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Comparison of the Indonesian Legal System with the Dutch Legal System

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Abstract. *Comparison of legal systems is comparing two or more legal systems in other countries, so as to obtain differences and similarities between one country and another. Learning about legal systems means having to start from different legal histories, even though the rules are somewhat the same, they are definitely different. However, even if there are similar rules between one country and another, there may still be differences in procedures and philosophies. The importance of studying comparative legal systems is to gain broader insight so as to gain a better understanding of the legal system and to predict whether the legal system can be applied in Indonesia or not. Broadly speaking, in this world, although there are five known legal systems, namely; Civil law, common law, socialist law, Islamic law and customary law systems, but in fact the dominant ones used in the international world are only two, namely civil law and common law systems, socialist law, Islamic law and customary law systems, but in fact only two are dominantly used in the international world, namely civil law and common law legal systems. The United States has a different structure in Indonesia so it is not suitable to be compared/applied in Indonesia. Comparative legal systems do not only compare the legal systems of one country or another but can also compare the past and present periods. For example, comparing the new law with the old law. In Indonesia, the legal system has long failed to function as it should. This is because for a long time the law has been marginalized and merely used as an ornament In fact, since the process of democratization, law is really needed and has a central role. The malfunction of the legal system has given rise to anarchism when people face the authorities, and even conflicts between communities. People are made apathetic and sometimes resort to street justice. The purpose of this research is to clarify the legal comparison between Indonesia and the Netherlands, so the following conclusions can be drawn: 1. Comparison of the Indonesian legal system and the Dutch legal system, 2. Application of the national legal system in Indonesia, which is a former Dutch colony.*

Keywords: *Comparative; Dutch; Law; Netherlands.*

1. Introduction

Indonesia is a former Dutch colony. Therefore, at the time of independence, the criminal law system implemented in Indonesia was adopted from the Dutch legal system, currently known as the Criminal Code (KUHP). Indonesia's substantive criminal law system is regulated in the Criminal Code (KUHP), a legacy of the Dutch colonial era that was codified into the Indonesian criminal law system, along with formal criminal law as the implementing agent of substantive criminal law, namely the Criminal Procedure Code (KUHAP). Because the Criminal Code (KUHP) is a legal system originating from a western country, it is referred to as a western criminal law system.

In Romli Atmasasmita's book entitled Comparative Criminal Law, Winterton explains that comparative law is a method that compares legal systems and this comparison produces data on the legal systems being compared. Meanwhile, Soedarto defines it as:

Comparative law is a branch of legal science and therefore it is more appropriate to use the term "comparative law" than the term "comparative law". 3 Judging from the two definitions presented by the two experts, there are 2 (two) views regarding the definition of comparative law, namely the view that comparative law is a method and comparative law is a branch of legal science in the sense that comparative law is a branch of science. Here, the writer argues that both definitions are correct definitions because a legal comparison is not only seen from the perspective of a method but must also be seen that comparative law is a branch of legal science due to the development of society which now does not only see comparative law as a method of comparing one legal system with another legal system but now society sees comparative law as a branch of legal science that can help the development of law in society.

Furthermore, in his book with the same title, Comparative Criminal Law, Romli Atmasasmita explains legal families. Quoted from the book, the first figures to introduce and compile groupings in the form of classifications regarding legal families were Rene David and John EC Brierly. David and Brierly stated that the arrangement of legal families into different legal groups considers the basic elements of the laws applicable in the world and is not based on the similarities or differences of these laws. These basic elements are stated by Rene David and John as legal characteristics. To date, three recognized legal families are: 5

1) *The Romano-Germanic Family;*
2) *The Common-Law Family;*
3) *The Family of Socialist Law.*

However, in essence, besides the three legal families above, there are still other

legal families such as the Islamic legal system, the Far Eastern legal system, and the Chinese legal system.6 Marc Ancel divides 5 (five) legal systems in the world which are grouped or classified into one legal family based on the origins, history of their development, and methods of application. The grouping of the 5 (five) legal families in question is as follows:7

1) Civil law system (continental Europe);
2) Common Law System (Anglo Saxon);
3) Middle East System (far east);
4) Socialist Law (socialist).

In essence, although there are differences in the grouping of legal system families in the world as explained above, in essence, Nurul Qamar stated in his book entitled Comparative Legal and Judicial Systems that there are 5 (five) families of legal systems in the world, and which in their development are found in mixed legal system families, so that they can be shown as follows: Continental European legal family, Anglo-Saxon legal family, Socialist legal family, Local/Regional legal family, Religious legal family, and Mixed legal family.8 The author is interested in finding out which legal family the criminal law system adopted by Indonesia actually belongs to. Is it included in the Romano-Germanic family or the common law family or the family of socialist law. The author will draw several characteristics from each legal family and then compare them with the Indonesian criminal law system and then compare them with the Dutch criminal law system (civil law) so that a conclusion can be drawn as to which legal family the criminal law system in Indonesia belongs to. Therefore, the author will compare each characteristic of the legal family and then compare it with the criminal law system in Indonesia. related to the embodiment of comparative law in Indonesia which is still related to the comparison of the Indonesian legal system and the Dutch legal system, the following conclusions can be drawn: 1. Comparison of the Indonesian legal system and the Dutch legal system, 2. Development and renewal of the legal system in Indonesia.

2. Research Methods

The type of writing method used is the library method or another term, namely normative, which focuses on the study of literature and also laws that are still related to comparative law in Indonesia which is still related to the comparison of the Indonesian legal system and the Dutch legal system.

3. Results and Discussion

3.1. Comparison of the Indonesian legal system and the legal system

In this world, we don't encounter just one system, but rather more than one. The

legal system here encompasses elements such as structure, categories, and concepts. Differences in these elements result in differences in the legal systems used. We recognize at least two distinct legal systems: the Continental European Legal System and the English Legal System. People also commonly use the terms Romano-Germanic Legal System or Civil Law System for the former, and Common Law System for the latter. As a result of being colonized by the Dutch, Indonesia uses the legal system applicable in Continental Europe, or the Romano-Germanic legal system or "Civil Law System."

Indonesia is a former Dutch colony. Therefore, at the time of independence, the criminal law system implemented in Indonesia was adopted from the Dutch legal system, currently known as the Criminal Code (KUHP). Indonesia's substantive criminal law system is regulated in the Criminal Code (KUHP), a legal product inherited from the Dutch colonial government, codified into the Indonesian criminal law system, along with formal criminal law as the implementing agent of substantive criminal law, namely the Criminal Procedure Code (KUHAP). Because the Criminal Code (KUHP) is a legal system originating from a western country, it is referred to as a western criminal law system.

The main source of positive criminal law in Indonesia is the source of law in the sense of written laws, both those that have been codified such as in the Criminal Code and those that exist outside the codification, such as the Law on the Eradication of Criminal Acts of Corruption, and other laws that contain criminal sanctions. However, for certain people in certain regions, their customary law provisions can also be used as a source of criminal law.

With customary criminal law still in effect in certain regions, there is still a dualism in the application of criminal law. However, written criminal law still plays an important role. Customary law, or the law that exists within a community, not only serves as a basis for criminalizing those who commit acts (the material unlawful nature in its positive function), but can also serve as a basis for eliminating the unlawful nature of an act or a basis for not criminalizing someone even though they are legally registered as the perpetrator (the material unlawful nature in its negative function).

The Criminal Code (KUHP) originally came from the Wetboek van Strafrecht voor Nederlandsch Indie (WvSvNI) which was officially renamed the Indonesian Criminal Code based on the provisions of Law No. 1 of 1946, but strangely until now there has been no official translation from the Indonesian government. Translations were carried out by individuals such as Prof. Moeljatno, SH, Professor of Criminal Law at Gajah Mada University Yogyakarta who is widely used among academics, and Soesilo, SH who is widely used among practitioners such as the police and prosecutors/public prosecutors. All of these translations can be said to be "private" translations and not official translations authorized by a law.12 The translation is only the rules contained in the body of the WvSvNI, while the official

explanation contained in the Memorie van Toelichting (explanatory memoir) is still in Dutch and no one has translated it until now. In fact, the MvT from the Dutch WvS can be used to understand the articles in the Criminal Code which are still in force today.

Given that the original text of the Criminal Code is still in Dutch, it is ideal to effectively implement its provisions, and to master Dutch. Furthermore, the official explanation in the MvT is still in Dutch and has not yet been translated, making the need for reforms in the criminal law field a necessity.

Meanwhile, when the Republic of Indonesia was proclaimed on August 17, 1945, there were two laws in the criminal law field. The first regulation was made by the Dutch East Indies Government, contained in the Wetboek van Strafrecht voor Nederlandsch Indie (WvSvNI) Stbd. 1915 No. 732, which came into effect on January 1, 1918. On the other hand, On June 1, 1944, the Japanese government issued criminal law regulations known as Gunsei Keizirei. Thus, there was dualism in the application of criminal law at the beginning of the formation of the Unitary State of the Republic of Indonesia.

Based on the dualism conditions that were considered unfavorable for the newly independent Unitary State of the Republic of Indonesia, the government on February 26, 1946 issued Law No. 1 of 1946 concerning Criminal Law Regulations. Article 1 of Law No. 1 of 1946 stipulated: "With the necessary deviation from the Presidential Regulation of the Republic of Indonesia dated October 10, 1945 No. 2 stipulates that the criminal law regulations currently in force are the criminal law regulations that existed on March 8, 1942."

In the consideration of Law No. I of 1946, it is stated that before the formation of a new criminal law, criminal law regulations need to be adjusted to the current situation. This means that this law is a transitional regulation that contains transitory law and it is evident in the provisions of Article I. March 8th is the date one day before the unconditional surrender of the Governor General of the Dutch East Indies to the Leadership of the Dai Nippon Army in Kalijati Bandung.14 At that time, the provisions on criminal law in Indonesia still referred to Dutch regulations, namely WvSvNI and other regulations outside WvSvNI. Thus, Article 1 of Law No. 1 of 1946 has two functions15, namely:*An annulling function*or the function of abolishing or canceling all regulations issued after March 8, 1942, or criminal law regulations issued by the Japanese government.

1) *A restoring function*or re-implement all regulations issued by the Dutch East Indies government up to March 8, 1942.

The Indonesian government officially chose and implemented the material criminal law of the Dutch East Indies government and based on the provisions of Article

VI Law No. I of 1946 changed the name of the Wetboek van Strafrecht voor Nederlandsch Indie to Wetboek van Strafrecht and was subsequently referred to as the Indonesian Criminal Code (KUHP) and remains in effect to this day. Unfortunately, the enactment and name change were not accompanied by an official translation of the KUHP, which was originally in Dutch.

*WvSvNI*which was enacted with Stbd 1915 No. 732 based on the King's Decree (Koninklijk Besluit/KB) dated 15 October 1915 and came into effect on 1 January 1918 was actually a copy of the Dutch WvS which was made in 1881 and came into effect in 1886. The Dutch WvS itself was based on the French Penal Code during the time of Napoleon Bonaparte, because since 1810 the Netherlands had been part of France.16

Thus, the Indonesian Criminal Code has a long history and is more than two centuries old, so it is necessary to immediately draft a Criminal Code created by the Indonesian people themselves which is more oriented towards the values of justice of Indonesian society.

Articles in Law no. I of 1946 which is considered important in addition to Article 1 and Article VI, is Article V which reads as follows:

"Criminal law regulations, which in whole or in part are now unenforceable, or are in conflict with the position of the Republic of Indonesia as an independent state, or no longer has any meaning, must be considered wholly or partly temporarily invalid".

From the provisions of Article V, it is clear that its function is as a "screening board" with the existence of limitations in order to adapt to the conditions of the Republic of Indonesia as an independent country through the filtering of three provisions, namely:

1) in whole or in part is now unworkable.

2) contrary to the position of the Republic of Indonesia as an independent state

3) has no meaning anymore.

Although there is a difference of opinion on this matter, Prof. Sudarto and Han Bing Siong, on the one hand, consider Article V only aimed at criminal regulations outside the Criminal Code. Meanwhile, Prof. Muljatno and Prof. Oemar Seno Adji, on the other hand, argue that the provision applies to criminal regulations both inside and outside the Criminal Code. Prof. Sudarto's reasoning is that the provision only applies to criminal regulations outside the Criminal Code, because specifically for criminal regulations within the Criminal Code are already regulated in Article VIII.

Meanwhile, Articles IX to XVI regulate the addition/creation of new crimes related

to currency, broadcasting fake news and insulting the national flag. The crime of insulting the national flag has been revoked by Law No. 73 of 1958 and based on the provisions of Article III, a new article was inserted into the Criminal Code, namely Article 154a concerning desecration of the national flag and state symbols.

A. Development and renewal of the legal system in Indonesia.

For the first time, Law No. 1 of 1946 only applied in the Java and Madura regions. For Sumatra, it only came into effect on August. In areas outside Java and Madura which were occupied by NICA (Nederlands Indies Civil Administration) or the Civil Administration of the Indies which came returned to Indonesia with Allied/British troops on September 29, 1945, at that time WvSvNI Stbd 1915: 732 was still in effect. The NICA government also made several changes to this WvSvNI, for example the addition of Article 570 (Stbd 1945 No. 135) and the change of Wet boek van Srtafrecht voor Nederlands Indie to WvS voor Indonesia and came into effect on September 22, 1945.17

The application of these two Criminal Codes continued until the restoration of Indonesian sovereignty in the form of the Republic of Indonesia Serikat (RIS), because based on Article 192 of the RIS Constitution which came into effect on December 27, 1949, the RIS with its capital in Yogyakarta still applied its existing regulations including Law No. I of 1946. The provisions in Law No. I of 1946 also applied to regions that joined the Republic of Indonesia in Yogyakarta, based on Government Regulation in Lieu of Law No. 1 of 1950 in conjunction with Law No. 8 of 1950. For RIS regions outside the territory of the Republic of Indonesia in Yogyakarta, the WvS voor Indonesia still applied. This situation still applied immediately after the formation of the Republic of Indonesia based on the Provisional Constitution of 1950 which came into effect on August 17, 1950. In its Transitional Regulations, Article 142 of the Provisional Constitution of 1950 stipulated:

1) Criminal Code in conjunction with Law No. 1 of 1946 for the former territory of the Republic of Indonesia, Yogyakarta, and former restored areas.

2) 2. WvS for Indonesia for former non-choice areas controlled by the Netherlands

This dualism in the field of criminal law only ended with the issuance of Law No. 73 of 1958 (LN. 1958 No. 127) on September 20, 1958 and came into effect on September 29, 1958, which stipulated that Law No. I of 1946 was valid throughout the territory of the Republic of Indonesia. Thus, what was enforced was WvSvNI in conjunction with Law No. I of 1946 the re-enactment of the 1945 Constitution based on Presidential Decree of July 5, 1959, Law No. 73 of 1958 remains in effect until now.

Although Law No. 73 has successfully created a unified criminal code, subsequent

developments have continued with the issuance of several laws amending and/or adding to existing provisions in the Criminal Code, as well as the issuance of numerous laws containing criminal sanctions. Furthermore, criminal law outside the Criminal Code is known as special criminal law, while that within the Criminal Code is called general criminal law.

Many legal issues that are considered not to reflect justice will give rise to the idea that something that is considered unfair has happened and that is considered as something that is perhaps a result of the implementation of laws born from the Continental European legal tradition or civil law, which began to be introduced in Indonesia since the Dutch colonial era. The influence of positivism at that time developed an empirical understanding by saying that the peak of human knowledge is positive science or science, namely sciences that depart from strictly verified and measured facts.18 The emergence of the positivist paradigm in the epistemology of modern science is also marked by the existence of modern legal scientization,19 which prioritizes rational thinking by eliminating the influence of ancient traditions and theology that are considered irrational.

This civil law system follows the philosophy of legal positivism which states that the main objective of law is legal certainty, not justice and/or utility, because the philosophy of positivism prioritizes things that are clear and certain (positive) above all else by arguing that only something that is certain can be used as a measure of truth, Auguste Comte (1798-1857). Thus, in the civil law culture, the legal system is identical to the law, the source of law is the law, values are derived from the law, therefore the civil law system does not recognize the laws and values that exist in society. The civil law system has consequences for judges to enforce the law as it already exists in the law, as stated by Montesquieu (1689-1755), and is supported by the legalism school or the legal codification school, that the law is complete, there is no need to look for law outside the law. Therefore, according to van Apeldoorn, judges are merely mouthpieces of the law, judges are like machines without reason and without conscience, such a function of judges has also received criticism from the free legal school based on the theory of natural law (humans have reason and conscience) and the theory of legal sociology (where there is society there is law, the laws that exist in society are more numerous than the laws that are written and codified).20 Thus, the law that was born and developed with European traditions at that time, of course, in formulating justice, was not the same as the concept that existed and developed in Indonesia at that time and today. Based on this thinking, it seems that the effort to renew the Dutch legacy of the Criminal Code to be replaced with the Criminal Code created by the Indonesian Nation is a demand that is considered urgent. Sudarto stated that there are at least three reasons why the Criminal Code needs to be renewed, namely political, sociological and practical reasons (practical needs).

4. Conclusion

Indonesia was formerly ruled by the Dutch. Therefore, upon independence, the criminal law system used in Indonesia was an adoption of the Dutch legal system, called the Criminal Code (KUHP). Indonesian substantive criminal law is regulated by the Criminal Code (KUHP), which originated during the Dutch colonial period and has been compiled into the Indonesian criminal law system along with formal criminal law, namely the Criminal Procedure Code (KUHAP). The main source of positive criminal law in Indonesia is written law, both codified such as the Criminal Code and uncodified such as the Corruption Eradication Law, as well as other laws governing criminal sanctions. Meanwhile, customary law or laws applicable in society can be used as a basis for prosecuting perpetrators of crimes or as a basis for eliminating the crime, depending on the situation. The Criminal Code (KUH P) originally originated from the Wetboek van Strafrecht voor Nederlandsch Indie (W. v. S. v. N. I) before its name was officially changed to the Indonesian Criminal Code based on Law No. 1946. At the same time, if we look at the time the Republic of Indonesia was declared on August 17, 1945, two laws in the field of criminal law can be found. The first regulation created by the Dutch East Indies Government can be found in the Wetboek van Strafrecht voor Nederlandsch Indie (W. v. S. v. N. I) Stbd. 1915, therefore. 732 which has been in force since January 1, 1918. On the other hand, on June 1, 1944, the Japanese government issued a criminal law regulation known as Gunsei Keizirei. Throughout the initial process of the formation of the Unitary State of the Republic of Indonesia, there was dualism in the application of criminal law. Referring to the dualism situation that was considered less favorable for the newly independent Unitary State of the Republic of Indonesia, the government issued Law No. on February 26, 1946. 1946 concerning Criminal Law Regulations. In the consideration of Law No. In 1946, it was stated that before In creating a new criminal code, it is important to adapt criminal law regulations to current conditions. The Indonesian government has formally adopted and implemented the substantive criminal law of the Dutch East Indies era in accordance with Article VI of Law No. 100. In 1946, the Wetboek van Strafrecht for the Netherlands-Indies was changed to Wetboek van Strafrecht and has since become better known as the Indonesian Criminal Code (KUH P), which remains in effect to this day.

First, Law No. 1 of 1946 came into effect in Java and Madura. However, it did not come into effect until August 8 for Sumatra. Meanwhile, in areas outside Java and Madura controlled by the NIC A, or the Civil Administration of the Indies, which returned with Allied/British troops on September 29, 1945, W. v. S. v. was still in effect. N. I Stbd 1915: 732. The NICA government has also made a number of changes to WvSvNI, including the addition of Article 570 (Stbd 1945 No. The change from Wetboek van Strafrecht to WvS for Indonesia was recorded on September 22, 1945. Both Criminal Codes remained in effect until the restoration of Indonesian sovereignty with the formation of the Republic of the United States

of Indonesia (RIS). Article 192 of the RIS Constitution, which came into effect on December 27, 1949, emphasized that the RIS headquartered in Yogyakarta still applied the applicable regulations, including Law No. In 1946. The provisions were regulated in Law No. In 1946, this rule also applied to regions that joined the Republic of Indonesia Yogyakarta, in accordance with the Government Regulation in Lieu of Law No. In 1950, Law of the Republic of Indonesia number one was issued. In twelve fifty. For RIS regions outside the territory of the Republic of Yogyakarta, the policy of W. v. S voor Indonesia still in effect. Dualism in the field of criminal law has just ended with the issuance of Law Number. 73 of 1958 (Commonly Nota. In 1958, there was Number. Dated September 20, 1958, blown and sealed on September 29, 1958. Law No. In 1946, the event occurred throughout the territory of the Republic of Indonesia.

With the return of the 1945 Constitution based on the Presidential Decree of July 5, 1959, Law Number 73 of 1958 remains in effect until now. Although Law Number. 73 has succeeded in achieving unification in criminal law, but over time, it continues to develop with the issuance of laws that modify or add to the provisions contained in the Criminal Code, as well as with the issuance of laws containing criminal sanctions. Criminal law outside the Criminal Code is generally referred to as special criminal law, while those included in the Criminal Code are called general criminal law. Many questions about laws that are considered unfair may raise doubts that unfair acts have occurred, possibly caused by the application of laws originating from the Continental European legal tradition or civil law, which has existed since the Dutch colonial era in Indonesia.

The influence of positivism, which prevailed at that time, advanced empirical understanding by stating that the stage of human knowledge is positive science or science, namely a field of knowledge based on facts that are validated and measured precisely. The presence of the positivist paradigm in the epistemology of modern science is also characterized by the emergence of modern legal scientific scientification, which emphasizes rational thinking by eliminating the influence of ancient traditions and theology considered irrational. In the civil law system, the philosophy of legal positivism is followed, emphasizing that law aims to provide certainty, not just justice or benefit. The legal positivist view places clarity and certainty as the highest priority, arguing that only certain facts can be used as a reference to truth, as explained by Auguste Comte (1798-1857). Therefore, in the culture of the civil law system, law is identified with statutes. The source of law comes from statutes, and values refer to statutes. Therefore, the civil law system does not recognize the laws and values that develop in society.

The civil law system gives the impression to judges to enforce the law as stated in the law, as expressed by Montesquieu (1689-1755) and supported by the school of legism or legal codification, which asserts that the law is all-encompassing and there is no need to seek law outside of these regulations. According to van

Apeldoorn, judges only act as conveyors of the law, judges are considered machines without emotion or conscience. Such a judge's approach is also criticized by followers of the free law school, who cite the theory of natural law (which states that humans have a mind and conscience) and the theory of legal sociology (which emphasizes that law is present in society more broadly than what is written and codified). Thus, the law that emerged from the European tradition at that time certainly has a view of justice that is different from the concept that existed and developed in Indonesia both in the past and currently. With these considerations, it seems imperative that the Criminal Code inherited from the Dutch be replaced with the Criminal Code created by the Indonesian nation as a much-needed reform step. Sudarto highlighted the importance of reforming the Criminal Code for three reasons, namely political, sociological, and practical.

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Regulation:

In the 2019 Draft Criminal Code, customary law applies (the concept uses the term "living law" in society, whether derived from customary law or religious law). Article 2 paragraph (10) stipulates that the provisions referred to in Article 1 paragraph (1) (the principle of legality) do not diminish the validity of living law in society, which determines that a person is liable to punishment even if the act is not regulated by statute.