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Customary Law and Islamic Law Existence in the Reform of National Criminal Law

Rossa Ilma Silfiah[1], Suwardi[2], Khoirul Huda[3], Indratirini[4]
[1] Yudharta University, Pasuruan, Indonesia, rossa@yudharta.ac.id
[2] Narotama University, Surabaya, Indonesia, suwardi@narotama.ac.id
[3] Yudharta University, Pasuruan, Indonesia, hudarecht@yudharta.ac.id
[4] Narotama University, Surabaya, Indonesia, indratirini1956@gmail.com

Corresponding Author: rossa@yudharta.ac.id

Abstract: The existence of criminal law is a necessity for a nation to regulate the lives of its citizens. Indonesia is a constitutional state that has experienced a long legal history. Prior to the independence, the Indonesian people were familiar with the customary laws and religious laws of each resident. Customary Law and Islamic Law were jointly obeyed by the people at that time. As a living law, both are the solution for society in facing legal disputes. It is not surprising, then, that besides Positive Law, which is known to originate from Western/Colonial Law, Islamic Law and Customary Law have a higher bargaining position. So that in the establishment of National Law, Islamic Law and Customary Law become material sources for the establishment of a positive law. The formation of national law, therefore, including criminal law, really needs the contribution of Islamic law, in addition to customary and western law. The history of the development of criminal law in Indonesia is colored by Islamic values, because the socialization process of Islamic law is integrated with the development of customs in resolving criminal cases.

Keyword: Criminal Law, Custom, Islamic Law.

INTRODUCTION

Indonesia is one of states in the world that adhere to the state constitution. The existence of a constitution is a derivative or a consequence of the rule of law theory. Understanding the rule of law cannot be separated from the concepts of Rechtsstaat and The Rule of Law. The definition of a rule of constitutional state according to Aristotle (284 – 322 BC) is associated with a state which in its formulation is still bound to “Polis”, a small state with a small population, unlike most countries today, which have a large area and a large population. In the Polis, all matters are resolved by deliberation (ecclesia), in which all citizens take part as administrators of the state.

Constitutional state is defined as a state that stands above the law that guarantees justice to its citizens. Justice is a requirement for the achievement of the happiness of its citizens by teaching every human being a sense of morality in order to become a good citizen. Aristotle taught that those who rule in a state are not actual human beings, but that

the state is controlled by just ideas/concept/thoughts, while the ruler is just the holder of law and balance. (Kusnadi & Ibrahim, 1988)

AV theory. Dicey regarding the Rule of Law emphasizes three main benchmarks or elements: first: the rule of law, second: equality before the law, third: a constitution based on individual rights. (Azhary, 2001) At the same time, Julius Stahl with the Rechtstaats theory classifies a rule of constitutional state with four main elements: First: the recognition and protection of human rights, second: the division of powers, third: the government organized based on law, and fourth: the existence of state administrative courts.

Pancasila Constitutional State is the foundation for the absolute argument for the existence of religion in the land of Pancasila because the First Precept of Pancasila is the spirit of the other precepts, and underlies the founding of the Unitary State of the Republic of Indonesia. Padmo Wahyono stated more clearly about the origins of the Indonesian state, which stated that the Indonesian state does not regard the state as a state resulting from a community agreement from free individuals or from "naturalist" status to "civil" status with protection against civil rights.

Pancasila Constitutional State was born in a relationship or existence with God, as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia "by the grace of the Almighty Allah and driven by the lofty desire to live a free national life...". Padmo Wahyono eventually provided the formulation of the state according to the Indonesian people as follows:(Azhary, 2001) "A group life for the Indonesian Nation, thanks to the grace of God Almighty and driven by the lofty desire to live a free national life in the sense of being independent, sovereign, united, fair, and prosperous". The gratitude to God Almighty expressed by the Indonesian people for the independence it has obtained takes precedence over community agreements. Because the Indonesian warriors acknowledged that all the hard work they had put into achieving independence would not have been successful without the blessings of God Almighty. The same thing was also stated by Moch. Natsir in his Speech in Karachi, 9 April 1952:

"So is Indonesia an Islamic State by the fact that Islam is recognized as the religion of Indonesia people though no express mention is made in one constitution to make it the states religion. But neither has Indonesia excluded religion. In fact it has ut the monotheistic creed in the one and only God, at the head of Pancasila. The five Principles adopted as the spiritual, moral and ethical foundation of the state and nation."

The close relationship between the state and religion (interrelationship) revealed in the statements above has absolute consequences for the Indonesian nation so that it provides a real space for the protection of religion and religious life in Indonesia. Oemar Seno Aji, in relation to the Development of Criminal Acts Against Religion and Religious Life, gave a statement in a questioning tone, as follows: (Sjadzali, 1990)

"Is it not the recognition of the Precept of Belief in the One and Only God as the causa prima in our Pancasila State, the Constitution with its Article 29, which must be the basis for religious life, and which constitutes a continuum and inspirits the Constitution, justifying and obligating the creation of these religious offenses?"

The National Criminal Law reform policy is an inseparable part of social policy in general. This is because the existence of criminal law is also heavily influenced by social changes in society. The Criminal Code currently in force in Indonesia is a colonial legacy that is obsolete and out of context in the current era, even though there have been changes or additions to provisions made by the government regarding certain articles. So it is necessary to carry out a comprehensive reform, so that the enforcement of criminal law is in accordance with its purpose, specifically protecting society and social welfare. The legal politics of penal law reform in Indonesia can be studied starting from the colonial period which also coincided with the Dutch East Indies Government, the people had obeyed the local Customary Law. Reconstruction of criminal law covers a wide range of fields. As a

system, the Criminal Law System includes renewal of legal substance, legal structure, and legal culture. The legal substance includes material criminal law both in the Criminal Code and outside the Criminal Code. The structure of criminal law includes reform or arrangement of institutions, management and procedures as well as facilities and infrastructure in the context of enforcing criminal law. The culture of criminal law is the legal awareness of society and legal education. From this legal culture, it will be seen that the process of the Indonesian people in resolving criminal incidents since the colonial period also complied with their respective customary laws. Therefore, from this study, legal values in line with the spirit of the Indonesian nation can be explored.

METHOD

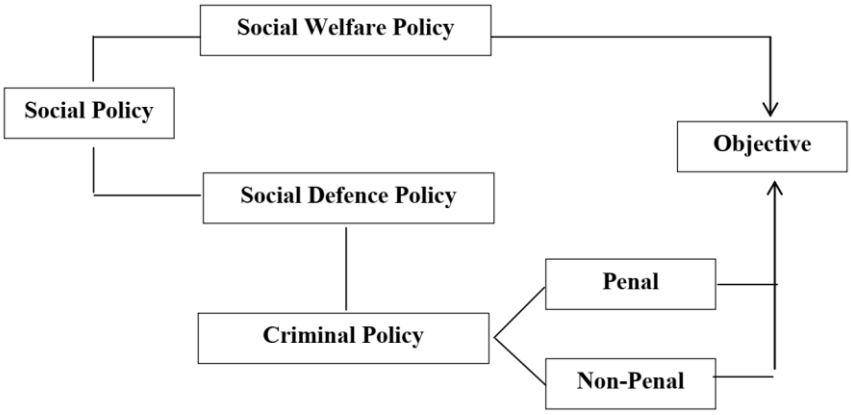
This research applied Normative Research Method, which examined the norms and principles of criminal law reform. Research on legal norms and principles is also known as doctrinal research. (Sunggono, 2002) This doctrinal research will be reflected in efforts to inventory the positive laws, and efforts to discover the principles and philosophical foundations (dogmas and doctrines) that lie behind them. Therefore, this research was also examined with a historical approach to determine the history of Criminal Law and the beginning of the National Criminal Law reform.

RESULTS AND DISCUSSION

The National Criminal Law reform policy is an inseparable part of social policy in general. This is because the existence of criminal law is also heavily influenced by social changes in society. The Criminal Code currently in force in Indonesia is a colonial legacy that is obsolete and out of context in the current era, even though there have been changes or additions to provisions made by the government regarding certain articles. So, it is necessary to carry out a comprehensive reform to make the enforcement of criminal law is in accordance with its purpose, specifically protecting society and social welfare. The legal politics of penal law reform in Indonesia can be studied starting from the colonial period which also coincided with the Dutch East Indies Government, the people had obeyed the local Customary Law. Reconstruction of criminal law covers a wide range of fields. As a system, the Criminal Law System includes renewal of legal substance, legal structure and legal culture. The legal substance includes material criminal law both in the Criminal Code and outside the Criminal Code. The structure of criminal law includes reform or arrangement of institutions, management and procedures as well as facilities and infstructure in the context of enforcing criminal law. The culture of criminal law is the legal awareness of society and legal education. From this legal culture, it can be seen that the process of the Indonesian nation in resolving criminal incidents since the colonial period also complied with their respective customary laws so that from this study it could be explored legal values that were in accordance with the soul of the Indonesian nation.

Broadly speaking, legal policies and legal reforms really consider the public/society interests. In the study of Islamic law, there is the rule of ushul fiqh which states that *tasharruful imaam 'alarra'iyyah manuthun bil-mashlahah*, which means that a leader's policy for his people must consider the benefit of society at large. The benefit in this case includes people's welfare, and people's welfare will be achieved by eliminating harm/damage, one of which is manifested in criminal law enforcement.

Crime prevention policies or efforts are essentially an integral part to protect society (social defense) and to achieve social welfare. Therefore, the ultimate goal of criminal law policy is the protection of society in order to achieve social welfare. It can also be said that basically criminal law policy is also an integral part of social politics, specifically policies or efforts to achieve social welfare. As the following chart shows: (Arief, 2014)



Source: *Bahan Hukum Sekunder, Barda, 2014*

Chart 1 Criminal Law Policy

Prof. Sudarto put forward three meanings regarding criminal policy: (Arief, 2014)

1. In a narrow sense, it is the entire principle and method that forms the basis of reactions to violations of law in the form of crimes.
2. In a broad sense, it is the overall function of the law enforcement apparatus, including the workings of the judiciary and the police
3. In the broadest sense (which is taken from Jorgen Jepsen), is the whole policy, which is carried out through legislation and official agencies, which aims to uphold the central norms of society.

According to Soedarto, there are three reasons underlying the reform of the National Criminal Law, namely: Political reasons, Sociological reasons and Practical reasons. Politically, it is fair that the State of Indonesia has a national Criminal Code, which will be a source of pride as an independent state and break away from colonialism. Sociologically, a Criminal Code is generally a reflection of the cultural values of a nation, because it contains provisions regarding prohibited actions and sanctions for those actions. The official text of the current Criminal Code is in Dutch. This fact practically cannot be implemented effectively, because there are fewer and fewer law enforcers. (Ruba'i, 2002)

Relations between Religion and State

Religion referred to in the Pancasila Constitutional State as set out in the Elucidation of Article 1 of the Law. No. 1 PNPS of 1965 on the Prevention of Misuse and Blasphemy of Religion is Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucius. This is based on evidence that the six religions have grown and developed and are embraced by almost the entire population of Indonesia. This does not mean that other religions, for example: Judaism, Zarazustrian, Shinto, Thaoism are banned in Indonesia. They receive guarantees as provided in Article 29 paragraph 2, and are allowed to exist as long as they do not violate the provisions contained in the legislation.

The correlation between the state and religion in Indonesia can be seen from the existence of religious institutions, laws, and regulations related to religion or religious life, and other policies related to religious life. The correlation between the state and religion in practice has been seen in the activities of state administration as expressed by the state officials, such as reciting prayers at ceremonial events and praying in congregation for those who are Muslim.

The following will briefly describe the government's efforts in physical and non-physical development related to religion and the continuity of religion in Indonesia, especially Islam. This is intended as a form of state responsibility in providing protection to the citizens in carrying out worship according to religious teachings in Indonesia. The existence of religious institutions: the ministry of religious affairs, religious education

institutions both formal and non-formal, such ***Madrasah*** (Islam School) and ***Pesantren*** (Islamic Boarding School) that have been existed before Indonesia's independence.

The Religious Court Institution was also formed in 1830. It was held by the princes and had existed in Java since the 16th Century under the supervision of the Colonial Court. (Suntana, 2014) In 1882, the Colonial Government administered the Religious Court through the determination of the King of the Netherlands which was contained in Staatsblad 1882 Number 152 which regulated that a Religious Court was carried out in Java and Madura called the ***Presterraad***. (Suntana, 2014) The cases that fall under the authority of the Religious Court are; marriage, guardianship, inheritance, grants, endowments, zakat, and treasury. The existence of the Religious Court is increasingly emphasized by the existence of Law Number 7 of 1989 on Religious Courts.

Other religious institutions namely; The Indonesian Ulema Council was founded during the reign of President Soekarno. Initially, the West Java Ulema Council was established in July 1958. The Ulema Council at the central level was founded in 1962, then continued with the formation of Ulema Council in other provinces. In 1975, a new version of the Ulema Council was formed called the Indonesian Ulema Council (***Majelis Ulama Indonesia: MUI***). (Sukardja, 2012)

Products of laws and regulations related to religion include; Marriage Law No. 1 of 1974 has stipulated positioning religion as a legal determinant of a marriage, as formulated in Article 2. So marriages in Indonesia adhere to religious marriages (marriage based on religion). Inheritance Law is also regulated in the Compilation of Islamic Law compiled in the Second Book. This Inheritance Law is compiled based on Faraidl Science, specifically knowledge about the provisions of inheritance allocation according to Islamic Law. (Sukardja, 2012) Waqf has also been regulated in this Compilation of Islamic Law. The first zakat regulation in Indonesia was Ministry of Religious Affairs Circular Letter No.A/VII/17367 of 1951 which continued the provisions of the Dutch ordinance that the state did not interfere with the collection and allocation of zakat, but only supervised it. https://pujohari.wordpress.com/2009/09/15/sejarah-pengelolaan-zis-di-indonesia/)

In 1990s, there was a change in the government's manner towards the management of zakat. In 1991 the government issued a Joint Decree of the Minister of Home Affairs and the Minister of Religious Affairs of the Republic of Indonesia Numbers 29 and 47 of 1991 on the Development of Indonesia's National Zakat Agency and Instruction of the Minister of Home Affairs Number 7 of 1998 on the Development of Indonesia's National Zakat Agency. Eventually in 1999, the government issued Law Number 38 of 1999 on Zakat Management which is now being revised by Law Number 23 of 2011.

The Hajj pilgrimage is regulated in Law Number 13 of 2008 on the Hajj Pilgrimage Management, explaining that the policies and implementation of the Hajj pilgrimage management is a national duty and is the government responsibility (article 8 paragraph 2). On that basis, the government is obliged to carry out guidance, service, and protection by providing facilities, convenience, security, and comfort needed by every citizen (Muslim) who will perform the hajj pilgrimage.

This law on the prevention of abuse/blasphemy of religion is a small part of the criminal law policy in general. If we take a closer look, this law is the key to the security of the religious life implementation. Criminal law policy is essentially an integral part of social policy in general in a country. Specifically, the policy is intended as an effort to realize social welfare. In the Resolutions of the People's Consultative Assembly (TAP MPR) Number VII/MPR/2001 on Indonesia's Future Visions, Article 2 Chapter IV point 1, it has been stated that Indonesia's 2020 Visions are:

1. The realization of a society that has faith, is pious, has noble character so that religious teachings, especially those that are universal in nature and noble cultural values, specifically honesty, are internalized and practiced in their daily behavior.

2. The realization of tolerance among fellow believers and among religious believers.
3. The realization of respect for human dignity.

History of Criminal Law in Indonesia

Pre-Dutch Colonial Period

Discussion of the history of criminal law cannot be separated from the discussion of law history in general in Indonesia. This is important, because to discuss it in depth and comprehensively, it must begin with the history of the law itself. For this reason, we will discuss legal developments that evolved in Indonesia before the independence. In the history of Nusantara law, it has been widely studied that the beginning of the existence of law in Indonesia was colonial. In fact, before colonialism entered Indonesia, the Indonesian people had adhered to their respective religious laws and customary laws.

References discussing the implementation of Customary Law and the implementation of Religious Law, including Islamic Law were scarcely any at that time. So it is as if the law in this country only existed after the Dutch arrived. Writing and research on the development of law in the archipelago kingdoms associated with the Dutch presence was minimal. Therefore, it can be said that there is no record of the legal situation in this independent state/kingdom in Indonesia, either after the arrival of the Dutch or before. (Soepomo, 1983)

Before the arrival of Islamic Law in the VII century and the arrival of the Dutch around the XV century, according to R. Tresna, the Indonesian people were already familiar with Pradata Court and Padu Court. In terms of legal material, the Pradata Court was sourced from Hindu Law, while Padu Court was sourced from original Indonesian Law. Apart from having different sources, the two courts also have different jurisdictions. The Pradata Law rules were described in papakem or written law, while the Padu Law rules were based on customary law in daily practice, so it was not written down. (Thesna, 1978) The Pradata Court deals with matters being the king's concerns, while the Padu Court deals with matters that are not the king's concerns. The two kinds of justice arose as a result of the influence of Hindu civilization that entered Indonesia. This can be traced through the use of the term Jaksa (Prosecutor) that comes from India. This term was at that time given to the Officer who ran the court.

The word Padu, as in the ***Padu Court***, means meet or face-to-face. Padu is a meeting forum for disputing parties, or in full it is called the Perpaduan (Unification) Court. This means that the settlement of cases peacefully by two disputing parties and other related parties by means of deliberations, witnessed by customary leaders or religious leaders and led by the Head of the Customary Fellowship, based on the genealogical composition of society (patrilineal, matrilineal, parental) or community territorial (village, clan, nagari, curia, province, and so on). (Hadikusuma, 1978) Thus, it can be concluded that the Padu Court works in rural areas under the leadership of Village Head or Headman, assisted by customary leaders and religious leaders, who are overseen by royal officials called Jaksa (Prosecutor).

The types of cases that were resolved peacefully through the Padu Court were civil and light criminal cases. These civil cases include: disputes in the field of land, accounts payable, leasing, marriage, and inheritance. Meanwhile, the minor criminal cases handled were theft, fraud, humiliation, and persecution. For Serious Criminal Cases which can result in disruption of public order, or reduce the dignity of the king and the kingdom, such as murder, robbery, arson, and rebellion, were handled by the prosecutor and tried by the ***Sitinggil Court*** or the ***Surambi Court***.

During the reign of Sultan Agung in Mataram in 1613-1645, the ***Pradata Court*** which was originally held in Sitinggil and carried out by the King, changed to the Surambi Court, because it was held in Surambi (porch) of the Great Mosque. In principle, the court leader was the Sultan, but practically it was carried out by the Penghulu (headman) who was accompanied by several muslim theologian in Islamic boarding school environment as

members of the assembly. The decision of Surambi Court served as advice for the Sultan. When Amangkurat I succeeded Sultan Agung in 1645, the Pradata Court was revived to reduce the muslim theologian role in the court, so that the king himself presided over the court. (Basri, 1998)

The Village Court received formal juridical recognition in 1935, through Staatsblad 1935 No. 102. By this acknowledgment, Article 3a paragraphs 1, 2, and 3 RO were added. In Article 1 paragraph (1) of the Law Drt. No. 1 of 1951, it was stipulated that the Customary Court would be gradually abolished. However, the rights and powers that have been granted to the Village Peace Judge will not diminish. Thus, the Village Peace Judge role is still recognized by laws and regulations. (Basri, 1998)

The historical sequence of Criminal Law in Indonesia cannot be separated from the development of original Indonesian law, known as Customary Law. In the following periods, specifically in VII century, the arrival of Islam to Indonesia as well as the public's respect for religion at that time were quite influential. Accordingly, it supported Islamic values to grow by the time in the life of its adherents and blended with the original Indonesian law. This will be discussed in the next section regarding the existence of Islamic law in Indonesia.

According to R. Tresna, the coming of Islam to Indonesia led to a change in the legal system. Islamic Law not only succeeded Hindu Law, called Pradata Law, but also introduced its influence into various aspects of people's lives in general. Even though Customary Law also showed its existence, Islamic Law had spread among its adherents, especially Family Law. These are a few sociological facts about the existence of Islamic law which developed side by side with Customary Law during the pre-colonialism period.

Dutch Colonial Period

The explanation in the pre-colonial period shows that the Indonesian people before being colonized by the Dutch were familiar with the law, known as Customary Law and Islamic Law for adherents of Islam. Customary Law has reflected local wisdom in responding to the norms that lived in society with the influence of Hinduism and Islam at that time. In Cirebon it was known as Papakem Cirebon, in Betawi it was known as Statuten van Batavia. Soepomo explained, during the Dutch colonial period, there were five judicial arrangements: (Basri, 1998)

1. **Gubernemen Court**, spread throughout the “Dutch East Indies”
2. **Indigenous Justice**, spread outside Java and Madura, specifically the Residencies of Aceh, Tapanuli, West Sumatra, Jambi, Palembang, Bengkulu, Riau, West Kalimantan, South Kalimantan and East Kalimantan, Manado and Sulawesi, Maluku and Lombok island from Residencies of Bali and Lombok
3. **Swapraja** (Autonomous Region) Court, spread in almost all autonomous regions, except in Pakualaman and Pontianak.
4. **Religious Court**, spread in areas where the Gubernemen Court was domiciled. In areas that become part of the Indigenous Court or in autonomous regions and become part of the Swapraja Court.
5. **Village Court**, scattered in the areas where the Gubernemen Court was domiciled. Village Court was part of Indigenous Court or Swapraja Court.

According to Utrecht, the laws that applied in the VOC's territory were: Statuten van Batavia Law (1642), Old Dutch Law, Roman Law Principles. The relationship between the old Dutch law and the Statuten van Batavia was as a complement, if the statute could not solve the problem, then the old Dutch law was applied. Meanwhile Roman Law applied to regulate the position of slaves (Slaven Recht). (Hamzah, 1991)

From 1811 to 1814, Indonesia fell into British hands. However, based on the London Convention of 13 August 1814, the former Dutch Colony was returned to the Netherlands. In order to avoid regulatory gaps due to the transfer of power, the Proclamation of August 19,

1816, Stbl. 1816 Number 5 which says that for the time being all the regulations of the former British Government will be maintained. At that time, the Statuten van Batavian was still valid, and for Indigenous Criminal Customary Law was still recognized as long as it did not conflict with legal principles recognized by the government, as well as statutory regulations from the Government.

The codification of Criminal Law first occurred with the existence of Crimineel Wetboek voor het Koninglijk Holland 1809, which contained: (Hamzah, 1991)

1) Granting freedom to judges in imposing criminal sanctions
2) Special provisions for juvenile offenders
3) Elimination of general deprivation

This codification was very brief, due to the arrival of France with the Penal Code which was implemented in the Netherlands in 1811. The Penal Code reintroduced general deprivation, which was different from the 1809 Codification. With Gouv, Besluit December 11, 1813, several changes were made, for example regarding general deprivation, but it was reintroduced geseling. Execution of capital punishment in the France way was replaced by hanging according to the Old Dutch System.

Prof. Mr. J.E. Jonkers in his book Het Nederlandsch-Indische Strafstelsel, published in 1840, as quoted by Wirjono Prodjodikoro, stated: “De Nederlander, die over wijde zeeen en oceanen baan koos naar de koloniale gebieden, nam zijn eigenrecht mee”. (The Dutch people who passed through the seas and oceans had a way to settle in their colonies, bringing their own laws to apply to them). (Prodjodikoro, 1989) So during the Dutch colonial period in Indonesia, since everything had legal dualism;

1) The Criminal Law Regulations applied to Dutch people and other Europeans, and were a copy of the law in the Netherlands, based on the Word of the King of the Netherlands on February 10, 1866 No. 54 (Staatsblad 1866 No. 55), which entered into force January 1, 1867.
2) For Indonesians and Foreign Easters (Chinese, Arabs and Indians/Pakistani), separate laws applied which were different from the laws for the Dutch in Indonesia. It is contained in the Ordinance of May 6, 1872 (Staatsblad 1872 No. 85) which entered into force on January 1, 1873.

The Criminal Code that applies to the European Group was a copy of the Penal Code that applied in the Netherlands. However, it was different from the source, what applied in Indonesia consisted of 2 (two) books, while the Penal Code consisted of 4 (four) books. The Criminal Code that applied to the Bumiputera Group was also the same as that which applied to the European Group, but the sanctions for the Bumiputera Group were more severe. (Hamzah, 1991)

The Dutch continuously made changes in an effort to create a National Criminal Code, but to no avail. In the end, with the KB on September 28, 1870 a State Committee was formed which finalized the draft in 1875. In 1879, Minister Smidt sent the draft on it to Twee-de Kamer. It was debated in the Staten General with Minister Modderman who was previously a member of the State Committee. On March 3, 1881 the new Dutch Criminal Code was born, and applied from September 1, 1886.

After the new Criminal Code took effect in the Netherlands, in 1886 the Dutch government wanted to change the legal dualism that was in force in the Dutch East Indies. The Dutch East Indies Criminal Code 1866 (Dutch and European groups) and 1872 (Foreign Easterners and Bumiputera), need to be replaced and adapted to the new Dutch Criminal Code. Based on the Concordance Principle according to Article 75 Regeling Reglement, and Article 131 Indische Staatsregeling, the new Dutch Criminal Code must also be enforced in its colonies such as the Dutch East Indies with adjustments to local circumstances. (Hamzah, 1991)

Minister Idenburg completed his duties in 1913, with the KB on October 15, 1915 and promulgated in September 1915 Number 732. Thus, the new Wetboek van Strafrecht voor Nederlandsch-Indie was born for all groups of the population. So, the WvSI came into effect on January 1, 1918. (Hamzah, 1991) Even though the unification of Criminal Law was not a new thing for the Indonesian at that time, because the Betawi Statute in 1642 applied to all residents.

Japanese Occupation Period

During the Japanese occupation, WvSI was still enforced in accordance with Article 3 of the Osamu Serei Law No. 1 of 1942, which came into effect on March 7, 1942 as the Transitional Regulations for Java and Madura, namely: (Hamzah, 1991) "All government agencies and their powers, statutory laws from the former government are still recognized as valid for the time being as long as they do not conflict with the rules of the military government".

So, only the articles relating to the Dutch Government were still valid, for example the mention of the king/queen which was no longer valid. This regulation was also published outside Java and Madura. Compared to the Material Criminal Law, the Criminal Procedural Law had changed more, due to the Unification of Procedural Law and Judicial Structure. WvSI was called as Too Indo Keihoo by the Japanese.

Independence Period

On August 17, 1945, the Republic of Indonesia was proclaimed, and it did not yet have a Constitution. A day later, on August 18, 1945, the Preparatory Committee for Indonesian Independence (PPKI) ratified the 1945 Constitution as the state constitution. (Kusnadi & Ibrahim, 1988) Before being amended, Article II of the Transitional Rules of the 1945 Constitution stipulated that: "All existing state agencies and regulations are still valid as long as new ones have not been enacted according to this Constitution". Article IV of the Transitional Rules of the 1945 Constitution stipulated that: "According to this Constitution, the People's Representative Council and the Supreme Advisory Council are established before the People's Consultative Assembly, all powers are executed by the President with the assistance of a Central National Committee".

By this regulation, on October 10, 1945, the President issued Regulation no. 2 which stipulated as follows: "For public order, based on the Transitional Rules of the Constitution of the Republic of Indonesia Article II relating to Article IV, we, the President, stipulate the following regulations: "All state agencies and existing regulations until the establishment Republic of Indonesia on August 17, 1945, as long as a new one has not been promulgated according to the Constitution, it is still valid. As long as it does not conflict with the Constitution." (Prakoso, 1986)

Thus, the existence of Wetboek van Strafrecht Voor Nederlandsch Indie (W.v.S.N.I) is still valid in Indonesia. In 1946 its existence was strengthened by the issuance of Law Number 1 of 1946. (Ali, 2015) Laws have been promulgated by the Government of the Republic of Indonesia in Yogyakarta to abolish all criminal regulations issued by the Japanese occupation government, which were previously maintained by the Transitional Provisions of the 1945 Constitution of the Republic of Indonesia and by Government Regulation No. 2 of 1945. Criminal regulations from the Japanese side were not desired by the Government of the Republic of Indonesia. Therefore, the Government of the Republic of Indonesia decided to return to the criminal law that was in effect before the Japanese occupied Indonesia. This is stipulated in Article I of Law no. 1 of 1946, which reads: "By deviating as necessary from the government regulation of the Republic of Indonesia dated October 10, 1946 No. 2, stipulates that the criminal law regulations currently in effect are the criminal law regulations that existed on March 8, 1945." (Prakoso, 1986)

However, the Dutch East Indies Legal System was not simply accepted as Indonesian criminal law, but various changes were made, which were also made by Law no. 1 of 1946. Wetboek van Strafrecht Voor Nederlandsch Indie which took effect on March 8, 1942 was changed to Wetboek van Strafrecht, which is also called the Criminal Code. The contents of which have also undergone several changes based on Law no. 1 of 1946, which took effect from January 1, 1918.

Wetboek van Strafrecht Voor Nederlandsch Indie is a copy of the Wetboek van Strafrecht Netherlands which was completed in 1881 and took effect in 1886. It also originates from the French Penal Code, because the Netherlands became part of France by Emperor Napoleon Bonaparte since 1810. The area and validity period of Law Number 1 of 1946 can be seen in Article XVII as follows: "This law comes into force for the islands of Java and Madura only. For Sumatra Island, it comes into force on August 8, 1946 based on Government Regulation no. 8 of 1946." From the agreement of the Round Table Conference in Den Haag in 1948, Law Number 73 of 1958 was promulgated on September 29, 1958 regarding the validity declaration of Law Number 1 of 1946 as a criminal law regulation for the entire territory of the Republic of Indonesia, and this law simultaneously changed the Criminal Code. (Prakoso, 1986)

National Criminal Law Reform

Criminal law reform (Penal Reform) can be interpreted as an effort to replace a positive legal order that is not corresponding to social changes and people's aspirations regarding the new legal order that is aspired to, must be in line with the needs of society and the times. However, a state's Criminal Code is an expression of its civilization. Legal order reform is a fundamental and rational amendment.

Referring to the notion of legal reform, Criminal Law Reform is an effort to reform the Positive Criminal Law order (Ius Constitutum) with the desired criminal law order (Ius Constituendum). Ultimately, criminal law reform (Penal Reform) must be realized through criminal law policy/politics (Penal Policy).

Criminal law reform is closely related to the background and urgency of criminal law reform itself, specifically an attempt to reorient and reform criminal law in accordance with the central socio-political, socio-philosophical, and socio-cultural values of Indonesian society which underlies social policy, criminal policy, and law enforcement policy in Indonesia. Thus, criminal law reform must be pursued with a policy-oriented approach and a value-oriented approach. (Arief, 2014)

The policy-oriented approach can be viewed from three parts: First, as part of social policy, criminal law reform is essentially part of efforts to address social problems. It covers all activities of human life in meeting needs and individual existence in society. So that this social policy is a preventive effort in protecting the society to maintain public order.

Second, as part of criminal policy, criminal law reform is essentially part of efforts to protect the society. Society as a whole has the same needs, specifically primary, secondary, and tertiary needs. In addition, they also have psychological needs to feel safe, to feel respected, as well as the need for self-expression and existence in society. So, this criminal policy is a repressive effort carried out by the state.

Third, as part of law enforcement policies. Criminal law reform is essentially part of efforts to reform legal substance in order to make law enforcement more effective. In relation to this discussion, this third part is the most important part, because law enforcement is a process of change as well as legalization.

CONCLUSION

Customary law and Islamic law in the history of national law establishment is an inevitability for the Indonesian people. This study is found more in Civil Law than Criminal

Law. Because the application of Islamic criminal law does not stand alone as the application of private/civil law for Muslims. The implementation of Islamic criminal law can be seen from the role of customary leaders in resolving criminal cases with several Muslim theologian during the pre-colonial period. Prior to the existence of Islamic Law in the VII century and Dutch colonialism around the XV century, Indonesian people were already familiar with Pradata Court and Padu Court.

Pradata Court deals with matters being the king's concerns, while Padu Court deals with matters that are not the king's concerns. These courts were affected by Hindu civilization that entered in Indonesia. The word Padu, as in the Padu Court, means meeting. Padu is a meeting forum for disputing parties, or in full it is called the Unification (Perpaduan) Court. This means that the settlement of cases peacefully by the two disputing parties and other related parties by way of deliberations, witnessed by customary leader or religious leaders and led by the Head of the Customary Fellowship, based on the genealogical composition of society (patrilineal, matrilineal, parental) or community territorial (village, clan, nagari, curia, province, and so on).

The history of the development of criminal law and criminal justice ultimately adapted to national conditions and world developments. As a nation with the ideology of Pancasila, the National Criminal Law is a window into the civilization of the Indonesian nation. Criminal law reform, in addition to taking a policy-oriented approach, is also carried out using a value-oriented approach. This value-oriented approach includes efforts to review and evaluate the socio-political, socio-philosophical, and socio-cultural values underlying the desired normative and substantive content (ius constituendum).

Criminal law policy/politics (penal policy) can be interpreted as a rational effort to trun back crime using criminal law means. The definition of criminal law policy according to legal political perspective has two meanings; *first*, efforts to realize good regulations in accordance with the existing circumstances and situations. (Sudarto, 1981) *Second*, the state's policy through the authorized agency to establish the desired regulations and is expected to be used to express what is contained in society and to achieve what is aspired to.

From this legal political perspective, implementing criminal law policies means holding elections to achieve the best outcome of criminal law legislation in terms of fulfilling the requirements of justice and efficiency. In addition, implementing criminal law policies can also mean efforts to realize criminal laws and regulations in accordance with the circumstances and situation existing and in the future.

In a value perspective, criminalization is a change in values that causes a number of actions that were previously blameless and not criminally prosecuted, to turn into actions that are considered disgraceful and criminally prosecuted. Therefore, the justification for declaring an act as a crime according to Van Bammelen, in Criminologie, Leerboek der Misdaakunde, originates from the opinion that in general it must be seen as "destructive or immoral".

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