

September



2017

The 3rd PROCEEDING

“Legal Development in Various Countries”

IMAM AS SYAFEI BUILDING

Faculty of Law, Sultan Agung Islamic University

Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Diterbitkan oleh :
UNISSULA PRESS

ISBN. 978-602-1145-67-8

The 3rd PROCEEDING

“Legal Development in Various Countries”

Reviewer:

Prof. Dr. H. Gunarto, S.H., S.E., Akt., M.Hum

Dr. Hj. Anis Mashdurohatun, S.H., M.Hum

Prof. Henning Glaser

Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM

Prof. Shimada Yuzuru

Prof. Associate Dr. Dr. Ahmad Zaharudin Sani

Editor:

Dr. Amin Purnawan., S.H., CN., M.Hum

Dr. Hj. Widayati., S.H., M.H

Dr. Hj. Sri Endah Wahyuningsih, S.H., M.Hum

Dr. H. Ahmad Khisni., S.H., M.H

M. Abdul Hadi., SE

Hak Cipta © 2016, pada penulis

Hak Publikasi pada penerbit UNISSULA PRESS

Dilarang memperbanyak, memperbanyak sebagian atau seluruh isi dari buku ini dalam bentuk apapun, tanpa izin tertulis pada penerbit.

Hal i-x, 1-391

Cetakan Pertama Tahun 2017

Penerbit UNISSULA PRESS

Jl. Raya Kaligawe Km. 4 Semarang 50112

PO BOX 1054/SM,

Telp. (024) 6583584, Fax. (024) 6594366

ISBN. 978-602-1145-67-8

INFORMATION OF THE CONFERENCE AND CALL PAPER

WORLD CLASS ISLAMIC UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY

Welcome to Participants on International Conference

“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. And focusing on the development of law in both developed and developing countries and its role in shaping a good future.

KEYNOTE SPEAKER:
Prof. Henning Glaser
Thammasat University, Thailand

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

SPEAKERS :

1. Prof. Shimada Yuzuru
Nagoya University, Japan
2. Prof. Dr. Ruzian Markom
Universitas Kebangsaan Malaysia, Malaysia
3. Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M
Sebelas Maret University, Indonesia
4. Assoc Prof. Dr. Ahmad Zaharuddin S.
Universitas Utara Malaysia, Malaysia
5. Dr. Anis Mashdurohatus, S.H., M.Hum
Sultan Agung Islamic University, Indonesia

Prof. Shimada Yuzuru Prof. Dr. Ruzian Markom Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M
Assoc Prof. Dr. Ahmad Zaharuddin S., LL.M Dr. Anis Mashdurohatus, S.H., M.Hum

Indonesia, September 05th 2017

Organized by : Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang-Indonesia

WORLD CLASS ISLAMIC UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY

International Conference

“Legal Development In Various Countries”

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. And focusing on the development of law in both developed and developing countries and its role in shaping a good future.

KEYNOTE SPEAKER:
Prof. Henning Glaser
Thammasat University, Thailand

IMAM AS SYAFEI BUILDING, Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

SPEAKERS :

1. Prof. Shimada Yuzuru
Nagoya University, Japan
2. Dr. Hilaire Tegnau, LL.M.
Faculty of Law, Sorbonne University
3. Prof. Dr. Ruzian Markom
Universitas Kebangsaan Malaysia, Malaysia
4. Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M
Sebelas Maret University, Indonesia
5. Assoc Prof. Dr. Ahmad Zaharuddin S.
Universitas Utara Malaysia, Malaysia
6. Dr. Anis Mashdurohatus, S.H., M.Hum
Sultan Agung Islamic University, Indonesia

Prof. Shimada Yuzuru Dr. Hilaire Tegnau, LL.M. Prof. Dr. Ruzian Markom
Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M Assoc Prof. Dr. Ahmad Zaharuddin S., LL.M Dr. Anis Mashdurohatus, S.H., M.Hum

5
September
2017

FACULTY OF LAW
Sultan Agung Islamic University

Organized by : **Faculty of Law UNISSULA**
Semarang-Indonesia

This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

Day: Tuesday

Date : September 5th 2017

Time : 08:00 - 15:00 pm

Place : Imam AsSyafei Building 3rd Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584 Fax.(024)6582455
Semarang 50112

**COMMITTEE OF THE 3rd INTERNATIONAL CONFERENCE
AND CALL FOR PAPER
“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”**

Responsible Person	: Prof. Dr. H. Gunarto.,S.H.,SE.,Akt.,M.Hum	(Dean)
Advisory	: Dr. Hj. Widayati.,S.H.,MH Arpangi.,S.H.,M.H Dr. Hj. AnisMashdurohatun,S.H,M.Hum Dr. H. Ahmad Khisni.,S.H.,M.H Dr.H. Umar Ma'ruf, SH.,Sp.N.,M.Hum Kami Hartono.,S.H.,M.H	(Vice Dean I) (Vice Dean II) (Head of PDIH) (Head of M.Kn) (Head of MIH) (Head of S1)
Chairwoman	: Dr. Hj. AnisMashdurohatun,S.H,M.Hum	(Head of PDIH)
Secretary	: Dr. Hj. Sri Endah Wahyuningsih,S.H,M.Hum	(Secretary of PDIH)
Treasurer	: Dr. Hj. Sri Kusriyah.,S.H.,M.Hum	(Secretary of MIH)
Drafting Team	: Dr. H. Amin Purnawan.,SH.,CN.,M.HumH Denny Suwondo.,S.H.,M FaisolAzhari.,S.H.,M.Hum Hj. AryaniWitasari.,S.H.,M.H	
Event Division	: Anita.,S.S.,M.H	
Secretariat and Supplies Division		
Coordinator	: M. Abdul Hadi.,SE	
Member	: Slamet Ariyanto Dyan Teguh Aryanto, Amd M. Ngaziz.,S.H.,M.H Hendro Widodo.,S.H.,M.H Nailul Mokerobin.,S.Psi AgusPrayoga	
Publication and Documentation Division	: Ikrom.,S.H	
Member	Ahmad Mutohar.,S.H Achmad Arifullah.,S.H.,M.H	
Consumption Division	: Shinta Pratiwi	
Member	Latifah Rosdiyati.,S.E Siti Pardiyah Laili Rohmah.,S.E Laila Najihah.,S.H	
Receptionist	: Riftia Anggita W.S.,S.H Auliana	
General Assistant	: Riswanto NurAlamsyah Rofiq	
Security	: Rohmani Arif	
Driver	: Ismail Irwanto	

PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM from Sebelas Maret University, Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discuss views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5th 2017

Chairman of the Committee,



Dr. Anis Mashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: “**Legal Development in Various Countries**” which is held by Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on September 5th 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.

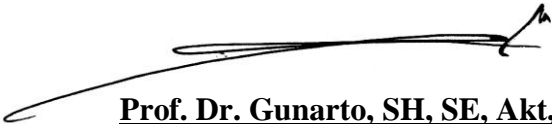
Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme “**Legal Development in Various Countries**” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and committee who have contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, September 5th 2017

Dean,



Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

TABLE OF CONTENTS

Front Page	i
Information of the International Seminar	ii
Committee Composition	iii
Preface	iv
Greeting From The Dean Faculty of Law	vi
THE IMPACT OF ARTICLE 3(1) OF MALAYSIAN CONSTITUTION TOWARDS JUDGMENT MADE IN CIVIL COURT	
Ahmad Zaharuddin Sani Sabri	1
INTANGIBLES INTELLECTUAL PROPERTY DEVELOPMENT CONCEPTS AS BANKING PRINCIPLES IN INDONESIA	
Anis Mashdurohatun	11
THE HISTORICAL DEVELOPMENT OF THE FRENCH LEGAL SYSTEM	
Hilaire Tegnan	23
JAPANESE CONSTITUTION AND STATE SYSTEM	
Shimada Yuzuru	29
POWER AND PROCESSES UNDER THE THAI CONSTITUTION 2017”	
Henning Glaser	38
JURIDICAL NORMATIVE REVIEW OF DIFFERENT RELIGIOUS MARRIAGE	
Doni Adi Supriyo	38
THE IMPLEMENTATION OF ROLES AND FUNCTIONS OF REGIONAL HOUSE OF REPRESENTATIVES (DPRD) BASED ON LAW STATE FRAMEWORK TO ACHIEVE GOOD GOVERNANCE	
Agus Sukadi	65
OPTIMALIZATION OF THE ROLE OF THE DPRD (Regional House of Representative) IN THE PREPARATION OF REGIONAL REGULATIONS	
Budi Alimudin	81
THE PROGRESSIVE LEGAL THEORY IN THE IMPLEMENTATION OF LAW ENFORCEMENT BY THE LAW ENFORCER (POLICE, PROSECUTOR, JUDGE)	
Teguh Santoso	99

CRIMINAL POLICIES IN LEGAL ACCOUNTABILITY AGAINST FACILITATION OF HEALTH SERVICES AND HEALTH PERSONNEL IN DISTRIBUTION AND SALES OF HARD DRUGS FOR SALE WITHOUT PRESCRIPTION DOCTORS Yadi Supriyadi.....	111
RECONSTRUCTION OF PATIENT LEGAL PROTECTION HOSPITAL IN USE OF X-RAY IN THE HEALTH BASED FIELD OF JUSTICE Andhika Yuli Rimbawan.....	127
CORRUPTION ASSET RECOVERY THROUGH STATE CIVIL LAWSUIT Sujono.....	139
THE EFFECTIVENESS OF GUIDANCE OF CHILD PRISONERS IN ADULT PRISON Wilsa	147
URGENCY OF VOTERS PARTICIPATION ON THE REGIONAL HEAD ELECTION IN THE STATE OF DEMOCRACY (Study: Voters Participation On Governor and Vice Governor Election in Indonesia in2015) Dewi Haryanti	152
COMPARATIVE RULES ON DETENTION IN SOME COUNTRIES Muhammad Khambali.....	158
THE DEVELOPMENT OF LAW OF BUYING AND SELLING LAND IN INDONESIA Lilik Warsito	169
INDONESIAN LEGAL DEVELOPMENT PROGRESSIVE LAW APPROACH TO BUILD THE LAW IN INDONESIAN SENSE Wendra Yunaldi	179
REMOTE SENSING TO THE INDONESIAN SURFACE OF THE FOREIGN SATELLITE AND THE SOVEREIGNTY OF INDONESIA Ruman Sudradjat.....	186
THE CONSTRUCTION OF THE RAHN SYARIAH LAW IN THE LEGAL SYSTEM OF WARRANTIES OF INDONESIA Suryati	194
THE DEVELOPMENT OF ISLAMIC LAW IN THE LEGAL SYSTEM IN INDONESIA Sumarwoto	194
CONTRACT ABOLITION DUE TO UNDUE INFLUENCE (LAW RECONSTRUCTION OF OBLIGATION THE CIVIL CODE IN INDONESIA) Bahmid	210

FIDUCIARY GUARANTEE PROBLEMATIC WITH OBJECTS INVENTORY IN CREDIT AGREEMENT	
Lathifah Hanim and MS.Noorman.....	214
LEGAL POLICY OF INVESTIGATOR IN CASE SETTLEMENT CRIMINAL VIOLENCE IN THE HOUSEHOLD	
Anwar Sanusi Simanjuntak.....	222
INDUSTRIAL RELATIONS COURT'S VERDICT IN THE CASE OF CERTAIN TIME WORKING AGREEMENT (PKWT) BECOME UNCERTAIN TIME WORKING AGREEMENT (PKWTT)	
(Analysis of Industrial Relations Court's Verdict Number : 37/G/2011/PHI.Mdn)	
Mangaraja Manurung	222
DOMESTIC COMPANY LAW "PMDN" AFTER SHARE PURCHASED (ACQUIRED) BY FOREIGN CITIZENS OR FOREIGN LEGAL AGENCIES	
M. Irfan Islami Rambe	245
GUARANTEE OF RICE FARMS HAVE NOT YET BEEN HARVESTED IN SIMALUNGUN REGENCY	
Riduan Manik.....	245
LEGAL PROTECTION OF CONSUMERS IN CONSUMER FINANCING AGREEMENTS	
Imelda Mardayanti	267
THE AUTHORITY OF PERFORMING A DEATH PENALTY ACCORDING TO THE DOCTRINE OF LOVE OF JESUS CHRIST IN THE BIBLE	
Dame Pandiangan.....	278
CRIMINAL ACCIDENT OF NARCOTICS, APPLICATION OF LAW NUMBER 35 YEAR 2009 AND JUDICIAL DECISIONS IN THE COURT COUNTRY KISARAN	
Muhammad Salim Fauzi Lubis	283
ISLAMIC LAW STUDY ABOUT DAM TAMATU' HAJJ FOR INDONESIAN JAMAAH HAJJ FOR PEOPLE'S CONSULTATION	
Muthoam	290
IS RICH AND POOR UNIFORM IN PATENT LAW	
Abd Thalib.....	299
PREVENT VIOLENT ONLINE VIDEO GAMES THROUGH LEGAL CONSTRUCTION	
Yenny AS, Charlyna S. Purba, Hendrik.....	309

COMMUNITY PARTICIPATION IN THE FORMATION OF LOCAL REGULATION BASED ON JUSTICE (Analysis of Political Interaction and Law) Nursid Warsono Setiawan	314
THE ROLE OF POLITICAL PARTIES IN RECRUITMENT OF CANDIDATES FOR REGIONAL HEAD AND DEPUTY REGIONAL HEADS BASED ON LAW NO. 32 YEAR 2004 (CASE STUDY IN PURBALINGGA AND CILACAP) Anton Budiarto	324
THE BASICS AND THE FUNCTIONS OF FINGERPRINTS OF MURDER PERPETRATORS Achmad Sulchan, Annisa	343
RECONSTRUCTION OF DIFFERENT TYPES OF MENS REA TO PROVE CORRUPTIONBASED ON JUSTICE VALUES Arif Awaludin	349
PRINCIPLES OF FAIR LAND REGISTRATION (STUDY OF PUBLIC SERVICE OF LAND REGISTRATION IN INDONESIA) Shalman	355
INDEPENDENCY AND IMPARTIALITY OF AD HOC JUDGE INDUSTRIAL RELATIONS COURT (PHI) IN RESOLVING DISPUTES Resy Desifa Nasution	378
CONSTRUCTION WORK CONTRACT IN GOVERNMENT BASED VALUE OF BENEFIT Mokhammad Hilman.....	387
SHARIA ECONOMICS DISPUTE RESOLUTION IN RELIGIOUS COURT INSTITUTIONS Amanah	400
WOMEN PROTECTION POLICY FROM PHYSICAL VIOLENCE BASED ON JUSTICE VALUES Hadjar Handokojati	417
LEGAL ANALYSIS ON THE IMPLEMENTATION OF DIRECT APPOINTMENT OF PROCUREMENT SERVICESOF GOVERNMENT’S PROJECT Humala Sitinjak.....	424
RECONSTRUCTION ON CORRUPTION ACT AND SHIFTING BURDEN OF PROOF ON THE SETTLEMENT OF CORRUPTION IN INDONESIA Ibnu Hadjar.....	434

COMPARATIVE RELIGIOUS APPROACH IN THE DEVELOPMENT OF NATIONAL CRIMINAL LAW SYSTEM Sri Endah Wahyuningsih.....	443
LEGAL STUDY OF DECISIONS SUPREME COURTS NUMBER: 85 K / Pid.Sus / 2012 Contract Abolition Due to Undue Influence (Law Reconstruction of Obligation the Civil Code in Indonesia) Ismail.....	449
THE EXISTENCE AND RECONSTRUCTION OF SALE AND PURCHASE Fiqih Madhab Syafi'i in Globalization Era (Sale and Purchase Practice Study in Pondok Pesantren Tahfidzul Qur'an Al-Asy'ariyah Wonosobo Central Java and Pondok Pesantren Al-Munawir Krapyak Jogjakarta) Machfudz.....	457
RECONSTRUCTION OF LEGAL SANCTIONS ON BUILDING FAILURE IN LAW NO.2 YEAR 2017 ON CONSTRUCTION SERVICES BASED ON THE VALUE OF BENEFIT Subhan Syarif	466
THE CONSTRUCTION OF RESIDENTIAL SERVICES AND CIVIL REGISTRATION BY THE GOVERNMENT OF Pematangsiantar City in Perspective of Public Services Law No: 25 2009 Pandapotan Damanik.....	485
CRIMINAL RESPONSIBILITY AND CIVIL RESPONSIBILITY ACCORDING TO COMMON LAW FOR A MAN WHO HAS SEXUAL INTERCOURSE BEFORE LEGAL MARRIAGE Mangembang Pandiangan	485
GUIDANCE TO THE CHILDREN WHO REPEAT CRIMINAL ACTIONS BASED ON JUSTICE VALUE Achmad Arifulloh	512
CRIMINAL JUSTICE SYSTEM, CRIMINALIZATION AND CIVIL SERVICE APPARATUS Risto Samudra	524
INTERNATIONAL SEMINAR PHOTOS	542

CRIMINAL JUSTICE SYSTEM, CRIMINALIZATION AND CIVIL SERVICE APPARATUS

Risto Samudra.¹

samodraristo@gmail.com

The Student of Law Doctoral Programme UNISSULA

ABSTRACT

The existence of laws and institutions has the essence of promoting justice in two ways. First, to identify the moral values and moral system that has been settled in the structure of society. Second is to establish a system of legal norms that indirectly form the system of justice itself. The character of justice is essentially "unlawful", so the concept of justice itself is born from the assumption that a moral value is not contrary to law, that is justice. Justice is part of a crystallized moral, in orderly terms. Regularity in positive law, but it is not enough with only positive law, it can also be seen from the principle in the basic norms in community life.

Criminal is the sorrow imposed by the state upon someone who commits a violation of the provisions of the law. Criminal intentionally dropped to be perceived as sorrow. The size of a criminal penance that someone deserves is an unresolved problem. New crimes are felt in real terms when they are effectively implemented. Its objectives are not solely by the way of imposing a criminal but by resorting to acts. Criminalization is a form that must be given by criminal law, because it has disrupted social life. The ideal punishment becomes the center of attention of modern criminal law today.

The role of a criminal judge is crucial, especially to decide a case fairly. Therefore, the criminal justice must have a lot of data about the actions and the perpetrators. Although the judgment is often a problem, in the same case but have different decision. The circumstances require a control point, which can provide useful help in punishing. The present judicial world has accommodated the "progressive law," which in its application has created a new meaning, namely "substantive justice," with its peculiarity based on court proceedings and facts, and this is a legal breakthrough, in various criminal justice activities.

The purpose of the upcoming criminal law system is the law that organizes human actions. Through a regulation which contains a unity, with essentially linking specific rules, to the moral order, religion order, so that the renewal of the criminal law requires the research and thought of the central, very fundamental and strategic problems, including the policy in establishing criminal sanctions. The regulation of criminal law is a reflection of the ideology of a nation, which makes the law grow, and it is of utmost importance, that the whole law building, rests on a healthy and consistent political view. Implications Reform of criminal law, with the substitution, refinement of material and formal punishments, is as a step forward, the people of Indonesia, to achieve justice of legal certainty and its usefulness. Therefore it is needed to immediately apply the new formal and material criminal law as a container to improve the nature of the punishment of dignified Indonesian society.

Keywords : Law, Criminal, Punishment, Judge and Justice.

¹Artikel ini bukan tulisan yang sama sekali baru, melainkan makalah yang pernah disampaikan dalam Simposium Hukum Tanggal 15 Desember 2016 di Kabupaten Kuningan Jawa Barat yang disampaikan oleh Prof. Dr. Syaiful Bakhri, S.H.,MH.

Introduction

Criminalization intends to uphold the benefit, peace, and happiness of all human beings. "No one who sins will bear the sins of others"². "We will not punish, until We send the messenger first". "*Nemoprudens punit qui peccatum est, sed ne peccet*"³. The upheaval of thinking about the purpose of punishment, to the attention of jurists and philosophers, that evil must be punished accordingly, so that evil does not repeat, and society finds peace and tranquility in its life. Criminalization is not intended to carry out a grudge and as an instrument of political criminalization, but it further performs its true function, namely the goal of feeling just, and maintaining the happiness of society.

Criminal is the sorrow imposed by the state upon someone who commits a violation of the provisions of the law. Criminal intentionally dropped to be perceived as sorrow. The size of a criminal penance that someone deserves is an unresolved problem. New crimes are felt in real terms when they are effectively implemented. Its objectives are not solely by the way of imposing a criminal but by resorting to acts⁴. Criminalization is a form that must be granted by criminal law, because it has disrupted social life, Ideal Criminalization becomes the center of attention of modern criminal law today.

The development of criminal detention in the world today is experiencing the dissatisfaction and frustration of the existing punishment mechanism, because it felt unable to meet the sense of justice and goals to be achieved, namely preventing and tackling crime.⁵ The purpose of punishment, in practice, can never be achieved due to law enforcement. There is always an upheaval between justice and the certainty and the utility of the law which has never met at an ideal level. So that punishment is only a reflection of the values and fulfills the desire for vengeance only.

Criminal law not only focuses on one or several sides, but criminal law has concentration on the whole universe, because only narrow minds that declare criminal law only in touch with human problem. An important issue in the upcoming criminal law, in its novelty is how the best form of criminal law is in accordance with the circumstances in society, reform of criminal law is not a negation, it brings civilization, especially the politics

²Al Quran. Surat 17 Ayat (15). Senada dengan asas legalitas. Pasal 1 (1) KUHP, "Tiada suatu perbuatan dapat dipidana, kecuali berdasarkan kekuatan ketentuan perundang undangan pidana yang telah ada sebelumnya."

³Tujuan Pidana adalah untuk mencegah dilahirkannya kejahatan pada masa akan datang, (Seneca Filsuf Romawi).

⁴Roeslan Saleh. *Stelsel Pidana Indonesia*. (Jakarta; Aksara Baru, 1983) hlm.. 9.

⁵Eva Achjani Zulfa. *Pergeseran Paradigma Pidana*. (Bandung; Lubuk Agung, 2010) hlm.. 1.

of criminal law⁶. Modern criminal law, has tried to come out of the most ancient form of "retaliation", with its various penalties, starting from the functionalization of fine, social work, the imposition of a restorative justice model with various means of settlement.

Criminalization is not a pleasant thing for a convicted person. Criminalization also costs a lot, the costs of proceedings in court, prison fees, issued by the State, including parole, institutions or consultation centers to be made, as well as the collection of fines. Therefore, punishment is a justifiable crime, when the crimes have been able to prevent the occurrence of the crimes greater than the conviction of the perpetrators of the crime alone. On the objectives to be pursued in a crime, there is no similarity of opinion among the experts, but at least there are three points of thought about the purpose of a crime, namely to correct the offender's person, to make a deterrent, and to make the perpetrators of crime, unable to do it again, in ways that can not be fixed⁷. For this reason, the Judge has a noble mandate, to reflect on ideal thoughts and purposes, with reference to the values of justice, but in fact the Judges are also instrumentalists, ie, oriented in pursuit of measurable gains on worldly matters, even functional thinking, as a combination of ideal and instrumental ways of thinking, by calculating each aspect of its advantages and disadvantages⁸. The criminal judge must leave behind the legacy of the past, which makes the positive laws positive, and exalt them in concrete events, but keep a close eye, to the justice that develops around him.

In the perspective of the spirit of Islam, judge, is a man chosen by Allah SWT, carries a noble mandate to be accounted for, to uphold justice and life of mankind in the world. Judicial power, whose principal actor is Judge, is the power of an independent state, to organize a judiciary to enforce law and justice based on Pancasila, for the sake of the implementation of the rule of law. Judge as *mujtahid*, is a person who is given the advantage by ALLAH, in the form of intelligence of reason, with certain conditions, using all the ability to think⁹. Judge as a symbol of power in the judiciary, must stand upright, in support of the fanaticism of a sense of justice, which wrestles in its idealism, radiates the herbs of progress and sense of justice, which continues to grow in the heart of the criminal Judge, to continue to foster a sense of fanaticism as a judge who stands. He avoids the life of luxury, cultivate a

⁶Rosylin Muraskin dan Albert R. Roberts. *Vision For Change.Crime and Justice In The Twenty-First Century*. (USA; Prantice-Hall,Inc., 1996) hlm.. 1.

⁷P. A. F Lamintang. *Hukum Penitensier Indonesia* (Bandung: Armico, 1989), hlm.. 10-11.

⁸Teddy Asmara. *Budaya Ekonomi Hukum Hakim*. (Semarang; Fasindo, 2011) hlm.. 4

⁹HM. Muslich.Ks. *Catur Penegak Hukum*.(Yogyakarta; Prodi Syariah FIAI Universitas Islam Indonesia, 2012) hlm, 113-114.

calm and peaceful attitude. It thus reflects the idealistic character of Judges who serve the essential justice.

Criminalization in modern times leads to rational, alternative, sanctioning, so that Judges are granted the freedom to choose fair and humane types of criminal, even possible use of restorative justice. Through mediation penal, it is done in order to achievement of justice, above the legal certainty. It is known that judicial decision is still strongly influenced by economic culture which grows in the environment of pragmatism around the judiciary. So that in various decisions, it always cause the problem of punishment, because less harsh and cruel criminal law, when associated with, corruption, as the main enemy of Indonesia, even the world community.

"The Problem of Justice in Criminalization"

Justice is a winding way, and even something abstract, but it can be fought for. The struggle of justice is done very earnestly, with a sincere conscience, with a national character, with a philosophical view of Pancasila, and even by holding on to the belief in the One God.

Although the struggle to achieve justice in criminal law, until now, has not been solved, but at least the criminal law, seeks to bring about justice. Through penal law and punishment, the noble aim is to provide protection to the public interest, through the interests of law and justice¹⁰. The struggle for justice requires a consistent attitude, because justice seems to be untouchable, to get it needed energy for its accomplishment, through various roads and obstacles to get to the target.

The existence of laws and institutions has the essence of promoting justice in two ways. First, identify the moral values and moral system that has been settled in the structure of society. Second, is to establish a system of legal norms that indirectly form the system of justice itself. The character of justice is essentially "unlawful", so the concept of justice itself is born from the assumption that a moral value is not contrary to law then that is justice.¹¹ Justice is part of a crystallized moral, in orderly terms. Regularity in positive law, but not enough only positive law path, it can also be seen from the principle in the basic norms in the pulse of community life.

¹⁰D.Schaffmeister.N.Keister dan EPH.Sitorius. *Hukum Pidana*. (Bandung; PT. Citra Adytia Bakti, 2007) hlm, 21.

¹¹Richard. A. Myren, *Law and Justice: An Introduction*, (California: Crove Publishing, 1988) hlm.. 3

This is what often traps the legal institutions, especially the courts. The use of criminal law is often regarded as a means of achieving essential justice, whereas criminal law is a form of last resort in the attainment of a justice, when the criminal law is not used beyond reasonable doubt then what happens is not reasonable justice but reasonable injustice. Justice can be achieved by establishing an up-to-date and responsive legal structure. Legal institutions should be flexible in bringing rigid criminal law; even justice concentrates on the legal structure or infrastructure, not on the substance of the law. Hence the change of the legal structure is easier, when compared to changing the substance of the law, especially the criminal law¹². Justice as part of the basic humanitarian values, which serve as a pillar of private life, household and society, and the form of justice is defined as social justice, namely justice as a balanced position, harmonious, and put something appropriate in accordance with its position, and wise in making legal decisions.

The role of a criminal judge is crucial, especially to decide a case fairly. Therefore, the criminal justice must have a lot of data, about the actions and the perpetrators. Although the judgment is often a problem, in the same case, but not the same, this situation requires a control point, which can provide useful help in punishing¹³. The present judicial world has accommodated the "progressive law," which in its application has created a new meaning, namely "substantive justice," with its peculiarity based on court proceedings and facts, and this is a legal breakthrough, in various criminal justice activities.

The Judge's activity, since questioning, is to prove, to judge, to be rational, logical and intellectual intelligence, but also to emotional intuition quotient, to interpret and discover law as an art. The judge's ideal ruling contains elements of justice (*Gerechtigkeit*) benefit (*Zweckmassigkeit*) and legal certainty (*Rechtssicherheit*). That is an art to balance the demands of the various elements¹⁴. That is why every criminal Judge always tries to find answers, searches for them through interpretation based on precise reasons, through various contextual interpretations, and ties them closer to science. The question of justice, by far the most complex, is to liberate the concept of law with the idea of justice, and to mix with political, ideological, and conservative events as if law and justice are identical, and justice should be a rule governing man to all human, and have found his joy, and known as social justice and happiness.

¹²*Ibid*, hlm.. 35

¹³Oemar Seno Adji. *Hukum Hakim Pidana*. (Jakarta; Erlangga, 1984) hlm.. 23-24.

¹⁴Sudikno Mertokusumo. *Teori Hukum*. (Yogyakarta; Cahaya AtmaPustaka. 2012) hlm.. 20-21.

The sociological aspect is also one aspect that needs to be taken into account in the imposition of a punishment that in a strong and normative penal system can be shaken by the impulse of social impulse outside the law and penal system. So the concept of modern punishment is a concept capable of covering the value and sociological impact, due to the imposition of a norm, which is considered not to give the restoration of the perpetrator or the victim¹⁵. The character of the law is a method of sanction; its severity depends on the nature of its crime, coupled with the belief of the terrible deeds, therefore the law made, inseparable from society, as the two bases for the operation of the law. But justice and law can also be looked into in other approaches.

The approach to justice can be achieved, by looking at the economic aspects of the law, that not all legal matters can be settled fairly, through the law itself. To convict a person regardless of the economic aspect which may be incurred, due to the obedience of a person by a certain penalty, will make the criminal law as an obsolete law, if it does not want to be called a law that has human objects, but not treat human as human.¹⁶

The purpose of the criminal justice in general, as an examination mechanism that aims to punish or liberate a person from a criminal suspect, and the ultimate goal of achieving community justice, by strengthening the role of competence, independence and impartiality. In the purpose of criminal justice, there is a view of theory, *mashab* and some jurisprudence, which inspires the struggle for justice in concrete events. Criminal law theories are often a logical argument.

Until now there are 4 (four) theories about punishment, they are: the theory of retribution¹⁷, the theory of prevention¹⁸, incompetence theory¹⁹, and rehabilitation theory²⁰. The existence of such theories is essentially useful for answering the question "why should we give a criminal?", Although besides that there are other related questions such as "who will be imposed a criminal?", "How severe the crime?", "What kind of criminal which should be

¹⁵David Garland, *Punishment and Modern Society: A Study in Social Theory*. (Oxford: Clarendon Press, 1995) hlm.. 3-7

¹⁶Richard A. Posner, *The Problems of Jurisprudence*. (London: Harvard University Press, 1993) hlm.. 358

¹⁷Teori retribusi atau pembalasan berpangkal tolak pada pandangan bahwa, kejahatan itu harus dipidana, karena pengingkaran terhadap hukum.

¹⁸Teori pencegahan, berpangkal tolak pada adanya penjatuhan pidana untuk kepentingan pencegahan khusus dan umum, agar setiap orang tidak lagi melakukan kejahatan, dan hukum pidana harus tertulis, dalam bentuk undang-undang, sehingga mengurungkan niat orang untuk melakukan kejahatan.

¹⁹Teori inkompetensi, berpangkal tolak pada pandangan, bahwa penderitaan memang sesuatu sewajarnya, ditanggung pelaku kejahatan, namun dalam batasan apa yang layak ditanggung oleh pelaku kejahatan berdasarkan kemanfaatan social dan menetapkan berat ringannya derita yang layak dijatuhkan

²⁰Teori rehabilitasi, bermakna, bahwa pelaku pidana harus diperbaiki kearah yang lebih baik, agar ketika kembali kemasyarakat diterima oleh berbagai komunitasnya, dan tidak lagi mengulangi perbuatan jahatnya.

dropped? "These are the kinds of questions that will set the theoretical ground on punishment. Retributive theory is a theory that starts on what criminal act is done, and what punishment according to the law against the criminal acts that have been done. Then, the other three theories are a theory that has a vision of the future and hope to get the benefit of the criminal law itself²¹. Therefore, the use of criminal law should pay attention to national development, that is based on a just and prosperous society based on Pancasila, so that criminal law aims to overcome crime for the sake of his welfare. Acts that are prevented by criminal law, are actions that are not desired by the public. The use of criminal law should take into account the principle of cost benefit principle, and must take into account the capacity or ability of labor, law enforcement agencies, in order to avoid over blasting.²²

The criminal court through Judge's verdict is an official legalization or haram acts of the authoritarian regime against anyone, who is inconsistent or against the regime and in that way has been unlawful and convicted by the court. Now the judgment of Indonesia has maintained its independence, so the Judge is dependent on his personal strength, to maintain his impartiality, to maintain his views and thoughts, to remain focused on himself, as the Judge is mandated by the state to judge, so as to stand on his own feet without turning. Judge's mind control based on moral philosophy, can provide direction in thinking and acting, so that Judges gain confidence in the profession and the verdict²³. Therefore in capturing the dynamics of justice, it is necessary to understand the history of the flow of criminal law, recorded over a period of time, so that criminal law enforcement and justice can get its meaning.

"The Struggle of Justice in the Historical Trajectory"

The struggle for justice in criminal law is always to look at historical trajectories, growth and development of streams or *mashab* of criminal law, which influence it.

In criminal law, its flows have proven its influence, on the application of criminal law in various countries, especially when reflecting on it in the renewal of the criminal law. It begins with classical, neo classical, modern streams and social control streams. New thought

²¹C.M.V Clarkson dan H. M Keating, *Criminal Law: Text and Material*, (London: Sweet & Maxwell, 1998) hlm. 26

²²Sudarto. *Hukum dan Hukum Pidana. Op cit*, hlm. 44-48.

²³Suparman Mazuki. *Kekuasaan Kehakiman; Independensi Dan Pengawasan Hakim*. Dalam Dilaektika Pembaruan Sistem Hukum Indonesia. (Jakarta; Sekretariat Jenderal Komisi Yudisial RI, 2012) hlm. 286-292.

on the basis of punishment at the beginning of the twentieth century, which emerged in Western Europe, with the wave of a movement toward a rational victory of criminality, using the results derived from anthropology and sociology. While the legislator has the duty to establish what is threatened with criminal in an easily understood language and eliminates what is not clear in the law, that in judging any crime, the Judge must draw the conclusion of two considerations. First, it is established by law with the limits of entry into force; secondly, whether the concrete act to be tried is against the law.²⁴ The linkage of the work of criminal law legislation with justice grows and develops in the life of the community. With its characteristics of justice gives a new meaning between the mixing of legal work in accordance with the law, and the legal work of meaningful social justice in the community. It is known from the streams or *mashab* of criminal law from its spread in the world to affect each State, in determining its criminal law respectively. The flow of criminal law, which has contributed to criminal law and influenced the practice of criminal law, is a classical, modern and social control. The classical flow has contributed to the growth of criminal law until now.

Characteristic of the classical flow is the principle of legality, the principle of error, as well as the principle of retaliation²⁵. Because in modern state life, law is constituted by the legislature, with material extracted from real society life to be posited as a written rule, in order to maintain certainty²⁶. In the past, Judges were not free to pour views in their decisions and could not interpret the law. The judge only obeys and applies the book of laws. This is what the jurists saw, that the formation of the law solely through the formation of laws and no other institutions authorized for it. With the monopolization of the formation of law by the legislator, then at least in theory there is no more space to work and work for law officers. The judge in his possibilities interpreted the law as if it were programmed²⁷. Against the circumstances, at the present time, it turns out that the science of law is merely a pure science of the courts. The science of law has been too strongly concentrated on legislation and judiciary²⁸. This is a tendency of Indonesian criminal law, which is experiencing a link in its historical range.

²⁴ J.M. Van Bammelen. *Hukum Pidana II* (Bandung: BinaCipta, 1991), hlm. 1.

²⁵ Asas legalitas bermakna tiada pidana tanpa undang-undang. Asas kesalahan bermakna, bahwa pidana atas dasar kesengajaan dan kealfaan, dan asas kesalahan bermakna, bahwa pidana dikenakan untuk kemaslahatan dan sesuai dengan kesalahannya

²⁶ Sutandyo Wignjosebroto. *Hukum Yang Tak Kunjung Tegak; Apa Yang Salah Dengan Kerja Penegakan Hukum Dinegeri Ini?.* Dalam Dialektika Pembaruan Sistem Hukum Nasional. (Jakarta; Sekretariat Jenderal Komisi Yudisial RI, 2012), hlm. 5.

²⁷ Roeslansaleh. *Penjabaran Pancasila dan Undang-Undang Dasar 1945 dalam Perundang-undangan* (Jakarta: Aksara Baru, 1979), hlm. 24.

²⁸ A.Hamid S. Attamimi dalam Farida Indriati Soeprapto, *Ilmu Perundang-Undangan Dasar-Dasar dan Pembentukannya* (Yogyakarta: Kanisius, 1988), hlm.xv-xxv.

Classical streams emphasize on the codification of criminal law as a means to protect the interests of the authorities. The shift of attention in the development of criminal law is through the modern flow of focusing on the interests of the makers of the offense. Crime can be prevented properly through certainty and not through the harshness of punishment²⁹. The classical notion of the classical flow is maintained in the modern school of which, among other things, categorizes the makers of the offense. Adult offenders are treated differently from other offenders.

Modern streams break the ice that human behavior is no longer left to and is dominated by abstract thoughts about law. The development of criminology has led to changes in modern development, despite denials because criminology and criminal law have been more evolving. In certain countries Judges can convict the defendant without being sentenced. The modern criminal law's view has led to the possibility of opening the possibility under existing laws to express errors without the imposition of criminal sanctions on them. Such beliefs are growing.³⁰

While the flow of social control, criminal law experienced a new development, it is marked by a variety of attention, especially in the last century to enter the next millennium of the new age. Understanding of criminal law in this century, no longer refers to criminal law alone, but further includes a globalized attention to the changes that occur, affect the symptoms of crime, and affect the workings of criminal law in terms of handling or tackling crime. The development of technology often brings the most rapid impact on the development of criminal law that in many aspects of legal development is due to technological developments³¹. Given the changes that occur in society due to globalization it also requires review of the way the work of the law. It aims to enforce the criminal law can be balanced with comprehensive calculations so that it can see the advantages and disadvantages in using the criminal system. Economic globalization breeds criminal organizations with global networks, infrastructure, communications and international relations in its criminal activities. Relationships through this international network enable it to open up new markets for illegal goods and services, through transnational corporations giving birth to criminal organizations

²⁹ George Golwin. *Criminal Man* (New York: George Braziller Inc. 1957), hlm. 79

³⁰Roeslan Saleh. *Segi Lain Hukum Pidana* (Jakarta: Ghalia Indonesia, 1984), hlm. 20.

³¹Roeslan Saleh. *Hukum Informatika* (Jakarta : Fakultas Hukum Universitas Muhamadiyah Jakarta, 1996) hlm. 30.

using modern high speed and encrypted faxes³². Hazel Croal mentioned that a number of basically persuasive and preventive strategies such as strategy of giving advice and legal education, warning, administrative sanctions, non-court peace, and negotiations on compensation.³³

The occurrence of changes in these areas is in fact also a result of the development of a liberal social process towards the welfare community. Therefore the problem of crime initially is a major problem of the criminal law being shifted and also the concern of the welfare state. The handling of crime is no longer solely a criminal law affair but is always associated with social issues. In the welfare state, criminal law is not only a moral force in society but a comprehensive part of the means of social defense. Such efforts in the context of crime prevention are essentially an integral part of social protection efforts³⁴. The handling of crime should be linked with attention to family life, education, youth activities, labor, health and population administration.³⁵

The criminal law by which experts have sought alternative alternatives, namely actions and efforts that began to be realized through *defencesociale nouvelle*. The character is Marc Ancel. This movement grew after the Second World War. In 1945 the thought of human freedom and accountability had changed from before, especially the Italian criminologist. *Gramatika* established a movement called *La defense sociale*. This movement is gaining attention by Marc Ancel and other experts, who advise refraining from being careful about using criminal law.³⁶

The flow of social control has a prominent characteristic of an integrated approach to the implementation of the criminal justice system, criminal law as one of the alternative forms of social control, and the approach is carried out in a very efficient way. Criminal law according to modern schools as a means to achieve social protection objectives, criminal law not only determines what can be convicted, and how it is done, but also determines who is formally authorized in law enforcement. It therefore becomes one of the main pillars of discovery or freedom to continually improve its use. In the flow of social control of the

³²Mardjono Reksodiputro. "Multikulturalis medan Negara-Negara Nation serta kejahatan Transnasional dan Hukum Pidana Internasional." Disampaikan dalam Seminar Nasional Pengaruh Globalisasi terhadap Hukum Pidana dan Kriminologi Menghadapi Kejahatan Transnasional. Bandung; 17 Maret 2008, hlm. 1-8.

³³ Hazel Croal, *White Collar Crime* (Buckingham: Open University Press, 1992), hlm. 78.

³⁴ Barda Nawawi Arief. *Bunga Rampai Kebijakan Hukum Pidana*. Op.cit, hlm..2.

³⁵ John Graham. *Crime Prevention Strategies in Europa and North America* (Helsinki: Helsinki Institute for Crime Prevention and Control Affiliated Eight the United Nations. 1990), hlm. 18-60.

³⁶ Roeslan Saleh. *Dari Lembaran Kepustakaan Hukum Pidana*, op.cit, hlm. 37-39.

institution's position to apply the law to be more free, and the discovery progressively evolved, the Judges can do the definition of law through the invention of the law that has been, the formation of law-makers. With its new role on criminal law must be reconstructed as a form of means that contains the rules in realizing social welfare. As a result, it will cause various social impacts, namely criminal law becomes a matter of will which contains the policy regarding the rules for selecting law enforcement that can be done eventually lead also to the problems of policy.³⁷ The problem of morality is changing rapidly, so it has an impact in practice. Another thing that can be seen from the flow of social control is the occurrence of supervision among members of the community, using the criminal law, so that will be tangible in an individual accountability³⁸. In the renewal of the criminal law, it has occurred that the Draft Penal Code adopts the classical neo flow, for human reason and represents the balance of interests proportionally, its characteristics are; the modification of the doctrine of freedom of will on the basis of age, pathology and the environment, *Daaddaderdtrafrecht*, promotes expert testimony, the development of mitigating and aggravating factors, the development of the twin-crime system of crime and action, the combination of justice models and the protection of the rights of the convicted, non-institutional treatment and decriminalization and depenalization.³⁹

Including the application of penalties, by way of day fine payments applied in some European countries, the criminal penalty of social work as the latest generation of crime⁴⁰. Classical, neo-classical, modern and social-controlled streams have contributed to the most significant thinking in judicial practice in the world. Therefore the advantages and disadvantages of enforcing the flow of criminal law provide meaningful learning, in the reform of Indonesian criminal law, especially ideal punishment, in Pancasila society.

"Criminalization in Indonesian New Criminal Law"

Indonesia's new criminal law, which has been drafted by jurists, has contributed to the thinking of modern criminal law, in harmony with the wish for reform of Indonesian criminal law, hence legal politics becomes the backdrop of struggle and interest, to make this modern criminal law takes place for a progressive State.

³⁷*Ibid*, hlm. 7

³⁸J.S.Roouceked. *Social Control* (Princeton: D. Van Nostand Company Inc, 1962), hlm. 3.

³⁹Muladi. *Kapita Selekta Sistem Peradilan Pidana. Op.cit*, hlm. 52

⁴⁰SyaifulBakhri. *Pidana Denda dan Korupsi*. (Yogyakarta; Total Media, 2009) hlm. 169-172.

Politics of criminal law is basically an activity, which concerns the process of determining the purpose and how to carry out the goal. It is related to the process of decision-making, or election through selection, among the various alternatives that exist, it becomes the objectives of the upcoming criminal law system. Since the selection is the key issues in criminal law, namely unlawful acts, mistakes or criminal liability, and alternative sanctions, both criminal and criminal sanctions⁴¹. Law is a reflection of a civilization, culture, and a fabric, which is close. The law has indeed fallen into decadence, if the shortcomings of the lawmakers have shown backwardness, with regard to the facts and ideas that are in effect or are beginning to develop. Law-makers who can not adjust, are sensitive to future problems.⁴² The influence of legal education, by criminal jurists, in various times, has been urgent, and gave birth to criminal law reform in various fields of life, economy, politics, social, culture, and law enforcement, has embellished and even complementary, lagging criminal law regulated by The applicable Criminal Code, as a colonial relic. With all its weaknesses lawmakers, it is still far from perfection in formulating legislative policies in the field of criminal law, it is an improvement. Since in good faith, it has contributed good sides, to overcome the unstoppable and unpredictable growth of evil, in a globalized world, with its very special features.

Renewal of criminal law, demands the existence of research and thinking on the central problem, which is very fundamental and strategic, including in the matter of policy in setting criminal sanctions. The policy of establishing penalties in legislation is as a policy line of criminal and punishment system, which at the same time as the basis of legality in the next stage⁴³. The setting of the penal law is a reflection of the ideology of a nation, which makes the law grow, and it is of the utmost importance that the whole law building rests on a sound and consistent political view. It can be calculated that the Western European Criminal Code is individualistic and has a different character with the Eastern European Socialist Penal Code. Indonesia has a political view based on Pancasila, while the criminal law view, closely related to the general view of law, state and society.⁴⁴

In formulating a new criminal law, it also takes into account the intersection of the existence of social norms, which by criminal law is formulated and equipped. Therefore it is necessary to transform social norms into legal norms. The context of a democratic society, in

⁴¹Muladi. *Demokrasi dan HAM. Opcit*, hlm. 251.

⁴²LiliRasyidi. *Dinamika Situasi dan Kondisi Hukum Dewasa ini. Kapita Selekta Hukum. Op cit*, hlm. 4.

⁴³Barda Nawawi Arief. *Kebijakan Legislatif Dalam Penanggulangan. Op, cit*, hlm. 3-4.

⁴⁴Sudarto. *Hukum Pidana dan Pandangan Masyarakat* (Bandung; SinarBaru, 1990) hlm. 3.

the end, occurs congruence between various social norms, through social ethics and legal norms. Although social norms are more volatile when it compares to the rule of law, set out in the law. Therefore it is given the place, so that judges more free to take into account the development of society. The criminal law has to be realized in a criminal justice process; this is called the criminal procedure law (*starfvorderingsrecht*), or also referred to as a formal criminal law. The book is summarized in the Criminal Code. In the Netherlands it is decided that the process of the event or the judiciary should be well implemented. Referring to the provisions, developed through the jurisprudence of the Supreme Court of the Netherlands, a number of criminal procedural law teachings, such as unlawful evidence, as well as good orderly principles. It develops the principle of the European agreement on the protection of human rights. Therefore it is necessary to understand the material and formal criminal law simultaneously.⁴⁵

Therefore, criminalization will depend on the independence of the judge in taking a decision through considerations that combine the dimensions of law and human dimension so that criminal law can create a humanistic conception of punishment⁴⁶. Judge as a judicial subsystem, is a core actor, functionally exercising judicial power, because essentially has a pillar as a judicial body, enforced by law, so that in carrying out its functions Judges are required to understand the scope of duties and obligations, to examine, hear, decide and completing each case, modeling the case, translating it, selecting relevant rules, interpreting, reviewing and formulating the settlement formulation.

In many parts of the world, the modern criminal law is reflected through the imposition of the implementation and supervision of sanctions that are not only focused on raising sorrow but also bring a sense of return to the social system so that criminal law can be analogy as a hospital then crime is a disease which then carried out a series care to restore its performance.

The struggle to uphold justice, has been done by the civilized nations in this part of the world. Including the State of Indonesia, this from time to time, incised the struggle of justice, independence, prosperity, since the Europeans came, until the physical struggle, to achieve independence. Even to the independence experience of delivering this country, it entered the century and era as part of the modern legal state in the world. The colonial remnants of the

⁴⁵ Jan Rummelink. *Op cit*, hlm. 3-4.

⁴⁶ *Ibid*, hlm 223

Law field, still felt, due to our legal politics, have in the past focused on physical, social, economic and cultural development, defense and security, but are very slow on the development of the field of law.

Modern law does not fall from the sky. Modern law grows and evolves through a long historical journey, to form modern law as it is today. Law keeps the rules of values, rules of role and organization. Through law, values can be translated into rules and therefore have force imposed. The modern Indonesian state of law is favoring the Supremacy of morals. This gives a special emphasis on the moral aspect rather than the mere aspect of legislation⁴⁷. The criminal law is material and formal, is a family law. Therefore, the material criminal law (Penal Code) and Formal criminal law (KUHAP), established a close relationship, intimate and inseparable and mutually supportive. Criminal procedural law is a legal regulation that regulates, organizes and maintains the existence of the provisions of the material criminal law. Regulate how Judge Decision-making process and process. The legal rules governing the implementation stage of the judge's verdict, with its various principles, namely Equality before the law principle, Legality Principle, Presumption of innocence Principle, Judicial Principle fast, Legal aid principle. Open justice principle, fairness.⁴⁸

As for the draft of Criminal Procedure Code, which has received various inputs, there are nine fundamental changes;⁴⁹ Treats Suspects right to remain silent and the presumption of innocence. This rule gives the right of the suspect, to be unable to answer the question of the investigator. The existence of Protect Citizens liberty and privacy interest in the area of pretrial detention. It is in connection with detention. Within 5x24 hours a suspect must be confronted with a commissioner's judge, aligned with the international covenant civil and political right (ICCPR). The remove the preliminary investigation stage and ensure better police / prosecutor cooperation. The issue of investigation and prosecution relations has been established since the beginning, with prosecutors providing guidance to meet the formal requirements and substance of the official news. The existence of Develop a pretrial stage and clarify the role of the commissioner of judge to preside over it. Significant changes at the pre-trial stage and the establishment of new institutions, namely the Judge Commissioner, (Preliminary Examining Judge) have the responsibility of authorizing a search warrant. The

⁴⁷Suteki. *Op cit*, hlm. 269.

⁴⁸Lilik Mulyadi. *Putusan Hakim Dalam Hukum Acara Pidana. Teori, praktek, Op cit*. hlm. 1-15.

⁴⁹Indriyanto Seno Adji. *KUHAP Dalam Prospektif*. (Jakarta; Diadit Media, 2011) hlm. 18-22.

judge commissioner conducts a special hearing on the prosecutor. The judge of the commissioner may abolish and order to arbitrarily release the arrest to the suspect.

Criminal law reform is a work and effort that deserves support, because the foundation of justice seekers, the general public, wishes to achieve a model of punishment, which reduces the need for "retaliation" solely. But it has developed a widespread public protection of access to justice, which is reflected in criminal justice rulings. This is the work of criminal justice experts, practitioners and the daily criminal justice in solving concrete legal events in society.

"Epilogue"

First. Criminalization is a real suffering. Implementation is very complicated, and costly and expensive. Criminalization is a crime that can only be justified, if the crime is capable of preventing the occurrence of a crime greater than criminal prosecution. The purpose of developing punishment has come about rationally. The existence of the theory of vengeance aims to satisfy all parties, and is very primitive, and still felt its influence in modern times. The crime of suffering is atonement, and the guilt will be restored through the balance of the value of the criminal. With regard to the objectives to be pursued in a crime, there is no common opinion among scholars, but at least there are three points of thought about the objectives to be achieved in a crime, namely to improve the perpetrator's person, to make a deterrent, and to make the perpetrators of crime , unable to do it again. Criminalization in the modern period, leads to things, rational, with alternatives, the use of sanctions.

Second. The noble purpose of the criminal law is to provide protection to the common good, aimed at upholding the rule of law, protecting the rule of law, the dependent one by one, and the relations between them protected by the norms of social orderliness. Criminal law is a tool of state power, to impose sanctions, so criminal law is not an end in itself, but has a function of social service and function. The role of a criminal judge is crucial, especially to decide a case fairly. So the criminal judge must have a lot of data, about the deeds and the perpetrators. In fact, the decision is often a problem. Justice becomes infinite or unstable, the meaning of justice demands is endless, it means the obligation to deconstruct every concept of justice. Justice is a movement, and as a movement, justice can not be frozen.

Third. The purpose of the criminal law is that opposition to evil is seen as a symptom of society. Criminal is one of the powerful tools that the state controls against crime. A fact of doctrinal outcomes, legal principles in various universities, then submitted to authoritative institutions, to make it the basis of legislators to rationally make it clear that there is a certain influence of jurists on the form and reasoning of the law. The dominance of the experts against modern law, making the flow of law coming from the university to educate candidates for law scholars, think abstractly of the law and relate it to various concepts. At present, criminal law is linked, with social protection, protection of society. Freedom of law is to determine the type, size, and manner of criminal execution. Whether a person is put in prison or submitted to a probation service to be given a form of punishment or supervision. Therefore an integrated approach to the implementation of the implementation of the criminal justice system, criminal law as part of an alternative form of social control, and the approach is carried out in a very efficient way. The institution's position to enforce the law becomes freer, and discovery is growing, the judges can do the definition of law through the invention of the law that has been the formation of law.

Fourth. Judges have an important role, in the enforcement of criminal law for the achievement of a justice that is expected and aspired. The problem that always appears and always experienced by judges in the enforcement of criminal law, is about judges decisions that are less fair and less responsible in deciding a case. The judge must give the decision with a sense of responsibility, as an honest, impartial judge, remember the oath of office, and remember his position free from the power of execution, meticulous and meticulous as a good judge. The main requirement for the judge's decision is that the decision must be grounded in order to be justified. Professional judges are judges capable of playing their role as mediators, between the enactment of the law of the resolved state law, to uphold legal justice, and the enforcement of social justice, which is mocked by the moral rules and traditions of society. So that judges in developing countries with a pluralistic culture, it's time to change and change. Judges are no longer limited to the existence of the mouth of the sentence of the legislation. The judge is not a tool, designed to logic and work mechanically, but a whole person who has a sensitivity to the humanitarian, social, and justice.

Fifth. The purpose of the upcoming criminal law system is the law that organizes human actions. Through a regulation which contains a unity, with essentially linking specific rules, to the moral order, the order of religion, so that the renewal of the criminal law requires

the research and thought of the central, very fundamental and strategic problems, policy in establishing criminal sanctions? The setting of the penal law is a reflection of the ideology of a nation, which makes the law grow, and it is of the utmost importance that the whole law building rests on a sound and consistent political view. Implications Reform of criminal law, with the substitution, refinement of material and formal penalties, is a step forward, the people of Indonesia, to achieve justice of legal certainty and its usefulness. Therefore immediately apply the new formal and material criminal law, as a container to improve the nature of the punishment of dignified Indonesian society.

REFERENCES

- A.Hamid S. Attamimi dalam Farida Indriati Soeprapto, *Ilmu Perundang-Undangan Dasar-Dasar dan Pembentukannya* (Yogyakarta: Kanisius, 1988)
- Asas legalitas bermakna tiada pidana tanpa undang undang. Asas kesalahan bermakna, bahwa pidana atas dasar kesengajaan dan kealfaan, dan asas kesalahan bermakna, bahwa pidana dikenakan untuk kemaslahatan dan sesuai dengan kesalahannya
- Al Quran. Surat 17 Ayat (15). Senada dengan asas legalitas. Pasal 1 (1) KUHP, “ Tiada suatu perbuatan dapat dipidana, kecuali berdasarkan kekuatan ketentuan perundang undangan pidana yang telah ada sebelumnya.”
- Barda Nawawi Arief. *Kebijakan Legislatif Dalam Penanggulangan*. *Op,cit*
- . *Bunga Rampai Kebijakan Hukum Pidana*. *Op.cit*
- C.M.V Clarkson dan H. M Keating, *Criminal Law: Text and Material*, (London: Sweet & Maxwell, 1998)
- D.Schaffmeister.N.Keister dan EPH.Sitorius. *Hukum Pidana*. (Bandung; PT. Citra Adytia Bakti, 2007)
- David Garland, *Punishment and Modern Society: A Study in Social Theory*. (Oxford: Clarendon Press, 1995)
- Eva Achjani Zulfa. *Pergeseran Paradigma Pemidanaan*. (Bandung; Lubuk Agung, 2010)
- George Golwin. *Criminal Man* (New York: George Braziller Inc. 1957)
- Hazel Croal, *White Collar Crime* (Buckingham: Open University Press, 1992)
- HM.Muslich.Ks.*Catur Penegak Hukum*.(Yogyakarta; Prodi Syariah FIAI Universitas Islam Indonesia, 2012)
- Indriyanto Seno Adji. *KUHAP Dalam Prospektif*. (Jakarta; Diadit Media, 2011)
- J.M. Van Bammelen. *Hukum Pidana II* (Bandung: Bina Cipta, 1991)
- John Graham. *Crime Prevention Strategies in Europa and North America* (Helsinki: Helsinki Institute for Crime Prevention and Control Affiliated Eight the United Nationas. 1990)
- JS.Rooucek ed. *Social Control* (Princeton: D. Van Nostand Company Inc, 1962)
- Jan Remmelink. *Op cit*
- Lili Rasyidi. *Dinamika Situasi dan Kondisi Hukum Dewasa ini*. *Kapita Seleкта Hukum*. *Op cit*

- Lilik Mulyadi. *Putusan Hakim Dalam Hukum Acara Pidana. Teori, praktek, Op cit*
- Mardjono Reksodiputro. "Multikulturalisme dan Negara-Negara Nation serta kejahatan Transnasional dan Hukum Pidana Internasional." Disampaikan dalam Seminar Nasional Pengaruh Globalisasi terhadap Hukum Pidana dan Kriminologi Menghadapi Kejahatan Transnasional. Bandung; 17 Maret 2008
- Muladi. *Kapita Selekta Sistem Peradilan Pidana. Op.cit*
 ----- *Demokrasi dan HAM. Op cit*
- Oemar Seno Adji. *Hukum Hakim Pidana.* (Jakarta; Erlangga, 1984)
- P. A. F Lamintang. *Hukum Penitensier Indonesia* (Bandung: Armico, 1989)
- Rosylin Muraskin dan Albert R. Roberts. *Vision For Change. Crime and Justice In The Twenty-First Century.* (USA; Prantice- Hall, Inc., 1996)
- Roeslan Saleh. *Segi Lain Hukum Pidana* (Jakarta: Ghalia Indonesia, 1984),
 ----- *Hukum Informatika* (Jakarta: Fakultas Hukum Universitas Muhammadiyah Jakarta, 1996)
 ----- *Dari Lembaran Kepustakaan Hukum Pidana, op.cit*
 ----- *Penjabaran Pancasila dan Undang-Undang Dasar 1945 dalam Perundang-undangan* (Jakarta: Aksara Baru, 1979)
 ----- *Stelsel Pidana Indonesia.* (Jakarta; Aksara Baru, 1983)
- Richard. A. Myren, *Law and Justice: An Introduction,* (California: Crove Publishing, 1988)
- Richard A. Posner, *The Problems of Jurisprudence.* (London: Harvard University Press, 1993)
- Syaiful Bakhri. *Pidana Denda dan Korupsi.* (Yogyakarta; Total Media, 2009)
- Sudarto. *Hukum Pidana dan Pandangan Masyarakat* (Bandung; Sinar Baru, 1990)
- Sudikno Mertokusumo. *Teori Hukum.* (Yogyakarta; Cahaya AtmaPustaka. 2012)
- Sutandyo Wignjosebroto. *Hukum Yang Tak Kunjung Tegak; Apa Yang Salah Dengan Kerja Penegakan Hukum Dinegeri Ini?.* Dalam *Dialektika Pembaruan Sistem Hukum Nasional.* (Jakarta; Sekretariat jenderal Komisi Yudisial RI, 2012)
- Suteki. *Op cit*
- Sudarto. *Hukum dan Hukum Pidana. Op cit*
- Suparman Mazuki. *Kekuasaan Kehakiman; Independensi Dan Pengawasan Hakim.* Dalam *Dialektika Pembaruan Sistem Hukum Indonesia.* (Jakarta; Sekretariat Jenderal Komisi Yudisial RI, 2012)
- Teori rehabilitasi, bermakna, bahwa pelaku pidana harus diperbaiki kearah yang lebih baik, agar ketika kembali kemasyarakat diterima oleh berbagai komunitasnya, dan tidak lagi mengulangi perbuatan jahatnya.
- Teddy Asmara. *Budaya Ekonomi Hukum Hakim.* (Semarang; Fasindo, 2011)
- Tujuan Pidana adalah untuk mencegah dilahirkannya kejahatan pada masa akan datang, (Seneca Filsuf Romawi).