

Penal Policy in Undertaking Transnational Crime

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Abstract. The development of science and technology and this global era, moreover, bringing positive impacts, have negative impacts as well, where for certain people it is used as a form of committing crimes that are transnational both in their actions and as a result, known as Transnational Crimes. The purpose of this article is to review the implementation of criminal policies in combating transnational crime. By using a doctrinal approach method, where the materials are collected from literature studies either through regulations, mass media, and literature. It was found that criminal politics in Indonesia in undertaking transnational crime is achieved by ratifying international instruments and enacting laws and regulations that criminalize acts related to transnational crimes, among others in the Law on criminal enactments of corruption, money laundering, human trafficking, and terrorism. It is crucial to support the apparatus in terms of capacity and cooperation with international and international law enforcement agencies in undertaking transnational crimes.

Keywords: Policy, Crime, Crime, Transnational

1 Introduction

Many talks about my drinking, but no one about my thirst (Anton Van Duinkerken)

The above phrase is quoted from the book *The Other Side of Criminology* written by G. Peter Hoefnagels, describing that society in general only judges a phenomenon (crime) from the outside without looking at the cause of why the phenomenon (crime) was committed. Thus, it is crucial to change the way of seeing (change of lens) crimes that occur in society holistically, which will result in a comprehensive arrangement as well in undertaking crime, for the protection of society and the order of values in society.

The penal system is inextricable from the economic, social, cultural, and political factors of a nation. This is as formulated in the Milan Plan of Action United Nations Convention in 1985, that: *crime prevention and criminal justice should be considered in the context of economic development, political systems, social and cultural values, and social change.*

In attaining an effective penal policy, must be based on principles things from the penal system, specifically the concept of crime and punishment itself [1]. An integral approach in penal policy must be accomplished with numerous strategies that combine criminal policy with social policy and combine crime prevention endeavours through penal policy and non-penal policy.

Crimes that occur in society are not only within the scope of a country but are already borderless or without state borders, in the sense of crimes that go beyond national borders or transnational crimes or transnational crimes. This is a result of globalization where the world can be said to be on one hand. Along with the support of science and technology in the era of globalization, interaction and communication between humans are not limited to one region or one country nevertheless is conveniently and immediately accomplished between humans who are across countries and indeed across continents within seconds the message is delivered arrives at the destination in spite of the fact that in another country or continent.

The development of science and technology and this global era, moreover in order to bring positive impacts, have negative impacts as well, where for certain people it is used as a form of committing crimes that are transnational both in their actions and as a result, known as TRANSNATIONAL CRIMES. Numerous forms are used to execute transnational crimes intended at gaining the perpetrators with individual and state victims, such as corruption crimes which retributions are laundered in foreign banks; terrorism which is executed by certain syndicates; human trafficking, including trafficking in human organs that occurs across countries; smuggling of immigrants by cross-border syndicates [2].

Transnational crime has the ability to be in the form of organized crime – traditional, non-traditional, and transnational groups have the ability to be characterized by a typology of criminal activity. Despite the fact that the size and structure of these organizational groups are sparse, their system of creating and exploiting opportunities to commit crimes is consistent. Most of these groups are tied to more than one type in that they commonly involve illicit companies, inter-ethnic cooperation, and organized crime in globalization [3].

In controlling this transnational crime, it must be done holistically, not only in the role of the state as a legislator to formulate acts that are classified as transnational crimes with high criminal threats, as well as in realizing the mandate of UN resolutions in combating transnational crimes, but also must be balanced with community participation in preventing themselves from becoming perpetrators or victims of these transnational crimes, the role of the media is substantial as well in shaping public perspectives and awareness of certain behaviours that lead to transnational crimes that make themselves victims or perpetrators.

In this paper, which is the result of this research, the discussion is focused on penal policies in overcoming transnational crime in Indonesia.

The problem raised in this paper is how is the penal policy undertaking transnational crime in Indonesia?

2 Method

This research uses a doctrinal approach, in which materials are attained from library research, both through laws and regulations, mass media, and literature. This method is used to build an analysis that will be described in a qualitative descriptive way.

3 Result and Discussion

3.1 Transnational Crimes and Their Impact on Indonesia

Transnational crimes are:

1. *Violations of law involve more than one country in their planning, execution, and impact.*
2. *Crime takes place in more than one country's jurisdictions, but their consequences significantly affect other countries.*

3. *The crime against more than one country's domestic law, however, need not be based on international law such as.*
4. *The crime crossing national borders or jurisdictions [4].*

According to the Convention on Transnational Organized Crime 2000, an offense is transnational if:

1. *Firstly, it is committed in more than one state.*
2. *Secondly, it is committed in one state but a substantial part of its preparation, planning, direction, or control takes place in another state.*
3. *Thirdly, it is committed in one state but involves an organized crime criminal group that engages in criminal activities in more than one state.*
4. *Finally. It is committed in one state but has substantial effects in another state.*

The United Nations Convention on Transnational Organized Crime (UNTOC) 2000 has identified 18 different categories of transnational crime, as follows: (i) money laundering; (ii) terrorist activities; (iii) theft of art and cultural objects; (iv) theft of intellectual property; (v) illicit traffic in arms; (vi) sea piracy; (vii). Hijacking on land; (viii) Insurance fraud; (ix) computer crime; (x), environmental crime; (xi) trafficking in persons; (xii) trade human body parts; (xiii) illicit drug trafficking; (xiv) fraud bankruptcy; (xv) infiltration of legal business; (xvi) corruption; (xvii) bribery of public officials and (xviii) other offences committed by organized criminal group.

Transnational crimes are distinct from international crime which involves the most serious crime to the global community: its violation can result in imprisonment. The core crimes of international crime are genocide, war crime, and crimes against humanity [5].

Transnational organized crime tends to thrive in countries where law enforcement institutions are weak, and countries where citizens have economic restraints, such as in narcotics trafficking, human trafficking circles, and corrupt governments.

The development of science, technology, and communication encourages globalization and interdependence between countries in order to improve the quality of life. Nonetheless, on the negative side, there are widespread organized transnational crimes in all parts of the world. Transnational crimes seriously threaten Indonesia's National Security and International Security, which have an impact on public security, public health, democracy, and global economic stability [6]. Along with reference to Indonesia, transnational crimes have the ability to affect integrity and independence in law enforcement that is objective and fair; eradicate the economic order due to the reason that the motive for the transnational crime is excessive amounts of money; threaten the social and cultural system related to the society's culture that is too permissive to new things in spite of the fact that it is detrimental; threaten the political order and government related to the efforts of the perpetrators to infiltrate and influence political decisions in both the executive and legislative institutions, and threatens state sovereignty related to the nature of transnational crimes that are cross border/cross-jurisdiction where the perpetrators control their actions in other countries but consequently appears in Indonesia.

The impacts of transnational crimes on national interests include:

- a. Detrimental civil society, the political system, and the sovereignty of a country through the cultivation of violence and bribery, as well as corruption in the political structure.
- b. Endangering market mechanisms, including government policy activities and undermining the benefits of a fair, free, and secure economic and trade system. In extreme cases, all

- legal trade sectors will be led to illegal activities, which tend to undermine state sovereignty.
- c. Disturbance to the environmental system through the destruction of the security system and environmental regulations.
 - d. Strategically destabilizing the interests of the nation and bringing down the progress of transition economies and developing countries' economies by interrupting foreign policy and the international system.
 - e. Imposing a large social and economic burden on society (BPHN Compendium).

3.2 Operationalization of Penal Policies in the Formation of Transnational Crime Laws

Based on the results of the research, it was found that there were facts regarding the regulation of penal policies formulated in laws and regulations as the basis for undertaking transnational crimes in Indonesia, where the penal policy was a form or implementer of the demands stipulated in UN resolutions in the undertaking. transnational as stated in The United Nations Convention on Transnational Organized Crime (UNTOC) in 2000.

Criminal law policy is often referred to as a penal policy as well, which is an endeavour to realize adequate, efficient, and effective (criminal) regulations in the future, which aims to express what is contained in society in order to achieve what is aspired, by holding elections for achieving the best results of criminal legislation, such as fulfilling the requirements of justice and being efficient.

Basically, in undertaking a crime that develops in society, the penal policy must conceive and devise actions as criminal acts, with the following criteria for action:

1. Behaviour that violates the norms of conduct of society (concept of violating conduct norms/anti-social conducts), due to the fact that every society has rules and norms devised to control its members.
2. Acts that violate basic human rights, such as racism, sexism, and imperialism.
3. Acts that violate the law are devised by law as an act that is detrimental to society. (Clayton A. Hartjen, Crime and Criminalization).

Savitz specifies criteria for acts that can be punished theoretically, they must meet 5 conditions:

- a. *An act must take place that involves harm inflicted on someone by the actor.*
- b. *The acts must be legally prohibited at the time it is committed.*
- c. *The perpetrator must have criminal intent (men's rea) when he engages in the act.*
- d. *There must be a causal relationship between voluntary misconduct and the harm that result from it.*
- e. *There must be some legally prescribed punishment for anyone convicted of the acts.* (Savitz, 1967: 10 – 13).

In the context of undertaking transnational crimes and protecting victims of transnational crimes, through penal policies, the state conceives laws and regulations, changes, or updates existing ones in accordance with the lines of penal policy as determined by A. Mulder:

1. To what extent do the pertinent criminal prerequisites need to be changed or updated?
2. What can be done to prevent crime?
3. How should investigations, prosecutions, trials, and criminal acts be achieved?

The operationalization of the penal policy is accomplished through criminalization which rationally consists of 3 (three) substantive fundamental problems as stated by Herbert L. Packer:

1. *What conducts should be designed as criminal.*
2. *What determinations must be made before a person can be found to have committed a criminal offense.*
3. *What should be done with persons who are found to have committed offenses.*

At the same time, in his writings *Cases Unmeet for Punishment*, Jeremy Bentham emphasizes proportionality and parsimony (parsimony principle) in the prerequisites of punishment, in which a sentence may not be imposed if the following conditions are met:

- a. *Groundless, where there is no mischief for it to prevent, the act not being mischievous upon the whole.*
- b. *Inefficacious, where it cannot act in order to prevent the mischief.*
- c. *Unprofitable or too expensive, where the mischief it would produce would be greater than what it prevented.*
- d. *Needless, where the mischief may be prevented, or cease of itself without it: that is at a cheaper rate.*

3.3 Penal Policy Through Ratification of International Instruments and Formulation of Transnational Crime Legislation in Indonesia

United Nations Convention Against Transnational Organized Crime (UNTOC), sering disebut Palermo Convention di sahkan oleh PBB pada plenary meeting ke-62 tanggal 15 November 2000. Konvensi ini memiliki 3 protokol, yaitu :

- i. *Protocol against the smuggling of migrants by land, air, and sea, supplementing the United Nations Convention Against Transnational Organized Crime.*
- ii. *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against the illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.*
- iii. *Protocol against the smuggling of migrants by land, sea, and air, supplementing the United Nations Convention against Transnational Organized Crime.*

Indonesia signed the *United Nations Convention on Transnational Organized Crime* in December 2000 in Palermo, Italy. This convention has been ratified by Indonesia with Law Number 5 of 2009 concerning Ratification of the United Nations Against Transnational Organized Crime, in which it states that the category of transnational organized crime (TOC) consists of 8 (eight) categories, they are money laundering, corruption, illicit trafficking of protected plants and wild animals, the crime of cultural property, human trafficking, smuggling of migrants, illicit trafficking of firearms and terrorism, as agreed by ASEAN countries in the preparation of the Plan of Action Against Transnational Crime.

UNTOC as a form of penal policy at the international level formulates 5 (five) types of transnational crimes, such as:

1. Participation or taking part in organized crime groups (Article 5)
2. Crime of money laundering takings of crime (Article 6)
3. Corruption crime (Article 8)
4. The crime of interfering with the judicial process (Article 23)
5. Other serious criminal acts as stated in Article 2 letter b

UNTOC states that the state parties/participants are obliged to make every effort including establishing laws and regulations that criminalize the acts stipulated in Articles 5, 6, 8, and 23, and urges to establish a framework for legal cooperation between countries such as

extradition; mutual assistance in criminal matters; cooperation between law enforcement officers; and cooperation in technical assistance and training.

Consequently, Indonesia as a ratifying country to UNTOC implements a penal policy in undertaking transnational crimes, both those that have been articulated in the Criminal Code and regulations that are spread across several other laws. The Criminal Code has determined the principles of the implementation of criminal rules conferring to territory in order to prosecute transnational crime perpetrators, both those committed in Indonesia, nevertheless, the impact transpired in other countries, acts committed in other countries by Indonesian citizens whose impacts transpired in other countries or in Indonesia, as well as acts that attack the legal interests of the Indonesian state committed outside Indonesia. The principles referred to are the Territorial Principles (Article 2) which are expanded by Article 3 for criminal acts in Indonesian boats. The Personality/National Active Principle which conditions are devised in Article 5 Paragraph (1) and its expansion in Paragraph (2) of the Criminal Code, as well as its diminishing, are devised in Article 6 of the Criminal Code. The Passive National Principal concerns in the event that the crime is committed outside Indonesia but as a result attacks the legal interests of the Indonesian state as articulated in Articles 4 and 8 of the Criminal Code and Universal Principles to the extent that the interests of foreign countries are concerned, with an emphasis on the protection of international interests.

On this occurrence, the discussion of penal policies outside the Criminal Code is focused on transnational crimes with the highest level of threat and level of danger in Indonesia's national security and which are rampant in Indonesia, such as corruption, money laundering (related to terrorism and narcotics), narcotics and human trafficking.

3.3.1 Corruption Crime

Article 8 Paragraph (1) UNTOC determines each participating country to criminalize acts, as criminal acts of corruption, in the event that intentionally:

- a. Promising, offering, or giving to public officials, directly or indirectly for an undue advantage for the officials themselves, or other people or entities thus the officials act or refrain from their duties.
- b. Solicitation or acceptance by public officials directly or indirectly for an undue advantage for the official himself, or another person or entity thus the official acts or refrains conferring to their duties.

Paragraph (2) Article 8 UNTOC encourages participating countries to criminalize acts as referred to in Article 8 Paragraph (1) above, which involve a foreign public official or international civil official as another form of the criminal act of corruption, as likewise articulated in Article 16 paragraph (1) of UNCAC as foreign bribery to attain benefits related to international or transnational transactions. Paragraph (3) determines a criminal act participating in a corruption crime. Paragraph (4) stipulates a definition of a public official as a public official or someone who stipulates public services as determined by domestic law and implemented in the criminal law of the participating country in which that person performs his function.

Criminal acts of corruption are regulated in Law Number 31 of 1999 concerning the Eradication of Corruption Crimes in conjunction with Law Number 20 of 2001 concerning Amendments to the Law on the Eradication of Corruption Crimes. In this Law, a criminal act of corruption has the ability to become a transnational crime in the event that an act is conducted in order to benefit oneself or another person or a corporation, resulting in harm to the finances or the economy of the Indonesian state.

Article 16 of the Law on the Eradication of Corruption Crimes stipulates to punish everyone (both Indonesian citizens and foreign nationals) who are abroad providing assistance; opportunity; means; or information for the incidence of a criminal act of corruption with the same punishment as the perpetrator of a criminal act of corruption (both principal and affixed crimes).

Article 21 of the Corruption Law criminalizes any person (Indonesian citizen/foreign citizen) who intentionally prevents, hinders, or thwarts directly or indirectly the investigation, prosecution, and examination at the trial of the accused and witnesses of corruption cases.

3.3.2 Money Laundering

Article 6 paragraph 1 of UNTOC stipulates that each country participating in the convention must criminalize money laundering as a crime against acts committed intentionally [7]:

- a. Conversion or transferring money or property, which is known to be the takings of a crime, with the intention of concealing or disguising the origin of the property or assisting a person who is involved in an act of predicate offense to avoid the legal consequences of his act.
- b. Concealment or disguise of the true nature, source, location, disposition, movement, or ownership or rights related to property, which is known to be the result of a crime.

The basic concepts are [8]:

- a) The acquisition, possession, and use of assets known at the time of receipt as proceeds of crime.
- b) Participate, correlate, or agree to perform acts, trials, and assistance, persuade, facilitate and support money laundering acts.

In determining predicate crime, each member country is inquired to include all serious crimes (*serious crime: conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty*, Art. 2) as a predicate crime, including *participation in an organized crime group*, Art. 5, *corruption*, as well as *obstruction of justice*, Art 23. whether achieved within or outside the jurisdiction of the participating countries.

In the event that the crime is committed outside the jurisdiction of the participating country, predicate offenses are only if when the act is a criminal offense under the domestic law of the country where the act was committed and is a criminal offense according to the domestic law of the participating country.

Money laundering crimes are acts as formulated in Law Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering, as defined in Article 3 and Article 4 as Active Money Laundering, and Article 5 as Passive Money Laundering.

Money laundering turns into a transnational crime in the event that it involves more than one country, in the sense that the crime is committed in one country as a result of the original crime committed in another country. The enactment of Indonesian rules against perpetrators of money laundering crimes refers to the principles of the application of criminal rules conferring to the territory as formulated in Articles 2, 3, 4, and 5 of the Criminal Code.

Article 10 of Law Number 8 of 2010 criminalizes every person, such as an Indonesian citizen or foreigner residing within or outside the territory of Indonesia, committing acts of participation, testing, assistance, or collusion to commit money laundering.

Article 89 determines international cooperation between PPATK and similar institutions in other countries or international institutions related to the prevention and eradication of money

laundering offenses, either in the form of formal cooperation or based on mutual assistance or the principle of reciprocity.

3.3.3 Narcotics Crime

In the legal politics of Law Number 35 of 2009, it is stated that narcotics crimes are transnational, achieved with a high form of operation, and advanced technology, supported by a wide network of organizations, causing many victims, particularly the younger generation, the nation, society, and the state.

3.3.4 Human Trafficking

Human trafficking as a transnational crime where the activity in this crime crosses countries from the country of origin of trafficked humans to the destination of trafficking, with numerous approaches such as job offers, kidnapping, and others. In handling human trafficking, a strong police force is needed in understanding the crime of human trafficking as a transnational crime, and awareness and specific means and actions are needed in ensnaring the perpetrators of human trafficking [9].

In undertaking human trafficking in Indonesia through a penal policy, such as establishing several laws and regulations related to human trafficking activities, including:

- Law Number 21 of 2007 concerning Eradication of the Crime of Trafficking in Persons.
- Law Number 23 of 2002 concerning Child Protection.
- Government Regulation Number 9 of 2008 concerning Procedures and Mechanisms for the Eradication of Trafficking in Persons.

3.4 Supporting Capabilities of Indonesian Law and Authorities in Enacting Social Defense Policy

One of the factors that must be considered in criminalizing acts is the ability of law enforcement officers to deal with acts that are criminalized in the law, in the context of realizing a social defense policy. In undertaking transnational crimes, the laws governing both substantive criminal law and law enforcement procedures are sufficient. The Criminal Code as the rear of criminal law has required the capital to implement the rules of Indonesian criminal law against transnational crimes in the form of the Territorial Principle, the Personality/Active National Principle, the Passive National Principle, and the Universal Principle.

The ability of law enforcement officers to respond to transnational crimes must be balanced with community participation, and community reports on suspicious actions, and those who are victims must support each other in eradicating transnational crimes [10].

In the meantime, cooperation between countries in undertaking transnational crimes requires the support of the capabilities of domestic law enforcement officers. There are several institutions authorized to tackle transnational crime in Indonesia, they are:

1. Police of the Republic of Indonesia
2. Interpol/NCB/International Relations Division of the State Police of the Republic of Indonesia/Police of the Republic of Indonesia
3. Navy
4. Maritime Security Coordinating Agency (BAKORKAMLA)
5. Attorney General's Office
6. The Corruption Eradication Commission
7. Centre for Financial Transaction Reports and Analysis
8. Financial Management Agency
9. National Counter-Terrorism Agency

10. Coordinating Ministry for Political, Legal, and Security Affairs of the Republic of Indonesia
11. Ministry of Foreign Affairs
12. State Intelligence Agency
13. Local Government (Compendium BPHN).

In the meantime, the challenges of the apparatus in dealing with transnational crime, which is very influential, are as follows:

1. The quality of the capabilities of the apparatus
2. Corruption behaviour
3. The framework in the legal system is weak/poor
4. Society's social trust towards the authorities and officials
5. Human Resources in the Criminal Justice System.

It takes a law enforcement strategy in tackling transnational crime which is important as well, such as the concept of intelligence in law enforcement which requires tactics and operational strategies, specifically in police institutions in collaboration with international police [2].

4 Conclusion

Penal policies in eradicating transnational crimes are criminalized through the formulation of criminal rules or legislation that formulates criminal acts and threats, in criminal rules related to transnational crimes committed across countries, including the law on corruption; money laundering laws; terrorism laws; narcotics laws; and human trafficking laws. On the other hand, it prepares the ability of law enforcement officers to succeed in laws and regulations in eradicating transnational crime, including evaluating the quality and capabilities of the apparatus, corrupt behaviour, a strong legal system framework, public trust in the apparatus, and human resources in the criminal justice system.

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