The Seybold Report

ISSN 1533-9211

DOI 10.5281/zenodo.7505468

THE SHIFTING OF MONISTIC TO DUALISTIC THEORY IN INDONESIAN CRIMINAL LAW

LUKMAN HAKIM [1]and ENDANG HADRIAN [2]

[1, 2] Faculty of Law, Universitas Bhayangkara Jakarta Raya, Indonesia.
Email: lukm anhakim33@gmail.com[1] (Corresponding Author), endanghadrian@yahoo.co.id [2]

Abstract

This article aims to discuss the shifting occurrence from monistic to dualistic theory in Indonesian materiel criminal law in which the criminal system within the Criminal Code (KUHP) is known as KUHP based on recent legality principle. This article is a normative research which analyzes dualistic theory in order to acknowledge the law issues. The methodology used is qualitative descriptive methodology with conceptual, statue, and dualistic theory's approach. In short, based on legality principle, criminal can be received or accepted if the action or fault cause the criminal in KUHP which is rigid in solving the law enforcement problem. The difference of dualistic theory can be seen in the separation between criminal offense and responsibility. The results indicated that the Draft Penal Code (RKUHP) has explicitly been implemented the duality theory as criminal system in Indonesia due to make the relationship between certainty law and justice can be realized in jurisprudence.

Keywords: Dualistic Theory, Monistic Theory, Criminal Law, Criminal Offense

INTRODUCTION

Globally, the influence of criminal law development after the implementation of PBB (United Nations) Congress on The Prevention of Crime and the Treatment of Offenders, is talked about criminal law encounters that is more "humanize" the offenders during its treatment(Bahiej, 2004). Based on this development, Indonesian judicial criminal law attempts to upgrade the criminal law which is rigid and imperative to become the criminal law that is focused on upholding justice in humanity aspect.

In the development of criminal theory that is related to jurisprudence, it receives a bitter criticism from the criminal law expert last year. It happens because the jurisprudence is often considered the contradiction with the meaning of justice, which only based on criminal act that is appropriate with the delict pattern (besteendelen delict). Thus, the law enforcers are regarded as "servant" of constitutional in practice field.

Meanwhile, in its theory, the criminal law has been shifted from monistic, that is focused on the legality principle, become principle with no offense without fault or it is known as dualistic theory(Hamzah, 2014). In the thought of separating the criminal offense and its responsibility, dualistic theory has been selected as Indonesian criminal law revision which then adopted in the draft penal code (RKUHP). Hence, the criminal conviction in its principle, appoint judge as someone who has duty to give balanced consideration between criminal offense and its responsibility. In other side, criminal offense affirms the society's legal interest will be protected by the legal norm. Moreover, the criminal's fault and responsibility are emphasized on the legal obligation which based on a certain situation of the lawbreaker. Based on this statement, the writer tries to explain the dualistic theory that is not yet arranged previously,

The Seybold Report
ISSN 1533-9211
DOI 10.5281/zenodo.7505468

thus it can be implemented explicitly in Draft Penal Code (RKUHP) which contains all of the criminal law application in Indonesia.

METHODOLOGY

The research was conducted using a qualitative research design, by comparing several laws and regulations related to the article. The data analysis technique uses secondary data and primary data as in descriptive analytical research, then the data analysis is carried out qualitatively, meaning that the data that has been obtained is compiled systematically and completely and then analyzed qualitatively, so it does not use mathematical formulas.

DISCUSSION

The idea which contains with criminal justice expands the various kind of criminal's goals. It develops from past to present which is addressed to rational direction. It begins from revenge theory (retributivism) until beneficial theory (utilitarianism)(Packer, 1968). Further, in Draft Penal Code (RKUHP) not all conceptional construction of criminal law system or general criminal law study is patterned in General Section of Book I such as the provision on the legal objective and guideline, the definition or authentication of criminal offense, the illegitimacy of criminal offense (including the irresponsibility of law principle without illegitimacy or no liability without unlawfulness, material unlawfulness principle or afwezig-heids van alle materiele wederrechtelijkheid (AVAS).(Penyusun Naskah Akademik, 2015) Meanwhile, the students of Law Faculty in Indonesia can study about it intensively at their class.

Although the Draft Penal Code (RKUHP) does not contain general lesson or conceptional construction, but most of them are located in criminal law lesson which taught to the law faculty students. However, it is often abandoned and its practice might be useless for judgement in the court because there is no explicit pattern in Criminal Code (KUHP). In addition, even though it is seen through the intersection system, the purpose of sentencing is very fundamental and central. This purpose is a soul of the criminal system.

Moeljatno's speech admission as criminal law professor in Gajah Mada University, has declared his perspective about "there is no criminal without fault" (Geen straf zonder schuld, actus non facit reum nisi mens sist rea) principle or known as dualistic principle. This principle is not mentioned within the written law but it existed in non-written law in Indonesia. The point is, dualistic principle separates the criminal offense and responsibility. The criminal offense refers to the prohibition of action except responsibility.(Moeljatno, 1955)

As Moeljatno's declared that "criminal offense only refers to the deed which is prohibited; it will get criminal threat if it is violated." Besides, the criminal offense's pattern only contains three aspects, such delict subject which is directed by legal norm (norm addressaat), prohibited the deed (strafbaar), and criminal threat (strafmaat). It is criminality problem includes criminal offense scope. Otherwise, criminal responsibility only discusses subjective aspect from suspect. In this phase, the problem is not only deed problem and unlawfulness, meanwhile it has relation with how the suspect's situation should be responsible to the criminal offense.

The Seybold Report
ISSN 1533-9211
DOI 10.5281/zenodo.7505468

Thus, according to Moeljatno, changing the criminal law system in Indonesia, both practice and theoretically, will make it returned to "its house" (back to where it is started). Even if the principle is not practiced or applied massively in criminal law and Criminal Code after the long process and it is embedded in future Draft Penal Code explicitly. Similar to Moeljatno's perspective, Saleh(Saleh, 1994) stated that committing a criminal offense does not always mean the suspects feel guilty about it. The suspect can be responsible if he/she is imposing the crime. Criminal responsibility is only accused when it claimed as 'faultiness'. In interpreting the 'faultiness', Saleh stated that faultiness is reproaching of suspect seen from the society's perspective.(Saleh, 1983)

Meanwhile Moeljatno acquires his perspective from Simmons that stated 'Faultiness' is a certain physical state of person who doing criminal and the relationship between the condition and his action, until he or she can be reproached because of it. It means that the faultiness should have two be thought the two things besides criminality. First, certain physical condition. Second, the certain relationship between inner condition and act which has been done, until it derives the reproaching. Indeed, between first and second there is close relationship, moreover the first is basic for the second or the second depends on the first. Nevertheless, it is better to separate one and each other briefly(Moeljatno, 1955).

Arief(Arief, 2013) declared that criminal offense only discusses on the action objectively. While the subjective thing is related to the suspect's inner behaviour that must be excluded from the definition of criminal offense. The suspect's inner behaviour is included in the scope of faultiness and criminal responsibility which become the ethical basic for sentencing. William(William, 1961) stated that, "the act constituting a crime may causes in some circumstances be objectively innocent". This means that there is distinction between criminal offense and responsibility. The criminal offense only oriented in prohibiting act based on the legal norm, and criminal responsibility refers to subjective attitudes based on law person's obligation for obeying the law.(Saleh, 1994) In addition, Fletcher disclosed that criminal law has two norms. Firstly, legal norm which arrange prohibitive or orderly acts, "the basic norm of the criminal law prohibits particular acts or require the particular acts be performed". It is tatbestandmabigkeit which contains a set of criminal act's elements in legal regulation comprehensively; it also includes various kind of crimes. In other words, criminal acts emphasize propriety of actions with delict establishment.(Fletcher, 2000)

Secondly, the norm which illustrate the certain condition that causes the suspect can be reproached of committed criminal offense. It can be stated that, "The analysis of attribution turns our attention to a totally distinct set of norms, which do not provide directives for action, but which spell out the criteria for holding persons accountable for their deeds".(Fletcher, 2000) In analyzing about the criminal liability which has distinctive term; it does not refer to the deeds, but it is dealing with person's criteria which can be responsible for their actions.

Further, the separation of criminal offense and responsibility aims to emphasize the criminal law functions, thus it can be understood by broad society as Paul H. Robinson(Robinson, 1990) declared that, "To be effective, the rules of conduct must be simple, based on objective criteria with easily communicable and comprehensible standard." In other side, criminal responsibility

The Seybold Report
ISSN 1533-9211
DOI 10.5281/zenodo.7505468

emphasizes adjudication functions which give guideline to the judge for determining certain situation; it becomes as the basis that can held accountable; thus, it can be punished(Dan-Cohen, 2002).

Based on the writer, the separation of criminal offense and liability above cause the out faultiness from criminal offense element and placed in factor which determine the criminal responsibility. Nevertheless, how this concept is applied in legal practice need depth elaboration. In other side, criminal responsibility particularly is viewing as judge's duty implementation in examining, judging and determining their case. Therefore, the first thing in elaborated the separation of criminal offense and liability, thus browsing the application and its development in judge's duty practice on the determination. It means that the concrete form in this theoretical application practically can be seen as judge's determination in the court.

As well as, it can be analyzed in Draft Penal Code which emphasizes the criminal offense and responsibility's segregation. Consequently, all the criminal offense only arranges objective deeds which is prohibited in particular terms listed, meanwhile the criminal responsibility is formulated in general term. Therefore, The Draft Penal Code is not applied the separation theory consistently. Since it is still formulated the subjective element in criminal offense with absence. It also regulated in general term with the note that it only applied to certain criminal offense.(Syamsu, 2014)

Furthermore, the criminal law experts' perspective related to monism and dualism concept are described in giving their definition to "criminal offense'. J.E Jonkers formulates the criminal moment as 'unlawful act (wederrechttelijk) which has relation with intention and faulty. It can be done by person who is responsible." Meanwhile H.J. Van Schravendijk defines that criminal offense is "the person's action which is contradicted with legal conviction so, it can be threatened with punishment, it also can be done by person who is in faultiness"(Chazawi, 2017). Then, Van Hamel interprets strafbaar feit as "person's action which is formulated in wet, which is unlawfulness. It deserves to be convicted and done with faulty".(Moeljatno, 1955) Simmons stated that Strafbaarfeit is "an action which is threatened with criminal, unlawfulness and relationship with person who able to responsible".(Sianturi, 1996) The perspective of criminal law's experts can be interpreted as monism receiver both implicitly and explicitly.

Unlawfulness and faultiness in Indonesian criminal law, particularly Criminal Code which is followed monistic theory. It stated that unlawfulness (wederrechtelijkheid) and faulty (schuld) is criminal act's element (strafbaar feit).(Farid, 2007) Progressively, Criminal Code does not explain the criminal relationship with the suspect, though it is only offended by legal excuse ad legal justification. It is also an exclusion of criminal punishment as accordance in Article 44, 48, 49, 50, dan 51 Criminal Code.

Several criminal law experts who disagree with monistic theory stated that criminal law situation in Dutch and Indonesia occurred the clumsiness, although the faulty as absolute character for criminal responsibility. However, each intentional practice and absence is considered as criminal act element (strafbaar feit), and not criminal responsibility element. In

The Seybold Report
ISSN 1533-9211
DOI 10.5281/zenodo.7505468

accomplishing the code in Indonesian, thus it never confirmed the system which is used in WvS to intentional element. Due to the Dutch's text which was the intentional place in code's statement arrangement, it has certain meaning related to intentionality (welke element worden door het opzet beheerst), a place that cannot be defended (Farid, 2007).

Further, the perspective which separate criminal act and responsibility is the main element of criminal responsibility; it is only faulty element. On the other hand, the faulty which is not criminal act known as dualistic theory or principle. The first criminal law experts who declares dualistic theory is Herman Kantorowicz. He was a bachelor of Germany criminal law who wrote a book entitled Tut und Schuld in 1933 (Muladi & Priyatno, 2010). Moreover, Moeljatno's perspective which attends with Herman Kantorowicz's notion is followed and developed by Indonesian criminal law experts such Roeslan Saleh, A. Z. Abidin, Barda Nawawi Arief and Chairul Huda. In addition, dualistic theory is influenced by Germany and Europe Anglo Saxon criminal which applied common law system. Otherwise, Eser(Eser, 1976) stated that "…Some systems, such as the French and Anglo-American systems, which have shown little concern about elaborating the distinction between justification and excuses and exploring its implications, treat putative justification as a justification in itself…". It means that the self-defense is needed for justifying her or himself; if he or she is being attacked.

Furthermore, the criminal law definition by Academic Script of Draft Penal Code (RKUHP) is a deed of doing or undoing something as law regulation mentioned as criminal law, except those acts; it will be threatened and prohibited by law regulation. Thus, it includes of unlawfulness or contradictory with legal society's awareness.(Penyusun Naskah Akademik, 2015)

The basis in acknowledging a deed as criminal law or contradict the formal legality principle, but it also gives a site to the living law or convention as legal source. It contains of the signs which are accordance with Pancasila values or general law principles. Both of them are approved by nation's society (national and international values). It is according to the national values called Pancasila; it contains of paradigm values as religiously, humanity, nationality, democracy and social justice values. Meanwhile, international values are concerned to the term of "the general principle of law recognized by the community of nations" in Article 15 (2) ICCPR (International Covenant on Civil and Political Right).(Penyusun Naskah Akademik, 2015) Basically, Draft Penal Code (RKHUP) adheres to dualistic theory in Article 12 (1) RKHUP which arranged that, "Criminal law is a deed of doing or undoing something which will be convicted by law regulation". Moreover, in Article 12 (2) RKUHP stated, "Declaring as criminal law, it is a deed which convicted by law regulation should be unlawfulness or contradictory with the living law in society". It also stated in Article 12 (3) RKUHP, "every criminal act is always regarded as unlawfulness, except there is legal justification".

Based on the statements above, it is emphasized the arrangement's location of criminal responsibility and faulty in its Draft Penal Code (RKUHP). In Article 37 Draft Penal Code (RKUHP) stated, "Criminal responsibility is a condition of fulfilling objective and subjective reproaches so that someone who has committed a crime can be convicted". Then, it also stated in Article 38A, "Criminal responsibility includes responsible ability's element, intentionality

The Seybold Report
ISSN 1533-9211
DOI 10.5281/zenodo.7505468

or negligence, and no legal excuse". The provision regarding "faulty" which regulated in Article 38 Draft Penal Code (RKUHP) as stated, "None who commits the criminal act can be handled without any mistakes".

In addition, the provision above is in line with Draft Penal Code (RKUHP) contained in academic paper which focuses on 3 (three) main problems in criminal law, such as; criminal law, criminal liability, and criminal punishment. Each of them is sub-system and pillars of entire punishment system construction.

Further, there is deed's arrangement principle and the perpetrator, that is principle which based on what was done and who did it; the criminal acts and criminal liability obtain brief regulation. Hence, the criminal liability is continuation of reproaches that objectively exist in a criminal act based on the applicable legal provision, and subjectively to the perpetrators who fulfill the term in criminal code for having the punishment because of their deeds (Penyusun Naskah Akademik, 2015).

Besides, there is reproached objectively in criminal act based on the applicable provision to the perpetrators which fulfill the terms in code (criminal). They should be convicted because of their deed; thus, it can be called as criminal liability. As the problem, is the preparatory can be reproached as what they done? If it is able, means that they can be convicted. Meanwhile, it is done if the evidence can be proven, both intentional and negligence. Meanwhile, a person can be said as "guilty" if he can be reproached from the point of view of society. Since it is accused if they can make the other deed if he did not want to do it. Then, the faulty is a soul person's condition which do the action. Those relationships can be reproached the deed. In addition, based on Beling stated that "…the notion of an attempted offense belongs to the same logical space as the notion of a consummated offense…"(Mañalich R., 2018). It means that the attempt offense cannot be mentioned as the real offense; since it does not show or explain a kind of its offense.

Based on logical consequent above, thus, every criminal act is always done intentionally, except certain criminal act which has been done by negligence. In distinguishing the criminal act in intentional and negligence, the Draft Penal Code (RKUHP) stipulates that the element of intent does not need to be included in the formulation of a criminal act, only the element of negligence is included in the formulation of a crime, because it has been regulated in Article 40 (2) of the RKUHP that every criminal act is committed on purpose unless the law expressly stipulates that it is committed by negligence.

If the regulation above considered in examining the trial may have implications, namely that the public prosecutor no longer needs to prove the element of intent, because the element of intent is not explicitly stated in the formulation of a crime. If it followed to dualistic opinion, which contains negligence element only explicitly is not proven; thus, it will cause the judgement which is stated that the suspect is released (vrisjpraak). The intentional element does not contain explicitly in criminal act formulation; thus, it is also as unproven liability will cause the suspect is released from all the legal prosecution (ontslag van alle rechtsvervolging)(Penyusun Naskah Akademik, 2015).

The Seybold Report
ISSN 1533-9211
DOI 10.5281/zenodo.7505468

Moreover, the attempt should be developed until the benefit more comprehensive with Andi Hamzah's perspective, "those important separation is only known by public prosecution in arrangement of indictment letter, since it only contains the main delict section (bestandeel) and the realistic deed charged, so only actus reus".(Hamzah, 2010) Based on the statements above, therefore it is very important for the advocate for arranging the plea agreement. Then, the judge also needs to understand this concept in managing the decision.

Ideally, the court is a place for receiving the justice. Practically, it is a place for separating guilty person and innocent person. But in reality, it is not always in line with its normative idea. Thus, judges do not always have the awareness that one day they will be responsible for the results of their work to God Almighty. Furthermore, mostly in society's perspective claimed that the jurisprudences do not reflect the justice sense. Hence, criminal justice system refers to the "criminalization" to the policy, as well as corruption (case buying and selling, i.e. prosecutor fraud)(Lesmana, 2021). Moreover, it often occurs violation to the human right.

Factually, many criminalities which is "unworthy" proposed to the court, particularly if it towards the development of social aspect, economic aspect and cultural aspect in plural society and various kind of different necessity. It occurs because the loss of small value or involves trivial problems, or the perpetrators who should receive special treatment (younger and older offender), or the cases that threatened above 5 (five) years which are contradict to the values of humanity, justice that live in society and in fact need to find other ways in its resolution.

Based on the dualistic theory above, in taking the penalty, the court gives balancing consideration between criminal offense and liability as well as defendant as the basis of penalty. In other side, it emphasizes society law importance which is protected by legal norm. Besides, the faultiness and liability also emphasize to legal obligation; it based on certain condition of the defendant.

However, there are several of adjudications which declared that judgement only prioritizes the delict formulation, it also ignores the criminal law as its basis. The "noble" duty of judge in adjudicating has been finished when the defendant's act is proper to all delict formulation. In addition, without elaborating more distant whether the act of defendant is contradicting with the society's propriety. Then, whether the defendant's condition is proper for being the penalty basis.

Likewise, the attention and voice of society towards law enforcement institutions and apparatus is very strong in the post-reform era, especially with regard to legal issues concerning the interests of the community, nation and country. As well as news in various social mass about social support toward law enforcement, but also the public disappointment and criticism toward law enforcement, both police, attorney and also court.

The public disappointment happens because the expectations of court are not fulfilled to realize the truth and justice, as well as, the realization of peace and benefit(Anshori, 2008). Recently, several people believe that the court as the last bastion in seeking the justice. However, their belief is in contrast with the fact of the law failure. It is contradicting with the "nature" of justice institution as one of facilitation to solve the legal conflict. Nonetheless, the judge is

The Seybold Report
ISSN 1533-9211
DOI 10.5281/zenodo.7505468

viewed as code's angle. Meanwhile, the "noble" duty of judge must be distant from it. It is in line with Article 14 (2) Provisional Constitution 1950 is known as Undang-Undang Dasar Sementara (UUDS) 1950 which declared, "None is said to be required to be punished or sentenced, except because of a law that already exists and applies to him."(Moeljatno, 2008). Law regulation (Recht) which the definition is widen certainly more than the regulation "constitution" (wet), because the definition of "law" (Recht) formed as "constitution" and "convention" law.

According to the explanation above, it can be stated that based on legality principle in law enforcement's perspective, there is no faultiness in sentence (criminal penalty). It means that whichever the jurisprudence's content as the judge can determine it based on his conviction and also the positive law; it means that the judgement is valid legally. In applying the dualistic theory in Draft Penal Code (RKUHP) soon, thus it is expected that criminal system will be more balance between legal certainty and justice from jurisprudence in crime.

CONCLUSION

In short, there are two summaries which disclosed in this research. Firstly, the existence of legality principle as monistic theory implementation in criminal law system. Particularly in Criminal Code Procedures is known as (KUHP) has position which is significance in criminal court system, in which unlawfulness (wederrechtelijkheid) and faultiness (schuld); it is a criminal offense element (strafbaar feit) known as monistic theory. The Criminal Code Procedures (KUHP) does not explain the relationship between criminal liabilities with the defendant, but it is only related with the legal excuse and justification. Therefore, many problems are occurred in criminal justice system where law enforcers emphasize the legal certainty than justice.

Secondly, in criminal law doctrine, "no punishment without fault" principle known as the implementation of dualistic theory. This notion pointed about the separation of criminal act and liability. In dualistic theory, the criminal act only relates to the problem of 'deed', while the problem of 'person' becomes the person's own responsibility. In this context, the dualistic theory has significance role for solving the rigid problem in criminal justice system, especially for the law enforcers. Moreover, when there is law conflict between legal certainty and justice, justice should be put in the first priority.

Reference

1. Anshori, A. G. (2008). Hukum Islam dan Perkembangannya di Indonesia. Kreasi Total Media.
2. Arief, B. N. (2013). Kapita Selekta Hukum Pidana. Citra Aditya Bakti.
3. Bahiej, A. (2004). Prinsip Individualisasi Pidana dalam Pembaharuan Hukum Pidana Materiel Indonesia. Jurnal Sosio-Religia, 3(4).
4. Chazawi, A. (2017). Pelajaran Hukum Pidana 1. Rajawali Pers.
5. Dan-Cohen, M. (2002). Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law. Harvard Law Review, 97(3), 622–677.

The Seybold Report
ISSN 1533-9211
DOI 10.5281/zenodo.7505468

6. Eser, A. (1976). Justification and Excuses. The American Journal of Comparative Law, 24. https://doi.org/https://doi.org/10.2307/839577
7. Farid, Z. A. (2007). Hukum Pidana I (Cetakan 2). Sinar Grafika.
8. Fletcher, G. P. (2000). Rethinking Criminal Law. Oxford University Press.
9. Hamzah, A. (2010). Asas-Asas Hukum Pidana. Rineka Cipta.
10. Hamzah, A. (2014). Asas-Asas Hukum Pidana. Penerbit Rineka Cipta.
11. Lesmana, A. S. (2021). Usut Dugaan Kasus Jual Beli Perkara, Jurnalis Suara.com Ditakut-takuti Jaksa Pakai UU ITE. Suara.Com.
12. Mañalich R., J. P. (2018). The structure of criminal attempts. Revus, 1(34). https://doi.org/10.4000/revus.4118
13. Moeljatno. (1955). Perbuatan Pidana dan Pertanggungjawaban Dalam Hukum Pidana. Jajasan Badan Penerbit Universitas Gajah Mada.
14. Moeljatno, M. (2008). Asas-asas Hukum Pidana. Rineka Cipta.
15. Muladi, & Priyatno, D. (2010). Pertanggungjawaban Pidana Korporasi. Kencana Prenada Media Group.
16. Packer, H. L. (1968). The Limits of the Criminal Sanction. Stanfod California Press.
17. Penyusun Naskah Akademik. (2015). Naskah Akademis Rancangan Kitab Undang-Undang Hukum Pidana (RKUHP). BPHN & Menhukam.
18. Robinson, P. H. (1990). Rules of Conduct and Principle of Adjudication. The University of Chicago Law Review, 57(3), 729–771.
19. Saleh, R. (1983). Perbuatan Pidana dna Pertanggungjawaban; Dua Pengertian Pidana Dasar dalam Hukum Pidana. Aksara Baru.
20. Saleh, R. (1994). Masih Saja Tentang Kesalahan. Karya Dunia Fikir.
21. Sianturi, S. . (1996). Asas-asas Hukum Pidana di Indonesia dan Penerapannya. Alumni Ahaem-Petehaem.
22. Syamsu, M. A. (2014). Pergeseran turut Serta Melakukan Dalam Ajaran Penyertaan. Prenada Media Group.
23. William, G. (1961). Criminal Law: General Part. Stevens & Sons.