



Causal Factors of Judicial Decisions Disparity on Cases of Violence Against Children

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Abstract

Disparity Judge's verdict on crime cases of recent violent against children often happens everywhere, one of them is in Kupang High Court of East Nusa Tenggara. Justice nowadays, generally aimed at the justice holders, in this case, are more specifically aimed at the profession of judges. Then, the approach method used was Normative with analytic thinking which means departing from an event. The research showed that: the factors that are very influential on the judge's decision were the difference of law application between the judge of the state court and the high court judge, so that always appear the case of disparity. Disparity done by the judge turned out to be caused a very big problem, this is due to the judge decided freely based on their self-desire the things that will be done or not done in a verdict.

Keywords: Criminal Justice System; Judge's Decision; Violence Against Children

Introduction

Indonesia is rampant from the acts of violence in children, it is also considered weak and so low, therefore, many victims are happening every where and one of them happened in East Nusa Tenggara. According to the law No. 23 year 2002 about Child protection was made to suppress the number of violence against children which often happens everywhere, It is in need of special attention from the government, especially the law enforcers to minimize this very inhumane actions, one of the things that need to be paid attention is by suppressing the existing judicial system in order to be truly objective in decision making because with a good legal system it is capable of providing protection to children, criminal justice is a process that works in several law enforcement agencies.

The criminal justice process shows the existence of a close relationship between law enforcement agencies, or in other words the proof of a criminal justice system. It is also to know how the system based on the Criminal Procedure Law (Law Number 8 Year 1981, Indonesian State Gazette Number 76, Additional State Gazette Number 209, hereinafter abbreviated as KUHP). Law No. 11 of 2008 and No. 44 of 2008, Judges are challenged to integrate normative aspects with prevailing (social justice)¹ Normal

¹ A.Salaman,Manggalatung”hubungan antara fakta,Norma,Moral dan doktrin Hukum dalam pertimbangan Putusan Hakim.”
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Morality to provide justice which is expected by the society (moral justice) in each case which is examined (facts law) these three aspects are essential to unity in the judge's ruling.

One of the complaints addressed to the Judges Profession is that there are frequent judgments that are not suitable for the sense of community justice (*substantive justice*), which is caused by the use of positivism paradigm in dealing with a case. There are still many judges in decision making that only embrace positivistic patterns that are highly dominated by the legalistic formalism perspective, as all the decisions that should be taken are stacked on the sound of the rules. However, it can be found that Judge's defense contains the basis of legality above all else. Principles of legality extracted from the meaning of Hans Kelsen about "Justice based on the Law." That justice in meaningful meaning of legality is a general rule that is actually applied to all cases which are strictly according to the content of the regulation to be applied. The rules are unfair if applied to a case but not applied in other similar cases. So that, justice is a quality that not related to the contents of a Positive Law (*law in ektion*). The actions of a person are declared to be just or unjust in accordance with a law norm which is considered legal by the subject of which it is valued.²

In discovering this truth, it is usually used analysis or earlier presumption. From this presumption, a logical proof is made. The facts that are found will draw the mind to a logical analysis. Logic will lead to our thoughts on the achievement of material truth. Judges, Police Attorneys, and defendants are also human beings who have a feeling that can be afforded to understand his behavior.³ The State of Indonesia is a State of Law, not based on power and may act arbitrarily, but action shall be in accordance with the Laws. Theory of the State of law or rule of law is based on the belief that power is operated on a just, good and objective Law.⁴

According to Plato in his third paper that is with the concept of *Nomoi* that in good organization is based on good Law. Furthermore, Plato's notion of the State of Law was reaffirmed by his disciples, ArisToteles in his book *politica* declared a good State is a State governed by the Constitution and the rule of law.⁵ The use of the word "system" in the jurisdiction of the Criminal Justice system means that we consent to a systemic approach in the management of our Criminal Justice administration. This means that the elements mentioned above (Police, Attorney, Judiciary, and Community Institutions) are subsystems of the Judiciary Criminal which resulted in the need for integration in order to motion of each subsystem towards the achievement of common goals.⁶ Beginning with the consequences of legal thinking in law, it is important to see whether the context also influences or tends to be tired in real life in implementing the Law. Especially, in the corridor of Judge's decision as the last bastion for the seeker of justice. Currently there are allegations that the hope of the judiciary has not been fully satisfactory to all parties. Judge Profession as a form of the Law profession is often described as a giver of justice. Therefore, Judge is also classified as a noble profession (*officiumnobile*).⁷

Judges as central figures in the judicial process are often required to sharpen the sensibilities of Conscience, maintain moral intelligence and promote professionalism in upholding the Law and justice for the people. Especially in his/her position must give the verdict with the statement "For the sake of justice based on God Almighty." Freedom Judge in the case is an absolute matter owned by the Judge as stated in Law Number 48 Year 2009. Judicial Power in Article 5 paragraph (1).⁸ Injustice in cases of

² Hans Kelsen. (2009). The Pure Theory of Law. Bandung: Nusa Media, hlm. 17-18 *Officium Nobile Adalah Profesi yang pada Hakikatnya Merupakan Pelayanan pada Manusia dan Masyarakat*.

³ Dr. Monang Siahaan, S.H., M.M., Falsafah dan filosofi Hukum Acara Pidana (Jakarta: PT Grasindo, Anggota IKAPI 2017) Hal. 81.
⁴ <http://id.Wikipedia.org/wiki/Negara> Hukum.

⁵ Yopie Morya Immanuel Pattiro, Diskresi pejabat publik dan Tindak Pidana Korupsi (Bandung: CV Keni Media, 2012), Hlm. 6.

⁶ Buletin informasi, jakarta: Lembaga Kriminologi Universitas Indonesia No.1 tahun 2012, hal. 12

⁷ Sidharta. (2006). Moralitas Profesi Hukum: Suatu tawaran kerangka berpikir. Bandung: PT. Rafika Aditama, Hal. 4.

⁸ Lihat pasal 5 ayat 1 dalam Undang-undang No.48 Tahun 2009 Tentang Kekuasaan Kehakiman. "Hakim dan Hakim Konstitusi Wajib menggali, mengikuti, dan memahami nilai-nilai Hukum dan Rasa keadilan yang hidup dalam masyarakat".

violence against children are increasingly fatigued everywhere, which greatly affects the growth of children because it is related to the psychic of the child.

Methodology

In this paper, Researchers use the concept of Law as the law in *concreto* (*The Rational Law*). This approach aims to examine the judge's decision in the Criminal Court. Considering there are differences between the judges of the District Court and the judges of the High Court. Doctrinal Law Research works to find answers that are really by proof of the truth sought or from the prescriptions of the Law. The Case Approach (*Case Approach*), is an Approach conducted by examining the cases related to the issue raised in the Court decision which has the power of the standing Law.⁹So that, it is done by reviewing the background of what is learned in development of issues encountered.¹⁰A comparison study between one case and another or one decision with another decision.¹¹The way of analytical thinking that departs from something that applies to events or groups of that type.

Discussion

Consider the Judge, must obey the laws of hereditary law and pay attention to the unwritten law of the community. This contribution makes the Judge's basis for determining the punishment in determining the case. Legal discovery made by the Judge decided this case is to review in advance whether the case is regulated in law or not. If the law is incomplete and clear, then the Judge must have his own law of implication is that the Judge must find and apply the punishment in the case.¹²The Judge's Decision should not be much different from the Prosecutor. This means that judicial freedom is judicially restricted by what the Prosecutor demands in the court session. Judge's consideration in giving physical punishment as payment is based on: 1. Investigation; 2. Prosecutor's demands; 3. Judge's decision as intended in article 148 KUHAP (criminal procedure).¹³Based on several Decisions of the Kupang High Court against the District Court rulings on the same case of the Criminal Act of violence against children, 164 / Pid / 2016 / PN.KPG.Jo147 / Pid.Sus / 2017 / PT.KPG and case No.01 / Pid.sus / 2016 / PT.KPG, No.138 / Pid.sus / 2017 / PT .KPG then the authors analyze that the difference of judge decision due to the difference of law application between District Court Judge and High Court Judge. One of the reasons for these two levels of justice differs from one to another, because of other factors affecting a decision so that there will be a disparity of the judge's decision. Factors that play a very important role in this case are: The existence of the motive of doing the criminal act which is due to cause the victim so that it becomes the basis of the judge's consideration in dropping the Verdict.

In dropping criminal punishment, the judge is free to give the criminal verdict based on the conscience, so that the actions set by the judge may at least affect the occurrence of criminal disparity in the District Court and High Court Judges will be free to determine on the basis of his own desire things to do nor will it be done, otherwise, internal and external factors also affect the disparity of the judge's decision itself. Internal factors are the background of a Judge, and the age factor of the Judge is so influential as it relates to the flying hours of the judge itself. While the external factor is found in the defendant is a motive of criminal acts, sex, age of the accused, and justice in the community where the

⁹ . Loc Sit.134.

¹⁰ . Loc sit 133.

¹¹ . Loc sit 136.

¹² Ellyne Dwi,Poespasari. (2015). Perkembangan Hukum adat Berdasarkan Yurisprudensi Mahkamah Agung (Putusan Hakim). Jurnal Media dan peradilan, 1(2): 20—24.

¹³Babbi, Sandi dkk. (2016). Tinjauan Yuridis Terhadap Putusan Hakim dalam Menjatuhkan Hukuman badan Sebagai Pengganti dalam Perkara Pidana. USU Law Jurnal, 4(2): 42,55.

defendant is located. However, in the case of disparity of Judges' verdict in cases of violence against children, it cannot be prevented because this is the law itself has a distance in punishment. A judge in dropping a criminal verdict must not exceed the general maximum because it would violate the code of ethics of the Judge itself. The existence of distance from a decision makes the judge must enter the distance of the verdict in order to get a fair verdict, for the defendant. The judge is not a funnel of a law that should always be the same in dropping a verdict. The purpose of the judge dropping the verdict, to give deterrent effect to the perpetrator of the crime, but in the decision must fulfill the sense of justice for the defendant, the victim, or from the society itself. According to Pagar. M. Watu many complaints against the Judge Decision must be considered. Products based on the Law on Judge's decisions are often considered controversial; this tends to be rejected by society in general. Judge's verdict in the Court ideally does not create new problems in society.¹⁴ The results of relevant research are among others by: 1. ItcaToysAlyaMabra. 2014. Disparity of Judge's Verdict Against Gambling Crime (Study of Malang District Court); 2. Hamidah et al, 2012. Disparitas Judge Decision in Drug Case; 3. Theo Krisnanda. 2015. Analyst of Dispute of Judge's Verdict on Criminal Acts of Corruption of Athletes Wisma Case (Study of Decision No.1616 k / Pis.Sus / 2013).

Conclusion

Based on the analysis of the disparity of the judge's verdict on the case of violence against children, the authors can conclude that the factors that are very influential on the judge's decision is the difference in the application of the Law between the Judge of District Court and High Court Judge, so there is always a case of disparity. Then, the Disparity which is done by the judge was indeed caused a very big problem. One of them is that the judge freely determines based on of his own wishes the things which will be done or not be done that made a verdict possible actions will thus harm the interests of other society. And then, another factor that influences the different verdicts of judges between the judges of the District Court and the High Court is the judge's own factors are the background of the judge and the age of the judge itself relating to the flying hours of the judge. Another thing that is very influential is that a judge in imposing criminal verdict should not exceed the general maximum because it would violate the code of ethics of the Judge itself.

Suggestion

The disparity of the judge's verdict between the District Court Judge and the High Court Judge is very influential on the justice of the community, so it is especially directed to the judges so that in handling the case needs to pay attention to the things that are very sensitive to the justice of the community, because when there is a disparity of Judge's verdict like in this case, then the community will consider the factors that are very influential in terms of decision-making. Therefore, it is better that such a verdict is not only a single judge but a panel of judges to give each other strengthening in order to make a decision of a case related to this particular criminal act does not occur Disparity of judge's verdict.

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¹⁴ Fance M ,Watu. (2012). Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan dalam Putusan Hakim di Peradilan. *Jurnal Dinamika Hukum*, 12(3): 479-489. DOI :10.20 884/i jdh.2012.12.3.121.

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