

THE PARADIGM RECONSTRUCTION OF INDONESIAN JUDGE'S THOUGHT OF LAW IN ADJUDICATING CRIMINAL CASES

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ABSTRACT

Construction of legal thought of the Indonesian criminal judge is guided by the Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana/ KUHP*) which based on the positivistic paradigm that is directed to the principle of legality, as the expression of deductive syllogisms. The existence of all elements of the offense formulation indicates not only the unlawfulness character but also the fault or criminal liability. This research finds the verdict constructed by legal thought which is different from positivistic paradigm. The verdict was constructed by unlawfulness character which consider misconduct in the view of the public (construction of unlawfulness character) or the construction of fault covered the objective view of person mental condition where the fault can be done or avoided, and punishment considers the balance of the person need, victim and society. However, walking out of legal thought of positivistic paradigm domain is not easy because there are many internal, external or legal aspects that influence strongly. Thus, it is necessary to find the way to rebuild the construction of legal thought of criminal judge equitably. The objections of this research are to know and understand, the factors that affect the judge's legal thought of paradigm, and to find ways that can reconstruct the paradigm judge's thought of criminal law which accommodate law and justice. This study used double type of research technics, doctrinal research at once by used data collection techniques of the study of librarianship and empirical research by observation and interview. Data analysis techniques using qualitative analysis of model interactive. This research concludes that the judge paradigm legal thought is not determinism because of strong influence of many aspects such as internal, external as well as the legal aspects, although in some cases, it could obtain the true principle of justice by applying the objective or material elements on criminal construction.

Key words: paradigm, the unlawfulness, fault, criminal responsibility, punishment.

A. INTRODUCTION

One of Indonesia big issues in the law implementation is how to enforce it fairly, where all citizens feel get legal protection. The existence of a different verdict over similar criminal events, cause a big question about what underlies the differences.

Sentencing is connected with the judge comprehension (*verstehen*) and interpretation over legislation and legal events. Comprehension and interpretation of judges form a construction of law, that is a reflection of the point of views or paradigm of legal thought when handling a lawsuit. A different paradigm is surely going to produce a different verdict.¹

Legal reasoning of Indonesia Criminal Code is based on three pillars: a) dealing with *criminal deeds* (*strafbaarfeit*, criminal offense, *actus reus*), b) relating to *a person* (criminal liability, fault, *schuld*, guilty, *mens rea*), and c) punishment (*straf, poena*, sentencing).² The three pillars are formulation of criminal construction related to the issue of whether the act of the defendant meets the elements of *unlawfulness*, and whether there is a guilty on the defendant because of the liability base on fault (*geen straf zonder schuld*) unless there are no reasons for criminal responsibility. Through the paradigm³ of law will form the three pillars of criminal law as the figure (*gesamt*) of law in accordance with thought of law, namely the positivistic paradigm which aimed at legal certainty, or paradigm values aimed at justice.

Shape of Indonesia criminal law is based on the book of criminal code act of Dutch colonial heritage (*Het Wetboek van Strafrecht voor Nederlands Indie, Staatblaad-1918*), which still applies on the basis of Act No. 1 of 1946. Though the changes have been partial towards the Criminal Code, but the changes are not fundamental, because in fact the principles and the basics of Indonesian criminal law is still based on the colonial criminal jurisprudence and colonial practice.⁴

¹ In the circumscription of *Rule of Recognition* state that "were the norm different in content from what is...- the result for which the norm calls would be different" (Matthew H. Kramer, *Where Law and Morality Meet*, Oxford University Press, United Kingdom, 2012, hlm. 19).

² Barda Nawawi Arief, *The Formulation of Criminal Act Policy*, Semarang, UNDIP, 2012, p. 5.

³ According to Thomas Kuhn, Paradigm is a set of values that make up a person's mindset as a starting point of views that will form a subjective image of someone about reality and finally will determine how someone responds to that reality. (Thomas S Kuhn, *The Structure of Scientific Revolution, Peran Paradigma dalam Revolusi Sains*, PT Remaja Rosdakarya, Bandung, 2012, p. 22)

⁴ Barda Nawawi Arief, *The reform of the judicial system (the system of law enforcement) in Indonesia*, Semarang, UNDIP, 2012, pp.13-14. According to Brianz Tanamaha, the domination of colonizing power over indigenous law because the

Paradigms of positivistic law of the Criminal Code is historically can be traced from the provisions of articles 20 and 21 *Algemene Bepalingen van Wetgeving voor Indonesie/AB (Staatsblad 1847-23)* which specifies prohibited judge assessing the contents and the Justice of the law, and should not create common rules in an award. Therefore, the judge thought of the criminal law construction basically hold on legal thought paradigm of positivistic or legalism.

Indonesia has plural legal systems (customary law, civil law, common law, and Islamic Law), that affect the change of the social life communities and problems, which in fact it cannot be accommodated by legislation alone. The community requires verdicts voiced a sense of fairness of the various interests.

Though the basic construction of the paradigm of judge's legal thought is positivistic, but in some cases, they have applied thought that considers the values of community life, and capability of changing the construction not only as being the *formyl unlawfulness* as prohibited by the Statute, but also cleared on construction of *conduct* according to the community views, or construction *fault* that includes an objective view of the inner state of offender i.e. whether faults be reprehensible and inevitable. In punishment, the values of paradigm are able to maintain the balance interests of individual and community, takes account of the result of the deplorable *conduct* for the public interest.

Nevertheless, creating a balance between various interests is not easy, because the judges are not in a vacuum space when judging. Many factors are influenced in shaping the figure (*gesamt*) of law. It is not wrong when a judgement based on legal formalities, because various things are contributed to form such a decision. However, the society thinks that decision is not on their side. The influential factors which is legal or extra

This is done by the question of why the paradigm of judge's thought of criminal law is positivism, which viewed the law as it is in the book as written. For this reasons, the research will be concentrated on studies of legal *verstehen* of the judge's decisions, which is normative research. But in fact, the judge always adds extra private legal consideration in the form of his experience in life so that his decision is more functional.⁵ Examining how and why the judge make decisions in adjudicating criminal cases is the empirical law research, study of the law as it is decided by the judge through the judicial processes or judge behavior. In researching this behavior researcher will revealed the concept of natural law as a fact subject to uniformity observed, and as patterns of action that embodies the meaning of the system (manifestation of the symbolic).⁶

This paper will be served as empirical law research and normative law research. The researcher will collect the primary data from the field to study form words or actions by interview directly to Supervisory Secretary RI Supreme Court. The secondary data was obtained from the literature, which include the primary legal materials, secondary and tertiary. In accordance with the method used, the analysis of this research was using qualitative analysis that uses interactive models of analysis.

B. TWO LEGAL THOUGHT PARADIGMS

Taking the opinion of Matthew H Kramer on moderate legal positivism⁷, Kelik Wardoyo,⁸ Satjipto Rahardjo,⁹ J.J.H. Bruggink¹⁰, the paradigm of Indonesia legal experts (includes judges) in dichotomy is divided into two: *first*, that the understanding of the law as positive law, is an autonomous institution, separate from the values, morals, and all the elements that play a role in the formation of the law (such as justice, political, sociology, psychology). Positivistic view holds on the theory of correspondence truth. The 'truth' is the similarity between the theory and the reality. Positivistic view gives high respect on human senses; works objectively portray a world of fact as is without converting it. It's only informative propositions that give knowledge, not a normative proposition or the subjective evaluative. *Second*, the view of the law is not just something that is positive, but rather than a social structure and behavior, which tends to follow a stream of Critical Legal Studies, namely the paradigm of values or normative view. Understanding of the law as the embodiment of the values will carry on using methods that are idealistic in order to understand the meaning of Justice. The normative paradigm follows the pragmatic theory of truth, it is considered as truth if it is functioning satisfactorily.

Positivistic paradigm was based on the philosophy of rational paradigm August Comte, the originator of the science method, it describes and explains patterns of social behavior to a certain extend predictable occurrence. Think positivistic is thinking *nonteleologic* (do not aim at the finals), so that each result of the logical received as a consequence of the occurrence of a cause. Positivistic paradigm does not accept the rule of human being/other things. Each incident and human action, cannot be explained from its substance (moral altruistic), rather than appear in forms that visible. While the paradigm of values, tends to be transformative, that touches the aspects of the normative and doctrinal solely, and attempts to transform critical phenomena of

customary law officially recognized by the system was often limited to family law issues, minor crimes, issues unique to the customary or religious law, and minor disputes. Often repugnancy or supremacy clauses were enacted that invalidated particularly offensive (by the coloniser's standart) local law or practices, and often the official state court often would have final authority over indigenous court (Brianz Tanamaha, Understanding Legal Pluralism, *Sydney Law Review*, Vol. 30:375, 2008, pp. 383-384).

⁵ Burhan Ashofa, *Legal Research*, Rineka Cipta, Jakarta, 2010, p.45.

⁶ Bernard Arief Sidharta, *The Reflection Structure of Law*, Mandar Maju, Bandung, 2009, pp. 47-48.

⁷ See Matthew H Kramer, *Where and Morality Meet*, Oxford Univ. Press, United Kingdom, 2012.

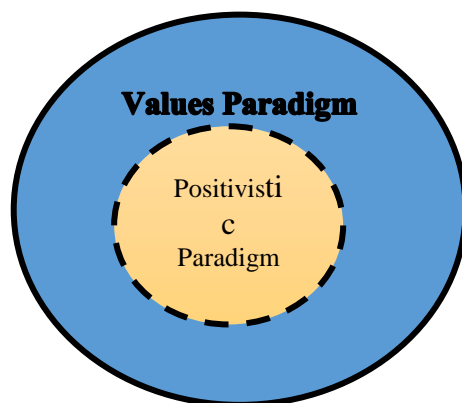
⁸ Dimiyati, Khudzaifah and Kelik Wardiono, *Rasional Paradigm in Legal Science, Epistemology Base: Pure Theory of Law Hans Kelsen*, Genta Publishing, Yogyakarta, 2014, p. vi.

⁹ Satjipto Rahardjo, *Legal Science*, Alumni, Jakarta, 1982, p.6

¹⁰ J.J.H.Bruggink, *The Reflection of Law: Basic definitions in the theory of law*, Citra Aditya Bakti, Bandung, 2011, pp. 184-

empirical level (the social value) into the philosophical theory.¹¹ Analyzing judge's behavior in understanding the law, the author use the theory "Moderate Legal Positivist or moderate Incorporationist Rule of Recognition on hard cases by Matthew H Kramer. The opinion of Matthew H. Kramers is the answers for judges in interpreting the law flexibly, not releasing the extent of moral consideration. The principles of moral are only applied in *hard cases* or cases which are not entirely consonant with the true principle of the law.¹² When looking at fairness as a goal, the positivistic thought of law and justice is not separated parts or transformation of values paradigm.

Positivistic paradigm with position values paradigm can be illustrated as follows



C. LEGAL CONSTRUCTION OF JUDGE THOUGH ON CRIMINAL LAW: FORMULATING OF UNLAWFULLNESS, LIABILITY AND PUNISHMENT

There are two major theories in criminal law: *monistic* theory and *dualistic* theory. The Indonesia's Criminal Code apply *monistic* theory in formulating criminal acts, which includes *fault* both as the element of criminal act and element of criminal responsibility. *Monistic* theory is based on the principle of *liability based on fault* (*geen straf zonder schuld*). The fulfillment all elements of crime proves the criminal act which in turn resulting punishment of defendant. A proven criminal act will assure criminal responsibility. The defendant will get punishment unless there is an exculpation reasons (*strafuitluitings gronden*).

Dualistic theory states that the element of criminal act is not only unlawfulness, but also the absence of justifying reasons. *Dualistic* theory separate *act* and criminal responsibility, because the element of a criminal offence is simply an 'act', not a 'fault' (*schuld*). The form of the *act* element is the 'act' against the law (*unlawfulness*), while 'fault' is element of criminal responsibility. The crime is simply included course of 'act' (*actus reus*) element, the issue of the criminal responsibility only concern with "person" who committed the crime (a subjective nature). Fault (*schuld*) is the deciding factor of criminal liability (*strafbaar feit*), then the items expressly as a main of 'fault' must be removed from elements of the criminal act.¹³

Even so, certain things have happened on the changes or intermingling of the application of the theory *monistic and dualistic*, so that legal construction of Indonesia's judge thought on criminal law in the wrap of *monistic*, not merely fixated on *positivistic* paradigm.

1. Application of elements unlawfulness (*wederechtigheids*)

Criminal acts only refer to the ban of the deeds which are against the law. Comprehended on the unlawfulness is very important, though not all formula criminal acts include elements of unlawfulness. Whether the 'unlawfulness' are stated or not in the articles, it is the basic for the judge to set judgment, and at the same time as restrictions that only the acts mentioned in the articles are against the law.¹⁴ This is known as the principle of legality.

According to *positivistic*, not all acts that harm the community were given criminal sanctions. In tort that is not banned with criminal law, does not constitute a criminal offence, but rather allows others suffer to demand loss through private law. Consequently, only acts that are referred to as tort law are referred to as (formyl) unlawfulness, which base is written law.

¹¹ See Dimiyati Khudzaifah dissertation, entitled "the development of legal Thought in Indonesia: a study of the process of the realization of the development of the science of law in Indonesia".

¹² See Matthew H Kramer.*op.cit.*p. 60, and Henry Campbell Black, *Black's Law Dictionary*, West Group, Boston, ed.ke 6, 1991, p.494.

¹³ Agus Rustianto, *Tindak Pidana dan Pertanggungjawaban Pidana, Tinjauan Kritis Melalui Konsistensi Antara Asas, Teori dan Penerapannya*,(Criminal Crime and Responsibility, an Essay on Principles Consistency) Jakarta, Kencana, 2016,p.p. 5-6, 16.

¹⁴ Van Bemmelen, *Criminal Law I, The General Part Material Law*, Bandung, Bina Cipta, 1987, p. 149

In the Indonesia jurisprudence, comprehension of the element “unlawfulness” is not merely apply the ‘*formyl unlawfulness*’, but also implement both ‘*formyl unlawfulness*’ and ‘*material unlawfulness*’¹⁵, which based on or manifested of the thought paradigm of values, i.e. not only about contrary to the Act (*wet*) but also considered as reprehensible deeds by community.

The shift paradigm as anomaly of ‘*formyl unlawfulness*’, had begun in the period 1960-1970, i.e. in the case Machroes Effendi (*ruling no. 42/K/Kr/1965 on January 8th 1966*). The Supreme Court did not punish the defendant is not the reason for the existence of a criminal removal based as set forth in the Criminal Code, but rather related to the element of unlawfulness is not against the law in acts committed the defendant in this matter ex – Article 372 of the criminal code, i.e.:

“The factors of public interest are served as well as factor the absence of profit in the defendant’s pocket, and finally there was no State loss factor... Factors that have more than enough to eliminate the element unlawfulness of defendant deeds, who proved a formyl entered in the outline of the crime”.¹⁶

The application of ‘*the material (objective) unlawfulness*’ have been made precedence in the handling of criminal acts of corruption which is in both negative and positive interpretation, even though the Constitutional Court docket number 003/PUU-IV/2006 dated July 25, 2006 has decided to keep applying the theory ‘*formyl unlawfulness*’ in the corruption offence. This table below shows the revolution of thought about unlawfulness behavior in some cases, excluding the two cases above.

Table 1. The application of element unlawfulness

No	Verdict	Paradigm		Note
		Positivism	Values	
1	103 K/Pid/2007 , <i>F. Toemion</i> , corruption case	-	Yes	The application of positive material unlawfulness
2	334 K/Pid.Sus/ 2009 <i>John Darwin</i> , corruption case	-	Yes	Application of formyl unlawfulness to correct the wrong application of negative material unlawfulness
6	1608 K/Pid/2013 <i>Hermanto</i> , false oath case		Yes	Subjective unlawfulness has been proved on the intention of false information giver in court.
7	41 PK/Pid.Sus/ 2014 <i>Hotasi Nababan</i> , corruption case		Yes	Application of formyl unlawfulness to correct the wrong application of negative material unlawfulness

2. Application of Element Liability

According with monistic theory, the fault is an element of a criminal offence related to the ‘*inner state*’ of doer as the element of criminal liability. The elements of the criminal offence aimed at determining whether the doer can be convicted, which depends on the question of whether the offender in performing deeds that have ‘*fault*’ (*dolus/culpa*) or not, that depends on doer attitude/ inner psychological (a subjective nature). This comprehension is the logic consequence of the principle of *geen straf zonder schuld* or liability base on fault, or *actus non facit reum, nisi mens sit rea*. It means that the act does not make a person guilty unless there is an inner attitude, or an act does not make a person guilty unless his mind is guilty. So, the wrong inner attitude or guilty mind or *mens rea* showed the fault as the subjective nature of the crime, which are on the side of the doer,¹⁷ unless there are reasons that negate criminal responsibility (*strafuitsluitingsgronden*), such as mental incapability. Thus, mental incapacity is intimately related to the foundational concepts of legal subjectivity and individual criminal responsibility, as a basis for exculpation.¹⁸

Fault in the construction of monistic theory of the Criminal Code was a psychological fault. Hence, fault is the element of criminal act. Fault valuation is conducted by the characteristics of the act carried out by the doer, whether it is intentional or negligent (*opzet or culpa*). In contrast, the theory of *dualistic* separates criminal act and criminal responsibility. Criminal act merely to the act which unlawfulness, whereas the subjective elements of fault are not the element of criminal act. Thus, criminal act formulation should not explicitly state any form of fault. Norrie argues that important dimensions of the lived moral context of criminal behavior are excluded from questions of guilt, and this deficiency stems from the Kantian ideology that shapes criminal justice.¹⁹

Although in general the fault as an element of criminal act always applied, but it has occurred paradigm shift of fault elements, such as in the case of malpractice Dr. Ayu ‘cs (*Ruling no. 79 PK/PID/2013 on September 18th 2012*) where the victim died shortly after the operation was completed due to caesarean emboli at time of surgery. Though the final verdict is acquittal (*vrijspraak*) because the main element of fault which is part of Article 359 of the Criminal Code deemed not proven, however

¹⁵Application of the theory “material unlawfulness” follows the development of the verdict Lindenbaum Cohen (*Arrest Hoge Raad Nederland 1919*) about the tort (*onrechtmatige daad*) article 1365 of Indonesia Private Code (article 1401 *BW Netherlands*).

¹⁶The ruling of the Supreme Court of the Republic of Indonesia No. 42K/Kr/1965, on January 8th 1966

¹⁷Teguh Prasetyo, *Criminal Law*, ed.1, Rajawali Press, Jakarta, 2015,p. 77

¹⁸Arle Loughnan, Mental Incapacity Doctrines in Criminal Law. *New Criminal Law Review*, Vol. 15 , NO. 1 . WINTER 2012. p.2.

¹⁹Thomas Giddens, Criminal Responsibility and the Living Self, *Criminal Law and Philosophy*, 06/2015, Volume 9, Issue 2, pp.192-193.

in the dissenting opinion of the Tribunal of Judicial Review, there was consideration of fairness by applying the element of “*culpa*” (fault) which is objective judgments (normative view), which based on how the legal judgement over the inner state of the doer, i.e. that fault can be reprehensible (*verwijtbaarheid*) and can be avoided (*vermijdbaarheid*). As it is said by Prof. Dr. Surya Jaya, the Supreme Judge, who deals with dissenting opinion:

“One of the obligations of a judge is not only to apply the law, but must comprehend [*verstehen*] the text of the law. The judge must be able to understand by testing it medically, if merely the law will not come by the spirit of the law... then it takes the opinions of experts and expert witnesses, such as how the operating procedure, how should the surgery”.²⁰

Normative assessed in fault are ‘*willing*’ and ‘*deeds*’, they are the willingness to do something that doer can still do others deeds to prevent the consequences, but it’s not done. In case of not doing another that’s according to the assessment of the community is deplorable. The normative view refers to the objective of fairness and utilitarian (social justice).

Paradigm shift on ‘*fault*’ have also been applied the doctrine of ‘*liability without fault*’ with the expansion of the subject of the law on agency law. The principle of absolute fault or liability without fault (strict liability, vicarious liability) is a principle of criminal liability regarding ‘*fault*’ as something that is irrelevant to the question of whether in fact there or not. In the case *no. 2239K/PID. SUS/2012* Supreme Court has applied the principle of vicarious liability which aims at fairness (Justice) and utilities (social justice), because the judge has considered the defendant’s criminal deeds of avoid tax solely for Corporations benefit.

3. Application of Punishment

Construction of case settlement purposes in the criminal code is passing a sanction, if the judge holds the defendant has been proven legally and convincingly guilty committed to a crime and no criminal removal. That such thought, has put the instrument of justice as sanctions written by articles that are violated. Criminal threat within the criminal law serves as pushy tool, so that the prohibition in the criminal law is not violated, and as an overbearing that everyone obeys the norms.²¹

The Act provisions did not provide an explanation as a basis sentencing, so it makes judges free to determine which theory used in the judgment. The Criminal Code only requires that the judge pass the sentencing within the maxima and minima as specified Act (article 10 of the Criminal Code), and forbid the pass sentence of more than one main sentence (except other specified in legislation).²² From the type of punishment set in KUHP, it can be known that the purpose of punishment is retributive.

The purpose of the formation of specific laws (such as the Child Protection Act and Juvenile Court Act) is to protect special interests. According to Komariah Emong Sapardjaja, in interpreting status, Judge should pay attention on the ‘*legal interests to be protected*’ at the time these laws were made and for whom the legal regulations that apply.²³ Improper comprehension over the special laws can result in punishment that is contrary to the purpose of protected interests. For example, Verdict *1659 K/ Pid. Sus / 2013 jo. no. 99/ Pid. A/ 2013/ PN. NGR*, judges annulled the enactment of the Child Protection Act (special Act) because the penalty with the special minimum limit is not applicable for the children defendant. According to Sukreni, Judge of District Court that handle the case on the first level:²⁴

“The main problem is all the suspect is still under age, while the rules do not give further explanation that if the defendant is children, they will also get the protection. Although they are still convicted as the deterrent effect. However it is not appropriate in enacting the regulation of children protection for them.”

In some cases, judge has also applied the balance in sentencing, that gives the protection to defendant as well as the interest of victim and society, has absorbed the basic principal of customary law that aims to restore balance due to the action of the defendant by the application of penal mediation. Penal mediation model in the form of diversion to verdict with the punishment of less than 7 years has been accepted in the system of children justification. (article 12 paragraph (3), subsection (4) and paragraph (5) of Act No. 11 of 2012 on Child Justice System) but not for adult offender. However, there are some cases that adjudicate based on the penal mediation:

Table 2. The application of balance in punishment

No	Verdicts	Paradigm		Notes
		Positivism	Values	
1	<i>1600K/ Pid/ 2009, Ismayawati</i> , deception case.		Yes	The judge accepted the penal mediation between victims and Offender, and stop the case.

²⁰ Interview with Supreme Justice Prof. Dr. Surya Jaya on Thursday, April 21st 2016, housed in the building of the Supreme Court of Indonesia.

²¹ Mudzakkir, Study of Sentences In The Draft Bill of The Criminal Code ". *Jurnal Legislasi Indonesia* - Volume 1 Nomor 2 - September 2004

²² Article 10 of the Criminal Code/ KUHP follow single tract punishment, it provide main sentences (death sentence, imprisonment, detention, fine, and close sentence) and add sentences (repeal of certain rights, seizure of certain goods, and announcement the verdict of the judge)

²³ Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Materiil dalam Hukum Pidana Indonesia (The Idea of material unlawfulness in Indonesia criminal law)*, Alumni, Bandung, 2013. p.115.

²⁴ Interview with judge Sukreni, SH on Monday October 21st 2015, placed on Pengadilan Negeri Denpasar-Bali.

2	46 /PID/78/ UT/ WANITA, Ellya Dado, abduction case.	-	Yes	judges assess the actions of the defendant is not a crime or offense that can be punished again for the peace agreement has been reached.
3	53/PID/1983/PT Mdn, Zulham, battering case	-	Yes	forgiveness from the victim to the accused, can simplify punishment

4. Application of Deductive Syllogisms and Weakness in the Construction of Criminal Law

Construction of the formulation of criminal offence is based on the utilization of deductive syllogisms.²⁵ Syllogism is a form of logic reasoning, that is the provision of article claims as a major premise, facts of law as a minor premise and the conclusion as punishment or not. Because the logical conclusion never contains more than the contents of the premise, so the law does not contain more than that contained in the legislation in relation to the legal events. Similarly a judge's verdict will not contain more than what is contained in the legislation relating to concrete events.²⁶ Application of the syllogism is application of legal justification in the positivistic paradigm, which allow only written provisions (Act) as a major premise, not on unwritten terms or customary offence or problems that have not been regulated by law.

According to Sutandyo Wignjosobroto, advocates of natural law as well as adherents of positive law are both equally do the logic of normative and efficiently utilize deductive syllogism to find answers about "what the law" in order to settle a case specific deeds. By placing the facts sitting as a minor premise, the positivist easily find a summary about what is law *in concreto* on criminal cases.²⁷ Both the theories of monistic and dualistic in formulating criminal offence equally apply the logic of normative, thereby application of the theory of dualistic or monistic in formulating criminal acts are both equally efficiently utilize deductive syllogisms. The problem is how judges apply the thought of law paradigm through syllogisms to solve matters.

In judicial practice, there are no cases that are exactly the same, there is only the resemblance, similarity or likeness. Similarity of a case is a subjective assessment. Something that appear to be similar to a judge would not necessarily be viewed equally by the others. For Indonesian plural societies, the presence of judge is expected to no longer merely *la bounce de la loi*, who's thinks and works as mechanics. Social changing demands another dimension of justice (besides positivistic thought of justice), i.e. moral justice and social justice.

As an example: the case of criminal offence of custom adultery (*drati karma*) from Amlapura–Bali (*Ruling No.159/PID. B/2006/PN. AP jo. 03/Pid. B/2007/PT. DPS*), the defendants have been commit adultery in Banjar Central village, sub-district of Bebadem, District of Amlapura-Bali, and charged with article 284 subsection (1) 1-e letters b and e-2 of Criminal Code, although the defendants have been convicted to the indigenous village of *Pekramen Bebadem Adat* sanctions. The judge declared the defendants guilty. The State of criminal sanctions on top of the customary sanction is the denial of the existence of customary law (*Adat recht*), punishing the perpetrator twice and that should be applied the principle of double jeopardy, and showing the spirit of the implementation of the criminal sanctions purpose as retaliation (retributive), which's characteristic of legalistic paradigm.

According to I Dewa Gede Alit Saputra, Klungkung- Bali Artists, in interviews relating to the application of customary sanctions and State law said:

"The Balinese consider that the sanctions provided by the custom is more severe than criminal sanctions given the country. When someone gets custom sanctions it will be influential in his/her life, so it would be unfair if someone have got custom sanctions then also convicted State criminal sanctions. Therefore, many events that surely ought to be applied to customary sanctions which aims at maintaining the harmony of the life of the community, then ultimately resolved through State law".²⁸

D. CAUSES THAT AFFECT JUDGES THOUGHT PARADIGM

Examining how and why the judge made the judgement in adjudicating criminal cases as the influence of paradigms, the writer will examine the meaning of the judge thought as patterns of action or the symbolic meanings of social actors as looked between them.

According to Segal and Spaeth, the judging behavior can be either a legal model i.e. based solely on the facts and in considering the facts based solely on interpretation of the pure (plain meaning) of the regulation, or attitudinal models that pay attention to the balance of interests of society.²⁹ Therefore, judge behavior model is aligned with the paradigm of judge thought when judge matters, can be affected by various aspects of both external (outer) or internal (subjective), whose work influenced the judge

²⁵ Judging is a methodical and logical activity, primarily (or least sufficiently) deductive application of legal doctrines, principles, rules to the facts of the case (Vitalius Tumonis, *Legal Realism & Judicial Decision-Making, Jurisprudence. 2012, 19(4)*,p.1363)

²⁶ Sudikno Mertokusumo, *Legal Finding*, Jogjakarta, Universitas Atma Jaya, 2010, p. 53

²⁷ Sutandyo Wignyosubroto, "Ranges of Legal Research, Sulistyowati Irianto & Shidarta, *legal Research Methods: Constellation and Reflection*, Yayasan Pustaka Obor Indonesia, Jakarta, 2011, pp.51-52.

²⁸ Author interview with Artists Klungkung Bali I Dewa Gede Alit Saputra, on Tuesday, August 24th, 2015, at 1 pm, at his house in Klungkung (Semarapura) Bali.

²⁹ Lawrence S. Wrightsman, *Judicial Decision Making, Is Psychology Relevant?*, London, Kluwer Academic/ Plenum Publishers, 1997, p.45, p.46.

behavior in handling criminal cases. The external and internal aspects is the habit (*habitus*) as a result of learning or the interaction of the unconscious and subtly appears as something natural.³⁰ These two aspects will reconstruct the judges though in interpret and comprehend the rules for interacting in the trial proceedings as well as in legal reasoning.

1. The Social External Aspect Works on the Paradigm of Legal Thought

Every social interaction or communication always use symbols that provide device mark to facilitate the occurrence of mutual understanding. Symbolic domination contains symbolic power as a form of power that can make people recognize and trust, strengthen and change view of the world. Symbolic power that works through the control symbols and construct reality through the pattern of the symbols,³¹ Researchers identify symbols of justice power system that serves as symbol of an instrument of domination or symbol of the power of judiciary.

A symbol of the power of judiciary as provided for in article 24 Constitution of 1945 (*Undang-Undang Dasar 1945*) and Act No. 3 of 2009 on the Supreme Court, has given strength to the Supreme Court issued the policy formulation in the field of technical trials. On the other hand, the symbol of the power of judiciary also brings power to the judges (agent) to make different decisions within the framework of freedom of judgement. At the same time, the Supreme Court in the field of the power of judiciary applying the power symbol of '*professionalism*' for the judges as control and authority over the judge behavior. The symbol of '*professionalism*' as the effective control due to the reinforced by State (internal form of institutional Supreme Court Supervisory and externally form of Judicial Commission), with the arrangement of code ethics and sanctions.³²

A '*symbol of professionalism*' is the symbolic capital of the judges to get authority in the handling of the matters, as well as surveillance instruments of the Supreme Court as the dominant group, which is given the power of the threat of sanctions and institutionalized with parameter code of ethics (the Code of Ethics and Conduct of Judges /CECJ). CECJ asserted that the judge's behavior is the attitude, speech, or the acts committed by a judge in his/her personal capacity that can be done at any time including acts committed at carrying out duties.

On examination CECJ by the Supervisory Bodies, it is done the examination of verdict and behavior in dealing with the cases, such as a fair behavior in the law of criminal procedure relating to the application of the principle of balance of proof (*audi et alteram partem*), independent ethics for free from any influence directly or indirectly in handling cases, and the ethics professionalism (mastery of legal science and proceedings), with the threat of sanctions of the offense. Enforceability of the powers of the judiciary with the symbol '*professionalism*' that have successfully influenced the paradigm of thought and behavior of judges in adjudicating criminal cases along with the judicial technical connection. As said by I Ketut Gede, SH, MH, The Chairman of the High Court Denpasar:

"The judge's behavior is included what the judge did in handling cases, how the judges run the law principles. The judge must be careful in administration matters, and pay attention to the precedence of the Supreme Court's when building legal argumentation".³³

According to Lilik Srihartini, Secretary of Supervisory Bodies Supreme Court, "the purpose of sanctions is deterrent effect at once as a review for the improvements in the construction and improvement of the capacity of the apparatus of the courts".³⁴

The application of the symbol of the professionalism, has been able to make the judge always attempts to awake from formal provision. The application of the standard of professionalism in the proceeding refers to the legal model behavior, because it requires adherence to the ethics of the profession (CECJ). The symbol of '*professionalism*' also gave a warning to judges not to make tactics one's interests or negligent in carrying out the functions of the judiciary.

Another symbol is '*seniority*'. The meaning of '*seniority*' of judges refers to a symbol that indicates the State of judge rank, experience and age, status or priority levels obtained from the age and duration of duties as a judge. Indonesia judges are recruited with the status of civil servants, who will be educated and trained in every period of recruitment, there that the seniority of judges are seen and taken into account. The symbol of seniority corresponds to '*stratification*' by Donald Black as the difference between each group, between the lowest and highest among them, or the height of the distribution.³⁵ The period

³⁰ See Rindawati, "Habitus and Field: Pierre Bourdieu Intellectuality Project building a Structural theory of Genetic", Bagong Suyanto and M Khusna charity (ed.) in *Anatomy and Development of social theory*, Aditya Media, 2010, p. 432.

³¹ Fauzi Fashri, *Pierre Bourdieu: Unveil the power of symbols*, Jalasutra, Yogyakarta, 2014, p. 122.

³² The Supreme Court and Judicial Commission together form 4 joint letter: Decisions along with Chairman of the Supreme Court of the R.I. and Chairman of the Judicial Commission of RI number: 047/KMA/LCS/IV/2009-02/LCS/URP.KY/IV/2009 regarding the Code of Ethics and Conduct of Judges (CECJ), the Joint Rules of the Supreme Court RI and Judicial Commission RI number 02/PB/MA/IX/2012-02/PB/URP.KY/09/2012 about the Enforcement of the Code of Ethics and Guidelines of Conduct of Judges. Joint Regulation number 03/PB/MA/IX/2012-03/PB/URP.KY/2012 about The Examination together, and Shared Rules of the Supreme Court of Indonesia and of the Commission Judicial number 04/PB/MA/IX/2012 – 04/PB/URP.KY/09/2012 on the creation of frame work and Decision-making Procedures of the Assembly of the Honorary Judges.

³³ Interview with I Ketut Gede, SH, MH, The Chairman of the High Court Denpasar on Thursday, April 14th 2016, housed in the building of the High Court Denpasar.

³⁴ Interview with Lilik Srihartini, Secretary of Supervisory Bodies Supreme Court R.I on Thursday, April 21st 2016, housed in the building of the Supreme Court.

³⁵ Donald Black, *The Behavior of Law- Special Edition*, United Kingdom, Emerald Group Publishing Limited, 2010, p. 13.

of judge recruitment, education and training as a potential judge became a symbol of the seniority of judges. Senior judge usually gets a higher position, the higher position then the greater influence.

The influence of seniority manifest in behavior of avoiding disagreements, because dissent disturb the harmony of collegial relationship, tends to magnify the significance of the majority opinion.³⁶ The judge's verdict is a collegial verdict of deliberation result over the indictment and everything that is proven in the court examination. In deliberation, judge presiding as the Chairman of the Tribunal will ask the opinions of the junior members judge to the senior judge, then Chairman of the Tribunal gave his/her opinion the last. Basically the verdict meted out based on consensus, but when an unanimous vote is not achieved, taken the most votes or the most profitable of the defendant.³⁷

For example, on the juvenile case *no. 11/Pid. Sus.Child/2014/PN.Slt* from District Court of Salatiga, with girl defendant DW handled by tribunal judges: led by Vice Chairman District Court of Salatiga along with two members of the judges. Against the perpetrator of the girl defendant cannot apply the provisions of the appropriate diversion of The Act Child Justice System, since denial of assignment already exists the previous diversion was ever filed by the Chairman of the District Court of Salatiga. While against the accused boys have successfully done with diversion assignment *No. 11/ Pid. Sus-child/ 2014 / PN. Slt* by the same judge (Vice Chairman District Court of Salatiga), because there is no intervention from her senior, so the judge concerned feel freer to take a stance.

Other influences are the 'public opinion'. According to Leonard W. Doob, public opinion is the attitude of people about a problem, where they are member of a same society. Symbol that is commonly done through the submission of opinions openly, either through a forum, the movement demonstration, and the mass media (newspapers, radio or television).³⁸ Public opinion has practical purposes that influence the verdict of the Court.

The Public Prosecutor receives 'public opinion' to set standards for the lawsuit of the defendant, which surely will directly influence the judge to drop the verdict in the range of not far from the demands of the public prosecutor.³⁹ For example the verdict in domestic violence case on defendants Koko Wahyu Nugroho case number 282/ Pid. B/2012/PN. PO. of District of Ponorogo, who was charged under article 49 a Act No. 23 of 2004. The families of the victims mobilized the mass intimidation and demonstrations in order to affect the trial. The intimidation affect the public prosecutor so that criminal charge of 4 years (higher than threat of a maximum of 3 years subject to Section 49 a Act no.23 of 2004) and the Tribunal judges drop the verdict of 2 years prisoner. A high enough to *ommissi delict* neglect the household.

2. The Social Internal Aspect as an Influence of Law

Language is one of the ways of mankind to control one another, like the way the control conducted by the pastor with the creation of a sense of guilt.⁴⁰ Through the language (text) of the Code of Criminal Procedure, the judge rules, controls the path of trial and can put the defendant in a position as a person who guilty.

Law No. 8 of 1981 on the Indonesia Criminal Code Procedure gives special attachment since the inspection process introduction to the proceedings, i.e. through the existence of the letter Investigation & Interrogation Report (IIR).⁴¹ IIR as resume of investigation result has got the direction of the Public Prosecutor and part of files that should be assigned to the Court. When judge looked into the IIR, the judge will automatically think of the defendant as guilty person, because the IIR will be the guideline for judges in examining the matter actively.

When the judge was wrong in identifying the position of the IIR, may give rise to an unbalance position between the accused and the public prosecutor, because:

- When the witness or the defendant deny the information, they have provided in the IIR, then the judges tend to look for defending the procedural truth of the IIR, as listened to the investigator reviewers in the trial.
- If an error occurs in the running of the 'efforts forced' (*dwang middelen*) such as obtaining evidence, arrest, detention, examination of witnesses and the suspect, would cause miscarriage justice, because the Criminal Code Procedure does not recognize advanced examination conducted by the public prosecutor over the results of the investigation.
- That situation tends to complicate the application of principle *audi alteram et partem* (balance of proof), because when the judge behaved actively ask for the truth with IIR as guidance, then the result is guilty.

E. THE JUDGES THOUGHT OF FAIRNESS PARADIGM

The concept of justice in question is the concept of social justice as reflected by the philosophy of Pancasila and progressive law, and not merely the concept of distributive justice or corrective justice of Aristotle that focused on equitable community needs through the legal process. The justice concept of the progressive law by Satjipto Rahardjo attempts to get out of the concept

³⁶ Richard A Posner, *How Judges Think*, London, Havard University Press, 2010, p.32.

³⁷ See the provisions of article 182 subsection (5) and (6) of Act No. 8 of 1981 on The Law of Criminal Procedure.

³⁸ Djonaesih S. Sunarjo, *Public Opinion*, Liberty, Jogjakarta, 1997, p.21

³⁹ Based on the provisions of the Ordinance the Attorney General R.I No. PER-022/A/JA/03/2011 about the Organization of the supervision of the Prosecutor, the prosecution determined to give special attention to do examination, on matters that interest the public, or other matters which, according to the assessment of the leadership of the examination needs to be done, both to the matters being handled or has been handled by the Public Prosecutor completed and has acquired the force of law.

⁴⁰ Ivan Snook, "Language, Truth and power: Ministrium Bourdieu", Richard Harker, et all (ed), (*Habitus x Modal*)+ *Field = Practice*, Jalasutra, Yogyakarta, 2009, p.225

⁴¹ See Articles 110 to 138, article 139 the Criminal Code Procedure .

of procedural fairness, and focusing on the East with regard to spirituality and religiosity, and drift off into discussion of consensus and mutual cooperation.⁴² The concept of Pancasila as a social justice that bases its meaning in the context of the law is not merely in the sense of a legal positivist, but in a broader context on relationship concerns the matter of man and humanity. The concept of social justice is more tangible as utilitarianism justice (common interest) on *ekonomishe democratie* sense.⁴³

Efforts are taken to reconstruct the paradigm of legal thought focused on conditioning: handling cases, criminal law policy formulation, either *in abstracto* or *in concreto*, and the idea of thinking about the construction formulation of criminal.

1. Carrying Moral Justification and Activate Legal Pluralism in Handling Matters

When the judge handling the matter, not only guided by the law, but also by the feeling of his law. The feeling of the law is not something that is subjective or sentiment, but rather the way in which the law has been responding with judge and their feelings. Law is a feeling of confidence, in which the judges feel about a substance of the law itself. But inevitably that individual factors (including knowledge, values, attitudes, and intentions), opportunity (such as professional codes, corporate policy, rewards/punishment) and significant others (including differential association and role-set configurations) influence the individual decision-making stage to produce a behavior.⁴⁴

Objectiveness is the highest award of positivistic thought of processes by using five senses. Five senses will work objectively portray the reality of the world outside judge self as it is, without changing it.⁴⁵ During the examination search process of truth through observation data obtained by sensory of five sense, at the moment it filters through judge's cognition, this is where moral have the central position. The establishment of moral can only be correct, if it can be justified rationally with regard to other participants (the accused, the public prosecutor and victims) involved in such moral discussions. This process shift objectivism to inter subjective, so relation would be created between law and moral.

Indonesia has customary system of law as a legal system derived from the society. Embodying the ideas of Justice of legal pluralism into the criminal law is not an easy thing, considering fundamental principle of legality of the criminal law. However, the rule of law is not solely defining the rule of regulation, but also the rule of social cohabitation (*rule of community*).⁴⁶ But mishandling of *adat* law that would ultimately lead to its destruction, took place primarily because of the lack of knowledge of *adat* law.⁴⁷

At the court, often found incompatibility between principles of law (hard cases) due to the merging of several different legal systems. It is this extent, judge may adopt moral principles such as the principle of propriety, *condemnabile*, communality as known in custom, to achieve balance of peace due to the evil doers.

According to David I. Bazelon, law with a moral force emphasized that the law cannot be applied unless it can be categorized deplorable. To be able punishable (responsibility) then must meet the requirements: (1) the actions is reprehensible (condemnabile), (2) the culprit condemnabile: the culprit reasonably have been expected to have his behavior conformed to the demand of the law, and (3) of the community in which the deed is done, has the assessment of propriety which implementing the condemnation act.⁴⁸

In legal reasoning of a verdict not only contains the '*ratio decidendi*' analyzing legal justification (application of syllogisms that alignment of the basics of legal reason and rational, and actual consideration carefully all the '*facts*' that are found in the trial proceedings), but also include '*obiter dicta*' (things that are not principal explains brighter *ratio decidendi*). On proposition of '*obiter dicta*', moral justification and social justice are placed.

The proposition of *obiter dicta* formulates the explanation of *unlawfulness* by adopting the view of *objectieve strafuitsluitingsgronden* as justification reason that eliminate the element of *unlawfulness*, or the objective judgement: do the deed it is exactly contrary to law awareness and propriety of society life.

The proposition of *obiter dicta* formulates the explanation of criminal liability and apply the objective view (*fault* as normative view). The judgments depend on how the legal judgement over the inner state of the perpetrator, i.e. that *fault* can be reprehensible (*verwijtbaarheid*) and can be avoided (*vermijdbaarheid*). The defendant's own reprehensible led to situations that wipe out the reason of criminal responsibility removal, named as the principle of "*culpa in causa*", which no longer merely considering the reason of elimination for the criminal responsibility of the *unlawfulness* act (*subjectieve strafuitsluitingsgronden*).

⁴²Awaludin Marwan, *Satjipto Rahardjo Sebuah Biografi Intelektual & Pertarungan Tafsir Terhadap Filsafat Hukum Progresif (The Intellectual Biographic of Satjipto Rahardjo & The Fight on Progressive Philoshopy)*, Thafa Media, Yogyakarta, 2013. p. 344

⁴³ See Brian Amy Prastyo, The Principle of Social Justice as The Law, *Jurnal Ius Vol. 1. No. 3, Desember 2013*, p. 419.

⁴⁴ Adenekan Dedeke, A Cognitive-Intuitionist Model of Moral Judgment, *Journal of Business Ethics, 02/2015, Volume 126, Issue 3*, p. 438.

⁴⁵ J.J.H. Bruggink, *Op.cit.* p.185

⁴⁶ Barda Nawawi Arief, *Reformasi Sistem Peradilan (sistem penegakan hukum) di Indonesia*, Semarang, Universitas Diponegoro, 2012, Semarang, Universitas Diponegoro, 2012, *op.cit.* pp. 61-64.

⁴⁷ Zezen Zaenal Mutaqin, Indonesian Customary Law and European Colonialism: A Comparative Analysis on Adat Law, *JEAIL, 2 (2011)*, p.361

⁴⁸ David I Bazelon, "The Morality of the Criminal Law", Michael Louis Corrado, *Justification and Excuse in the Criminal Law*, New York & London, Garland Publishing, Inc, 1994, p. 523.

The proposition of *obiter dicta* formulates the explanation of punishment, then the judge can consider the purpose of as balance between individual (defendant) interests, victim and community interests, which focused justice above the legal certainty, applied the principle liberalism oriented due to harm others and consequence of 'deplorable' to the majority of society. Thoughts about the protection of the victim rights at the same time with the protection of the community as far as possible by put the victim's interest in a balanced way of the punishment. Through the way:

- (1) Enter the victim's right to obtain restitution include the right balance for the sake of society's values as a type of criminal sanctions (the type of additional criminal sanctions), in the form of 'payment of indemnity' and/or 'custom fulfillment of obligations.
- (2) Through penal mediation mechanism.

Penal mediation involves an active role party perpetrators and victims. Their position is not seen as an object of criminal law procedure, but rather as a subject has a responsibility and personal ability to do. The nature of mediation is to resolve disputes refer to compromise the victim's and doer to reach profitable result. Penal mediation is often carried out in indigenous communities. The existence of penal mediation is volunteer, which can be used as consideration for judges in meting out punishment, that is, as a matter of criminal case or if the victim wishes to penal mediation can be applied as a matter of stop checks. An example is in cases no. **1600K/ Pid/ 2009**, Ismayawati defendant on deception case, no. **46 /PID/78/ UT/ WANITA**, Ellya Dado defendant on abduction case, in table 2 above.

2. The Formulation of Criminal Law Policy

The penal policy (material or formyl), in fact it is stages of policies of the enforcement of criminal law: (1) formulation policy stages/ legislative stage i.e. the stage of drafting (2) stages of policy implementation, i.e. the applicable criminal law, and (3) the stage of Executive Policy /administrative i.e. the implementation/ execution.⁴⁹

As the structure of the criminal law, the formulation of national criminal law policy bases on three pillars : the problem of 'criminal act' (offence, deeds, *strafbaarfeit*; the *actus reus*), problem 'fault' (*schuld*; guilt; criminal responsibility; *mens rea*) the terms of what is supposed to be filled the ability of the crime, and the issue of sanctions (*straf*; punishment, sentencing; *poena*). On Draft Criminal Procedures Code also confirmed the existence of the aim of punishment.

The formulation of *unlawfulness* is against the law as formyl and materially meaning by adopting the view of *objectieve strafuitsluitingsgronden* as reason of justifying that exculpation the offense against the law (*rechtvaardigingsgronden*). The principle of legality –*nullum delictum noela poena sine praevia noella, lege poenali*- confirms that any criminal act is considered always contrary to the law, then the law is *unlawfulness* elements of a criminal act. This means that, although the existence of the formulation of 'unlawfulness' was not formulated explicitly in the criminal act, but it should always be considered 'act' are against the law. Thus, the assessment of the 'objective' is to claim an action of unlawfulness. The assessment of the objective unlawfulness must still be tested in objective (material) to the offender, whether there is there a justifying reason or not, and whether the 'act' was exactly contrary to the people's legal awareness.

Fault no longer constitutes an element of a criminal offence, by applying an objective view (normative) that assessment depends on how the legal judgement over the inner state of the doer, i.e. that fault can be reprehensible (*verwijtbaarheid*) and can be avoided. Fault with regard to the principle of "*culpa in causa*", i.e. when the defendant's own reprehensible led to circumstances that truly can be a reason to delete punishment. The fault is no longer merely considering the reason of forgiving as the elimination of the unlawfulness (*subjectieve strafuitsluitingsgronden*). The doer of a criminal offence cannot be exempted from the punishment based on the removal of criminal reason, if the doer themselves ought to be blamed as the cause of the occurrence of the circumstances that may be the reason of criminal removal. Criminal liability will be forwarded into the objective view of the criminal offence and subjectively to someone who is eligible to be sentenced because of his/her actions.

The purpose of the punishment is the 'monodualistic' balance between the community interests and individual interests, the balance orientation of liberalism due to 'harm others' and the *despicable deeds* majority of society, focused justice above the legal certainty. Paradigm judgment aims 'to protect the legal interests of the Community (*rechtsgoederen*)', as a system of rules 'to protect society as a whole'. Although the Draft of Criminal Code still focuses on imprisonment as a criminal subject matter, but punishment has been using humanist approach, which aims to neutralize the violators of the law, without ignoring the basic values of freedom (individual rights) and the rights of society, such as: recognizes customary law, give priority to justice on top of legal certainty, the death penalty is a special and alternative, social work or the action penalties (double track system).

The formulation of criminal policy also provides 'judge forgiveness' (*rechterlijk pardon*) on punishment, having regard to guidelines: fault, the motive and purpose of doing the crime, the inner attitude, planned or not, how to do a criminal act, social life history and the doer economic circumstances, influence against future victims, victim's *pardon*, community views.⁵⁰

3. Judicial Applicable Policies as Product of Law Maker and Law Enforcer

⁴⁹ Barda Nawawi Arief, *Kebijakan Formulasi, Ketentuan Pidana dalam Peraturan Perundang-undangan*, Pustaka Megister, Semarang, 2012, hlm. 9.

⁵⁰ Article 56 of the Draft PENAL CODE 2015

The provisions of article 20 paragraph (2) letter b Act No. 48 of 2009 about the Power of Justice authorizes to the Supreme Court to do review against the regulation below the Act only. But in practice, the Supreme Court through its policies has done review over provision of the ACT (*wet*), with the intention of enabling judges can take decisions more clear.⁵¹

All of these reviews were made to the legislation which was substantially already did not comply anymore with the dynamics of the community. The tools used by the Supreme Court to do the review is through policies such as the applicative Regulations of the Supreme Court/ RSC (*Peraturan Mahkamah Agung/ PERMA*), Supreme Court Circulars/ SCC (*Surat Edaran Mahkamah Agung/ SEMA*), judicial authority, and judicial policy of the court below Supreme Court:

- The Supreme Court policies in the handling of criminal cases is concentrated through the establishment of norms through the RSC, and an administrative policy through SCC. The weak position of RSC and SCC in the legislation hierarchy can be strengthened through the application of the principle of “*res judicata pro veritate pro veritate habitur*” (the ruling of the judge shall be considered true) when the judges handling the matters. For example, RSC No. 2 of 2012 about the Adjustments the Light Criminal Acts and Limits the Amount of Penalty in the Criminal Code. The RSC apply the concept of restorative justice with regard to the judgment in a criminal offence, where the value of money that exists in the Criminal Code adapted to current conditions (limit values for the maximum losses of Rp. 250.00,- was made Rp.2,500,000.0), as the processing of the light criminal acts procedure (i.e. light theft, light fraud, light embezzlement and the like), with a soft threat of punishment (maximum three months in jail or fine). This RSC affects the pros and cons, pros because of partisanship to the community through restorative justice and counter because it is considered violating the principle of legality by deleting and applying the new criminal law through judicial review.
- The policy of public service by applying the aspects of psychology in the proceeding at District Court of Salatiga. The applicable policy is intended to create a thoughtful judge who referred to spiritual intelligence, through the establishment of a counselling agency. It aims to assist the mental recovery of main party litigants, as well as the input for judges to understand the underlying problems of a matter. The formation of the counseling agencies take the expanded *Amicus Curie* model⁵², because it also aims for mental recovery of the defendant or the victim.

4. The Idea of Fairness Formulation of Criminal Act

The orientation of the law is justice, then the purpose of the positivist paradigm of justice is part of which is inseparable from the values paradigm. This means that in the values paradigm applies the formula unlawfulness as formyl and material nature. Consequently, all articles have been considered contain elements unlawfulness, without distinguishing whether it was mentioned explicitly or not. So, the accused must be able to prove the size of the formal/objective of the conduct, i.e. whether there is a reason of justification and whether the act was exactly not contrary to the legal consciousness of the people or whether it's reprehensible deeds. The application of this idea will promote the balance of proof (the *audi alteram partem* principle).

The idea of such unlawfulness on hard case will not endanger the principle of innocent (POI) as procedural side, although the relationship between the principles of criminal law and the POI is dialectic.⁵³ Offender was not thought as “innocent” in the sense that they are fairly blamed for wrongdoing.

The thoughts of fault is subjective elements as reasons of forgiveness or cannot be responsible and the objective (normative) fault with the assessment depend on the inner state of the perpetrator: i.e. whether that error can be insulted (*verwijtbaarheid*) and can be avoided (*vermijdbaarheid*). The fault orientation is values of morality.

Thought of the balance in punishment implies through penal mediation of victim-offender mediation model. The victim-offender mediation model is primarily dialogue driven, with the emphasis on victim healing, offender accountability, and restoration of losses.⁵⁴ So the protection for victim can include processual and material substance. The result of mediation can terminate the process or as the justification of judge pardon. It cannot be inevitable that economic analysis affects thinking about crime itself, whose losses can be recovered through restitution payments or otherwise amortized.⁵⁵

F. CONCLUSION

The paradigm construction of judge's thought of criminal law generally focuses on the positivistic paradigm that only consider positive legal norms. It takes aim at the certainty of the law and applies the theory of monistic i.e. formulating formyl unlawfulness and subjective nature of the fault element as the main elements of criminal liability. Though there have been anomalies in its development of the awards with the paradigm that considers the fairness and balance of interest, i.e. formulating

⁵¹ Oemar Seno Adji and Indriyanto Seno Adji, *Independent Judiciary & Contempt of Court*, Diadit Media, Jakarta, 2007, p. 124.

⁵² Amicus curie which means "friend of the court" or friend of the court brief is sort of a written argument, that is summarizes relevant research and thorough meaning of clarification a number of findings (Mark Constanzo, *Psychology Applied to Law*, Helly Prajitno Soetjipto, Pustaka Pelajar, Yogyakarta, 2008, pp. 37-38).

⁵³ No one has an obligation or a possibility to prove the nonexistence of “harm”, “guilt”, which neither the accused nor the prosecutor can (in any reasonable way) prove. The harm is more or less presumed as soon as the *actus reus* requirement is fulfilled. The question of innocence only relates to the act itself (Magnus Ulva`ng, *Criminal and Procedural Fairness: Some Challenges to the Presumption of Innocence*, *Criminal Law and Philosophy* (2014)- 8, p 483).

⁵⁴ Mark Umbreit, *Victim-Offender Mediation Model*. *Encyclopedia of Social Problems*, Ed. Vincent N. Parrillo. Vol. 2. Thousand Oaks, CA: SAGE Publications, 2008, p. 996.

⁵⁵ Ion Ristea, *The Definition of Criminal Responsibility and The Understanding of thr Lae of Evidence*, *Linguistic and Philosophical Investigations*, 01/2009, Volume 8, p.210

material *unlawfulness*, liability based on the material or objective fault justification, and punishment fit the balance of people and individual interests. Thoughts on the protection of the rights of the victim at the same time the protection of the community as far as possible by put the victim's interest in a balanced way of the punishment.

The presence of some external and internal aspects of a social nature, that influence the judge thought of law. This aspect shows that legal thought of judge does not merely independent or indeterminist. Judge is not necessarily able to realize his will in legal thought. On the one hand this influence successfully keeps the judge submissive to formalistic legal way. On the other hand, this influence can be a counterweight to arrive at the paradigm thought of justice as fairness.

Paradigm thought of fairness values is the revolution of positivistic paradigm, that happen through the changes on an improvement of criminal cases in handling criminal cases through the consideration of moral justice values in argumentations, reactivating the role of the customary penalties, changing of the formulation of national policy about criminal law and institutional policy of Supreme Court on handling matters along with the Courts below, and the idea of fairness formulation on criminal act. These efforts will carry the implications of restoring the legal paradigm of judge thought which bring fairness as an indispensable part in the Indonesia judge awards.

REFERENCES

- Adji, Oemar Seno and Indriyanto Seno Adji. 2007. *Independent Judiciary & Contempt of Court*. Jakarta. Diadit Media.
- Arief, Barda Nawawi. 2012. *Reformasi Sistem Peradilan (sistem penegakan hukum) di Indonesia, (The reform of the judicial system (the system of law enforcement) in Indonesia)*. Semarang: UNDIP.
- , 2012. *The Formulation of Criminal Act Policy*. Semarang: UNDIP.
- , 2012. *Kebijakan Formulasi, Ketentuan Pidana dalam Peraturan Perundang-undangan*, Pustaka Megister, Semarang.
- Ashofa, Burhan. 2010. *Legal Research Methode*. Jakarta: Rineka Cipta.
- Atmasasmita, Romli. 2011 *The Contemporer Criminal Court System*. Jakarta: Kencana Prenada Media Group.
- Bazon, David.L.1994. "The Morality of the Criminal Law", Michael Louis Corrado, *Justification and Excuse in the Criminal Law*, New York & London, Garland Publishing, Inc, p.523.
- Black, Henry Campbell. 1991 *Black's Law Dictionary*, West Group, Boston, ed.ke 6.
- Black, Donald. 2010. *The Behavior of Law- Special Edition*. United Kingdom: Emerald Group Publishing Limited.
- Bruggink, J.J.H. 2011. *The Reflection of Law: the Basic Definitions in the Theory of Law*, Bandung: Citra Aditya Bakti.
- Constanzo, Mark. 2008. *Psychology Applied to Law*. Yogyakarta: Pustaka Pelajar.
- Dedeke, Adenekan. 2015. A Cognitive-Intuitionist Model of Moral Judgment, *Journal of Business Ethics*, 02, Volume 126, Issue 3, p.438.
- Dimiyati, Khudzafah and Kelik Wardiono, 2014. *Rasional Paradigm in Legal Science, Epistemology Base: Pure Theory of Law Hans Kelsen*. Yogyakarta: Genta Publishing.
- Fashri, Fauzi. 2014. *Pierre Bourdieu: Unveil The Power of Symbol*. Jogyakarta: Jalasutra.
- Giddens, Thomas. .2015. Criminal Responsibility and the Living Self, *Criminal Law and Philosophy*, 06, Volume 9, Issue 2, hlm.192-193
- Kramer, Matthew H. 2012. *Where Law and Morality Meet*. United Kingdom: Oxford University Press.
- Kuhn, Thomas S. 2012. *The Structure of Scientific Revolution, Peran Paradigma dalam Revolusi Sains*, Bandung:PT Remaja Rosdakarya.
- Loughnan, Arlie. 2012. Mental Incapacity Doctrines in Criminal Law. *New Criminal Law Review*, VOL. 15, NO. 1. WINTER. p.2.
- Mertokusumo, Sudikno. 2010. *Legal Finding*. Jogjakarta: Universitas Atma Jaya.
- Mudzakkir. 2004. Study of Sentence Provisions in The Draft Bill of The Criminal Code. *Jurnal Legislasi Indonesia* – (Volume 1 Nomor 2 – September)
- Mutaqin, Zezen Zaenal. 2011. Indonesian Customary Law and European Colonialism: A Comparative Analysis on Adat Law, *JEAIL*, 2, p.361
- Prastyo, Brian Amy. 2013. The Principle of Social Justice as The Law, *Jurnal Ius Vol. 1. No. 3, Desember*, p. 419.
- Pompe, Sebastiaan. 2012. *The Indonesian Supreme of Court, A Study of Institutional Collaps*. Jakarta: The Institutions of Study Advocacy for Justice Independency.
- Posner, Richard A. 2010. *How Judges Think*. London; Havard University Press.
- Rahardjo, Satjipto. 1976. *Law, Society and Development*. Bandung: Alumni.
- , 1982. *Legal Science*. (Jakarta. Alumni.
- Ristea, Ion. 2009. The Definition of Criminal Responsibility and The Understanding of thr Lae of Evidence, *Linguistic and Philosophical Investigations*, 01, Volume 8, p.210.
- Rindawati. 2010. Habitus and Field: Pierre Bourdieu Intellectuality Project building a Structural Theory of Genetic, Bagong Suyanto and M Khusna charity (ed.) in *Anatomy and Development of social theory*. Aditya Media.
- Rusianto, Agus. 2016. *Criminal Crime and Responsibility, an Essay on Principles Consistency* Jakarta: Kencana.
- Sapardjaja, Komariah Emong. 2013. *The Idea of material unlawfulness in Indonesia criminal law*. Bandung: Alumni.
- Sidharta, Bernard Arief. 2009. *The Reflection Structure of Law*. Bandung: Mandar Maju.
- Snook, Ivan. 2009. "Language, Truth and power: Ministrium Bourdieu". Richard Harker, et all (ed), *(Habitus x Modal)+ Field = Practice*. Yogyakarta: Jalasutra.

- Sulistyowati Irianto & Shidarta (ed), 2012. *Legal Research Method; Constellation & Reflection*. Jakarta: Yayasan Pustaka Obor Indonesia.
- Sunarjo, Djonaesih S. 1997. *Public Opinion*. Yogyakarta: Liberty.
- Tanamaha, Brianz. 2008. Understanding Legal Pluralism, *Sydney Law Review*, Vol. 30:375, pp. 383-384
- Vitalius Tumonis, Vitalius. 2012. Legal Realism & Judicial Decision-Making, *Jurisprudence*, 19(4), p.1363.
- Umbreit, Mark. 2008. Victim-Offender Mediation Model. *Encyclopedia of Social Problems*, Ed. Vincent N. Parrillo. Vol. 2. Thousand Oaks, CA: SAGE Publications. p.996.
- Ulva'ng, Magnus. 2014. Criminal and Procedural Fairness: Some Challenges to the Presumption of Innocence, *Criminal Law and Philosophy*, 8. p. 483.
- Wignyosubroto, Sutandyo. 2011. Ranges of Legal Research, Sulistyowati Irianto & Shidarta, *Legal Research Methods: Constellation and Reflection*. Jakarta: Yayasan Pustaka Obor.
- Wrightsmann, Lawrence S. 1997. *Judicial Decision Making, Is Psychology Relevant?* London: Kluwer Academic/ Plenum Publishers,

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