

The Nature of the Judge's Imposition of Penal Supervision Against Children Conflicts With Justice to Realize Justice

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Abstract. Judicial power is an essential element in the constitutional structure of a country's legal system. The rule of law includes the concept of *Rechtstaat* and the rule of law, and Islamic nomocracy. Judicial power becomes the pillar of support for a legal state to work. In a state of law, judicial power is demanded to be free or independent from anyone's influence apart from the legislative and judicial powers. The supervision punishment applied by the Judge to the child in conflict with the law must reflect Justice. The word criminal is generally not commonly given to children. It is hoped that the imposition of criminal sanctions or penalties will be replaced with a better meaning, namely by conducting supervision, which is much more effective in applying so as not to cause stigmatization of children who are dealing with the law.

Keywords: *judge, supervision, children, realistic justice*

1. INTRODUCTION

According to the Locke of state power as put forward by John Locke, the British philosopher is divided into 3, namely:

- 1) Executive power
- 2) Legislative power
- 3) Judicial power

Apportionment this rule is under the culture private Indonesian nation in the field of preparation constitutional nationwide as it turns out in the countries of Indonesia Merdeka Sovereign all-time drafting the constitutional sourced to the proclamation of independence of Indonesia in 1945 is the implementation of the Constitutional Law of liberty in order to indulge Demands- modern demands on Indonesian land from foreign lands in 1776-1945 [1]. The division of Government Power occurs in a unified government unit and is solely to strengthen unity by ensuring smooth administration and freedom of Indonesian. So the division of power is to eradicate divisions in society and to guarantee the unity of action (*l'union d'action*) in the Republic of Indonesia, which does not recognize the concentration of power but in one human hand (*la concentration du pouvoir*) but instead *creates* national unity and unity in the Republic of Indonesia called as "*une et indivisible*" one and (without being divided) in spirit and the goals and objectives of action in defending independence, so that guided democracy and economy are guaranteed its implementation. [2]

The implementation of Imposition of Crime, In the case that the Criminal Word is identical to the

giving of witnesses and imprisonment. Although the criminal in prison is a criminal primarily threatened and held by the majority state since the first, the criminal's effectiveness prison in prison is doubtful. [3] That is based on the results of research Djisman Naidoo at the Institute of Correctional Cipinang in 1990 discovered that the eight-five of the 100 prisoners surveyed stated that the criminal in prison is not something scary because before committing acts of criminal already know about the risks of his actions is sentenced criminal prison. Because of that, the criminal in prison getting much got the spotlight sharply from experts Penology.

The criminal system in Indonesia and how to regulate criminals are supervision in the criminal system to reform criminal law in Indonesia with imprisonment. First, under the politics of criminal law, the purpose of punishment must be directed at protecting the community from crime. Therefore, the basic idea of the realization of the supervision punishment as an alternative to the criminal type of deprivation of liberty (imprisonment) in Indonesian criminal law should be in line with the two aspects of the punishment's purpose. [4]

Second, In the explanation of the Draft National Criminal Code, it is stated that the implementation of this supervision punishment is linked to the threat of imprisonment. Criminal supervision is characterized alternative to criminal deprivation of liberty conditional, namely, the provision for no exercise of crime has been dropped (relating to criminal imprisonment) with the holding of the terms of the specific and set a trial period not exceeding three years.

Third, Criminal parole as an alternative to criminal deprivation of liberty in the Penal Code in force today is still less protected by individual/perpetrators of acts of crime. Because of this reasons, to determine the formulation of alternative criminal deprivation of liberty in the National Penal Code (KUHP Nasional) in the future to come, we need alternative criminal deprivation of liberty that others, such as criminal supervision (Probation) that has been much developed in other counties.

The State of Indonesia itself, the Supervision Crime and the granting of its decision is part of the Criminal Code which is placed on certain conditions stipulated in Section 14 a. section 14 of the Criminal Code (KUHP) insignificant line mention, that of the convicted person will be sentenced to criminal imprisonment of less than 1 (one) year, confinement is not a substitute for penalties and fines not be paid by the convict can be replaced with a criminal on parole. By against the perpetrators of criminal/defendant having a da imposition of punishment is absolute, the implementation of which was delayed by a conditional has been stigmatized against the perpetrators of criminal acts through the verdicts delivered in the trial open to the public.

From the research results, it can be concluded that the basic idea of holding a supervision punishment is to replace the crime of deprivation of liberty/prison, which in its development has harmed the interests of the convicted person and the interests of the community. Supervision punishment should be included as one of the main types of punishment. National Penal Code (KUHP Nasional) will come in the future, the necessary means of alternative criminal deprivation of liberty that others, such as criminal supervision (probation), has been much developed in the countries Country else.

Based on the research background, the problem was made, namely the essence of the supervising criminal imposition given by the Judge against children in conflict with the law.

2. RESEARCH METHODS

The type of research used is normative legal research, this research that examines statutory regulations related to the object of research, especially regarding the principles and legal norms contained in statutory regulations. In this research, the approach used is the Regulatory Approach law (Statute approach), approach concept (Conceptual Approach)

The Comparative Approach, The approach of legislation Statute Approach), which approach is to

assess and analyze the legislation and regulations relevant to the study's subject matter.

Approach Kraft (Conceptual Approach), the approach by studying the views and doctrine in jurisprudence, the concept, the principle of law that are relevant to the subject matter of research the law provide analysis point of settlement problems in the study of law from the aspect of legal concepts relating with normalization in law. This approach departs from the viewpoint of doctrine in legal science.

A comparative approach is an approach by comparing events that have occurred in one country and related to research results that have been made by other people, which will later be used as an additional reference for the author. In this case, the researcher will compare existing research and add to the research that the author is currently researching. [7]

3. RESULTS AND DISCUSSION

Combating crime by using the (law) the criminal is the oldest way, as old as the civilization of man's own. Criminal is a term that is more special than "punishment" according to Sudarto that "referred to a criminal is suffering deliberately imposed to those who commit acts that meet the requirements certain. The Word " acts of crime "is a translation of" straffbaarfeit, "Moeljatno wear the term "act of criminal" therefore, a sense act more abstract so that more comprehensive than the notion of following criminal who declares a state of concrete, Tirtaamidjaja wear the term "violation of criminal" and Utrecht wear the term "incident of criminal." More further said that in general, acts of crime in synonym with the offense, which is derived from the language of others, namely dictum. In the dictionary, much Indonesian offense means acts that can be subject to punishment for an offense toward laws follows criminal. Sense of Elements contained and above are: [8]

- 1) There is something done,
- 2) The Act that can be subject to punishment, and
- 3) The Act that violates the Act is criminal. [9]

According to Sudikno Merto Kusumo, the definition of criminal law is: " criminal law is the law that determines the actions that can what or anyone else's making convicted and sanctions what are some available. Criminal law divided into Materially Criminal Law and Formal Criminal law. This material criminal law makes illegal acts called offenses and which are punishable by sanctions. [10]

Criminal law formal or inmate law regulate how do countries apply sanctions criminal in the event of concrete According Prodjohamidjojo that: "legal punishment is part of the overall law in force in a country that entered the basics of fund rules for. Determine which dressings should not be done. Meanwhile, According to Schaffmeiter Act of abusing IAPA that has been set in the provisions of the criminal, it is the Act that is against the law. Schaffmeiteret. al, which is translated by JE. Sahetapy divides the nature against the law into four meanings bellow:

- 1) The nature against general law,
- 2) The nature against special law,
- 3) The nature of against the formal law and
- 4) The nature against law materially. [11]

Nature against the law of formal means: "all sections listed on the formulation of the offense have been fulfilled (so all the terms in writing to be convicted), whereas the nature against the law who want to be protected by forming legislation in the formulation of the offense specified.

According to Mertokusumo, "The implementation of law can be mean running the law without any dispute or violation. This includes the implementation of the law by all citizens of the State every day are not realized and also forces the state, such as for example a policeman standing at the intersection of the road set up the cross (Law enforcement). In addition to the implementation of the law may occur if there is a dispute, namely that dilaksanakanoleh Judge. This is also law enforcement".

Furthermore, Mertokusumo said that in upholding the law, there are three elements that must always be considered, in an effort to implement a decision in relation to criminal supervision, namely: legal certainty (*rechtlicherheit*), benefit (*zweckmassigkeit*) and Justice (*gerechtigkeit*). Certainty of law is the protection *yustisiabel* to act arbitrarily, which means that someone will be able to obtain something that is expected in the circumstances specified. *Fiat Justitia et pereatmundus* (although this world is collapsing, laws must be upheld). On the other hand, "society expects benefits in implementing or enforcing the law. Likewise, Justice is a matter that must be considered in law enforcement, which must be able to provide Justice for the community. [10]

In essence, legal principles or principles called freedom or independence of judicial power or freedom of power of judicial bodies do not only apply in Indonesia. The source of reference that this principle is also known in the international world by

referring to, It is said that the universal principle is adhered to in world countries. this is in the basic Principles on independence of the judiciary filed by the UN General Assembly (Resolution 40/32 of 29 November 1985 and Resolution 40/146 dated 13 December 1985 principle of the independence The law Asian Region of the Judiciary in manila 28 August 1977 in the Bear Statement stated that:

1. Justice Is an institution of the highest values in every society
2. Independence requires that the Judge decides a case entirely on the basis of an understanding of the law and is free from any influence, either directly or indirectly, the Judge has jurisdiction over all issues that require Justice. [12]

The meaning of the power of Justice regarding the essence of Justice to impose a Criminal Decision Supervision for children, who are free and free as stated above, has been given a functional dimension. Functional in the sense that such a meaning demands the implementation of the function of the Judicial Power in resolving both dispute cases (Civil Disputes, State Administration and Criminal Cases) which is examined by the Judge. [13]

The Judge here, when examining a case in the case of a child, must be seen first, the source of the existing and / applicable regulations, as long as the regulation is correct or inaccurate on the case being examined. as well as the imposition of punishment whether it is appropriate for children in conflict with the law. Towards children as perpetrators of criminal acts, sometimes the community and government, in terms of law enforcers, are not wise enough to see this problem, the assumption of being naughty children or criminals is often given to them. Even in the juvenile court process, it is treated unfairly so that it seems that the child perpetrators of criminal acts are victims of the structure of law enforcement [14]

Handling of children in conflict with the law, especially children as perpetrators of criminal acts, is problematic. In a seminar and workshop on 5-6 April 2010, Patrialis Akbar was the Minister of Law and Human Rights in handling children with legal problems as much as possible with the Restorative Justice Approach. Furthermore, it is said that the results of the monitoring are that in prison / remand center shows almost the same fact, children who are in the criminal justice process and deprivation of liberty significantly reduce children's rights which have a negative impact. Prisons / remand centers are overcapacity, uncomfortable, in some prisons,

children are still mixed with adults and what is worse is isolation from families, lack of educational / social services, guidance, and guidance. [15]

Regarding this, Wirjono Projodikoro is of the opinion that: in the field of criminal law, the Judge has the duty to apply *in the concerto*, called as what is done by a defendant, especially a child, must be in line with the formulation of an act violating the law in the Criminal Provisions for the determination of this crime, the Judge must first know which crime which is violated by looking at the existing legality principles. [16]

The above conception relates to the principle of legality but it should be remembered that it is not only as formulated in Article 1 paragraph 1 of the Criminal Code " *Nullum crimen sine lege*" but also " *Nulla Punna Sine Lege* " but also " *Nulla Poena Sine Lege*" means not only understanding the prohibition of an act only, but the number of penalties imposed must also be determined by law. [17]

Within that framework, it is necessary to state here that apart from being limited by statutory regulations (the principle of legality), freedom or independence of judges in deciding criminal cases in the judicial process is also limited by the indictment of the public prosecutor. According to Andi Hamzah:

"Judges' verdicts in criminal cases are also limited by what the public prosecutor charges are the same as civil cases, limited by what will be sued. The Judge must not make a decision other than what the prosecutor has decided. The ideal is an act that actually happened and was charged and that too is proven. It is true that " *Dominis Litis* " is the prosecutor (who adjudicates the state). Prosecutors may prosecute one *feit* (deed) even though the defendant committed one *feiten* (deed), but that one really happened and was proven as sufficient evidence coupled with the Judge's conviction. The freedom to sue the prosecutor is also carried out by prosecutors in the United States with Practice Plea Bargaining means that if the defendant admits his mistake, the prosecutor can reduce the charges he is accused of. Therefore, the freedom or freedom of judges to decide cases also depends on whether or not the public prosecutor makes the indictment. [18]

The purpose of the Criminal Court is to decide whether a person is guilty or not, criminal Justice is carried out by the procedures set out in the laws and regulations which cover all constitutional limits that end in court examination.

The existing Criminal Code has not regulated the existence of the Supervision Crime, especially the Supervision of Children. In Supervision Crime, in

the Criminal Code itself, Judges are guided by Article 14 a of the Criminal Code, as well as in the Juvenile Justice System Law, to prevent the occurrence of imprisonment which has so far been emphasized in efforts to retaliate against children, then in Section 71- section 78 of the Law No 11 of 2012. [19]

Self-Supervision Crime in Law No. 11 of 2012 is regulated in section 77, namely:

- 1) Supervision punishment that can be imposed on a child as referred to in section 71 paragraph 1 letter b number 3 is a minimum of 3 (three) months and a maximum of 2 (two) years
- 2) In the event that a child is sentenced to a Supervision Crime as referred to in paragraph 1, the child is placed under the supervision of the public prosecutor and guided by a social supervisor. [20]

Imposition of punishment by the Judge as a mouthpiece of law is not wrong, however, the Judge should reconsider whether the decision provides Justice and benefits to the child. Particularly in Supervision Criminal Matters, the Judge is more emphasized in thinking flexibly for the Judge and seeing from the child's background the goal is to realize protection for children. Supervision Penalty applied by the Judge aims to create " *Social Welfare*" and " *Social Defense*", namely the welfare of the community and social protection. [21]

Decisions in the Judicial Process are stated in the Judge's decision or judicial decision. According to section 1 point 11 of the Criminal Code, what is meant by a judge's decision or a judicial decision is a judge's statement pronounced in an open court in the form of punishment, independent of all legal claims and methods regulated in law. According to Lilik Mulyadi, the essence of the Judge's Decision is: A decision pronounced in a trial open to the public. According to Mulyadi, in this context, a decision is pronounced by a judge because his position means that the Judge is authorized by law. to adjudicate a case (CHAPTER I Article 1 point 8 KUHAP) The Judge's decision must then be pronounced in a trial open to the public (Article 195 KUHAP, Article 13 of Law Number 48 Year 2009 concerning Judicial Power. [22]

It was also stated that the decision was passed after going through a process or stages of trial and administrative process according to the criminal procedure law in general. only those who have binding and legal strength. The meaning of the process or stages of the trial of children here is:

1. Reading of the research results of the social adviser (before open trial)
2. Closed trial opening
3. Reading of the Indictment
4. Exception
5. Intermediate decision (the trial is continued or the exception is rejected) if it is continued, then
6. Evidence (examination of the accused, expert sanction, the defendant)
7. Requisition / demands
8. Pledge (defense by parents, or attorney / guardian / foster parent)
9. Verdict (trial open to the public). [23]

According to Raws, the essence of a decision is said to be fair if: Where the judicative process works, "the court must decide to apply and enforce the laws and regulations in which it is said that the law rationally provides directions and gives direction to humans. In the rule of law, criminal procedural law is demanded, which is a procedure designed to ensure the existence of a truth whose way and way following the judiciary's objectives must be fair and open but not allowed to be tampered with by political pressure. The essence of a just law is ensuring the legal order. can be maintained impartially and regularly. [24]

According to John Raws, Justice is *Fairness* which contains the principles that free and rational people who wish to develop their interests should obtain the same position when starting it and that is a fundamental condition for those who enter the association they want to say that Justice is a political policy whose rules form the basis of state regulations and these rules are a measure of what constitutes a right. [24]

Justice can be interpreted as a value to create an ideal relationship between one human being and another as fellow members of society by giving humans what they are entitled to according to their achievements. Furthermore, impose obligations according to law and morals. The definition of Justice above shows that to realize something is fair is not as easy as imagined. Fair to certain groups is not necessarily fair to other groups. [25]

Justice is one of the things that must be realized by the court. In the opinion of some experts, Justice is one of the goals of law for any society. Justice is an inseparable part of the law itself. Law is basically about Justice. Law should contain the value of Justice, which is following John Raws' opinion, who said that the main subject of Justice is the basic structure of society or, more precisely, the ways

social institutions distribute fundamental rights and obligations and determine profit-sharing and social cooperation.

4. CONCLUSION

It is undeniable that the essence of the Judge's decision in the case of supervision punishment imposed on children who face the law is an important value for children in contrast to legal certainty which is more disguising, in essence, Justice is individual so that in the implementation and enforcement of the law the community is very interested. Supervision crime is an alternative. This is suitable for children where the punishment of supervision is the Judge's choice when the decision is made. Supervision punishment is a punishment placed on certain conditions so that the Judge can choose to impose a sentence related to that particular condition. To realize a fair decision for children, judges must also dig deeper through the intuition of their hearts and minds before passing a verdict.

5. SUGGESTION

We recommend that the legislators and related parties immediately update the law in the juvenile criminal justice system, especially in criminal supervision. Here, the legislators must be conscientious and separate the Criminal and Supervision Words are two things that need to be corrected and reviewed.

REFERENCES

- [1] S. Dahlan, *Kemandirian dan Kebebasan Hakim Memutuskan Perkara Pidana dalam Negara Hukum Pancasila*. Bandung: Nusa Media, 2015.
- [2] H. L. . Hart, *LE Concept Du Droit*. Brussel England: Universitas Saint Louis, 1976.
- [3] Muladi, *Hak Asasi Manusia Politik dan Sistem Peradilan Pidana*. Semarang: Badan Penerbit Universitas Diponegoro, 2002.
- [4] Muladi, *Lembaga Pidana Bersyarat*. Bandung: PT alumni Bandung, 2008.
- [5] L. Marpaung, *Unsur-unsur Perbuatan Yang Dapat Dihukum, (Delik)*. Jakarta: Sinar Grafika, 1991.
- [6] Moelyatno, *Asas-asas Hukum Pidana*. Jakarta: Bina aksara, 2017.
- [7] Peterr Mahmuh Marzuki, *Perlunya Undang-undang Tentang Macam dan Harga Mata Uang (penelitian) kerjasama sama dengan Bank Indonesia*. Jakarta: Prenada Jakarta, 2017.

- [8] Hanafi Amrani dan Mahrus Ali, *sistem Pertanggungjawaban Pidana Perkembangan dan Penerapan*. Jakarta: Rajawali Press, 2015.
- [9] Sudarto, *Hukum dan Hukum Pidana*. Bandung: Alumni bandung, 1983.
- [10] S. Mertokusumo, *Mengenal Hukum Sebab Pengantar*. Yogyakarta: liberty, 2015.
- [11] J. Shaetapy, *Hukum Pidana*. Yogyakarta: Rajawali Press, 2012.
- [12] L. M. Friedman, *The Legal System a Sosial Science Perpractive*. New York: Russel Sage Foundation, 1975.
- [13] Moentesquieu, *The Spirit Of Laws Dasar-Dasar Ilmu Politik*, Cet 4. Bandung Indonesia: Nusa Media, 2012.
- [14] Sajipto Raharjo, *Penegakan Hukum : Suatu Tinjauan Sosiologis*. Yogyakarta: Genta Publishing, 2018.
- [15] R. D. Pursley, *Introduction to Criminal Justice*, Second edi. New York: MC Millan Publishing Co, 2015.
- [16] Prodjohamidjoyo, *Memahami Dasar-Dasar Hukum Pidana*. jakarta: Pradnya Paramitha, 2017.
- [17] T. oleh M. R. Pound, Roscoe, *Pengantar Filsafat Hukum*. Jakarta: Bhratara, 2016.
- [18] A. dan D. S. Sujatno, *Pemasyarakatan Menjawab Tantangan Zaman*. jakarta: vetlas Production, 2008.
- [19] A. S. C. Kemps, *Law in the making*, vol. 6. Amerika: Oxford University Press.
- [20] B. N. Arief, *Bunga Rampai Kebijakan Hukum Pidana*. jakarta: Kencana Prenada Media, 2010.
- [21] B. N. Arief, *Bunga Rampai Kebijakan Hukum Pidana*. jakarta: Kencana Prenada Media, 2010.
- [22] B. N. Cardoso, *The Nature of Judicial Procces*. Yale: New Haven Yale University Press.
- [23] P. Kennet, "Justice Administration," 2012.
- [24] J. Raws, *A Theory Of Justice*. Cambridge: Harvard Universiy Press, 2019.
- [25] A. M. Richard, *law and Justice an introduction*. Pasific Groove: Cole Publishing, 2014.