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Legal analysis of the meaning of "victims' losses and suffering are not too great" from the perspective of legal certainty

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Abstract
The paradigm shift in Indonesian criminal law through Law Number 1 of 2023 concerning the Criminal Code introduces normative innovations, one of which is in Article 70 paragraph (1) letter d, which grants authority to a judge not to impose an imprisonment sentence based on the consideration that 'the loss and suffering of the victim are not too great.' This norm represents a shift from a retributive approach towards a sentencing system that is substantially just and responsive to the principles of restorative justice and ultimum remedium. However, this key phrase is an open-ended formulation, laden with subjective and multidimensional content, encompassing both material and immaterial aspects, as well as physical and psychological elements. The lack of clarity in its operational boundaries has the potential to create legal uncertainty, extreme disparities in judgments between courts, abuse of discretion, and procedural injustice for victims, particularly from vulnerable groups. This research aims to analyze the normative meaning of this phrase in depth using the legal hermeneutics method, Gustav Radbruch's theory of legal certainty, theory of justice, and a comparative approach. Based on terminological and theoretical analysis, it is concluded that the assessment of this phrase requires a holistic and contextual approach. The research then formulates measurable multidimensional operational parameters, encompassing economic, medical, psychological, and sociological aspects, as well as the capacity for restoration and reconciliation. Clear interpretative guidelines, such as a Supreme Court Regulation or technical directive, are necessary to bridge the gap between normative progress and practical implementation, ensuring that this norm functions effectively as a preventive filter against overcriminalization and prison overpopulation, while guaranteeing legal certainty and substantive justice for all parties.

Keywords: Law No. 1 of 2023 concerning the criminal code, article 70 paragraph (1) letter d, victim's loss and suffering, legal certainty, restorative justice, ultimum remedium, judicial discretion

Introduction

The paradigm shift in Indonesian criminal law, as represented by Law Number 1 of 2023 concerning the Criminal Code, represents a philosophical reconstruction towards a more substantive and just sentencing system. Among various breakthroughs, Article 70 paragraph (1) letter d, which grants the judge the authority not to impose an imprisonment sentence based on the consideration that 'the loss and suffering of the victim are not too great,' occupies a strategic position as an embodiment of the principles of proportionality and ultimum remedium (UU No. 1, 2023).

Philosophically, this provision is an antithesis to the tradition of pure retributive sentencing, placing the victim as the central subject and directing criminal law to be more responsive to substantive justice, in line with the spirit of progressive law (Rahardjo, 2020) [20]. However, the phrase 'the loss and suffering of the victim are not too great' is an open-ended legal formulation and laden with subjective content.

The lack of clarity in the operational boundaries of this phrase has the potential to create legal uncertainty and extreme disparities in judgments among courts, thereby undermining the principle of equality before the law (Herlambang, 2023) [19]. The complexity increases when unpacking the dual meaning of 'loss and suffering,' which encompasses material and immaterial dimensions as well as physical and psychological suffering. From a victimological perspective, the absence of comprehensive assessment guidelines can result in procedural injustice for victims, particularly those from vulnerable groups (Satria, 2023) [6].

Theoretically, this norm aligns with and should enhance the application of restorative justice, which focuses on restoring the victim's loss, holding the perpetrator accountable, and fostering social reconciliation (Sholeh, 2023) [14]. Article 70, paragraph (1), letter d, can serve as a strong legal basis for diverting the resolution of minor cases from the prison sentence route to penal mediation or restitution channels. However, its success heavily depends on the judge's ability to conduct an accurate and fair preliminary assessment. The empirical context of law enforcement in Indonesia highlights the importance of a proper interpretation of this norm, as the problem of overcrowding in correctional institutions has reached an alarming stage (Dirjenpas, 2021). This norm, if implemented with clear and wise parameters, can function as an effective filter to prevent perpetrators of minor crimes with minimal victim impact from entering an already overpopulated prison system (Herlambang, 2023) [19]. However, haphazard implementation without clear guidelines conversely risks causing serious adverse effects, such as abuse of discretion, public perception of injustice, and the weakening of the deterrent effect of criminal law.

Therefore, the effort to reformulate and operationalize the parameters of 'loss and suffering are not too great' is a constitutional necessity to realize legal certainty and substantive justice. This research is motivated by the gap between normative progress in the New Criminal Code and its operational readiness at the practical level. It aims to bridge that gap by deeply analyzing the normative meaning of the key phrase using legal hermeneutics, Gustav Radbruch's theory of legal certainty, and a comparative approach, namely: What is the meaning of 'the loss and

suffering of the victim are not too great' for not imposing imprisonment as regulated in Article 70 Paragraph 1 letter (d) of Law No. 1 of 2023 concerning the Criminal Code? The research results are expected to provide both theoretical contributions and practical recommendations in the form of measurable and fair, multidimensional operational parameters.

Methods

The research entitled 'Analysis of the meaning of the loss and suffering of the victim not being too great in Article 70 Paragraph 1 letter (d) from the perspective of legal certainty and justice' constitutes normative legal research because this study examines and analyzes a new concept where a judge should, as far as possible, not impose an imprisonment sentence as regulated in Article 70 Paragraph 1 letter (d) of Law Number 1 of 2023 concerning the Criminal Code (KUHP). In this research, the author will conduct the study using three approaches, namely the legislative approach (also known as the statute approach). The Legislative Approach is carried out by analyzing several laws and government regulations that are the focus and central theme of the research.

Legal Theory

Theory of Legal Certainty

Legal certainty is the principle stating that law must be clear to its subjects so that they can adjust their actions to the existing rules and so that the state does not act arbitrarily in exercising power (Fenwick & Wrbka, 2016) [16]. This principle of legal certainty is found in both civil law systems and common law systems (Maxeiner, 2008) [13]. Today, the principle of legal certainty is considered one of the main elements in the concept of the rule of law or rechtsstaat (Claes *et al.* 2009). Normatively, legal certainty can be defined as a statute that is enacted and promulgated with certainty (Asikin, 2014) [25]. This is because legal certainty can be clearly and logically regulated, thereby eliminating doubt in cases of multiple interpretations. Thus, it will not conflict with or contradict existing societal norms. Legal certainty can also be understood as the certainty of legal rules, rather than the certainty of action conforming to them (Putro, 2024) [24].

Definition of legal certainty according to Gustav Radbruch: There are four fundamental matters closely related to the meaning of legal certainty itself, namely (Leawoods, 2000) [12] Law is a positive matter, meaning that positive law is legislation. Law is based on fact, meaning that law is created based on reality. The facts contained or stipulated in law must be formulated clearly, thereby avoiding errors in meaning or interpretation and facilitating implementation. Positive law must not be easily changed.

Gustav Radbruch's opinion regarding legal certainty is based on his view that legal certainty itself means certainty of the law. Radbruch states that legal certainty is one product of law, or more specifically, a product of legislation (Alexy, 2015) [17]. Based on Gustav Radbruch's opinion regarding legal certainty, law is a positive matter capable of regulating the interests of every person in society. It must always be obeyed, even if that positive law is considered less just. Furthermore, legal certainty is a state of certainty, stipulation, or determination (Spaak, 2009) [22].

Purpose of Legal Certainty

The theory of legal certainty is one of the primary aims of law, and it is integral to the effort to achieve justice. (Fauzia *et al.* 2021) [1] Legal certainty itself has a tangible form, namely the implementation or enforcement of law against an action, regardless of who the individual perpetrator is. Through legal certainty, every person can anticipate the consequences of committing a specific legal action (Hamdan *et al.* 2023).

Legal certainty is also required to realize the principles of equality before the law without discrimination. From the word 'certainty,' there is a meaning closely related to the principle of truth (Tamelab *et al.* 2023) [23]. This means that the word 'certainty' in legal certainty is a matter that can be strictly syllogized in a legal formalistic manner. With legal certainty, it guarantees that a person can act in accordance with the provisions of applicable law and vice versa. Without legal certainty, an individual cannot have a firm standard for their conduct. Consistent with this purpose, Gustav Radbruch also explains that legal certainty is one of the aims of law itself (Leawoods, 2000) [12].

Therefore, this discussion will use the theory of legal certainty and the theory of justice as proposed by Gustav Radbruch in examining whether the Reformulation of Parameters for 'The Loss and Suffering of the Victim Not Being Too Great' for not imposing an imprisonment sentence as regulated in Article 70 Paragraph 1 letter (d) of Law No. 1 of 2023 concerning the Criminal Code is in accordance with Legal Certainty and Justice from that perspective. The reason for using Gustav Radbruch's theory as an analytical tool in this research is that the principle of equality he proposes is in harmony with establishing the regulation regarding the non-imposition of an imprisonment sentence, as regulated in Article 70, Paragraph 1, letter (d) of Law No. 1 of 2023 concerning the Criminal Code for a defendant in a criminal act.

Results And Discussion

Research Findings Regarding the Meaning of 'The Loss and Suffering of the Victim Are Not Too Great' for Not Imposing Imprisonment as Regulated in Article 70 Paragraph 1 Letter (d) of Law No. 1 of 2023 concerning the Criminal Code.

Article 70, Paragraph 1 of Law No. 1 of 2023 (the new Criminal Code) regulates that a judge should, as far as possible, not impose an imprisonment sentence if parameters already regulated in that article are found, including the parameter 'the loss and suffering of the victim are not too great.' The meaning of the loss and suffering experienced by the victim in this context lies in the existence of both objective and subjective limits to the impact resulting from the criminal act. Loss is interpreted as material or immaterial loss caused by the perpetrator's act, whether in the form of physical damage, economic loss, or psychological disturbance. Suffering refers to the psychological effects experienced by the victim, including grief, trauma, and mental pressure experienced in connection with the criminal act. The phrase 'not too great' suggests that the victim experiences a minor impact that, legally and socially, does not yet obligate a severe punishment for the perpetrator. This concept adopts the principle of restorative justice, which places justice as restoration, not merely punishment (Soemitro & Hanitijo, 1994) [21], thereby providing room for the judge to consider humanitarian and individual justice aspects through the provision of Article 70 Paragraph 1 that 'as far as possible the judge should not impose an imprisonment sentence.'

'The Loss and Suffering of the Victim Are Not Too Great' Terminologically

Lexically, the word 'loss' in the Great Dictionary of the Indonesian Language (KBBI) is defined as a negative condition due to a decrease in value, profit, or a state that should be possessed. In the context of criminal law, this understanding must be expanded to capture the full impact experienced by the victim, ensuring it is not limited to a narrow interpretation (KBBI, 2016).

In the realm of criminal law, specifically related to Article 70 Paragraph 1 (d) of the Criminal Code, the term 'loss' must be interpreted broadly and encompass two main dimensions: material and immaterial. Material loss refers to the loss of property or wealth that can be objectively valued in monetary units, such as repair costs, medical expenses, or loss of income. Meanwhile, immaterial loss is abstract and difficult to quantify, yet no less important, as it relates to the disturbance of non-economic rights such as reputation, dignity, peace of life, and social relations. Therefore, the judge's assessment of the requirement 'loss not too great' must be comprehensive by considering both dimensions through relevant evidence and in-depth examination of trial facts (Hamzah, 2021) [2].

Lexically, the word 'suffering' in the Great Dictionary of the Indonesian Language (KBBI) refers to a state of suffering, misery, or hardship, indicating a negative psychological condition resulting from a traumatic event or experience. In the context of criminal law, specifically Article 70, Paragraph 1, letter (d) of the Criminal Code, suffering can be distinguished into physical suffering and psychological suffering. Physical suffering includes pain, wounds, or bodily injuries that can be assessed relatively objectively through evidence such as a Visum et Repertum.

Meanwhile, psychological suffering is more complex and subjective, encompassing emotional shock, trauma, fear, shame, or post-traumatic stress disorder that can be short-term or permanent. Therefore, the judge's assessment of the requirement 'suffering not too great' must be holistic, by not only considering visible physical suffering but also actively exploring and considering psychological suffering through victim testimony, psychologists, or social worker reports to make the assessment fairer and more comprehensive (Kanter & Sianturi, 2019) [7].

The phrase 'not too great' is the qualitative determinant that limits the concept of 'loss and suffering.' Lexically, the word 'not' functions as a negation, 'too' means more than usual or very, and 'great' describes size or level of severity. Thus, the phrase 'too great' refers to an extreme condition exceeding reasonable limits, while the addition of the word 'not' reverses its meaning to 'does not reach an extreme level or exceed reasonable limits.'

In a legal context, the phrase 'not too great' must be understood as a relative and contextual standard, not an absolute mathematical measure. The judge is required to apply a sense of reasonableness in assessing whether the loss and suffering in a specific, concrete case can still be categorized as 'not too great.' This assessment must consider prevailing social standards, the nature of the criminal act, and the victim's unique circumstances, so that the resulting judgment reflects the justice that prevails in society (Atmasasmita, 2015) [18].

After analyzing the terminological components, the synthesized meaning of the phrase 'the loss and suffering of the victim are not too great' can be interpreted as a condition where the negative impact of a criminal act on the victim, whether financial-physical (loss) or mental-emotional (suffering), overall has not reached a severe, extreme, or socially unreasonable level. This assessment is aggregate and considers the cumulative total of all impacts experienced by the victim.

Based on this synthesis, operational parameters for judicial assessment guidelines can be derived.

First, Economic Value and Nature of Material Loss, assessing whether the financial loss is relatively small, not significant to the victim's economic condition, and is temporary and easily recoverable.

Second, Severity Level and Nature of Physical Suffering, referring to Visum et Repertum to assess whether injuries are categorized as minor, heal quickly, and do not cause permanent disability or threaten life.

Third, Psychological Impact and Recovery Time Frame, considering whether the psychological impact is temporary, does not cause medically diagnosed mental disorders, and has a short estimated recovery time.

Fourth, Victim's Perspective and Position, considering whether the victim themselves considers the impact burdensome or whether reconciliation and restitution are satisfactory to the victim, where the victim's voice carries significant weight in the context of restorative justice (Marpaung, 2020).

'The Loss and Suffering of the Victim Are Not Too Great' Based on Legal Hermeneutics

Grammatically, the phrase 'the loss and suffering of the victim are not too great' contains a complexity of meaning that must be deconstructed. The word 'loss' typically refers to the material dimension that can be assessed economically, such as loss of property, medical expenses, or loss of income (Kanter & Sianturi, 2022). Meanwhile, 'suffering' firmly enters the realm of the immaterial, which is subjective and psychological, such as pain, trauma, fear, shame, and other mental disturbances caused by the criminal act (Kanter & Sianturi, 2022). The combination of these two elements indicates that the legislator was conscious of not reducing the impact of a criminal act to merely financial aspects. The adjective 'not too great' becomes both a determinant and a source of multiple interpretations. This phrase is not 'none' or 'small,' but rather an acknowledgment that there indeed is loss and suffering. However, its level has not reached a threshold considered significant or severe according to societal standards. This is a relative and normative legal standard, requiring contextual judgment from the judge, as what is considered 'not too great' in one community may differ in another, depending on social values and local economic conditions (Hamzah, 2023) [3].

Teleological Approach: Dissecting the Purpose of Substantive Justice and Utility

Teleological interpretation, which focuses on the purpose of enacting a norm, is crucial for clarifying the meaning of this phrase. The primary purpose of this norm itself is to avoid injustice arising from the rigid application of law (ius strictum), and to achieve substantive justice in concrete cases where the imposition of an imprisonment sentence is deemed no longer beneficial. Therefore, the phrase 'loss and suffering are not too great' must be interpreted as one prerequisite for realizing that purpose. Its meaning becomes:

if the defendant is spared imprisonment, is the burden that must continue to be borne by the victim still within limits tolerable to the community's sense of justice? If, in sentencing, where imprisonment is not imposed, it is viewed as a form of disregard for the victim's suffering, which is actually significant, then the purposes of utility and substantive justice will not be achieved. In other words, this phrase functions as a balancing brake ensuring that the legal policy for a judge to, as far as possible, not impose imprisonment does not sacrifice the sense of justice for the victim, so that the utility to be achieved is utility with a victim's perspective, not merely for the perpetrator.

Sociological Approach: Contextualization within the Living Values of Society

Legal hermeneutics emphasizes that law must be understood within the context of the society where it is applied. Therefore, the meaning of 'not too great' cannot be separated from the values that live in society (living law) (Mahfud, 2007) [15]. The judge must not be confined to a sterile and isolated assessment, but must delve into the social reality in which the case occurs. A material loss with the same nominal value can have a significantly different meaning and impact for a victim from a low-income background compared to a victim from an affluent background. Similarly, immaterial suffering, such as shame, is heavily influenced by cultural context; an act considered shameful in a strong, customary community may not be viewed the same way in a metropolitan environment. Thus, the assessment of this phrase must be conducted by performing a socio-diagnosis of the victim's position, cultural background, and the community's sensitivity to certain types of criminal acts. The judge acts as a gauge of the community's sense of justice, rather than merely counting numbers (Sumaryono, 1999) [5].

Systematic Approach: The Phrase within the Network of Cumulative Conditions of Article 70, Paragraph 1, Letter (d)

The phrase 'the loss and suffering of the victim are not too great' does not stand alone but is one link in a network of cumulative conditions, as regulated in Article 70, Paragraph 1, letter (d). This phrase has a close and mutually reinforcing systematic relationship with other conditions. For example, the condition that 'the act constitutes a minor offense' (letter b) logically correlates with the small likelihood that the act will cause significant loss and suffering. Similarly, the condition of 'the good nature and attitude of the defendant's heart' (letter d) can be a consideration in assessing whether the defendant has made efforts to alleviate the victim's suffering, for instance, by restoring the loss or apologizing. In this systematic reading, the phrase under discussion functions as a test of the objective impact of the act, complementing other conditions that place more emphasis on the nature of the act and the subjectivity of the perpetrator. An act may formally be a minor offense. However, if, in reality, it causes extraordinary suffering to the victim, then it fails to meet the condition for avoiding imprisonment (Hamza, 2021).

Conclusion: The Judge as a Wise Hermeneut in the Circle of Meaning

Based on the hermeneutic analysis above, it can be concluded that the phrase 'the loss and suffering of the victim are not too great' is an open legal concept that requires active and wise interpretation by the judge in each case. The process of its interpretation is a hermeneutic circle, where the judge must iteratively consider the literal text, the purpose of the law (teleos), the social context of the victim, and its relationship with other conditions. Its final meaning lies not in the nominal magnitude of the loss, but in the proportionality between the impact of the crime on the victim and the reason for not imposing imprisonment on the perpetrator. Loss and suffering can be assessed as 'not too great' if, in a holistic and victim-justice perspective, sparing the perpetrator from imprisonment is no longer viewed as a denial of the victim's pain, but rather as a just legal solution for all parties in the context of that particular and minor case (Sumaryono, 1999) [5].

'Loss and Suffering Are Not Too Great' in the Limitative Selective Theory

Limitative selective theory views the phrase 'loss and suffering are not too great' as an essential selection criterion in applying the ultimum remedium principle in the criminal law system. From this perspective, this phrase serves as a tool to sift through cases that do not substantially require criminal intervention, as their impact on the protected legal interest is minimal. This criterion is necessary to prevent overcriminalization and ensure criminal law is only used for dire and harmful cases.

Within this theoretical framework, the assessment of this phrase must consider the legal system's capacity to provide effective non-criminal alternatives for dispute resolution. If the civil justice system or other alternative dispute resolution mechanisms are capable of adequately resolving the issue, then criminal law need not be applied. Thus, this phrase is a concrete manifestation of the subsidiarity principle, which places criminal law as a last resort. This theory also emphasizes the importance of differentiation and gradation in handling criminal cases based on the level of loss and suffering caused, where criminal acts with minimal impact can be resolved through restorative and rehabilitative approaches.

The application of limiting selective theory to this phrase requires a structured and controlled discretionary policy to prevent arbitrariness. Judges must have clear and measurable guidelines in assessing the limit of 'not too great' to avoid overly broad disparities in judgments. These guidelines must contain objective, transparent, and accountable criteria to ensure that the selection made is genuinely based on limitative and proportional considerations.

Theoretical Synthesis and Applicative Parameters

Based on analysis using rational-proportional theory and limitative selective theory, it can be concluded that the phrase 'loss and suffering are not too great' serves as a limitative criterion, grounded in considerations of proportionality and selectivity in criminal law enforcement. The synthesis between the two theories yields a comprehensive understanding that avoidance of imposing imprisonment can only be granted if the victim's loss and suffering are at an insignificant level, such that sentencing is deemed irrational, disproportionate, and unnecessary.

Applicative parameters that can be developed based on this theoretical synthesis encompass five aspects. First, economic parameters assess the magnitude of material loss in relation to the victim's economic capacity and its

significance to their life. Second, medical parameters assessing the severity of physical suffering based on forensic examination and its impact on the victim's health. Third, psychological parameters assessing the impact of trauma, mental disorders, and the capacity for recovery. Fourth, sociological parameters assessing the impact on social life, reputation, and social relations of the victim. Fifth, parameters of restoration and reconciliation capacity, i.e., the extent to which loss and suffering can be restored through non-criminal mechanisms and the relationship between perpetrator and victim can be repaired. This fifth parameter is highly relevant because it concerns considerations of rationality and selectivity; if restoration and reconciliation can be fully achieved without sentencing, then the application of Article 70 of Law No. 1 of 2023 can be considered.

Application of these parameters must be cumulative, comprehensive, and contextual, considering all aspects holistically and from the victim's perspective. To identify criminal acts meeting the criteria, parameters such as the following can be considered: (1) minor criminal acts with small fine penalties or short detention, such as minor assault without serious injury; (2) criminal acts with minimal economic loss value (e.g., below Rp 2,500,000); (3) suffering that is temporary or mild psychological without prolonged trauma; and (4) subjective conditions of the perpetrator such as first-time offender status, cooperativeness, and good faith in compensating for the loss. With these parameters, the judge has discretion not to impose imprisonment as a means of respecting humanitarian elements and promoting restorative justice.

Analytical Findings Regarding the Meaning of 'The Loss and Suffering of the Victim Are Not Too Great' for Not Imposing Imprisonment as Regulated in Article 70 Paragraph 1 Letter (d) of Law No. 1 of 2023 concerning the Criminal Code.

Granting authority to the judge to consider not imposing an imprisonment sentence based on Article 70 Paragraph (1) letter (d) of Law No. 1 of 2023 concerning the Criminal Code is a humanistic breakthrough in the Indonesian criminal law system that adopts the ultimum remedium principle. However, the key phrase 'the loss and suffering of the victim are not too great' as one of the main parameters poses serious challenges from the perspective of legal certainty. This analysis will examine the meaning of that phrase from the perspective of Legal Certainty Theory, drawing on various experts to assess the extent to which this norm fulfills the principle of legal certainty in the context of considering not to impose imprisonment.

Contextualization of Legal Certainty Theory in Rechtsvinding for Sentencing Alternatives

According to Gustav Radbruch, legal certainty requires that facts in law must be formulated clearly to avoid interpretive errors and facilitate implementation (Radbruch, 2023). This theory occupies a central position in analyzing the phrase 'the loss and suffering of the victim are not too great' as a basis for not imposing imprisonment, as it provides a comprehensive epistemological framework for testing the validity of legal norms. Radbruch asserts that legal certainty is a fundamental prerequisite for creating a legitimate legal order in civilized society.

The four pillars of law, as a positive matter, are based on fact, precise formulation, and a stable form, forming an analytical paradigm relevant for testing the coherence of this phrase in the context of selecting types of punishment. This approach is significant because it sharply distinguishes between formal legal certainty and substantive justice, while providing a resolution mechanism when a conflict between the two arises. In the decision not to impose imprisonment, the phrase 'not too great' presents a dialectic between the need for legal certainty and the flexibility required to achieve restorative justice. This analysis will assess the extent to which this phrase aligns with Radbruch's standards of legal certainty while preserving its role as an instrument of equity in determining alternative punishments to imprisonment.

Analysis of Positive Law Formulation in Radbruch's Framework in the Context of Non-Imprisonment Sentencing

According to Gustav Radbruch, law must take a positive form through valid legislation as a manifestation of the will of the sovereign state (Radbruch, 1946) [10]. The phrase 'the loss and suffering of the victim are not too great' in Article 70, Paragraph 1(d) of Law No. 1 of 2023 meets this requirement because it is explicitly contained in a legitimate legislative product as one of the legal conditions for considering punishments other than imprisonment. However, Radbruch emphasizes that positive law must not only exist but must also be formulated clearly and unambiguously so it can be understood and followed by citizens. Therefore, the author opines that the problematic nature of this phrase lies in the term 'not too great,' which contains high indeterminacy and is highly dependent on subjective interpretation, potentially creating uncertainty in the application of alternative sentencing. Radbruch, in his work 'Rechtsphilosophie,' states that 'law must be understandable by those it governs,' a principle that is difficult to fulfill when a legal standard is as open-ended as this.

Basis in Fact and Operationalization of the Norm in Judicial Practice for Non-Imprisonment Consideration

The second element of Radbruch's theory emphasizes that law must be grounded in empirical facts and can be effectively implemented in practice. The phrase 'loss and suffering are not too great' as a basis for considering not imposing imprisonment, although normative, must be reducible to verifiable factual parameters in court proceedings. The author, through this research, identifies at least four relevant dimensions of fact in the context of evaluating non-imprisonment sentencing options: The economic dimension encompassing the value of material loss and its impact on the victim's financial condition; The medical dimension including the severity of physical injuries based on visum et repertum; The psychological dimension encompassing trauma and mental disorders experienced by the victim; The sociological dimension considering the impact on the victim's reputation and social relations.

Radbruch in 'Einführung in die Rechtswissenschaft' asserts that 'law without implementation is an illusion,' therefore, the judge must be able to transform this abstract norm into operational procedural standards in deciding whether a case is worthy of not being subjected to imprisonment

(Radbruch, 1952) [11]. Implementation of this phrase requires what Radbruch calls 'concretization through jurisprudence,' where the court plays an active role in developing precedents that provide more explicit guidance on the boundaries of 'not too great' in the context of alternative sentencing.

Test of Clarity and Stability of Legal Formulation for Certainty in Sentencing

Radbruch requires that law be formulated clearly to prevent arbitrary interpretation and guarantee predictability.(Radbruch, 1952) [11] The phrase 'not too great' as a basis for not imposing imprisonment clearly fails to meet the high standard of clarity idealized by Radbruch, because it does not provide easily identifiable objective boundaries. However, we must understand that Radbruch also acknowledges the 'limits of clarity' in legal formulation, especially in legal fields that are heavily dependent on context, such as alternative sentencing policy. In this context, the vagueness of the phrase can be seen as a deliberate legislative choice to provide judges with the discretion necessary to select the most appropriate type of punishment. The aspect of stability in Radbruch's theory is also relevant to analyze. This phrase is formulated generically enough to withstand social change without needing amendment as an eternal principle in humane sentencing considerations. Nevertheless, the absence of clear interpretative guidelines may create legal uncertainty and wide disparities in judgments among courts when applying alternatives to imprisonment. To mitigate this risk, the Supreme Court needs to play an active role in composing guidelines that contain objective parameters, such as the maximum loss value, types of injuries considered minor, or criteria for psychological recovery, which can be used as references by first-level judges when considering not to impose imprisonment.

Legal Certainty as an Instrument of Justice in the Consideration Not to Impose Imprisonment

For Radbruch, legal certainty is not an end in itself but an instrument to realize substantive justice. In his famous work 'Gesetzliches Unrecht und Übergesetzliches Recht,' Radbruch even argues that excessively unjust law must yield to justice (Radbruch, 1946) [10]. This perspective is highly relevant for understanding the phrase 'loss and suffering are not too great' as a preventive mechanism against injustice that may arise from the rigid application of criminal law. This phrase enables the judge to conduct an individualized justice assessment without being constrained by excessive legal formalism. However, Radbruch also warns that overly broad discretion can threaten the rule of law itself (Radbruch, 1946) [10]. Therefore, in the author's considered opinion, the implementation of this phrase in the context of the decision not to impose imprisonment must be balanced by the judge's obligation to provide a transparent, reasoned justification in their judgment. What Radbruch calls the 'inner morality of law' requires judges not only to apply law mechanically but also to consider the social impact and ethical implications of the choice not to sentence to imprisonment. In this context, legal certainty is no longer seen merely as predictability, but as procedural fairness in the decision-making process regarding the type of punishment to be imposed.

Implementation of Radbruch's Theory in the Indonesian Socio-Legal Context for Just Sentencing

The application of Radbruch's theory in analyzing the phrase 'loss and suffering are not too great' as a basis for not imposing imprisonment must consider Indonesia's unique socio-legal context. Although the civil law system aligns with Radbruch's emphasis on explicit codification, Indonesia's legal pluralism and socio-cultural diversity demand a flexible approach (Radbruch). This phrase is appropriate because it enables judges to adjust standards in accordance with local wisdom and community values when assessing the proportionality of sentencing. The 'basis in fact' aspect in Radbruch's theory also needs to be viewed in light of the limitations of judicial institutional capacity, such as access to forensic experts and psychologists in remote areas, which can impact the quality of proof. Furthermore, standards of loss and suffering can vary between communities, such as those in urban and rural societies or those with different economic conditions, when judging the appropriateness of imposing imprisonment.

Synthesis between Certainty and Justice in Radbruch's Paradigm. The phrase 'the loss and suffering of the victim are not too great' represents a dialectical synthesis between legal certainty and substantive justice in sentencing policy. Although it does not meet the high standard of clarity idealized by Radbruch, this phrase functions as a necessary mechanism to prevent injustice from the overly rigid application of criminal law. Its value lies in the ability to accommodate contextual considerations without sacrificing the legitimacy of positive law. However, to prevent abuse of discretion, strict procedural control mechanisms are required, including the obligation for judges to provide deep and transparent legal considerations, as well as further regulations such as Government Regulations or Supreme Court Regulations (PERMA) regarding standard parameters to avoid wide disparities in judgments.

Conclusion

The meaning of 'The Loss and Suffering of the Victim Are Not Too Great' in Article 70 Paragraph (1) letter d of Law No. 1 of 2023 is an open legal construction (open concept) containing interpretive complexity. Grammatically, this phrase encompasses a dual dimension, namely loss (both material and immaterial) and suffering (both physical and psychological), which are assessed as not having reached an extreme level of severity or exceeding reasonable limits. From the perspective of Gustav Radbruch's theory of legal certainty, the absence of objective boundaries and operational clarity in the phrase 'not too great' creates a risk of legal uncertainty that can erode the principle of equality before the law. Nevertheless, within Radbruch's framework of legal purpose, this flexibility can be justified as an instrument to achieve substantive and individual justice in each case, provided it is applied through transparent, accountable judicial reasoning and balanced with adequate guidelines to prevent disparity and arbitrariness.

As a follow-up to the findings and conclusions of this research, the following recommendations are proposed: To the Supreme Court of the Republic of Indonesia: To promptly issue a Supreme Court Regulation (PERMA) or a Technical Guideline that operationally elaborates on the meaning and assessment parameters of the phrase 'the loss and suffering of the victim are not too great' in Article 70

Paragraph (1) letter d of Law No. 1 of 2023. The guideline should contain:

Indicators and objective boundaries for the four dimensions (material loss, immaterial loss, physical suffering, and psychological suffering), including illustrative examples of their application to various types of minor criminal offenses. Special evidentiary requirements, such as the use of a psychological visum (psychological assessment) from an expert to evaluate psychological suffering in certain offenses (e.g., domestic violence, sexual violence). • A mandatory cumulative and phased assessment procedure for judges to follow, as well as the obligation to include detailed reasoning for each element in the operative part of the judgment to ensure transparency and accountability.

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