Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.24, 2014
www.iiste.org

Prevention Religion Offenses (Delic) In Policy Formulation For National Criminal Justice Reform

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Abstract
Religious offenses as crime on the public focuses on the protection of peace religious people is not a religion as the object of protection. However, as the editorial seems that the formulation of the Criminal Code (KUHP) requires the protection of religion. This means that religion is seen as a legal interest or an object that must be protected. Thus there is disharmony between the status and description of the offense with text or formulas offense. In the prevention efforts of religion especially have relationship with criminal law policy formulation in the future in the prevention religious offense in the RUU KUHP 2008 is formulated as a crime against religion and relating to religion or to the religious life.
Keywords: Offences Religion, Policy Formulation, Prevention, National Criminal Justice Reform.

1 . INTRODUCTION

Indonesia is a country that puts religion as the major principal in the life of the nation spirit as the first principle of Pancasila is the Belief in God Almighty. It is then explicitly stated in the Constitution of the UUD 1945, at Section 29, subsection (1) which reads: "The State is based upon belief in one God" is then defined in Section 29 subsection (2) which reads: "The State guarantees freedom each citizen to profess their own religion and to worship according to his religion and belief".[5] Thus freedom of religion is one of the most fundamental rights of the human rights, because freedom of religion it is directly sourced to the dignity of human beings as God's creation.[6] Thus the state must guarantee the freedom for everyone to embrace each religion and to worship according to the religion or their belief.

Guarantees of freedom of religion then stated in UU no. 39 Year 1999 on Human Rights which in Section 22 (1) which states that: "Everyone is free to adhere to their religion and to worship according to their religion and belief". The right to freely embrace his religion or belief means any person entitled to religion according to his own faith, without any coercion from anyone. Then in Section 22 subsection (2) also stated: "The State guarantees freedom of every person to embrace their own religion and to worship according to their religion and belief". Fm that reprovisions mentioned above, it is obvious that religious freedom is a human right which contains the obligation to be respected as a human right inherent basic obligations to other humans. Basic obligations to respect religious freedom must be implemented completely respect, protect and enforce human rights. For the government, the state apparatus, and other public officials have an obligation and responsibility to ensure the implementation of the respect, protection, and enforcement of human rights, as defined in Section 8 of UU no. 39 of 1999 which asserted that "the protection, advancement, upholding and fulfillment of human rights are the responsibility of the state, especially the government ".

From the description above it is clear that the religious element in the life of Indonesian law is a fundamental factor, it is understandable if religion be a solid foundation in the turned-powerful religious offenses.[7] Settings on the crime against to religion and religious life by Muladi a reflection that Indonesia is 'Nation State' religious, in which all religions that is recognized as valid in Indonesia is a big legal interest to be protected, and not just a part of the general governing religious that arrange sense or serenity religious life.[8] An insult to a recognized religion in Indonesia or in other ways interfere with religious life would end anger the

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[5] Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 yang dikutip dalam tulisan ini merupakan Undang-Undang Dasar 1945 yang disusun dalam satu naskah yang berasal dari terbitan Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, cet.II, 2007. UUD 1945 tersebut awalnya merupakan naskah yang diterbitkan oleh Sekretariat Jenderal MPR RI pada tahun 2002. Naskah ini merupakan rangkuman Naskah Asli Undang-Undang Dasar 1945, naskah Perubahan Pertama, Perubahan Kedua, Perubahan Ketiga, dan Perubahan Keempat Undang-Undang Dasar 1945.
[6] Oemar Seno Adji, *Hukum Pidana Pengembangan*, Jakarta: Erlangga, 1985, hlm. 96
[7] Oemar Seno Adji, *Hukum (Acara) Pidana dalam Prospeksi*, cet. 3, Jakarta: Erlangga, 1981, hlm. 68
[8] Muladi, *Beberapa Catatan Berkaitan Dengan RUU KUHP Baru,* Makalah Disampaikan pada Seminar Nasional RUU KUHP Nasional Diselenggarakan oleh Universitas Internasional Batam, Batam 17 Januari 2004, hlm. 7.

peace unity of the nation's life.[1] With the legal interest to be protected it is natural that the religious offense becomes a priority that should be protected by the criminal law, especially in the context of the renewal of the KUHP.

However, some people oppose regulation by the criminal law, especially in the preparation of the KUHP national for a variety of reasons, among others, stated that the protection of religion is more focused on the protection of honor religion should be given in the protection for the rights of freedom to worship their religion. Another reason put forward is also an increasing number of sections about offense of religion in the RUU KUHP national 2008 on the bill will be over criminalization.[2] There was also reason to reject the proposed formulation of the offense of religion in RUU KUHP is that religious issues should be left within the community. That Community have to considered. Not necessarily all religious matters must be entered in the law offenses.[3] Considerations in determining the importance of religious offense in Indonesian criminal law is how to realize a sense of peace religious or religious life as well as an interest law also in public interest for any society that has been protected. It is based on the fact that Indonesia is a godless country and has a philosophy of Godhead. Religious feeling was considered very high among the people of Indonesia.

In order to provide legal protection for any legal interest to every citizen of the country, the provision of religious offense should be set in the RUU KUHP. Therefore, the legislation governing that arrange religious offenses must be reconstructed so that the religious offenses can be dealt with professionally and proportionately by law enforcement officers. Thus Indonesia's multi-religious country, multi- ethnic and multi-racial can avoid destroying things, especially the conflicts between faiths.[4] Based on the statement above, we conclude the religion with all the devices is a great legal interest. It required setting offenses to religion, and criminal offenses relating to religion.[5]

Based on the statement above, the scope of the problem in this study can be formulated as follows : (1) How does the prevention of religious offense in criminal policy formulation at this time? (2) How does the prevention of religious offense in order to reform the national criminal law as a formulation policy in the future?

2 . RESEARCH METHODS

The main problem in this research is a matter of criminal law policy formulation to the religious offense of of criminal law reform in Indonesia. Therefore, the approach to this problem can not be separated from policy-oriented approach. Policy approaches include mutual understanding with the goal-oriented approach, a rational approach, economical and pragmatic approach, as well as value-oriented approach.[6] This research focused on the study of the law relating to the substance of religious offense, both the current positive law (ius constitutum) and aspired law (ius constituendum). This study used a normative juridical approach, namely by reviewing/analyzing secondary data in the form of legal materials, especially primary legal materials and secondary legal materials, to understand the law as a set of rules or norms of positive law system governing of human life. This research focuses on the study of the principles of law, systematic law, the level of vertical and horizontal synchronization, comparative law and positive law inventory. The existence of comparative law approach, it is necessary to provide an overview and input for policy formulation criminal law should be formulated. In a comparison between some state laws should reveal similarities and differences though in terms of economic and political developments may different.[7]

Specifications in this study was a descriptive analytical study, the research described in detail the results of an analysis of the legal principles, systematic law, the level of vertical and horizontal synchronization, comparative law and positive law inventory. In this study, derived from secondary data as follows: a. Primary legal materials, ie materials legally binding, such as the Indonesian KUHP and the Criminal Code as well as several foreign countries legislation outside the Criminal Code offenses relating to issues of religion, b. Secondary legal materials, ie materials that relate to primary legal materials and the subject of analysis and

[1] Mardjono Reksodiputro, *Pembaharuan Hukum Pidana: Buku Keempat,* cet. 1, Jakarta: Pusat Pelayanan Keadilan dan Pengabdian Hukum Lembaga Kriminologi Universitas Indonesia, 1995, hlm. 95

[2] Delapan pasal dalam delik agama pada revisi KUHP sangat terlihat jelas bahwa negara ingin memproteksi kehormatan agama. Agama yang dimaksud adalah agama-agama yang dianut di Indonesia. Artinya, jika terdapat agama-agama yang tidak dianut di Indonesia, maka negara tidak bisa memberikan proteksi. Hal ini disampaikan Direktur Program Hukum dan Legislasi Reform Institute Ifdhal Kasim dalam diskusi "Tinjauan Kritis Pasal Agama dalam rancangan KUHP" yang diselenggarakan The Wahid Institute, di Jakarta Jakarta. *Delik Agama Semakin Diperbanyak Menjadi 8 Pasal*, http://www.kompas.co.id/kompas-cetak/0609 /07/Politikhukum/2936130.htm.

[3] *Kriminalisasi Berlebihan,* Koran Jawa Pos Jumat, tanggal 08 Desember 2006.

[4] F. Sugianto Sulaiman, *Penodaan Agama, Suatu Delik Pidana*, http://us.click.yahoo.com/lMct6A/Vp3LAA/ i1hLAA/b0VolB/TM.

[5] Muladi, "Pembaharuan Hukum Pidana yang Berkualitas di Indonesia", Majalah *Masalah-Masalah Hukum,* Fakultas Hukum Universitas Diponegoro, No. 2-1988, hlm. 25

[6] Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, Cet.3, Semarang, Badan Penerbit Universitas Diponegoro, 2000, hlm. 61.

[7] Peter Mahmud Marzuki, *Penelitian hukum*, Jakarta: Prenada Media, 2005, hlm. 135.

understanding the primary legal materials. Secondary legal materials consist of text books containing the writings and opinions of the scholars/experts, the results of the study, the results of the seminar, a journal that deals with the problems studied. Tertiary legal materials, ie materials that provide instructions and explanations of the primary and secondary legal materials, such as Indonesian dictionary, English dictionary, a dictionary of computer and internet terms and legal dictionary.

Data collection methods used in a study essentially depends on the scope and purpose of research. According to Ronny Hanitijo Soemitro, data collection techniques consisted of a literature study, observations, interviews and use a list of questions (questionnaire).[1] Based on the scope, objectives and approach in this study, the data collection techniques used is the study of literature and documentary secondary data have been analyzed.

3 . RESULT AND DISCUSSION

3.1. Current Criminal Law Policy In Religion Offences Effort in Indonesia.

The effort of religious offense in Indonesia at this time is still using the KUHP (WvS). The choice using the KUHP to prevent the religious offense is a policy step that the can not be separated from the larger scope is a social policy.

3.1.1. Religion Crime formulation of in the KUHP

Indonesian criminal law as a legal system is the adoption of the laws of the Netherlands in establishing a criminal act or a deplorable act is use of Section 1 subsection (1) of the KUHP. Formulation in section 1, subsection (1) is known as the principle of legality, is a determining or know for certain and clear, prohibited acts and criminal sanction.

The decision of the existence of a crime is in the KUHP is in line with the Simons opinion that explains straafbaar feit as an act against the law, because the maker has violated a prohibition or requirement of the law makers.[2] Simons argued that the criminal offence is exist to when an action is in conformity with the contents of the formulation of the legislation. Therefore, in determining whether a particular act as a criminal offense especially the crime of religious references used are the terms that have been defined in the KUHP. Formulation of a criminal religion offense in the KUHP that can be classified or used to reach religious offense is the provision contained in Section 156 and Section 156 A are arranged in Book II, Chapter V of the Crimes Against Public Order (Kejahatan Terhadap Ketertiban Umum). The inclusion of religious offense in a criminal group that disrupt public order offenses such as religion generally considered contrary to the public interest or violate harm/society. Briefly, religion offences is a crime against to the public order.

In KUHP doesnt applies yet the regulate religious offense. Religious offense in the KUHP appear after rising UU No.1/PNPS/1965. Section 4 of the UU that the provisions of the law governing religious offenses included in the KIHP, specifically Section 156 KUHP. With the inclusion of Section 156 of the KUHP is the policy measures to provide protection against the legal interests of private religious.[3] The provisions of Section 156 of the KUHP is more to read as follows :

> Whoever publicly expressed hostility, hatred or contempt toward one or several layers of Indonesian, punishable by a imprisonment maximum four years or a maximum fine of three hundred rupiah.
>
> Statement of groups in this section and the next section means, each part of the Indonesian, which is different from one or another parts because of race, country of origin, religion, place of origin, descendants, nationality or position according to constitutional law.

Review of material or the implementation of Section 156 of the KUHP requires the protection of "population group", or in other words, This section requires protection of "persons", whether the person is included in the "group" that is recognized as valid under the laws of their state, as well as groups according to the "religion". Protected object is a "person", it protects is not the physical, but the self-respect of that person. The attack on the self-esteem of people who are including in a group lead to "disruption" to that person who then lead to the disruption of "public order" that assume the duer is publicy. Thus, a statement in feeling hostile, hateful or condescending towards religious groups, can be criminalized under Section 156 of the KUHP. The provisions of Section 156 of the KUHP a completely reads as follows:

> "Sentenced to imprisonment for ever 5 years, whoever intentionally publicly issued feelings or acts;
>
> a. That is essentially hostile, abuse or desecration of a religion followed in Indonesia;
> b. With the intention that people do not subscribe to any religion as well, which principle Belief in God Almighty."

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[1] *ibid*, hlm. 51.
[2] D. Simons, *Leerboek Van Het Nederlanches Strafrecht (Kitab Pelajaran Hukum Pidana)* diterjemahkan oleh PAF Lamintang, Cetakan Pertama, Bandung: Pionir Jaya, 1992, hlm. 127-128
[3] Oemar Seno Adji, *Herziening, Ganti Rugi, Suap, Perkembangan Delik*, Jakarta: Erlangga, 1981, hlm. 298

Section 156 a KUHP if the material terms of this section calls for "religious offense", that directly, that is tarnish the learned of religion and religious facilities. The phrase "in public" in this section reduces the value of this goal, because it was not convicted for it is not done in public, and if the act was not intended "for people who do not subscribe to any religion principle Belief in God Almighty". Therefore, this section is not clear, whether to be protected "religion" or "religious people", in order to ensure its serenity, or both. Then becomes deficient in the policy formulation of the provisions contained in these provisions.

According Oemar Seno Adji, Section 156 a of the KUHP still just giving solving partially, because the criminal act directed against religion (or to not adhere to the religion) and therefore have not been included statements feelings directed against the prophet, the holy book or the nobles religion and religious organization. Thus Section 156 a of the KUHP still requires a legal construction as used in Section 156 of the KUHP for facing the statements or actions directed against the Prophet as the founder of the religion, holy book, religious leaders and others[1]. It may be said, that the prophets, holy books, religious leaders essentially can not be separated from religion, so that statements or actions directed against the prophets, holy books and others are also seen directed against religion, as intended by Section 156 a KUHP.

Besides the offenses are formulated in Section 156 and 156 a of the KUHP in fact there are several provisions which constitute the offenses are categorized as offenses are concerned with religion (relating/concerning) and offenses directed against religion. By Oemar Seno Adji offenses concerned with religion is called with Grabdelikte and Leinchenfrevel [2] and about violations of religious meetings. The clauses relating to religion was formulated in Section 175-181 of the KUHP which completely reads as follows:

Section 175.

Whoever by force or the threat of violence that impede religious gatherings are common and permitted, or allowed religious ceremonies or burial ceremonies, shall be punished by a maximum imprisonment of one year and four months.

Section 176.

Whoever willfully disturbing a religious meeting are common and permitted, or allowed religious ceremonies or burial ceremonies, to cause chaos or noise, punished by imprisonment of one month two weeks or a fine of one hundred twenty Rupiahs.

Section 177.

Punished with a maximum imprisonment of four months and two weeks or a fine of one hundred twenty Rupiahs:

1. Whoever laugh at a religion officer in duty that allowed;
2. Whoever insults objects for the purpose of worship in a place or at a time of worship done.

Section 178.

Whoever intentionally hinder or obstruct the way, or transport the bodies to the cemetery are allowed, punished by imprisonment of one month two weeks or a fine of one hundred twenty rupiahs.

Section 179.

whoever deliberately disfiguring graves, or intentionally and unlawfully destroying or damaging grave warning sign, shall be punished by a maximum imprisonment of one year and four months.

Section 180.

Whoever intentionally and unlawfully dig or take a move or transport the bodies or the bodies that have been excavated or taken, shall be punished by a maximum imprisonment of one year and four months or a maximum fine of three hundred rupiahs.

Section 181.

Whoever bury, conceal the death or birth, shall be punished by a maximum imprisonment of nine months or a maximum fine of three hundred rupiahs.

If breaking down some of the provisions contained in the foregoing, it can be categorized as the following key elements:

1. Section 175: by force or by threat of violence that impede religious gatherings are common and permitted, or allowed religious ceremonies or burial ceremonies.
2. Section 176: disturbing a religious meeting are common and permitted, or allowed religious ceremonies or burial ceremonies, to cause chaos or noise.
3. Section 177: laugh at a religious officer in performing his duties and insulting objects for the purpose of worship in a place or at a time of worship done.
4. Section 178: hindering or obstructing the way, or transporting bodies to the graveyard are allowed.

[1] *Ibid*.
[2] Oemar Seno Adji, *Hukum Pidana Pengembangan,* cet. I, Jakarta: Erlangga, 1985, hlm. 97

5. Section 179: desecrating graves, or willfully and unlawfully destroying or damaging grave warning signs.
6. Section 180: dig or take a move or transport the bodies or the bodies that have been excavated or taken.
7. Section 181: bury, conceal the death or birth.[1]

3.1.2. The Formulation of Religion Criminal Liability in KUHP

Legal experts generally identify the three fundamental problems in criminal law. One of the fundamental problem is a matter of criminal liability (responsibility)[2]. Criminal liability will depend on the ban and a threat by the legislation to an act. It is based on Section 1 subsection (1) of the KUHP which is a provision that govern the determination of a criminal offense. Meanwhile, criminal liability can only occur after a person committing a crime. Criminal responsibility on the basis of unwritten legal principle "no punishment without fault".[3]

Thus in determining the criminal liability previously determined whether the person has committed a criminal act and the required a fault. But not every doer who commit criminal acts be held accountable. This is in accordance with the opinion stated **Moeljatno**, committing despite a crime is not always the manufacturer may be liable.[4] In other words, the doer can commit criminal acts without having mistakes, but otherwise may not have a fault if it does not do anything that is against the law. The doer is eligible with this case means that the doer is to be accountable. As the principle of no criminal liability without fault, then the doer may be justified if it has mistake.[5]

The system of responsibility formulation in criminal is closely related to the subject of a criminal offense. In view of the KUHP, which can be the subject of a criminal act is a human being as a person.[6] This is in accordance with Section 59 of the KUHP, where the legal entity/corporation is not the subject of criminal liability. In the official explanation (Memorie van Toelichting) Section 59 of the KUHP states that a "strabaar feit" can only be realized by humans, and the fiction of legal entities does not apply in criminal law. Therefore, criminals accountable only to the individual/person to person. Then in the Memorie van Toelichting Section 51 Ned. WvS (Section 59 of the KUHP) stated "a strafbaar feit" can only be realized by humans, and the fiction of a legal entity shall not apply in the field of criminal law".[7]

Of the existence of the formulation above, then according to the provisions of the KUHP that can do as well that can be justified is the person (natuurlijke person) not the corporation. The arrangement of the KUHP is influenced by the principle of Societas delinguere non potest ie legal entities can not be committing a crime. According to the terms of **Enschede** "non potest delinguere university" is a typical example of dogmatic thinking of the 19th century, where the mistakes are always signaled by the criminal law and in fact just human error, so closely related to the individualization of criminal".[8] **Enschede** further explained, the French Revolution Period collective responsibility of a city or **gilde** (a group of expert), can carry consequences that undoubtedly starting point WVS maker Netherlands in 1881 was delinguere non potest university.[9]

3.1.3. Sentencing in the KUHP.

Adresat criminal law is society in general and the posseser, in the sense of the law enforcement officials.[10] Law enforcement officers who are members of a series of integrated criminal justice system is a carrier of the law in order to realize the overall stelsel criminal sanctions. In order to realize the criminal sanctions that judges have a central role in the sentencing process. The judge was an actor who concreted criminal sanctions in the legislation to be imposed on the manufacturer regarding strafsoort, strafmaat, and strafmodaliteit. Wetboek van Strafrecht (KUHP) less provide guidance to judges who comes to this criminal

[1] Oemar Seno Adji, *Herziening, Ganti Rugi, Suap, Perkembangan Delik….*, *Op.cit*. hlm. 306.
[2] Lihat Herbert L Packer, *The Limit of The Criminal Sanction,* California: Stanford University Press, 1968.p. 54.
[3] Chairul Huda, *Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada tiada Pertanggungjawaban Pidana Tanpa Kesalahan,* Jakarta: kencana Prenada media, 2006, hlm. 20. Asas ini dikenal dengan "tidak dipidana jika tidak ada kesalahan (*Geen straf zonder schuld; Actus non facit reum nisi mens sir rea*). Asas ini tidak tersebut dalam hukum tertulis tapi dalam hukum yang tidak tertulis yang juga di Indonesia berlaku. Hukum pidana fiskal tidak memakai kesalahan. Di sana kalau orang telah melanggar ketentuan, dia diberi pidana denda atau rampas. Moelyatno, *Asas-Asas Hukum Pidana*, Jakarta: Rineka Cipta, 2002, hlm. 153.
[4] Moelyatno, *Asas-Asas Hukum Pidana,* Jakarta: Bina Aksara, 2002, hlm. 155.
[5] Chairul Huda, *Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada tiada Pertanggungjawaban Pidana Tanpa Kesalahan,* Jakarta: kencana Prenada media, 2006, hlm. 89
[6] Muladi dan Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana,* Bandung: Alumni, 1998, hlm. 136
[7] Andi Hamzah, *Korupsi Di Indonesia: Masalah dan Pemecahannya,* Jakarta: PT Gramedia Pustaka Utama, 1984, hlm. 59
[8] Muladi dan Dwidja Priyatno, *Pertanggungjawaban Korporasi Dalam Hukum Pidana,* Cet. Pertama, Bandung: Bagian Penerbitan Sekolah Tinggi Hukum Bandung, 1991, hlm.35.
[9] Muladi dan Dwidja Priyatno, *Pertanggungjawaban Korporasi Dalam Hukum Pidana,* Cet. Pertama, Bandung: Bagian Penerbitan Sekolah Tinggi Hukum Bandung, 1991, hlm.35.
[10] Sudarto, Pemidanaan, Pidana dan Tindakan, dalam *Peran Universitas Diponegoro Dalam Meningkatkan Kualitas Sumber Daya Manusia,* cetakan pertama, Semarang: Badan Penerbit Universitas Diponegoro, 1995, hlm. 68.

problem.[1] But that the KUHP which is a legacy of the Dutch, according to **Sudarto** have sentencing guidelines, as stated in the Memorie van Toelichting from W.v.S Holland of 1886, the contents of which as follows,[2] to determine the level of punishment, the judge must consider for each event:

1. Objective and subjective circumstances of the criminal offense committed, should pay attention to the act and its manufacture?
2. What rights are violated by the existence of the crime?
3. What disadvantage are incurred?
4. How is the background life of offender?
5. Is it a crime blamed him first step towards crooked or an act which is a repetition of the bad habit that previously had appeared?
6. Between the minimum and maximum limits should be set as wide as possible, so that even though all of the above questions were answered at the expense of the defendant, the maximum ordinary criminal who was already adequate.

Punishment is regulated in the Book of Criminal Justice (KUHP) starting from section 10 of the KUHP. That section as a legal basis in imposing sentencing by the judge.[3] Section 10 states that the two types of crime:

1. Basic punishment;
2. Additional criminal.

The presence of setting sentencing guidelines explicitly, for example, in Book I also in the explanation of the KUHP, according to the author basically its does not make sense only in some of the provisions that set up the sentencing guidelines only, because basically the general or overall criminal law provisions contained in in the KUHP and the Law on the outside of the KUHP, is a sentencing guideline. For the record in criminal punishing should understand about the essence/purpose of punishment as a legitimate basis to prevent the of crime (crminaliteits preventie) in providing protection to society (social defense) as an effort to achieve social welfare. Justify the existence of a criminal is also review from the statement of Saleh Ruslan that "is a reaction to criminal offenses (delik), and the has been formed of a sorrow that is state intentionally inflicted to a offense maker".[4] Sentencing issues also received attention Plato and Aristotle, said that "it was dropped not because the criminal has done, but that do not do the crime".[5]

Unfortunately in the KUHP, provisions about purposes and sentencing guidelines is not defined in the General Section Book I of the KUHP. Omission is expressly/explicit problems and goals of sentencing guidelines in the KUHP are likely to bring destructive consequences. This was stated by **Nawawi Arief Barda**, that the purpose of punishment is often overlooked in practice or a court decision. But actually when its review from the system, the position of sentencing purpose is very fundamental because this purpose which is the soul/spirit/spirit of the sentencing system.[6] Therefore, the punishment must also be a means to achieve that goal. The sentencing should be directed to the achievement of sentencing purposes. According **WHM Jonkers,** purposes of sentencing as follows:[7]

1. Purpose to influence human behavior in accordance with the rules of law. In classifying these objectives can be distinguished between the influence offender (delinkuen) and addressed to the behavior of other people.
2. The purpose of eliminate anxiety and unpeaceful that caused by the offense, which is commonly referred to as conflict resolution.

The opinion of Jonkers the above it can be concluded sentencing is a system that aimed. Because the punishment is sorrow that imposed intentionally it must be used carefully and selectively. That is sentencing be ultimatum remedium in order to achieve goals of common prevention and specific prevention.

Sentencing does not be imposed only by law, but also its imposed limited what extent by the law. Thus, the limits sentencing set by the formulation of the model criminal threat in the legislation. The conception in accordance with Section 1 subsection (1) of the KUHP that is not an act but the form and amount the imposition of a punishment to offender determined by legislation. Therefore, the form and duration of punishment which can be imposed, limited only specified in the legislation either on the form of punishment in accordance with Section 10 and Section 69 of the KUHP. The number of criminal that may be imposed even if not explicitly

[1] Sudarto, Pemidanaan, Pidana dan Tindakan, *ibid,* hlm. 68.
[2] Sudarto, *Hukum dan Hukum Pidana*, (Bandung, Alumni, 1977), hlm. 55-56
[3] Andi Hamzah dan Siti Rahayu, *Suatu Tinjauan Ringkas Sistem Pemidanaan Di Indonesia,* Jakarta: Akademika Pressindo, 1981, hlm. 28
[4] Roeslan Saleh, *Stelsel Pidana Indonesia*, Jakarta: Aksara baru, 1978, hlm. 5.
[5] W. A Bonger, *Pengantar Tentang Kriminologi,* Jakarta: PT Pembangunan-Ghalia Indonesia, 1997, hlm.
[6] Barda Nawawi Arief, *Tujuan Dan Pedoman Pemidanaan dalam Konsep RUU KUHP,* Disusun untuk penerbitan Buku Kenangan/Peringatan Ulang Tahun ke 70 Prof. H. Mardjono Reksodiputro, SH, MA, Badan Penerbit FH UI, Edisi I, Maret 2007
[7] Loeby Luqman, *Pidana dan Pemidanaan,* Jakarta: Data Com, 2001, hlm. 16.

formulated in the KUHP. Unlike the case with the Statute Rome of the ICC. In the statuta the principle of legality formulated both in terms of nullum crimen sine lege (Section 22) and nulla poena sine lege (Section 23).

3.2. The Upcoming Policy of Criminal Law Formulation to Prevention Efforts Religion Offence (Delic) in the Criminal Law Reform in Indonesia

3.2.1. National Criminal Code Bill 2008

3.2.1.1. Criminalisation of Religion Crime in the National Criminal Code Bill 2008

KUHP that used in Indonesia is a book of criminal law inherited the Dutch government. Hence, the desire to have the national KUHP has long coveted.[1] The national KUHP reform going on untill to the National Criminal Code Bill 2008 (RUU KUHP Nasional 2008). From the formulated in the RUU KUHP Nasional 2008 appears, that the legal reform efforts in addition to trying to absorb the national ideas of also social culture values on the basis of human, nature and Indonesian traditions are reflected in the Pancasila and the UUD NRI 1945, also should be adapted to the universal tendencies/international. Thus the material of the RUU KUHP Nasional 2008 (criminal justice system and its principles), want to be formulated with a oriented the basic idea as discussion befor. RUU KUHP Nasional 2008 was formulated based on the idea monodualistik balance between the public interest/community and individual interests/person, the protection of offenders and victims of crime, the subjective and objective factors, formal and material criteria, the rule of law and justice, and national values, global value/universal. Balance values are then manifested in the three main problems of criminal law that is a crime, criminal responsibility and sentencing.

The settings in RUU KUHP Nasional 2008 on Crime Against Religion and Religious Life, in order to show that Indonesia is not a country that is based on religion, but also a secular state, but the state principle to God Almighty. In this case that is protected is the feeling of religious life, religious life and religious peace which its principle in God Almighty as a great legal interest. For comparison is the existence Godslasteringswet in the Netherlands and Blashphemy in the UK.[2]

3.2.1.2. Formulation System Crime Religion in the RUU KUHP Nasional 2008

RUU KUHP Nasional 2008, according to Barda Nawawi Arief planned contrast of the principal balance of mono-dualistic thinking, that considering the balance of the two public interests and individual interests that views is what known as the principle of "daad-dader Strafrecht" that takes into terms of action (object) and the offender (subject). The formulation extending the existence of the living law in people (unwritten law/common law) as the basis of proper to punish throughout the act since has no equivalent or not regulated by law. Expansion formulation of the principle of legality is also inseparable from the basic idea to realize and guarantee the principle of balance between individual interests and the interests of society, and between the rule of law with justice.[3]

Considering that religion is a legal interest which considerable so in the concept of the RUU KUHP Nasional 2008 on religious offenses which are dealt with separately in Chapter VII of the Religion Offences and Religious Life, which is divided into 2 parts: Part One is set the Religious Crime to religion consists of two subsections that subsection 1 of the defamation of Religion which consists of Section 341 to Section 344 and subsection 2 about losing to religious belief to Section 345 of the RUU KUHP Nasional. While in Part Two is Crime against Religious Life and Worship Facilities consisting of two subsections. Subsection 1 of the Disruption of Operation Worship and Religious activities, namely in Section 346, Section 347 and Subsection 2 of the Destruction of Places of Worship, namely Section 348 of the RUU KUHP Nasional. The provisions of these sections completely reads as follows:

Section 341

Any person who publicly expressed feelings or does something that is an insult to the religion followed in Indonesia, shall be punished with imprisonment of 2 (two) years or a maximum fine of Category III.

Section 342

Any person who publicly insults the majesty of God, Its word and nature, shall be punished with imprisonment of 5 (five) years or a fine of the Category IV.

Section 343

Any person who publicly mocked, disfiguring, or degrading religion, apostles, prophets, scriptures, religion, or religious worship, shall be punished with imprisonment of 5 (five) years or a fine of the Category IV.

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[1] Lihat Soedarto, Perkembangan Ilmu Hukum dan Politik Ilmu Hukum, jurnal *Masalah-Masalah Hukum,* Edisi khusus, Tahun XVII-1987, hlm. 6.

[2] Muladi, *Beberapa Catatan Terhadap Buku II RUU KUHP (Bab I s/d Bab XV),* Makalah Disampaikan Pada Sosialisasi Rancangan Undang-undang Kitab Undang-Undang Hukum Pidana Diselenggarakan oleh Departemen Kehakiman dan HAM Hotel Sahid Jakarta - 24 Agustus 2004.

[3] Barda Nawawi Arief, *Bunga Rampai ...*, *op.cit*, hlm. 108

Section 344

1) Every person who broadcast, perform or paste text or images, then seen by the public, or play a recording that is heard by the general, which contains criminal offenses referred to in section 341 or Section 343, with the intention that the contents of writings, drawings, or recordings are known or more known to the public, shall be punished with imprisonment of seven (7) years or a fine of the Category IV.
2) If the maker of a criminal offense referred to in subsection (1) committed the act in their profession and in that time has not passed two (2) years from the sentencing decision that has acquired the force of law for committing the same offense, it can be additional punished by revoking the rights referred to in Section 91 subsection (1) letter g.

Section 345

Any person who publicly incites in any form for the purpose of negating the belief in a religion followed in Indonesia, shall be punished with imprisonment of four (4) years or a fine of the Category IV.

Section 346

1) Every person who interfere with, hinder, or to disperse the unlawful violence or threat of violence against worshipers to worship, religious ceremonies, or religious meetings, shall be punished with imprisonment of three (3) years, or a fine many of categories IV.
2) Any person who makes noise near the building of worship places to run is in progress at the time of worship, shall be punished by a maximum fine of Category II.

Section 347

Any person who publicly mock people who are performing religious worship or mock officer who was doing his duty, shall be punished with imprisonment of 2 (two) years or a maximum fine of Category III.

Section 348

Any person who unlawfully sullied or destroy or burn the building of places of worship or objects used for worship, shall be punished with imprisonment of 5 (five) years or a fine of the Category IV.

Breaking down of some formulations of the section mentioned above you will see the following:

1. Section 341: In publicly expressing feelings or does something that is an insult to the religion followed in Indonesia;
2. Section 342: publicly insulting the majesty of God, Its word and nature;
3. Section 343: public ridicule, disfiguring, or degrading religion, apostles, prophets, scriptures, religion, or religious worship;
4. Section 344: broadcast, perform or paste text or images, then seen by the public, or play a recording that is heard by the general, which contains criminal offenses referred to in Section 341 or Section 343, with the intention that the contents of writings, drawings, or the recording known or more known to the public;
5. Section 345: in publicly incite in any form for the purpose of negating the belief in a religion followed in Indonesia;
6. Section 346: interrupt, hinder, or to disperse the unlawful violence or threat of violence against worshipers to worship, religious ceremonies, or religious meeting and make noise near the building of worship places to run is in progress at the time of worship;
7. Section 347: in publicly mocking people who are performing religious worship or mock officer who was doing his job;
8. Section 348: sullied or unlawfully destroy or burn the building of places of worship or objects used for worship.

From the details presented above it can be concluded that religious delics set out in the RUU KUHP Nasional 2008 are all classified in religious delics that included delic criteria aimed relating to religion or to religious life. However there are some interesting developments that formulated by the RUU KUHP Nasional 2008 is to be set specifically on Blasphemy or Godslastering namely in Section 342 of the RUU KUHP Nasional 2008 different KUHP (WvS). In addition, Section 348 of the RUU KUHP Nasional 2008 extending and different with Section 177 for 2 of the KUHP (WvS). Because to include the protection of religious buildings (mosques, churches, etc) which includes for the worship.

In RUU KUHP Nasional 2008, standart prospect of arrangements that not only addressed to general crime but also the criminal acts that are set outside the KUHP. According to Muladi[1] the crime stipulation policy in the upcoming KUHP is quite complex. It is considered good enough in terms of political, economic, social, cultural, defense and security and the development of theoretical and empirical in the field of criminal law.

[1] Muladi, *Perkembangan Tindak Pidana dalam KUHP Mendatang*, Makalah Disampaikan Dalam Rangka Penataran Nasional Hukum Pidana Dan Kriminologi Untuk Dosen-Dosen PTN/PTS Se Indonesia 1993, hlm. 2

Aspects of national ideology, the human condition, nature and traditions of the nation and is no less important is the international trends that are recognized by civilized society.

3.2.3. System of Criminal Responsibility Formulation in the RUU KUHP Nasional 2008

The responsibility of criminal policies set out in the RUU KUHP Nasional 2008 will be linked to the principle of criminal responsibility or fault principle in criminal law, which stipulates that in principle there is no punishment without fault. Basically, someone may sentencing if had been convicted of a criminal offense and there is a mistake. The principle of this fault is one of the fundamental principles of criminal law and is a partner of legality principle. Contrary to that balance principle of criminal liability based on two fundamental principles, namely the principle of legality (which is a social principle) and principle culpability (which is the principle of humanity). Principle legality is a basic of proper or not the act should be punished. While in the principle of fault it is not only limited to acts by intentionally (dolus) but also to acts by accident or negligence (culpa).

Criminal liability based on fault, basically can be imprisoned if someone already has proven a mistake committing a crime. With special considerations authorizes the judge to determine the types and number of criminal punishment. Based on the principal of thought monodualistik balance, RUU KUHP Nasional 2008 still retaining the fault principle (principle culpability) is a pair of the principle of legality that must be defined explicitly in the legislation. Therefore affirmed in the RUU KUHP Nasional 2008 (Section 35), that the principle of no punishment without fault is a principle that is fundamental to account for makers who have committed a criminal offense".[1]

Although contrary to the principle of criminal liability based on fault (liability based on fault) it is stipulated in Section 37 of the RUU KUHP Nasional 2008.[2] The concept of not looking at the two terms/principles as requirements are rigid and stiff.[3] However in special cases the concept also gives the possibility of strict liability, in Section 38 subsection (1),[4] and accountability substitute (vicarious liability) in Section 38 subsection (2)[5] and the principle of forgiveness /forgiveness judges (rechterlijk pardon or judicial pardon).[6] According to Barda Nawawi Arief in the principle of judicial pardon contained ideas/basic thoughts :

1. Avoid stiffness/absolutism sentencing;
2. Supply valve/safety valve (veiligheidsklep);
3. Form of judicial correction of the legality principle (judicial corrective to the legality principle);
4. Implementation/values integration or paradigm more wisdom as in the Pancasila values;
5. Implementation/integration of sentencing goals in terms of punishment (as in giving forgiveness/remission, the judge must consider the purposes of sentencing); so requirement or justification of punishment is not only based on the existence of a criminal offense (principle of legality) and fault (culpabilities principle), but also on purposes of sentencing.[7]

Normatively has become a habit every maker who commit criminal acts can blame and can be proved then it is the creator proper to punished. However, the RUU KUHP Nasional 2008 does not specify in accordance with the above conventional thesis but revolutionary authorizes the judge to consider forgiving and forgiveness. Apology and forgiveness here means the maker is not subject to civil or criminal action. Guidelines on the judge remission (pardon Rechterlijk) is set in Section 55 subsaction (2) as part of the sentencing guidelines.[8]

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[1] *ibid,* hlm. 95

[2] Pasal 37 ayat (1) berbunyi: "tidak seorang pun yang melakukan tindak pidana tanpa kesalahan".dan Pasal 37 ayat (2) berbunyi: "kesalahan terdiri dari kemampuan bertanggungjawab, kesengajaan, kealpaan dan tidak ada alasan pemaaf."

[3] Barda Nawawi Arief, *Pokok-Pokok Pemikiran (Ide Dasar) Asas-Asas Hukum Pidana Nasional,* makalah disampaikan pada Seminar Tentang Asas-Asas Hukum Pidana Nasional, Semarang, 26-27 April 2004, hlm. 16

[4] Pasal 38 ayat (1) berbunyi: "bagi tindak pidana tertentu, undang-undang dapat menentukan bahwa seseorang dapat dipidana semata-mata karena telah dipenuhinya unsur-unsur tindak pidana tersebut tanpa memperhatikan adanya kesalahan."

[5] Pasal 38 ayat (2) berbunyi: "*dalam hal ditentukan oleh undang-undang, setiap orang dapat di pertanggungjawabkan atas tindak pidana yang dilakukan oleh orang lain*".

[6] Pasal 55 ayat (2) selengkapnya "*Ringannya perbuatan, keadaan pribadi pembuat atau keadaan pada waktu dilakukan perbuatan atau yang terjadi kemudian, dapat dijadikan dasar pertimbangan untuk tidak menjatuhkan pidana atau mengenakan tindakan dengan mempertimbangkan segi keadilan dan kemanusiaan*". Kemudian dalam penjelasannya berbunyi; "*Ketentuan dalam ayat ini dikenal dengan asas rechterlijke pardon yang memberi kewenangan kepada hakim untuk memberi maaf pada seseorang yang bersalah melakukan tindak pidana yang sifatnya ringan (tidak serius). Pemberian maaf ini dicantumkan dalam putusan hakim dan tetap harus dinyatakan bahwa terdakwa terbukti melakukan tindak pidana yang didakwakan kepadanya*".

[7] Barda Nawawi Arief, *Pokok-Pokok Pemikiran (Ide Dasar) Asas-Asas Hukum Pidana Nasional,* makalah disampaikan pada Seminar Tentang Asas-Asas Hukum Pidana Nasional, Semarang, 26-27 April 2004, hlm. 16

[8] Adapun bunyi Pasal 55 ayat (2) tersebut adalah: "*ringannya perbuatan, keadaan pribadi pembuat atau keadaan pada waktu dilakukan perbuatan atau yang terjadi kemudian, dapat dijadikan dasar pertimbangan untuk tidak menjatuhkan pidana atau mengenakan tindakan dengan mempertimbangkan segi keadilan dan kemanusiaan*".

Unlike the KUHP (WvS), the RUU KUHP Nasional 2008 also recognize criminal liability by the corporation. This means that every form of offence that are formulated in the RUU KUHP Nasional 2008 which held its criminal liability in addition to a personal individual (Natuurlijk persoon) is also a legal entity or corporation . It is formulated in Section 47 of the RUU KUHP Nasional 2008, which reads, "The corporation is the subject of a criminal act." Basically, the corporation can commit any crime, but there are limitations. Criminal offenses that can not be done a corporation: (a) that the only criminal threats that can only be imposed on ordinary people, and (b) that can only be done by ordinary people , such as bigamy, rape and perjury.[1]

Issues of corporate accountability, it seems RUU KUHP Nasional 2008 in using an cumulative alternative formulation system. This can be seen in Section 49 of the Book I RUU KUHP Nasional 2008, which reads: "If the criminal offenses committed by corporations, criminal liability shall be imposed on the corporation or its committee". It is difficult to determine the presence or not of mistake on the corporation, it turns in its development, especially concerning the existence of criminal liability corporation is called "new view" or let's say a different view, that particularly for liability of legal entities (corporations), do not apply absolutely in the principle of fault, so that criminal liability refers to the doctrine of "strict liability" and "vicarious liability" which in the essence is a deviation from the principle of fault, should be taken into consideration in the implementation of corporate responsibility in the criminal law.[2] Strict liability is: the offender has been able convicted if he has done as defined in the legislation without seeing how the inner attitude.[3]. Vicarious liability is often interpreted to mean "a person legally accountable for the actions committed by any other person",[4] often interpreted briefly "additional accountability". Corporate criminal liability in addition to the two doctrines based upon, in English also known as the principle of identification, which corporation accounted together by the private. In principle the "mens rea" are not ruled out as it does on the "strict liability" and "vicarious liability".

Identification theory is one theory that justifies corporate responsibility in the criminal law. This theory states that the act or will of the director is also an act of the mind of corporation (the act and state of mind of the person are the acts and state of mind of the corporation) according to Richard Chard.[5] Although in principle the corporation accountable to the same individual, but there are some exceptions: [6]

1) In the case that by its nature can not be done by the corporation for example : bigamy, rape, perjury.

2) In the case that the only punishment imposed may not be charged to the corporation, such as imprisonment and the death penalty.

The same thing also expressed by Peter Gillies that "the law Recognizes that the company can incur criminal liability, although not for all crimes"[7] so not all criminal acts can be committed by a corporation and can be accounted for by the corporation.

3.2.4 . System of Criminal Sanctions Formulation, Types of Criminal Sanction and Criminal duration to the Religion Delic in the RUU KUHP Nasional 2008

The criminal provisions in religious delic in the RUU KUHP Nasional 2008 adopts the formulation of criminal sanctions as follows:

1 . Singular;

2 . Are cumulative;

3 . Is an alternative.

Types of sanctions (strafsoort) criminal offenses in criminal acts of religion delic there are 2 (two) types, namely imprisonment and criminal fines. Additionally it also set additional punishment may be imposed although not listed in the formulation of a crime, namely the revocation of rights for corporations (Section 67 subsanction (3) RUU KUHP Nasional 2008). Additional Criminal itself can actually be used as the principal criminal, such as the revocation of the right/closing of the company within a specified period, as same with imprisonment/removal of the right of freedom. System formulation number / length of the criminal (strafmaat) criminal offenses RUU KUHP Nasional 2008 offense religion is a specific minimum and maximum system specific, namely:

1. Minimum specific to imprisonment ranging from 1 year to 3 years;
2. Maximum specific to imprisonment ranging from 7 years to 15 years ;

[1] Setiyono, *Kejahatan Korporasi (Analisi Viktimoogis dan Pertanggungjawaban Korporasi dalam Hukum indonesia),* Cet. III. Bayu Media, Malang. 2005.hlm. 118-119

[2] Barda Nawawi Arief dalam Dwidja Prayitno*, Pertanggungjawaban Pidana Korporasi Dalam Hukum Pidana*, Cet. I, bandung: Sekolah Tinggi Hukum, 1991, hlm. 56

[3] Barda Nawawi Arief, *Perbandingan Hukum Pidana,* Cetakan Kedua, Jakarta: PT Raja Grafindo Persada, 1994, hlm. 28

[4] *Ibid* hal 33

[5] Richard Chard, dalam Hanafi*, Reformasi Pertanggungjawaban Pidana*, Jurnal Ilmu Hukum No. 11 Vol 6, 1999, hlm. 29

[6] Barda Nawawi Arief, *Perbandingan Hukum Pidana, op.cit*, hlm. 28

[7] Richard Gilles, *Criminal Law*, 1990*,* p. 125

3. Minimum specifically for criminal fines ranged from category III to category IV;
4. Maximum specific to criminal penalties ranging from category V to category VI .

Formulation of criminal sanctions for corporations should be a single character or criminal penalties are cumulative alternative, which is accompanied by additional criminal punishment. The use of two-track system (the double track system) will be more effective in the corporation accountable as criminals, because the motives that corporate crime is economically more effective to apply criminal sanctions are economic, administrative or disciplinary. The use of sanctions system that is an alternative formulation, can lead to the imposition of imprisonment. It is not applicable and is not very effective for the corporation.[1]

3.2.5. Sentencing Guidelines for the Criminalization of the RUU KUHP Nasional 2008.

The criminal law is a special legal sanctions or Sudarto said that the criminal law is a system of negative sanctions. Its applied if the means (effort) of other inadequate, the criminal law is said to have functions subsidiar.[2] In line with that expressed by Sudarto, Ruslan Saleh argued "it is a reaction to delic, and the influx of a sorrow that is intentionally inflicted on a country that delic maker ".[3] Therefore the most important part of a book of the Criminal Justice (KUHP) is stelsel criminal. Stelsel include regulation of the kinds of criminal (strafsoord), severe and weight criminal (strafmaat), and how the criminal carried out (strafmodus). Understanding the importance of these stelsel by Muladi based on the establishment, that the criminal stelsel KUHP is basically a reflection of social and cultural values of a nation.[4] Therefore reform of criminal law (KUHP) can be understood as an attempt to realize the criminal justice system as an integrated system aimed at (purposive system) and the criminal is only a tool/means to get goal.[5]

Based on the idea that the criminal essentially just a means to get goal, then the RUU KUHP National 2008 is first formulated of the purpose of sentencing. As noted earlier that the RUU KUHP National 2008 contradicts the balancing of mono - dualistic between protection of the public and the "protection /individual coaching/criminal offender". Based on the balance of the mono - dualistic RUU KUHP National 2008 identifies the purpose of sentencing in Section 54 subsection (1) are as follows:

a) Preventing crime by enforcing the rule of law for the protection of public;
b) Promoting convicted by holding coaching to be a good and useful man;
c) Resolving conflicts caused by criminal acts, restore balance, and bring a sense of peace in the community, and;
d) Liberating guilt to convict.

The first goal clearly summed up the view of protection of society (social defense), while the second goal was conceived for the purpose of rehabilitation and resocialization convict. The third objective in accordance with the view of the reactions of indigenous customary law in order to resolve conflicts and bring a sense of peace. And the fourth goal has spiritual dimension that corresponds to the first principle of Pancasila is belief in God Almighty, but it is also the purpose of sentencing include the psychological aspects to eliminate guilt for actors/offender act in question. In accordance with the principle that the criminal justice system is a system aiming therefore to in Section 54 subsection (2) asserts: " sentencing is not intended to sorrow and degrading". This provision is an affirmation that give meaning to the above criminal in the criminal justice system even though the criminal is primarily a sorrow, but the sentencing is not intended to sorrow and not degrading.

Starting from the idea that the balance of the two principal objectives, the terms of punishment according to the RUU KUHP National 2008 also contradicts the basic ideas of mono - dualisitik balance between public interest and individual interests; between objective factors and subjective factors. Therefore, it is also contrary to the terms of punishment of the two basic principles of the criminal law, namely the principle of legality (which is the principle of community and the principle of fault or culpabilityy (which is the principle of humanity). Thus sentencing is related to the subject matter of thinking about criminal acts and criminal liability.

In addition to the provisions which contain the purposes sentencing. RUU KUHP National 2008 will help the judge in consider sentencing by loading guidelines to give the punishment (straftoemetings - leiddraad).

[1] Brickey dalam Muladi, op.cit. hal 29
[2] Sudarto, yang dikutip dalam Andi Hamzah dan Siti Rahayu, *Suatu tinjauan Ringkas Sistem Pemidanaan Di Indonesia.* Akademika Presindo, jakarta: 1993. hlm. 27
[3] Roeslan Saleh, *Stelsel Pidana Indonesia*, Jakarta: Aksara Baru, 1978 hlm. 5
[4] Muladi, Pembaharuan Hukum Pidana yang Berkualitas Indonesia, *Majalah Masalah-Masalah Hukum*, No. 2 Tahun 1988, hlm. 21.
[5] Barda Nawawi Arief, *Pokok-Pokok Pemikiran (Ide Dasar) Asas-Asas Hukum Pidana Nasional,* makalah disampaikan pada Seminar Tentang Asas-Asas Hukum Pidana Nasional, Semarang, 26-27 April 2004, hlm. 17

Guidelines for the administration of criminal includes various terms in determining the size of the sentencing which the judge shall consider :[1]

a. A fault who offender done;
b. The motive and purpose of committing a crime;
c. An inner attitude offender done;
d. Is the crime is done with planning;
e. How do the crime;
f. The attitude and actions of after committing a crime;
g. Life history and socio-economic offender;
h. The effect on future criminal offender done;
i. The effect of a criminal offense against a victim or victim's family;
j. Forgiveness of the victim and/or her family, and/or;
k. The public perseption of the offenses committed.

From the above it can be concluded that the formulation of various provisions/general rules about sentencing in Book I of the RUU KUHP National 2008 oriented idea or fundamental thinking of criminal individualization is reflected in the fundamental principle that no punishment without fault. Terms reason eraser criminal, especially excuses, power force, which defense forced that goes beyond, not able to be responsible and problem children under 12 years old. In the guidelines pardon or forgiveness by the judge among other factors are also taken into consideration the personal circumstances of the offender and humanitarian considerations. In provisions concerning mitigation and weighting the various factors to be considered criminal as stipulated in Article 113 and 115. On the other side of the individualization of punishment as outlined in the RUU KUHP National 2008 is provisions regarding the changes or adjustments that have been sentencing decision is legally binding is based on the consideration due to changes or developments in the inmate's own self. So in thinking, understanding not only the means of individualization of criminal punishment to be imposed should be adjusted or oriented in consideration of the individual, but also a criminal who had been dropped should always be modified or adjusted to the change and development of the individual (the inmate) is concerned.

RUU KUHP National 2008 adopts a two-track (double track system) in stelsel criminal. That is in the bill determining the RUU KUHP National 2008 any offense may be liable to criminal and/or criminal act. In connection with the matter, in the preparation of the RUU KUHP National 2008 criminal distinguished principal of Article 65 subsection (1), the additional punishment (Article 67 subsection (1)) and a special main criminal (Article 66). When examined in the formulation of the principal types of criminal RUU KUHP National 2008 is not much different from the KUHP (WvS). The layout of the difference is the addition of social work criminal that had been unknown in the KUHP (WvS).

Based on the reasoning above, who maintained of the KUHP (WvS) is death penalty but called a special punishment, wheareas imprisonment and criminal fines, categories as basic criminal which is then added again to cover criminal, penal supervision and criminal social work. While imprisonment (Article 10 a.3of the KUHP/WvS) is abolished. While the main criminal and criminal - (special) above is known also additional criminal. Besides the three old criminal (Article 10.b.1, 2 and 3 of the KUHP/WvS) also added two additional criminal, namely: compensation payment and fulfillment of customary obligations.[2] The acceptance of the corporation as the subject of a criminal offense, then the offense can be imposed on the corporation shall be in accordance with the nature of the corporation in question.[3] Remember the RUU KUHP National 2008 adopts a two-track (double track system)[4] in sentencing, in the sense that in addition to the criminal may also be a range of criminal acts to the offender, so this system can also be applied in corporate criminal liability as a criminal act.

It may be argued that the impact to be achieved in imposing sanctions against the corporation not only has financial impacts but also having nonfinancial impact. Because it can be argued that the death penalty, imprisonment, and criminal confinement can not drop on the corporation. Sanctions that can be imposed on the corporation is fined, additional criminal, disciplinary actions, administrative actions and civil penalties in the form of compensation. Prosecution and punishment of the offenses committed by or a corporation, can be made or imposed upon corporation itself; corporation and its board, or board only.

3.2.6. The study of Comparison Religion Delic to Criminal Code Different Countries.

[1] Lihat tujuan pemidanaan seperti yang di uraikan J.E.Sahetapy,"*Suatu Studi Khusus Mengenai Ancaman Pidana Mati Terhadap Pembunuhan Berencana*", Disertasi, Penerbit: CV. Rajawali, Jakarta, 1982.hlm. 28.
[2] Mardjono Reksodiputro, *Pembaharuan Hukum Pidana (Kumpulan Karangan)* Buku Ke -4 Jakarta: Universitas Indonesia. 1995.
[3] Setiyono, *Kejahatan Korporasi .... op.cit*. hlm. 125.
[4] Untuk lebih jelas mengenai ide dasar dan model perumusan double track system, lihat M. Shollehuddin, *Sistem Sanksi Dalam Hukum Pidana (Ide dasar Double Track system dan Implementasinya).* PT Raja Grafindo, Jakarta, 2003.

Policy formulation of criminal law in the fight against religious offense in Indonesia requires a comparison study with countries that have a policy in the fight against religious offense, either through a policy of penal and non- penal policy. This comparative study can be a reference or consideration and provide feedback, such as how the crime formulation, accountability systems, types of criminal sanctions and so on. In addition, to be able to know the progress of crime that using information technology continues to grow. Even so, the legislators must make adjustment to the social and cultural conditions of the people of Indonesia, because the law is the people's needs and will be applied to the community. The following discussion of comparative studies that include three countries, namely Latvia, Finland and Canada, that apart of:

a). Latvia:[1] In Latvia there is no specific chapter on religious offenses. Religious offenses relating to religion spread in several sections in Chapter XIV: Criminal Offenses Against the Fundamental Rights and Freedoms of a Person, which includes:

Section 150

Violation of Equality Rights of Persons on the Basis of their Attitudes Towards Religion. For a person who commits direct or indirect restriction of the rights of persons or creation of whatsoever preferences for persons, on the basis of the attitudes of such persons towards religion, excepting activities in the institutions of a religious denomination, or commits violation of religious sensibilities of persons or incitement of hatred in connection with the attitudes of such persons towards religion or atheism, the applicable sentence is deprivation of liberty for a term not exceeding two years, or community service, or a fine not exceeding forty times the minimum monthly wage.

Section 151

Interference with Religious Rituals;

For a person who commits intentional interference with religious rituals, if such are not in violation of law and are not associated with violation of personal rights, the applicable sentence is community service, or a fine not exceeding ten times the minimum monyhly wage.

b). Finland[2] : In Finland Criminal Code contained in section 10 of the Criminal Code of Finland, entitled Breach of the sanctity of religion is included as part of Chapter 17 (Offenses against public order). Offense in question reads as follows:

> Section 10 Breach of the sanctity of religion (563/1998).
>
> A personal who (1) publically blasphemes against god or, for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community, as referred to in the act on the freedom of Religion or (2) by making noise, acting threatening or otherwise, disturbs worship, ecclesiastical proceedings, other similar religious proceedings or a funeral, shall be senteced for a breach of the sanctify of religion to a fine or to imprisonment for a most six months.
>
> With this section, the actual existence of God can also constitute contempt delic ethnic agitation.
>
> Section 8 Ethnic agitation (578/1995)
>
> A person who spreads statements or other information among the public where a certain race, a national, ethnic or religious group or a comparable group is threatened, defamed or insulted shall be sentenced for ethnic agitation to a fine or to imprisonment for a most two years.

c). Canada[3] : Blasphemy offense under Section 286 (titled Blasphemous Libel):

1. Everyone who publishes a blasphemous libel is guilty of an in citable offence and liable to imprisonment for a term not exceeding two years;
2. It is a question of fact whether or not any matter that is published is a blasphemous libel;
3. No person shall be convicted of an offence under this section for expressing in good faith and decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.

From the comparison in various countries above it can be concluded that the policy formulation in various Criminal Code offense religions of different countries are divided into several patterns. The first pattern is religious delic specifically defined or regulated in a separate chapter and the pattern of the second formulation is formulated religious offense or not formulated in isolation but rather scattered in various chapters that organize religious delic.

The existence of two (2) pattern formulation/formulation in various religion delic to criminal court different countries. the RUU KUHP National 2008 team adopt a first formulation/formulation offense religion is specifically regulated in a separate chapter. In addition to formulation specifically religious offense or in a

[1] Barda Nawawi Arief, *Delik Agama …*, *op.cit*. hlm. 84.
[2] *Ibid,* hlm.80.
[3] *Ibid*, hlm.72

separate chapter in the book of the law of the state criminal law, which is also interesting to observe is that countries are not based on the Belief in God Almighty, but religious offenses regulated and formulated in law books criminal law even specifically stipulated in a special chapter or separate. Therefore, it becomes a very out of place on the attitude of some people who refuse to be regulated and religious offenses defined in the RUU KUHP National 2008 based on the offense of religion is a real example of the occurrence of excessive criminalization and violation of human rights as stated in early. Based on this it is necessary to Indonesia claiming to be a state based on the belief in God Almighty formulate and set about religious offense in the book of criminal law (RUU KUHP National 2008).

4. CONCLUSION AND RECOMANDATION

4.1. Conclusion

Based on the above discussion, can conclude as follows :

1. Criminal law is currently being used in the fight against religious offense is the Criminal Code/KUHP (WvS). But it contains some weaknesses or deficiencies in the substance of the arrangement is religious offenses as crimes against public order. The existence of such formulation emphasizes the protection of religious people is not a religion of peace that serve as the object of protection. However, as the editorial seems that the formulation of the KUHP (WvS) requires the protection of religion. This means that religion is seen as a legal interest or an object that must be protected. Thus there is disharmony between the status and description of the offense with text or formulas offense.
2. In the prevention to that delic religion related with criminal law policy formulation in the future in the prevention against religious offense in the RUU KUHP National 2008 is formulated as a crime against religion and relating to religion or to religious life. formulation that will come especially governing religious delic should also be formulated by taking into account and consider the following points :
   a. Policy formulation criminal offenses, including the integration of religious offense, the subject of the crime consists of persons and/or corporations, is a special formulation of the crime/explicit that includes all forms of action and all kinds of religious offense occurred, as well as the formulation of acts religious offense concretely as elements of a crime in the RUU KUHP National 2008;
   b. The policy criminal liability formulation, includes the principle of accountability based on fault (liability based on fault), the principle of strict liability (strict liability) and the principle of accountability substitute (vicarious liability). The stipulation of a corporation as the subject of a criminal offense should be accompanied by the formulation of the system of corporate accountability are clear and detailed;
   c. Policy formulation and conviction of the criminal system, the system includes the formulation of criminal sanctions-cumulative system alternative, systems formulation of the length of the criminal use of specific minimum and maximum system specifically, the types of criminal sanctions consisting of imprisonment, criminal fines and additional administrative or criminal adjusted perpetrators person/corporation, either physical/virtual or real/virtual world. Crime and punishment system formulation is accompanied by the formulation of sentencing guidelines and rules and people-oriented corporation.

4.2. Recommendation

Based on the research that has been stated above, so it can gives some recommendation as follows :

1. In efforts to delic religious should pay attention to the characteristics of religious delic as crimes that the public interest that was instrumental in the life of the nation must be arranged and oriented on RUU KUHP National 2008, as a part the renewal of national criminal law;
2. Efforts to control religious offense can run effectively by means of penal and non-penal facilities through a variety of approaches, because it is more preventive and given the limited ability of penal facilities.
3. The process of policy formulation in the prevention of criminal offenses religion must involve competent parties, such as government, parliament, academia, law enforcement officers, expert internet, telecom operators and internet service providers.

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