

COMPARATIVE LAW, LEGAL REFORM AND LEGAL POLICY: HOW TO HANDLE ECONOMIC CRIMES IN GLOBALIZATION ERA?

Prof.Dr.Topo Santoso,SH.MH

SEMARANG, 29 AUGUST 2018

- Globalization : “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by event occuring many miles away and vice versa” (Giddens, 1990).



- The network society (several different phenomena related to the social, political, economic and cultural changes caused by the spread of networked, digital information and communications technologies)
- Information revolution
- Global economy
- Neo-liberalism
- The changing role of the state



- The changing role of the state → the issues of crime control
- Criminal Policy
- Penal Policy and Non Penal Policy
- How the Criminal Justice System handle Economic Crimes ?
- How the Legal Framework prevent and settle Economic Crimes



MAIN TYPES

- FRAUD
- ELECTRONIC CRIME
- MONEY LAUNDERING
- TERRORIST FINANCING
- BRIBERY AND CORRUPTION
- MARKET ABUSE AND INSIDER DEALING
- INFORMATION SECURITY

The offenders ?

- Individual
- Organized Crime
- Business Leaders or Senior Executive
- Employees
- Customer, supplier, contractor

■ “Acknowledging the urgent need for more effective international cooperation between government, keeping in mind that the international and national economic and social order are closely related and are becoming more and more interdependence and that as growing socio political problem may transcended national boundaries”

■ (Guiding principles for Crime Prevention and a New International Economic Order, Kongres PBB ke 7, Milan, 1988)

WHAT ARE PURPOSE AND FUNCTIONS OF COMPARATIVE LAW?

- COMPARATIVE LAW
- COMPARATIVE CRIMINAL LAW
- COMPARATIVE PROCEDURAL LAW
- COMPARATIVE CRIMINAL JUSTICE SYSTEM

Functions and Purpose of Comparative Law

- ◆ (1) Comparative law as an Academic Discipline
- ◆ (2) Comparative law as an Aid to Legislation and Law Reform
- ◆ (3) Comparative law as a Tool of Construction
- ◆ (4) Comparative law as a Means of Understanding Legal Rules
- ◆ (5) Comparative law as a Contribution to the Systematic Unification and Harmonisation of Law

Comparative law as an Academic Discipline

- Examples of texts - all in Indonesian -
- Used for this purpose include
- Romli Atmasasmita's book titled *Principles of Comparative Criminal Law* (1989),
- Barda Nanawi Arief's *Comparative Criminal Law* (2002) and *Criminal Law Reform from a Comparative Study Perspective* (2005), and
- *Introduction to The Comparative Legal System: Civil Law, Common Law, Islamic Law* by Ade Maman Suherman (2004).

- Although the Indonesian Association of Comparative Law was founded only in 2015, comparative law courses have long been taught at the undergraduate, masters, and doctoral levels in most Indonesian law schools.
- With the exception of Jambi University, which has a doctoral programme in comparative law, other universities offer comparative law only as a course and not as a separate programme yet.

- Soerjono Soekanto (University of Indonesia) and Sunaryati Hartono (Padjadjaran University) were two of the many jurists who encouraged law students, researchers, and legal professionals to apply comparative methods in their studies and professional activities.
- Barda Nawawie Arief and Andi Hamzah on the other hand have contributed to the use of comparative law in their many papers and books describing issues in criminal law and the criminal justice system.

- Currently, there is considerable diversity in the comparative law curricula of Indonesian institutions. Some law faculties (such as Parahyangan University in Bandung) designate comparative law (or a specific class such as comparative private law, comparative criminal law, or comparative constitutional law) as a compulsory course for all students;
- others make comparative law compulsory only for students who specialise in a certain area of law, such as requiring students who specialise in civil law to study comparative civil law. The University of Indonesia falls into the latter category.

Comparative law as an Aid to Legislation and Law Reform

- The legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar result
 - Although different societies have different specific problems, all societies have the same basic problems
 - They need to resolve their particular domestic / local problems and to consider how best 'the law' may deal with these problems.
- EXAMPLE: PROBLEM OF CORRUPTION, TERRORISM, DRUGS CRIMES, ECONOMIC CRIMES, etc

- Comparative law is needed in Indonesian legislation process and legal reform
- In the new penal code drafting process there are many concepts based on comparative law study, for example: alternative to death penalty → death penalty → live prison/ 20 years. The concept of community service order, etc

- In the area of economic crimes and corruption → there are some aspects are resulted from comparative law study
- Example: Non Conviction based asset recovery (NCB), Beneficiary Owners (BO), reversed burden of proof , ect
- In the area of justice system
→ Witness protection, justice collaborato, restorative justice, dissenting opinion, lay judges, etc

In the future

- Plea bargaining ? Applied In the US, the UK, and other common law countries. Also adapted in some civil law countries
- Deferred Prosecution Agreement (DPA)? Applied in the US and the UK → we need to discuss about the possibility to applied DPA in corruption or other economic crimes committed by corporation

Comparative law as a Contribution to the Systematic Unification and Harmonisation of Law

- EU Law
- What about ASEAN Law ? Or Law in ASEAN
- Comparative law is become more important in the new era of ASEAN
- ASEAN law/ Law in ASEAN in Indonesian universities curriculum ?

Types of Comparative Studies (Hug, 1922)

- ✦ (a) Comparison of foreign systems with the domestic system in order to ascertain similarities and differences;
- ✦ (b) Studies which analyse objectively and systematically solutions which various systems offer for a given legal problem;
- ✦ (c) Studies which investigate the causal relationship between different systems of law;
- ✦ (d) Studies which compare the several stages of various legal systems;
- ✦ (e) Studies which attempt to discover or examine legal evolution generally according to periods and systems.

The Comparative Method (Rheinstein)

- ✦ Macro-Comparison → the study of two or more entire legal systems
- ✦ Micro-Comparison → the study of topics or aspects of two or more legal systems
 - mis.
 - (i) the institutions or concepts peculiar to the system
 - (ii) the sources of law, judicial systems and judiciary, legal profession or even the structure of the legal system
 - (iii) the various branches of national or domestic law
 - (iv) the historical development of legal system;
 - (v) the ideological, socio-legal and economic bases of that system

THE PURPOSE OF THE COMPARISON will often determine the suitability of selection !!!

WHAT QUESTIONS ANSWERED BY LEGAL POLICY?

(Satjipto Rahardjo, 1991)

- What goals will be achieved by the existing system?
- What means and which are the best ways to achieve those goals?
- When and by what means the law need to be reformed?
- Whether a kind of established and fix pattern could be formulated to assist in deciding goal and the best way to achieve that goal?