



Ratio Legis for Deradicalization Regulation for People Who Have Been Exposed to Radical Ideology of Terrorism in Indonesia

Tatu Aditya¹; Thohir Luth²; Bambang Sugiri²; Adi Kusumaningrum²

¹ Student at the Faculty of Law, Brawijaya University, Malang, East Java, Indonesia

² Lecturer at the Faculty Law, Brawijaya University, Malang, East Java, Indonesia

<http://dx.doi.org/10.18415/ijmmu.v8i2.2314>

Abstract

The formulation of Law no. 5 of 2018 concerning the Eradication of Criminal Acts of Terrorism explains that in dealing with criminal acts of terrorism, a comprehensive criminal policy that involves all elements of society and stakeholders in Indonesia is needed. The referred comprehensive criminal policy is a policy with an approach to community protection and social welfare. The integration of this approach is formulated in both criminal and non-criminal law with prevention, action, and remedial approaches. A meeting participant who is representatives from the Supreme Court, Salman Luthan, stated that crime is not only a legal problem that must be resolved by criminal law or the criminal justice system but also social problems that must be addressed by other legal, economic, political, socio-cultural, and security defense. The ability of the criminal law or criminal justice system to deal with crimes is limited only to the ability to deal with the systematic symptoms of violations of criminal law. This study uses the Normative Juridical method. The goal to be achieved is to find a comprehensive formula for dealing with terrorism and deradicalization of terrorism crimes in Indonesia. Deradicalization as referred to in article 43 of Law no. 5 of 2018 is carried out through the following stages: identification / assessment; rehabilitation; re-education; and social reintegration.

Keywords: *Terrorism; Crime; Deradicalization*

1. Introduction

Ontologically, the essence of law is to realize and prevent crime, but in overcoming terrorism it is no longer intended only as a means to regulate order and security and legal certainty in society, but more than that, it is how the legal measures function as a means to achieve maximum value in life. The view that law can shape and change a situation in society has long been developed by Roscoe Pound in Usman (2014) with the well-known theory of "*law as a tool of social engineering*". On the basis of this approach and study of legal philosophy, the laws to be built in order to combat terrorism will still be based on ideological values, cultural values, historical values, sociological values, and juridical values.

In essence, criminal law policy is an attempt to realize criminal laws and regulations so that they are in accordance with certain conditions of time (*ius constitutum*) and the future (*ius constituendum*). However, criminal law policy is identical to penal reform in a narrow sense, because as a criminal law system, it consists of legal culture, structure, and substance (substantive). Because laws are part of legal substance, reform of criminal law, in addition to updating legislation, also includes reforming basic ideas and criminal law science.

Since the enactment of Law no. 5 of 2018, terrorism in Indonesia has its own definition. Based on Article 1 point 2 of Law No. 5 of 2018 Terrorism is:

“acts that use violence or threats of violence that create an atmosphere of terror or widespread fear, which can cause mass casualties, and/or cause damage or destruction to vital strategic objects, the environment, public facilities, or international facilities with motives such as ideology, politics, or security disruption.”

The formulation of terrorism is made in full which is aimed at the acts stated in the criminal provisions. The act is described as an act that has ideological, political or security motives.

2. Methodology

This research uses juridical normative method, which is a legal research to find legal rules, legal principles, or legal doctrines to answer legal problems to be studied (Marzuki, 2011). In a normative legal research, it includes the types of research on legal principles, legal systems, vertical and horizontal synchronicities of law, legal comparisons, and history of law. A juridical normative legal research is supported by the use of approach to laws (*statute approach*). The approach to laws (*statute approach*) is used because it is the focus of research on deradicalization regulation in Indonesian Positive Law, so that positive legal materials will be examined regarding the regulation on the formulation of law on terrorism and the regulation on deradicalization for people who have been exposed to the radical ideology of terrorism in Indonesia.

3. Result & Discussion

3.1. Process in Regulating Deradicalization

Deradicalization is one of the counter-terrorism efforts other than counter-radicalization, national preparedness, and law enforcement. Sandler argues that there are two main categories of anti-terror policies, namely proactive and defensive (Sandler, 2005). Counter-terrorism efforts can be carried out by deradicalization and disengagement. Deradicalization tends to be a remedy with a psychological approach, whereas disengagement is another soft line approach that focuses on improving the social relations of former perpetrators of criminal acts of terrorism in order to prevent their re-entry into their network or group as well as the prevention and repetition from the same acts.

Deradicalization has been formulated since the beginning as a preventive measure. In the draft Bill on Amendments to Law no. 15 of 2003, this policy has existed since 2017 in Chapter VIIA with the title: Prevention of Criminal Acts of Terrorism. Draft Bill on Amendments to Law No. 15 of 2003 formulates preventive efforts in Article 43A, consisting of three paragraphs which formulation was approved on October 4, 2017 by the Task Committee, namely (Arief, 2010):

- (1) The government is obliged to take preventive measures to criminal acts of terrorism.
- (2) In the effort to take preventive measures as referred to in paragraph (1), the Government shall take anticipatory steps which are proactive and implemented continuously and are based on the principles of protection of human rights and the principle of prudence.
Elucidation: In this provision, what is meant by "the principle of prudence" is a principle which states that in carrying out preventive functions and tasks, the competent official must always be prudent in order to provide legal protection and protections to the rights of individuals or groups entrusted to the official.
Note: A note is given in the explanation of the meaning of the word proactive, in which it contains the preemptive meaning.
- (3) Preventive measures as referred in Paragraph (1) are executed through:
 - a. National preparedness;
 - b. Counter-radicalization; and
 - c. Deradicalization.

On February 22, 2017, deradicalization by the Task Committee on the Bill on the Law on the Eradication of Criminal Acts of Terrorism was formulated through the general provisions of Article 1 number 21 with the following formulas (House of People Representatives of the Republic of Indonesia, 2017):

Deradicalization is a process carried out through a systematic method in the context of social reintegration which is applied to people or groups of people exposed to radical ideology of terrorism, with the aim of eliminating or reducing and reversing the radicalization process that has occurred.

Until the enactment of Law No. 5 of 2018, the definition of deradicalization has not undergone significant changes, but only the placement of the formula that originally existed in the general provisions which moved and formulated into Article 43D paragraph (1) of Law No. 5 of 2018. Article 43D paragraph (1) of Law no. 5/2018 states that deradicalization is a planned, integrated, systematic and continuous process carried out to eliminate or reduce and reverse the understanding of radical ideology of terrorism that has occurred. When compared with the formulation approved by the Task Committee on 22 February 2017, there is no change in the elements of this deradicalization activity.

Furthermore, in a session of Task Committee meeting on 19 October 2017, the formulation of article 43D in the fourth part, Deradicalization was approved with the following article formulations (Golose, 2010):

- (1) Deradicalization as referred to in Article 43A paragraph (3) letter c is carried out by the Government.
- (2) The execution of deradicalization as referred to in paragraph (1) is coordinated by the agency that carries out affairs in the field of counter-terrorism by involving the relevant ministries / agencies.
- (3) Deradicalization as referred in Paragraph (1) is executed with the following steps:
 - a. Identification/Assessment;
What is meant by "identification" is a detailed description of a person's level of exposure regarding his role or involvement in a group or network so that the level of exposure to radical ideology of terrorism can be measured.

- b. Rehabilitation;
What is meant by "rehabilitation" is recovery or healing to reduce the level of radical ideology of terrorism in a person.
 - c. Re-education; and
What is meant by "re-education" is counseling or strengthening a person's state in order to leave radical ideology of terrorism.
 - d. Social Reintegration
What is meant by "social reintegration" is a series of activities to facilitate people exposed to radical ideology of terrorism to return to their family and society.
- (4) In certain cases, the implementation of deradicalization for persons as intended in paragraph (1) must be based on a court ruling in accordance with the provisions of statutory regulations.
- (5) Further provisions regarding the procedures for the implementation of deradicalization are regulated in a Government Regulation.

Referring to the formulation of Article 43D paragraph (4) of the draft Bill on Amendment to Law No. 15 of 2003 as mentioned previously, the thought of deradicalization, seen from the formulation of the draft, the Task Committee emphasized that it was carried out as an effort to social reintegration. The consequence to the wordings "*as an effort to social reintegration*" here shows that deradicalization is an effort to eliminate or reduce and reverse the radicalization process that has occurred, so since the beginning the formulator has the aim that deradicalization is carried out simultaneously with undergoing the process of penalties in the Correctional Institution (prison). This means that there are no subjects who do not go through the criminal justice process or at least involve the court.

In addition, as provided in the formulation of Article 43A and Article 43D paragraph (4) of the Draft Bill on Amendments to Law No. 15 of 2003, the author believes that deradicalization is placed as a preventive measure that has been conceptualized in the sense of prevention of crime so that there is no repetition. The words "*social reintegration*" indicates the existence of a conviction that has been carried out by the perpetrator which followed by deradicalization process based on a court order (double track system). However, over time, this thinking has changed and no longer places deradicalization as a preventive effort in the sense of a preventive measure, but rather a prevention that can be done without going through court trial process or a criminal court process.

There is no explicit statement on the subject of deradicalization in the formulation of articles 43A and 43D of the Draft Bill on Amendment to Law No. 15 of 2003. Article 43D paragraph (4) only emphasizes "... *the implementation of deradicalization for persons as referred to in paragraph (1) must be based on a court order in accordance with the provisions of laws and regulations.*" The existence of this sentence (in Article 43D paragraph (4) of the draft Bill on Amendment to Law No. 15 of 2003) clearly shows that deradicalization was initially a process which also had to be determined by the court in accordance with the statutory provisions. However, this changed along with the drafting process.

3.2. Formulation Process of Deradicalization Subject

During the process of drafting the Draft Bill on Amendment to Law No. 15 of 2003, deradicalization as regulated in Presidential Regulation No. 46/2010 concerning National Counter-Terrorism Agency (NCTA) (Presidential Decree No. 46/2010) as well as the Regulation of the Head of NACT No. Per-01/K.BNPT/I/2017 concerning the Organization and Work Procedure of the NCTA (Regulation of the Head of NCTA No. 1 of 2017) was further developed to become a formulation in the draft of Law No. 5 of 2018. In 2017, deradicalization activities were carried out by the Deputy for Prevention, Protection and Deradicalization, in this case is by the Directorate of Deradicalization, based

on Article 76 of Regulation of the Head of NCTA No. 1 of 2017 letters a and d, to carry out monitoring, analysis and evaluation functions as well as the implementation of coaching activities on the subject: terrorism convicts, former terrorism convicts, former terrorists, their families and their networks. The complete formulation of Article 76 is as follows (Alqurtuby, 2009):

In carrying out the tasks referred to in Article 75, the Directorate of Deradicalization carries out functions:

- a. Performing the functions of monitoring, analyzing and evaluating on the activities of mentoring towards terrorism convicts, former terrorism convicts, former terrorists, their families and their networks;
- b. Preparing the draft of policies, strategies and guidance programs in the national penitentiary, guidance in society and guidance in the Special Penitentiary for Terrorist;
- c. Preparing coordination for the implementation of counterterrorism in the field of deradicalization;
- d. Executing coaching activities for terrorism convicts, former terrorism convicts, former terrorists, their families and their networks; and
- e. Monitoring and evaluation as well as controlling materials for guidance program in the Correctional Institution, guidance in the community and guidance in the Special Penitentiary for Terrorist.

Along with the process of drafting the Draft Bill on Amendment to Law no. 15 of 2003, the subject of deradicalization which previously regulated in the Regulation of the Head of NCTA No.1 of 2017 was developed and included in the formulation of Law No. 5 of 2018 (we have described the progress in the table in the previous Chapter 3). The development of the subject of deradicalization is included in Law no. 5 of 2018, according to the obtained data, was proposed by NCTA during the Task Committee meeting. NCTA proposes in Article 43D paragraph (4) of the Draft Bill on Amendment to Law No. 15 of 2003, namely:

In the event that the implementation of Deradicalization as intended in paragraph (1) is carried out on:

- a. Suspect;
- b. Defendant;
- c. Convict;
- d. Convicted Criminal;
- e. Former Convict;
- f. Their family; and/or
- g. Certain person or group that suspected to perform the crime of terrorism.

The National Counter-Terrorism Agency (NCTA) has proposed that the mention to the subject of deradicalization must be explicit and not followed by differentiating the stages of deradicalization. There are no different stages in the proposed formula. The proposed deradicalization stages go through the stages of identification, rehabilitation, re-education, and social reintegration. Along with the process of drafting on the Draft Bill on Amendment to Law no. 15 of 2003, the subject of deradicalization becomes an option to be mentioned in the law which currently regulated in Article 43D paragraph (3) of Law no. 5 of 2018.

The determination of those six subjects of deradicalization as stated in article 43D paragraph (3) of Law no. 5 of 2018, which consists of suspects, defendants, convicts, convicted criminal, former convicts, and people or groups of people who have been exposed to radical ideology of terrorism, have undergone a fairly dynamic debate process in the process of amending Law No. 15 of 2003 to become

Law no. 5 of 2018. The formulation of Law No. 5 of 2018, especially Article 43D, was followed by debates among meeting participants that consist of various elements of society such as the academics, practitioners, politicians and also the government including law enforcers, each of whom expressed their opinions according to their respective scientific fields.

At a meeting session of the Special Committee on Terrorism for the 2018-2019 sessions on Thursday, 4 October 2017, the review on the subject of deradicalization was seen from various aspects, including legal aspects that covers criminal law, the practice and the psychological scientific aspects. Prof. Harkistuti Harkrisnowo, SH, MA, Ph.D expressed his opinion from a legal perspective, stating that the subject of a person who has been exposed to radical ideology of terrorism is a subject who has not committed a criminal act (termed as yellow level), which according to him cannot be subject to a legal action but can only be imposed to preventive activities such as community education. Completely submitted at the meeting as follows:

“That means not to wait for it to happen as a criminal act. So if a criminal act occurs, it means that the Government is re-active, so before it happened then what was said by Habib about those colors must be noticed immediately. However, it could not be executed with certain measures, hence what can be taken are those in preventive activities, for example, by giving public education because the Government is not allowed to take legal action against people who have not committed a criminal act.”

Professor Hakristuti Hakrisnowo, S.H., M.A., PhD’s statement is an answer to a question from the Chairman of the Meeting, H. R. Muhammad Syafi’i, SH, MHum, who discussed the general technical concept for the Prevention of Terrorism in Indonesia. The Chairperson's question originated from the doubts in placing deradicalization according to the scale escalation, which is coded with colors according to the level, from those who have not been exposed, those who have been exposed, until to those who have done acts of terrorism, respectively as follows: 1. Green (not yet exposed); 2. Yellow (already exposed); and 3. Red (has committed a criminal act of terrorism).

The Chairperson of the Meeting was of the opinion that deradicalization was implemented at the 3rd level or the red level, in order to prevent perpetrators of criminal acts of terrorism from committing a crime again. The complete statement of the chairman of the meeting is as follows:

“... on the third issue was mentioned about the green level, yellow level, and red level. I think the preferred deradicalization here is mainly on the red one, so that the subject won’t do the acts again, it doesn’t repeat the crime. Maybe the yellow level also aims for repentance. But in the green one, I mean we don’t deradicalize it but we know there is exposure there, right? Talking about the prevention, is it possible i we set another point, ma’am? For instance, concerning national preparedness strategy.”

In the discussion of the meeting, there were differences of opinion, the meeting participants were representatives of the National Police, Brigadier General Drs. Herry Nahak, M.Si, stated that the measure to implement deradicalization should solely be seen from the possession of the thought of radical ideology of terrorism ("already exposed") in a person, not from whether or not a criminal act has been committed. Thus, deradicalization in his opinion can be imposed on someone who has been exposed even though that person has not committed a criminal act. In full, his opinion was as follows (Kohler, 2017):

“... Deradicalization here should be carried out to those who have been exposed, whether they have committed a criminal act of terrorism or not, but have been exposed. Hence the aims are to two, one to those who have not committed crimes but suspected to have been exposed, and the other one is to those who have been exposed and have committed a criminal act of terrorism.

Therefore, if granted, we ask permission for not differentiating the subjects between Easter and non-Easter, but on the base exposed and not exposed. Thus, for those who are exposed, the applied program is deradicalization, but for those who are not exposed, the program is counter-radicalization.”

Prior to the stipulation of deradicalization as one of the preventive activities, the chairman of the meeting first confirmed to a practitioner, Professor Irfan Idris, who is the Director of Deradicalization in NCTA, to learn more about deradicalization in the practice of prevention activities that have been implemented. In full, Prof. Irfan Idris has the following opinion:

“...The targets aimed so far by NCTA's activities in the context of deradicalization activities are directed, first to terrorism convicts, and second to former convict, means that they are already freed from the correctional institutions.

As for the prisoner, the implementation of the program means to reduce so his level won't get to 100, and still being processed so he can be at 40 or 30, even to zero if possible. As for the former convict that we have done in reducing, we keep reducing him outside the correctional institution, even to zero level if possible. That's about it.

Next, for the family, it is automatically considered that the family has also been exposed as well as being affected by environmental factors. In this concern, family doesn't necessarily have to do the crime. He has not necessarily done the crime but also can be suspected to have done it, so there are two possibilities that the family used to do it but already has subsided. However there is possibility the family might comes back and the convict becomes emotionally influenced again.

At last, it can also be a network because they have a community. Now, as from this community, it is suspected to still give at least 5, 10, or even 15% influence to radical ideology of terrorism. Therefore, we are aiming to execute deradicalization to 4 targets at once. Thus, this is called deradicalization activities carried out by NCTA so far ... etc.”

Referring to the opinion of Prof. Irfan Idris as the Director of Deradicalization in NCTA above, it can be concluded that in practice (before the enactment of Law No.5 of 2018), deradicalization was carried out on 4 target subjects (according to Article 76 of Guideline No.1. Year 2017), namely (Shodiq, 2018):

1. convict
2. former convict
3. family of convict who already exposed
4. specific network/community

On January 11, 2018, the regulation on deradicalization was approved by the Task Committee, where the formula is the same as what is stated in Article 43D of Law No. 5 of 2018 at present. Confirmation by the NCTA on what was carried out before the enactment of Law no. 5 of 2018 then becomes an affirmation to include the norms of article 43D paragraph (2) letter f of Law No. 5 of 2018. In addition, it is known that the subject of people or groups of people who have been exposed to the radical ideology of Terrorism is classified as a middle level (number 2 of 3 – or yellow) which means a person who has not committed the crime of terrorism but has been “exposed”. This is provided in order for the subject to repent.

Furthermore, the drafting team includes an explanation of the subject of a person or group of people who have been exposed in the explanation of Article 43D Paragraph (2) letter f of Law No. 5 of 2018 which is defined as a subject that has 2 characteristics, namely:

1. Possess radical ideology of terrorism; and
2. Potential to commit criminal act of terrorism.

Observing those two characteristics stated in the explanation of Article 43D paragraph (2) letter f, there are essentially differences in meaning from what was confirmed by NCTA in the special committee meeting for drafting Law No. 5 of 2018 mentioned previously. Before the enactment of Law no. 5/2018, as conveyed by Prof. Irfan Idris, the deradicalization program that aimed at families is the subject of "families classified as exposed" and has a direct relationship with the perpetrators of the criminal act of terrorism. However, the family subject referred to by Prof. Irfan Idris is not normalized in a concrete way but only provides an explanation by mentioning only 2 characteristics of "been exposed", as if the subject of deradicalization can be applied entirely to the public in general, not only to the subjects of exposed family.

3.3. Mandate from Article 43D Paragraph (3) of the Law No. 5 of 2018

Pasal 43D ayat (7) UU No. 5 Tahun 2018 mengamanatkan agar ketentuan pelaksanaan deradikalisasi diatur dalam Peraturan Pemerintah. Selanjutnya pada tanggal Pengaturan tentang subjek deradikalisasi terhadap orang atau kelompok orang yang sudah terpapar juga dapat ditemukan dalam peraturan pelaksanaannya. Subjek orang atau kelompok orang yang sudah terpapar Paham radikal Terorisme sebagaimana tercantum dalam penjelasan Pasal 30 ayat (1) PP No. 77 Tahun 2019, disebutkan yakni:

Article 43D paragraph (7) of Law no. 5 of 2018 mandates that the provisions for the implementation of deradicalization are regulated in a Government Regulation. Furthermore, on the regulations regarding the subject of deradicalization for people or groups of people who have been exposed can also be found in the implementing regulations. Subjects of people or groups of people who have been exposed to the radical ideology of terrorism as stated in the explanation of Article 30 paragraph (1) of Government Regulation No. 77 of 2019 stated as follows (Kholer, 2017):

“What is meant by "people or groups of people who have been exposed to the radical ideology of Terrorism" include, among others, husband/wife/children, family, individuals or groups involved in Terrorism organizations in foreign countries or persons/groups of people designated as terrorist suspects based on court decisions.”

Thus the subject of deradicalization can be described as follows (Sub-Directorate of Society, 2020):

1. Husband/wife/children involved in Terrorism organizations in other countries;
2. The families involved in Terrorism Organizations in other countries;
3. Individuals or groups involved in Terrorism Organizations in other countries; and
4. Suspected terrorists based on court decisions.

With regard to beliefs/ideology/understanding, in the field of terrorism criminal law can be found the norms of article 43D paragraph (3) letter f of Law no. 5 of 2018 which mandates that people who have been exposed to radical ideology of terrorism can be deradicalized. The explanation to what is meant by a person who has been exposed is a person who possesses radical ideology of terrorism and has the potential to commit a criminal act of terrorism, one of the characteristics of which is the belief to resort to violent means in spreading his belief.

Conclusion

In a broad sense of law enforcement, law enforcers in the field of terrorism today not only involves regular law enforcers such as police, prosecutors and judges, but also involves other kind of law

enforcers which called the *peace maintenance* such as NCTA. *Peace maintenance* which is given the authority to determine the subject of people who have been exposed to radical ideology of terrorism has not been guided by clear parameters for how it works and its measuring parameters. In fact, what is measured is a belief (known in criminal law as *mens rea*) that has not been manifested into real actions (*actus reus*).

This ambiguity of norms is the result of placing deradicalization as a means of prevention rather than as a means of intervention. However, the *peace maintenance* body that works in the scope of prevention has not been equipped with adequate provision, even simply with access to justice by the law itself. The guarantee of human rights in the implementation of deradicalization becomes a mere metaphor which essentially has not been contained in legal norms in the field of deradicalization for the subject of people who have been exposed to radical ideology of terrorism.

If deradicalization is maintained as a preventive tool, it is not sufficient to include only a few articles. The legal system must be created for the realization of justice which is the same with other areas of law. The legal system must be made by containing clear rules and protecting freedom and justice for all Indonesians through clear parameters to ensure rational investigation procedures, so that *peace maintenance* officers have a strong legal basis in enforcing the law.

References

- Alqurtuby, S. (2009). *Jihad Melawan Ekstrimis Agama*. Semarang, Borobudur Indonesia Publishing.
- Arief, B.N. (2010). *Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep KUHP Baru)*. First Edition, Second Printed, Jakarta, Kencana Prenada media Grup.
- House of People Representatives of the Republic of Indonesia. (2017). *Proceeding of Task Committee Meeting on the Criminal Act of Terrorism*, Jakarta, 22 February 2017.
- Golose, P.R. (2010). *Deradikalisasi Terorisme: Humanis, Soul Approach dan Menyentuh Akar Rumput*, PTIK. Jakarta, Grafindo Jaya.
- Kohler, D. (2017). *Understanding Deradicalization: Method, Tools, and Programme, For Countering Violence Extremism*. Oxford.
- Marzuki, P.M. (2011). *Penelitian Hukum*. Jakarta, Kencana Prenada Media.
- Sandler, T. (2005). *Collective Versus Unilateral Response to Terrorism*. *Public Choic*, Vol. 124, 75-93. <https://doi.org/10.1007/s11127-005-4747-y>
- Sub-Directorate of Society, Directorate of Deradicalization of BNPT. (2020). *Instrumen Penelitian Alat Ukur Radikalisasi (AKURAD)*. Jakarta, BNPT.
- Shodiq, M.D. (2018). *Paradigma Deradikalisasi Dalam Perspektif Hukum*. Jakarta, Pustaka Harakatuna.
- Usman, A.H. (2014). *Kesadaran Hukum Masyarakat dan Pemerintah Sebagai Faktor Tegaknya Negara Hukum di Indonesia*. *Jurnal Wawasan Yuridika*, 30(1), 26-53. DOI: <http://dx.doi.org/10.25072/jwy.v30i1.74>

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).