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INDONESIAN POST-COLONIAL PENAL CODE POLICY WITHIN STATE RESPONSIBILITY FOR EQUAL JUSTICE IN THE CRIMINAL JUSTICE SYSTEM

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ABSTRACT

Indonesian penal code has a mental construct in the criminal justice system to determine suspected culpability as a punishable decision to pursue the accused person for inevitable punitive incarceration. In the colonialism dominative power as an imperialism legacy penal code (Nederland Indie Strafrecht), it is also possible to release from the accusation or freedom verdict due to insufficient evidence. Prisonization mindset in punitive incarceration imprisonment is not the only punishment in the currently integrated criminal, administrative justice system. Decolonized Indonesian government has human rights dogmatic imperatives concerning state responsibility in protecting, fulfilling, enforcing, and promoting equal justice and the ease to obtain. This study found that intersubjective communication between the parties can function as a technology for the government's self-decolonization. It is necessary to apply therapeutic jurisprudence through a pretrial process—implementing criminal law processes to seek restorative justice for all stakeholders related to criminal acts by perpetrators. Calm and peaceful intersubjective communication in the criminal justice process. Perpetrators can peacefully and subject to criminal acts through alternative punishments that apply. Following significant evidence found by investigators, lawyers, and advocates.

Keywords: imperialism dominative power, decolonization, post-colonial penal code policy, constitutional human rights in state responsibility, equal justice in the criminal justice system, pretrial restorative justice.

INTRODUCTION

There was a relationship between "thinking activities, language, and law as juridical logic thinking for making decision and action" (Bruggink, 2015).[i] This kind of juridical thinking in Hollands, the former colonial government in Indonesia's state area, is initially called "*berechten*" as it relates to *"straf, wordt gestraft, strafrecht."* It consecutively means "punishment, be punished, penal code." *Strafrecht* then was converted into nowadays Indonesian Penal Code within reformation made into many provisions occasionally after that Republic of Indonesia independence on August 17, 1945, until today of writing. "*Berhukum*" in Indonesia as *berechten* in Hollands during the time becomes Indonesian mindset embedded for such kind of juridical thinking. Since "*hukum*" in Indonesia means law in a broad sense. But thence "*hukum pidana*" as penal code or "strafrecht" in Holland emerges into the practical mindset that "law as penal code." Punishment and be punished in such law, become punitive incarceration imprisonment instead of other administrative, detention or confinement

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and fine sanctions, *et cetera*. Despite moreover the substance of criminal Lawyers and the proceeding is not only to pursue punishment but also to release from the accusation (Hollands: "*onslag van alle rechtsvervolging*") or verdict in freedom due to insufficient evidence (Hollands: "*vrijspraak*"). That kind of built mindset has been seriously criticized by prominent criminal law experts of Indonesia such as late Sudarto and Moeljatno (Muladi, 1992)[ii] and the recent famous experts of Indonesia Criminal or Penal Law.

Therefore, the act of "determining" or "deciding on law" consists of a series of processes in juridical logic thinking ("*berhukum*" or "*berechten*") concerning a punishable act which is not only criminal law but also civil law and, more broadly in other areas of law. There is a process stage of the performance mechanism, which includes the "thinking process" ("*cogitatione*" in Latin) to compile a series of "words" ("*verbo*" in Latin) then proceed with a stage of actions ("*opera*" in Latin). In the end, "responsibility taking" for everything that becomes burdens of the personal responsibility which is unable to be neglected ("omissione" in Latin). Those stages of dogmatic logic thinking derived from Latin rites liturgy[iii] of *Confiteor* stating "*... quia peccavi nimis cogitatione, verbo, opere, et omissione... mea culpa, mea culpa, mea maxima culpa.*" It signifies that the responsibility for any action taken by any subject person is a series of inseparable unity beginning from the thinking process into words composed and followed by a series of steps taken for such responsibility. The criminal law doctrine is called "mens rea and actus reus" (intention in mind).

Michel Foucault refers to "historical archeology"[iv] into such above juridical thoughts, as it is in the colonial law policy. It is clear that there are no "mental constructs"[v] of abductive "binary non-opposition"[vi] in "inter-subjective communication relationship."[vii] Criminal law policy in Indonesia after the Criminal Code with inter-subjective communication in non-binary opposition in mental construction is interesting for this research, examining whether equal justice and convenience are legally feasible. Based on the theory, it will try to find out the responsibility of the post-colonial state in carrying out justice.

Formulation of Problem

Referring to the above background, two problems can be formulated in this research, namely:

a. How does the policy of Indonesian Criminal Law develop the implementation of state responsibility in determining criminal acts, examining to investigate the liability and legal responsibility of the offender in that criminal act, as well as during the convicting process for them?

b. How is equal justice within equal law enforcers in implementing the court's process to protect the fulfillment of the ease in obtaining justice as the state responsibility in togetherness by convicting or releasing someone?

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LITERATURE REVIEW

Assuming the above-formulated problems have not been single made yet in the legal definition of the post-colonial Indonesia Penal Code or Criminal Law. But the human rights concerning state responsibility has been defined as the current Indonesian constitution and law dogmatic imperatives as it prevails in Indonesia's legal system. State responsibility on behalf of and for the state must be jointly borne together by all law institutions and the apparatus enforcers.

Theory of Decolonization

Theorizing the distinction of state responsibility during colonialism power domination is different from the state responsibility in the independent state of Indonesia. State power in utilizing the law between the two systems is archeology of knowledge during the history of law implementation made by the state authority into her citizens. State law implementation with binary opposition appears to have been passed down from the era of Roman Law to France, the Kingdom of the Netherlands, and the Dutch East Indies as the territorial area of Indonesia state.

Edward Said and Michel Foucault may refer to this archeology of knowledge in understanding the Indonesian Criminal Code before and until more than seventy-five years after that independence. The history of colonial rule is integrated into the "archaeological thought of the transition from one method of knowledge to another, the history of the flow of thought, structural orderliness, differences in knowledge and its discontinuity" (Said: 2001; Foucault: 1972, 1973).[viii] This colonial legacy of law appears as a method of knowledge under the domination of Netherland Indie's colonial power. There is then transition and transformation to condition knowledge of the law in the post-colonial era ("*berechten*"; or "*berhukum*").

Historical archeology of juridical thought during the colonial law policy is clear that there are no "mental constructs" (Friedman: 1984) of "abductive binary non-opposition in inter-subjective communication relations." Decolonization to this kind of mental construct in criminal law policy is to be referred further in theoretical, philosophical directions according to Friedman, Gadamer, Heidegger, Derrida, Habermas, and Peirce Charles Sander.[ix] From this decolonized, theoretical and philosophical direction can be found out what and where the responsibility of the state in carrying out equality for justice and the togetherness in that responsibility.

Theory of Postcolonial Indonesia

The Grand theory of decolonization is to implement state responsibility in criminal law according to constitutional dogmatic on human rights. Postcolonialism theory means an "effort to improve oneself in getting rid of viewpoints as a colonized nation" (Said: 2001). To improve itself aims to carry out its policies by making and producing its laws in an independent nation. Referring to Michel Foucault's philosophical basis of thinking uses a systemized expression of the power in critical thought as "power is knowledge" to "fight against power relations that work in a certain space and time concerning the relationship between thought, language, knowledge, and decisions with actions." (Foucault: 1980).

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Optional choice of action arises from "the insurrection of subjugated consciousness" (Foucault: 1997). It is awakening that emerges from a solid awareness to improve oneself with the power of itself[x] within the statehood of post-colonial Indonesia.

Theory of Indonesia Postcolonial Law

Theoretical bridge to that grand theory is derived from Lawrence Friedman to construct "law as mental constructs for the system and processes of post-colonial Indonesian criminal law." Friedman's theory of "law, legal system and legal process are all mental constructs" is assembled to include four main topics in simultaneously one mindset constructs of criminal law, namely: (a) legal substance; (b) legal structure; (c) legal culture; and (e) its impacts from one another (1984; 2011).[xi]

Human rights theory concerning state responsibility as an applied approach in practice is deemed appropriate to parse the implementation of criminal law policies that are systemized with legal processes into the administration of the criminal justice system. Human rights theory has been accommodated into formal penal code positive law with dogmatic imperatives, and it has become an essential part of criminal proceedings.

Deconstruction of colonialism is carried out on everything that correlates with the imperialist dominative power to create discontinuity against binary opposition with a plurality of meanings in an inter-subjectivity communication. Genealogy of state power in this deconstruction is post-colonial in "governmentality conduct with the technology of the self" (Foucault: 1982a; 1978a; 1982).[xii] This regulates, shapes, and constructs various choices of decisions and actions into mental constructs, namely the state's legal system that is already independent of the legacy of colonial imperialist domination.

Theory of Equality of Justice in Indonesia Postcolonial Penal Code

Deconstructed independent Indonesia was departed from the genealogy of colonial rule by establishing its law, i.e., the direction of the nation-state of the Republic of Indonesia. Sovereignty as a source of state power in law-making implements policies to administer government within the criminal law system as the technology of the self in Indonesian criminal law. This refers to the framework of forbidden post-colonial knowledge, which is noted by Sudarto, Moeljatno, Muladi, Romli Atmasasmita, Andi Hamzah, *cum suis*.[xiii]

State, meaning in the term of responsibility of the post-colonial state, is a subject person who carries out the functions to implement the legal system as her technology of the self for any offender as her citizen by legal enforcements of state branch apparatus. The entity of state subject is "personified" as a person with actions and decisions in holding "legal duty and functions as her legal liability, accountability, and responsibility." The responsibility is to be demanded fulfilled as the order of legal obligation (Hans Kelsen: 1973).[xiv] Sanctions of the fault and accountability to the subject persona of the state responsibility can occur as a "result of delinquency, wrongdoing, and neglect of duty." This is decolonized state construction.

"Equality of justice" in the legal system of post-colonial states can take place with "emancipatory communication" in carrying out the functions of the legal system as a technology of the self. The genealogy power of the governmentality in this post-colonial state becomes the conduct, as a technology of the self, in composing legal mentality to conduct

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state governance.[xv] State responsibility as mental constructs (Friedman) is during time becomes Law, legal system, and legal process, which can be carried out in "deliberative democratic communication" (Habermas).[xvi]

The function of the legal system in structure, substance, culture, and its impact plays a vital role in "planned social change," with many things that follow. The legal system in inter-subjective reciprocity will simultaneously carry out "redistribution and social engineering, social control, dispute settlement and conflict resolution with redistribution through social engineering" for social maintenance (Roscoe Pound).[xvii] The post-colonial state functions differ from the construction of legal power genealogy in the last colonial state.

RESEARCH METHOD

This legal research is a "scientific activity based on a certain method, systematics, and certain thoughts, analyzing certain legal phenomena by examining in-depth legal factors and seeking solutions to the problems" (Soekantor: 1981; Hartono: 1994; Ibrahim: 2005).[xviii] This is to study and analyze the theory of "state responsibility" and "equality of justice" in "upholding the protection of the advancement of the fulfillment of human rights" to determine the examination of "criminal acts and responsibility of the perpetrator" in Penal Code and the proceedings within decolonized Indonesia.

This method is literature with secondary data from legal documentation with an analytical approach to understanding the substance meaning. Research typology is exploratory evaluative. Data types are secondary legal materials from primary sources in the 1945 Constitution of the Republic of Indonesia, prevailing Laws, and decrees of the Constitution Court, *etc*. Types of legal sources are derived from both formal and material law, with data collection tools using literature document studies, interviewing the authorities, and focus group discussions. The analyzing method was the descriptive qualitative approach[xix] , and the results were inductively proposed to several related legal rules.

RESULT AND DISCUSSION

The human rights imperative in Indonesia's post-colonial state constitution must be held concerning the state's responsibility, especially the government. These dogmatic imperatives have been stipulated on the latest amended RI Constitution of 1945 Article 28I paragraphs 4-5 *junction* Law number 39 of 1999 concerning Human Rights Articles 8, *jo*. 70-71. Those imperatives made no state authority to rule arbitrarily or tyrannically by ignoring human rights. More specifically, the scope of human rights is to be integrated into the criminal justice system, substantive and formal criminal law, and the enforcement covering the administration of criminal justice policy for implementing the criminal justice system (Muladi, Arinanto, Rahayu).[xx] The constitution imperatives for "the responsibility of the state, especially the government" in human rights are to protect "the guarantee of fulfillment the enforcement of certain treatment inequality of justice and the ease to obtain" in Indonesia as a "democratic law state in a democratic society." RI Constitution of 1945 stipulates those imperatives in Article 28D (1), 28H (2), 28I (4-5), and 28J.

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The substantive and proceedings of penal code in the democratic post-colonial Indonesian state regulates legal actions and decisions to "investigate, examine, prosecute, adjudicate and decide the law regarding alleged criminal acts and the responsibility of the offender." Human rights concerning the state's responsibility as an imperative of constitution also have to be performed in the main functions of due process models, crime control models, family models protection as Herbert Packer, Romly Atmasasmita, Sahetapy, and Muladi noted them.[xxi] Referring to Michel King, it functions "therapeutic jurisprudence restorative justice with emotional intelligence" rather than only crime control.

Pursuing the end of criminal procedures, inside and within an integrated criminal justice system and administration of justice is to: (1) seek and find the truth, (2) give a decision by the judge, (3) carry out to execute the judge's decision, (4) carry out prosecution actions correctly and appropriately, (5) striving for the implementation of proper and specific protection for victims and witnesses statement, (6) equal position of all human rights law enforcers with shared responsibility in different functions. Those are noted by the recent prominent Indonesia experts such as Andi Hamzah, Bambang Purnomo, Muladi, and Barda Nawawi, etc.[xxii] The purpose of "seeking and finding the truth and so on" is a significant part of the whole performance of "under criminal procedure" by all authorized state branch officials.

This research found that decisions and actions taken should follow the rules under the criminal procedural of law, including determining criminal acts with equality for justice and so on. The performance of criminal procedure law with the mechanism of administration in criminal justice, as it is found, can also be pursued by "implementing legal human rights which are standardized in the process of inter-subjective emancipatory communication procedures based on the prevailing laws and regulations." Such legal conduct occurs in "a deep hermeneutical-critical inter-subjective communication process through dialogue and multilogue," as it refers to Habermas, Gadamer, et al. The standard process of this kind of democratic deliberation in multilogue is to pursue "reciprocal communication for gaining mutual understanding." This reciprocal is no dichotomy and frontal opinion in binary opposition of opinion. There should be no right or wrong between the parties involved. But it grows, mutual sympathy and empathy appearing in "seriousness of good faith focusing into solutions" from one party to another. This sympathy and kindness make the parties feel rested with mutual calm and pacify in "inter-personal forgiving with peaceful condition." It becomes the result that may be documented from this inter-subjective deliberative communication. This confirms to Heidegger, Marleau Ponty, Gadamer, Derrida, and Harbermas.[xxiii]

It was also found that projected case by case in such above condition is part of implementing "social-emotional intelligence" for "self-mastery, self-control, self-awareness." This consciously creates humane authentical efforts in pursuing "self-healing therapeutic jurisprudence restorative justice with emotional intelligence," as it refers to Daniel Goleman and Michael King.[xxiv] Such procedural law in criminal proceedings is found in the practice of "Pre-Trial Justice with the implementation of the restorative justice" either prior before or in front of court proceedings.

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By this "Pre-trial Justice with the implementation of restorative justice," the purpose of punishment can also be achieved with a legal process in an integrated criminal justice system. The Court management mechanism is structurally synchronized by and between all human rights law enforcement components. Such pretrial justice practices are evident in this study being implemented in various countries of the European region and North America. Pretrial justice in that area of continents has become "a reflection of final results of the trial process and constitutes the principles of criminal procedure in postmodern society." This practice of law, in turn, has contributed significant reduction in the number of prisoners in imprisonments house (Basrief Arief, Andi Hamzah - RM Surachman).[xxv]

As it can also be called "before tribunal process" in the criminal proceedings, pretrial justice has the purpose of "being punished not meaning to violate the rights of the suspect offender and the victim."[xxvi] The rights of victims and the suspected offender are part of state responsibility which "protects guarantees of fulfillment in treating equality of justice and the ease to obtain it up to imprisonment execution." The burden of state responsibility is found in this research, that it should be realized "not only borne alone by the judges in the court, also not only by the police officer and not only by prosecutors." This burden must be shared simultaneously by all official apparatus of the five law enforcer components as a team group in different functions. That burden is transmitted along with the processes of multilogue deliberation.

The recent Constitution Court Decision Number 21/PUU-XII/2014 was pronounced on October 28, 2014. They finally decided that "in determining a suspect culpability must be with at least two legal evidences no human rights deprivation in determining a suspect culpability to any person." This pretrial justice can also be equated in similarity with "alternative of court solution" following prevailing statutory regulations at Law number 30 of 1999. It has been commonly implemented in due process of international business practices.

The practice of this pretrial justice solution makes no impact of "prolonged hostility and hurt feeling" but rather a win-win solution as it is in alternative out-of-court solution with mutual honorable in solving their problems. A similar implementation is found in "pretrial with restorative justice," which has recently existing regulated as a management mechanism for handling criminal cases in several Head of Police Regulations (which is called "*Perkap*" for "Peraturan Kepala Polisi RI" of 2012 and 2019)[xxvii] and State Attorney General Regulations (called "Perja" for "Peraturan Jaksa Agung RI" of 2020).[xxviii] Those "Perkaps" and "Perja" as legal procedures are "administrative decisions in the form of discretion so that there is no legal vacuum." While the Criminal Code Proceeding has not regulated it yet, it is based on authority derived accordingly from Law number 2 of 2002 concerning Indonesian Police and Law number 16 of 2004 concerning the Indonesian Prosecutor's Office Administration. Moreover, those administrative decisions made by the top leader of law enforcers are also hierarchically "recognized as statutory regulations" following the Penal Code Proceeding (Law number 8 of 1981).

With such the above procedural law model, discretionary in pretrial justice also reflect the final results of the trial process as mentioned in various countries. It is because the substance purpose of the punishment has also been carried out within the pretrial process in

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implementing restorative justice. The aim is to participate in giving judicial considerations whether to carry out detention or release or suspension of the case involved only.
Restorative justice is also a model for a solution to overcome the lousy deterioration of imprisonment in human civilization. Many experts have noted this kind of imprisonment such as "vestige of our savage past, a relic of barbarism, dehumanization, a place of contamination, stigmatization" and the like.[xxix] Similar to the current Indonesian condition, there has been an overcrowding of prison occupancy with all its systemic consequences related to security, daily meals that drain state finances in a vast trillion rupiahs, etc.[xxx] Lawyers and criminologists in various countries of five continents region generally have agreed to take a solution with the law of restorative justice procedures. There have been many notes, and even United Nations (UNO) has exposed a *Handbook on Restorative Justice Programmes* of 2006 stating that "*Restorative justice is an approach to problem-solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies, and the community*." This kind of definition aligns with the value of "social justice" in Indonesia's fundamental state norm called "Pancasila" as the Five Principles of fundamental importance in statehood and social livelihood. "Justice in Pacasila" is not a single element but integrated with the whole aspects of transcendence immanence in divine God simultaneously in humanity in the unity of Indonesia within people democracy making law constitutionally.
The restorative justice found above appears to agree with the substance purpose of punishment in the prevailing recent "*Perkap*" and "*Perja*." "*Perkap*" formulates that *"Restorative justice is the settlement of criminal cases involving the offender or perpetrators, victims, and their families and related parties, to achieve justice for all parties."* While "Perja" accentuates that *"Restorative Justice is the settlement of criminal cases by involving perpetrators, victims, families of offenders and victims, as well as other related parties to jointly seek a fair solution by emphasizing recovery back to its original condition, and not retaliation."* It is again emphasized that "*The termination of prosecution based on restorative justice is carried out based on (a) justice; (b) public interest; (c,) proportionality; (d) punishment as a last resort; and (e) fast, simple, and low cost.*" The goal of primum *remedium* is prioritized over the *ultimum remedium* of imprisonment as a last resort. It becomes evident that the result is the same as when the case is tried in front of a court.
Restorative justice is found to be in line with the same direction to place imprisonment as the last resort when no other way is found. Many experts have noted that imprisonment is a "relic of our past savagery... a vestige of our savage past (Packer: 1968)[xxxi] ... full of images of treatment which current standards view as cruel and transgressing" (Bassouni: 1978)[xxxii]... "punitive culture mindset to a therapeutic attitude" (Karel Menninger in Stanley Grupp: 1971)[xxxiii] "criminal law adheres to indeterminism which places humans as having free will... without which there is no error" (Sudarto: 2009).[xxxiv]

CONCLUSIONS AND RECOMMENDATIONS

First, the formulation of state responsibility, which contains equality of justice, although not explicitly stated in one criminal law reform policy, exists already and is imperative in constitutional dogmatic and several favorable recent laws. Human rights and the state's responsibility, especially government, in the judicial sphere, have also become an

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administration of justice management with the integrated criminal justice system by recent pretrial with restorative justice.

Secondly, equal justice in pluralism, meaning within administration management of the criminal justice system, is dealt with non-opposition binary emancipatory communication. Human rights law enforcement that protects the fulfillment of advancement to achieve the objectives of punishment can be obtained by conducting the pretrial justice for the implementation of restorative justice, as it is an administration justice management within the framework of the integrated criminal justice system.

It is recommended that synchronization and harmonization of the related omnibus law of these topics accordingly be carried out for substance, structure, culture, and all its associated impacts for all state branches in enforcing human rights law. Socialization, dissemination, and a series of technical guidance tutorials need to be carried out simultaneously in the related state branches' environment of the five components of human rights law enforcers at the whole level. It is predicted to take at least five years of intensive consistency in conducting these programed events.

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[ii] Muladi and Barda Nawawi, *Teori-teori dan Kebijakan Pidana* (Theories and the Policy of Criminal Law), Penerbit Alumni Bandung, 1992, p.p. 1-10; But anyhow, it has been repeated again on the recent drafted Indonesia Penal Code reformed, called "Rancangan Kitab Undang-Undang Hukum Pidana" drafted May 2018 with total 735 articles and the latest draft September 2019 with total 628 articles, stated in Article 733/627 that "this law is called as Penal Code" literally meaning of "pidana" as "punishment" emerging in a long run mindset of law as punitive incarceration.

[iii] Catholic Encyclopedia*, Robert Appleton, New York, 1913, Confiteor;*

[iv] Michel Foucault, *The Archeology of Knowledge & The Discourse on Language*, Pantheon Books, New York, 1972;

[v] Friedman Lawrence M., noted *"Law, legal system and legal process are all mental constructs"*, in *American Law,* Stanford University, 1984, p. xii;

[vi] Jacques Derrida, *Posisitions*, The University of Chicago Press, 1981, p.p. 41-43; Akhyar Yusuf, Lubis, *Dekonstruksi Epistemologi Modern Dari Posmodernisme Teori Kritis Poskolonialisme Hingga Cultural Studies*, Pusataka Indonesia Satu, Jakarta, 2006, p.p. 46, 49, 121;

[vii] It refers to Jurgen Habermas concerning "depth hermeneutic in inter subjective reciprocity communication within a paradigm of emancipatory communication" inside Budi Hardiman, *Kritik Ideologi: Menyingkap Pertautan Pengetahuan dan Kepentingan Bersama Jürgen Habermas,* Penerbit Kanisius, Yogyakarta, Cetakan V, 2013, p.p. 61-62; Josef Blucher, *Contemporary Hermeneutic*, London Routledge,1980, 141-181, inside Zuhri, *Hermeneutika Dalam Pemikiran Habermas*, Jurnal Filsafat dan Pemikiran Islam, Fakultas Ushuluddin IAIN Sunan Kalijaga, Yogyakarta, Vol. 4, no.1 Januari 2004; and Budi Hardiman, *Demokrasi Deliberatif*, Kanisius, Yogyakarta, 2009, p.206; also Paul Budi Kleden - Adrianus Sunarko, Editor, *Dialektika Sekularisasi, Diskusi Habermas - Ratzinger dan Tanggapan,* Penerbit Lamalera & Ledalero, April 2010;

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[viii] **Edward Said**, *Culture and Imperialism*, *Orientalism, Occidentalism*, inside Gauri Viswanathan, 2001, p.p. xx-xxv; **Michel Foucault,** referring “Archeology of knowledge” inside “*Arkeologi Pengetahuan dan Pemikiran Sejarah Michel Foucault*” in Greg Soetomo SJ, doctoral thesys *Bahasa & Kekuasaan Dalam Sejarah Islam Sebuah Riset Historiografi,* 2017, UIN Syarif Hidayatullah Jakarta, published by Obor Jakarta, 2017; Also Foucault, Michel*, The Archeology of Knowledge & The Discourse on Language*, Pantheon Books, New York, 1972; *The Order of Things*: *An Archaeology of The Human Science*, Vintage Books, New York, 1970; *The Birth of The Clinic*: *An Archaeology of Medical Perception*, Routledge, London and New York, 1973;

[ix] *“Law, legal system and legal process are all mental constructs”*, **Lawrence M. Friedman**, *American Law,* Stanford University, 1984, p. xii; “The relationship between history and understanding, for which we remain intrinsically contains the relationship between history and our present situation, including how we understand it.” inside **Gadamer, Hans-Georg**, *Philosophical Hermeneutics,* University of California Press, London, 1976, p.p. 8-9; also Gadamer, Hans-Georg, *Truth and Method*, Sheed and Warp, London, 1975, p. 261; **Martin Heidegger** “we understand something not from an empty consciousness, but precisely because there are certain intentions stored in us regarding in advance what we want to understand. Within us there is a certain prejudice ... it is impossible for a contemporary understanding to be understood without presupposing the past or vice versa.” inside Richard Palmer, *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer*, Evanston, Northwestern University Press, 1969, p.p. 86, 177; **Jacques Derrida** (1930-2004 found out that classically, the "binary opposition" is a "dichotomy between the being - does not exist". Binary opposition is rejected to bring up "a plurality of meanings, grasping and understanding it (verstehen)". There is “an expansion of inter-subjectivity, mutual understanding and communication”. This Derrida's deconstruction of "binary opposition" to seek and create meanings related to the text, context, inter-textuality, interpreters, and language games. All binary oppositions need to be analyzed and criticized in all manifestations of the function of logical and axiological oppositions in all discourses that give meaning and values. Refer inside Akhyar Yusuf, Lubis, *Dekonstruksi Epistemologi Modern Dari Posmodernisme Teori Kritis Poskolonialisme Hingga Cultural Studies*, Pusataka Indonesia Satu, Jakarta, 2006, p.p. 46, 49, 121; **Jacques Derrida**, *Posisitions*, The University of Chicago Press, 1981, p.p. 41-43; For binary opposition deconstruction, "apart from the method of thinking, deduction and induction, but also abduction", inside **Habermas** and **Peirce Charles Sander** (1839-1914) Jurgen Habermas, *Ilmu dan Teknologi sebagai Ideologi,* translated by Hasan, LP3ES, Jakarta, p.p. 59-60; dan *Theory and Practice,* translated by John Viertel, Heineman London, 1971, p. 8; Thomas S. Kuhn, *Structure of Science Revolution*, The University of Chicago Press, Chicago, 1970, p.p. 53-75; A.F. Chalmers, *Metodologi Penelitian (Apa Itu yang Dinamakan Ilmu),* translated by Editor of Hasta Mitra, Jakarta, 1983, p. 98; inside Mohammad Anas, *Rekonstruksi Epistemologis Ilmu Pengetahuan, Analisis Kritis Dialogis Jurgen Habermas dan M. Abid Al-Jabiri,* Penerbit UB Press, Univ Brawijaya Malang, 2018; Reference to Peirce, namely: Charles Sanders Peirce, *Pragmatism as a Principle and Method of Right Thinking,* the 1903, *Harvard Lectures on Pragmatism,* Edited by Patricia Ann Turrisi, State University of New York Press, Albany, New York, 1997; Kenneth Laine Ketner (Editor), *Reasoning and the Logic of Things: the Cambridge Conferences Lectures of 1898*, Harvard University Press, Cambridge, Massachusetts, 1992; *Writings of Charles S. Peirce: a Chronological Edition*, Volume I 1857-1866, Volume II 1867-1871, Volume III 1872-1878, Volume IV 1879-1884, Volume V 1884-1886, Edited by the Peirce Edition Project, Indiana University Press, Bloomington, Indiana, 1993;

[x] Michel Foucoult, *Society Must Be Defended: Lectures at the College de France 1975-1976* (1997); *The Archeology of Knowledge & The Discourse on Language*, Pantheon Books, New York, 1972; also *Power/Knowledge*, Pantheon Books, New York, 1980; Foucault, Michel, inside *The Order of Things*: *An Archaeology of The Human Science*, Vintage Books, New York, 1970; *The Birth of The Clinic*: *An Archaeology of Medical Perception*, Routledge, London and New York, 1973; Knowledge for Foucault is "orderly structure and conditions between methods or ways of knowing with certain objects what is known about the conditions and the transformations in them";

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[xv] Michecl Foucault, technology of the self and governmentality... op.cit.;

[xvi] Habermas, Gadamer, Heidegger, Derrida, op.cit.;

[xvii] Roscoe Pound (1870-1964) in his famous theory *"Law as a tool of social engineering"* such as it refers to *"Social Engineering Theory Of Roscoe Pound Free Essays 1-20", StudyMode.com.* Retrieved 2012-09-05*; Roscoe Pound. ""The Spirit of the Common Law" by Roscoe Pound", Digitalcommons.unl.edu.,* Retrieved 2012-09-05*;* Laski, Harold J. "*The Responsibility of the State in England to Roscoe Pound,*" Harvard Law Review, vol. 32, no. 5, 1919, pp. 447–472. *JSTOR*, www.jstor.org/stable/1327923. Accessed 18 Aug. 2020; *The Need of a Sociological Jurisprudence*, First Published October 1, 1964 Research Article, https://doi.org/10.1177/001112876401000405; inside Crime & Delinquency, Oct 1964, e.g. *The Spirit of the Common Law*; *Inherent and Acquired Difficulties in the Administration of Punitive Justice*; *The Causes of Popular Dissatisfaction with the Administration of Justice;* also Sudarto, Moeljatno, Roeslan Saleh, Muladi and Barda Nawawi, op.cit.;

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[xx] Michael Freeman, *Human Rights,* Polity Press, Cambridge, 2002, p. 54; Muladi, *Hak Asasi Manusia, Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat,* Refika Aditama, Bandung,

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[xxi] Herbert L. Packer, *the Limits of the Criminal Sanction,* Stanford California University Press, 1968, p. 153; King, Michael S., "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice" [2008] MelbULawRw 34; (2008) 32(3) Melbourne University Law Review 1096; http://classic.austlii.edu.au/cgi-bin/download.cgi/au/journals/MelbULawRw/2008/34 (downoad, January 02, 2021), also Michael King, *The Frame of Criminal Justice,* Croom Helm, London, 1981, p. 13; inside Luhut M.P. Pangaribuan, *Lay Judges & Hakim Ad Hoc Suatu Studi Teoritis Mengenai Sistem Peradillan Pidana Indonesia,* disertasi Universitas Indonesia, 2009, p. 45; Muladi, *Hak Asasi Manusia, Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat,* Refika Aditama, Bandung, cetakan ketiga, 2009, p. 99, also Muladi, *Kapita Selekta Sistem Peradilan Pidana,* Badan Penerbit Universitas Diponegoro, Semarang, 1995, p. 3; Romli Atmasasmita, *Sistem Peradilan Pidana Perspektif Eksistensionalisme dan Abolosionalisme,* Bina Cipta, Bandung, 1996; also noted by Syaiful Bakhri, *Sistem Peradilan Pidana Indonesia Dalam Perspektif Pembaruan, Teori, dan Praktik Peradilan,* editor Ibnu Sina Chandranegara, Pustaka Pelajar, Yogyakarta, 2015, p.p. 141-143; *Sistem Peradilan Pidana* 1996 inside Heri Tahir, *Proses Hukum Yang Adil Dalam Sistem Peradilan Pidana Indonesia,* doctoral thesys, Universitas Airlangga, Surabaya, 2002, p.p. 7-8, 17; Mardjono Reksodipuro, *Hak Asasi Manusia Dalam Sistem Peradilan Pidana,* Pusat Pelayanan Keadilan dan Pengabdian Hukum, Lembaga Kriminologi UI, 1994, p. 93;

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[xxv] Andi Hamzah and Surachman has conducted researches and visited many countries in the region of five continents and thence they wrote the notes in a book *"Pre-Trial Justice Discretionary Justice Dalam KUHAP Berbagai Negara"* Sinar Grafika, Jakarta, 2015, supported by thereat time Head of RI State Attorney, Basrief Arief;

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[xxvii] Perkap No. 12 Thn 2009 Pengawasan dan Pengendalian Penanganan Perkara Pidana di Lingkungan Kepolisian RI, diundangkan 13 November 2009 Berita Negara RI Tahun 2009 Nomor 429; Perkap No. 14 Thn 2012 Manajemen Penyidikan Tindak Pidana; Perkap No. 6 Thn 2019 Penyidikan Tindak Pidana, diundangkan tanggal 4 Oktober 2019, Berita Negara RI Tahun 2019 Nomor 1134; juga dapat disebut Surat Edaran Kapolri, SE/2/11/2021 tentang Kesadaran Budaya Beretika untuk Mewujudkan Ruang Digital Indonesia yang Bersih, Sehat, dan Produktif;

[xxviii] Peraturan Jaksa Agung (Perja) RI Nomor 15 Tahun 2020 tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif, diundangkan 22 Juli 2020, Berita Negara Tahun 2020 Nomor 811;

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[xxx] Indonesia Imprisonment Database System as it is called "Sistem Database Pemasyarakatan" on Desember 2014, appears the numbers of imprisonment in Indonesia has reached more than 163.000 persons since the occupancy available preserved only for 116.000 persons. Data on November 18, 2018 showed that 252.397 persons occupied the available facilty for only 125.867 persons. Overcrowding ratio of the imprisonment reaches 198% making systemic consequences for security related matters and for daily meal for a very simple menue about 15.000 rupiahs per day reaching the amount of 1.3 trillion in rupiahs yearly of the state budgets. Ref., Yasonna H. Laoly, the recent RI Minister of Law and Human Rights, inside *Pengantar* (Introduction) to the book "*Pemasyarakatan dan Legacy"* Dirjen Pemasyarakatan Kementerian Hukum dan HAM RI, cet.1., April 2019, also p.p. 12-15;

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[xxxii] M. Cherif Bassiouni, *Substantive Criminal Law*, Thomas Publicher, Illinois, 1978, p. 86;

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