

Interpreting The Expansion of The Principles of Legality in The New Criminal Code and Its implications for Legal Certainty in The Progressive Legal Perspective

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ABSTRACT: In the Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, the principle of legality is formulated differently from the basic idea of the colonial one. The Indonesian criminal law system adheres to the principle of legality with a prohibition on the use of analogical legal interpretation. The question is, what about our new Criminal Code? In this study, the type of legal research used was a sociological juridical approach. Primary data was obtained from data sources in the field. Secondary data was obtained from primary legal material of Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code and related laws and regulations, as well as from books and other legal research journals. Reforming criminal law with a balance between formal legality and material legality is expected to create a criminal system that considers justice and legal benefits in addition to legal certainty. Based on the findings, this can be concluded. The concept of balance as the basic idea of reforming criminal law in Indonesia is in accordance with the ideals of law and the character of the Indonesian who places a balance between individual interests and social interests, the state law and living law in society, as well as formal legality and material legality, so that the values shared by the Indonesian people as mandated by Pancasila can be implemented in a just law enforcement.

Keywords: Criminal code, Principles of Legality, Legal Certainty

1. INTRODUCTION

As Gustav Radbruch conceptualized, law encompasses three fundamental domains of value and serves as the gateway through which the enforcement of the law flows. The validity of the three basic values is called *Triadism*, namely: a. Philosophical applicability: the value of justice (justice); b. Juridical applicability: the value of certainty; c. Sociological applicability: the value of expediency (kindness, wisdom, utility, and others). The problem is: Has our law fulfilled the values of justice, certainty and expediency, especially with regards to social welfare, which Brian Tamanaha refers to as “the thick rule of law”? When these three basic legal values are not upheld, it becomes apparent that there is biased law enforcement (non-equality before the law), indicating that an unjust law is not considered a true law-- *lex injusta non est lex*, “rushed / convoluted”, inequality, misery, poverty, lack of freedom, oppression, persecution, and also authoritarian attitudes, etc. The absence of these three basic values can lead to a depletion of social capital, causing “trust” to turn into “distrust”, ultimately resulting in disobedience.

In addition to distrust, civil disobedience can also result from authoritarianism, the use and prioritization of the power approach in administering law and government. And finally, this authoritarianism can lead to *the death of democracies*. In their book, entitled “*How Democracies Die*”, Levitsky dan Ziblatt state that “*Donald Trump’s presidency has raised a question that many of us never thought we’d be asking: Is our democracy in danger? Harvard professors Steven Levitsky and Daniel Ziblatt have spent more than twenty years studying the breakdown of democracies in Europe and Latin America, and they believe the answer is “yes.”*” *Authoritarianism is the one factor that cause how democracies die?*”

One approach to averting authoritarianism, which can undermine democracy, is through the enforcement of laws that take into account contextual factors in addition to being text-oriented and reflective of the essence of the rule of law. This should be observed at the level of formulating legal processes and implementing legal principles, particularly the principle of legality. In other words, the formulation and implementation of the principle

of legality must be progressive. The question is, what about our new Criminal Code? The Criminal Code Bill was officially ratified as Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code --- hereinafter referred to as the New Criminal Code --- on December 6th, 2022 through a plenary meeting discussing decision making on the Criminal Code Bill. The ratification of the Criminal Code Bill into Law is a historic moment for the Indonesian nation, especially in the field of Criminal Law. We are all aware that the Dutch colonial Criminal Code has been enforced in effect in Indonesia for 104 years. Therefore, it can be argued that this colonial artifact is no longer applicable to be enforced in present-day Indonesia. In fact, since 1963, Indonesians have formulated criminal law reforms based on values that originate and thrive in Indonesian society (living law).

However, despite having been formulated a long time ago, in fact, after the ratification of the Criminal Code Bill into the new Criminal Code, it does not eliminate the pros and cons regarding the substance of the articles in the new Criminal Code. One of the content materials that is in the public spotlight is the formulation of the law that lives in society as a principle of the appropriateness of criminalizing a person. Andi Hamzah is one of the legal experts who disagree with the presence of the article regarding living law in society. In Andi Hamzah's view, the provisions of Article 2 of the new Criminal Code concerning laws that live in society are contradictory to the principle of legality in Article 1 paragraph 2 of the Criminal Code concerning the prohibition of using analogies.

In the Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code, the principle of legality is formulated differently from the basic idea of the principle of legality in the colonial Criminal Code. The formulation of the principle of legality in criminal law renewal is set forth in Article 1 and Article 2 of the new Criminal Code. Article 1 of the Criminal Code states "(1) no action shall be subject to criminal sanctions and/or measures, except as provided by current laws and regulations at the time the action is committed; (2) analogies shall not be applied prohibited in determining the existence of a criminal action. Whereas Article 2 of the Criminal Code states "(1) the provisions referred to in Article 1 paragraph (1) do not invalidate the law, which prevails in the society, that mandates punishment for an act not regulated in this Law; (2) The law that lives in the community as referred to in paragraph (1) applies in the locality where it is valid, as long as it is not regulated by this Law and complies with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights and general legal principles recognized by the community of nations".

If the formulation of the principle of legality in the New Criminal Code is considered, it can be interpreted that the criminal law system in Indonesia adheres to the principle of legality with a prohibition on the use of analogical legal interpretation. However, , the implementation of the law may be subject to overriding by societal living law that aligns Pancasila, the 1945 Constitution of the Unitary State of the Republic of Indonesia, human rights, and general legal principles recognized by the nation community. With such formulation, Indonesian criminal law recognizes two principles of legality, namely the formal legality principle as formulated in Article 1 of the Criminal Code and the material legality principle formulated in Article 2 of the Criminal Code. The dualism implications of the principle of legality (progressive legality principle) pose a challenge to the legal certainty in law enforcement in Indonesia.

2. RESEARCH METHODS

The type of legal research used was a sociological juridical approach. The Sociological Juridical Approach is an approach that emphasizes research with the aim to obtain legal knowledge empirically through direct observation to the object. Sociological Juridical Research is legal research using secondary data as initial data. This is typically followed up with primary data collection performed in the field or in the public settings, aimed at examining the effectiveness of a given statutory regulation with respect to identifying correlation among various symptoms or variables. Data collection for this type of research typically consists of a combination of document or library material study and interviews conducted using questionnaire. Primary data as data directly obtained from data sources in the field (field research). Secondary data, specifically from primary legal resource, Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code and related laws and regulations. In addition to secondary legal materials, tertiary legal materials were obtained from books and other legal research

journals. Furthermore, from the data obtained, this research utilized processed and interpreted data as legal material to address the research questions.

3. DISCUSSION

3.1. The Principle of Legality of the New Criminal Code in the Perspective of Progressive Law

What exactly is progressive law? Progressive law is suitable for accommodating all legal studies, especially legal and community studies. The suitability of this study can be seen from its scientific nature, which includes aspects of ontology, epistemology, methodology and axiology as detailed below:

- a. Ontology: Law encompasses not only rules and logic but also behavior, including that which may be concealed.
- b. Epistemology: The search for truth by placing law as an object of critical study.
- c. Methodology: legal pluralism approach; mixed method; socio-legal approach.
- d. Axiology: Substantive justice; truth and honesty, the perfect justice.

Therefore, it can be said that progressive law, which extends beyond the text, is an ongoing development that cannot be deemed absolute, final, or finite. Beyond legal positivism, creativity, *mele* (liquid, like an amoeba). One additional point to highlight is the spirit of progressive law, namely the spirit of liberation (conventional type, method and culture). Additionally, the legal process is distinguished by its prioritization of substantive justice, with a focus on mission-oriented rather than procedural outcomes.

Therefore, based on the character of progressive law as described above, progressive law aligns with the Indonesian people's approach to justice, which seeks truth and justice, as mandated by the ideology of Pancasila and the 1945 Constitution of the Republic of Indonesia. This is in line with the objective nature of progressive law.. The moral of our constitution upholds "fair and civilized humanity", which must permeate all fields and professions in this country, particularly in the justice system, including law enforcement. Our constitution mandates that the judiciary in Indonesia prioritize idealism by assisting those in need, including the poor, marginalized rather operating as a profit-driven entity.

In essence, only progressive universities with law schools that are aware of the limitations of law being viewed solely as statutory regulation can produce police officers, prosecutors, judges, and advocates with progressive characters. Therefore, it is crucial to initiate changes in the Law School curriculum and shift the mindset of legal educators towards a progressive education curriculum that no longer adheres to conventional-legal positivism. Legal Higher Education in Indonesia should consider implementing a course to promote progressive law. Finally, it is noteworthy that progressive legal ideas have greatly influenced legal education, lawmaking, and legal enforcement.

Progressive law enforcement must be accompanied by a special character in law enforcement, namely rule breaking. There are 3 rule breaking characters, namely:

- a. The utilization of spiritual quotes (in a creative form) to circumvent legal regulations leads to unjust outcomes. In his inauguration, Suteki introduced a policy with the nomenclature "policy of non-enforcement of law", which entails refraining from enforcing the law in the interest of substantive justice.
- b. Deeper interpretation of the law, the law should not be interpreted superficially but rather should be interpreted deeply, taking into account its social and philosophical context in order to uncover its deepest socio-ideological meaning for uses as a guiding principle of the law in law enforcement.
- c. Law enforcement must not only be based on logic, but must also be based on feelings, namely a sense of concern for and involvement with vulnerable, marginalized, weak people, and oppressed people. This can be summarized with the term compassion. So implementing the law is not enough to rely on rules and logic but also behavior, even the underlying motives driving that behavior

Based on these three rule breaking characters, law enforcement in Indonesia is expected not to be trapped in legal positivism, but instead will prioritize respect for legal values and a sense of justice within society (vide Article 5 paragraph 1 The Law of Indonesian Republic No. 48 of 2009 concerning Judicial Power)

Law enforcement is frequently constrained by the enchanting allure of legal positivism, which heavily emphasizes strict adherence to rules and logical reasoning. This is due to our orientation towards Continental European law, which has a civil law system characteristic. Is it accurate to say that there is a distinct approach to legal culture in Indonesia with the adoption of Pancasila as a means of law enforcement? Has there been a shift in the paradigms of law enforcement, moving away from prioritizing legal certainty based on rule and logic, to solely legal certainty? We can see that the 1945 Constitution of the Republic of Indonesia as well as the Law on Judicial Powers and also our new Criminal Code prioritize the value of justice in addition to the value of certainty (rule and logic). This is a progressive step. The question is: Is it enough to only be at the level of ideas and write down a law on paper? The author believes that this should not only be at the level of ideas, but should be implemented at the level of practice. Therefore, it is necessary to change the legal culture, both the Internal Legal Culture (APH) and the External Legal Culture (society).

Gustav Radbruch with Triadism (justice, certainty and expediency (utility)) also said: "where statutory law is incompatible with justice requirements, statutory law must be disregarded by a judge...". Therefore, the law should prioritize the search for truth and justice, not merely pursuing legal certainty which can actually present injustice. An unjust law is not a law, as stated by Thomas Aquinas: "*lex injusta non est lex*".

The new Criminal Code can be said to carry progressive criminal law reform, especially in the expansion of the principle of legality. In Article 1 of the Criminal Code, the principle of legality is formulated as follows:

- (1). "No action shall be subject to criminal sanctions and/or action, except for the power of criminal regulations in existing laws and regulations before the act is committed."
- (2). "Analogies shall not be applied in determining the existence of a criminal action."

The progressiveness of the new Criminal Code is shown by the formulation of Article 2 of the Criminal Code which states:: The progressivity of the new Criminal Code is shown by the formulation of Article 2 of the Criminal Code which reads:

- (1). "The provisions referred to in Article 1 paragraph (1) shall not prejudice the validity of the law living in society which determines that a person should be punished even though the act is not regulated in this Law;
- (2). The law that lives in the society as referred to in paragraph (1) applies where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Unitary State of the Republic of Indonesia, human rights, and general legal principles that are recognized by the community of nations."

With such formulation, Indonesian criminal law recognizes 2 (two) principles of legality, namely the principle of formal legality as formulated in Article 1 of the Criminal Code and the principle of material legality as formulated in Article 2 of the Criminal Code. The formulation of the principle of legality has been substantially broadened by emphasizing that the provisions of Article 1 of the Criminal Code do not limit the applicability of "the law that lives in society". Thus, the Criminal Code acknowledges the existence of unwritten sources of law that prevalent in society, in addition to written source, as a basis for determining the criminality of an act.

Progressive law is essentially not a law that opposes a law formulation but always asks "what can be done with this law to bring justice to the people". Recognition of the principle of material legality in criminal law reform in Indonesia tries to answer this question. Similar to progressive law which does not rule out the presence of positive law, recognition of the principle of material legality also does not deny the existence of formal legality but realizes that the principle of formal legality that has been in effect is not an absolute and inviolable principle.

3.2. The Impact of Implementing the Principle of Formal Legality on Law Enforcement

Law and politics (power) are like two different sides of a coin, many even believe that in a secular system of democracy, law is a product of politics. Legal and political relations are effectively described by Philips Nonet and Philip Selznick, who categorize legal typologies into 3 types, namely repressive, autonomous and responsive. The legal typology in an authoritarian political system is repressive, which certainly prioritizes the value of formal legal certainty. The law itself is under the control of political power. It is also believed that in the authoritarian type of power, laws are often created to serve interests (political power, certain groups, business interests). The government often utilizes the law as a means to legitimize its actions, prioritizing its interests over what may be considered right or wrong. The crucial aspect is satisfying its interests. In this context, the direction of law enforcement is often to serve the interests of power rather than the law itself or even using the law only to defend its interests by prioritizing the principle of formal legality. When dealing with hate speech perpetrated by certain individuals or groups, the emphasis tends to skew towards protecting interests over following the law. This can result in persecution, layered accusations under different articles which give the impression of "finding fault," and the abuse of power.

After we understand the legal and political relations in authoritarian government, then we need to understand fair law enforcement. Is it possible? Justice and law reside in separate categories. Justice can be classified within moral domain which Ulpianus categorizes into three, namely:

- (1) *Honeste vivere* (to be honest in your life)
- (2) *Alterum non laedere* (to hurt no one)
- (3) *Suum cuique tribuere* (to give the right to others)

Law and justice reside in different domain. Even conceptually, according to Gustav Radbruch's triadism, the two have the potential to attract each other so that tension arises (*spanungsverhältnis*). Radbruch emphasized that "where statutory law is incompatible with justice requirements, statutory law must be disregarded by a judge". However, in an authoritarian government, the legal certainty of state law is prioritized by ignoring justice. The law is actually used to legitimize all actions even if they are wrong.

There is one case that can be used as a reflection of the application of the principle of formal legality, namely the case of Habib Rizieq Shihab (HRS), a figure of the *Front Pembela Islam - FPI*. In the HRS detention case, is law enforcement oriented towards seeking justice and the truth? The writer believes otherwise as several law violations, particularly concerning justice, were discovered from a normative point of view. The arrest of HRS began with state officials shouting that the state must not lose and that law enforcement agencies are protected, indicating a lack of regard for the law. One consequence of adopting this slogan is the flawed policing practices that result, namely:

- (1). Ambiguous Standard: Driven by personal interest

Today's law does not have clear standards. Law Enforcement is often based on APH's conscience. Police can apprehend suspects at their discretion, while making reports at their leisure.. The police have the power to suspend individuals at their discretion, disregarding suspension requests if they choose not to comply. There is no objective measure by which the police treat, even when the suspects are merely suspects. The following facts show the style of law enforcement that seems to be based on personal interest.

- a. In the HRS case, irregularities were found in the alleged law articles. At first, he was charged under Article 93 of the Health Quarantine Law (threat of 1 year or a fine of 100 million rupiah), but later it became the core of Article 160 of the Criminal Code on incitement, punishable by 6 years in prison. There is some kind of article smuggling. This was the reason why the police could detain HRS, especially from an objective standpoint. Allegations of law enforcement based on personal interested to smuggling. However, the investigation revealed that there was no Article 160 of the Criminal Code. Instead, there was only Article 93 in conjunction with Article 9 Paragraph (1) of the KK Law and Article

216 of the Criminal Code. Basic Lidik Lap. Information 15 November 2020. Locus in Petamburan. Whereas for Sidik, it is based on the LP on November 25 2020 and Sprindik on. 25 Nov 2020. SPDP date. 25 Nov 2020 the alleged article, Article 160 of the Criminal Code, Article 93 of the KK Law and 216 of the Criminal Code. Locus in Petamburan and Tebet Utara.

b. The detention was executed before the examination on offense's merits. HRS came to comply with the summon of Polda Metro Jaya. However, HRS was immediately arrested, as was previously suspected. According to FPI General Secretary, Munarman, the issue that day had not yet delved into the substance of the matter. On what grounds is the individual in custody? In addition to being subjective, this also goes against Constitutional Court Decision No. 21/PUU-XII/2014

c. Predicted suspension of custody on bail. There is the fact that there have been several figures (Aboe Bakar Al Habsy and Fadli Zon--both members of the House of Representatives) and also Amien Rais who are willing to guarantee the suspension of HRS's detention. There are indications of arbitrary treatment of the suspects' rights, even if they both seek suspension and are both entitled to it. However, if the investigators reject their request to suspend detention later, their guarantees may not apply.. If all parties, including the police, acted solely based on their own preferences, it would effectively nullify the state's functions as an entity that delineates and guarantees every citizen's rights. The state's purpose is to establish boundaries that provide optimal fulfillment of each citizen's rights.

d. Later there was also a protest by the Governor of West Java, Ridwan Kamil, to the Police not to enforce the law based on personal preference in examining officials involved in health protocols violations on 10 December 2020 at Soekarno-Hatta Airport and subsequent events. He requested the police to investigate behind the crowd at the airport, specifically the statement made by the Coordinating Minister for Political, Legal and Security Affairs' that permitted HRS supporters to pick him up at the airport to Petamburan. The Minister for Political, Legal and Security Affairs should also be held accountable. Ridwan Kamil also questioned why the Governor of Banten was not investigated, given that the airport is located in the Tangerang region, Banten. If the Coordinating Minister for Political, Legal and Security Affairs and the Governor of Banten are not subjected to the legal process, would that not be a form of subjective law enforcement?

(2). Discretion Tends to be Discriminatory

APH has the discretion to enforce or not enforce the law, which may reflect a non-enforcement policy.. Fairness in the application of the law requires that similar cases receive equal treatment, while different cases receive distinct treatment. Therefore, equality must exist under the law. However, what will happen if there is unfair law enforcement, for example: (1) Selective logging law enforcement (crowd case (HRS (DKI: religion) vs. Gibran (Solo: PILKADA)); (2) Criminalization of the clergy vs letting the buzzers supporters of the regime (Abu Janda, et.al.); (3) Abuse of power revoking the HRS FPI's photo billboard by the Indonesian National Military (TNI), not in accordance with the TNI's main duties, allegations of police abuse of power stalking the HRS entourage to kill 6 FPI soldiers.

(3). The government did not comply with the Constitutional Court's decision

There are at least 2 decisions of Constitutional Court that have been violated by the Government, c.q. the police in determining the suspect and detaining HRS, namely: (1) Why did the government and police fail to comply with Constitutional Court Decision No. 7/PUU-VII/2009 when dealing with the HRS case after Article 160 of the Criminal Code was changed from a formal offense to a material offense by the Constitutional Court?? So, the government has enforced laws arbitrarily, based on personal preference. Why was Article 160 of the Criminal Code chosen as the basis for the accusation against HRS? Does the use of this charge imply a strong desire to imprison HRS? The detention of HRS on charges of incitement to commit a material offense raises suspicions that the government and/or the police acted in defiance of the Constitutional Court's decision no. 7/PUU-VII/2009. And regrettably, currently there are no legal measures that can be taken in case an institution fails to comply with a decision of the Constitutional Court.; (2). Determination of suspects without investigation against of HRS. The police did not comply with the Constitutional Court Decision No. 21/PUU-XII/2014. The Constitutional Court's decision emphasized that the phrases 'preliminary evidence', 'sufficient preliminary evidence' and 'sufficient evidence' in Article 1 point 14, Article 17 and Article 21 paragraph (1) of the Criminal Procedure Code must be interpreted at least with two pieces of evidence as well as an investigation of possible

suspects, in accordance with Article 184 KUHP, unless the suspect can be identified without physical presence for the crime.

These three matters illustrate the application of the formal legality principle by the ruling regime which has been able to uproot the value of justice in law enforcement in this country. As a result, a harsh system has been created in the world of law enforcement through the regime's use of formal legality.

4. FINDING A WAY OUT OF THE MAZE OF FORMAL LEGALITY

In the case of HRS, APH should not prioritize the principle of formal legality over material legality by implementing a policy of non-enforcement based on the argument that first, the law is unfriendly friendly to social life or even the social atmosphere. Second, the law is unclear, uncertain (*lex certa*), not detailed and strict (*lex stricta*). Third, there is a legal vacuum and fourth, there is a compelling crunch (force majeure). The author believes that it is necessary to enforce the law progressively so that justice and social welfare can be realized through the implementation of the principle of material legality. Progressive legal methods prioritize substantive justice so that they are more mission oriented than procedure oriented. Such a legal method must be accompanied by a special character in law enforcement, namely rule breaking. The 3 characters of rule breaking are first, the utilization of spiritual quotation (in the form of creativity) should not be limited by rules when enforcing the law, as it can lead to injustice. Even in the professor's inauguration speech on August 4th 2010, Professor Suteki from UNDIP boldly suggested a model in which the policy of non-enforcement of law, also known as the policy of not enforcing the law to promote substantive justice, is implemented.

When studying the legality principle, it is vital to incorporate material legality principles with formal legality principles in order to shift criminal law towards fair law enforcement. To support the progressive legality principle, two potential solutions are suggested, specifically:

4.1. Shifting the Meaning of Unlawfulness

The principle of "no liability without unlawfulness" or "the principle of no liability without unlawfulness" is one of the important principles in criminal law. Unlawful is an objective assessment of an action and there are three stances on the matter: Is an act against the law? against the rights of others? or was an act done without authority or right? According to the principle of formal unlawful nature, an action is considered illegal if it is defined as a crime by the law and is subject to a fine as punishment. Elimination of unlawful nature is also regulated solely by law. Therefore, what this teaching understands as unlawful is inherently violating or contradicting codified law.

When assessing whether an act is unlawful, the doctrine of material lawlessness requires consideration of both legal statutes and unwritten legal principles, not just written laws. The unlawful nature of an act that is obviously included in the formulation of a criminal act can be erased either based on the provisions of the law or unwritten rules (*ubergesetzlich*). This is in line with Moeljatno's view that the written rules in the law are important as boundaries for the meaning of the substance of the regulations themselves. However, it should be in accordance with the progressivity of the community where the rule applies.

Unlawfulness is an essential element of any criminal offense. This means that when an act is deemed a crime under the law, it is implicitly considered to be against the law, even if the specific formulation of the crime does not mention unlawfulness as an explicit element. The formal formulation in the law is an objective criterion for declaring an unlawful act. However, this formal criterion still needs to be tested substantively to determine whether the action is truly contrary to the community's sense of justice and the laws that apply in society. This doctrine is also known as *afwezigheids van alle materiele wederrechtelijkheid* (AWAW principle).

In terms of its function, the material tort can be divided into two, namely the positive function and the negative function. The doctrine of material resistance in its positive function considers an act to remain a criminal offense even though it is not punishable by written law, in the event that it contradicts the living law in society. Meanwhile,

the doctrine of material unlawfulness in its negative function recognizes the existence of unwritten laws outside the law which eliminates the unlawful nature of actions that are formulated as criminal offenses in the law. This is known as the elimination of unlawful nature.

4.2. Nurturing the Idea of Balance

The principles of criminal law reform are closely related to the main ideas or basic ideas of Pancasila as the *grundnorm* or philosophy of the nation. The principles of Pancasila, interwoven as a complex web of values, reflect the idea of balance. Paul Scholten, a Dutch legal expert, argued that “the law is indeed in the law, but it still has to be found”. In line with this opinion, Satjipto Rahardjo believes “looking for law in regulations is finding the meaning and value contained in regulations. The law encompasses more than a mere collection of article regulations. It carries significant meaning and value.”. The two perspectives above illustrate the importance of balance in interpreting law. This involves not only an understanding of written regulations, but also the ability to discern their legal implications.

The basic ideas to be realized in criminal law reform that are oriented towards the idea of balance are:

1. Monodualistic balance between public interest and individual interest.
2. The balance between the interests of the perpetrators of criminal acts through criminal individualization and the interests of victims of crime;
3. Balance between objective elements (*actus reus/outward*) and subjective elements (inner attitude/*mens rea*);
4. Balance between formal and material criteria;
5. Balance between legal certainty, legal elasticity and justice; and
6. Balance of national and global values.

The concept of balance can be applied in various aspect of sentencing, including on the principles and conditions of sentencing, on the issue of sources of law (the principle of legality), on the issue of the enactment of criminal law, on the principle of guilt-strict *strict liability-rechterlijk pardon-asas culpa in causa* principle and on a criminal orientation: protection community-victims-perpetrators. The monodualistic balance between public interests and individual interests implies that criminal law has the objective of protecting the interests of society while considering the rights of perpetrators of criminal acts as human beings. The idea of balance in the purpose of sentencing is to create a balance between the goals of social defense and social welfare. Criminal law has a goal to foster perpetrators and aims to prevent criminal acts through law enforcement. In addition, criminal law also aims to resolve conflicts arising from criminal acts and restore balance in society so as to bring a sense of peace.

The balance between the perpetrator's interests and those of the victim must be considered. The protection of the victim is by restoring the disturbed balance of values in society. To fulfill the objective of victim protection, the Criminal Code accommodates “payment of compensation” and “fulfillment of customary obligations” as additional sanctions. These two sanctions are often implemented as it has been revealed that only imposing the primary criminal sanctions on the accused through formal judicial processes is not perceived by the community as an adequate resolution to the problem.

The implementation of the idea of balance in criminal law reform is oriented towards individualization of punishment which contains several characteristics:

- a. The personal principle is that criminal responsibility is personal;
- b. The principle of no punishment without guilt, punishment is only given to the guilty;
- c. The principle of flexibility, this principle provides flexibility for judges in choosing punishments that are in accordance with the characteristics and conditions of the perpetrators;
- d. The principle of criminal modification is that there is a possibility of criminal modification or adjustments/changes in its implementation.

The balance between objective elements and subjective elements, in contrast to the belief system of the colonial Criminal Code, which was influenced by the classical school that was oriented towards action. According to this, any act that meets the qualifications of a crime warrants punishment. The renewal of criminal law is based on the element of error as a fundamental principle in holding accountable those who have committed a crime. The intentional element is no longer included in the formulation of the offense as an element of a crime, but an element of guilt or criminal responsibility.

Implementation of the idea of balance in sources of law is through material expansion of the principle of material legality. Formal legality as state law, which is formulated in law and material legality is law originating from society. The balance between legal certainty and justice is important. Legal certainty (*rechtszekerheid*) is a legal goal to be achieved in dogmatic juridical doctrine. This doctrine dictates that law's sole function is to ensure legal certainty and its nature is confined to establishing legal rules. The enforcement of unjust laws with limited benefits to society does not pose a concern if legal predictability is maintained since the law equals certainty.

Jan Michiel Otto argues that legal certainty has a more juridical dimension. For this reason, he defines legal certainty as a possibility in certain circumstances:

- a. There are clear, consistent and accessible legal rules issued and recognized by the state (authority);
- b. Government institutions (state) consistently apply, obey and comply with these rules;
- c. Citizens in principle must adapt their behavior to these rules;
- d. Independent and impartial judges (courts) apply these rules consistently when resolving legal disputes; dan
- e. The court decision is concretely implemented.

As mentioned earlier, according to Gustav Radbruch, the purpose of law requires three values, The first is the value of justice in the sense that everyone has the same rights in court; the second is the goal of justice or finality, which produces goodness or benefit, and the third is the value of legal certainty or legality. In this case, a country's legal instruments are considered capable of guaranteeing the certainty of fulfilling the rights and obligations of every citizen. Legal certainty is an integral characteristic of law. A law lacking certainty would become meaningless as it would no longer provide a guideline for behavior applicable to all. In contrast Radbruch stated that when state law is inconsistent with the fulfillment of justice, the state law must be ignored by the judge. So, the value of justice still takes precedence over the value of legal certainty.

Legal justice has two substantive and procedural dimensions, namely, "Substantive justice is an order that must be obeyed by individuals and is mandatory for them, including the individual obligation to comply with applicable regulations, as well as the obligations of courts and law enforcement to implement applicable regulations. Procedural Justice is related to procedural justice in court and procedurally, by requiring the existence of individual rights and obligations regulated in legislation to achieve fair procedural law".

In conclusion, reforming criminal law to achieve a balance between formal legality and material legality is expected to create a fair criminal law so that it is not always oriented towards legal certainty alone but also considers justice and the benefits of law. The concept of the idea of balance is fundamental in reforming criminal law in Indonesia. It aligns with the ideals of law and the character of the Indonesian nation, which prioritizes a balance between individual interests and social interests, between state law (formal) and living law in society, between formal legality with material legality. Therefore, this approach ensures that the values shared by the Indonesian people as mandated by Pancasila can be implemented in a just law enforcement.

5. Conclusion

According to Barda Nawawi Arief, criminal law reform involves updating various policies and underlying aspects. The purpose of the reform is to review and assess socio-political, socio-philosophical, and socio-

cultural values of Indonesian society that underlie criminal law policies. Therefore, it is important to note that reforming criminal law does not only formulate norms but essentially also explore or design and implement basic ideas, concepts, values, ideas and paradigms of the legal ideals of the Indonesian people in legal formulations. Thus, the formulation the principle of legality in Article 1 of the New Criminal Code, which is further developed by the provisions in Article 2 of the New Criminal Code is also oriented towards shifting the meaning of the nature of against the law (from formal to material lawlessness) and seeding the idea of balance, namely (1) monodualistic balance between public interests and individual interests ; (2) a balance between the interests of the perpetrators of criminal acts through criminal individualization and the interests of criminal victims; (3) balance between objective elements (actus reus/outward) and subjective elements (inner attitude/*mensrea*); (4) balance between formal and material criteria; (5) balance between legal certainty, legal elasticity and justice; and (6) balance of national values and global values.

The further development of the principle legality in Articles 1 and 2 of the New Criminal Code can be considered a progressive legality principle. This is due to the fact that the formulation and implementation of this principle embodies the rule breaking credo of progressive law, namely:

(1) The utilization of spiritual quotations (in a creative form) to circumvent legal regulations leads to unjust outcomes. In fact, in the inauguration speech I introduced a policy called the “policy of non-enforcement of law”, the policy of not enforcing the law for the sake of substantive justice.

(2) Deeper interpretation of the law, i.e. the law should not be interpreted superficially but rather should be interpreted deeply, taking into account its social and philosophical context in order to uncover its deepest socio-ideological meaning of the law for uses as a guiding principle in law enforcement.

(3) Law enforcement must not only be based on logic, but must also be based on feelings, namely a sense of concern for and involvement with vulnerable, marginalized, weak, and oppressed people. This can be summarized up with the term compassion. So implementing the law is not enough to rely on rules and logic but also behavior, even the underlying motives driving that behavior.

The progressive law rule-breaking credo is considered to have encouraged the renewal of Indonesian criminal law, recognizing two principles of legality, namely the principle of formal legality as formulated in Article 1 of the Criminal Code and the principle of material legality as formulated in Article 2 of the Criminal Code. The formulation of the principle of legality has been substantially broadened by emphasizing that the provisions of Article 1 of the Criminal Code do not limit the applicability of “the law that lives in society”. . Thus, the Criminal Code acknowledges the existence of unwritten sources of law that prevalent in society (living law) in addition to written source, as a basis for determining whether an act should be punished as long as it does not conflict with Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights and general principle of law, recognized by the community of nations in the world.

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