

The Criminal Act on Religion in Indonesia with Syari'Ah Perspective

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Abstract

The Seminar of National Law I of 1963 had been fundamental of issuing the Statute Number 5 of 1965 on the Prevention of Religion Misuse and/or Stigmatization (then called the Statute of PNPS). The Indonesian nation to have the Criminal code truly reflected the soul of Pancasila still continues. Therefore, it needs various comprehension discussions, such as by discovering the values of Islamic Law, for a long time became one of material sources in formulation of National Law. The purpose of applying the Islamic Law (*maqshid asy-Syari'ah*) also insists that protecting religion (*hifdhuddin*) becomes the main purpose. The right to believe in a religion and to give opinion allowed by the statute are *non derogable*, however, there are limitations allowed by the statute (*permissible restriction*), because certain reasons such as "protection of human right and other freedom". To bring about the First Principle and Act 29 of the Fundamental Constitution of 1945 of Republic Indonesia, it needs Penal Effort to protect religion from misuse.

Keywords: *Syari'ah*, criminal act on religion

1. Introduction

Sudikno Mertokusumo states that the law has function as protection of human interest, and it relates to the legal main purpose to create orderliness and balances in society, in order the society interest protected (Mertokusumo, 1995). Philipus M. Hadjon gives definition on the legal protection for the people referring to "rechtsbescherming van de burger tegen de overheid or "legal protection of the individual in relation to act of administrative authorities" (Hadjon, 2007). Moreover, Hadjon gives addition that legal protection for the people covers preventive and repressive legal protections (Hadjon, 2007). The preventive legal protection is purposed in order to there is no conflict of religion stigmatization, violence in the name of religion, destroying pray places or others. Whereas, the repressive one purposes to resolve conflict already happened.

The freedom of religion in legal country of Pancasila is always in positive connotation meaning that there is no place for *atheism* or propagates against the religion in Indonesia (Azahary, 2001). The statement that "The country bases on the Only God Principle" (Act 29 verse (1) of the Fundamental Constitution of the Republic Indonesia of 1945) give consequence that Indonesia does not sterile at all the role of religions in conducting the country, however, Indonesia does not focus on one religion either. Therefore, the statement that Pancasila country "is not a state of religion" and "a secular country either" becomes guidance to find the legal purpose in line with social and cultural values as the Indonesian soul reflection.

The effort to reform the National Criminal Law related to Criminal Act on Religion requires comparative, critical and constructive contribution of discussion. In addition, it appeared in the Criminal Code/WvS taken from the colonial era following "Civil Law System" or "The Romano-Germanic Family" orienting on *individualism/liberalism* values. Thus, it is necessary to put the reform of National Criminal Law in line with the Indonesian Characteristics that is *monodualistik pluralistic*. The source of the National Criminal Law hopefully orientates from legal values living in the society, rooting from the values of the Custom and Islamic Laws (the *traditional and religious law family*) (Arief, 2003).

Abu Ishaq Al-Syathiby states the purpose applying Islamic Law (the theory of *maqashid al-syar'i*) covers to keep the religion (*hifdz al-diin*), spirit (*hifdz al-nafs*), thought (*hifdz al-'aql*), heredity (*hifdz al-nasl*) and wealth (*hifdz al-mal*) (Bakri, 1996). In line with the purpose of Islamic Criminal Law, it is necessary to struggle the legality of the Law on the Criminal Act on the Religion and Religious Life. The reason of keeping the religion becomes main purpose of Islamic Law implementation. Thus, it is quite relevant if in the future Framework of the Criminal Code adopt the values in the Islamic Law

The Seminar of National Law I in 1963 had been the background of the Statute Number 5 of 1965 on the Prevention of Religion Misuse and/or stigmatization (then called the Statute of PNPS). In Act 4 of the Law PNPS, it formulates additional act of the Criminal Code, or Act 156a stating:

"In the Criminal Code, a new additional act included as follow:

"Act 156a"

Being punished for maximum 5 years, anyone in purpose in front of public states his feeling or conducts deed:

- a. The content is hatred, misused, or stigmatized the religion believed in Indonesia;

- b. With the purpose that people does not believe any religion at all, in line with the First Principle of the Only God.

Thus, the Act 156a of the Criminal Code arranges more specifically related to criminal deed toward the religion. However, after five years implementation of this Act, more cases happen. The penal or non-penal policy related to the religion stigmatization appear more frequent as the reaction of vague of norms stated in the Act 156a of the Criminal Code. It results from many factors influencing the religious life in Indonesia. The destruction of praying house is considered the same as destruction of other ordinary buildings.

The threat of maximum five years in prison does not give wary effect on the society. It can be seen in the increasing numbers of stigmatization and misuse of religion recently. The religious symbols have been too many to be stigmatized, as if; the high value was no longer needed for life religiously. It also results from vague of norms including in the Act 156a of the Criminal Code that does not clearly explain the religion object. Thus, it necessary needs various discussions comprehensively, one of them by exploring the values of Islamic Law, that for long time they have become one of the material sources in formulating the National Law. As stating in the *Al-An'am* Verse 108 and in *Al-Hajj* verse 40, they concretely state the creator/God and house of praying as the religious elements.

2. Research Method

This study on the Criminal Action on Religion and Religious Life uses *normative* legal study (Soekanto, 1986). This research method hopefully is able to understand and discuss the norm and bases that they can be synchronized through comparison method between the National Criminal Law and Islamic Criminal Law on the Criminal Act on Religion in line with the renewal of the National Criminal Law.

The study uses Historical Approach to search the history as the background of applying the Act 156a of the Criminal Code and its philosophical bases (Marzuki, 2013). The time includes from the appearance of the Statute No. 1/PNPS/ 1965 on the Prevention of Religion Misuse and/or Stigmatization to the decision of the Constitution Committee Number 140/PUU-VII/2009 on 19 April 2010 on the Statute No. 1/PNPS/ 1965. Moreover, the research also uses Statute Approaches, or collects and analyzes the regulations in line with criminal actions toward religion in Indonesia.

The concept of *Syari'ah*, being discussed in conceptual approach (Soekanto, 1996) and begin with the principles of the purpose as implementation bases of *Syari'ah*, refers to human being and universal welfare by placing the protection of religion (*hifdzuddin*) as its base of *Syari'ah* implementation. This concept is relevant to apply in Indonesia where religion becomes source of material legal. As stated in the theory of Kohler and Kahl, the religion refers to legal interest that must be protected, or *Religionschuts-theory*.

3. Result and Discussion

The Country of Law means country based on law guarantying its people by teaching them sense of morality to anyone in order to be a good citizen. Aristotle gave lesson that those who rule a country are not a human, but the country is controlled by justice idea/opinion, whereas the authority is only the actor of law and balance (kusnardi, Ibrahim, 1988). Thus, the country of law ideally refers to legal country that gives priority on Human Right, especially the right of having a belief.

The formula of Criminal Act on Religion is one of struggle results of those who try to reform the Indonesian criminal law. A long journey of Indonesia becoming freedom country has given special experience to find the truth of national identity. The national identity covering in Pancasila is national consensus that cannot be changed anymore. Pancasila becomes the philosophy of Indonesia based on the Principle of the Only God, thus the implementation of the next Principles should hold the first one.

What ironic that a country with philosophy of Pancasila and put the Principle of the Only God in the First Principle, till now still use the Criminal Code of Dutch heritage orienting to values of *individualism/liberalism* and not give priority to the religious values. Thus, in 1964, Indonesia began to start and self introspect through the reformation effort of the Criminal Code. In that time, this effort hopefully represents the truth of Indonesian society culture.

The reformation of criminal law (*Penal Reform*) means as an effort to change the positive legal pattern considered inappropriate to social changing and people aspiration using new legal pattern that being achieved, in line with the social needs and demand of world development. Nevertheless, the Criminal Code of a country refers to expression of culture for the country. The reformation of the legal pattern becomes basic and rational change or reformation.

In line with the definition of the reform, Penal Reform refers to an effort to change the Positive Penal pattern (*Ius Constitutum*) with future legal pattern (*Ius Constituendum*). In the end, the penal reform must be performed factually through Penal Policy.

The policy of effort of criminal resolution in fact is part of integral of Social defense and the effort to obtain the social welfare. Therefore, the final goal of the criminal policy refers to social protection to achieve the

social welfare. In other words, the criminal policy becomes integral part of social policy, meaning policy or effort to achieve social welfare (Arief, 2013).

The understanding of penal reform close related to the background and urgency of conducting penal reform itself, that an effort to do reorientation and reform on criminal law based on central social-politic, social-philosophy and social-cultural values of Indonesian society as the base of social, criminal and legal implementation policies in Indonesia. Thus, the penal reform should be conducted using policy-oriented approach and value-oriented approach (Arief, 2013).

The policy-oriented approach is reviewed from three parts: **First**, as part of **social Policy**, meaning that penal policy is part of efforts to solve social problems. Related to criminal action toward religion and religious life, the religious expression cannot be separated from the individual social life as religious members. Thus, harmony among the religious members becomes part of social policy.

Second, as part of **criminal policy**, the penal reform means part of the effort to protect society. In this case, the effort of protection toward the members of religion covers in expressing their belief that each religious member feels safe and peaceful without any obstacles in the forms of crimes threaten when they do their belief.

Third, as part of **legal implementation policy**, that penal reform refers to an effort to reform legal substance in order to effectivate the legal implementation. Based on this discussion, the third part is the most important one because the legal implementation refers to reform process and also legalization of criminal conduct toward religion and life of having religion.

The penal reform beside implements the policy-oriented approach, it also implements **value-oriented approach**. This approach covers effort to review and examine the values of **social-politic, socio-philosophy, and socio-culture** as fundamentals of normative and substantive contents being achieved (*ius constituendum*).

The value oriented in discussion of criminal conduct toward religion and religious life refers to the most essential approach because this approach close related to the Indonesian Principle or Pancasila as the fundamental of legal substance being obtained (*ius constituendum*). In other words, Pancasila is based on the spirit of the Only God Principle as stated in the First Principle, therefore, the base used in the Criminal Code Plan must base on *religionsschutz-theory*.

Penal policy means as a rational effort to resolve crime using penal instrument. The definition of penal policy can be reviewed from legal political opinion that has two meaning; *first*, the effort to implement regulations that in line with condition and situation in certain time (Soedarto, 1981). *Second*, the country policy through authority board to decide regulations purposed and predicted able to express what the content in the society and to achieve what goals in the future (Soedarto, 1981).

Based on the legal political opinion, implementation of penal policy means to conduct election to achieve the best result of penal statute meaning that fulfill the requirements of justice and usage (Soedarto, 1981). Moreover, implementation of penal policy means the effort to achieve penal regulation that appropriate to condition and situation in certain time and to the future (Soedarto, 1983).

The discussion of the reform certainly touches the criminal field, especially in constructing the future Criminal Code. The criminal action on Religion and Religious Life become one of the criminal processes. Because many previous norms not arranged in the Criminal Code, the future Criminal Code Arrangement will content more acts arranging certain actions related to religion and religious life considered as forbidden action and liable for punishment.

In the value perspective, criminalization refers to value changing that result in number of actions previously considered not deformed and not liable for punishment, change into actions considered deformed and liable for punishment (Soewondo, 1982). Therefore, the correctness base to state an action as criminal action according to Van Bammelen, in *Criminologie*, Leerboek der Misdaakunde, is taken from opinion that in general considered as “destructive or immoral” (Saleh, 1982).

Meyer states that crime refers to action against the *culture-normen* (Utrecht, 1986). It also happen to the formula of Criminal Action toward Religion and Religious Life considered as the result of criminalization effort previously not belong to criminal action but change into criminal one. It needs long social process, that finally through legal process, an action considered against the norm. The Indonesian culture firmly keeping the religious lesson becomes the core of penal formula on Religion and Religious Life.

Pela gandong becomes the cultural heritage from the past in Maluku in facing religious sentiments. A Christian village had blood vow in Islamic village that they are brothers. If the Christian village was attacked by enemy meant the enemy also attacked the Moslem village, thus the two villages would fight together against the enemy. However, this culture does not keep well that it finally disappears together with disturbance in many areas.

The Criminal Code hopefully reflecting the culture and principle of Pancasila orienting on religious values (*religious law family*), in fact, runs with orientation on *individualism/liberalism*. It shows something backward. Thus, with various effort together, the appearance of new Criminal Code should be able to integrate the humanism, cultural and religious values, that it achieves a rational policy (*policy-oriented approach*) (Arief,

2013).

3.1. The Fundamental Theory of Religious Offense

- 1) *Friedensschutz-theory*, viewing public orderliness as legal interest that must be protected.
- 2) *Gefullsschutz-theory*, stated by Binding, viewing that country willing to protect the sense of religion.
- 3) *Religionschutz-theory*, stated by Kohler and Kahl, viewing religion as the legal interest that must be protected by the country (Adji, 1981).

The Legal protection toward religion in Indonesia, as stated in the Criminal Code Act 156a declares: “Being condemned by maximum five years sentence in prison, anyone who in purpose in front of public states his feeling or conduct action that:

- a. Content sense of hatred, misuse, or stigmatization toward religions believed in Indonesia;
- b. In intention to make people not to choose any religion, based on the Principle of the Only God.”

This Act is part of Chapter Public Orneriness. Thus, the protection on religion is in line with protecting orderliness in general known as *Friedenschutz-Theory*. It does not belong to the Chapter of Stigmatization that will protect the members of those who believe in religion in order to protect the feeling of having religion (*Gefullsschutz-Theory*).

Friedensschutz-theory refers to offense principle/criminal action toward religion viewing the public orderliness as legal interest that must be protected. Thus, Acts including 156,156a, 178 to 181 and 503 of the Criminal Code being implementing cannot show the offense/criminal action toward religion in whole and true way, but they only show criminal action related to religion. The result is the formula cannot be found specifically in any chapters arranging on criminal action toward religion.

This criminal action toward Religion and Religious Life in Islamic become essential criminal action for—as stated in theory of *maqashid al-syar’i*—keeping the religious existence refers to the first goal of creating a law in Islamic. Moreover, all criminal conduct in Islamic Penal Law is related to the religion. It has been stated by Barda Nawawi Arief, who classifies religion offense into three parts: criminal action **toward** religion, criminal action **related to** religion and criminal action **according to** religion (Adji, 1981). The agreement between formula of Criminal Action toward Religion and religious Life in the Criminal Code Plan with values including in the Qur’an supported by relevant theory of *maqashid al-syar’i* and theory of *religionsschutz*, thus, it relevant to the Pancasila principle.

3.2. The Criminal Action toward Religion in the Islamic Law

According to Abu Ishaq Al-Syathiby, the purpose of implementing the Islamic Law (*theory maqashid al-syar’i*) includes to keep religion (*hifdz al-diin*), Spirit (*hifdz al-nafs*), thought (*hifdz al-’aql*), heredity (*hifdz al-nasl*) and wealth (*hifdz al-mal*) (Al-Syatiby, Bakri, 1996). In line with the Islamic Penal Law, the Criminal Act toward religion and Religious Life becomes significance to struggle for its legality. Because keeping religion is the number one of implementing Islamic Legal. Thus, it is significantly relevant if the Plan of the Criminal Code adopts the values of Islamic Law.

Specifically, the verse 108 of the *Al-An’am* arranges on the Criminal Act toward Religion that stating forbidden to humiliate the gods:

“*And don’t humiliate the gods that they pray for others than Allah because they will in return humiliate Allah more out of limitation without any knowledge. Thus, we create each people think of good on their job. Then, to their God they will return, then He lets them know their condition about what they did in the past.*”

In the Qur’an of *Al-Hajj* Verse 40, it state on warning not to destroy house of praying

“(That) those who had been chased away from their hometown without any correct reason except that they stated: “Our only God is Allah”. If it is not because Allah has refused (the cruelty of) human being, some of people and others, it must have been destroyed the Christian monasteries, churches, sinagog-sinagog (the house of praying for Jews) and mosques, where the Name of Allah have been called many times. Truly, Allah absolutely helps those who help Him (religion). Allah is truly the Powerful and Mighty One”.

The Penal reform refers to effort to change the arrangement of Positive Penal (*Ius Constitutum*) using the penal law being desired (*Ius Constituendum*). In the end, the penal reform must in fact appear in penal policy. The criminal act toward Religion and religious life in the Criminal Code plan becomes one of results in criminalization process facing three processes of implementation, namely Philosophical, Sociological, and Judicial processes.

The relevance of implementation **philosophically** shows that Indonesia has together achieved Pancasila as national and country philosophy implementing the First Principle of the Only God as the First and the Main Principle. Thus, **juridical**, all statutes must be based Pancasila. As stated in Act 29 of the Fundamental Constitution 1945, the country is based on the Principle of the Only God, followed by the second verse giving freedom for any members of religion to pray in line with their own religion.

The relevance in **sociological** has shown that Indonesia has known and implemented its own religious

legal, as stated in theory of legal authority from H.A.R. Gibb and the opinion of Van Den Berg stating that Indonesian people when believe in their own religion, they do the religious lesson in line with the religion that believe. The framework of the Indonesian Islamic people absolutely has fundamental in behavior, the same as the theory of Legal Authority Acceptance that all the *Imam Madzhab* in Islamic Law stated that those who have declared himself as Muslim by saying two *syahadat* sentences, he is tied to obedient and dutiful toward Islamic Law and Lesson. This theory has been stated by Gibb in his book *The Modern Trends in Islam* (Gibb, 1947).

The theory of *maqashid al-syar'ī* lied *hifdz al-dīn* (save the religion) as the first goal of implementing the Islamic Penal Law that have relevance to the theory of *religionsschutz* that followed by the formula of the Criminal Code. The absorption from the two theories results in criminalization toward criminal act on the religion and religious life. The legalization in the form of Criminal Code becomes support (*maqashid al-hajiyat*/secondary goal –*penal policy*–) for being protected the religion and implemented the religious life (*maqashid al-dlaruriyat*/ primary goal). Therefore, the tolerant behavior among the religion members (*maqashid al-tahsiniyat*/tertiary goal) is quite needed in order to be protected the religion and the religious life through secondary instrument or formulation of the Criminal Code.

Today, the Criminal Code in Indonesia is facing process to the National Penal Law that truly gives aspiration from the inner soul of the Indonesian (*volkgeist*). In line with the Islamic Penal Law, as stated by *syari'at*, various values having positive benefit for the life of Indonesia. Thus, in line with the regulation in the *Al-An'am* verse 108 forbidding of humiliating others' gods, the Indonesia may apply the values of Islamic penal Law with still in the framework of *Bhinneka Tunggal Ika*. At least, the *spirit* including in the verse has changed the religious offense/criminal act *friedensschutz-theory* into *religionsschutz-theory*.

The development of criminal act toward religion and religious life in Indonesia, in the following, becomes joyful development for religious members in Indonesia for it has created the Criminal Code Plan of 2015 systematically in the Book II in the Chapter VII on the Criminal Act on Religion and religious Life.

This criminal act becomes certain chapter in the Plan of Criminal Code since the first concept of the Book II in 1977 known as concept of BAS (the concept that constructed by Tim Basaroesdin), as intended in Acts 181 s/d 196 Chapter VI. To the time of the Concept development from 1993-1998, it was included in Chapter VI (becoming Acts 257-264). In the concept of 2000-2002, it was included in Chapter VII of Book II, stated in Acts 290-297; the concept of 2004 was written in Acts 336-343; the concept 2005 in Acts 342-345; the concept 2006/2012 was written in Acts 341-348. To the Formula of the Criminal Code 2015, the concept lied in Acts 348-353 (Arief, 2013). The following are acts of criminal act toward religion and religious life as stated in Formula of 2015;

CHAPTER VII THE CRIMINAL ACT TOWARD RELIGION AND RELIGIOUS LIFE

Part One

The criminal act toward religion

Act 348

Anyone in front of public conducts humiliation toward religion in Indonesia, that for him being punished for maximum 2 (two) years in prison or fine maximum as stated in Category III.

Act 349

- (1) Anyone who informs, shows, or stuck text or picture that shown in front of public, or play a recording and heard publicly containing criminal act as intended in Act 348, in the purpose that the content of text, picture, or recording known or unknown by the public, for him five years sentence in prison or fine as stated in Category IV.
- (2) If the doer of criminal act as stated in verse (1) does the action to do his profession and that time not more than 2 years since the implementation of the penal decision having its legal support because he had conducted the same criminal act that he can be punished additional punishment such as revoke right as stated in Act 93 verse (1) alphabet g.

Act 350

Anyone in front of public provokes in any forms in purpose to eliminate belief of official religion in Indonesia, for him punishment maximum 4 (four) years or fine maximum as stated in Category IV.

Part Two

The Criminal Act toward Religious Life and Praying Facility

Act 351

- (1) Anyone disturbing, blocking, or by illegally dismiss using violence or violated threat toward people having pray, religious ceremony, or religious meeting, for him in prison sentence maximum 3 (three) years or fine maximum as stated in Category IV.
- (2) Anyone resulting in noise near the building where people conduct prays and the praying is on the process, for him punishment using fine maximum as stated in Category II.

Act 352

Anyone in front of public conducts humiliation toward someone who conducting pray or conducting conduct humiliation toward religious officer who doing his duty, for him punishment in prison sentences or fine maximum as stated in Category III.

Act 353

Anyone conducting stigmatization or illegally destroy or burn buildings of praying took place, for him punishment maximum fine as stated in Category IV.

4. Conclusion

The Islamic Criminal law becomes a point that must be explored in purpose to do the national Penal Reform. In line with the criminal act toward Religion and religious life, *Al-Qur'an* explains as stated in *Al-Ma'idah* verse 33 stating on criminal act or *hirabah*. This criminal act generally may be interpreted, that those who fight against Allah and His Prophet in the meaning of not direct fight against, but meaning *majazi*. The meaning of fight against Allah and His Prophet are fight against *syari'at* stated by Allah.

The *Al-An'am* verse 108 refers to special verse giving regulation borders (*syari'at*) in how various people may resolve pluralistic life as the life of Moslem in Indonesia. This verse becomes a basic of the duty to close the road toward dangerous matter (*sadd al-dzari'ah*) and also explain limitation for any Moslem to humiliate others' gods, causing anxiety will get response greater, meaning others religion in return humiliate Allah SWT.

The value contribution in Islamic considered also interesting is included in *Al-Qur'an* of the *Al-Hajj* verse 40. This verse shows that Allah protect the houses of pray for all religion, such as Christian monasteries, churches, sinagog-sinagog (the house of praying for Jews). This verse is needed to be socialized specially in line with past events in Indonesia. The house of praying becomes the only target of first symbol for the action of crime toward religion. Thus, by socializing the values included in this verse hopefully, it can change and legitimate the Formula of the future Criminal Code.

Different from the Criminal Code Formula, it will appear specially that focus on criminal act toward religion and religious life, because of following certain base *religionsschutz-theory*, viewing as the legal interest that must be protected. Viewed from its systematic, the formula of Criminal Code examines that religion and religious life are a public interest being urgent to protected, or Book II of Chapter VII after the chapter discussing on crime act toward justice implementation.

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