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# Dualistic View in the Formulation of Criminal Offenses in the National Criminal Code

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**Abstract**

This article discusses the shift in criminal law perspectives in Indonesia from monist to dualist within the National Criminal Code (KUHP). These reforms were driven by the need for a better criminal legal framework in line with societal developments. The aim of criminal law reform is to achieve legal certainty, justice, and utility. The reasons for reform are influenced by political, sociological, psychological, and practical aspects. Reform efforts include legal discoveries through interpretation, analogy, and legal refinement, covering substantive, structural, and cultural aspects of the law. The National Criminal Code of Indonesia has shifted its perspective from monist to dualist. Monist theory unifies the wrongful nature and culpability as elements of a criminal act, while dualist theory separates them. The National Criminal Code affirms this separation but still formulates the subjective element of negligence in specific criminal acts. This shift in perspective has implications for law enforcement processes in courts. Prosecutors are not required to prove intent, and courts must balance criminal acts and criminal liability. However, there is a need for the development and understanding of these concepts by law enforcement, legal advisors, and judges to maintain a balance between legal certainty and justice. In conclusion, the National Criminal Code adopts a dualist perspective to strengthen the role of criminal law. The separation of criminal acts and criminal liability is expected to enhance the balance between legal certainty and justice in criminal court decisions in Indonesia.



## Introduction

Criminal comes from the word straf (*Dutch*) which is often defined in terms of "punishment" or with other definitions as a suffering that is deliberately imposed or

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given by states to a person or several people as a legal consequence (sanction) for him or her for actions that have violated criminal law prohibitions (Suyanto, 2018). Furthermore, according to J. Van Kan, criminal law is essentially a law of sanctions (*het strafrecht is wezenlijk sanctierecht*). He threatens criminals and punishes them, that is the task of criminal law. Punishment can include the death penalty, cutting off body parts (*verminken*), flogging (*kastijding*), deprivation of liberty (*vrijheidsberoven*), and statements of disrespect (Hamzah, 2015).

The criminal law that applies in Indonesia, both material (substantial) criminal law and formal (procedural) criminal law, cannot be separated from the enactment of Dutch criminal law (WvS) which was enforced in Indonesia as a colonial country based on the principle of concordance. After Indonesia became independent, the two criminal laws inherited from the Dutch era were enforced under the names of the Criminal Code (KUHP), previously known as *Het Wetboek van Strafrecht voor Nederlans-Indie* (hereinafter referred to as the WvS Criminal Code) and the Criminal Procedure Code (Criminal Code) (Parthiana, 2015).

The criminal law inherited from the Netherlands is currently very far behind the development of society and the public's need for the importance of better criminal law regulation. Since 1958 efforts to reform criminal law have begun with the establishment of the National Legal Development Institute. Efforts to reform law in criminal law in Indonesia are an effort to create success in fulfilling the three legal objectives as stated by Gustav Radbruj, namely certainty, justice and expediency. This is an urgency for a country to create a legal system that can protect the interests of the country and its citizens (Saputra, 2021).

The reasons for national legal reform are influenced by several aspects, namely political, sociological, psychological and practical, so that the need for legal reform in a country becomes an urgent need. According to Barda Nawawi Arief, criminal law reform essentially contains the meaning of an effort to reorient and reform criminal law in accordance with the central socio-political, socio-philosophical and socio-cultural values of Indonesian society which underlie social policy, criminal policy and law enforcement policy in Indonesia (Putra Jaya, 2017).

Legal reform can be carried out through legal discovery, which is obtained from interpretation, analogy, or legal refinement. Law enforcement is not only carried out with the logic of applying the law which relies on the use of logic, but also involves judgment and entering the realm of giving meaning (Hiariej, 2009).

Reform in Criminal Law means renewing it completely and not partially, including legal substance, legal structure and legal culture. Formulation policy/legislative policy can be interpreted as a policy to formulate Positive Law to make it better and also to provide guidance not only to law makers but also to the courts that apply the law and also to the administrators or implementers of court decisions. Such policies are often called "penal policy" which is part of "Modern Criminal Science" alongside "Criminology" and "Criminal law" (Ariyanti & Ramadhan, 2022).

Legal reform can also be interpreted as a process of testing various formulations of applicable legal provisions and statutory regulations, and implementing a number of changes to achieve efficiency, justice and also the opportunity to obtain justice according to applicable law. Actual legal reform occurs when law-making power bodies, namely the judiciary, and legislation-forming bodies, namely the government and legislative power bodies that have power or authority in a country, take the necessary steps to enforce laws and regulations. laws and regulations in force in that country with the hope of determining whether the legal rules and principles contained in the laws and regulations in that country can adequately fulfill their respective objectives and as a system, whether there are still gaps there, whether the legal system in the system has certain undesirable consequences and whether the legal system and applicable laws and regulations are consistent with international standards that bind the country, for example including rights human rights and make the necessary changes to do so.

In the terminology of legal reform, the differences between the terms legal reform and legal renewal are discussed (Yudianto, 2015). In discussing the term legal reform, it is broader than statutory renewal. Behind the terms legal reform and legislative renewal, the names of legal experts are also mentioned. The experts not only discussed their ideas, but also discussed the background of their legal system which uses the term. For the term legal reform, for example, the name of a legal political expert such as Roscoe Pound is mentioned. The jurist came from a legal tradition with a background in the *Anglo-Saxon* political system. Meanwhile, behind the term legislative reform, parties such as Mochtar Kusumaatmadja were appointed, who modified Roscoe Pound's ideas and were motivated by the influence of the continental European system.

Law Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as the "KUHP"), does not regulate the concepts adopted in relation to the meaning of criminal acts or criminal liability. This situation often gives rise to debate, and also differences in the enforcement of criminal law in Indonesia. Although basically most Dutch criminal law teachers are influenced by a monistic view, which basically sees the

issue of "accountability" as part of a "criminal act". This means that a "criminal act" automatically includes the ability to be responsible. In Indonesia, dualistic thinking has been developing for a long time, one of which is specifically influenced by the thinking of Moeljatno, who basically thinks that the concept that separates "criminal acts" from the issue of "criminal responsibility" is considered more in line with the way of thinking of the Indonesian people. This concept seems to have been used as one of the bases for updating the Criminal Code, as seen in chapter II (book I), namely "Criminal Offenses and Criminal Liability".

## Method

The research method used is prescriptive legal research using a statutory approach and a conceptual approach (Marzuki, 2017). The statutory regulatory approach is carried out by reviewing all laws and regulations with the legal issues being discussed, for example the WvS Criminal Code, the National Criminal Code and the Criminal Procedure Code. Meanwhile, the conceptual approach departs from the views of legal experts and doctrines that develop in legal science.

## Discussion

### 1. Shift from Monistic to Dualistic Views in the National Criminal Code

The nature of unlawfulness and wrongdoing, in the criminal law in force in Indonesia, especially the WvS Criminal Code which is still in effect, adheres to a monistic theory which states that unlawfulness *(wederrechtelijkheid)* and wrongdoing *(schuld)* are elements of criminal acts *(strafbaar feit*) (Farid, 2007). The monistic theory is widely followed by several Dutch criminal law experts, and several criminal law experts in Indonesia, for example according to van Hamel that criminal acts are human behavior that is formulated in law, is against the law, which deserves to be punished and is carried out with mistakes (Farid & Hamzah, 2010).

Several criminal law experts who do not agree with the monistic theory, are of the opinion that the situation of criminal law in the Netherlands and Indonesia is irregular, even though error is an absolute characteristic of criminal responsibility, but in practice intentionality and negligence are each considered an element of a criminal act (*strafbaar feit*), and not an element of criminal liability (Moeljatno, 1983). Moeljatno hopes that in drafting the future Criminal Code, as much as possible, separate criminal acts from criminal responsibility, or what is known as a dualistic view. According to Muladi, the dualistic theory was first put forward by a German scholar, namely Herman

Kantorowicz. The dualistic theory emphasizes intent, error and criminal responsibility which are separate from the nature of unlawfulness (Huda, 2006).

According to Tongat, the monistic view in criminal law views criminal acts and criminal responsibility as one unit, while the dualistic view separates the two. These two views have similarities in punishment, but this paradigm shift has an impact on criminal elements. The element of crime in the monistic view is human action; threatened with criminal law; Act against the law; committed with mistakes and capable of taking responsibility, while the elements of criminal acts in a dualistic view are human actions; fulfill the formulation in the law; and is against the law (Tongat, 2022).

In short, if we discuss criminal acts, we will not discuss mistakes, and if we discuss criminal liability, we will not discuss the nature of breaking the law but we must discuss mistakes. According to Eddy Hiarij, after going through a fairly long process, the dualistic view was explicitly accommodated in the National Criminal Code. The National Criminal Code emphasizes the separation of criminal acts and criminal liability. As a consequence, all criminal acts only formulate prohibited objective acts as stated in special provisions, while criminal liability is formulated in general provisions. However, the National Criminal Code does not apply the theory of separation of criminal acts consistently because it still formulates subjective elements in criminal acts committed with negligence. Negligence should be regulated in general provisions accompanied by a note that negligence is only applied to certain criminal acts (Ahmadi, et.al, 2023).

Basically, the National Criminal Code adheres to a dualistic theory as stipulated in Article 12 paragraph (1) of the National Criminal Code which stipulates that, "A criminal act is an act of doing or not doing something, which according to statutory regulations is punishable by a crime." Furthermore, Article 12 paragraph (2) of the National Criminal Code states, "To be declared a criminal act, an act that is punishable by law must also be unlawful or contrary to the laws that exist in society." This is further stated in Article 12 paragraph (3) of the National Criminal Code, "Every criminal act is always deemed to be against the law, unless there is a justification." The above is further emphasized by placing the formulation of criminal responsibility and error in the National Criminal Code.

In Article 37 of the National Criminal Code, it is stated, "Criminal responsibility is the condition that objective blame and subjective blame are met in order for a person to be punished for committing a criminal act." Where further, based on Article 38A, it is stated, "Criminal liability includes elements of capacity for responsibility, intention or

negligence, and there is no excuse." The provisions regarding "Mistakes" are regulated in Article 38 of the National Criminal Code which states, "No one who commits a criminal act can be held responsible without any fault."

The logical consequence of the formulation of the article above is that every criminal act is always committed intentionally, except for certain criminal acts which are committed with negligence. To distinguish between criminal acts committed intentionally and negligently, the National Criminal Code regulates 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 criminal act, because it is regulated in Article 40 paragraph (2) of the National Criminal Code that every criminal act committed intentionally unless the law expressly determines that a criminal act was committed with negligence (Hakim, 2019).

Based on the explanation above, it can be concluded that the use of a dualistic view in the National Criminal Code aims to emphasize the functions of criminal law, so that it can be understood by the wider community as expressed by Paul H. Robinson, "to be effective, the rules of conduct must be simple, based on objective criteria with easily communicable and comprehensible standards" (Robinson. 1990).

Criminal Code Based on the results of research and discussion regarding the Legislative Ratio of changes, additions and deletions of provisions in the National Criminal Code, it is influenced by several aspects, namely political, sociological, psychological and practical aspects, so that the need Legal reform is an urgent need because the provisions in the Colonial Criminal Code are no longer deemed appropriate. 16 Reforming the criminal law (KUHP) is a necessity for the Indonesian people. This is due to the fact that the Indonesian Criminal Code is outdated and not in accordance with current conditions, with indicators that it misses the regulation of existing adult crimes which are increasing day by day.

There are at least four reasons why there is a need to reform the criminal law, namely: 1. From the point of view of the interests of the ideology that created it, it is more dominant, or in other words, the Criminal Code that was created by itself can be seen as a symbol and is a source of pride for a country that has become independent and liberated. themselves from the political colonial environment. The Criminal Code of one country which is forced to be treated in another country, can be seen as a symbol of colonialism by the country that created the Criminal Code. 2. From a sociological point of view, it is clear that the National Criminal Code must reflect the ideology and worldview of the Indonesian people regarding the philosophy and objectives of national

criminal law. This means that the social or cultural values of the nation should be reflected in criminal law regulations. Collective values and views in Indonesian society regarding what is considered good and bad can be used as benchmarks (parameters) for criminalizing an act. 3. From a practical point of view, it feels strange if we apply a regulation to someone who commits a certain act based on a text that is not original or regulations that are translations from private parties and not official translations from the government, as a result the translation is very confusing. young generation. 4. From an adaptive perspective, referring to world developments that are increasingly global in nature.

The new national criminal legislation is expected to be able to anticipate developments at the global level regarding crime and efforts to prevent it. It turns out that the reform of Indonesian criminal law is not only based on political reasons, sociological reasons, practical reasons and adaptive reasons but is also based on national development reasons. UN congresses often state and indicate that the criminal law system that exists so far in several countries, which often originates (imports) from foreign law during the colonial era, is generally outdated and unfair, outdated and not in accordance with reality because it is not rooted in cultural values and even has discrepancies with community aspirations and is not responsive to current social needs, which can be a criminogenic factor. 17 Thus, in the context of reforming criminal law, the enactment of the law can at least be seen from three aspects that are related to each other (relevance), namely: 18 a. Juridical relevance A legal regulation that will be established in society must be a regulation that has been established by an authorized institution (legislature) and if possible be in accordance with the needs of society.

A legal rule is said to have juridical relevance if it is based on a hierarchy of legal norms at a higher level or if the legal rule is formed according to a predetermined method. The possibility of enforcing customary law as material for the formation of national law. In fact, it is supported by a fairly strong juridical basis, especially based on Article 32 (1) and Article 1 of the Transitional Rules of the 1945 Constitution which have been amended. Article 32 (1) of the 1945 Constitution reads: The State promotes Indonesian National Culture amidst world civilization by guaranteeing the people's freedom to maintain and develop their cultural values. Furthermore Article 1 of the Transitional Rules reads: All existing laws and regulations remain in effect as long as new ones are not implemented according to this Constitution. " 19 b. Sociological Relevance Sociological relevance is needed to see and assess the extent of the community's response to the plan to implement a new national criminal law. Therefore,

the law that will be treated must be in accordance with the aspirations of the community, especially customary law which is also called native law. It is born from below or from the traditional community which is in accordance with their interests. With regard to customary law which has a formal legal place in the National Criminal Law System. Pancasila wisdom in representative deliberation and the principles of social justice for all Indonesian people. It should be added that the renewal of the national criminal law system through the current discussion of the Draft Criminal Code Bill must be recognized as an effort to accommodate the aspirations of the majority of religious communities in Indonesia.

Various offenses regarding religion or related to religion have begun to be formulated in the bill, for example regarding insulting religion, obstructing worship or religious ceremonies, destroying religious buildings, insulting God, desecrating religion and belief, and so on. This kind of formulation is impossible to find in criminal law enforced in secular countries, because religious matters are not the state's business and are the individual rights of each citizen. Apart from several articles relating to religious offences, the draft also includes new articles relating to moral offenses, such as various forms of sexual intercourse outside of legal marriage or which violate religious provisions. Of course, there are many other articles related to Indonesia Criminal Law material in the Criminal Code Bill. Steps like the ones above are a positive effort by the government to enforce legal provisions in accordance with the aspirations of the community.

The policy of regulating criminal law in laws outside the Criminal Code is getting stronger day by day, some say, this policy is to surround the Criminal Code for various reasons and divert the development of criminal law into laws outside the Criminal Code. The formation of laws outside the Criminal Code is easier and more flexible without having to change or amend the Criminal Code. Part of the political manifestation of criminal law is clearly illustrated in the formulation of criminal law norms, the threat of criminal sanctions, and criminal procedural law which contains legal rules that deviate from the general provisions of criminal law both in the field of material criminal law (Book I of the Criminal Code) and formal criminal law.

Whether we realize it or not, the formation of criminal law norms and the formulation of threats of criminal sanctions have secretly formed a system for formulating criminal law norms and a system for formulating threats of criminal sanctions that deviate from the General Provisions (Book I of the Criminal Code), thereby forming its own criminal law system outside Criminal Code. For theoreticians,

this kind of development is certainly not encouraging, because in a country whose criminal law system follows the civil system, it is generally known that it only has one national criminal law system, so it is easy to identify what the national criminal law system is. The theory or doctrine of criminal law is developed consistently and law enforcement refers to the theory and doctrine of criminal law which is also consistently followed. When Indonesia was faced with a situation where the development of criminal law was regulated in laws outside the Criminal Code which tended to be partial and in fact there were deviations from the general provisions of criminal law which went too far, inviting a series of legal problems. So, in this case it is necessary to change, add and delete provisions in the national criminal code.

## 2. Implications of a Dualistic View on the Law Enforcement Process at the Court Level

The shift from Monistic to Dualistic views in the National Criminal Code during examinations at trial can 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 the criminal act, if only the element of negligence is included, it will have implications for differences in qualifications. If the element of negligence stated explicitly is not proven, it will result in a decision stating that the maker is acquitted (*vrisjpraak*). The element of intent that is not explicitly stated in the formulation of the criminal act, and the element of intent as an element of liability is not proven, will result in the maker being declared free from all legal charges (*ontslag van alle rechtsvervolging*).

Nevertheless, this effort must continue to be developed so that the benefits can be more comprehensive in line with Andi Hamzah's view, "the separation is only important for the public prosecutor to know when preparing the indictment, because the indictment contains enough of the core part (*bestandeel*) of the offense and the actual actions of the defendant, so just actus reus." Considering the opinion above, it is also very important for legal advisors to prepare a defense. In turn, judges also need to understand this concept when formulating decisions (Wahid & Rafiqi, 2022).

Ideally, the court is a place to obtain justice. In practical terms, the court is a place to separate guilty and innocent people. However, the reality is not always in line with normative ideas. Judges do not always have the awareness in their hearts that one day they will be accountable for the results of their work before God Almighty. Furthermore, in the opinion of the majority of society, judges' decisions often do not reflect a sense of justice. The criminal justice system is precisely where the "criminalization" of policies

and buying and selling of cases is rampant, and even human rights violations often occur.

Linked to the dualistic theory above, in the case of criminal imposition, the court is tasked with giving balanced consideration between the criminal act and the criminal responsibility of the perpetrator of the criminal act as a basis for the imposition of the crime. On the one hand, criminal acts emphasize the legal interests of society which are intended to be protected by legal norms. On the other hand, guilt and criminal responsibility emphasize legal obligations that are based on certain circumstances in the perpetrator of the criminal act. By implementing the dualistic theory in the National Criminal Code, it is hoped that the criminal system will become more balanced between legal certainty and justice that emerges from the judge's decision in criminal cases.

Criminal responsibility is a person's responsibility for a criminal act he or she commits. Criminal liability occurs because a criminal act has been committed by someone. Criminal liability is essentially a mechanism built by criminal law to react to violations of an "agreement to reject" a particular act. 20 In more detail, Sudarto stated that in order for a person to have the aspect of criminal liability, in the sense that the perpetrator is punished, there are several conditions that must be met. fulfilled, namely: 1. There is a criminal act committed by the maker; 2. There is an element of error in the form of intent or negligence; 3. There is a maker who is capable of responsibility: 4. There is no excuse. The person can be said to have made a mistake, if at the time of committing it; Criminal acts, seen from the perspective of society, can be criticized for this, namely why do they commit acts that are detrimental to society even though they are able to know the meaning of these acts, and therefore can even avoid such acts.

With this understanding, the psychological definition of error, which focuses on a particular mental error (psychis) of the maker and the relationship between the internal state and his actions in such a way that the maker can be held responsible for his actions, 23 is not followed because it creates problems in practice. law that is triggered by the absence of the element "intentionally" or "by negligence" in the formulation of a criminal act. In the current Criminal Code, criminal offenses do not contain the element "intentionally" or through negligence. Therefore, legal practice has been filled with questions about whether not formulating the element "intentionally" or due to "negligence" in the offense, causes the perpetrator to still be punished, even if there is no one of the two forms of error. This problem arises and causes doubts about the ability of psychological error theory to explain the problem of error what is done. Not including intentional actions, is a movement caused by reflex, a parrying movement that is not

controlled by consciousness. In this sense, it is stated that intentionality is defined as: "willing and knowing" (*willens en wetens*). an action is done intentionally, one must intend and be aware of the action and/or its consequences.

So, it can be said that deliberate means wanting and knowing what is being done. The person who commits the act intentionally intends the act and besides that knows or is aware of what is being done and the consequences that will arise from it. Placement of intent in the formulation of a criminal act. If in the formulation of a criminal act the term deliberately is used to indicate the presence of an element of intent, then the elements formulated behind the element of intent must be considered to be covered by intent. In other words, it can be said that if in the formulation of a criminal act the term intentionally is used then the elements of the criminal act are located behind the element is imbued with the element of intention. If the element of intent is formulated in the midst of other elements in the formulation of a criminal act, the consequence is that the element which is located behind the element of intent must be considered to be imbued with the element of intent. In the event that intent is not clearly defined in the formulation of the criminal act. If you look closely at the formulation of criminal acts in the Criminal Code, it will also be seen that in several articles of the Criminal Code the element of intent is not formulated at all.

If the formulation of a criminal act does not clearly state the element of intent, then to determine whether the criminal act is Criminal acts that contain elements of intent or not must be carried out with interpretation. The existence of an understanding of legal fiction, namely the principle that assumes everyone knows the law (*presumptio iures de iure*). Everyone is assumed to know the law, including farmers who have not graduated from elementary school, or people who live in rural areas. In Latin there is also the adage ignorantia jurist non excusat, ignorance of the law cannot be forgiven. A person cannot avoid being trapped by the law by arguing that he or she is not aware of the existence of certain laws and regulations. Legal fiction actually has consequences for the Government. Every government official is obliged to convey the existence of certain laws or regulations to the public. If citizens who are not legally literate are then dragged to court even though they really don't know the law, state officials should also feel guilty.

The existence of the principle of legal fiction has been normalized in the explanation of Article 81 of Law Number 12 of 2011 concerning Legislative Regulations, namely "By promulgating the Legislative Regulations in the official gazette as intended in this provision, everyone is deemed to have known about them". The official gazette referred to in the provisions of Article 81 consists of 7 types, namely (a) State Gazette of

the Republic of Indonesia: (b) Supplement to the State Gazette of the Republic of Indonesia; (c) State Gazette of the Republic of Indonesia; (d) Supplement to the State Gazette of the Republic of Indonesia (e). Regional Gazette; (f). Additional Regional Gazette; or (g) Regional News. One of the statutory regulations promulgated in the State Gazette of the Republic of Indonesia is the Supreme Court Regulation, abbreviated as Supreme Court Regulations.

What is meant by Supreme Court Regulations are legal regulations containing and containing provisions regarding judicial procedural law within the Supreme Court and its subordinate judicial institutions as referred to in the Attachment to the Decree of the Chief Justice of the Republic of Indonesia Number Concerning Amendments to the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 271/KMA/SK26 57/KMA/SK/IV/2016 Thus, the implication of deleting the phrase "intentionally" in the National Criminal Code is that there is a principle that assumes everyone knows the law (*presumptio iures de iure*). Thus, every person who commits a criminal act is deemed to have done so intentionally because they know and want the consequences of the criminal act.

## Conclusion

That in the Criminal Code WvS means in the criminal justice system, which has the nature of being against the law (*wederrechtelijkheid*) and mistakes (*schuld*) are elements of criminal acts (*strafbaar feit*) or what is better known as monistic teachings. The WvS Criminal Code does not explain the relationship between criminal liability and the author, but criminal liability is only mentioned solely in relation to forgiving and justifying reasons. As a result, many problems occur in the criminal justice system, where law enforcers prioritize legal certainty over justice. Meanwhile, in criminal law doctrine, there is the principle of no crime without fault" or better known as the dualistic theory. In essence, this teaching separates criminal acts and criminal responsibility. Criminal acts only concern the issue of 'acts', while the issue of whether the 'person' who committed the act can then be held accountable is a different issue. In this context, dualistic theory has a very significant role in overcoming the rigidity of problems in the criminal justice system, especially for law enforcers. So, when there is a clash between legal certainty and justice, what must be prioritized is justice.

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