JOURNAL *of* INDONESIAN LEGAL STUDIES

UNNES
UNIVERSITAS NEGERI SEMARANG

Volume 3 Issue 02
JILS 3 (2) 2018, pp. 149-174

NOVEMBER 2018
ISSN (Print) 2548-1584
ISSN (Online) 2548-1592

Indonesian Penal Policy: Toward Indonesian Criminal Law Reform Based on Pancasila

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Article Info

Submitted on January 2018
Approved on July 2018
Published on November 2018

Keywords:
Penal Reform, Criminal Law, Pancasila, Indonesian Criminal Law

Abstract

*Criminal law enforcement in Indonesia has always been a very crucial and the sexiest issue. Almost 35 years the idea of criminal law enforcement has been carried out and so far several concepts of the National Criminal Code have been born which continue to experience developmental dynamics that are quite interesting to study. The desire to realize a better criminal law and be able to fulfill the aspirations of the people is the ideal criminal law politics (penal policy). National Criminal Law must have characteristics that are typical of Indonesia, authentic and original, encompassing customary law, systems of values and beliefs, characteristics of modern states and international values. Pancasila as the source of all sources of law, which has not received serious attention needs to be used as a recommendation for the paradigm of penal reform. Pancasila has at least the main principles that must be implemented in all formulations of criminal legislation. These principles are among others, principles based on the source of religious values (Godhead / Divine God), the value of humanity (humanism), the value of unity and peace, the value of democracy and the value of social justice. Therefore, Indonesian criminal law must have values that are based on Pancasila, both in the form of legal norms (*addresaat norm*), on the types of acts that are regulated (*straafbar*), in the form of punishment or sanctions (*straafmaat*), as well as regulatory aspects and implementation of law enforcement law (formal law).*

HOW TO CITE (Chicago Manual Style)
Najih, Mokhammad. 2018. "Indonesian Penal Policy: Toward Indonesian Criminal Law Reform Based on Pancasila", *Journal of Indonesian Legal Studies (JILS)*, 3 (2): 149-174.

INTRODUCTION

HAVING an Indonesian Criminal Law in the national legal system is a dream that to this day has not become real. It has been a long way for generations of criminal law intellectuals to still be incapable of embodying an ideal that wants to free themselves from the grip of the nails of the colonialism

product law (Reksodiputro 1995; Reksodiputro 2009)[1]. This is due to the legal politics of state administrators who are not consistently committed to resolving it, since the Old Order, New Order regimes and the current Reform Order.

Looking at the history of the draft Criminal Code Bill until 2012, it cannot be separated from the effort to reform the Criminal Code thoroughly. This effort began only after the recommendation of the results of the National Law Seminar I, on 11-16 March 1963 in Jakarta calling for the draft codification of national criminal law to be resolved as soon as possible (Saleh 1980). Then in 1964 the draft Criminal Code was first issued and continued until 2012. Thus it can be concluded that the universal/global/comprehensive criminal law reform effort is still a *rechtside* (legal idea) or *ius constituendum*, because it has not been ratified into a law (*ius constitutum*).

This penal reform effort in its entirety can be considered as an implementation of the mandate of the founding fathers implicitly contained in Article II of the Transitional Rules.[2] If so, then the implementation of the ideals of the founding fathers of this nation could only begin after 19 years of independent Indonesia. It is understandable that the effort to compile the Criminal Code can only begin in 1964 because during the period of 19 years (1945-1964), Indonesia's political and state conditions were not stable. The draft of the 1964 Criminal Code was then followed by the following year's designs, namely the Draft Criminal Code 1968, Draft Criminal Code 1971/1972, Draft Basaroedin Criminal Code (BAS Concept) 1977, Draft Penal Code 1979, Draft Criminal Code 1982/1983, Draft Criminal Code 1984/1985, Draft KUHP 1986/1987, KUHP Draft 1987/1988, Draft KUHP 1989/1990, Draft KUHP 1991/1992 revised until 1997/1998, and Draft

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1 This also emphasized that the government seriously formed a team to draft a new Criminal Code Bill since 1981/1982 (35 years after independence). The experts included in the team, among others, Prof. R. Sudarto, Prof. Oemar Seno Adji, Professor Mr. Reslan aleh, including Prof. Mardjono Reksodiputro himself (as experts laying the foundation for the renewal of the Criminal Code), besides that there is Prof. J.E Saehatpy, Prof. Muladi, Prof. Barda Nawawi Arief, Prof. Romli Atmasasmita and so on. However, the 1st concept can only be submitted on March 13, 1993, unfortunately the 1st concept (RUU KUHP 1993) at the time of Oetojo Oesman's minister was forgotten. Only later on the term of the Minister of Justice Muladi and then Minister of Justice Justice Yusril Ihza Mahendra was discussed again. In 1999-2000 the 2nd concept was published and then in 2004 the 3rd concept was published. Then as far as the author in 2007/2008 was born the 4th Concept and the last in 2012 was born the 5th Draft Criminal Code Bill. After approximately 32 years of struggle of the thought of reforming criminal law has experienced extraordinary dynamics, following the development and dynamics of society. The question that arises is a: Will the concepts continue to develop? And when is the new National Criminal Code immediately?

2 Article II of the transitional regulation, confirms that the enactment of the regulations at the time was temporary. Because before there was a new law, the old law was still used, even though it was a colonial product, until a new law was formed. This means that state administrators are required to carry out legal renewal as soon as possible, if they do not want the old law to continue to apply.

KUHP 1999/2000. Then in 2004 the Indonesian Ministry of Law and Human Rights issued the 2004 Criminal Code Bill as a revision of the 1999/2000 Criminal Code Bill, then the 2012 Criminal Code Bill was published as a further development of the 2004 Criminal Code draft (Bahiej 2006). Thus it can be seen that legal experts in Indonesia at least 14 times had drafted the Criminal Code (including the revision) for 49 years (from 1964 to 2013). It is a long journey and struggle of thought that is highly anticipated by the nation as one of the great works.

This article wants to try to describe a small thought about the idea of reforming criminal law based on Pancasila as the basis of the state. Even though at the present stage it might be considered too late, but it still needs to be presented as an assessment material. Since the proclamation of August 17, 1945, the spirit to liberate itself from colonialism was surging in the revolutionary struggle both physically and psychologically, morally and materially. But the struggle in terms of legal reform and regulations left by the invaders is still ongoing, although many conditions, these efforts have not received priority from politicians acting as legislators. Outdated legal products are still being used in the name of '*still relevant to current needs*' and '*have not been urgently replaced*'.

This article will discuss the views relating to two issues, namely (1) how are the characteristics of criminal law reform that are in line with the legal needs of the Indonesian people? (2) How to translate the principles of Pancasila as the basis of the state and the source of all legal sources in the reform of the national criminal law?

THE CONCEPT *of* NATIONAL PENAL POLICY

SINCE independence the desire to realize a national legal system is one of the main agendas in national development, as indicated by official state documents (Lukito 2013).[3] The politics of National Criminal Law must be interpreted as the national will to create criminal law that is in accordance with the aspirations and values derived from the Indonesian nation itself. In addition, criminal law can also participate to contribute to realizing the goals of the formation of the state (the ideals of independence), namely to realize a just prosperous state based on Pancasila.[4]

Regarding to the politics of criminal law, the following opinions and thoughts will be put forward on the understanding and political concepts of

[3] In official documents of BPUPKI, in discussing the 1945 Constitution Bill, was spearheaded by the freedom movement fighters. Mr. Supomo with his integralistic state conception, Mr. M Yamin with nationalism, also the thoughts of Ir Soekarno and Muhammad Hatta were among the figures who had the idea to shape the character and characteristics of the national legal system. In the New Order era, the GBHN text actually scheduled these ideals, although in practice many experienced serious obstacles and challenges from academics and practitioners themselves.

[4] the Preambule of the 1945 Republic of Indonesia Constitution

criminal law, as follows; Sudarto argued that criminal law politics is defined as a rational (logical) effort to prevent and deter crime by means of criminal law and the criminal justice system. Select laws and regulations that are appropriate, best and meet the requirements of justice and their functions. This also means that the politics of criminal law must consider the aspects of legal sociology and reach the future (Sudarto 1981; Sudarto 1983).

According to Salman Luthan (1999) and Muladi (1990) there are several factors that can be the reason for renewing criminal law;

1. Existing criminal law does not conform to social development and the needs of the community concerned. Laws and laws are no longer relevant to the social conditions of the people they wish to regulate, for example with the manifestation of new crimes;
2. A portion of the provisions in criminal law that are available, are not in line with the idea of renewal / reform that leads to the values of human rights, values of independence, justice, democracy and moral values that develop in society;
3. That the availability of criminal law enforcement that is available exists to create injustice and even damage human rights;
4. The available laws and criminal laws cannot guard and control public security and order.

Furthermore, Muladi also stated that criminal law politics and renewal of criminal law must remain based on the three core and main substances of criminal law; first, formulate and determine the behavior or action referred to as criminal; second, determine the form of elements of criminal acts and their accountability; and third, determine the form or type of punishment that can be given to anyone who made the mistake.

As referred to by Barda Nawawi Arif, Marc Ancel (1965) stated that in modern criminal science, there are three main components of study in criminal law, namely; "Criminology", "Criminal Law" and "Penal Policy". So to realize a good, progressive and realistic criminal law it is necessary to have an integrated collaboration between scientists (scholar) with practitioners (practitioners), between experts on crime (criminologist) with advocate or lawyers, so that prevention ideas can be united crimes with legal engineering ideas in the process of designing criminal law.[5]

Furthermore, Marc Ancel also provides an understanding of "penal policy" as a science of art which aims to enable legislation in criminal law to be better formulated and progressive so that it does not only provide guidance to the lawmakers, but also to law enforcers who carry out relevant legislation (Arief 2005). In line with that, Sudarto once stated three meanings about the politics of criminal law (criminal policy), namely:

[5] In the Author's understanding, legal practitioners include prosecutors, police, judges, notaries, politicians (legislators), if the lawyer is an advocate, legal consultant, lecturer and legal reviewer and the like.

1. In a narrow sense, the whole principles and methods that form the basis of the reaction to violations of the law in the form of judgment;
2. In the broadest sense, is the overall function of law enforcers, including the way of working from the judiciary and the police;
3. In the broadest sense (taken from the view of Jorgen Jepsen), it is the overall policy carried out through laws and official bodies, which aims to uphold the central norms of society (Sudarto 1981a; Sudarto 1981b; Prijatno 2004; Arif 2005).

Thus, it can be concisely stated that the politics of criminal law (penal policy/criminal law policy/*strafrechtpolitiek*) can be interpreted as an effort to realize criminal legislation that is in accordance with current conditions and for the improvement of laws in the future, in accordance with the principles of justice and value benefits for society and the country (Wisnubroto 1999).

In line with that, Peter Hoefnagels at quoted by Arif (2005) stated that criminal policy is the rational organization of the social reaction to crime (politics of criminal law is a form of social reaction to rationally organized crime), and some of the other terms expressed are as follows:

1. Criminal policy is the sciences of responses;
2. Criminal policy is the sciences of crime prevention;
3. Criminal policy is a policy of designating human behavior as crime; and
4. Criminal policy is a rational total of the responses to crime

Whereas A. Mulder, calls criminal law politics as "strafrechtspoliitiek" which means as a guideline to determine; (1) how far the powerful criminal provisions need to be modified or modified; (2) what can be done to prevent the enactment of evil acts; (3) determine the method or procedure of judgment and carry out punishment by the power of judgment (Winusbroto 1999; Mulder 1980; Onneweer 1994).

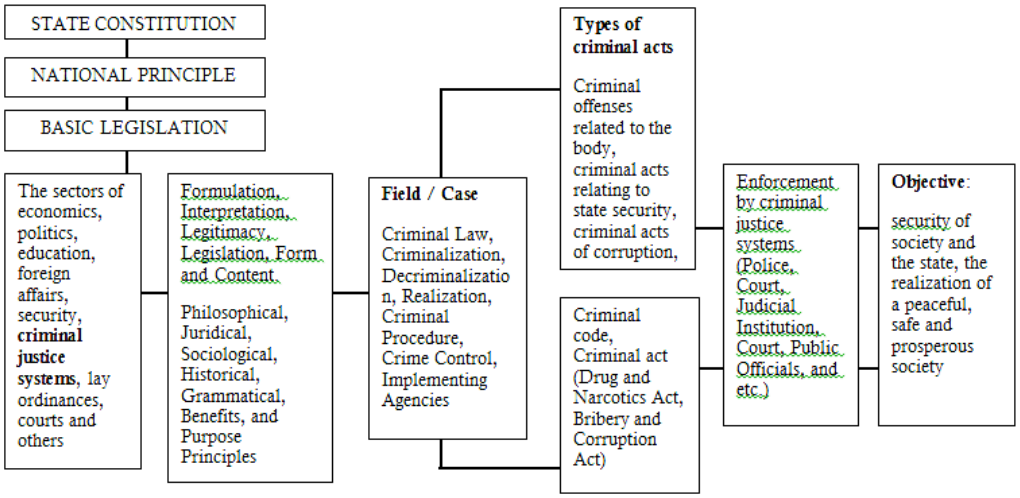
Then Ifdal Kasim understands the politics of criminal law as a policy, both to give an assessment of a human behavior as an evil or not evil behavior; the so-called criminalization and decriminalization of a behavior or action (Kasim 2005). In this regard, the issue of choices towards a behavior determined equally exists as an act of crime or not, and the choice between the various alternatives that exist, regarding what is the purpose of the criminal law system in the future. Thus the state is given the power to formulate and determine the behavior that is assessed and categorized as malicious behavior and form a form of judgment action that can be given to anyone whose actions fulfill the provisions of the relevant legislation (Miller 2003; Muncie 2002).[6]

[6] In the same contexts, also highlighted that criminalization is interpreted as manipulation (judging a behavior as a genius), that is a process carried out by the power of legislation to assess and determine a behavior that was not a criminal behavior and violate the law then determined as misbehavior by determining the level of punishment and who does it and discussed in the court. Likewise, decriminalization is interpreted as a process of assessing

Mardjono Reksodiputro (Chair of the National Criminal Code Draft Team 1987-1993) stated that the working group's approach to implementing criminalization and de-criminalization was to seek a synthesis of three rights, namely individual rights (civil liberties), community rights (communal rights), as well as maintaining the political interests of the state (State's policy). The problem that applies is, is it easy to balance the three domains in question. Because of this, failure to maintain a balance of these three interests (individuals, society and the state) will crush the basis of the legislation made, and there is a huge potential for "over-criminalization" to apply to one of the three domains (Kasim 2005).

From the description above, it can be understood that criminal law politics has different meanings with the term "renewal of criminal law regulation". However, the political understanding of criminal law embraces the concept of renewal of criminal laws. It should be stressed that criminal law is just one part of the legal system in a country. Nevertheless the politics of criminal law has a broad meaning, encompassing the renewal of written substantive regulations (Laws, Government Regulations Substituting Laws/*Perpu*, Regional Regulations, and other Regulations), renewal of the law enforcement administration structure, and community culture in practicing the laws and regulations. In summary the basic legal rules can be drawn in two matrices as below.

Fig. 1 Forms of basic formulation of legislation towards the basis of criminal law



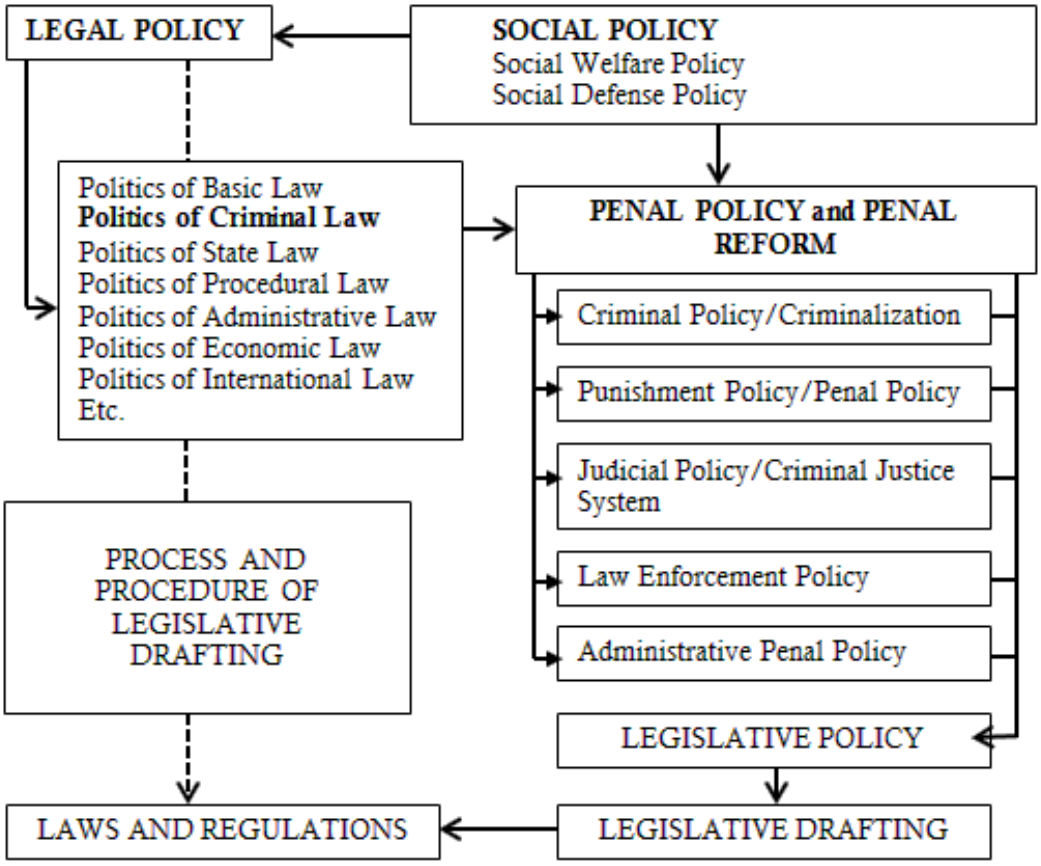
Source: Najih (2014)

From figure 1 it can be explained that in general the criminal law politics is a part of the political law of the whole government, while legal

and determining a behavior that all as genres and for the perpetrators may be discussed in the court, changing no longer as criminal behavior.

politics as a whole is a part of the program of wider vision / mission of government. While the outline of the broad and comprehensive government programs and policies of all walks of life, is strongly influenced by political ideology that controls the government. So criminal law politics is a small part of the draft policy implementation strategy and the development program of a state government. From this concept it can be studied and studied how political ideology relations dominate governance, its relation to the implementation of basic principles and principles of the nation which have been enforced through its constitution.[7]

Fig. 2 Political Position Scheme of Criminal Law in Legal Politics



Source: Najih (2014)

Furthermore, in figure 2 below, it can be explained that national politics of criminal law is part of the politics of national law as a whole, which is part of a broader program, namely the field of social welfare. That renewal of criminal law is part of the efforts of the state to realize social welfare, and

[7] For the country of Indonesia the basic principles of the country's objectives and the principles of national law have been enacted in the 1945 Constitution of the Republic of Indonesia, as amended to the 4th of 2002.

among the outputs of the functioning of criminal law in society is to realize the objectives of the law itself. With regard to the matrix, the politics of criminal law can be shared in several forms of branches and the scope of criminal law politics, among others:

1. Criminalization Policy, a legal politics that focuses on efforts to formulate bad deeds as a renewed criminal act or form a new formulation in the drafting of laws, such as the making of a Criminal Code Bill or certain criminal acts. Included in this legal politics, is a policy relating to the abolition of an act which was originally a criminal act in a law which is not a decriminalization;
2. Penal and Non Penal Policy, criminal law politics that focuses on punishments in criminal law, types or kinds of penalties, forms of punishment, and means needed for that. Including policies to evaluate the implementation of punishment, effectiveness of punishment, aspects of aspects that need to be corrected in accordance with the development of punishment principles;
3. Judicial Criminal Policy, this section is a branch of criminal law politics that discusses and examines criminal justice systems and procedures, and discusses issues of judgment procedures, forms of judgment, and the like;
4. The policy of criminal law enforcement (Law enforcement policy) is a part of criminal law politics that examines and discusses issues that need to be taken into account in implementing criminal law enforcement. This problem relates to law enforcement institutions, the needs and potential of its human resources, the professional aspects of law enforcement, infrastructure facilities that support law enforcement, and also aspects related to its legal culture.
5. The Criminal Justice Administration policy is related to the administration of criminal justice. This policy is very close to the field of law enforcement and the implementation of punishment. This is related to the technical implementation of criminal justice, budget planning, management and procurement of assets, infrastructure, such as the need for fostering court buildings, prison buildings, storage buildings for confiscated objects or booty, criminal justice administration systems, and so on.

From the description, the author would like to emphasize that the politics of criminal law, is one part of a "legal planning reform"—a well-designed legal development plan—by paying attention to the accompanying aspects. Starting from the state foundation as the main source along with its constitution (1945 Indonesian Constitution), political ideology of power, national development policy, legal politics and to politics of criminal law. From this description it is clear that Pancasila as the basis of the state

becomes a source of substantive value and legal resources in carrying out the reformation and formation of national criminal law.[8]

BUILDING THE CHARACTER *of* INDONESIAN CRIMINAL LAW: AN EXPLORATION

IN THE opinion of the author, there are a number of things that must be considered and the characteristic must be understood and inspired by the initiators of the reform of Indonesian criminal law, so that national criminal law has the characteristics of Indonesia. *First*, that Indonesian society is a pluralistic society, which has a diversity of customs and cultures, each of which has its own customary legal system, which must be protected, respected and recognized. *Second*, that Indonesian society has a religious system and beliefs that are adopted (religious systems). Religious values are very influential in society, even in customary law and social relations. *Third*, that as an independent country and the modern state of Indonesia also has the desire to build its own legal system which has Indonesian characteristics. And *fourth*, that Indonesia cannot be separated from the influence of international development, relations between nations. Human rights issues, democratization and the world or global economy-politics put pressure on forming and developing national law.

a. Support for the attention to the existence of the Customary Penal Code

Long before it was formed the drafting team of the National Criminal Code Bill (1981), in the Congress of Persahi II in 1964. Moeljatno offered a model of National Criminal Law sourced from the Customary Criminal Law. Moeljatno includes customary criminal law norms in national criminal law by emphasizing sanctions/convictions. He stated; "That to form the forthcoming National Criminal Code it is necessary to find a new conception in criminal law that is not foreign to the Indonesian nation. The provisions of criminal law can be extracted from unwritten law or customary law with two conditions, namely (1) he must live within the Indonesian community; and (2) it will not hinder the development of a just and prosperous society. That is, that unwritten legal rules must be accompanied by criminal threats. The existence of a criminal threat in the unwritten law is intended so that customary offenses will eventually expand into national law, so that judges are also authorized to determine it as a criminal act (Moeljatno 1964; Kadish, Schulhofer, and Barkow 2017).

De facto, Indonesia is a country that has a diversity of ethnic groups, a diversity of people with diverse social and cultural backgrounds. The intended

[8] We can look back on the ideals of the founders of the state of Pancasila in the fourth text of the main explanation of the opening of the 1945 Constitution before the amendment. In the explanation it is called "The fourth point contained in the opening is the state based on the One Godhead on the basis of just and civilized humanity. Therefore, the Constitution must contain contents that oblige the government and other state administrators to maintain noble human character and uphold the noble people's moral ideals".

diversity has also been bound and appointed with a motto Unity in Diversity. The diversity is politically bound to be one by the only nation, homeland and language, namely Indonesia; - In de jure, socio-cultural diversity is also accompanied by a diversity of customary laws and customs which in some Indonesian communities customary law and habits are still alive and developing in the middle -in the community, such as: Papua, Dayak, Samin, Bedouin and so on. Therefore, the potential for the realization of criminal law pluralism in certain cases must be accepted, especially with the implementation of regional autonomy and decentralization in the implementation of regional government.

b. The role of religious norms in the formation of national criminal law

That in Indonesian society even long before independence has made religion and belief in the Almighty God the pillar of life. Even a lot of customary law on indigenous peoples' units comes from religion, such as in the Minangkabau community, Javanese society, Madurese society, Balinese people, Sundanese people, and others. Empirically we have accepted the presence of regulations that apply specifically, such as in Aceh (Taufik, Sarsiti, and Widyaningsih 2016).

But it should be remembered also that Indonesia is also a country with a majority population of Muslims but Indonesia is not an Islamic State. Although Islamic law does not become a joint and legal basis for managing the life of the community as a whole but in certain legal questions Islamic law is used, which includes among others: marriage and inheritance, hajj, zakat, *waqaf*, and several other *mu'amalah* provisions. Article 18B Paragraph (1) of the 1945 Constitution expressly states that "the State recognizes and respects customary law community units along with their traditional rights insofar as they are alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia".

c. The intention to renew national criminal law in a planned modern state legal system (State of Law)

Penal reform as a national will needs to also pay attention to several important principles in the Indonesian state system which are related to this description, namely a system based on the principles of the rule of law, constitutional principles and democratic principles. These three principles are interrelated and mutually supportive losing just one of the principles will result in a limping of ideal legal politics. The principle of the rule of law contains three main elements, namely the separation of powers (check and balances), guarantee of free judicial power (due process of law), and guarantee of protection of human rights. Furthermore, in the State of law, the task of state administrators, especially the government is very broad, namely creating, maintaining the administration of order, security and welfare of its citizens in the broadest sense. In addition, constitutional principles require that each state implementing agency has only the constitutionally regulated corridor and based on the mandate given by the constitution.

In a state system such a variety of political products, in the form of political policies and legislation are born, including national criminal law. In the paradigmatic framework that is such a political product as a source of law as well as a source of binding power. law is expected to be able to accommodate all the interests of various layers of society, so what is meant by law is what is in the legislation that has been ratified by the state institution that has the authority to do so. This political condition and configuration greatly influences the configuration of legal products (Mahfud MD 2008). Therefore the importance of every holder of power to uphold the values of Pancasila (moral and ethical) is very important. Thus the moral values, ethics and interests of the people that exist in social reality remain the idealized sources of law that will always control and give birth to new positive laws through the process of change, correction and formation of new legislation, even though the rulers differ in their political flow.

d. Influence of values that are campaigned by the international world (the issue of universal human rights and democratization)

National penal reform also cannot be separated from the influence of values developed by the international community. In fact, the Indonesian state has been actively involved, becoming a state party in every important convention between nations. For example, Indonesia participated in becoming a party to ratifying the UN Convention on Human Rights, anti-violence conventions, anti-corruption conventions, convention on drug control issues, anti-trafficking conventions, child and women's protection conventions and so on.

As a state party, the Indonesian state is bound to implement these conventions in the form of incorporating these international values and norms into the relevant legal products and regulations, although sometimes the government requests exemption (reservations) in certain norms.

In line with the description above, Muladi provides five characteristics of Indonesian criminal law in the future; first, the upcoming national criminal law is formed not only for sociological, political and practical reasons, but must be consciously arranged in the framework of the national ideology of Pancasila. Second, national criminal law must not ignore aspects of the human condition, nature, and traditions of the Indonesian people. Third, the upcoming criminal law must be able to adjust to the universal tendency that grows in the international community. Fourth, national criminal law must consider preventive or crime prevention aspects, and fifth, national criminal law must always be responsive to every form of development of science and technology (Muladi 1990).

Thus the character of Indonesian criminal law is a criminal law that can openly accept the value system that developed in the community regulations, by making the Pancasila ideology as an assessment parameter and at the same time as a source of value which is the main standard.

PANCASILA AS A SOURCE IN THE ESTABLISHMENT *of* INDONESIAN CRIMINAL LAW

ON 2000, the MPR through the MPR TAP No. III of 2000 concerning the Source of Law and Order of Legislation has asserted that Pancasila is the main legal source in the formation of laws in Indonesia (Subandi H 2003).[9] In the TAP MPR, several sources of written law are determined as follows: (1) Pancasila, (2) Opening of the 1945 Constitution; (3) body of the 1945 Constitution and its amendments; (4). determination of the people's consultative assembly; (5) Constitution; (6). legislation; (7) government regulations; (8) presidential decree; (9) local regulation. Then in 2004 Law No.10 of 2004 concerning the Establishment of Legislation Regulations was enacted, in Article 2 it was stated that "Pancasila is the source of all sources of state law", and replaced with Law No. 12 of 2011 concerning Establishment of Legislation Regulations (UUP3U), where in Article 2 it still regulates the same thing, that "Pancasila is the source of all sources of state law."[10]

Then the explanation of article 2 is stated, that; "The placement of Pancasila as the source of all sources of state law is in accordance with the intention of the Preamble of the 1945 Constitution of the Republic of Indonesia in the fourth paragraph namely *Ketuhanan Yang Maha Esa, Kemanusiaan Yang Adil dan Beradab, Persatuan Indonesia, Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan dalam Permusyawaratan/Perwakilan,* and *Keadilan Sosial Bagi Seluruh Rakyat Indonesia*. Put the Pancasila as the basis and ideology of the state and at the same time the philosophical basis of the State so that every contents of the Laws and Regulations must not conflict with the values contained in the Pancasila.[11]

In line with that, then Article 5 regulates the principle of establishing legislation, there are 7 principles; (1). Principle of clarity of purpose; (2) the right institutional or forming principle; (3) the principle of conformity between types, hierarchies, and material content; (4) principles can be implemented; (5) principles of usefulness and usefulness; (6) the principle of clarity of

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9 Before the TAP MPR, in the Decree of the MPRS No. XX/MPRS/1966 which contains the title of the DPR-GR memorandum concerning the sources of legal order in the Republic of Indonesia and the order of the legislative regulations of the Republic of Indonesia, in its appendix stated as follows: Pancasila: source of all legal sources.

10 In considering Law 12 of 2011, it was stated that one of the reasons for replacing Law 10 of 2004 was that the old Law contained shortcomings and had not been responsive to the development of community needs, in the process of establishing legislation.

11 The complete sound of the opening of the 1945 Constitution in the 4th paragraph which reads; "Then than that to form an Indonesian state government that protects the entire Indonesian nation and the entire Indonesian bloodshed and to promote public welfare, educate the nation's life and to carry out world order and social justice, the Indonesian independence was established in a republican constitution Indonesia which has people's sovereignty based on; The One Godhead, just and civilized Humanity, Indonesian Unity and Popularism are led by wisdom in deliberation/representation, and by creating a social justice for all Indonesian people".

formulation; and (7) principle of openness; This spirit then in Article 6 of UUP3U 2011 is regulated on general principles for the formation of laws and regulations.

Besides that in the Preambule (Introduction) of the 1945 Constitution, the expressions of several points of mind that can be used as guidelines in the implementation of nation-building, including being implemented in the form of legislation, as described below. (Nur 2013; Sudjito and Hariyanti 2018; Jhoner 2018).

1. Unity

Indonesian nation is a pluralistic nation consisting of a variety of cultures, customs and groups, the birth of various diversity will actually raise problems such as division, if not based on a philosophy contained in the third precept of the Pancasila which reads "Indonesian Unity" strengthened in article 1 paragraph (1) of the 1945 Constitution "the state of Indonesia is a unitary state that has a republic" it has become the most basic base since the Indonesian nation became independent, so that with the unity and unity of the nation there is a mutual respect for each difference. It's just that in my opinion, what happens at this time is that mutual respect and respect for each difference is even further out of its essence, meaning differences between ethnic groups, races, cultures, religions, etc. as if it has entered into the form of "intervention" it has very thin boundaries so that the diversity actually creates a variety of interpretations as well. This is actually what back-fires our nation. The solutions to this will be discussed further in the conclusions and suggestions chapter.

2. Social Justice

Article 33 paragraph (4) "The national economy is organized based on economic democracy with the principle of togetherness, efficiency with justice, sustainability, environmental insight, independence, and by maintaining a balance of progress and unity of the national economy". From the contents of the article it is reflected that the Indonesian nation wants every citizen to carry out their obligations and guarantees to obtain rights and fair treatment in particular social and economic status. But in its application, as we all know, there is a great deal of discrimination and inequality in various ways, the cause is none other than social status and power, meaning that welfare guarantees seem to be the main reason for groups with high positions to obtain various benefits for various reasons .

Whereas in the form of the second principal institution, it can be seen by the existence of a social department tasked with resolving various social problems, while in the legislative field reflected in each judge's decision always contains a clause "for the sake of justice based on the supreme divinity."

3. Popularism

As an embodiment of a democratic state, one of the main pillars is the freedom of the people to channel their aspirations, thoughts and interests. Huntington 1994) emphasizes that widespread political participation is a

hallmark of political modernization. Also in Robert Dahl's opinion, the practice of democracy always involves two dimensions, namely competition (contestation) and participation (Budiardjo 1984; Hutington 1994). The people are always the ones who determine the direction of democracy and national development, through an agreed mechanism as stipulated in the applicable legislation. In this connection the 1945 Constitution has also regulated the system of democracy in the administration of the state. Like the electoral system, the system of the executive, legislative and judicial powers.

4. Almighty Godhead and Fair and Civilized Humanity

Article 29 paragraph (1) of the 1945 Constitution states; "The state based on the Almighty Godhead" of these provisions implies that, Indonesia is a country that wants and recognizes its religious community members in a broad sense. The meaning is that the state protects and accepts a value system that lives and comes from various different tigers of religion. Although the majority of the people are Muslim but it does not mean that the state only protects the majority religion, as stipulated and confirmed in article 29 paragraph (2) "The state guarantees the freedom of each citizen to embrace their respective religion and worship according to their religion and belief".

These constitutional provisions prove the acceptance of Pancasila as the basis of the state and the national ideology of the Indonesian nation. This brings a logical consequence that the values of the Pancasila are used as the basic foundation, the fundamental foundation for the implementation of the Indonesian state (Siswanto 2017).[12] Pancasila contains five precepts which essentially contain five fundamental fundamentals values. The basic values of the Pancasila are the value of the One Godhead, the Value of Just and Civilized Humanity, the value of Indonesian Unity, the value of the People led by wisdom of wisdom in deliberation/representation, and the value of social justice for all Indonesian people. In short, the basic values of Pancasila are the values of Godhead, the value of Humanity, the value of Unity, People's value/Democracy, and the value of Social Justice can be described as follows.

a. Godhead Value

This Godhead value has the intention that Indonesian society is a society that has a value system that is based on the values that are derived from religious teachings. Acceptance of religious belief systems, religious systems have long been rooted in the traditions of society. These are the potentials of the Indonesian nation which have continued to be explored and developed into a National value system through the process of crystallization in every regulation. Whereas the values in the religions that are the beliefs of the Indonesian people are used as guidelines in formulating each policy, every action. The Godhead value also means that there is recognition of tolerance for religion, respect for religious freedom,

[12] As the consequences, Pancasila should be reflected on all Indonesian people activities, including the State activities.

no coercion and no discriminatory acts between religious people. This brings the meaning that Pancasila is a binding value in people's lives, and not vice versa.

b. Value of Humanity

The value of humanity which implies that the existence of the Indonesian people must place themselves as whole human beings, respect themselves as human beings and respect other human beings such as respecting themselves. The necessity in universal humanitarian principles is carried out in the realm of just and civilized independence. This principle implies that awareness of attitudes and behavior is in accordance with moral values in living together on the basis of the demands of conscience by treating things as they should. In the context of law formation, the law is placed as a means to regulate human protection (law for humans), and not otherwise humans create laws to suppress other humans (not humans for law).

c. Unity Value

The value of Indonesian unity implies that diversity must be accepted as a national reality that cannot be rejected by the Indonesian people. That in Indonesian nationalism is driven by diversity. The majority attitude should not be developed to overcome the minority, and vice versa. The equality of rights and obligations in the life of the nation and state are united in the unity of the people to foster a sense of nationalism in the Unitary State of the Republic of Indonesia. The Unity of Indonesia, this value also means that diversity must be merged into the national values that the Indonesian nation has.

d. Popular Value

The value in the 4th principle of popularism led by wisdom of wisdom in consultation/representation" confirms that the unity of the Indonesian nation must be managed with a democratic system that is typical of Indonesia. That Indonesia's democratic values prioritize consultation, through democratically elected representatives. The community is given the opportunity to engage openly in a democracy that is guided by an Indonesian value system. This also implies a government of the people, by the people, and for the people to be run by means of deliberation and consensus through representative institutions.

e. Value of Justice

The value of social justice for all Indonesian people implies that justice is both a basis and a goal. That divine values, human values, values of unity and people's values / democracy are guides to creating social justice systems. The value of social justice becomes the goal to be achieved by implementing the values that were previously. With this achievement, national goals can be realized, namely the achievement of a Just and Prosperous Indonesian society outwardly or inwardly.

The epistemological concept as emphasized by Nur (2013) and Sugara (2018) is as follows, that the value of the First Precepts (*Sila*) of the One Godhead which is symbolized by the light in the middle of the star-shaped shield of the Pancasila is five. At the state level or constitutional law, namely the current knowledge of legislation, the reality of legal semiotics is realized/described as "principles of balance, harmony and harmony" (Explanation of Article 6 Paragraph (1) letter j of Law Number 12 of 2011) , i.e., that every material of the contents of the legislation must reflect balance, harmony and harmony, between individual interests, society and the interests of the nation and state and this principle in semiotics the law remains the central basis, therefore in semiotics the first precepts are placed in the middle of the red and white shield and placed on its own black shield as the natural color and the *Sila* I which is symbolized by the light in the middle of the five-pointed star shape shines all the values into the other four precepts or becomes light, namely *Sila* II, III, IV and V or become a guide star for the other four precepts/*Sila*.

Theoretically or conceptually, it can be explained the construction of its legal semiotic model, namely *Sila* I to be the light of the principle of civilization which is just and civilized which is symbolized by a chain string with eyes and circles in the lower left part of the Pancasila shield. The meaning is that progressive law reflects human rights or obeys humanitarian principles (Explanation of Article 6 Paragraph (1) letter b of Law Number 12 of 2011), meaning that every material in the contents of legislation must reflect the protection and respect for human rights humans and the dignity of every citizen and citizen of Indonesia proportionally and obediently also on the principle of Unity in Diversity (Explanation of Article 6 Paragraph (1) letter f of Law Number 12 Year 2011), meaning that any material content of legislation must not be contains things that are distinguishing based on background, including; religion, ethnicity, race, class, gender, or social status as well as any material content of legislation must reflect balance, harmony, and harmony, between the interests of individuals and society with the interests of the nation and the state and also obedience to the principle of equality in the law and Government (Explanation of Article 6 Paragraph (1) letter h of Law Number 12 of 2011), which means that each content matter of the laws and regulations must pay attention to the diversity of population, religion, ethnicity and class, regional specific conditions, and culture specifically concerning problems sensitive in the life of the community, nation, and state.

Then *Sila* I becomes the light of the third principle of Indonesian Unity symbolized by the banyan tree in the upper left of the Pancasila shield, the meaning of progressive law obeys the principle of National Explanation (Article 6 Paragraph (1) letter c Law Number 12 of 2011), it means that every material contained in the laws and regulations must reflect the nature and character of the Indonesian nation that is pluralistic (diversity) while maintaining the principle of the unitary state of the Republic of Indonesia.

Then the *Sila* I becomes the basic light of the Fourth principle which is led by wisdom in Consultation / Representation symbolized by the head of the bull on the right side of the Pancasila shield, because legal products in this case legislation are the result of wisdom as the manifestation of the essence of democracy for translate people's voices without disregarding the voice of government (state) interests, meaning, that Progressive law must obey the principle of family (Explanation of Article 6 Paragraph (1) letter (d) of Law Number 12 of 2011), meaning that any legal content . The law must reflect deliberation to reach consensus in every decision and obey the principle of guidance (Explanation of Article 6 Paragraph (1) letter (a) of Law Number 12 of 2011), meaning that any material content of legislation must function to provide protection in order to create peace of society.

Then the *Sila* I become the light of *Sila* V as a basic of Justice for all the Indonesian people symbolized by cotton and paddy in the lower right part of the Pancasila shield. The meaning is that progressive law must realize a sense of community justice, or obey the principle of Justice (Explanation of Article 6 Paragraph (1) letter g of Law Number 12 Year 2011), meaning that every material contained in the legislation must reflect proportional justice to every citizen without exception and also obey the principle of Mediation (Explanation of Article 6 Paragraph (1) letter e Law Number 12 of 2011), meaning that every material in the content of the laws and regulations always takes into account the interests of the entire territory of Indonesia and the contents of the Law - Invitations made in the regions are part of the national legal system based on Pancasila and also obey the principles of Order and Legal Certainty (Explanation of Article 6 Paragraph (1) letter i of Law Number 12of 2011), meaning that any material contained in the Laws and Regulations Invitations must be able to create order in society through guaranteeing legal certainty.[13]

Thus at the level of planning the drafting of Laws in the National Legislation Program as a priority scale of the program for establishing the Law within the framework of the national legal system based on the 1945 Pancasila and the State Constitution of the Republic of Indonesia. is in accordance with the opening of the fourth paragraph of the 1945 Constitution of the Republic of Indonesia and at the same time placing Pancasila as the basis and ideology of the state and at the same time the philosophical basis of the state so that the content of legislation must not conflict with the values contained in the Pancasila concept of reading in line with the legal semiotics of Pancasila reading based on the State Symbol of the Republic of Indonesia (Article 48 paragraph (2) of Law Number 24 of 2009 concerning the State Symbol), namely the reading of the Pancasila with an affiliated logo-

[13] What is meant by national legal system is a legal system that applies in Indonesia with all its elements and supports each other in order to anticipate problems that arise in the life of the nation, state and community based on Pancasila and the Constitution of the Republic of Indonesia, Explanation of Article 17 of Act Number 12 of 2011.

centrism.[14] In that context, then Law No. 11/2012 requires that the establishment of laws and regulations must also implement the principles of its formation, as stipulated in Articles 5 and 6 as described in the previous discussion.

FORMULATION AND RECOMMENDATIONS *of* PANCASILA AS A SOURCE *of* INDONESIAN CRIMINAL LAW

FROM the discussion of the characteristics of national criminal law and Pancasila as sources of national criminal law, then at least two standards are needed which show that the Pancasila is used as the main reference which is, *First*, it is necessary to affirm the formulation of the objectives of national criminal law, and *second*, what values should be implemented from the formulation of the provisions of national criminal law.

1. Purpose of National Criminal Law

If we look back at the history of state formation, we will find a national agreement that the 1945 Constitution needs to oblige the government and other state administrators to maintain noble human character and uphold noble people's moral ideals and high faith.[15] One of the functions of criminal law is to safeguard and maintain the behavior of citizens rather than do evil and immorality. In this section the author wants to provide a description of how the formulation of the objectives of national criminal law was formed, as an effort to implement Pancasila as a source of law; That the purpose of national criminal law must encompass the following objectives.

a. National criminal law aims to protect the principles of Godhead and Religion that live in Indonesia. So all values that are derived from religious teachings and which are trusted by the Indonesian people have a place in criminal law. Thus, the norms stipulated in criminal law must regulate orders or prohibitions that may not conflict with the belief /

[14] Affiliated Logo-centrism or *Logosentrisme Berthawaf*, This idea was expressed by Sultan Hamid II who created the symbol of the Geruda Pancasila. In the Transcript of Sultan Hamid II, April 15, 1967 on page 7, it was stated that "... the philosophy of" thawaf "contains a message, that idea of Pancasila can be explained together in developing the country, because it is "thawaf" or a turn according to the Borneo language the meaning of making a rebuild/*vermogen* which has an objective on the clear objectives, if a just and prosperous society which co-exists harmoniously and peacefully, that is according to His Excellency President Soerkarno, the direction of his philosophy is intended at the end, if he builds a moral state but still upholds the religious values of each religion are high in the people of the nation in the part of the RIS region and continue to have the original character of the nation in accordance with the identity of the nation/the development of "nation character building" as explained by President Soekarno.

[15] The fourth point contained in the "opening" is the state based on the One Godhead on the basis of just and civilized humanity. Therefore, the Constitution must contain contents that oblige the government and other state administrators to maintain noble human character and uphold noble people's moral ideals.

religious system recognized in Indonesia. Such as prioritizing the principle of benefit rather than harm, prioritizing justice rather than legal certainty, and the like.

b. National criminal law aims to protect the human body and soul of Indonesia. That the purpose of regulating legal norms in national criminal law must pay attention to the human body and soul. In the second principle of Pancasila, humanity principles are born. Then the formulation of the norms of reparations are prohibited and or governed by criminal law to protect the human body and soul. Included are norms regarding punishment, also paying attention to humanitarian principles. This principle of protection does not mean to also let humans exercise their right to life freely.
c. The National Criminal Law aims to protect Indonesian human reason. That the formation of criminal law must be able to protect the power of creativity, reasoning / thinking power. Although criminal law must not guarantee that humans can act as freely as possible, it also does not mean that criminal law restricts freedom of human creativity. Then the norms relating to the protection of human creativity must still rely on the values contained in the Pancasila.
d. National Criminal Law also aims to protect offspring (regeneration of human / Indonesian people); that in formulating an act as a criminal act (straafmaat), formulating a form of punishment, it must be able to ensure that aspects of the honor protection of Indonesian regeneration adhere to religious values. Like, national criminal law must guarantee the protection of marriage institutions, family institutions, and social relations among individuals. That criminal law does not allow freedom of association which makes it unclear the legal relationship between generations. The values of commandments, prohibitions in religious teachings must be accepted and followed.
e. National Criminal Law aims to protect Indonesian human property. The norms of actions that damage property, damage the natural environment, abuse of power / authority, corruption, collusion and nepotism (KKN) must be the center of attention. That the norms formed by criminal law make people not greedy for material things, and merely worldly (hedonism). However, on the contrary, humans should not have difficulties and lack of property, the prohibition on monopoly on property, prohibition on hiding assets, laundering money and so on must be a clearer formula.

2. Pancasila Values Implemented in the Criminal Law

a. Godhead value that in the Godhead system it gives birth to many norms and systems of teachings which are believed to bring good and benefit to humans. Such norms of conduct which are prohibited in religion or sourced from religious teachings need to be the norm in criminal law. Religion teaches not to commit adultery, drunkenness, stealing, corruption, killing, cheating, robbing, bribery, actions that harm other

people, are prohibited from damaging the environment and the like. The formulation of norms of criminal acts in criminal law must at least fulfill the system of religious teachings, including the norms for giving sanctions.

b. Value of Humanity, that criminal law is established for humans not the opposite of humans for criminal law. Therefore, criminal law norms also need to prioritize fair responsibility, the qualifications of civilized actions, as well as the determination of just and civilized punishment. National criminal law must not destroy the principles of humanity and human rights. Criminal law is enforced, and enforced by paying attention to human needs in the community and the surrounding environment. In the context of punishment / punishment then it must be considered a. the quality of the mistakes of the maker of a criminal act; b. the motive and purpose of committing a crime; c. the attitude of the maker of a criminal act; d. whether a crime is committed by planning; e. how to commit a crime; f. attitudes and actions of the maker after committing a crime; g. curriculum vitae and social and economic conditions of the maker of criminal acts; h. criminal influence on the future of the maker of a criminal act; i. the effect of criminal acts on victims or families of victims; j. forgiveness from victims and/or their families; and/or k. the community's view of the crime committed. Then in terms of the aspect of lightening or the lightness of the deed, the personal condition of the maker, or the situation at the time of the action or later, it can be used as a basis for not imposing criminal acts or taking actions taking into account aspects of justice and humanity (Widjoyanto 2014; Soge, and Munthe 2018).
c. The value of Unity and Entity that criminal law norms contain provisions that make the people of Indonesia able to realize the values of nationalism. The acceptances of religious norms, customs, laws that live in society, make the norms of criminal law easy to implement and the purpose of criminal law is easy to realize. The implementation of criminal law norms does not cause hostility between victims and perpetrators, does not cause disputes between law enforcement agencies and the like. The concept of "restorative justice" is in line with the values of unity (Maghfirah, Arisandy, Risandy, and Hilimi 2016; Yusriando 2015; Daly 2016).[16]
d. Community Value/Democracy and Representative Consultation, where the formation of criminal law norms uses procedures that are democratic, open, fair, participatory. In addition to the notion of "Legality" also need to consider "Living Law". As in the Criminal Code Bill Article 1 paragraph (3) affirms the partiality of the "living Law" legal values that live in the community. This provision does not reduce the entry into force of the living law in the community which determines that a person is liable to be convicted even though the act is not regulated in legislation, insofar

[16] The restorative justice is an approach where victims, offenders, and community who are involved and/or affected by crime put real efforts to heal the harm and put things right after the crime has been committed, and this type has various forms and implementations.

as it complies with the values of Pancasila and/or general legal principles recognized by the peoples of the nations. Providing opportunity to resolve through the mechanism of mediation, in the settlement of criminal acts (reasoning mediation), in certain criminal acts, is a model that needs to be considered in the formation of new criminal law.

e. Social justice values, welfare aspects, security, protection; the use of criminal law must also take into account the principle of costs and results. The use of criminal law must also pay attention to the capacity or ability of the work force of law enforcement agencies, namely not to have overloading. The values that develop in the community need to get a positive response in the formation of criminal laws. New criminal law needs to consider various dynamics of society, such as the need for Transitional Justice oriented to protect the interests of victims. There is debate about the struggle between Kantianism vs. Utilitarianism and there was a struggle between the civil law and common law systems, also the value of indigenous people is faced with the reality of digital society, the existence of secularist understanding dealing with religious communities (Maghfirah, Arisandy, Risandy, and Hilimi 2016; Yusriando 2015; Daly 2016).

Thus the right legal parameters are needed so that Enforceability can be easily achieved, therefore the provisions established must meet the establishment of criminal law norms also ideally need to consider the following criteria (Kusuma 2009).

1) *Necessity*, that the law must be formulated in accordance with systematic and planned needs;
2) *Adequacy*, that the formulation of legal norms must have a high level of certainty,
3) *Legal Certainty*, that the law must really contain the rules clearly and clearly, not vaguely and not cause interpretation;
4) *Actuality*, that the law must be able to adjust to the development of society and times, without ignoring legal certainty;
5) *Feasibility*, that law must have accountability that can be accounted for especially with regard to the level of its arrangement;
6) *Verifiability*, that the law framed must be in a condition that is ready to test objectively;
7) Enforceability, that in essence continues to have forced power to be observed and respected; and
8) *Provability* that the law must be made in such a way so that it is easy to prove.

From the discussion above, in principle the writer wants to suggest that the acceptance of Pancasila as a source of all legal sources in compiling criminal law must be based primarily on Pancasila as the ideology of the nation. Thus, the norms that need to be formulated in the provisions of national criminal law must be based on the values that live in the Pancasila ideology, which makes the principle of "One and Supreme Godhead,

Ketuhanan Yang Maha Esa" is the center and which becomes the light for all values systems.

a. The Indonesian nation is a nation that has a strong communalism spirit, and reduces its individualistic spirit. Therefore, the attention of criminal law must prioritize common interests, because criminal law is public law (*adrresat norm*)
b. Norms that are prohibited from religious teachings must be part of an act of 'criminal act' (*strafbaar*). National criminal law is formed no longer distinguishes whether this is an act of public or private territory, because the system of values of Pancasila has no individual problems (privacy) or public (communal) problems,
c. The principles offered by the universal / international value system must be filtered and assessed by the Pancasila standard before being accepted as a norm system in Indonesian criminal law. That not all systems agreed upon by the international world are in accordance with the needs of the formation of Indonesian values.
d. The purpose of understanding, (*standard maat*) for Pancasila as the source of all sources of law, then the purpose of punishment and punishment must pay attention to the principles of balance. The purpose of criminal law and punishment is to provide a balance between criminal acts, criminal offenders, victims of criminal acts and community value systems. So that the death penalty is still relevant to be applied in certain criminal acts.
e. The formulation of elements of criminal acts is simpler and easier to prove, using good and correct Indonesian language standards. Therefore the formulation of the subject matter of the law (*adrresat norm*), criminal acts (*straafbaar*), forms of threats of punishment/sanctions (*straaf maat*). Including the implications relating to its procedural law (formal criminal law) and its criminal justice system.

CONCLUSION

THIS article is still explorative, so it still needs further exploration and study, on aspects of value system adoption that can technically be juxtaposed with the norm system that is intended to be formed in material and formal criminal law. At the end of this article, the author would like to conclude by pointing out some interesting questions to be explored further from this theme; Can Pancasila be used as a test stone for every product of legislation. Who has the authority to determine the rules is against the Pancasila or at least does not contain normative values contained in the Pancasila. How to describe the normative values of the Pancasila so that it can easily be used as a benchmark or standard in evaluating a statute not Pancasila? So that on one occasion the Indonesian people can also test materially and formally a law, contrary to the Pancasila source of all legal sources.

Again, it must be stressed that the effort to make Pancasila as a source of values does not just stop at 'determination' in paragraph 2 of Law No. 11/2012, that Pancasila is the source of all sources of law. But concrete formulation is still needed to be used as a guide in formulating the content of all regulations that are still not getting real attention. The reality of the Pancasila as the basis of the state makes Pancasila the central inspiration in forming and building legal character nationally requires serious understanding and attention. This writing is a reflection of thinking that is still very premature, still needs a more mature study. It is an honor if the readers are pleased to provide constructive input or criticism of the central idea of this paper, so that it can be further developed.

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