by the court as a manager (*bewindvoerder*), and to be a tutor, co-tutor, curator or co-curator of his own or others' children, (5) the parental authority, the tutorship, or guardianship over his own children, and (6) the practice of some special professions.

In these cases the judge must fix the term of the deprivation: (a) for life when the offender is sentenced to death or sentenced with imprisonment for life, (b) minimum for two years but not exceeding five years when the offender is sentenced with temporary imprisonment or detention, or (c) minimum for two years but not exceeding five years when the sentence is a fine.

As to the "confiscation of special goods," these goods should belong to the offender and be those with which the crime was committed or which were obtained by the crime. Most often these goods are already seized, but, if not, the offender has to hand them over or has to pay the estimated amount. If he fails to do so, he has to serve the substituting detention whose term is fixed by the court but not exceeding six months. The "publication of the sentence" is another additional punishment. The way of the publication is described in the sentence itself.

Besides these punishments, there are other measures provided in the Criminal Code. If the offender is not criminally liable because of insufficiently developed or sickly disturbed mind, the judge can send him to the lunatic asylum for no longer than one year. If the offender is a juvenile under 16 years, the judge can send him back to the parents, tutor, or guardian, or place him in a government's educational institution or in social institution for his education till his 18th year.

### Disparities in Sentences

The wide discretion of the judge in sentencing offenders is one of the causes of the disparity in sentences. Another cause of this disparity in Indonesia is the different estimation of some crimes in the various regions of Indonesia, which may be attributed to the difference in the sub-

cultures. For example, if the crimes of adultery are committed in Aceh and in Jakarta under the same circumstances, the sentence in Aceh will be severer than the sentence in Jakarta, because the Adat Law in Aceh provides that an adultery is a grave crime. Kidnapping a 19-year-old girl with her consent with intent to marry her is not a crime in Bali according to the Balinese Adat. While it is a crime according to article 332 of the Criminal Code because a 19-year-old girl is still considered an infant according to the Code. The judge in Jakarta will find the offender guilty of such kidnapping and, on the contrary, the judge in Denpasar will acquit him. Another cause of the disparity in sentencing is the different opinions of judges about the objectives of punishment, because the Criminal Code does not give a clear theory of the objectives of punishment.

The Criminal Code (the National Criminal Code) should clearly outline the objectives of punishment under the following principle.

#### (1) *Reformation*

This has a personal preventing effect as well as an effect of protecting the public in the future against the behaviour of the offender. The personal aspects of the offender shall be taken into account in the choice of the kind of sentence and in the way of executing the sentence to assure the fullest possible achievement of those objectives. Since the imprisonment often has a negative effect in reforming the offender, suspended sentence with probation should widely be used.

#### (2) *Deterrence*

This has a special (personal) and a general preventing effect for protecting the public from the offender. Death penalty and imprisonment are effective against the recidivists and the potential offenders.

The Criminal Code should cover not only the outlining of the objectives of punishment but also the reform of the punishments by adding new kinds of penalties such as compensation to the victim and some Adat sanctions, by adjusting the punishment with the Adat view

## SENTENCING STRUCTURE AND POLICY: INDONESIA

in fixing the maximum and minimum, and by redefining of some crimes by taking the Adat view into account.

To decrease the disparity in sentence, the Indonesian judges have tried to find a formula to promote uniformity through the conferences held by the Court of Appeal in the region. The Court also sent circulars to the lower courts in their region for the decrease in disparity. The

Supreme Court did the same but in a larger scope. The sentencing structure and policy was discussed during the Seventh National Congress of the IKAHI (Union of the Indonesian Judges) held in Pandaan, Eastern Java, in July 1975. It would be a very good start if the judges periodically participate in sentencing seminars or scientific discussions with scientists of human behaviour.



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