



## The Concept of Balance as a Beneficial Ownership Principle in Criminal Law Reform Policy

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<http://dx.doi.org/10.47814/ijssrr.v7i9.2335>

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### **Abstract**

The Indonesia criminal law review of Beneficial Ownership policy regarding crimes committed by corporations needs to be thoroughly analyzed. Act number 1 2023 about The penal code of law has defined a criminal and an idling on the Beneficial Ownership to the criminal ACTS committed by the corporation. The focus of this study deals with the development of criminal law policies particularly on the idea of balance asa guiding principle in the renewal of criminal law policy. This aversion to Beneficial Ownership is a special concern because it is often in law enforcement when it comes to criminal ACTS perpetrated by corporations, Beneficial Ownership It's not touched by the law. The purpose of this writing is to identify the idea of balance asa principle of punishment on corporate actions in the reform policy of criminal law. The study used normatif juridical approaches as a primary approach. The primary object of this study is a secondary data that includes primary law and secondary law materials. Whereas data analysis is done using qualitative analysis methods. The results of discussion on the issues presented in this text indicate that, a close relationship between the Beneficial Ownership by the law of the corporation as the subject of law, often by order of its undertaker to perform judicial action in his behalf. The legal works of the corporation's caregiver reflect the actions of a corporation, so that all its implications can make a Beneficial Ownership as a subject of law that can be demanded for criminal liability.

**Keywords:** *Concept of Balance; Beneficial Ownership; Punishment; National Criminal Law Reform*

### **Introduction**

The idea of balance in the objective of idling is intended in addition to encouraging the perpetrator and relieving the guilt of the perpetrator, it is intended to prevent criminal ACTS by enforcing the law, by resolving the conflicts that criminal ACTS cause, by restoring balance and bringing peace to society. The renewal of national penal law is one of the major problems facing indonesians, especially in order to change and replace penal code (WvS) the current Dutch colonial legacy as it is no longer conformed to the demands and values developed in society, into a new national penal code that matches the life views of a nation based on social values, Indonesian culture and structure. As stated by J.E. Sahetapy, that when the construction or establishment of national law is not rooted in SOBURAL (social, cultural and structural) realities of the country and nation, it is a dream (J. E. Sahetapy, 1994:18).

In this regard, Barda Nawawi Arief states that "efforts to reform law (criminal) are essentially continuous and continuous activity. (Barda Nawawi Arief, 1998:109-110). Next, Barda Nawawi Arief clearly defined three Settings and the renewal of criminal law by highlighting it from socio-political, socio-philosophical, and socio-cultural aspects, as follows: The legal reform of criminal law is essentially a means, an attempt to reorientate and reform criminal law that conforms to the central values of socio-political, socio-philosophy, and socio-cultural socio-culture of Indonesian society that underpin social policy, criminal policy, and law enforcement policies in Indonesia (Barda Nawawi Arief, 2002:30-31).

Corporations are placed subject to criminal law because given that in social and economic life, corporations have increasingly played a part in its important role that criminal laws should function in society and enforce common norms or rules (Mahmud Mulyadi and Feri Antoni Surbakti, 2010:18). The existence of major criminal law controllers in practice cannot be reached by penal code laws and laws outside the penal code of law, and law enforcement officials have had difficulty trapping the major controller (Beneficial Ownership), as long as there has been no firm rule to adopt the major controller of criminal ACTS in the current criminal law book As far as corporate crimes go, its accountability are limited to individuals. Although the subject of criminal law to the corporation is already established in the special criminal law outside the book of criminal law but there is still inconsistency and discrepancy regarding the management of the criminal corporation especially as to officers in this matter the DE facto or real control of the corporation.

Based on the above background, it would be interesting for the research team to do the title "The Concept of Balance As a Beneficial Ownership Principle in Criminal Law Reform Policy"

## ***Research Methods***

The type of research used in this study is normative legal research. Bambang Sunggono describes that, a normative law study (legal research) is: "research that examines principles, systems, synchronization, history and comparative law (Muhaimin, 2020:46) Or called the study of doctrinal law. In normative legal research the type of data that is needed is secondary data. This data is drawn by the study of documents/library research). Research on literature is theoretical studies, references and other scientific literature relating to cultures, values and norms that developed in under study of social situations (Milya Sari, 2020:43). Data obtained in research is logical and systematic, and then analyzed by means of qualitative analysis methods, and then presented qualitatively.

Researchers analyzed and assembled the data for analysis and gave a study on balance ideas as the Beneficial Ownership principle in the renewal of criminal law policy. Soerjono Soekanto USES descriptive research as intended to provide advanced data perhaps about humans, other circumstances or symptoms (Soerjono Soekanto, 2006:10). In the study it would describe the results of an analysis of the idea of balance asa principle of Punishment on a Beneficial Ownership of criminal law policy.

## ***Discussion***

### **A. An Overview of the Principles Beneficial Ownership**

Beneficial ownership is a term originally derived from the common law states. In common law, there are two forms of ownership of wealth, legal and commercial. On the other hand, civil law states believe that the possession of wealth is indistinguishable between legitimate owners who bear the legal title and benefiteres who underpin the benefits of such wealth. Civil law states feel that rights and obligations relating to others are subject to those who assume the legal title. Rights held by the third

party can be requested to the person carrying the legal title. (Anthony Tiono dan R. Arja Sadjiarto, 2013: 3). In that way, Beneficial ownership is a required owner, without any legal requisite.

The concept of Beneficial ownership can be found within a few of the regulations that are required by Indonesia, such as in the tax sector regulation, the financial sector regulation, as well as the 2018 President's rule on implementing the principle of recognizing the benefits of the corporation in order to prevent and eradicate criminal money laundering and criminal operations of terrorism that specifically set out the commitment and transparency data of the Beneficial ownership.

### **B. Review of the Idea of Balance in the Punishment System National Penal Code**

The system of punishment is poured inside the law number 1 in 2023 on the penal code (national criminal law) has several concepts, against which the background is based on various basic ideas or principles include a monodualistic balance. The basic idea of a monodualistic "balance" in the book of the national penal law as a material law in criminal law or materials law requires a change in the law of the event (book of criminal law) as well as in the execution of a fixed law (*Kracht Van Gewijsde*) through the corrections of the penitentiary law (Bagus Satrio Utomo Prawiraharjo, 2023:166). The basic idea of "balance" in the national penal code of law, can be embodied in the 3 fundamental criminal law problems, which are in the problems of criminal crime, criminal liability, and criminal and criminal and criminal problems.

The idea of a monodualistic balance contains principles of legal certainty (*rechtmatigheid*), principles of legal justice (*gerechtigheit*), and law enforcement principles (*zwech matigheid or doelmaticheid or utility*). And thus the application of the idea of a monodualistic balance in law enforcement of a just and beneficial legal certainty. By reason of the rights or interests of the suspect/defendant/convict or criminal alike all should be equally balanced. With the current philosophy of individualism and liberalism behind the book of criminal law law, if the act of a person has met the delic article in the penal code of law and the perpetrator is legally liable, then the perpetrator must be punished for the crimes committed, without any other consideration, for example, there is peace between the perpetrator and the victim, or minor harm, Or the defendant was old (over 70), etc. Eventually it will create injustice both for the accused and the victim, and that requires balance or monodualistic.

Monodualistic can be defined as the flow of the soul that dictates, that between the soul and the body an entity is intertwined and imbued with one another (Bagus Satrio Utomo Prawiraharjo, 2023:166). This idea of monodualistic equilibrium and popularized by Barda Nawawi Arief has been accepted by legal academics, so there is no debate over the meaning and meaning and scope of the idea of monodulistic equilibrium, since proposed by him to this point, the idea of a monodualistic balance has been inherent in the book of national penal law.

### **C. The Concept of Balance As a Beneficial Ownership Principle in Criminal Law Reform Policy**

The renewal of criminal law is background to the idea of a monodualistic balance between the perpetrator, victim and society. A national draft of a criminal law against a background of national needs and requirements for a renewal and change or replacement of the old penal code (WvS) of the Dutch colonial era. Thus, this is closely related to the renewal of penal law (penal reform) which is also essentially a larger part of the development or renewal of the national legal system. Efforts to reform criminal law basically include a penal policy that is part or bound up with the law enforcement policy, criminal policy, and social policy (Mien Rukmini, 2009: 137).

The principle of balance became the idea of a renewal in current criminal law. The book of criminal law that has been in effect has not been able to deliver justice because it is oriented around colonial law values, it has not come from Pancasila. In the end, in enacting a justice law must have the notion of a balance that is expected to be the solution. The principle of balance in the objective of idling is to build up the perpetrator and absolve the guilt of the perpetrator, while it is also intended to prevent criminal ACTS by enforcing the law, by resolving the conflict created by criminal ACTS, by restoring balance and bringing peace to society. Formulating the system of idling in the penal code of WvS is more oriented towards perpetrators. The value of the philosophy that sets the underlying underlying book of criminal law/WvS is "individualism, liberalism" inspired by the classical flow of the systematic systematic of criminal laws (O.S Hiarij, 2014: 4-5) Which in this case is characteristically noble-oriented.

One part of national development is legal development, known by the term law reform). The renewal of national law as part of this national chain of development is carried out in a complete and unified way both criminal law, civil law and administrative law, and includes both formal and material law. According to Barda Nawawi Arief, the renewal of criminal law is not only a matter of substance, but always has to do with values. For that in his view he declared (Barda Nawawi Arief, 2002: 28): "The legal reform of criminal law is essentially meaningful, an effort to reorientate and reform criminal law in accordance with the values of socio political, socio philosophy and socio cultural socio of Indonesian society that underpin social policy, criminal policy and law enforcement policies in Indonesia".

The sense and the nature of the renewal of criminal law are closely linked with the background and the urgency of the renewal of criminal law itself. The background and urgency of the renewal of criminal law may be viewed from socio-political, socio-philosophic, socio-cultural or various aspects of policy (particularly social, criminal policy and law enforcement policies). This means that the concept and substance of criminal law are also closely related to these aspects. That is, the renewal of criminal law must also be in effect a manifestation of the change and renewal of the various aspects and policies that result from it. Thus, the renewal of criminal law is essentially meaningful, an attempt to reorientate and reform criminal law in accord with the central values of socio political, socio-philosophy, socio-cultural socio-cultural of Indonesian society that underpin social policy, criminal policy and law enforcement in Indonesia. This is due to an effective application of the law in society, so good laws have always required requirements of juridical, sociological and philosophical, and even historically.

The renewal of criminal law is background to the idea of a monodualistic balance between the perpetrator, victim and society. The creation of a book of national criminal law law against a background of national needs and requirements for a renewal and change or replacement of the old penal code (WvS) Dutch colonial heritage. Thus, this is closely related to the renewal of penal law (penal reform) which is also essentially a larger part of the development or renewal of the national legal system. Efforts to reform criminal law basically include a penal policy that is part or bound up with the law enforcement policy, criminal policy, and social policy (Mien Rukmini, 2009: 137).

Today, Indonesia has several regulatory legislation that regulates the terminology of Beneficial Ownership in its respective sectors. While it may be said that in the context of certain crimes, corruption and money laundering are still viewed as scarce, yet efforts to provide transparency to the public towards any Beneficial Ownership to the corporation in particular have developed. To understand what Indonesia has done in support of transparency to "inequality of information," there has been a growing provision of the law on the term "Beneficial Ownership already known in Indonesia:

- a. act no. 8 in 1995 on capital markets;
- b. act no. 36 in 2008 on the fourth amendment to the 1983 revenue tax bill;
- c. act no 8 in 2010 on the prevention and the elimination of money laundering crimes;
- d. President rule no 13 in 2018 about the application of principles to recognize the corporation's benefits in order to prevent and eradicate criminal money laundering and criminal terrorism funding.

Referring to the President's rule no 13 in 2018 On the application of principles to identify the corporation's beneficiaries in defense of and eliminating criminal money laundering and terrorism (further called "Perpres BO"), Then the President's appointment no. 13 in 2018 as a preventive measure toward the practice. Such regulations are viewed as ready to bring to light information about the owners of the benefits of a corporation. Accordingly, as a technical form of the arrangement, two regulations are established, which is the 2019 rule of operating principle recognizing the Beneficial Ownership of the corporation and law minister of law and ham no. 21 in 2019 on the principle operating ordinance recognizing the beneficiary of a corporation. Through these two regulations, Indonesia established that all kinds of corporations, Publicly-listed telecommunications operator pt bakrie telecom TBK said on Tuesday. Foundations, societies, Cooperative, Commanding officer alliance, Corporate alliance, And other forms, that are required to report the data of " Beneficial Ownership (BO)" to the ministry of law and ham (ministry of justice) as one of the dedicated ministries for information registration of BO. That obligation is to be associated with taking a stand, registration, and/or legalizing of a corporation.

Although President rule number 13 in 2018 basically contains an arrangement and mechanism for recognizing the owner of a corporation's benefits or Beneficial Ownership ( BO) to be obtained information about bo that is accurate, up-to-date, and available to the public, But it would be better in the future to be strengthened by a higher rule on Beneficial Ownership to rule of legislation or to be included in clause of the law book a penal code associated with proving.

Act number 1 in 2023 on the penal code of law has contained the concept of absolute criminal accountability. The phrase "rejected simply because the elements of criminal conduct have been fulfilled without regard for its error" appears in chapter 37 letter a. On the basis of its defense, it contains the concept of absolute criminal accountability, whereby a person who commits a crime is subject to compulsory reprisal when the act has met all criminal conditions. In the future, the writer of corporate criminal crimes not only relates to the actions of those who are functional within the structure of corporate organizations but also may relate to actions performed by the governing authority or the corporate control or the corporate benefit owners that are outside the corporate structure but are able to control the corporation, including "Beneficial Ownership".

The Beneficial Ownership themselves might be essentially a possession that is not only legally registered as an owner but also has the right to make a decision as to what to do with the subject. That the Beneficial Ownership can refer to someone who controls the entity (Syahrijal Syakur, 2022:110). From such understanding it can be known that the owners of the Beneficial Ownership themselves are not always the people in the corporate organization structure despite the President's regulations no 13 in 2018 Itself necessitates a corporation's obligation to stipulate its utility owners.

The Beneficial Ownership/beneficiaries or benefactors from criminal ACTS use a new mode of operation, among other things the perpetrators of criminal crimes are outside the corporate structure, but can influence corporate policies to avoid criminal accountability therefore need to make more obvious rules in the criminal corruption act; No corporation in law practice has ever been accused of corruption because it benefited and in the exchange for transitions of wealth to beneficiaries. In the case of a ultimate landowner or a giant landowner that survives the loss of a criminal can use the Supreme Court's



rule (PERMA) no 1 in 2013 was the policy of settling the application for the handling of wealth in money laundering or other criminal ACTS.

A corporation that is made up to commit a crime or become a burden to commit crime is that it is often difficult to detect who the owner of the Beneficial Ownership. This is because of some corporations that are intended in the first place to carry out crimes, the perpetrators or major crime controllers generally seek to disguise their name or identity to make it difficult to trace crime's flow of money. A technique often used with the aim of disguising or concealing evil results. That this technique was done by setting up a formal company based on the legal rules. That in practice the company is not used to engage in business activities but merely to make fictitious transactions or to store assets from the founders or others. Moreover, the technique is meant to obscure the identity of the people who control Dana (Syahril Syakur, 2022:110) So that the names of the Beneficial Ownership are also not listed in the corporate structure.

Identifying the intellectual dader based on the owner of the Beneficial Ownership can be seen from the policies in the corporation or from the flow of financial transactions. If the owner of the Beneficial Ownership of the transaction of a corporation exists outside the corporation, it is difficult even to determine whether the identity of the owner can be dropped against the corporation, but it is to his intellectual character, since the transaction is not committed to the benefit of the corporation. To establish the basis for the accountability of those who own the Beneficial Ownership as evildoers, it must be seen whether here the owners of the Beneficial Ownership serve to control evil from the role that commands actions on the property of the crime in order to hide or disguise the origins of the wealth, or here he is merely a passive party to accept or master the placement of the wealth he knows or believes is the result of evil.

In the case of the Beneficial Ownership of these crimes, who are the perpetrators of the crime, whose positions here are those who persuade or incite others to commit crimes (uitlokker) in order to disguise or disguise the results and benefit from them, then he can be held accountable. As for the accountability of the Beneficial Ownership, can be the author of analysis, which, asa controller and advocate of good criminal conduct committed by the steward, can be held to account for the active criminal act as set forth in section 55 (1) second of the penal code. Chapter 55 of this verse (1) 2 is charged with its role as the one who encourages or moves others to perform a deed. So that an owner of the benefits (vices) that moves people to commit crimes could be punished for violating the penal code of section 55 (1) the second book of criminal law.

The concept of penal law renewal (materials and its basic criminal law systems) that deal with proficiency (Beneficial Ownership) should be based on a balance point of thought or idea. The basic idea that we hope to implement in national custom must be based on an idea or principle of balance (Barda Nawawi Arief, 2014: 24):

1. A monodualistic balance between the common good/community and individual interests;
2. A balance between the protection/interest of criminals and innocent victims;
3. A balance between the objective and subjective elements, the idea of "daad-dader strafrecht";
4. A balance between formal criteria and material;
5. A balance between certainty of law, flexibility/flexibility, and justice; and
6. A balance of national values and national /universal values

The idea of a monodualistic balance demands balance that criminal laws on the one hand protect the common good (the community), and on the other hand protect individual interests. The presence of criminal law through the books of national penal law is to be able to provide social protection by

sanctioning and prohibiting the development of a social order that achieves social welfare. Idleness of benefit owners remains necessary by taking into account the position of crime victims to the point of recovery. The balance between certainty and justice in the national penal code of law is placed proportionately according to its context and situation. The national penal law book is found to be more flexibility in its appropriations guidelines despite alternate permits, but judges can impose a cumulative evil Beneficial Ownership sanctions. The most visible idea of balance in the national penal law book as a basis for proficiency (Beneficial Ownership) is a dynamism between formal criteria and materials, as to the balance of legality of formal (written law) and the legality of material (a living law) in the national penal code.

## Conclusion

The existing book of criminal law in Indonesia still applies colonial values, not to Pancasila values. Basic ideas: the Pancasila balance is oriented to the religious moral paradigm (Godhead), the humanistic paradigm of humanity (Humanistic) the national paradigm, the paradigm of democracy and the wisdom paradigm, the paradigm of social justice. Corporations as subject of law, where they are often a faction owner through a commandment to a corporation corporation to make a legal act in its behalf. The legal actions of the corporation's administrators reflect the actions of a corporation, so that its implications can make it the subject of the law for criminal liability. The concept of balance became the idea of a renewal in criminal law in Indonesia that was not in the book of criminal law, so reform of criminal law must be followed by replacing the book of criminal law in order to enable a system of values adopted according to the state of Indonesia and the expected justice to be realized. This is important because it makes criminal laws consistent with the character of the nation that place both individual and social interests equally, so that the concept of equilibrium underlies the policy of the renewal of criminal law in Indonesia. The principle of balance in the renewal of criminal law concerned with indulgence of the Beneficial Ownership is expected to be able to make a criminal law that focuses not only on a rigid certainty of the law, but, rather, the preying of justice and judicial expediency.

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