



## ***Lex tempus delicti* national criminal law in the book of criminal law ( kuhp ) law based on value justice of Pancasila**

**Muhammad Salim Fauzi<sup>1</sup>, Gunarto<sup>2</sup>, Sri Endah Wahyuningsih<sup>3</sup>**

<sup>1</sup> Program Doctor of Science of Law Unissula, Indonesia

<sup>2</sup> Lecturer at the Faculty of Law, Unissula Semarang, Indonesia

<sup>3</sup> Unissula Semarang Law Lecturer, Indonesia

### **Abstract**

This writing aims: 1) to identify and analyze the basic ideas / basic concepts in the regulation of the *lex tempus delicti* principle of criminal law in the Criminal Code (the Criminal Code) at this time; 2) identify and analyze the weaknesses of *lex tempus delicti* in the Criminal Code ; 3) make an ideal reconstruction of the *Lex tempus delicti* national criminal law based on Pancasila values. Research carried out by m etode research of normative law , ie, against the principles of criminal law in the Criminal Code , particularly *lex tempus delicti* research comparative law to support the normative research, the study of criminal law of other countries. Research approach methods: hermeneutics, statutory regulations and conceptual. Theoretical implications of research : The new theory is "The Theory of Humanity and Justice in Pancasila ". The value of humanity and justice of Pancasila is interpreted as having provisions containing the principles of the National Criminal Law that establish the limits of the validity of the *tempus delicti* principle.

**Keywords:** *Lex Tempus Delicti*, law of criminal national , the criminal code, justice , pancasila

### **1. Introduction**

Based on that, the concept of the state in national development is a *welfare state*, the state must realize *social welfare* and also must provide protection for all people as *social defense*. To realize the ideals of the state and government, the *founding fathers* have agreed that the form of the Indonesian state is the Republic of Indonesia which is sovereignty of the people based on the values of the nation's philosophy of Pancasila, namely the Almighty God, Humanity which Fair and Civilized, Indonesian Unity, Society led by wisdom in the deliberation / representation and realizing a social justice for all Indonesian people.

Pancasila is a philosophy of life (*weltanschauung*), as the basis of the state (state philosophy, state ideology, national ideology) functions as the soul of the nation and national identity. As a state (constitutional), the value of Pancasila <sup>[1]</sup> is the principle of the spirituality of the nation and the soul of the state constitution <sup>[2]</sup>.

<sup>1</sup> Pancasila is called the Grundnorm (basic norm) according to Hans Kelsen's theory in *Stufentheorie*, whereas according to Hans Nawiasky as a student of Hans Kelsen, that what is called the basic norm in a country should not be called a Staatsgrundnorm but Staatsfundamentalnorm or fundamental norms of the country. Grundnorm basically does not change, while the highest norms change for example by means of a coup or revolution. Staatsfundamentalnorm is the norm that is the basis for the formation of the constitution or basic laws (staatsverfassung) of a country. The legal position of a fundamental element is a condition for the application of a country's constitution. Lihat: Teguh Prasetyo dan A. Halim Barakatullah, 2013, *Filasaft, Teori dan Ilmu Hukum*, PT. Raja Grafindo Persada, Jakarta, p.392.

<sup>2</sup> A. Hamid Attamimi, 1990, *Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang berfungsi Pengaturan dalam Kurun Waktu Pelita I-Pelita IV*, Disertasi Ilmu Hukum, Fakultas Hukum Universitas Indonesia, Jakarta, p.287.

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that Indonesia is a state of law. Efforts to realize the state's goal to protect all of Indonesia's blood spills based on Pancasila and the 1945 NRI Constitution as mandated in the Opening of the 1945 NRI Constitution are still ongoing, the state constitution also mandates that it seeks to realize democratic ideals based on the law or realize a rule of law state sovereignty of the people. But in the course of the Indonesian nation's efforts to realize the principle of the rule of law are considered unsatisfactory in the era of reform and globalization as it is today, the Indonesian people have experienced crises in various fields and it turns out that law

Sudarto stated that there were at least three reasons for the urgency of renewing the Criminal Code, namely: political, sociological and practical reasons (needs in practice). From a political standpoint, an independent Republic of Indonesia is reasonable to have its own Criminal Code, which it created itself. The Criminal Code created by itself can be seen as a symbol (symbol) and is the pride of a country that has become independent and frees itself from the confines of political colonialism. The Criminal Code of a country which is "forced" to be enforced in another country, can be seen as a symbol of colonialism by the state that made the Criminal Code. Viewed from the standpoint of everyday practice, not many people realize today that the official text of our Criminal Code is still a text written in Dutch. The text contained in the Criminal Code prepared by Prof. Mulyatno, by R. Soesilo and others, is a "private" translation and not an official translation approved by a law <sup>[3]</sup>.

One legal problem that has not been resolved to date is the

<sup>3</sup> Sudarto, 1981, *Hukum Pidana dan Perkembangan Masyarakat*, Sinar Baru, Bandung, p.66-68.

absence of a National Penal Code based on Pancasila values. The Criminal Code / WvS which is still in force today began to be applied in Indonesia since January 1, 1918, meaning that it has been in effect for 100 years and has not been reconstructed. The Criminal Code / WvS which is a legacy from the Dutch colonial era with doctrines based on the values of foreign nations, is therefore not something appropriate if it continues to be applied in Indonesia, so it is necessary to develop criminal law by making fundamental changes to doctrines that are oriented towards Pancasila values as Indonesian philosophy.

**Research Methods**

To achieve the scientific truth that is expected in a study requires a set of fundamental beliefs that will guide in revealing the truth <sup>[4]</sup>. In accordance with the topic of this research, the paradigm used is the constructivism paradigm, because this research is intended to produce a reconstruction of new thoughts or ideas in the Indonesian criminal law system, particularly in the formation of the National Criminal Code. The focus of this research is on the reconstruction of the principle of the time of crime (*lex tempus delicti*) in order to realize the balance of values of Pancasila justice.

The constructivism paradigm views law as plural and plastic. It is said to be plural because the law is expressed in various symbols, languages and discourses. The nature of legal plastic is defined as the nature and characteristics of the law that can be formed in accordance with human needs. <sup>[5]</sup> Thus the reconstruction that will be produced is expected to be able to meet the needs of justice seekers and for criminal law enforcers as well as for the formation of national criminal law as stipulated in the national legislation program.

The constructivist paradigm used is from Egon G. Guba and Lincoln : the paradigm is a basic system that concerns the beliefs or views of researchers, but also determines the ontologically and epistemologically and the methodology that underlies a study. The aspects of the *constructivist* paradigm , namely <sup>[6]</sup>:

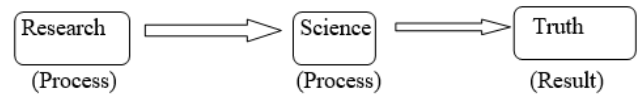
- 1 Ontology, which is an understanding of the nature of reality. In the *constructivism* paradigm reality is plural and diverse and relative.
- 2 The epistemological dimension, namely the understanding of the relationship between the individual and the environment or who is not himself, which in *constructivism* is transactional and subjective. An understanding of the reality or findings of a study is the result of the relationship between the researcher and the investigator.
- 3 Methodology or system methods and principles applied in observation or investigation, of the paradigm *constructivism* is hermeneutics is dialectic. Dialectical interaction is used by researchers with speakers to reconstruct the reality under study with qualitative methods.
- 4 Another dimension is axiology, the value of the

usefulness of research results on the reality of criminal law principles. By using qualitative research methods, it is expected to find hidden meanings behind the object under study. It is also hoped that the results of this study can be used as a concept for the formation of national criminal law books.

According to Almack, <sup>[7]</sup> relationship between science and research such as results and processes. research is a process, while the result is science.



According to Whitney, <sup>[8]</sup> argues that science and research are the same process, so that science and research are the same process. The result of this process is the truth (*truth*)



According to Edwin W.Patterson in *Law In A Scientific Age* <sup>[9]</sup> offers the use of scientific methods in legal research. But in the next discussion he was trapped in the problem of effective behavior, he did not touch things that are prescriptive.

**Research results and Discussion**

As a public law, criminal law finds its importance in legal discourse in Indonesia. How not, in the criminal law contained rules that determine the actions that should not be carried out accompanied by threats in the form of crime (misery) and determine criminal conditions can be dropped. The public nature of the criminal law makes the consequences that the criminal law is national. Thus, Indonesian criminal law is applied to all regions of the country of Indonesia.

In addition, given the criminal law material that is loaded with human values, the criminal law is often described as a double-edged sword. One side of criminal law aims to uphold humanitarian values, but on the other hand, the enforcement of criminal law actually imposes sanctions on human misconduct. That is why the discussion on criminal law material is carried out with extra caution, namely by paying attention to the context of the society in which the criminal law is enforced and continues to uphold civilized human values. The issue of conformity between criminal law and the community where the criminal law is enforced becomes one of the prerequisites whether or not criminal law. That is, criminal law is considered good if it meets and complies with the values of the community. Conversely, criminal law is considered bad if it is outdated and not in accordance with the values in society.

<sup>4</sup> Lexy J. Moleong, 1996, *Metodologi Penelitian Kualitatif*, Remaja Rosdakarya, Bandung, p.30.

<sup>5</sup> Teguh Prasetyo dan Abdul Halim Barkatullah, 2014, *Filsafat, Teori & Ilmu Hukum*, PT. RajaGrafindo Persada, Jakarta,hal 325.

<sup>6</sup> Bandingkan, Egon G. Guba dan Lincoln, 1994, *Competing Pradigms in Qualitative Research dalam Handbooks of Qualitative Research*, Sege Publication, London, p. 105, 110, 111.

<sup>7</sup> Moh Nazir. 2003. *Metode Penelitian*. Ghalia Indonesia, Jakarta : hal. 15

<sup>8</sup> *Ibid*

<sup>9</sup> Edwin W.Patterson, 1963, *Law In A Scientific*. Columbia University Press, NewYork : hal 4

To welcome the renewal of the Indonesian material criminal law (RUU KUHP), this article will highlight One legal problem that has not been resolved to date is the absence of a National Penal Code based on Pancasila values. The Criminal Code / WvS which is still in force today began to be applied in Indonesia since January 1, 1918, meaning that it has been in effect for 100 years and has not been reconstructed. The Criminal Code / WvS which is a legacy from the Dutch colonial era with doctrines based on the values of foreign nations, is therefore not something appropriate if it continues to be applied in Indonesia, so it is necessary to develop criminal law by making fundamental changes to doctrines that are oriented towards Pancasila values as the philosophy of the Indonesian nation with the results of the discussion as can be seen below

### 1. Reconstruction of the Lex Tempus Delicti Legal Norms of the National Criminal Law in the Criminal Code

- a. Tempus delicti regulation in the Criminal Code is not able to be used as a legal basis to overcome the problem of crime and demands for justice.
- b. Article 1 paragraph (1): An act cannot be convicted, except based on the strength of the provisions of existing criminal laws that cannot be established.
- c. Article 1 (2) of the old Penal Code states that there is no prohibition on the analogy,
- d. In the old KUHP there was no written criminal law. Old Criminal Code Article 1 paragraph (2): When there is a change in the legislation after the act has been carried out, the defendant applies the most favorable provisions.

#### The weakness of weakness of his is

- a. It is based on philosophical and social values, namely individual Western countries.
- b. The application of the *nonretroactive* principle does not apply absolutely; The uncertainty of the principle of *lex tempus delicti* in the meaning of the word "changes in legislation"; this orientation exclusion principle *nonretroaktif* only for the interests of individual actors ; It is unclear when the law changes can take effect;
- c. Determination of the *lex tempus delicti* crime has not yet occurred;
- d. In legislation outside the Criminal Code: in the ITE Law it is not clearly regulated; in the Aceh Qanun No. 6 Year 2014 of Law Jinayat not profitable perpetrators child.

### 3. After Reconstruction

- a. Value Reconstruction: Integrating the values of Pancasila balance and justice, namely moral-religious, humanistic and social (nationalistic and social justice).
- b. Norm Reconstruction: carry out reconstruction of Article 1 and Article 2 of the Criminal Code.
- c. Article 1, paragraph (1) : no one can be convicted, unless the actions undertaken stipulated in the legislation in force at the time they were committed as a criminal offense and the person can be held criminal liability.
- d. And then in the National Penal Code in order to establish not prohibited from using the analogy.
- e. While in the National Criminal Code article 2: (1) The provisions referred to in Article 1 paragraph (1) do not

reduce the enactment of the law that lives in the community which determines that a person should be convicted even though the act is not regulated in statutory regulations.

- f. While the National Penal Code Article 3 (1) says In the event of changes in legislation - law after the act occurred, then enacted laws - invitation new, except for the provisions of the old law is more favorable to the suspect, accused and convicted.

### Conclusion

- A. The regulation of the tempus delicti principle of criminal law in the Criminal Code is no longer able to be used as a legal basis for overcoming the problem of crime and demands for justice. The policy adopted is to carry out criminal law legislation policies that seem to tend to be beyond the control of the criminal law principles of Book I of the Criminal Code.
  - B. Weaknesses of the *lex tempus delicti* Principle of criminal law in the Criminal Code at this time are :
    - a. The principles of criminal law in the Indonesian Penal Code are based on philosophical and social values, namely individual Western countries.
    - b. Weaknesses in the application of criminal law according to time (*lex tempus delicti*) :
      - 1 The application of the *nonretroactive* principle does not apply absolutely.
      - 2 The uncertainty of the principle of *lex tempus delicti* in the meaning of the word "changes in legislation".
      - 3 The orientation exclusion principle of *non-retroactivity* only for the interests of individual perpetrators of criminal.
      - 4 It is unclear when the law changes can take effect.
  - C. Determination of the *lex tempus delicti* occurrence of criminal acts does not yet exist.
  - D. Weaknesses of *lex tempus delicti* in legislation outside the Criminal Code :
    - 1 *Lex tempus delicti* criminal acts in ITE Law are not clearly regulated.
    - 2 *Lex tempus delicti* in the Aceh Qanun Qanun No. 6 of 2014 concerning the Jinayat Law does not benefit child offenders
  - E. The Reconstruction of *lex tempus delicti* in the Penal Code based on the values of justice Pancasila namely
    - a. **Value Reconstruction**  
Integrate the values of Pancasila balance and justice, namely moral-religious, humanistic and social (nationalistic and social justice) into the renewal of the principle of legality, especially the principle of *lex temporis delicti* in the form of balanced and fair protection for everyone.
    - b. **Norm Reconstruction**
- #### Article 1
- 1 No one can be convicted, unless the actions undertaken stipulated in the legislation in force at the time they were committed as a criminal offense and the person can be held criminal liability.
  - 2 In determining the existence of a crime is prohibited

from using an analogy.

## Section 2

- 1 The provisions referred to in Article 1 paragraph (1) do not reduce the application of the law that lives in the community which determines that a person is worthy of a sentence even though the act is not regulated in the laws and regulations.
- 2 The law that lives in the community as referred to in paragraph (1) applies as long as it is in accordance with the values contained in Pancasila, human rights, and general legal principles recognized by the people of nations.
- 3 The provisions referred to in Article 1 paragraph (1) do not apply to crimes against humanity (*humanity crime*), crimes against peace (*peace crime*), war crimes (*war crime*), or participate in committing *genocide*, if it has been regulated in legislation.

## Article 3

- 1 In the event of changes in legislation - law after the act occurred, enacted laws - invites new to the provisions of the old law still applies if beneficial for pe behavior.
- 2 Law favorable effect on criminal acts committed (before U ndang U ndang newly declared valid), but also against those who are or have undergone long criminal judgment is still valid / ongoing.
- 3 In the case of U ndang U ndang new states can be convicted of a criminal act originally was not convicted, aggravate criminal or other things that do not benefit someone, can not be applied retroactively ( *non-retroactive* ) against acts before U ndang U ndang take effect.
- 4 In the event that after a conviction is given permanent legal force, the act that occurs will no longer be a criminal offense according to the new laws and regulations, then the implementation of the conviction will be abolished.
- 5 In the case after the verdict sentencing permanent legal power, acts that occur threatened with a lighter punishment according to the laws - the invitation is new, then the implementation of decisions of sentencing is keyed to the limit - the limit according to the laws of criminal - law new ones.
- 6 In the event that a criminal act cannot be convicted initially can be convicted (decriminalized), reduced criminality (depenalization) or other matters that benefit a person, as long as it is not otherwise stipulated by the Law, retroactive principle applies to the crime committed before the new Law declared valid, also against people who are or have undergone a crime as long as the sentence is still valid / ongoing.
- 7 In the case of new laws regulating criminal acts which are very dangerous / detrimental to the community, in the form of crimes against humanity (*humanity crime*), criminal acts against peace (*peace crime*), war crimes (*war crime*), or participating in commit *genocide*, then the new Law retroactively applies ( *retroactive* ).

## Article 4

Determination of the *lex tempus delicti* of a criminal offense is regulated by each law, unless it has been explicitly regulated in this Criminal Code.

## Reference

1. Abdullahi Ahmed An-Na'im, 1994, Dekonstruksi Syari'ah, LkiS bekerjasama dengan Pustaka Pelajar Glagah, Yogyakarta.
2. Achmad Sodiki, Politik Hukum Agraria, Konstitusi Press, Jakarta.
3. Adami Chamzawi. Pelajaran Hukum Pidana 1, PT Raja Grafindo Persada, Jakarta, 2005.
4. Adang Yasmil Anwar. Pembaharuan Hukum Pidana: Reformasi Hukum Grasindo, Jakarta, 2008.
5. Hanafi. Asas-Asas Hukum Pidana Islam, cetakan ke- 4, Bulan Bintang, Jakarta, 1990.
6. Hamid Attamimi A. Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang berfungsi Pengaturan dalam Kurun Waktu Pelita I-Pelita IV, Disertasi Ilmu Hukum, Fakultas Hukum Universitas Indonesia, Jakarta, hlm, 1990, 287.
7. Ahmad Rifai, 2011, Penemuan Hukum Oleh Hakim, Dalam Perpektif Hukum Progresif, Sinar Grafika, Jakarta.
8. Andi Hamzah, 2014, Asas-Asas Hukum Pidana, Edisi Revisi, Rineka Cipta, Jakarta.
9. Andi Hamzah, 2005, Asas-Asas Hukum Pidana, Yarsif Watampone, Jakarta.
10. Asas-Asas Hukum Pidana, Edisi revisi, PT. Rineka Cipta, Jakarta, 2014.
11. Antonius Sudirman. Hati Nurani Hakim dan Putusannya, Citra Aditya Bakti, Bandung, 2007
12. Anthon F Susanto. Penelitian Hukum Transpormatif-Partisipatoris, Fondasi Penelitian Kolaboratif dan Aplikasi Campuran (Mix Method) dalam Peneltian Hukum, Setara Press, Malang, 2015.
13. Zainal Abidin Farid. Hukum Pidana I, Sinar Grafika, Jakarta, 1995.
14. Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM. Draft Naskah Akademik RUU tentang Kitab Undang-Undang Hukum Pidana (KUHP), Jakarta, 2015.
15. Bagir Manan,. Dasar-Dasar Perundang-Undangan, 1990.
16. Barda Nawawi Arief dan Muladi. Teori-teori dan Kebijakan Pidana, Alumni, Bandung, 1979.
17. Bernard Arief Sidharta. Refleksi Tentang Sruktur Ilmu Hukum, Sebuah Penelitian Tentang Fundasi Kefilsafatan Dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia, CV. Mandar Maju, Bandung, 2000.
18. Edwin W Patterson. Law In A Scientific. Columbia University Press, New York : hal, 1963, 45.
19. Egon G Guba dan Lincoln, 1994, Competing Pradigms in Qualitative Research dalam Handbooks of Qualitative Research, Sege Publication, London, hlm. 105, 110, 111.
20. Erdianto Effendi. Hukum Pidana Indonesia Suatu Pengantar, PT Refika Aditama, Bandung, 2011.
21. Faisal. Menerobos Positivisme Hukum, Rangkang Education, Yogyakarta, 2010.
22. Frans Magnis Suseno. Etika Politik (Prinsip-Prinsip Moral Dasar Kenegaraan Modern), PT. Gramedia Pustaka Utama, Jakarta, 1999.
23. Mahmud Kusuma. Menyelami Semangat Hukum Progresif: Terapi Paradigmatik Atas Lemahnya

- Penegakan Hukum Indonesia, Antony Lib bekerjasama dengan LSHP, Yogyakarta, 2009.
24. M Ali Zaidan, Menuju Pembaharuan Hukum Pidana, 2015, Sinar Grafika, Jakarta.
  25. Moh Nazir. Metode Penelitian. Ghalia Indonesia, Jakarta : hal, 2003,.
  26. Sri Endah Wahyuningsih, 2013, Prinsip-Prinsip Individualisasi Pidana Dalam Hukum Pidana Islam dan Pembaharuan Hukum Pidana Indonesia, Badan Penerbit Universitas Diponegoro, Semarang.
  27. S.R.Sianturi. Hukum Pidana Perbandingan, Alumni-AHM-PTHM, Jakarta, 1983.
  28. Sudarto. Hukum Pidana dan Perkembangan Masyarakat, Sinar Baru, Bandung, hlm, 1981, 66-68.
  29. Teguh Prasetyo dan A. Halim Barakatullah. Filasoft, Teori dan Ilmu Hukum, PT. Raja Grafindo Persada, Jakarta, hlm, 2013, 392.
  30. Lexy J Moleong. Metodologi Penelitian Kualitatif, Remaja Rosdakarya, Bandung, hlm, 1996, 3