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## Criminal Law System in Indonesia and Its Comparison with Other Legal Systems\*

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### Abstract:

Criminal law in a general sense has the same aims and objectives in all systems universally. However, in its application, there are differences in methods and methods apart from being bound by standard rules which are the main basis as the basic norms of a country. The research method used in this study is a qualitative research method with a comparative studies approach. The results of the study state that there are similarities in the objectives of the criminal law system in several countries. However, in Indonesia, the legal system is based on the values of Pancasila and the 1945 Constitution and aspires to justice for all its people. The legal system in Indonesia recognizes the existence of legal pluralism, Islamic law, and customary law. This is not found in the legal system of other countries.

**Keywords:** Legal System; Ratio; Criminal law

### Abstract:

Hukum Pidana dalam pengertian umum memiliki kesamaan maksud dan tujuan pada semua sistem secara universal. Namun dalam aplikasinya, terdapat perbedaan cara dan metode selain terikat pada aturan baku yang menjadi landasan utama sebagai norma dasar suatu negara. Metode penelitian yang digunakan pada penelitian ini adalah metode penelitian kualitatif dengan pendekatan comparative studies. Hasil penelitian menyatakan bahwa ada kesamaan tujuan pada sistem hukum pidana pada beberapa negara. Namun pada negara Indonesia, sistem hukumnya berdasarkan nilai-nilai Pancasila dan UUD 1945 serta mencita-citakan keadilan bagi seluruh rakyatnya. Sistem hukum di Indonesia mengakui adanya pluralisme hukum, hukum Islam, dan hukum adat. Hal inilah yang tidak terdapat pada sistem hukum negara lain.

**Kata Kunci:** Sistem Hukum; Perbandingan; Hukum Pidana

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## A. INTRODUCTION

Criminal law is critical in providing public security against criminal activities, preserving state stability, and even as a "moral institution" that aids in the rehabilitation of criminal offenders. This legislation is always evolving to meet the demands of criminal activities that occur in every period. Criminal law regulates acts that are prohibited by law and results in the imposition of sanctions on individuals who conduct them and adhere to the criminal law's elements of actions. These include offenses against the Criminal Code, the Anti-Corruption Law, and the Human Rights Act, among others. Criminal law is a body of law that establishes what activities are prohibited and penalizes those who break them. Murder, theft, fraud, robbery, torture, rape, and corruption are all banned acts under criminal law.

Criminal law is defined as a collection of legal laws that establish the illegal activities, the punishments for those who conduct them, the procedures that the defendant and his court must follow, and the punishment inflicted on the offender. It is a component of a country's broader legal system, establishing the fundamentals and criteria for determining which activities should be avoided or prohibited, accompanied by threats or consequences in the form of specific crimes for those who breach the prohibition. Additionally, to define when and under what circumstances those who breach the restriction may be charged with or sentenced to a criminal violation. On the other hand, to ascertain the manner in which a crime may be imposed if individuals are accused of violating the restriction.

Not surprisingly, Sudarto eventually viewed Criminal Law as the State intentionally inflicting sadness on someone who violates the requirements of the law (criminal law) in order to induce feelings of anguish. Thus, the concrete objective of criminal law is to scare everyone away from doing terrible deeds and to educate those who have committed bad crimes on how to be good and reintegrate into their environmental lives.

The purpose of this criminal law actually contains the meaning of prevention of unhealthy social symptoms in addition to treatment for those who have not done well. So criminal law is the provisions that regulate and limit human behavior in eliminating violations of the public interest. But if in this life there are still humans who do bad deeds that sometimes damage the environment of other humans, it is actually as a result of that individual's morality. To find out the causes of an unkind act (as a violation of criminal provisions), it is studied through the science of "criminology".

In criminology, it will be investigated why someone commits a certain action that is not in accordance with the needs of social life. In addition, there are other sciences that help criminal law, namely psychology. So, criminology as one of the sciences that helps criminal law is tasked with studying the reasons why someone commits a criminal act, what is the motivation, what are the consequences and what actions can be taken to eliminate the act.

Criminal law is widely defined as the collection of legal principles that impose orders or restrictions on an event, and it includes the classification of allowed and

prohibited conduct, as well as punishments for violations. Roeslan Saleh<sup>4</sup> defines criminal law as any act that the community views as illegal or immoral, emphasizing the importance of the community's legal sensibility. Thus, a criminal conduct is one that obstructs or contradicts the attainment of the social order to which society strives.<sup>5</sup>

## B. METHODS

The method used in this research is a qualitative research method with a literature approach and a comparative studies approach. The comparative law method is commonly used as a research activity in every country, including Indonesia. This is done for the sake of the law itself, either by compiling the system, updating it or adapting it and responding to legal problems in the midst of the times. Therefore, before discussing the comparison of the Indonesian criminal law system with the criminal law systems of other countries. It is better to first mention the meaning of comparative law. Comparative law is an effort or method that can be used in all branches of law, for example criminal law. Such as the comparison of criminal law in Indonesia with Malaysia, criminal law in the United States, Britain, the Philippines and so on.<sup>6</sup>

Romli Atmasasmita<sup>7</sup> said that, comparative law (comparative law) is a method of comparing legal systems and that comparison obtains comparative legal data. In other words, comparative law is only a research method (method theory). Even so, there are some people who say that comparative law is a field of law. This is understandable, because comparative law is an activity to identify the similarities and differences between two or more legal systems.

Comparative law efforts have existed and developed since the end of the 19th century. Currently, comparative law efforts are needed because countries globally interact and need each other and are related between one country and another. Because among the purposes of comparative law, seen from the perspective of natural law theory, one will be able to see the similarities and differences in order to develop the natural law itself. Meanwhile, the pragmatic goal is a comparative law effort to find differences and similarities in order to carry out legal reforms. Another purpose of comparative law can be to find answers to legal problems in a country or society.

Comparative law, especially criminal law, is very necessary, especially to know the laws and views of life of other nations. By knowing each other the laws of other countries will be able to avoid forms of disputes and forms of misunderstanding with each other so as to achieve peace. Comparison of criminal law is very important in developing criminal law both nationally and internationally. Indonesia, for example, can learn and understand the criminal law of the United States, Britain, Malaysia, the Philippines and other countries, and vice versa. These countries can also learn about

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<sup>4</sup> Roeslan Saleh, *Sifat Melawan Hukum Dari Perbuatan Pidana*, Jogjakarta: Jajasan Badan Penerbit Gadjah Mada, Cet Kedua, 1962

<sup>5</sup> Teguh Prasetyo, *Hukum Pidana*, (Jakarta: Rajawali Pers, 2011), hlm. 8.

<sup>6</sup> Romli Atmasasmita, *Asas-Asas Perbandingan Hukum Pidana*. YLBHI, Jakarta. 1989. Hlm. 20

<sup>7</sup> Romli Atmasasmita, *Asas-Asas Perbandingan Hukum Pidana*. YLBHI, Jakarta. 1989. Hlm. 20

Indonesian criminal law by comparing and conducting research on which parts of the law are different and which parts of the law have similarities and can then be applied.

Thus, whether comparative law is a method or as a branch of legal science, it appears that it has concretely contributed to the development of legal knowledge and legal scientists. Because knowing the differences and similarities of law in various countries will be able to help the legal system. Among other things, it can help both change, draft and form legislation. In addition, it can assist the building of the judiciary in upholding the principles of justice. Then, comparative law can help treaty relations both nationally and internationally, for example by conducting research and translating the rule of law together.

Therefore, in looking at the practice of the criminal system, the author tries to compare with the countries mentioned above, the United States and Britain representing Western countries. The Philippines and Britain represent neighboring countries and include former European colonies, namely Britain and Spain, as well as Indonesia, a former European colony (the longest colonized by the Dutch).

## C. RESULTS AND DISCUSSION

### 1. Criminal Law in Terminological View

WPJ. Pompe, formulated criminal law as all legal rules that determine what actions should be imposed and what kinds of punishments are appropriate.<sup>8</sup> Meanwhile, Wirjono Prodjodikoro defines criminal law as a legal regulation regarding crime. Criminal means the thing that is being punished, that is, what the ruling agency delegates to a person so that he feels uncomfortable.<sup>9</sup>

According to Martiman Prodjoamidjojo, criminal law is part of the overall law applicable in a country, which provides the basics and rules for:<sup>10</sup> a). Determine which actions should not be carried out, which are prohibited, accompanied by certain criminal threats/sanctions for anyone who violates them; b). Determine when and in what cases those who have carried out the prohibitions may be subject to criminal penalties as threatened; c). Determine the way in which the imposition of the punishment can be carried out.

In line with Martiman, Moeljatno formulated criminal law as part of the overall law applicable in a country, which provides the basis for determining which actions should not be committed. Criminal law is also part of public law which contains provisions concerning: 1). The rules of criminal law and prohibitions from carrying out certain actions accompanied by threats in the form of criminal sanctions for those who violate the prohibition; 2). Certain conditions must be met for the violator to be able to impose criminal sanctions. Contains the mistakes (schuld) and criminal responsibility for the creator (toerekeningsvadbhaarheid).<sup>11</sup>

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<sup>8</sup> Bambang Poernomo, *Asas-Asas Hukum Pidana*, (Jakarta: Ghalia Indonesia, 1994, hlm. 19).

<sup>9</sup> Wirjono Prodjodikoro, *Asas-Asas Hukum Pidana di Indonesia*, (Bandung: Eresco, 1989), hlm. 1.

<sup>10</sup> Teguh Prasetyo, *Hukum Pidana*, (Jakarta: Rajawali Pers, 2011)

<sup>11</sup> Teguh Prasetyo, *Hukum Pidana*, (Jakarta: Rajawali Pers, 2011) hlm. 9.

## 2. Indonesian Criminal Law in Historical View

The historical chapters of criminal law written in Indonesia can be divided into:

### **First: The Era of VOC (Verenigde Oost-Indische Compagnie)**

In addition to the customary criminal law applicable to native Indonesians by the VOC authorities, placards containing the criminal law were first imposed. In 1642, Joan Maetsuycker, the former Hof Van Justitie in Batavia, who was assigned by the Governor-General van Diemen, completed a collection of plaques named Statuen van Batavia. In 1650 the association was legalized by Heeren Zeventien.

According to Utrecht, the applicable laws in areas controlled by the VOC were: a). The statutory law contained in: Statuen van Batavia; b). Old Dutch Law; c). Roman law principles.

The relationship between ancient Dutch law and the statute was as a complement, if the statute could not solve the problem, then the old Dutch law was applied, while Roman law was applied to regulate the legal status of slaves (slaven recht). The Betawi Statute applies to the Betawi area and its surroundings which have northern boundaries: the islands of the Betawi Bay, in the east: the Citarum river, in the south: the Indian Ocean, in the west: the Cisadane River. This is just a theory, because in practice the indigenous people are still subject to their customary law. In other areas, customary criminal law still applies. The VOC intervened only in criminal matters related to its commercial interests..

In the Cirebon area, there was Papaken Cirebon which was influenced by the VOC. In 1848 an intermediary strafbepalingen was formed again. It was only in 1866 that a systematic codification appeared. Starting on February 10, 1866, two Indonesian Criminal Codes were enacted: a). Het Wetboek van Strafrecht voor Europeanen (Stbl. 1866 Number 55) which applies to European groups starting January 1, 1867. Then with the Ordinance dated May 6, 1872 the Criminal Code applies to the Bumiputera and Foreign Eastern groups; b). Het Wetboek van Strafrecht voor Inlands en daarmede gelijkgestelde (Stbl. 1872 Number 85), entered into force January 1, 1873.

### **Second: The era of the Dutch East Indies**

History records that from 1811 to 1814 Indonesia had fallen from the hands of the Dutch to the hands of the British. Based on the London Convention on August 13, 1814, the former Dutch colonies were returned to the Netherlands. The British government was handed over to the Commissioner General who was sent from the Netherlands. Therefore, with the addition of the Regerings Reglement 1815 (Supleoire Instructie 23 September 1815), the basic laws of colonial government were created. In order to avoid regulatory gaps, a proclamation was issued on August 19, 1816, Stbl. 1816 Number 5 which affirms, that for the time being all the regulations of the former British government are retained. In general, the new Betawi Statute is still in effect, and for indigenous people, customary criminal law is still recognized as long as it does not conflict with recognized legal principles.

The Indonesian people are punished with forced labor on plantations based on Stbl. 1828 Number 16. They are divided into two groups, namely: a). Those sentenced to chain work; b). Convicted of forced labor. Which consists of those who are paid and those who are not paid. In practice, forced labor is imposed in three ways: a). Forced labor in chains and exile; b). Hard work in chains remains not thrown away; c). Forced labor without chains but thrown out.

The Criminal Code that applies to the European group is a copy of the Penal Code that applies in the Netherlands but is different from the source, which applies in Indonesia consists of only 2 books, while the Penal Code consists of 4 books. The Criminal Code that applies to the Bumiputera group is also an adaptation of the Criminal Code that applies in Europe, but is given more severe sanctions until the 1918 Criminal Code, the punishment is heavier than the Dutch Criminal Code 1886. Therefore, it is also necessary to briefly review the development of codification in the Netherlands.

The first time there was codification in the field of criminal law occurred with the existence of *Crimineel Wetboek voor het Koninkrijk Holland* 1809. The 1809 code of law contains modern features in it, namely: a). The granting of great freedom to judges in the provision of punishments; b). Special provisions for juvenile criminals; c). Elimination of general plunder. However, this codification was short lived, due to the entry of France with its Penal Code into the Netherlands in 1811. The criminal system in the Penal Code is very different from the 1890 codification which introduced general confiscation. With the *Gouv, Belsuit* of December 11, 1813, several changes were made, for example regarding general plunder, but the loop was introduced, and the execution of the French guillotine was replaced by hanging according to the old Dutch system.

The Netherlands continued to try to make changes, as well as efforts to create a national Criminal Code, but to no avail, except for partial changes. The criminal cell system that was in effect with the Law of June 28, 1851 Stbl 68 was expanded, the death penalty was reduced, a number of crimes were made into minor crimes (*wanbedriff*), the sentence for probation was commuted compared to a completed offense. Then, 17 September 1870 Stbl 162 the death penalty was abolished.

By Joint Decree of 28 September 1870 a State Committee was formed which finalized the draft in 1875. In 1879 Minister Smidt sent the draft to Tweede Kamer. Debated in the Staten General with Minister Modderman who was previously a member of the State Committee. On March 3, 1881, the new Dutch Criminal Code was born, which came into force on September 1, 1886.

The gap between the ratification and enactment of the Dutch Criminal Code is for 5 years because with the cell criminal system, it is necessary to build new cells and buildings, in addition to the need to create new laws such as the prison law and others. After the enactment of the new Criminal Code in the Netherlands in 1886 and 1872, which had many similarities with the French Penal Code, it needed to be replaced and adapted to the new Dutch Criminal Code. The Netherlands must also be applied in colonial areas such as the Dutch East Indies with adjustments to local situations and conditions.

Initially, it was planned that there would be two KUHP, one each for the European group and the new Bumiputera group. With Koninklijk Besluit dated April 12, 1898, the Draft Criminal Code for the European group was formed. After the completion of the two drafts, the Minister for the Dutch colony, Mr. Idenburg, was of the opinion that it would be best if there was only one Criminal Code in the Dutch East Indies, so that it would be in the form of unification.

In accordance with the idea of the Minister of Edinburgh, a commission was formed to complete its duties in 1913. With the KB dated October 5, 1915 and promulgated in September 1915 Number 732, a new Wetboek van Strafrecht voor Nederlandsch Indie was born for all population groups. The Invoeringsverordening came into effect on January 1, 1918, the WvSI.

According to Jonkers, the transition from the dualism period, namely two types of WvSI for two population groups, was more formal than material. The idea of unification is not new. The Betawi Statute of 1642 and the provisions of the criminal offense of 1848 apply to all population groups. Actually the two WvSI 1866 and 1872 are also almost the same, the difference between the two population groups, namely the European group and the Bumiputera-Eastern Foreign, which also colors the formulations of offenses in the WvSI, for example Article 284 (mukah = overspel) for men only applies to European groups (subject to Article 27 BW).

### **Third: The Era of the Japanese Occupation**

WvSI remained in effect during the Japanese occupation. This is based on the law (Osamu Serei) No. 1 of 1942 which came into force on March 7, 1942 as a transitional regulation of Java and Madura. Article 3 of Osamu Serei asserts, "All government bodies and their powers, the laws of the former government are still recognized and for the time being as long as they do not conflict with the rules of the military government". So, only articles concerning the Dutch government, for example the mention of king/queen which is no longer valid. Similar regulations were also issued outside Java and Madura. Compared to material criminal law, criminal procedural law has changed more, due to the unification of procedure and court structure. This is regulated in Osamu Serei Number 3 of 1942 dated 20 September 1942.

### **Fourth: The Era of Indonesian Independence**

The situation during the Japanese occupation was maintained after the proclamation of independence. Article II of the Transitional Rules of the 1945 Constitution which came into effect on August 18, 1945 formulates, "All existing state bodies and regulations shall apply immediately as long as new ones have not been enacted according to this Constitution."

To find out the extent of changes that have occurred in Indonesian criminal law, it is necessary to know the history of the enactment of criminal law in Indonesia, especially since the independence of Indonesia. With the strength of the 1945 Indonesian Constitution, the transitional regulations affirmed that existing state bodies and regulations were still in effect immediately, as long as new ones were not promulgated according to this Constitution. So it means that the criminal law still

applies *Wetboek van Strafscht voor Nederlandsch Indie* which has been amended and added by the Japanese Occupation Army, which also applies the regulations that were in effect when they landed in Indonesia. In addition to adding changes that are considered necessary for their occupation of the former Dutch East Indies territory.

It was only with Law Number 1 of 1946 that the Indonesian government stipulates that the Criminal Code applies the Criminal Code (*Wetboek van Strafrecht voor Nederlandsch Indie*) which has not been changed by the Japanese occupation army. Law Number 1 of 1946 which gives the power to adjust the material of the Criminal Code, is a provision contained in article V, which affirms that "Criminal law regulations, which are wholly or partly now not implemented, or are contrary to the position of the Republic of Indonesia as an independent country, or has no further meaning, shall be deemed wholly or partially invalid.

Law Number 1 of 1946, according to article XVII, stated that it was applicable to Java and Madura, even though Jakarta was still occupied by the Dutch at that time, the KUHP did not apply to Jakarta. It wasn't long before the Criminal Code came into effect, including for parts of the island of Sumatra. For other areas outside the areas already mentioned, in Ternate another Criminal Code applies. The explanation is that when the Dutch East Indies Government fled and formed a fugitive government in Australia (in the city of Brisbane) and when it was about to seize *Staatblaad No. 135 of 1945*, concerning the change of *Wetboek van Strafrecht voor Nederlandsch Indie* to *Wetboek van Strafrecht voor Indonesie*, and enforced in the areas occupied by them in Indonesia. So that in those years in the territory of Indonesia there were two KUHP, namely *Wetboek van Strafrecht voor Indonesie* as a result of *Staatblaad 135 1945*, or better known as the 'Brisbane Ordonantie'.

Both publications are based on the same source, the *Wetboek van Strafrecht voor Nederlandsch Indie*, which became effective in the Dutch East Indies on January 1, 1918. However, both Law No. 1 of 1946 and *Staatblaad No. 135 of 1945* made their own amendments, resulting in numerous distinct articles in both of these publications. The 'Brisbane Ordonantie' amendments, particularly those concerning crimes against state security, include both the addition of criminal threats and the introduction of new offenses, such as stipulating the act of espionage, as well as the addition of a new article, such as article 570 regarding violations of national security. As a result, the *Wetboek van Strafrecht voor Indonesie* (as modified by the 'Brisbane Ordonantie') contains 570 articles.

Additionally, provisions 159 a and 159 b are added, which threaten to use violence and topple the legal government against actions deemed to disturb public order. Article 335 is amended by the addition of paragraph (3), which governs actions involving economic interests. Changes to state security offenses that were originally included in the *Wetboek van Strafrecht voor Nederlandsch Indie*, specifically in the form of additional criminal threats, where several articles that originally carried the threat of imprisonment have been changed to carry the death penalty, life imprisonment, or a twenty-year sentence. This is as stated in Article 110 of the Indonesian Criminal Code.



Despite widespread knowledge, the death penalty has been abolished in the Netherlands. As a result, it may be argued that the revisions to the Criminal Code adopted by the Government of the Runaway Dutch East Indies were undertaken for political reasons, namely to facilitate their return to their former colony, Indonesia. The amendments made to the *Wetboek van Strafrecht voor Nederlandsch Indie* by the Brisbane Ordonantie had an effect on subsequent years, most notably on the emergence of the Subversion Criminal Act, because with the invalidation of the *Wetboek van Strafrecht voor Indonesie*, several acts that were originally regulated and threatened with criminal liability were not regulated by the Criminal Code, such that the Indonesian Government at the time could not enforce them. A regulation aimed at eradicating subversion.

The dualism of the criminal law continues even though the Indonesian government has full sovereignty, both juridically and de facto. This was because in the constitution of the United States of Indonesia (RIS) it was stated that all the regulations in force at that time were used, and this kind of situation was continued by the Provisional Constitution of 1950, which enforced all the regulations that existed at that time.

It was around 1955 that the existence of this dualism was realized, with the emergence of several cases, such as the 'Cikini case' regarding the attempted assassination of President Soekarno, where before the Court a problem arose regarding the Criminal Law Act which was applied to the case. Because if you look at the place where the crime was committed, namely Jakarta, then *Wetboek van Strafrecht voor Indonesie* applies. The articles still mention treason against the 'queen' and not the President. Likewise with the case of Djodigondokusumo 'which involves criminal threats for an official who uses state money. Then in the case of 'Allen Pope,' and many other cases that contradict the two Criminal Codes.

For Mulyatno from Gajah Mada University, the topic of the Criminal Code's enactment had sparked a debate. According to him, after the Unitary State of the Republic of Indonesia declared that all RIS states had voluntarily merged into the Republic of Indonesia at that time, the legislation issued by the Government of the Republic of Indonesia took effect automatically. Thus, the Criminal Code promulgated by Law No. 1 of 1946 is applicable. Mr. Han Bing Siong of the University of Indonesia believes that while Indonesia has become a unitary state, it is critical to examine the regions and laws in which one operates when it comes to criminal law. According to him, despite the fact that Indonesia has become a unitary state, two KUHP continue to apply: the KUHP derived from Statute No. 1 of 1946 with the scope of applicability specified in the law, and the *Wetboek van Strafrecht voor Indonesie*, which applies to territories outside the country.

Oemar Seno Adjie also noted in the polemic that occurred, namely his writings which were published in the magazine 'Hukum' published in 1958. He was of the opinion that after Indonesia returned to the Unitary State of the Republic of Indonesia, the regions that voluntarily submitted themselves to become the Unitary State of the Republic of Indonesia, should itself is subject to the Law of the Republic of Indonesia.

However, this is excluded in the State of East Indonesia, West Kalimantan and East Sumatra, they still use *Wetboek van Strafrecht voor Indonesie*.

The dualism of the Criminal Law was ended with the issuance of Law Number 73 of 1958 which stated that Law Number 1 of 1946 was valid for the entire territory of Indonesia. With the existence of the law, has unconsciously confirmed the opinion of Mr. Han Bon Sioang, especially in the case that criminal law should be applied dogmatically, in accordance with the principle of criminal law itself, namely the principle of legality.

With the existence of law number 73 of 1958, it is clear that for all parts of Indonesia the Criminal Code originating from *Wetboek van Strafrecht voor Nederlandsch Indie* which came into force in the Dutch East Indies since January 1, 1918, of course the original text is still in Dutch.

## 2. Principles of Criminal Law

In criminal law, there are principles that must be considered in relation to its implementation. The principles referred to include:

### First: Legality Principle

The principle of legality in criminal law is found in the provisions of Article 1 of the Criminal Code, which formulates that: (1). No act can be punished, but on the force of the law in the legislation that existed before the act occurred. (2). If there is a change in the legislation after the act has occurred, then the lighter provisions must be used for the defendant.

This provision is further clarified in the Elucidation of the Criminal Code which further emphasizes that (1) No act can be punished before it is stated in the law. If there is a law after the act has taken place, the date of enactment of the law cannot be retroactive. (2) If there is a change in the law after the act has been committed, the defendant must choose the lighter sentence.

The formula which in Latin is known as "*Nullum delictum nulla poena sine praevia lege poenali*" at the same time gives an understanding, that the entry into force of positive criminal law contains the following elements (ratio):<sup>12</sup> Sources of criminal law are written laws, not customary criminal laws or other unwritten regulations;

- a. Criminal law does not apply retroactively, meaning that an act can only be punished, if at the time (when) the act was committed there were already regulations prohibiting the act, as well as the threat of punishment given;
- b. The prohibition of analogical interpretation. That is, if an act is slightly different from what is regulated in criminal law regulations, that person cannot be punished by criminal law regulations which sound almost the same as the previous act. The person can only be punished according to the prohibition on this analogical interpretation, if he has done everything that is regulated or

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<sup>12</sup> R.O. Siahaan, *Hukum Pidana I*, (Cibubur : Rao Press, 2011), 97-98.

stated in the article in question, then for him that article applies. This prohibition arises at a time when the interests of the individual, especially the accused, are considered to be greater than the public interest and public interest;

- c. If the Criminal Code is interpreted analogically, then the Criminal Code will be expanded by treating it to acts that are not prohibited and which are not required to result in or give rise to a situation where there is no legal certainty.;
- d. The criminal law must include punishment. This understanding is to facilitate how much punishment will be given if the criminal law regulations are violated;
- e. Criminal law is working for the future, by saying that criminal law does not apply retroactively, it means that the regulation is not looking at past events, where criminal law is still at the level of *ius constituendum* or is still aspired to.

Furthermore, if the formulation of Article 1 paragraph (2) is elaborated, it can be interpreted, that although the Criminal Code explicitly states the prohibition on retroactive application of a law, retroactive application of a law is allowed if there is a change in legislation. This is also if the change occurs after a person commits an act that is threatened by law, but the verdict against the act has not been carried out.

### **Second: Territoriality Principle**

The legal basis for this principle of territoriality can be found in Article 2 of the Criminal Code, which formulates, that "Criminal provisions in the laws of the Republic of Indonesia apply to everyone who within the territory of the Republic of Indonesia commits a criminal act".

Furthermore, in the Elucidation of the article, it is emphasized that the criminal provisions in the laws of the Republic of Indonesia apply to anyone who commits a criminal act within the territory of the Republic of Indonesia, except for foreigners who according to international law are given the right of "exteriority". They cannot be contested, so that the criminal provisions of the Republic of Indonesia do not apply to them and they are only subject to the criminal law of their own country. They are:

- a. Foreign Heads of State who visit Indonesia with the knowledge of the Government of the Republic of Indonesia;
- b. The diplomatic corps of Foreign countries such as Ambassadors, Special Ambassadors, Ambassadors and Cahrge d'Affaires;
- c. Consuls such as the Consul General, Consul, Deputy Consul and Consul Agent, if between the government of the Republic of Indonesia and the foreign country there is an agreement mutually acknowledging the existence of diplomatic immunity for their respective countries;
- d. Foreign troops and crew members of foreign warships under the direct leadership of their Command, who arrived in Indonesia with the knowledge of the government of the Republic of Indonesia;

- e. Representatives from international bodies such as delegates from the United Nations, the International Red Cross, and others.

In addition, it is recognized that the exteriority rights also include family members who follow them, embassy members such as attaches, honorary attaches, military attaches and others along with their family members and embassy employees such as secretaries, chancellors, interpreters, couriers, note taker, driver, bodyguard, and so on.

With the right of exteriority, it does not mean that they can act as they please which is not in accordance with the criminal laws and regulations in Indonesia. Indeed, they cannot be criminally prosecuted in Indonesia, but they can always be submitted to the government from the diplomatic representative itself. Which complaint can be accompanied by a demand to recall the diplomatic representative and to prosecute criminals in their own country. So action against them can be taken, it's just that it must always be through diplomatic means.

The provisions of Article 3 of the Criminal Code which formulates, that "Criminal provisions in Indonesian legislation apply to everyone outside the territory of Indonesia who commits a crime in an Indonesian water vehicle or aircraft." Then this is clarified in his explanation, which formulates, that the criminal provisions in the Indonesian legislation do not only apply to anyone who commits a crime in the territory of the Republic of Indonesia, but also to anyone who commits a crime on board a ship or on board the ship. Indonesian aircraft, when the Indonesian ships or aircraft are in the territory of another country.

### **Third: Passive Nationality Principle**

This basic provision can be found in Article 4 of the Criminal Code, which formulates that criminal provisions in the laws of the Republic of Indonesia apply to anyone who commits acts outside the territory of the Republic of Indonesia:

- First, one of the crimes mentioned in articles 104, 106, 107, and 108, 110, 111 bis in 1st, 127 and 131;
- Second, a crime concerning currency, state banknotes or bank notes or regarding stamps or marks issued or used by the Government of the Republic of Indonesia;
- Third, falsification of debt securities or debt certificates borne by the Government of Indonesia, the region or part of the region, falsification of talons, sero debt securities (dividend statements) or interest notes on the money included in these documents. In addition to the certificates in lieu of the documents, or intentionally using fake or falsified documents as if the letter was genuine and not falsified.
- Fourth, one of the crimes mentioned in Articles 438, 444 to 446 concerning maritime piracy and Article 447 concerning the surrender of vessels to pirates and 479 letter j concerning unlawful control of aircraft, Article 479 letters l, m, n, and o on crimes that threaten the safety of civil aviation (UU. No. 4/1976).

In the explanation of this article, it is explained that everyone, both Indonesian citizens and foreign nationals who commit crimes as referred to in this article, can be subject to Indonesian criminal provisions, even though they commit the crime outside the territory of the Republic of Indonesia. This article leaves the territorial principle and accepts the universal principle. Sub 1 protects the interests of the state as a state, while sub 2 and 3 protect the interests of state finances.

Thus, it can be seen that the sovereignty of the state to protect its legal interests for the actions of those who commit it, either within the territory of the state or outside the territory of the state, is based on the national/state interests. So the protection pressure is no longer on the citizens, but the protection of the national interests of the state.<sup>13</sup> Therefore, whoever (Indonesian citizen or foreigner) and anywhere (in the territory or outside the territory of the state) commits crimes that harm the interests of the state will be prosecuted according to the Criminal Code of the country concerned. This principle of protecting the interests of other countries is called the principle of passive nationality. Prosecution of a person is not due to his nationality, but the prosecution occurs because the violator has violated/committed a crime, harming the interests of the state that adheres to this principle.<sup>14</sup>

This Passive Nationality Principle is often also referred to as the Protection Principle, which is a form of protection against the national interest or the Indonesian state which has been regulated by criminal provisions. This principle contains the principles of Indonesian criminal law regulations and applies to parties who commit criminal acts that attack the legal interests of the Indonesian state, both those committed by Indonesian citizens and non-Indonesian citizens committed outside the territory of Indonesia.<sup>15</sup> The place where the criminal act referred to in the passive national principle, namely *locus delicti* occurs, occurs outside the territory of Indonesia.

The application of the passive nationality principle is limited to actions that actually violate the interests of the Indonesian state, namely the interests of national law as stated in three articles, namely Article 4 paragraphs (1), (2), and (3), Article 7 and Article 8 of the Criminal Code, in the form of:

- a. Guaranteeing state security and ensuring the safety and dignity of the head of state and his representatives;
- b. Guaranteed trust in the currency, stamps and brands that have been issued by the Indonesian government;
- c. Guaranteed trust in the letters or debt certificates that have been issued by the Indonesian government;
- d. Ensuring that Indonesian employees do not commit office crimes abroad;

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<sup>13</sup> R.O. Siahaan, *Hukum Pidana I*, hlm. 112.

<sup>14</sup> R.O. Siahaan, *Hukum Pidana I*, hlm.113.

<sup>15</sup> Tongat, *Dasar-Dasar Hukum Pidana Indoneisa Dalam Perspektif Pembaharuan*, (Malang, UMM Press, 2020). Hlm. 67

- e. Guaranteed conditions, that the captain and or passengers of Indonesian boats do not commit crimes or violations of shipping outside the country of Indonesia

#### **Fourth: Active Nationality Principle**

The principle of active nationality is the personal basis or citizenship of a person who follows their respective laws wherever that person is. This means that a person's criminal law is sovereign over his/her citizens wherever he/she is or takes legal actions or legal relations. The provisions of this principle give the impression as if the legal sovereignty of foreign countries is not being considered as explained according to the territoriality principle.<sup>16</sup>

Although the national Criminal Code contains an acknowledgment of the treatment of the principle of personality, it is also proven in the formulation of the Criminal Code, the avoidance of limits on the authority of violating foreign criminal law in its territory by mentioning which actions can be imposed to treat this principle. This is clearly illustrated in the formulation of Article 5 of the Criminal Code, which emphasizes that:

- (1) Criminal provisions in the laws of the Republic of Indonesia, apply to Indonesian citizens who commit outside the territory of Indonesia: First, one of the crimes mentioned in Chapters I and II of the Second Book, and in articles 160, 161, 240, 279, 450 and 451; Second, an act which according to the criminal provisions in the laws of the Republic of Indonesia is considered a crime and can be punished according to the laws of the country where the act was committed.
- (2) The crime referred to in Number 2 can also be prosecuted, if the defendant only becomes a citizen of the Republic of Indonesia after committing the act.

The name of this principle is contained in the explanation of this article which emphasizes that in this article the principle of active nationality or personality is placed. Thus, a citizen of the Republic of Indonesia who commits one of the crimes referred to in sub 1 of this article, even though at the time the crime was committed outside the territory of the Republic of Indonesia, may be subject to the laws of the Republic of Indonesia. If he commits another criminal event which is considered a crime by the laws of the Republic of Indonesia (not a violation), he can only be subject to a criminal offense by the Republic of Indonesia. This only applies to citizens of the Republic of Indonesia and not to foreign nationals, unless after committing the act he becomes a citizen of the Republic of Indonesia.

#### **Fifth: The Principle of Universality**

This principle means that criminal law laws can be treated against anyone who violates legal interests from around the world, as long as the crime is recognized by the laws of nations around the world (international law). Because the crime actually involves the common interests of all countries in the world which can harm the common interests of all countries. So, if the crime was committed by a foreigner, and

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<sup>16</sup> Tongat, *Dasar-Dasar Hukum Pidana Indoneisa Dalam Perspektif Pembaharuan*, hlm. 107.

for that country no interests were attacked, based on the universality principle of the state, then the person concerned can sue the foreigner with his own country's Criminal Code.<sup>17</sup>

### 3. Comparison of the Indonesian Criminal Law System with the Islamic Criminal Law System

In the teachings of Islamic law, there is what is called Islamic criminal law. Criminal law in Islamic teachings is often also referred to as Islamic criminal law or in other terms *fiqh jinayah*. The rules of *fiqh jinayah* are the *shari'a* of Allah SWT which regulates the provisions of criminal acts or crimes (criminals) committed by someone who is in the *mukallaf* category (can be responsible).<sup>18</sup> According to the view of Islamic teachings, that criminal law essentially contains benefits for human life, both in the world and the hereafter. Islamic law or Islamic law contains a basic obligation for every human being to do so. The concept of the basic obligations of *sharia* law places Allah SWT as the regulator and holder of all rights. Every servant is only an executor who has the obligation to carry out Allah's commands. The commandment of God in question must be carried out both for the good of the individual and for other human beings. This is what distinguishes it from other criminal law systems, namely man-made law. Because man-made law is the result of human thought itself which of course has shortcomings so that humans can arbitrarily commit acts that violate the law.

The act of violating the law that applies in a region or country will be different from the act of violating the law specified in Islamic law. The scope of legal violations in positive law is only limited by wrongful acts or violations of the law, such as criminal law, civil law or state administrative law, including land law and so on. However, in Islamic law, any act that is considered to violate the rule of law is categorized as a violator of *sharia* law. The provisions and legal basis can be found both in the *Qur'an*, *Sunnah*, and in various *ijtihad* of the scholars. *Shari'a* rules do not only regulate *muamalah*, but also concern worship. Every action will be rewarded or punished, both while living in this world and later in the hereafter.

Islamic law or *fiqh jinayah* is faced with matters that study the science of *sharia* law which includes the actions that are *dilatang* (*jarimah*) and punishment (*uqubah*) which are extracted from the results of detailed arguments. In another sense, the object of discussion or scope of Islamic criminal law is a crime or a crime and its punishment.<sup>19</sup> However, if you look at its broad scope, Islamic law in principle is almost the same as positive law. Because in addition to covering criminal matters and sanctions, they are also accompanied by arrangements for probationary sanctions, participation, or a combination of criminal acts. Meanwhile, the word *jarimah* means a crime or a crime. Another word that is paired with the word *jarimah* is the word *jinayah*. Among jurists (*fiqh* experts) the term *jarimah* is generally used for any

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<sup>17</sup> Tongat, *Dasar-Dasar Hukum Pidana Indoneisa Dalam Perspektif Pembaharuan*, hlm. 116.

<sup>18</sup> Zainuddin Ali, *Hukum Pidana Islam*, Cet. 1., Sinar Grafika, Jakarta, 2007, hlm. 1

<sup>19</sup> Ahmad Wardi Muslich, *Hukum Pidana Islam*, Sinar Grafika, Jakarta, 2005, ha. ix

violation that is prohibited by sharia, including actions involving the soul or others. Meanwhile, jinayah is used to describe violations involving the soul or limbs, such as killing or injuring certain limbs.<sup>20</sup>

Jarimah, has general elements and special elements. General elements that concern each type of finger. Meanwhile, special elements include certain types of fingers that are only found in certain types of fingers that are not found in other types of fingers. General elements in Jarimah are categorized into three elements, namely formal, material and moral elements. Formal elements (*al-rukḥ al-syar'iy*) are textual provisions that prohibit or order actions and sanctions for violators. The material element (*al-rukḥ al-mahdi*) includes actions in the form of a finger that violates formal provisions. The moral element (*al-rukḥ al-adabiy*) if the perpetrator is in the *mukallaf* category. That is, his actions can be legally accounted for. Although, Jarimah is divided into three categories, but in particular Jarimah has its own elements.<sup>21</sup>

#### 4. Comparison of the Indonesian Criminal Law System with the Criminal Law System in Other Countries

##### First: Indonesian Criminal Law System

There are many legal systems adopted by countries in this world and at the same time have many differences from one another, namely Islamic Law, Common Law, Civil law. With the legal system adopted by many of these countries, there is a criminal law system in it. Criminal law is intended as a means of tackling crime. Of course, criminal law is not the only means in tackling crime, other means outside of criminal law, especially prevention tools are still needed. Criminal law is implemented to criminalize criminal behavior committed by perpetrators. As Philip Petit said that the form of criminalization is a form of regulation, prevention, which prevents harmful acts.<sup>22</sup>

The legal system and judicial system of the Indonesian government were formed based on Pancasila and the 1945 Constitution. The founding fathers of the nation aspired to justice for all Indonesian people as stated in the values of Pancasila and based on the constitution, especially Articles 24 and 25 in order to realize justice in upholding the law as fair as possible, free and without intervention from any party.

Until now, the Indonesian legal system, especially the criminal system, is still influenced by the European legal system, especially the Dutch. The Netherlands has long colonized Indonesia and implemented the rule of law in Indonesia. The Netherlands, with its common law legal system, shares it with public law and private law, and both are still under the same roof.

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<sup>20</sup> H.A. Djazuli, *Fiqh Jinayah (Upaya Menanggulangi Kejahatan dalam Islam)*, Ed.2., Cet.3., PT RajaGrafindo Persada, Jakarta, 2000, halaman 12.

<sup>21</sup> Topo Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat dalam Wacana dan Agenda*, Cet.1., Gema Insani Press, Jakarta, 2003. Hlm. 22

<sup>22</sup> Buku Philip Petit, *Criminalization in Republican Theory*. Dalam R.A. Duff *et al* (ed) *Criminalization: The Political Morality of the Criminal Law*. USA: Oxford University Press. 2014. p. 114



Judicial institutions in Indonesia are regulated and differentiated in a horizontal and vertical composition. Namely, the horizontal composition includes general courts, religious courts, military courts, and administrative courts or the State Administrative Court (PTUN). There are more special courts in general courts and courts of the Constitutional Court. Specifically for the Aceh region, there are Sharia Courts at the Regency or City level and Sharia Courts at the Provincial level.<sup>23</sup>

Currently, in Indonesia the applicable criminal law is written law and the law has been codified. The Criminal Code has been in effect since January 1, 1918. That is, since the reign of the Dutch East Indies. At the beginning of the enactment of the Criminal Code, it was specifically for European groups which referred to the penal code legal system, namely criminal law in France.<sup>24</sup>

Referring to Article 2 of the Transitional Rules of the 1945 Constitution jo. Article 192 of the 1949 RIS Constitution jo. Article 142 of the 1950 Constitution of Indonesia still refers to the Criminal Code of January 1, 1918 because the new Criminal Code has not yet been issued. Likewise, the current Criminal Code has been amended and needs adjustments. Its validity after the identification of criminal law is intended for all groups of people.

In the practice of criminal law, the principle of legality must be a reference as contained in Article 1 paragraph 1 of the Criminal Code, namely "no act can be punished, except for the strength of the law that has existed before or from the act". In another sense, that every criminal act must refer to the rules of law or the law that applies to criminals. As stated in Article 1 Paragraph 1 earlier that the punishment for perpetrators of law violators must be in accordance with the written law and the treatment is not retroactive.

Article 1 Paragraph 2 mentions the prohibition on retroactive application of criminal law. It is even indicated that the new criminal law will apply to the perpetrators of the crime while the case has not been decided by the judge.<sup>25</sup>

The terms of punishment for the perpetrators of crimes are associated with his actions. The punishment is based on the existence of a written law (legality principle) and the principle of error (culpability). The principle of legality concerns the actions of the perpetrator, while culpability concerns the person. This principle is called *nullum crimen soine lege* and *nulla poena sine culpa* (or intentional or unintentional act).<sup>26</sup>

Acts that violate criminal law are not included in criminal liability. As Ruslan Saleh said that a criminal act only refers to the prohibition of the act. It will depend on the actions of the perpetrator whether the category of error or not has an error. According to him, criminal responsibility is an act that is considered despicable by the community who is accountable for it aimed at the perpetrator. In another sense, the

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<sup>23</sup> Bagir Manan, *Sistem Peradilan, Suatu Pencarian*. Yogyakarta. FH UII Press. 2005. Hlm. 15

<sup>24</sup> Dwi Indah Wilujeng, *Studi Komparasi Hukum Pidana Indonesia dan Filipina Tentang Perdagangan Orang (Trafficking in Person)*. PPs Magister Hukum UII. 2016. Hlm. 62

<sup>25</sup> Wirdjono Prodiokoro, *Asas-Asas Hukum Pidana di Indonesia*. Bandung. Refika Aditama. 2003. Hlm. 42

<sup>26</sup> Sudarto, *Hukum dan Hukum Pidana*. Bandung. Alumi. 1986. Hlm. 25

perpetrator may be penalized and may not be convicted because he is unable to account for his actions.<sup>27</sup>

In the criminal system in Indonesia, the court will impose a sentence on the perpetrator if, first, he has the capacity to be responsible. Second, the act is intentional (dolus) or unintentional (culpa). Third, there is no excuse for forgiveness.

With the enactment of Law Number 8 of 1981 concerning the Criminal Procedure Code, the judicial system in Indonesia adheres to the equity system. That is, proof of a criminal case must refer to scientific evidence. The court process is carried out in a fair and proper process and recognizes the rights of the suspect or defendant.

The Indonesian criminal law system states that a form of criminal liability will occur if someone has committed a criminal act. Moeliatno said that it is impossible for people to be held accountable for their actions if they do not commit a crime.<sup>28</sup>

### **Second: The United States Criminal Law System**

The implementation of criminal justice in the United States is known by two models, namely; due process model and crime control model. Both models are based on an adversary model (resistance model) which has its own characteristics. First, the judicial procedure must constitute a dispute or combating proceeding between the defendant and the public prosecutor who have the same position before the court. Second, judge us umpire with the consequence that judges do not participate in the examination process in court. The judge only functions as a referee so that the court process is not violated by both parties, the defendant or the public prosecutor. Third, the purpose of the court process is to resolve disputes resulting from crimes. Fourth, these parties have their own functions.

The public prosecutor conducts the prosecution, and determines which evidence is submitted along with other evidence. Meanwhile, the defendant plays the role of rejecting or refuting the demands and determining which facts are presented in the trial that favors his position with other evidence as supporting.

In the jurisdiction of the United States of America, which uses the command law system as the basis for protecting individual freedoms against the arbitrariness of the authorities, officials are not free from the obligation to obey the laws governing ordinary citizens and refuse administrative justice. The United States government, gives high authority to police agencies, especially the Local Police and the Sheriff's Department as law enforcement. Meanwhile, the state police department functions for a wider service. Federal agencies such as the Federal Bureau of Investigation (FBI) and the U.S. Marshals Service are charged with more specialized tasks.

The common law legal system adopted by the United States applies four sources of law, namely the constitution, administrative law, written law (formal law),

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<sup>27</sup> Ruslan Saleh, *Pikiran-Pikiran Tentang Pertanggungjawaban Pidana*. Jakarta. Ghalia Indonesia. 1982. Hlm. 74

<sup>28</sup> Molejatno, *Asas-Asa Hukum Pidana*. Jakarta. Rineka Cipta. 2002. Hlm. 155

and common law (covering case law). The four sources of law are validly valid as positive law and are binding on all citizens of the United States.

In the process of the United States criminal system, there are several stages. The first stage is before the trial examination. Second, the stage of trial examination. The third stage after the trial examination.

The first stage, before the trial examination is carried out: Detention, Presence before the Judge, Initial Hearing, Supreme Jury Process, Summoning of the Defendant, Guilt Statement. The second stage, the trial examination stage, namely, the selection of the jury, the opening statement, the prosecutor's legal reasons, the defendant's legal reasons (lawyer), jury instructions, and jury decisions. The third stage after the trial examination, namely; Legal Decisions, Appeals, and Executions.

The building and structure of the criminal justice system in the United States of America and the structure of the legal justice system in Indonesia have many similarities. However, it looks different in the structure with the existence of a jury which is not found in the criminal system in Indonesia. The role of judges in Indonesia is very dominant as a decision maker. While the United States, the jury has an important role. The jury itself is drawn from the community.

### **Third: The British Criminal Law System**

Classification of crimes in the British criminal law system refers to the hierarchy of courts in that country. The court structure in England has two types of courts and has the power to adjudicate, namely, the Crown Court and the Magistrate Court. The Crown Court has the authority to examine and decide cases of serious crimes such as murder, rape, robbery, and serious maltreatment. Meanwhile, the Magistrate Court has the authority to examine and decide minor cases such as traffic violations, fighting police officers, making trouble in public places and checking the alcohol content of drivers on the highway.

Based on English law, criminal law in England stipulates that every person who commits a crime can be held accountable for his actions unless there are other reasons that can eliminate the burden of responsibility (exceptions from liability).<sup>29</sup>

According to British criminal law, criminal liability must be based on actions 1) intent (deliberate) 2) Recklessness (recklessness) 3) Negligence (negligence). According to the law of this country, a person cannot be called responsible for a crime if he is under pressure both physically and psychologically. Because of that pressure a person can lose or reduce the ability to control himself (like crazy).

### **Fourth: Philippine Criminal Law System**

The criminal law system in the Philippines is a combination of the Roman Civil Law and the Anglo-American Command Law system. The civil law system in the Philippines is related to family law, property rights, succession, contracts and criminal law. Meanwhile, the basic principles of common law are contained in constitutional

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<sup>29</sup> Romli Atmasasmita, *Perbandingan Hukum Kontemporer*. Jakarta. Fikahati Aneska. 2009. Hlm. 93

law, procedure, corporate law, taxation, insurance, labor and banking law. Meanwhile Islamic law is practiced in some parts of Mindanao with the establishment of a sharia state.

For approximately 300 years, Spain made the Philippines its colony, from 1565 to 1898. In various fields, especially in the field of law, the Philippines followed the Spanish legal system with a civil law tradition, especially in the field of criminal law and civil law.

The current Philippine penal code is the Revised Penal Code (RPC) which was passed in 1930 and has been effective since January 1, 1932. The amendment to the Philippine penal code consists of two parts. The first part contains general provisions in the implementation of the law and the principles of criminal law. It covers the scope of criminal acts of crime, criminal liability, forms of criminal sanctions and so on. The second part defines crimes specifically and the forms of threats, including crimes that threaten state security such as treason or espionage, rebellion, coups and so on. The Philippine RPC criminal code is a complement to a special law and is similar to Article 103 of the Indonesian Criminal Code.<sup>30</sup>

The main sources of law in the Philippines are divided into two forms, namely the form of law and the form of jurisprudence. The form of the Act is a written law and the formulation of the law is made by Congress. While jurisprudence is a decision of a previous case made by a court. Jurisprudence in the Philippines includes decisions made by the Legislature, decisions of the President or the Senate and the Electoral Court. Meanwhile, for Muslims in Mindanao, the main source is Sharia law, which refers to the Qur'an, Sunnah, Ijma, and Qiyas.<sup>31</sup>

The criminal system in force in the Philippines refers to the civil law tradition, namely, The Revised Penal Code (Revised criminal law law) and The Rules of Court (such as the Indonesian Criminal Code). The Philippine state court does not use a jury as other countries adhere to the same legal system. The tradition of courts in the Philippines makes judges the judge of court decisions on cases before them. All facts of the case, defense and other procedures are regulated in The Rules of Court.

### **Fifth: Malaysian Criminal Law System**

The Malaysian state did not change the legal order they applied even long before the British made Malaysia a colony. This was done because Malaysia wanted to maintain the law in accordance with the traditions and values of the people's life. Their legal awareness had been built long before the British came to bring a new law, therefore Malaysia did not completely overhaul it by replacing the old legal culture with a new legal culture.

The judicial system in Malaysia is adapted to the legal conditions that were built without having to eliminate the previous legal system and values that were practiced by their society. The sources of Malaysian state law consist of three forms,

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<sup>30</sup> Andi Hamzah, *KUHP Filipina Sebagai Perbandingan*. Jakarta. Ghalia Indonesia. 1987. Hlm. 37

<sup>31</sup> Milagros Santos-Ong, Philippine Legal Research, dalam <https://www.nyulawglobal.org/globalex/Philippines.html>. diakses pada 10 Desember 2021

namely, written law or national law, Islamic law and customary law. Customary law consists of English law and other laws that developed in Malaysia. Recently, the insistence on equality, especially legal equality has grown rapidly in various courts in Malaysia. The equality effort is made to avoid various conflicts with national law or written law. The existence of equality and adjustment is expected to be a solution to overcome legal conflicts in the community.

Malaysia and Indonesia have different legal systems. Malaysia follows the Anglo Saxon legal system and Indonesia follows the civil law legal system. The state of Malaysia applies the principles of criminal law the same as the law in force in Indonesia. These legal principles are fundamental principles in carrying out criminal law. These principles are, first, the principle related to the basis of punishment for an act, namely that a person's actions are punished based on the force of the law. Second, the principle of the abolition of the authority to sue, i.e. a person may not be prosecuted twice to the court in the same case because the legal decision is already permanent.<sup>32</sup>

#### D. CONCLUSION

There are many legal systems adopted by various countries in the world. There is Islamic Law (Islamic law), Common Law, Civil Law or there is Local Law (customary law) which is the community's reference in law. The country of Indonesia has been occupied by many countries, starting from the VOC, Europeans, Japanese and so on, and the longest was the Dutch, for approximately 350 years. Until now, the Dutch influence is still felt, especially its legal legacy, namely the Common Law criminal law system.

Indonesia is a sovereign country, its legal system is based on the values of Pancasila and the 1945 Constitution and aspires to justice for all its people. The legal system in Indonesia recognizes the existence of legal pluralism, Islamic law and customary law. However, national law is still the most dominant, especially in criminal cases. The Indonesian government also recognizes the criminal law system of other countries, the criminal system of the United States of America, the United Kingdom, the Philippines, Malaysia and other countries. Because of the times and the rapid development of science and technology, it is an advantage and makes it easier for Indonesia to study, compare and research the similarities and differences between the criminal law systems of other countries. The point is to provide input to the building of the national criminal law system in realizing justice and justice ideally, as aspired by the founders of the nation and all citizens who yearn for justice and prosperity.

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<sup>32</sup> Federal Constitution, as amendment at 27 December 2007. [http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf).

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