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A Comparative Study Of Principle Of Guilt In The Provision Of Indonesian And English Criminal Law

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Abstract : *The principle of guilt is universally recognized by worldwide nations as the absolute basis of a sentenced person. Principle of No Crime without Guilt or Principle of Guilt contains an understanding that any person committing an action, which contradicts with applicable criminal law, can be sentenced due to the absence of guilt in his/her actions. The principle of no crime without guilt is closely related to principle of legality, stating that there is no crime without previous arrangement. It means that the element of guilt can be attached if there are available regulations stipulating that the committed act is criminal act. This research aims to compare the principles of guilt in Indonesian and English Criminal Law. The method employed in this research was a normative-legal method based on secondary data as research material so that it focused on theoretically speculative measures and normative and qualitative analysis, which were the focus of the discussion on how principle of guilt in the criminal liability in Indonesia compared to with principle of guilt in the UK. The results of the study show that there were differences in the application of the principle of guilt in Indonesian and English criminal law.*

Keywords : *Principle of guilt, Indonesia, UK*

Abstrak : Asas kesalahan ini bersifat *universal* diakui seluruh bangsa-bangsa di dunia sebagai asas yang mutlak harus ada sebagai dasar dapat dipidananya seseorang, Asas Tiada Pidana Tanpa Kesalahan atau Asas Kesalahan mengandung pengertian bahwa seseorang yang telah melakukan perbuatan yang bertentangan dengan peraturan hukum pidana yang berlaku, tidak dapat dipidana oleh karena ketiadaan kesalahan dalam perbuatannya tersebut. Asas tiada pidana tanpa kesalahan ini juga berkaitan erat dengan asas legalitas yang menyatakan tiada pidana tanpa ada pengaturan yang mengaturnya terlebih dahulu, artinya unsur kesalahan dapat disematkan jika telah ada peraturan yang mengatur bahwa perbuatan yang dilakukan adalah suatu perbuatan pidana.Penelitian ini bertujuan membandingkan asas kesalahan di Indonesia dan di Inggris.

Metode yang di gunakan Penelitian dilakukan secara yuridis normatif yang mendasari pada data-data sekunder sebagai bahan penelitian sehingga berfokus pada langkah spekulatif teoritis, analisis normatif dan analisis kualitatif, yang menjadi fokus pembahasan Bagaimanakah Asas kesalahan dalam pertanggungjawaban pidana di Indonesia dibandingkan dengan asas kesalahan di Inggris. Hasil penelitian adanya perbedaan penerapan asas kesalahan dalam pidana di Indonesia dan di inggris.

Kata kunci : Asas kesalahan, Indonesia, Inggris

I. INTRODUCTION

Aside of unlawful act, guilt is one of the fundamental elements, and it must be satisfied. Hence, a legal subject can be sentenced. According to Sudarto, it is not sufficient to sentence someone if such person has committed unlawful act or against law. Though the perpetrator fulfills the formulation of an objective breach of a penal provision, but it has not satisfy the requirements for imposing a sentence. For sentencing, a condition is necessarily required that any person committing an act has subjective guilds. In short, a person must can be liable for his/her action or, if, seen from his/her action, he/she can be responsible to such person. It applies "the principle of no crime without guilt" (*keine strafe ohne schuld or geen straf zonder) snow or nothing poena sin culpa*). In broad sense, the *culpa* or guilt includes intentional.[1]

Guilt is the basis of liability for the perpetrator's action, so it is closely related to the conditions of criminal liability. Further, guilt is the emotional state of the perpetrator and the spiritual relationship between the perpetrator and his/her actions. If someone commits a guilt, such person can be blamed. Regarding someone's emotional state that commit an action, it is commonly called liability, while the spiritual relationship between the perpetrator and his/her actions is intentional, negligence, and reason of forgiving. Thus, to determine the existence of legal subject's guilt, it must satisfy a number of elements, such as: (1) The existence of the perpetrator's liability, (2) Spiritual relationship between the perpetrator and his/her actions, such as intentional (*dolus*) or negligence (*culpa*), (3) None of justifying reason or reason of forgiving is available.[2] These three elements are the integral unit, where one element depends on other elements.[3]

Moeljatno explained that the principle of no crime without guilt means a person is impossibly liable (sentenced) if he/she does not commit crime act. However, if he/she commits crime act, he/she is not always sentenced.[4] According to Simons, a person can be sentenced if there is an element of guilt where the element of guilt can be seen from the unacceptable act and such person can realize that his/her act is unacceptable. Thus, his/her action can be liable.[5] Guilt is a certain physicological state of someone committing crime act, and there is relationship between physical conditions with action related to such condition so that such person can be blamed due to such action.[6]

In addition, the principle of guilt is universally recognized by all nations globally as the absolute basis that must be available in determining a sentenced person. In the Civil Law system, the definition of criminal law is the provisions containing order and prohibition accompanied by a threat of sentence for whosoever is guilt in violating regulations regarding order and prohibition. Moreover, in the Criminal Law, there are two significant issues requiring consideration in the process of imposing criminal sanctions,

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[1] Sudarto, 1983, Hukum dan Perkembangan Masyarakat, Sinar Baru, Bandung, page 85

[2] Muladi & Dwidja Priyatno, 2012, Pertanggungjawaban Pidana Korporasi, Kencana Prenada Media Group, Jakarta, page 46-48

[3] Ibid

4 Moeljatno.2018. Asas-Asas Hukum Pidana. Edisi Revisi. Jakarta: Rineka Cipta, page 17

5 Simons in Adami Chazawi,2020.Pelajaran Hukum Pidana,Jakarta.Rajagrafindo persada, page 152

6 https://www.hukumonline.com/klinik/a/asas-tiada-pidana-tanpa-kesalahan-(geen-straf-zonder-schuld)-lt664c9ff651e23/, accessed on July 10, 2024

such as regarding committing a criminal act *(Actus Reus)* related to subject or perpetrator of criminal act, and concerning guilt *(Mens-Rea*) related to the issue of criminal liability. Regarding the subject or perpetrator committing criminal act, generally, criminal law in the Criminal Code only recognizes people as the perpetrator and corporation, which has been recognized in the new Criminal Code, while, regarding criminal liability, it is based on the principle of guilt, which states that *"No sentenced, if no guilt"*, in Dutch *"Green Straf Zonder Schuld"*, in Germanic *"Here Straf oh "Schuld"*. Currently.In English criminal law, the principle is known in Latin recited *"Actus Non Facilitate Reum, Mission Menstruation Sit Rea" (*An Act does not make a person guilty, unless the mind is guilty*).*[7] Although the principle cannot be found in the Criminal Code, the principle is the existing principle in the unwritten law that lives in the minds of society and the applicability is not less absolute than the principle written in statutory. Similarly, it applies in the United Kingdom, adhering to the Common Law system. Due to the importance of this principle, countries in the world makes an absolute requirement in sentencing, including in Indonesia and the United Kingdom. Therefore, the research reviews the comparison of the application of the principle of guilt as the basis for applicable criminal liability in Indonesia and UK.

II. RESEARCH METHOD

The research was conducted by analytic-decriptive depicting issues objectively and systematically related to facts occurring in the concept of legal comparison on the application of principle of guilt in criminal liability in Indonesia and UK. The research employed normative-juridicial approach based on secondary data as research materials so that it focused on theoretical-speculative measure, such as normative and qualitative analysis.

III. DISCUSSION

Principle of guilt as the basis of criminal liability in Indonesia

The principle of No Crime without Guilt or Principle of guilt contained understanding that any person having committed unlawful act according to applicable regulation could not be sentenced due to no guilt in the action. The principle of no crime without guilt was also closely related to principle of legality, stating that there was no crime without arrangement. It showed that the element of guilt could be attached if there had been regulations stipulating the committed act as a criminal act. The principle was manifested in chapter 6 section (2) Law No. 4 of 2004 concerning Judicial Power, which determined that: "Any person cannot be sentenced, unless the court has valid evidence lawfully, provided belief that the related person can be liable on the action accussed to himself/herself.[8]

The basis of criminal liability was guilt. In narrow meaning, guilt could be intentional (*opzet*) or negligence (*culpa*). Guilt was regarding liability. Thus, criminal liability was the

[7] https://media.neliti.com/media/publications/95895-ID-pembaharuan-hukum-pidana-konsep-pertangg.pdf, accessed on July 11, 2024
[8] Ibid

fundamental of criminal law so that, according to Idema, guilt was the heart of criminal law.[9] It displayed that the basis of someone's action was relied on concept/basic thinking of whether or not elements of criminal act were proven. If the elements of criminal act were proven, the guilt was real and it could be sentenced. The criminal liability was rested on the elements of criminal act.[10] The term *schuld* mostly used by scholars was translated as guilt. Satochid, confirmed that term *schuld*, translated as guilt, is slightly incorrect, so the word "guilt" means error. Satochid provided the example of 2 x 2 = 5. It articulated that the guilt was error action. In criminal law, "guilt" contained wider meaning, such as understanding that somebody could be liable for his/her actions.

To dismiss confusion in thinking, Satochid recommended to just use the term *schuld*. Although, the word *schuld* in Dutch had several meanings.[11] According to Schaffmeister, Keijzer and Sutorius, the principle of no crime without guilt in criminal law was generally used in the sense that there was no unlawful act without subjective guilt.[12] Then, guilt was interpreted as no crime without unacceptable action that could be reprimanded to the perpetrator. From all condition of criminalization, the principle of guilt was highly fundamental. The guilt was in the context of *dolus*/intentional or *culpa*/*alpa*/negligence.[13] In general, an occurring criminal act had elements that had to be satisfied, as follows:

1. Action is unlawful act (Law)
2. A perpetrator that can be liable for his/her action

This element in criminal law doctrine was particularly related to criminal act and the property of unlawful act was known by a clear principle, such as the principle of legality. The criminal act was against the law previously existing. Meanwhile, the elements of a person who could be liable for his/her action was the principle that there was no crime without guilt. The condition of someone stated guilty or his/her action could be liable and sentenced, according to Sudarto, had several required conditions, as follows:

1. The perpetrator's liability (*schuldfahightkeit or zurenchnungsfahigkeit*), meaning that spiritual state of the perpetrator must be normal.
2. Spiritual relationship between the perpetrator and his/her action, such as intentional (*dollus*) or negligence (*culpa*) as guilt.
3. The absence of justifying guilt or reason of forgiving.[14]

In order to sentence a person and before satisfying the conditions of criminal liability (or guilt, in broader sense), a person was decided committing unlawful act, unless if the property of the unlawful act was not satisfied due to acceptable with the justifying reasons. From the description, criminal liability could be satisfied if the satisfaction of guilt in perpetrator was fulfilled, where such guilt could be in the form of sentence and

[9] Sudarto, 2013.Hukum Pidana 1, Edisi Revisi (Semarang : Yayasan Sudarto- Fakultas Hukum UNDIP), page 147

[10] Rasyid Ariman dan Fahmi Raghib, 2016,Hukum Pidana, Malang: Setara Press, page 205

[11] Satochid Kartanegara dalam Topo Santoso, 2023. Asas-Asas Hukum Pidana . Jakarta. Rajagrafindo.page 233

[12] D.Shaffmeister,N.Keijzer dan E,pH Sutorius, Hukum Pidana dalam J.E Sahetapy dan Agustinus Pohan,Bandung. Citra Aditya Bakti,2007, page 77.

[13] Ibid

[14] Sudarto, op.cit., page 155

unacceptable action, such as *dollus* and *culpa*. Additionally, he/she was guilty if his/her action satisfied the reason of criminal abolition. The reason of criminal abolition in the Criminal Code regulated in the following issues[15]:

1. Justifying Reasons (Article 49 section (1), Article 50 and Article 51) of the Criminal Code, such as a truly unlawful act, but, due to its property, the action was justified so that there was no guilt.

a. Forced Defense (*Noodweer*). Article 49 section (1) regulated: "Whosoever shall not be sentenced in performing forced defense for himself/herself or for others, honor of decency or property, individually or others, due to a close attack or threat of attack at that time of against the law". Article 49 section (1) provided the basic conditions, such as: There must be an attack and defense is required. Those two condition could be specified as follows. First, attack (*annval*) had arisen suddenly or threaten directly and the property of attack was contradicted with law. Second, defense had to be forced. Defense had to be valuable, balanced, and the defense aimed to defense from any attack directing to body, morality, and property.[16] For example, A wanted to hit B with a stick. In this case B faced attack from A, who opposed law and direct threaten. Defense that could be performed by B was various. B could shoot A, but, if B could hit A to avoid A's attack, defense performed by B with shoot was not forced defense.

b. Performing Law (*Wettelijk Voorschrift*). Article 50 recited: "Whosoever performs law shall not be sentenced. In the formal context, "Statutory" was regulation drawn by legislators (in the 1945 Indonesian Constitution, laws were made by President with the approval of House of Representatives). Then, it was expanded to include the material meaning, such as general regulations. Thus, including government, local government regulations, and so on. The word "performing" articulated not only conducting law, but also exercising power/authority. It could be exemplified if the firing squad conducted execution of the death penalty for a convict, it could not be considered murder because the firing squad exercised the order of the law, especially the regulations regarding dead sentence.

c. Executing Office Order (*ambtelijke bevel*). Article 51 section (1) read: "Whosoever commits an act to execute office order granted by the authorized power shall not be sentenced." The example of executing office order was a police officer ordered his/her commander to arrest and detain someone. The action of arresting and detaining someone was a criminal act, but, due to the action based on office order, he/she could not be sentenced. The relationship between authorizer of order and authorizee of order had to be a relationship according to public law. Hence, when the police commander ordered his/her housemaid to arrest person, the action was not justified. However, both

[15]https://media.neliti.com/media/publications/95895-ID-pembaharuan-hukum-pidana-konsep-pertangg.pdf, accessed on July 10, 2024
[16] Ibid

authorizer of order and authorize of order were not necessarily civil servant. The word "*ambtelijk*" referred only a relationship according to public law. Thus, it was not necessary that the governed had to be under office order. For example, the mayor ordered a traffic policeman to detain a vehicle or order given by the prosecutor to the police because it was in accordance with his/her office order.[17]

2. Reason for Forgiving (Article 44, Article 48, Article 49 section (2) and Article 51 section (2)) of the Criminal Code, which was an unlawful act, but, due to its nature, such unlawful act was removed, so there was no guilt.

a. Non-Liable/Insanity Defense (*ontoerekeningsvatbaarheid*)

Article 44 recited: "Whosoever committing an action due to the perpetrator's perfectly non-occurring emotional state or disturbed by disease cannot be responsible".

According to Article 44, the conditions were:

1. Having perfectly non-occurring emotional state or the perpetrator is disturbed by disease
2. The level of disease, somewhat, causes the perpetrator's action cannot be responsible.

The Criminal Code did not specify when a person was considered to have a healthy emotion. MvT explained that a person could not hold responsibility for his/her actions, if his/her emotional state could not understand his/her actions' price and value. He/she could not determine his/her will to the action that he/she committed. He/she could not realize that his/her actions were forbidden.[18]

b. Duress (*overmacht*)

Article 48 stated: "Whosoever committing an act due to duress shall not be sentenced." A duress was a psychological coercion against which the aggrieved party could not avoid himself/herself or was a psychic force against which, physically, anyone could avoid thereof, but such force was big so that it could be understandable for having no ability to avoid. The absolute physical force that could not be avoided was called *vis absoluta*, while psychic force was *vis compulsiva* because though it was not absolutely compelling, but coercive as well. An example of duress was A threaten B slapped C. If not, he/she would be stabbed. Here, B dealt with an option to protect C's interest or his/her interest. Generally, he/she would save his/her interest, although others' interest would suffer loss. In this case, B's action could be justified.[19]

c. Defense of Excessed Force (*noodweer access*)

[17] Ibid
[18] Ibid
[19] Moeljatno, Asas-Asas Hukum Pidana, Jakarta: Rineka Cipta, 2018, page 151

Article 49 section (2) read: "Whosoever committing defense of excessed force directly due to a tremendously mental shock resulted in the attack or threat of attack, shall not be sentenced." A defense of excessed force in Dutch was *noodweer access* meaning no mis-accused, no misinterpretation. There was truly unlawful attack, but it was over-reaction, not equal with the nature of the attack. In this case defendant could only be spared from sentence, if judge accepted that its excesses "directly due to by a great mental shock," so that, due to external pressure, the function of his/her inner was not normal, and it resulted in reason of forgiving.

d. Exercising Unauthorized Official Order (*general bevel*)

Article 51 section (2) read: "Unauthorized official order shall not cause the sentence abolition, unless the governed party is ordered in good faith, considering that such order is granted with authority and its implementation includes in his/her scope of work".

Principle of guilt and Criminal Liability in the UK

The principle of guilt (*mens-rea*) and criminal liability were important elements in the English criminal law.[20]

1. **Principle of guilt (*Mens Rea*).** This principle referred to intention or the mental state of the perpetrator when committing the crime. In the English law system, *mens-rea* was one of the crucial elements that had to be proven in deciding whether a person could be considered guilty or not. Some forms of *mens-rea* were recognized in the English criminal law, as follows:
   a. **Intention**. It was the most serious form of *mens rea*. A person was considered to have an intention if he/she acted with a specific purpose, for example someone who planned and committed murder to kill someone.
   b. **Recklessness.** A person was considered guilty due to his/her negligence if he/she knew there were significant risks from his/her actions, but he/she remained to continue his/her action. For example, throwing stones into a crowd without caring about the risk of hurting someone.
   c. **Negligence**. It was form of guilt where someone did not take any actions that had to be taken to prevent the loss. For example, a driver who did not pay attention to traffic signs and caused an accident.
   d. **Knowledge**. Someone could be considered having *mens-rea* if he/she knew the facts that led to illegal action. For example, selling stolen goods by knowing that such goods were obtained from theft.
2. **Criminal Liability in the UK**

[20] Romly Atmasasmita,Perbandingan Hukum Pidana Kontemporer, Jakarta: Fikahati Aneska, 2009, page 93

Criminal liability involved proofing that someone did not only commit a criminal act (*actus reus*), but also commit with *mens-rea* appropriately. Some of the key principles of criminal liability in the English law system were as follows:[21]

1. ***Actus Reus* (Criminal Act).** *Actus reus* was a physical or behavioral act that violated criminal law. This could be an active act, such as hitting someone, or action passive, like negligence causing loss.
2. ***Mens Rea* (Criminal Intention)**. As explained previously, *mens rea* was mental condition or intention behind criminal act. To prove criminal guilt, evidence had existed that the perpetrator had a specific intention or guilt when committing a criminal act.
3. **Strict Liability**. In some cases, the English criminal law recognized the concept of strict liability where a person could be considered guilty without requiring the proof of *mens-rea*. This usually applied in case of regulation or law violation, aiming to protect public, like traffic violation.
4. **Defense**. As suspect could use various defense to avoid or reduce criminal liability. Some defenses commonly used were *alibi*, insanity, duress, and self-defense.

By understanding the principles of guilt and criminal liability, the English criminal law system aimed to ensure that those who truly found guilty morally and lawfully had to be sentenced. The law applied in fair and proportional manner. The regulation of the principle of guilt (*mens rea*) was regulated through various legal sources, including statutes, common law, and the principles of criminal law that had developed by the time. The following was a number of primary sources regulating the principle of guilt in the English criminal law:[22]

1. Statute
   a. Serious Crime Act 2007 arranged various criminal acts, including guilt related to conspiracy and attempted criminal act.
   b. The Theft Act 1968 stipulated criminal act of theft and fraud, including condition of *mens-rea* for every criminal act set up thereof.
   c. The Offences Against the Person Act 1861 set criminal act to person, including various levels of crime violence and the related condition of *mens- rea*.
2. Common Law
   a. R v Cunningham (1957) set out the concept of recklessness/negligence in the English criminal law. The Supreme Court ruled that the perpetrator was deemed to commit negligence if he/she "realized the existence of risks and recklessly ignore the risks."

[21] Ryan Prayudi Saputra,Perbandingan Hukum Pidana Indonesia dengan Inggris,Jurnal Pahlawan, vol 3 No1, Universitas Pahlawan Tuanku Tambusai.2020, page 55
[22] David Ormerod dan Karl Leid.Smith Hogan Criminal Law edisi 15. London. Oxford University Press. 2021

b. R v G and Another (2003) confirmed the standard subjective for recklessness/negligence, where there had been awareness of the perpetrator regarding the dealing risks.

c. R v Mohan (1975) determined that intention was desire to reach certain goal.

3. Principles of Criminal Law

a. **Presumption of *Mens-Rea***. There was assumption that *mens-rea* was required for most of criminal acts, unless the law expressly stated otherwise. The principle was emphasized in the case of **Sweet vs Parsley (1970)**.

b. **Coincidence of *Actus Reus* and *Mens-Rea***. *Mens-rea* and *actus-reus* had been collectively present to establish criminal guilt. The case of **Fagan v Metropolitan Police Commissioner (1969)** stressed on the importance of time similarity between physical action and intention.

4. Model Penal Code (MPC)

Although not part of the English law, the Model Penal Code of the United States often used as comparative references in learning and development of the English criminal law. The specific example was Jurisprudence Case of **R v Caldwell (1982)**, introducing the objective concept in negligence, later modified by **R v G and Another (2003)** as the subjective standard. **R v Woollin (1998)** regulated that intention could inferred from a barely occurring result due to the perpetrator's action, though it was not the primary purpose.

IV. CONCLUSION

Guilt is the fundamental for any liable action of the perpetrator so it is closely related to the conditions of criminal liability. Thus, guilt is the emotional state of the perpetrator and spiritual relationship of the perpetrator and his/her action. The existence of guilt on somebody makes such person being unacceptable. To determine whether there is a guilt or not, the legal subject must fulfill several elements, including: (1) The perpetrator's liability, (2) The spiritual relationship between the perpetrator and his/her action, which is intentional (*dolus*) or negligence (*culpa*), and (3) None of justifying guilt or reason of foregiving is available. In the provisions of the Criminal Code, the basis of no crime without guilt is because it satisfies the reason of justifying and reason for forgiving regulated in Articles 44, 49, 50 and 51 of the Criminal Code. Regulation of the principle of guilt in the English criminal law has been derived from combination of various sources of law, including statute, common law, and principles of criminallaw, and legal literature. The principle of guilt and criminal liability in the English criminal law system has aimed to ensure that those who are found guilty by moral and law can be sentenced, and the law is applied fairly and proportionately. Meanwhile, the settings of principle of guilt (*mens rea*) is regulated through various sources of law, including statute, common law, and principles of criminal law, which have evolved over time.

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