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IMPLEMENTATION BALANCING IDEA IN THE DEVELOPMENT OF CRIMINAL LAW IN INDONESIA

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Abstract

Development of national criminal law has long been a study and discussion for academics, practitioners and law enforcement in Indonesia. Development or renewal of criminal law would become ideals of the nation to realize laws for all society, because the Criminal Code at this time is considered not answer legal issues in Indonesia, in particular recent developments tends to evoke dissatisfaction of society in law enforcement. Renewal and development of criminal law can not be done on an ad-hoc (partial) but should be fundamental, comprehensive and systemic in the recodifikation form which includes three main problems of criminal law, namely the formulation of the act against the law (criminal act), criminal liability (criminal responsibility) both of the perpetrators as natural human (natural person) nor corporate (corporate criminal responsibility) and the criminal and actions can be applied. Criminal law occupies an important position in the entire legal system in a country. Although it is still questionable benefit in collating orderly and peaceful

society, but increasingly important for studying it facets to support the whole life system in society.

Keywords: Implementation, Idea Balance, Criminal Law.

A. Introduction

Indonesia is a state of law based on Pancasila and the Constitution of Republic Indonesia 1945 (UUD 1945), it can be called a State of Law Pancasila which has been contained and defined in Section : 1 (3) UUD 1945, as follows : "The State Indonesia is a State of Law ", aimed toward improved life of the nation peaceful, safe , orderly , prosperous and equitable. For realizing the purpose, it is not as easy as turning the palm of the hand , because a lot of issues and problems must be faced by Indonesia, particularly legal problems.

National goals as has been willpower of the founding fathers is stipulated in the preamble of UUD 1945, i.e. to protect the entire Indonesian nation and the entire country of Indonesia, promote the general welfare, the intellectual of life nation, and participate in the world establishment based on freedom, lasting peace and social justice. To achieve the national goal, our constitution also mandates to realize the ideals of democracy based on law or embodies state of law that sovereignty of the people (Sri Endah Wahyuningsih, 2013:15).

Awareness to develop the state law is consistent with stage of national improvement and in accordance with the way of life and sense of justice, is basically already laid after the proclamation of independence on August 17, 1945, the day followed by ratification of the Constitution of the Republic of Indonesia in 1945. Provision of transitional rules of Article II UUD 1945 still provide space for legislation from the colonial era, in addition temporary, also be seen as a mandate to form the new legislation is based on UUD 1945 ((Sri Endah Wahyuningsih, 2013:16).

Indonesia as a legal state also need to understand development of the world giving lot attention to human rights, so in the reform era a major agenda require changes in the governance system of national and state. One of the changes stand out are the protection of citizens right with regard to human rights itself.

In the protection of Human Rights has many safeguards that have been clearly and firmly set in legislation as set out in the children Act, protection of women, domestic violence and so forth hereinafter and witness protection nearly forgotten in the reform agenda. This proves there is discrimination in legal protection, when inception of Witness Protection Act was delayed for five years.

Needs to be understood that one of the legal evidence in criminal proceedings is the testimony of witnesses and/or victims who hear, see, or has experience the occurrence of a crime in an effort to seek and find clarity about the criminal acts committed by the offender. Law enforcement in the looking for and find clarity about criminal offenses committed by perpetrators often have distress because they could not present witnesses and/or victims due to the threat, both physically and psychologically from a particular party. In that connection, the necessary protection for witnesses and/or victims is great importance in the process of criminal justice.

B. Balancing Idea In The Development Of Criminal Law

Problems encountered in the process of criminal justice is, in a criminal case there is only one witness who confronted. Whereas in the criminal justice apply the principle of unus testis nulus testis, which means that one witness is not a witness, if not supported by other evidence, the verdict will be tangible free verdict from all charges.

Witness is a person who can provide information for the purpose of inquiry, investigation, prosecution, and examination before the court on a criminal case that he heard,

sees, and/or he experienced himself. Witness testimony is one type of evidence in criminal cases in form of witness testimony about a criminal and he heard, he saw himself and his own experience citing the reason and knowledge (Nyoman Serikat Putera Jaya,2004:35).

Based on description it can be taken the problem as follows :

1 How does the idea of balance should be realized or implemented (formulated) in the Development of the Indonesian Criminal Law?
2 Why implementation of balance idea in the Criminal Law Development of Indonesia did not reflect the values of justice?

Moeljatno – a scholar of criminal Indonesia leading – formulating criminal law covering material and formal criminal law, as contemplated by the Enschede-Heijder with systematically criminal law, as follows : "The criminal law is part rather than the whole law in a countries, which hold the basics and rules for :

a) Determine the acts which should not be done, which is prohibited , with the threat or function (Sic) in the form of certain criminal for anyone who violated the ban.
b) Determine when and in what matters to those who have violated the restrictions that may be imposed or sentenced as threatened.
c) Determine in what way imposition of criminal it can be implemented if someone is suspected of having violated the ban" (Moeljatno, 2002:1).

Moeljatno formulating materiel criminal law in points 1 and 2, while the formal criminal law in point 3. He formulated the substantive criminal law by separating the formulation of the offense and the sanctions in point 1 while the criminal liability clause 2.

State law is a state stands on the law, guarantees justice to its all citizens. Justice is a prerequisite for achieving happiness in life for its citizens and as the basis of justice needs to be taught a sense of decency to every human being so that he becomes a good citizen. According to Aristotle who ruled the state is not a real man, but a fair mind, whereas in fact only holds legal authorities and balance (Moh.Kusnardi dan Harmaily Ibrahim, 1988:153-154).

State of Law is a country stands on the law, to ensure fairness to citizens. Decency will determine whether or not a rule of law and law-making are some skills to govern the country. Therefore, it is important to educate people become good citizens, because attitude of fair will be guaranteed the happiness of life.

Every country adopts a state of law, enactment of three basic principles, namely : supremacy of law, equality before the law, and law enforcement not in conflict with the law (due process of law). Regard the mean of State based on law, Kusumaatmadja Muchtar said that the deepest meaning of the state of law is : " ...authority obey of law and all equal before the law"(Mochtar Kusumaatmadja , 2002: 12). Any action committed by people and the authorities should be accountable legally.

To consider carefully the Criminal Code as a whole, especially the editorial and content contained in the "preamble" and contained in the general explanation, contained in item 3, can we describe some grounding motivation Criminal Code as the law of criminal procedure. The cornerstone of the motivation was to be "understood and guided" in any law enforcement for all parties involved in the process of examination of criminal offenses. Without understanding the motivations grounding guidelines, the formulation of the Criminal Procedure Code in the implementation will be detached from the ideal targets, principles, and goals to be achieved.

The cornerstone of motivation into the steering

compass for law enforcement officers in the application and interpretation of the formula implicit in the Criminal Procedure Code. Every movement of law enforcement carried out by law enforcement officers in konkreto, must be linked and tested by grounding motivation Criminal Code, "integrally" with all the motivation runway. Should not be linked and tested partially limited to just one cornerstone of motivation alone.

If observed the whole Criminal Code closely, especially the editorial and content in the "preamble" and in the general explanation item 3, can we describe some grounding motivation Criminal Code as criminal law procedure. The cornerstone of the motivation was to be "understood and guided" in any law enforcement for all parties involved in the process of examination of criminal offenses. Without understanding the motivations grounding guidelines, the formulation of the Criminal Procedure Code in the implementation will be detached from the ideal targets, principles, and goals to be achieved.

The base of motivation become compass for law enforcement officers in the application and interpretation of formula implicit in the Criminal Procedure Code. Every movement of law enforcement carried out by law enforcement officers in concreto, be linked and testesd by grounding motivation Criminal Code, "integrally" with all the motivation runway. Should not be linked and tested partially limited to just one base of motivation.

This means, law enforcement officials should look and perform the formulation of whole Criminal Code integrally to the whole foundation of motivation Criminal Code, ranging from the philosophical framework contained in Pancasila, the constitutional basis contained in the 1945 Constitution and the laws principal judicial power No.14/1970, operational framework outlined Tap. MPR No. IV / 1978 and base of the goals outlined in the preamble part of the Criminal Procedure

Code.

Law enforcement officers in the implementation of Code of Criminal Procedure, may not associate and tested partially. Must not test and interpretation of the Code of Criminal Procedure associate with the philosophical foundations only. Or simply by grounding motivation purposes. Every interpretation, every execution, and any results of the implementation to be achieved, should be fully linked and tested with earlier motivational foundation (M. Yahya Harahap, 2005:19-20).

Barda Nawawi Arief said , the idea of balance consist of:

a) Monodualistic balance between the "public interest/ community." And "the interests of the individuals";
b) The interests between the "general interest/individual." It included the idea of victims protection/interests and criminal individualization idea;
c) The balance between the elements/factors "objective" (action/outward) and "subjective" (person/spiritual/ mental attitude;
d) The balance between the criteria of "formal" and "material";
e) The balance of national values and the values of global/ international/universal;
f) The balance between "legal certainty", "provision elastisistas/flexibility" and "justice" (Barda Nawawi Arief, 2003:48).

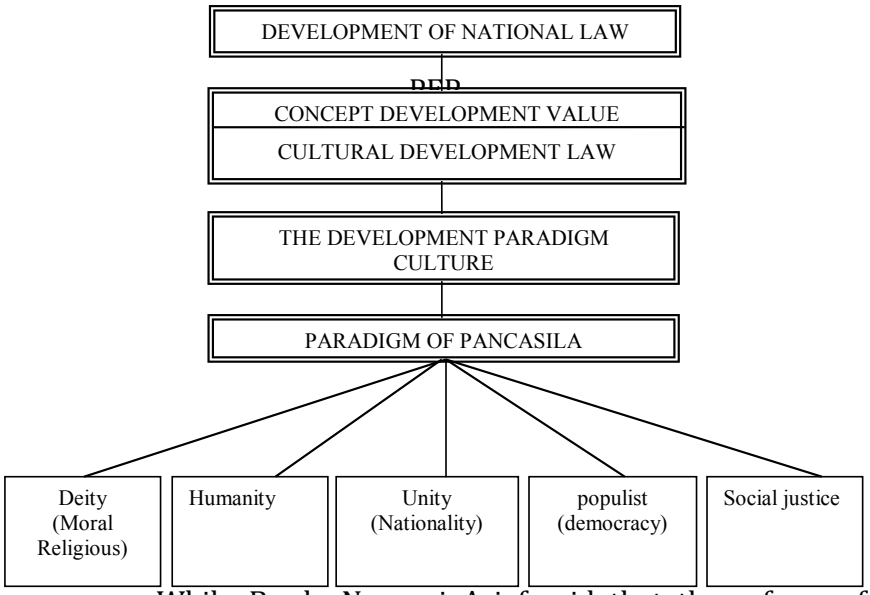
As for some caracteristic principles individualization of criminal according Barda Nawawi Arief as follows :

A. Accountability (criminal) personal/individual (personal principle);
B. Criminal only given to the guilty (culpabilitas principle : "no punishment without guilt");
C. Criminal should be tailored to the characteristics and conditions of the offender; This means there should be leniency/flexibility for selecting criminal sanctions (the type and severity of sanctions) and there must be the

possibility of criminal modification (change/adjustment) in its implementation.

C. Development Of National Law

For more details, Barda Nawawi describe the diagram below (Barda Nawawi Arief, 1994:19) :



While Barda Nawawi Arief said that the reform of criminal law is essentially an attempt to conduct a review and reappraisal ("reorientation and re-evaluation") values of socio-political, socio-philosophic and socio-cultural underlying and give content of the charges normative and substantive criminal law aspired (Barda Nawawi Arief, 1994:32).

As part of the development effort of national law Barda Nawawi Arief said that the renewal of the criminal law must be taken by policy-oriented approach and at the same time on value-oriented approach.

Further illustrated by Barda Nawawi Arief in a writing that reform of criminal law must be carried out with the policy, because it is only part of a policy measure (i.e part of the political law/law of enforcement, political criminal law, political

criminal, and social politics). In each policy also contained value judgments, criminal law reform should be oriented on the value approach (Barda Nawawi Arief, 1994:31).

Law enforcement as a process, is essentially an application of discretion regarding the decision-making that are not strictly governed by the rule of law, but has an element of personal judgment. Therefore it can be said, law enforcement is not merely mean the implementation of legislation, although in fact the tendency thus in Indonesia (Soerjono Soekanto, 2004:7).

Based on explanations above it can be tentative conclusions, the main problem the law enforcement lies on factors may affect it. These factors have neutral meaning, positive or negative impact lies on the content of these factors.

The factors are as follows :

1 Factors of law, this paper is restricted to laws.
2 Factors of law enforcement, the parties have to establish and apply the law.
3 Factors and facilities support law enforcement.
4 Factors of society, local environment where the law work/ apply or applied.
5 The cultural factor, i.e as a result of works, creativity, taste and intention which based on the human being in the social life of community.

These five factors mentioned above are closely interrelated, is the essence of law, also a measure of the effectiveness of law enforcement. Law enforcement of criminal act has potential problems. According to Robert B. Seidman, to see the operation or functioning of law in society can be seen from three elements, namely: regulatory agencies; regulations implementing agencies; and stakeholder role (Pusat Studi hukum dan Pembangunan Fakultas Hukum Universitas Airlangga;1977).

Three elements as very fundamental thing in supporting function of law or operation of the law is well

within the community. It should be an optimal functionof the law with their roles. According Muladi, objectives of Criminal Justice System (Sistem Peradilan Pidana/SPP) consists of :

1) The short-term goal, if want to achieved is social reintegration and rehabilitation of the offender.
2) The medium-term goal, if the intended wider the control and prevention of crime in the context of a political crime (criminal policy).
3) The long-term goal, if achieved is the public welfare (social welfare) in the context of social policy (social policy) (Muladi,1988:2).

The purpose of criminal justice system proposed Muladi above indicate administration of criminal sanctions for resocialization and rehabilitation of the offender and other purposes of punishment is as means of tackling crime or as a community control. The success of SPP are always influenced by the other systems that exist in society.

The criminal justice system is a system for enforcing criminal law often leads to incarceration (resocialization). Imprisonment institutions as one of the goals of the criminal justice system is influenced by people who appear stigma given on, often thwarting the success of resocialization process.

According Muladi, SPP is also the network trial using material criminal law, formal criminal law and the implementation of criminal law. Indonesian Criminal Justice System took place through three basic components of the system are:

1. Substance, is the result or product system including Law No. 8 of 1981.
2. The structure, are the institutions in the legal system consistof police, prosecutors, Courts and Prisons.
3. Culture, which how the system would actually be empowered or an activator of the criminal justice system (Muladi,1995:13).

The criminal justice system is an open system, in terms

of the criminal justice system in motion will always have the interface (interaction, interconnection and interdependence) with the environment in the ranks of society : economic, political, educational and technology as well as subsystems of the criminal justice system itself .

Punishment theories generally can be grouped into three major categories, namely :

1. The absolute theory or theory of retaliation (*vergeldigns Theorien*).
2. The relative theory or theory of objective (*doel Theorien*).
3. The combines Theory (*verenigings Theorien*)(E.Utrecht, 1958. p.157).

A clearer description of the theories of punishment, will be discussed.

a) The absolute theory or the theory of retaliation *(Retributive/Vergeldings Theorien).*

According to this theory the criminal was dropped solely because the person has committed a crime or a criminal act (*peccatum est quia*) and crime as result absolutely must exist as a retaliation against the person who committed the crime. Famous figures who put forward the theory of retaliation among others are Kant and Hegel.

They assumed that the punishment is a consequence of the crime does. Cause of crimes, the result must be punished. It is an absolute punishment for those who commit crimes. The function of criminal here is the recompense of those who do crime and to satisfy the demands of justice, so the existence of punishment itself depends on the existence of crime (Muladi dan Barda Nawawi Arif,1998:11).

b) The relative theory or theories destination *(Utilitarian/ Doel Theorien).*

According to this theory, punishment is not to satisfy the demands of absolute justice. Retaliation itself has no value but only as a means to protect the interests of the public and reduce crime frequency. This is beneficial goal then the

relative theory called the theory of objective (utilitarian theory) where the punishment was dropped not because person has made a crime (*peccatum est quia*) but cause of people do not commit crimes again (*nepeccetur*) (Muladi dan Barda Nawawi Arif,1998:16).

According to the theory, criminal punishment purpose to prevent society order is not disturbed or revenge the offender, but to maintain public order.

In criminal science, the theory of relative can be divided by 2 (two), namely :

1) *generale preventi (* M. Sholehuddin, 2003:76) ;
   In essence, it emphasizes that purpose of criminal prevention is to maintain public order of official interference. By convict criminals, it is expected other community members would not commit a crime.
2) *speciale preventie*;
   this prevention emphasizes purpose of sanction intended the convicted person not to perform or repeat his actions again, it serves to educate and improve the convict in order to become a good and useful member of public, in accordance with the dignity and values.

c) *Verenings theorien.*
   it's a combination of sanction purpose other revenge an error, also intended to protect the public to realize the order(M. Sholehuddin, 2003:76).

Thus the punishment is a protection against society and retaliation against the law. Above descriptions able to explain the criminal justice system has many limitations in controlling crime.

This proved the participation of Indonesia in several international conventions. These conventions always based on the principles that the national interest should precedence. International criminal law known as "universal jurisdiction" and "*jus cogens*". "Universal jurisdiction" defined as a system of international justice gives to a national courts jurisdiction

over crimes of serious human rights violations regardless of where and when the crime was committed and the nationality of victims and perpetrators. While the "*jus cogens*" is a doctrine in international law based on the Vienna Convention of 1986 relating to the law that is forced to be implemented by all countries (*obligatio erga omnes*) such as genocide, slave trade, racial discrimination, and crimes against humanity, which is the higher law. In this case, the principle is a country should prosecute or extradite without provision expired, perpetrators immunity or because on the orders of superiors and it apply universal jurisdiction (Muladi, 2011:364).

We conscious, a set of laws that do not have a principle or principles of law, can not be said to be an effective legal and can not be regarded as capable of standing to challenge the bad faith of its implementation. From the description above, let us try to look for and find the cornerstone legal principles contained in the Criminal Procedure Code. Perhaps among the principles will be outlined, different from that found in the Criminal Procedure Code. However, the meaning and purpose in line with meant by the Criminal Procedure Code (Yahya Harahap, 2005:35) .

1. principle of Legality
2. principle of balance
3. Presumption of innocence
4. Restrictions principle Detention
5. Principle of Compensation and Rehabilitation
6. principle Unification
7. Functional differentiation principle
8. The principle of mutual coordination
9. Principle of Simple Justice, Fast and Cost Lightweight
10. Principles of Open Public Justice

Article 1 of the Criminal Code which contains the principle of legality, according to PAF Lamintang formulation in Dutch "*Geen feit is strafbaar* and *kracht uit van eene daaraan voorafgegane wettelijke strafbepaling "*, which means no one

act can be imprisoned, except under the provisions of criminal law according to the first law rather than the offense itself. According to the Moeljatno, principle of legality is usually contains three terms, namely :

1. no prohibited and punishable if has not been stated in the rules of law;
2. to determine the existence of a criminal act should not be used analogy (*kiyas*);
3. The rules of criminal law is not retroactive (Moeljatno, 2002:35).

   Guilt of defendant and criminal sanctions can not be imposed based on judge feelings, but must be a theoretical justification that can be justified by the judge. Likewise, the victims of criminal acts must be considered, the rights owned, the losses suffered both physically and psychologically. General discretion can be interpreted as an authority to take decisions or choose different actions in solving the problem being addressed does not contradict with the law and provide a sense of justice (Mahmud Chadawi, 2009:8).

While restorative justice is a model approach in solving criminal cases are also on call with restorative justice, it is focuses on the direct participation of actors, victims and society out of court (O.C.Kaligis, 2008). Effort to reform national criminal law (Criminal Code) currently being done, especially in replacing the context of the Criminal Code from the colonial era, indeed require a critical and constructive comparative study materials. Moreover, from the standpoint of comparative law, criminal law system according to the Criminal Code/WvS derived from the colonial era (including family law "Civil Law System" or "the Romano-Germanic Family", which is oriented to the values of "individualism/liberalism") was not only system or a concept to solve legal problems. There are a concept or the other legal systems should be reviewed to further strengthen efforts for reforming criminal law in

Indonesia. Therefore, it should be done comparative studies or alternative studies.

One alternative assessment/comparison of urgency and in accordance with national law reform idea today is the study of family law being closer to the community characteristic and legal sources in Indonesia. Characteristics of Indonesian society is more monodualistic and pluralistic; and based on the conclusions of national seminars, national legal sources expected legal values oriented live in the community, which is derived from the values of customary law and religious law. Therefore, it is necessary to study the comparison of the corner of "traditional family and religious law" such comparative studies are not only a necessary, but also necessity.

The desire to hold a national codification of the Penal Code drawn up by the young of Indonesia itself, the source is extracted from the own Indonesia with regard to the development of the modern world in the field of criminal law, has long been initiated at various occasions including the National Law Seminar. Concrete efforts towards achieving the desire, can be seen the effort of Basaruddin and Iskandar Situmorang, who drafting Book I of the Criminal Code in 1971 and Penal Code Book II in 1976. Since 1979, has established the Criminal Law Assessment Team, was given the task of drafting the new Criminal Code by the Government (Ministry of Justice in this case the National Law Development Agency). In that year was composed of materials necessary for that purpose(Andi Hamzah,2008:25-26).

In the opinion of the author, it can be said at the time of this writing drafted (May 1991), 99% work drafting Book I of the Criminal Code has been completed and 80% work compile Book II of the Criminal Code have been achieved anyway. A striking difference between the draft and the Criminal Code (old) is the only design consists of two books, while the Criminal Code (old) equal to WvS Netherlands consists of three books. By itself the difference between crime

and offense in the draft was abolished. So, together with the Criminal Code of Germany, Japan, Korea and others. But 95% Book II material together with the old Criminal Code and WvS Netherlands(Andi Hamzah,2008:26).

The draft Criminal Code be reviewed or seen from the angle/aspects of the unitary system of criminal law are :

a. Penal Code only a part/subsystem of the criminal system or part of the criminal law enforcement system. By Karen was realized efforts to reform criminal law in Indonesia can not be done simply by submitting a draft of the Criminal Code, but also be accompanied by legislation draft on criminal procedure and law enforcement.
b. Preparation of criminal law material/substantive essentially a compilation of systems it aims functioning of the policy/ operation of the criminal law and it is part of the stages of. Hence, there should be a unified and chain entanglement between stages of making and the implementation phase (Barda Nawawi Arief, 2005:2-5).

Briefly criminal system can be defined as the system of criminal punishment. System of criminal punishment (criminal system) can be viewed from two angles :

1. Functional Angle
   Criminal system from the point of operation/functioning of/process, can be defined as :
   a. The entire system (rule of law) for the functionalization/ operationalization/concretization criminal.
   b. The entire system (rule of law) that governs how the criminal law enforced or operationalized in concrete terms till someone sentenced to criminal sanctions(Barda Nawawi Arief,2005:261).
2. Norma-Substantive Angle
   Only seen of substantive criminal law norms, criminal system can be defined as :
   a. The entire system of rules/norms of criminal law for criminal prosecution material .

b. The entire system of rules/norms of criminal law material for granting/imposition and enforcement of criminal law .

Based on the description above, the overall legislation in the Criminal Code and outside the Penal Code, in essence is the unity of punishment system, which consists of general and special rules. The general rule contained in Book I of the Penal Code and the special rules contained in book II and Book III of the Criminal Code and in specific laws outside the Penal Code (Barda Nawawi Arief,2005:262).

Renewal and development of criminal law can not be done on an ad-hoc (partial) but should be fundamental, comprehensive and systemic in the recodification form which includes three main problems of criminal law, namely the formulation of the act against the law (criminal act), criminal liability (criminal responsibility) from the perpetrators of human natural (natural person) and corporate (corporate criminal responsibility) and the criminal and actions can be applied (Muladi dan Diah Sulistyani, 2013).

Criminal Code reform totally starts with the resolution of National Law Seminar I 1963 in Jakarta, which urged the National Criminal Code finish in recent time (Barda Nawawi Arief, 2008:6-7).

On the other side, terms of the Criminal Code substance now arguably outdated (Andi Zainal Abidin Farid dan Andi Hamzah, 2006:1). Said to be out of date because it has many provisions that are no longer valid. Sudarto said, there are three reasons why it necessary to reform the Criminal Code (Sudarto, 1983:66) :

1. In terms of politics;

   Indonesia have been independent and reasonable to have its Criminal Code, it own created. Criminal Code which itself created can be seen as a symbol (symbol) and pride of independent country and break away from other country and escape the confines of political colonization.

2. In light of sociological;
   Setting in criminal law is a reflection of the political ideology of a nation where the law is developing. This means that social values and culture of people have a place in the setting of criminal law. Results of research conducted founding national law institute in 1973 in three areas, Aceh, Bali and Manado, it is known there are many desires of some people who have not been accommodated in the Criminal Code.
3. In light of everyday practice
   Today nobody aware official text of the Criminal Code is still written in Dutch. The text contained in the Criminal Code compiled by Moeljatno and R. Susilo and others it is a mere translation ; translation of "private" and not an official translation approved by law. In connection with the fact, it is actually for applying the Criminal Code, have to understand Dutch. This may be expected from an independent nation and has its own national language. By its angle, the Criminal Code have to be replaced by a national Criminal Code.

D. Conclusion

The idea of balance is actualized/realized/implemented in three material/substance/the central issue in the development of criminal law, namely the problem of "criminal acts or acts against the law", problem of "criminal liability or fault (criminal responsibility), "and the problem of "criminal" and "punishment" in "criminal offense", the implementation of balancing idea sources problem of law-oriented (principle or foundation of legality) which in addition to legal or grounding formal legality (based law), as the main base, but also based on legality of the material by gave place of the law it live in the community (the living law) but the concept gave guideline in accordance with the principles of Pancasila.

Law enforcement as a process, essentially an application of discretion regard for decision-making that are not strictly governed by the rule of law, but has an element of

personal judgment. Therefore it can be said, law enforcement is not merely mean the implementation of legislation, but should be based on the idea of balance justice although in fact the tendency thus in Indonesia

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