

LEGAL DISCOVERY BY JUDGE IN THE CUSTOMARY CRIMINAL SANCTIONS: A LEGAL HERMENEUTICS APPROACH

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Abstract

The legal philosophy used in juvenile criminal decisions must be based on transcendental values for the sake of justice based on belief in one and only God, guided by the principles of the best interest for the children. Type of the study is a normative-legal research by using philosophical, theoretical, and conceptual approach. It was conducted in the Provinces of Bali and West Papua, Indonesia. This paper provides information on the latest trend in research. The results show that the concept of legal discovery by judges in providing additional punishment in the form of fulfilling customary obligations towards children should consider aspects of moral justice and social justice by exploring the legal values that live in society (the living law). Judges have mixed and matched theological and sociological aspects by paying attention to legal values and a sense of justice in their decisions, in these circumstances the Judge has studied things that are meta- juridical in nature, namely the values behind statutory rules with the method of interpreting legal hermeneutics. Legal considerations by judges in the decision also pay attention to the sense of priority of justice enforcers.

Keywords: Children; Criminal Law; Legal Policy; Legal Hermeneutics.

1. INTRODUCTION

The main principle in legal protection for children must be in accordance with existing legal instruments such as international legal instruments namely the Convention on the Rights of the Child. Indonesia as a country in the Convention on the Rights of the Child which regulates the principle of legal protection for children has an obligation to provide special protection for children who have conflicts with the law and children who are faced with legal problems. These conventions as legal source that provides material on law-making and harmonization of laws relating to children. The legal rules contained in these conventions are legal materials that provide statutory rules regarding children. Therefore, it becomes an integral part of the law concerning children and can be used as a basis for consideration for judges in making decisions for children and of course with due regard to international legal instruments.

The judicial process for handling juvenile crimes has shown how the law works, namely still adhering to the teachings of the syllogism, a legal view that is legal in nature, law is identified as a statutory.¹ The only source of law is the statutory because it is considered complete and clearly regulates all legal issues, so that judges cannot do anything other than what is clearly and rigidly stated in the statutory.

One form of “fulfillment of customary obligations” is the payment of fines which are still known and recognized in several regions in Indonesia, such as those in Bali known as *Dedosan*, while in Lombok known as *Sasak*. Referring to the meaning and function of fines in the form

of “fulfillment of customary obligations”, this is of course different from fines in the criminal law system regulated in Article 10 of the Criminal Code or other laws, where fines are something that is paid to the State and becomes part of the from non-tax state revenues, as stipulated in Government Regulation No. 39 of 2016 concerning types and rates for non-tax state revenues, while the fines referred to as a form of “fulfillment of customary obligations” are fines that are the rights of victims of criminal acts.²

In the traditional legal system, local communities in Indonesia are better known as the customary law system, namely the tendency of customary sanctions to lead to meaning that is restitutive. The problem of determining sanctions in customary criminal law is a series of policies that are in one legal system. As a legal system, it cannot be said that each stage of imposing customary criminal sanctions can stand alone but is interrelated with one another and cannot even be separated at all.

Customary crimes occur when the community perceives the act as inappropriate, is seen as disrupting the cosmic balance and causing shock in society. Soepomo gave the view that in the customary law system all actions that conflict with customary law regulations are illegal acts and customary law also recognizes efforts to reform the law if the law is violated. Furthermore, Soepomo said that if there is a violation of the law, the legal officer (traditional head and so on) will take concrete action (*adat reactie*) to correct the violated law.³

Judges after seeing the actual legal facts associated with the problems of juvenile delinquency in a comprehensive manner, must use spiritual quotient that is correct and fair in considering and making decisions on juvenile delinquency.⁴ The legal philosophy used in juvenile criminal decisions must be based on transcendental values for the sake of justice based on belief in one and only God, guided by the principles of the best interest for the children and the principal of *ultimum remedium* which has become a global principle in criminal law enforcement.

As mentioned above, the position of the value of justice based on the values that grow and develop in society in a judge’s decision. Therefore, this research will focus on conceptualization aspects or ideas of judges through legal discovery by judges in the application of customary criminal sanctions to juvenile criminal cases based on the juvenile justice system in Indonesia.

2. METHODOLOGY

The research is normative legal research, namely to produce an argument, theory or concept as a prescription in solving a problem.⁵ The approach method used in this research is a qualitative-normative approach through philosophical, theoretical, and conceptual approach.⁶ It was conducted in the Provinces of Bali and West Papua, Indonesia. It was conducted by exploring the concepts or ideas of judges through the method of finding the law in judge’s decisions which is the tendency of judges in the practice of juvenile justice.

3. RESULTS AND DISCUSSION

Legal Hermeneutics of Legal Discovery by Judge in the Customary Criminal Sanctions

The social institutions that govern the conduct and order of Indonesian society are reflected in the provisions of customary law, as well as the provisions governing criminal law, which are contained in customary criminal law. Its existence as a social reality is as a living law, followed and obeyed by indigenous peoples continuously, from one generation to the next. Violation of the rules of order (customary criminal law) is seen as causing upheaval in society because it is considered to have disturbed the cosmic balance. Therefore, the offender is given a customary reaction, customary correction or customary sanctions.⁷

All societies that still recognize unwritten law, and are in a period of upheaval and transition, judges are formulators and diggers of legal values that live among the people. Therefore, judges must enter the midst of society to know, feel and be able to explore the feelings of law and sense of justice that live in society. Thus, judges can give decisions in accordance with the law and the sense of justice in society.

The judge in trying a case mainly considers the facts or events and not the law. The rule of law is only an instrument, while the decisive one is the event, because there may be an event which even though the law already exists, the judge has his own way of resolving it.⁸ Jan Rammelink,⁹ argues that criminal judges when deciding cases in court may not be able to apply criminal legislation without using interpretation. This interpretation can then give birth to jurisprudence which will become a source of law. In such case the court becomes *quasi-legislative*, because for example related to the intentional, error, causing, coercion (*overmacht*) or unlawful (*wederrechtelijkheid*), it needs interpretation. Therefore, judges in criminal law must also be recognized as playing the role of law seekers and discoverers. Even in criminal justice, the broad scope of the substance of norms is always developed and to a certain extent changed through interpretation.¹⁰

Table 1: The Development of the Composition of the Results of Assistance to Children in Conflict with the law in Indonesia¹¹

No.	Results of assistance to children in conflict with the law	2015	2016	2017
1.	Diversion	54,89	40	47.35
2.	Diversion child return to parents	52,78	37,32	42.78
3.	Diversion child to social institutions or other	2,11	2.68	4.57
4.	Action verdict	8.67	15,12	12.61
5.	Verdict child returns to parents	5,46	8,19	5.85
6.	Verdict child are submitted to social institutions or others	3,21	6,93	6,76
7.	Criminal verdict	36,45	44.88	40.04
8.	Conditional verdict	4.99	13,23	8,41
9.	Imprisonment	31,46	31.65	31.63

Source: Secondary data, 2018 (edited)

There are still several judge's decisions that are not in favor of children where the imposition of crimes against children in conflict with the law is not reasonable, causing stigma against

children. Judges still place themselves as mouthpieces for laws that are influenced by positivism thinking, so that the dominant legal culture of judges is still based on the old paradigm which influences the meaning of judges for the cases they examine.¹²

Judges do have to base the text of the law and make it a starting point in adjudicating but not as an ending point. Good judges open their eyes and see the legal system in all its nuances, provisions and basic values. Within the framework of the general context, a good judge gives the meaning of the text of a law in his decision. A good judge will not make a decision just by knowing and basing it on the text of the law. The judge must recognize the community, its problems and aspirations. A good judge does not see strictly the provisions of what is regulated in the constitution, laws, agreements or agreements that must be interpreted.¹³ the judge looks at the text of the law as a whole.

The paradigm of judge's thinking is very important in determining the content of a decision. His decision is part of the result of the judge's mindset. For this reason, the judicial power is an independent power to administer justice in order to uphold law and justice. The role of judges in law enforcement in principle must be able to provide benefits or utility for the community, but besides that the community also expects law enforcement to achieve justice. Nevertheless, it cannot be denied that what is considered good and useful in society sociologically is not necessarily fair, and vice versa, what is perceived as fair philosophically is not necessarily good and efficient for society.

The judge has a role and opportunity in classifying as many legal events as possible within a class, such as the class of legal regulations in force at that time or the law in force at a certain time. For example, legal regulations in the Criminal Code, local government regulations that apply either now or in the past as positive law and natural law and other unwritten laws. The procedure for discovery of law by judges is the operational steps carried out by judges in discovery of law. Judges can see the law as a tool or means to help find the law. In this case, the judge does not follow or rely on the law, but the law is used as a tool to find a solution to a concrete event.

Law in reality is not a new case, but on the contrary, it only reconstructs all problems, then judges make legal discoveries based on legal interpretations and legal constructions whose essence is science or the art of interpretation of texts that study the nature of things about or understanding something. The discovery of such a law is called the discovery of the law with the method of legal hermeneutics.¹⁴

Legal hermeneutics is a modern method of interpreting texts. Legal texts are applied to society, legal texts are not for law.¹⁵ for this reason, the law is demanded that what is needed for social and state life contains values, because the law regulates issues of social, cultural and economic relations, also qualifies relations of political power and other aspects of life. The law constructs individual relationships with other parties and categorizes wrong and right actions.

The research findings show that from various aspects of life that develop in society, judges also consider religious values which are matched with values that grow and develop in society as stated in the various considerations of the following judge's decisions:

Decision No. 8/ Pid.Sus-Anak/2018/PN Tlg. Considering, that the child is Moslem, so that in order for the child to become a better person and for the child to better absorb and implement the values of the religion he adheres to, it is hoped that the child will not repeat the crime again, the judge sees it necessary to be subject to the main punishment in the form of punishment for job training as stipulated in Article 71 of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System, children are also subject to additional punishment in the form of fulfilling customary obligations, namely for children to become muezzins (adzan) in mosques/*mushola* around their environment during the time of Subuh, Maghrib and Isha for 3 (three) months.

Decision No. 3/Pid.Sus-Anak/2022/PN Sbs. Considering, that because the child is Moslem and so that the child absorbs and implements the religious values he adheres to and it is hoped that the child will not repeat the crime again, so that in addition to being subject to the main punishment, the judge also considers it necessary to impose an additional penalty in the form of fulfilling customary obligations as stipulated Article 71 paragraph (2) letter b of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System, namely that children in their home environment located in Sambas regency, namely to become mosque cleaners every Friday, within the period to be determined in the order decision.

Decision No. 3/Pid.Sus-Anak/2019/PN Tel. In term to reduce for the Child, namely: (1) The child admits openly what he has done, regrets it and promises not to repeat it again; (2) The child is 17 years old and has student status at MA Bustanul Ulum Sumbergempol and have the determination to complete his studies; (3) The child has never been punished; (4) The child as orphans; (4) The biological mother says that she is willing to take the child back and is still capable of educating, fostering and supervising the child so that he can improve his behavior.”

Decision No. 3/Pid.Sus-Anak/2022/PN Sbs. In term to reduce for the child, namely: (1) the child admits openly what he has done, regrets it and promises not to repeat it; (2) the child are still young and need the love and guidance of their parents; (3) the child has never been punished; (4) the child’s parents say that they are still capable of educating and supervising the child so that he can improve his behavior.

This finding indicates that in imposing judges, the theological and sociological aspects have been combined with due regard to legal values and a sense of justice. The judge’s legal considerations in the decision also pay attention to the sense of priority of justice enforcers.¹⁶

This includes distinguishing between crime and delinquency with sociological considerations which are the background to the problems that trigger delinquency or juvenile crime, and the sensitivity of the community environment, so that there is synergy between the sense of priority and the sense of justice from justice enforcers.

Way to discover the law by a judge in deciding a child’s criminal case by applying additional punishment in the form of fulfilling customary obligations can be done by interpreting it through the method of legal hermeneutics.

However, when interpreting the law, judges must still be guided by the general principles of interpretation as mentioned by Jonkers, that there are 3 (three) things that must be considered

in interpreting, namely:

- 1) *Is het word duidelijk dan geldt het word en niet de bedoeling. Hierbij moet worden bedacht, dat het de rechter is, die beoordeelt of een word duidelijk is.* (If the words are clear, it is the word that applies, not the meaning. It must be remembered that it is the judge who judges whether a word is clear)
- 2) *Is het word niet duidelijk, maar voor verschillenden uitleg vatbaar, dan gaat boven het word de bedoeling.* (If the words are not clear, but can be interpreted differently, then the words that are suitable for their purpose are chosen).
- 3) *bij de mogelijkheid van verschillenden uitleg gaat de opvatting, die aan de woorden zin geeft boven die, welke geenerlei effect heelf.* (If the possible explanations are different, then the words that do not have any effect are chosen)

Based on the research on decisions that apply additional criminal impositions in the form of fulfilling customary obligations in Indonesia, it is known that there are several models of additional criminal impositions in the form of fulfilling customary obligations which are decided by judges in their decisions, namely: Firstly, fulfillment of customary obligations in the form of payment of customary fines or compensation. Secondly, the fulfillment of customary obligations in the form of an action or deed performed by the Child that is adapted to the values that grow and develop in society by taking into account the spiritual (religious) aspects as well as cultural aspects.

Judges in imposing additional punishments in the form of fulfilling customary obligations apply habits and patterns of mixing and matching basic punishments whose categories and types of criminal implementation do not limit the freedom of the child. The judge is of the view that children are the future of the nation and the imposition of crimes that limit children's freedom, such as imprisonment, is a last resort (*ultimum remedium*). The judge is not the only one who interprets the law, but the role of the judge is very important in finding the law in concrete events, so that it can be realized and has implications for the application of the law.

Enforcement of living laws in a society that regulates actions that are prohibited and threatens criminal sanctions is recognized as a crime and is threatened with sanctions criminal law which is an exception to the application of the principle of legality in the criminal law system in Indonesia. The enactment of this living law is a form of formulation into criminal law norms to ensure legal certainty in the future that Indonesia recognizes the principle of formal legality and material legality and to strengthen the development of criminal and criminal law and criminal law enforcement practices.

Judges in making legal discoveries through the legal hermeneutic method must pay attention to the purpose of sentencing, namely not solely to insult or suffer the child, but rather a form of accountability for the child's actions and to make improvements to the child so that after serving the crime, the child can return to the environment. Family and society, and will fulfill and comply with the applicable laws and regulations. Therefore, the judge will consider as fairly as possible by paying attention to various aspects, both aspects of legal justice,

sociological aspects, philosophical (ideological) and theological (religious) aspects to determine the proper punishment and should be imposed on the child by taking into account the objectives punishment which must be educative, preventive, corrective, repressive and restorative in nature.

4. IMPLICATIONS AND RECOMMENDATIONS

The concept of legal discovery by judges in providing additional punishment in the form of fulfilling customary obligations towards children should consider aspects of moral justice and social justice by exploring the legal values that live in society (the living law). Judges have mixed and matched theological and sociological aspects by paying attention to legal values and a sense of justice in their decisions, in these circumstances the Judge has studied things that are meta- juridical in nature, namely the values behind statutory rules with the method of interpreting legal hermeneutics. Legal considerations by judges in the decision also pay attention to the sense of priority of justice enforcers. This includes distinguishing between crime and delinquency with sociological considerations which are the background to the problems that trigger delinquency or juvenile crime, and the sensitivity of the community environment, so that there is synergy between a sense of priority and a sense of justice from justice enforcers. Conditions for setting settlement of criminal cases for children that pay attention to the sense of justice in society with patterns, criteria and procedures for fulfilling customary obligations considered still minimal, encouraging judges to play their role by finding the law as an effort to pass a fair decision for victims and children as perpetrators.

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Declaration of Interest

Authors declare there are no competing interests in this research and publication.

Notes

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