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THE THEORETICAL PRINCIPLES OF JUSTICE WITHIN THE PENAL ASPECT

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Abstract

Justice will be fulfilled when self-restraint are applied to on actions that will only be self-benefiting for the said individuals by way of seizing someone else's belongings or rejecting what is supposed to be given to others. Justice can be seen in legal provisions that govern and frame the human's life even if that provision is still in the form of ideas that are subscribed in the legal provisions of the country. The threat of a sanction that is contained in the law, as an element of crime, is also a form of manifestation of the accessibility of a certain value of balance between prohibition or permissibility which will be visible in the form of a sanction when a violation of these provisions occurs. The value of a balance between the prohibitions or threats will also form the values of justice in law, which is expected to be adhered to by by the people. As such, the social order and security of living together can be met. The importance of justice is seen as the essence of virtues that has to be followed upon and should be the basis of motivation of various basic social institution of a society. This means that each individuals are given the same possibility in a fair manner to develop and enjoy their self-respect and dignity as human beings; not by measuring the economical strength or means; therefore it has to be understood that justice runs deeper than the economic status of a person.
Keywords: Justice; Criminal Law; Sanctions.

Abstrak

Keadilan akan terpenuhi ketika adanya pengendalian diriatas tindakan memperoleh keuntungan diri sendiri dengan cara merebut apayang merupakan kepunyaan orang lain atau menolak apa yang seharusnya diberikan kepada orang lain.Keadilan akan terlihat dalam ketentuan hukum yang mengatur dan menjadi bingkai dalam menata kehidupan manusiasekalipun ketentuan tersebut masih berupa ide yang dituangkan dalam ketentuan hukum melalui negara. Ancaman sanksi dalam ketentuan hukum sebagai salah satu unsur tindak pidana, juga merupakan wujud dari adanya nilai keseimbangan antara larangan atau kebolehan hal mana akan berwujud dalam sanksi ketika terjadi pelanggaran terhadap ketentuan tersebut. Sebagai suatu nilai keseimbangan antara larangan dan ancaman berupa sanksi tentunya juga merupakan bentuk ide nilai-nilai keadilan dalam peraturan hukum yang mana diharapkan agar dapat ditaati oleh masyarakat. Sehingga ketertiban sosialdan keamanan hidup bersama dapat terpenuhi.Pentingnya keadilan dilihat sebagai kebajikan utama yang harus dipegang teguh dan sekaligus semangat dasar dari berbagai lembaga sosial dasar suatu masyarakat. Artinya memberikan kesempatan secara adil dan sama bagi setiap orang untuk mengembangkan serta menikmati harga diri dan martabatnya sebagai manusia yang tidak diukur dengan kekayaan ekonomis sehingga harus dipahami mendalam bahwa keadilan lebih luas melampaui status ekonomi seseorang.
Kata Kunci: *Keadilan; Hukum Pidana; Sanksi.*

Introduction

The legality principle as a fundamental basis in finding and discovering the value of justice in the realm of criminal law includes something quite interesting to be examined and studied more thoroughly. An act will not be declared as an criminal act in which a sanction is imposed upon if it is not strictly regulated in the legal provisions. On the other hand however, it needs to be considered whether acknowledging the act as a crime, in which a legal sanction may be imposed upon will then provide sense of justice for the perpetrators who violate those prohibited legal provisions.[1]

The development of the science of Penal Code provides several developments in the principle of legality towards both formal legality and materialistic legality, as well as the judges' judgment in exploring and finding the value of justice within in the customs of a society that leads to the theory and objectives of punishment that may satisfy the sense of justice. The legal reality of the judicial process also shows that there is still the use of judicial authority in using disparities of decisions that tend to ignore justice for justice seekers. Based on the above-mentioned background, the issue being raised is about the principle of justice in criminal prosecution.

Justice derives from the word "just" in the dictionary of the law, it is impartial to one party; it is honest, it sides with the truth according to the law. Meanwhile "justice" is defined as a protection of the rights of every human being.[2] Another consideration of justice is that it is non-arbitrary, impartial and even-handed. It implies that decision and action are based on objective norms, not subjectively, especially not arbitrarily. Basically, justice is a relative concept, it is not equally fair for everyone. Being fair according to one person will not necessarily be fair to another. When a person can affirm that what he is doing is fair, then what was done must be relevant to the general order in which the scale of justice is acknowledged. Basically, people will always need justice, truth and law. It is a value and basic need of civilized human life. Justice belongs to all and is for all; when justice does

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[1] Soedarti, 'Penegakan Hukum Pidana Terhadap "Anak Nakal" (2001) 16 Yuridika.[335].
[2] M. Marwan, *Kamus Hukum* (Reality 2009).[331].

not exist it will cause destruction and chaos to the existence of society itself. Even differences in attitude and hatred towards others should not result in unjust attitudes.

A Greek philosopher, Aristotle said "s*uum unicuique tribuere neminem laedere*";[3] which means to give everyone something that is within his right and to not do harm to others. He argues that justice is a form of the allocation of the interests of community life, but not viewing that order is the basic problem of life in society. Aristotle saw the reality of human beings as social creatures who live in groups, however small the unity of life is, people need a good life and this is where law is needed. He thinks justice is an attitude of the mind that wants to act justly, those who are unfair are the ones who break the law by improperly desiring more profit from other people, those who essentially do not want the same equal principle. Everything that is established by law is fair because justice is what can bring happiness in society. Therefore, the purpose of the law according to Aristotle is to achieve a better life, while *equity* is needed for those on duty to soften rigid legal existence.

Plato is not specifically talking about justice. Justice is depicted in the human soul by comparing it to a state. Plato argued that the human soul consists of three parts, namely the mind (*logistikon*), feelings and desires both psychologically and physically (*epithumatikon)*, as well as a sense for good and evil (*thumoeindes*)[4] the soul will be well balanced, if there is a a harmony between *epithumatikon* and *thumoindes*. There shall also be a control of feelings and passions through logical reasoning on correct and evil feelings. Similarly, a state must be balanced according to its parts to be just. For example, a division is made on the classes of people who have wisdom (the philosopher), another class of people who have the courage (class of soldiers) and the third class consists tof workers and peasants who have the self-control and duty to maintain the economy of society. When each class acts according to its place and duty respectively, then that is justice. This is why according to Plato,

[3] Dominikus Rato, *Filsafat Hukum Suatu Pengantar, Mencari, Menemukan Dan Memahami Hukum* (Laksbang Justitia 2002).[59].

[4] Sukarno Aburaera, *Filsafat Hukum, Teori Dan Praktik* (Kencana Prenada Media Group 2013).[182].

men can only develop and achieve happiness through the state. Therefore, the task of a man is to be obedient to both the written and unwritten state law.

According to him justice can only exist in laws and legislation made by those specialized in these issues. This understanding strongly links law with justice. Justice will be obtained through law enforcement and the law is a positive omniscient law that is created by the state, with the state being the source of law. In relation, Plato defines the criterion of justice as kindness in the sense of harmony and balance from within that cannot be known or explained by rational argumentation. On the other hand, justice can only be found in truth. What is believed to be true is more inclined to a justice. According to Thomas van Aquinas who adheres to the scholastic scholars of Augustine (philosophy of the Catholic Church). This view conveys that truth exists only in the church, therefore all science and knowledge must be in harmony with the teachings of the church (Catholic). The influence of religion that has a general and absolute influence of the law can also be regarded as the provision of rational thinking based on pure abstract logic. Human reason is regarded as a natural thing (natural law) which becomes the moral basis of human action. Justice is then divided into 2 (two), namely general justice (*justitia generalist)* and specialized justice (*justitia specialist*). General justice is justice according to the will of the law that must be done or not done/shall be avoided in the public interest or also called justitia legalists, and a special justice is the basis of similarity of indigenous justice or proportionality. Special justice is also divided into several forms: the division justice (*justitia distribution*), commutative justice (*justitia commutative*) and vindacte justice (*justitia vindicativa*).[5]

Understanding the value of justice basically is inseparable from law, wherein the law is a tool used to achieve justice. The real purpose of law is to achieve justice, legal certainty and feasibility. Justice, through these objectives, is then he main goal in which humans as social beings (*survival mode*) can not be separated from the reality of law that aims to achieve justice. The essence of justice stems from human morals to realize a sense of love and togetherness. There are many opinions about

[5] Dominikus Rato.*Op.Cit*.[68].

justice, as well as the theory of justice. This article will be described the form of justice according to some experts, including the form of justice from Aristotle's view. Justice is understood as a form of communicative justice where a treatment towards a person is regarded without placing a value on his services. For example, communicative justice is a person who has been given sanctions due to violations he made without looking at his services and position. While distributive justice is the treatment to a person in accordance with the services that have been done. An example of distributive justice is a construction worker who is given a salary according to the results that have been done. Natural justice is the treatment of a person in accordance with the laws of nature. An example of natural justice is that a person will reward him well if he does something good to him either. Furthermore, conventional justice is justice that occurs where a person has complied with the laws and regulations. An example of conventional justice is that all citizens are required to comply with all applicable laws of that country. Lastly, justice of improvement is justice that happens where someone has defamed another person. An example of justice for improvement is someone apologizing to the media for defaming another person.

Based on Aristotle's opinion, Thomas Aquinas then developed a form of theory of distributive justice (*iustitia distributive*) and commutative justice (*iustitia comutativa*). Distributive justice demands justice in sharing and requires sacrifice. While commutative justice is created because togetherness is a justice with respect to community life in society such as transactions, exchange, lease, buying and selling. This justice is always in line with social justice in societies based on social morals so that social sanction becomes effective in enforcing this type of commutative justice.

John Rawls saw justice as values of social justice. His book entitled, *a theory of justice* explains the theory of social justice as *the difference principle* and *the principle of fair equality or opportunity*. The first principle of justice describes that social and economic differences must be regulated to provide the greatest benefit to the less fortunate. This justice is more focused on a series of general principles of

justice that underlie and explain the moral decisions seriously to be considered in special circumstances. Moral decisions are clarified to be a set of moral evaluations that have been established which then lead to appropriate social action and are in line with our conscience. Moral decision is guidance; it is not a must. On the other hand, another form of justice is *the principle of fair equality of opportunity* which provides those with less possibilities the chance to achieve prosperity prospects, opinion and authority; in this regard this group are given special protection.

This theory is the development and refinement of a lack of theoretical justice according to the flow of *utilitarianism*. The importance of justice is seen as the ultimate virtue that must be upheld and at the same time the basic foundation for a society. It means giving a fair and equal opportunity for everyone to develop and enjoy their dignity as human beings; this is not measured by economic wealth and therefore it must be thoroughly understood that justice is broader than just one's economic status. Freedom as a sign of high and noble human dignity must be given priority over the economic benefits one can attain.[6]

Justice in Pancasila is particularly emphasized under its second principle of "just and civilized humanity" and on the fifth principle "social justice for all Indonesians". These principles stipulate that the value of a just humanity and social justice imply that the essence of human beings as civilized and fair, be it in relation to themselves, to other human beings, to the people of the nation and state, the environment and to God Almighty. In this regard, the consequence is that humans must uphold the dignity of human beings as creatures of God Almighty. Departing from this view, the form of justice set includes *distributive* justice, namely *commutative justice* and legal justice.[7]

Distributive justice includes a relationship between the state towards its citizens justice, meaning that the state shall provide justice in the form of equity share, welfare, aid, subsidies, and opportunity to live together based on rights and

[6] Andre Ata Ujan, Keadilan Dan Demokrasi, *Telaah Terhadap Filsafat Politik John Rawls* (Penerbit Kanisius 2001).[22-23].

[7] H.M. Agus Santoso, *Hukum, Moral, Dan Keadilan: Sebuah Kajian Filsafat Hukum* (Kencana Prenada Media Group 2012).[92].

obligations. On the other hand, legal justice, which is interpreted as a relationship of justice between citizens to the state, means that the citizens must fulfill justice in the form of compliance with laws and regulations to the state. Commutative justice is defined as a relationship of justice between the citizens of a state with other citizens on a reciprocal basis.

Forms and Purposes of Penal Code

When discussing the forms of punishment (*stelsel*) and its purpose, it is important to describe them within the criminal sense. This term criminal can be difficult and can almost be equated with the term of sanctions and punishment. Therefore, more in depth clarification will be described about the definition of criminal compared to the the term punishment. Punishment is more directed to something that is painful because it is a daily term rather than a legal terminology. Punishment is a general term and conventional, it can have a broad meaning and is interchangeable because the subject can be link with other subjects or issues, for example in education, moral, religion, and so forth.[8] The following example can provide an understanding of the difference between punishment and sanctions, for example, a teacher who disciplined his students by writing 100 words together in a single-page or an employer who cut the salaries of employees for being late or also parents who tweaked the ear of their children because they are too lazy to learn. These examples are understood more as a form of punishment rather than sanction, therefore the terminology between punishment and sanction is very different.

In some terms, sanction is also often used by experts to describe punishment, crimes, sentencing and penalization.[9] This article is more focused on the use of the word criminal as a legal term. Crime comes from the Dutch "*straf*" which is defined as a deliberate suffering imposed or granted by the state on a person or persons as a result of the law (sanctions) to him for his actions that have violated the criminal

[8] Muladi dan Barda Nawawi Arief, *Teori-Teori Dan Kebijakan Pidana* (Alumni 1992).[1].
[9] Mahrus Ali, *Dasar-Dasar Hukum Pidana* (Sinar Grafika 2012).[185].

law prohibition.[10] Soedarto defines penal as a suffering deliberately imposed on those who commit acts that meet certain conditions. Muladi and Barda Nawawi Arief, in his conclusion about the crimes describes the following characteristics: the penalty is essentially an imposition of suffering or misfortune or other unpleasant consequences; the penalty shall be deliberately imposed by a person or entity which has power (by the authorities); the penalty is imposed on a person who has committed a criminal offense according to the law.

Roeslan Saleh interpreted it as a reaction to the offense and tangible intentions that deliberately inflicted the country to the perpetrators of the offense. Based on some criminal understanding by some experts, then summarized that the penalty form of pain (pain/*nestapa)* provided by the state to someone who has violated the criminal law. The prohibition was later referred to as a crime. Eva Achjani Zulfa, cites the opinion of Benn and Peters[11] which imposes limits and certain characteristics of the criminal term, namely: as a form of support of the suffering experienced by the victim (it must involve; an unpleasantness to the victim); the mistake is realistic (it must be for an offense, actual or supposed); it is an act which was obviously or intended by the perpetrator (it must be of an Offender, actual or supposed); it is a deliberate act and not merely the natural consequence of an act (it must be the work of personal agencies; in other words, it must not be natural concequencies of an action); an act imposed by regulatory authorities for violations of the rules that have been made (it must be imposed by an authority of an institution against Whose rules the offenses has been committed).

In addition to the criminal term, it is also known as punishment or referred to as the imposition/award/imposition of a criminal. The punishment is more connoted to the process of criminal detention and criminal proceedings, so it is within the scope of the penitential law. However, in substance, punishment is inseparable from criminal, because in the process of imposition or penalization can not be separated

[10] Adami Chazawi, *Pelajaran Hukum Pidana Bagian I, Stelsel Pidana, Tindak Pidana, Teori-Teori Pemidanaan Dan Batasan Berlakunya Hukum Pidana* (RajaGrafindo Persada 2013).[24].

[11] Eva Achjani Zulfa dan Indriyanto Seno Adji, *Pergeseran Paradigma Pemidanaan* (Lubuk Agung 2011).[9].

from criminal stelsel, besides also discussed about punishment purpose and punishment theory. So as to outline the criminal (*straf*) will be followed by criminal prosecution. Article 10 of the Penal Code[12] regulates penal law which consists of of principal and additional criminal punishment. The principal punishment is capital punishment, imprisonment, penalization and fine. While additional criminal forms consist of removal of certain rights, confiscation of certain goods and the announcement is based on the judge's decision. The criminal stelsel is a manifestation of gratitude to the offender who violates the criminal law provisions in the form of a criminal offense. In Article 10 KUHD, feeling the pain or suffering are by lawmakers called as penalization (*straf*)¸ tangible and divided in the order or stelsel criminal law. The sequences (*stelsel*) show the weight of criminal act (offense) that violated the implications whether these are heavy weights and criminal threats. When the determination of the criminal on the type of capital punishment, namely the death penalty, then of course the offense is caused by a violation of a heavy offense, but otherwise an offense is categorized as a light offense when the criminal threat imposed is an announcement of the judge's decision. According Satochid mammal, the definition of criminal torture or *suffering* is given to a person who violates something norms prescribed by the criminal law. Such torture or suffering by a judge's decision is imposed on the person being blamed.

Whereas in case of criminal detention in the form of one of the above mentioned criminal stelsel which is then said to be punishable. Criminalization is one of the processes of criminal detention, of which there is a particular reason or purpose in determining the crime. When examining and exploring punishment is certainly not independent of the theories of punishment. Mahrus Ali proposed a conventional punishment that is commonly known in Continental European law, namely absolute theory, relative theory and combined theory.

Absolute theory also called theory of retaliation (*vergeldings Theorien*), which rests on the base of retaliation. *Retribution* by Andi Hamzah was retaliation against the offenders for committing a crime, so this theory is also referred to as

[12] Moeljatno, KUHP *Kitab Undang Undang Hukum Pidana* (Aksara 2012).[5-6].

a retributive theory. In this theory it is said that the interests of the protected state, namely the interests of the law of the individual, the society and the state, so that when a crime occurs (violation of the state provisions in the form of a crime), the state has the right to impose criminal sanction, because the criminal has committed rape and rape Legal interests. To impose a penalty on the offender with the intention of giving a reply to his actions. This means that when a person commits a crime it must be given suffering which aims in retaliation for his actions.

Retaliation as an objective of sentencing necessarily have a direction, in line with that then by Adami Chazawi, said retaliation in criminal punishment has two directions, namely[13] addressed to the villain (corner subjective from retaliation) and addressed to the satisfaction of ill feeling among the public (angle objective from public retaliation). Vengeance from a subjective angle, rewarding the feelings of hurt, anger, dissatisfaction that fall into the category of psychological suffering experienced by the victim or society as a result of a crime perpetrated by a criminal. So with a reward for his actions (objective retaliation) it is expected that psychological suffering can be satisfied (treated).

The provision of suffering (penalty) as a form of compensation for the crimes committed, as quoted from Imanuel Kant, according to Muladi,[14]

> "... the penalty is never carried out solely as a means of promoting other purposes, either to the perpetrator itself or to society, but in all cases it shall be imposed only because the person has committed a crime. Even if all members of the community agree to destroy themselves, the last killer still in prison should be sentenced to death as a resolution/decision for the dissolution of society to be implemented. This must be done because everyone should receive the rewards of his deeds and the feelings of revenge should not remain with the members of the community, otherwise they may all be regarded as persons who took part in the murder in violation of the common good".

Some experts then distinguish retributive theory in some form, as Nigel Walker and several other experts divide in purely retributive theory (*retributive negative*) and positive retributive. First basically dominated by consequentialist theory, the pure

[13] Adami Chazawi.*Op.Cit.*[158].

[14] Muhammad Taufik Makarao, *Pembaharuan Hukum Pidana: Studi Tentang Bentuk-Bentuk Pidana Khususnya Pidana Cambuk Sebagai Suatu Bentuk Pemidanaan* (Kreasi Wacana 2005).[39].

penalty in retaliation or the price to be paid is the ultimate goal. The positive retributive emphasizes that retaliation alone is not enough to impose criminal sanctions. It takes another reason to justify a criminal imposition beyond the excuse of vengeance, meaning that another advantage of criminal imposition is another consideration other than merely a reason for retaliation as well as a negative retributive theory. Similarly retributive pure, then retributive negative aims to satisfy the vengeful both the community itself and the injured party or victim, By Andi Hamzah called destination *Retribution* (*revenge*), which considers also that this theory is primitive but still feels his influence on modern times.[15]

Relative theory or also called goal theory departs from the base that the criminal is to uphold the order (law) in society. Utrecht considers that in principle this theory teaches that the execution of sentences and should at least be oriented in an effort to prevent the convicted person (*special prevention*) of the possibility of repeating the crime again in the future. And prevent the public in general (*general prevention*) of the possibility of committing a crime well as the crime committed and the other convict. All of these punishment orientations are in order to create and maintain the legal order in the life of the community.[16]

Criminal is a tool to prevent the occurrence of a crime with the aim that the order of society remains preserved, but it is also a tool to force the public order. So to achieve these objectives, the criminal has three kinds of properties, which are scare (*afschrikking*); ameliorative (*verbetering/reclasering*) and are destroyed (*onschadelijk/maken*). Besides the criminal is also seen as efforts to prevent the so-called general prevention (*general preventive*) and specific prevention (*preventive special*). As a public precautionary means, criminal sanction is imposed on a person who commits a crime so that people (public) will be afraid to commit a crime. This means that the goal is not only for the perpetrators of the crime but objectively criminal penalization can be an example for others (public) so that later will not do evil because it will be sanctioned, in an attempt to scare the general public. While

[15] Andi Hamzah, *Asas-Asas Hukum Pidana Edisi Revisi 2008* (Rineka Cipta 2008).[29].
[16] Utrecht, *Hukum Pidana I* (Pustaka Tinta Mas 1986).[185].

specific prevention (*preventive special*) places special emphasis to the perpetrator in order not intend to repeat the crime or even prevent the intention of going to commit a crime can not be implemented. Through this purpose the criminal nature to scare, fix and make it become powerless. The nature of the special precautionary theory is more pronounced to the person (individual) of the perpetrator who has committed the crime or intends to commit the crime.

The combined theory (*vernegings Theorien*) basically tries to combine the ideas that are contained in the absolute and relative theory underpinning the principle of retaliation and the principle of defense of lawful order in society. So it is intended as retaliation against the act of the perpetrator but also make improvements so that the perpetrator can return and be accepted in the community. This combined theory then gave birth to 2 (two) large groups of combined theory that prioritizes vengeance and combined theory that prioritizes the protection of public order. Vengeance as the main objective of combined theory is certainly limited to retaliation as an attempt to maintain order in society. While the purpose of providing protection to the public order by giving suffering where the criminal imposition should not exceed the weight of the acts committed by the convicted person.

The new problem then arises, namely the extent of how heavy are the actions committed by the perpetrators of crime so that it can be penalized. It certainly requires further discussion. Imposition of penalty then is referred to as the basic justification (*rechtvaardigingsgronden*) and basic forgiveness (*schulduitsluitingsgronden*). That, the weight of the action ultimately gives birth to crime (suffering) is seen on the basis of justification or no act against the law so that the criminal penalty of nestapa can not be imposed on the perpetrator (free), or based on the basis of forgiveness (no error) for the conducted act. Then the perpetrator of the crime is then discharged of all lawsuits.

Criminal act or offense derives from the Latin *delictum* and *delicta*.[17] According to the Dutch language term called *strafbaarfeit,*[18] whose meaning is defined differently

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[17] Andi Zainal Abidin, *Asas-Asas Hukum Pidana Dan Beberapa Pengupasan Tentang Delik Delik Khusus* (Prapantja 1983).[43].

[18] Moeljatno, *Perbuatan Pidana Dan Pertanggungjawabannya dalam Hukum Pidana* (Bina Aksara 1983).[38].

by legal experts. Another view of formulating strafbaarfeit as follows: "*Strafbaarfeit* is a behavior (*handeling*) which is punishable by penalty, which is against the law, which is associated with a mistake and made by people who could be responsible".[19] While Van Hamel Strafbaarfeit formulates it as follows: "*Strafbaarfeit* is the behavior of people (*menteliijkegedraging*) formulating the wet, which is against the law, which should be convicted (*strafwaarding*) and carried out by mistake".

Moeljatno also uses the term criminal act which states that: A criminal act is an act that is prohibited by a rule of law, a prohibition of which is accompanied by a threat (sanction) in the form of a specific penal for whoever violates the prohibition. Or it may also be said that a criminal act is an act which by rule of law is prohibited and is threatened with a criminal origin only in that it is remembered that the prohibition is directed to the act (ie a situation caused by the person's conduct), while the criminal threat is addressed to the person who caused the incident.[20]

Ruslan Effendy uses the term criminal event which states that a criminal event is an event that can be executed by criminal law.[21] Ridwan Halim uses the term offense stating that offense is a prohibited act or acts and punishable by law (criminal).[22] Monoism flow teaches that all the elements of a criminal act is the same as the terms of sentences. So according to monoism flow when a person conducts a criminal offense and will be sentenced, awareness is needed on all elements of the offense and of the responsibility of the offender.

Value of Justice in Criminal Law

The criminal law is always questioning the values of security, order and justice as a mean to achieve its goals. The purpose of criminal law is simply to fulfill a sense of justice. In respect of what has been described previously: that penalization is intended to scare people off so they do not to commit a crime, either by scaring off a large crowd (*general preventive*) or directed to certain people who are already

[19] *ibid.*
[20] *ibid.*[37]
[21] Ruslan Effendy, *Azaz-Azaz Hukum Pidana* (Lembaga Kriminologi Unhas 1981).[46].
[22] A Ridwan Halim, *Hukum Pidana Dalam Tanya Jawab* (Ghalia Indonesia 1981).[31].

commiting the crime. So that in the future they will avoid doing the said crime again (*special preventive*), in addition, it is also in order to protect the interests of communities and individuals from the unpleasant results caused by this offense.

The emphasis of criminal law is not only for the protection of the public, but also for individuals with the hope that it will create balance and harmony in order to protect people's lives and create a social order. The State then makes the legal provisions concerning the prohibition and permissibility, which is binding for the entire life of the community. Thus indirectly protecting the interests of the country as stipulated in the law by state authorities. The legal provisions made by the state to create balance and harmony in order to protect people's lives and create a social order in the form of prohibitions and binding ability for the entire life of the community are coupled with the provision of penalties for violators. This term is known as *strafbaarfeit*, or a crime. There is a existence of an act against the law as an initial requirement of a criminal act, in the sense that the act has been strictly regulated in a legal provision in the form of prohibition and permissibility. Along with it then Moeljatno confirms that criminal elements are the existence of the actions *(handeling)* and that the action was prohibitied and regulated within the provisions of law.

A criminal offense will be perfect again when the prohibition or permissibility was then threatened punishment for violators of the prohibition and negligence for permissibility. Increasingly clear that the action in the form of offense and skill set forth in the provisions of the law there should be an element of nature against the law (*wederechtelijk*). Elements of nature against the law is a prerequisite for the determination of punishment for offenders who break the law. Elements unlawfully indicate the nature of the unauthorized action, which means that when it is defined as the unauthorized nature of an action is evident in the examples of the action as provided for in Article 167 of the Penal Code regarding acts inside the house, yard or enclosed space that is used by another person unlawfully. Confirmation of the unlawful element is implicit intent that should be when it gets into the house or yard others, should be asked for permission to who owns the house. When the

prohibition to act so as not to be entered into the yard of the house, yard or indoor spaces used by others, eventually breached by taking action into people's homes without permission, then the provision can be said to act against the law. Why is that, because it is clearly stipulated in the law and the criminal law then known as the principle of legality.

Apart from this there are no meaningful law against the validity of a purpose, and therefore to be more concrete as according to the example provided in Article 328 of the Penal Code, or Article 339 of the Penal Code. Acts conducted by taking a person from his residence or place of residence temporarily, with the intent to place that person unlawfully under the authority or power of others, as provided for in Article 328 of the Penal Code, or the act of murder that followed, accompanied or preceded by something criminal act committed with the intent to prepare or facilitate its implementation or to detach themselves and other participants in the case of criminal caught in the act, or to ensure mastery of goods obtained unlawfully as set out in Article 339 of the Penal Code. These criminal acts by R. Susilo is referred to as premediated crime of murder (*moord*).[23] The intention of taking a person from his residence or place of residence temporarily, with the intent to place that person unlawfully or also act takes the lives of others (homicide) in order to prepare or facilitate (murder followed, accompanied or preceded by something criminal act) implementation that meets the intent element is against the law because it is not valid provisions of the law, because it is not the act of killing someone is a prohibited act.

Should actions against the law continues, the law will be reinforced by the threat of sanctions against the perpetrators of criminal acts (either prohibition or permissibility). Since the objective of penalization is to scare people so as not to commit a crime, whether targetted to specifically frighten a crowd (*general preventive*) and only to certain people who are already committing such crime to hinder them from committing such crimes in the future again (*special preventive*). In addition, it is also conducted to protect the interests of communities and

[23] R Soesilo, *Kitab Undang Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Politea 1996).[241].

individuals from the unpleasant actions of the offense by a person. It where the threat of sanctions is a mandatory requirement to complete the legal provisions in the context of criminal law.

Justice will be fulfilled when self-restraint are applied to on actions that will only be self-benefiting for the said individuals by way of seizing someone else's belongings or rejecting what is supposed to be given to others. As understood from Aristotle's definition of the value of justice; what is protected are the interests of individuals or groups against other groups or individuals who act unethically (violate moral, ethical) that would create disharmony in life. The person is disturbed because his belongings were seized, but within the scale of human life as social beings who live alongside each other, then the social order is disturbed as well. Therefore, the interests of members of the community as a social system should be protected.

The State has the duty and responsibility to protect members of the community through the creation of legal justice, legal certainty and legal expediency, so that it integrates with the purpose of the law as a means to uphold justice. This will enable the society's life to be more orderly and dynamic. In this connection the concept of justice will be fulfilled when the absence of legal provisions that govern and frame the administration and management of the society. Although these provisions are still in the form of ideas that poured in through the legal provisions of the country. This is done during the formulation stage by penal reform (*penal reform*)[24] which contains the value of justice by establishing a legal provision, meaning that the State seeks to protect the interests of society or individuals who are forced upon by other individual or group; whereas the values of justice have been established for the interest of the weaker society. It is therefore implied that law enforcement efforts carried out during the formulation stage form the legal provisions. Although it is undeniable that a measure of law enforcement is not only at the formulation stage of determining legal provisions, but should also be applicable as well during

[24] Barda Nawawi Arief, *Masalah Penegakan Hukum Dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan* (Kencana Prenada Group 2008).[9].

the execution process as part of the law enforcement, which is expected to provide fairness and certainty of law and legal expediency.

The threat of sanctions contained in the law as one element of a penalty, is also a manifestation of the value of the balance between the restrictions and the permissibility which will manifest themselves in terms of sanctions when a violation of these provisions occurs. As a value of the balance between the restrictions and the threat of sanctions is certainly also a form of the idea of the values of justice in law, which is expected to be obeyed by the people to sensure that social order and security can be fulfilled for those living together. However, it cannot be ignored that as social beings, who live side by side with different needs and interests, these will create rights and obligations, which certainly is not the same. In that case even if the legal provisions that have been established to harmonize the rights and obligations of individuals are certainly different, they would still cause social conflict between communities. In this regard, legal provisions are not only made in the form of an idea by the state in the form of legislation, its implementation is also an important part. This is then the main task of the state to implement its provisions. It will create other legal purpose, namely legal certainty and legal expediency that comes down to the value of legal justice.

Based on the above-mentioned view, therefore partial understanding of the value of justice is only seen as a legal provision which states an act in the form of prohibition and permissibility are threatened with sanctions. This is because as a fulfillment of legal certainty and legal use, as well as legal justice will be obtained and confirmed for both the community or individuals through stages or ongoing legal proceedings. Moeljatno interprets criminal law as part of the overall law applicable to a country, which holds the bases and rules to: determine which actions should not be done, are prohibited, may result in specific criminal sanction for violating the rules; determine when and in what way those who have made restrictions that may be imposed or sentenced as has been threatened; determine how the imposition of punishment can be implemented if the alleged person has violated these provisions.

The definition of criminal law by Moeljatno was then expanded into a criminal

law definition of material and formal criminal law. Material criminal law concerning acts which should not be done, is prohibited and accompanied by threats or criminal sanctions. Formal criminal law relating to the implementation of penalty, in which the substance contains information on the terms when, in which capacity did they conduct such criminal breach and what sanctions may be imposed on these criminal acts. So that when they wanted to scrutinize aspects of criminal justice, therefore to achieve justice, one cannot separate the substantive criminal law and criminal law formal. Providing the sentencing or the sanction is not the final part of the form of criminal sanctions against a person who has violated the prohibition, therefore it should not be made as an imposition in the law. In this regard, the rule of law as part of an effort to create and provide a sense of justice for the community. Then the values of justice should be upheld by law enforcement agencies in the implementation of the criminal law so that by itself would provide a sense of justice for the people. Automatically certainty and legal expediency met and authority of the law is always upheld.

Conclusion

Penalization or also known as the determination of a crime or even the imposition of sanctions is a part of the criminal proceedings conducted by the state to impose sanctions in the form of offense to a person (group) in people who have violated the prohibition, have conducted an act that should have been conducted as imposed in the legal provisions, and an act that is not allowed to be conducted as described in the law. Penalization is made when it has fulfilled the elements of a crime or violations committed were proven by the imposition of sanctions. Punishment as one of the legal process will certainly give suffering (pain) for people who are sentenced. The suffering or pain (wijn) as a chain on the freedom of both inward and spiritual. Thereby disrupting the social relations between society and spiritual relationship with the Creator, on one hand such enchainment is a disruption of a fundamental right conferred by the Creator, therefore, the value of justice is an important part of human life, which must be sought, obtained and maintained so as

to provide peace and tranquility of life. No matter how big, justice will be felt when the implementation of obligations and fulfillment of the rights, or the realization of the greatness of heart to accept the form of criminal sanctions as imposed in the legal provisions on criminal acts committed, both in the lives of individuals and also in communities.

Bibliography

Books

A Ridwan Halim, *Hukum Pidana Dalam Tanya Jawab* (Ghalia Indonesia 1981).

Adami Chazawi, *Pelajaran Hukum Pidana Bagian I, Stelsel Pidana, Tindak Pidana, Teori-Teori Pemidanaan Dan Batasan Berlakunya Hukum Pidana* (RajaGrafindo Persada 2013).

Andi Hamzah, *Asas-Asas Hukum Pidana Edisi Revisi 2008* (Rineka Cipta 2008).

Andi Zainal Abidin, *Asas-Asas Hukum Pidana Dan Beberapa Pengupasan Tentang Delik-Delik Khusus* (Prapantja 1983).

Andre Ata Ujan, *Keadilan Dan Demokrasi, Telaah Terhadap Filsafat Politik John Rawls* (Penerbit Kanisius 2001).

Barda Nawawi Arief, *Masalah Penegakan Hukum Dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan* (Kencana Prenada Group 2008).

Dominikus Rato, *Filsafat Hukum Suatu Pengantar, Mencari, Menemukan Dan Memahami Hukum* (Laksbang Justitia 2002).

Eva Achjani Zulfa dan Indriyanto Seno Adji, *Pergeseran Paradigma Pemidanaan* (Lubuk Agung 2011).

H.M. Agus Santoso, *Hukum, Moral dan Keadilan: Sebuah Kajian Filsafat Hukum* (Kencana Prenada Media Group 2012).

M. Marwan, *Kamus Hukum* (Reality 2009).

Mahrus Ali, *Dasar-Dasar Hukum Pidana* (Sinar Grafika 2012).

Moeljatno, *Perbuatan Pidana Dan Pertanggungjawabannya Dalam Hukum Pidana* (Bina Aksara 1983).

——, KUHP *Kitab Undang Undang Hukum Pidana* (Aksara 2012).

Muhammad Taufik Makarao, *Pembaharuan Hukum Pidana: Studi Tentang Bentuk-Bentuk Pidana Khususnya Pidana Cambuk Sebagai Suatu Bentuk Pemidanaan* (Kreasi Wacana 2005).

Muladi dan Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana* (Alumni 1992).

R Soesilo, *Kitab Undang Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Politea 1996).

Ruslan Effendy, *Azaz-Azaz Hukum Pidana* (Lembaga Kriminologi Unhas 1981).

Sukarno Aburaera, *Filsafat Hukum, Teori Dan Praktik* (Penerbit Kencana Prenada Media Group 2013).

Utrecht, *Hukum Pidana I* (Pustaka Tinta Mas 1986).

Journals

Soedarti, 'Penegakan Hukum Pidana Terhadap "Anak Nakal" (2001) 16 Yuridika.

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