



## An Analysis on the Judges' Consideration Basis in Penalizing the Actor of Cultural Conservation Object Vandalism; Case Study in Decree of the State District of Mojokerto Number: 52/Pid.Sus/2018/PN. Mjk

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### **Abstract**

The existence of ancient and cultural conservation objects are prone to damage, loss, and ruin. It is caused by either natural factor or the human' behavior. Law enforcement against the criminals who intentionally not reporting the object presumed as Cultural Conservation Object on the Decision of the District Court of Mojokerto number: 52/ Pid.Sus/ 2018/ PN. Mjk which state that the defendant, Fendi Andriyanto Bin Badri, has been legally and conclusively proved guilty by committing crime for "intentionally not to report the findings that is presumed as a cultural conservation object and because of it, the judge sentences the defendant with 7 (seven) month of imprisonment and Rp.1000.000,- (one million rupiahs) penalty and if that penalty is not paid, it shall be substituted with 2 (two) months of imprisonment. This study was classified as a normative legal study by employing primary and the secondary data obtained from literature study. Based on the findings of the study, the basis of the judge' consideration in subjecting the penalty was based on the aspect of certainty, fairness, and benefits of law based on the evidence materials proposed in trial, the witness' testimony, the defendant' testimony, the expert information, trial fact, and all the lightening and burdening things.

**Keywords:** Criminal; Cultural Conservation Object Vandalism; Judge' Consideration Basis

### **Introduction**

In Indonesia, there are numerous historical and ancient objects as the ancestors' heritage. Such historical and ancient heritages are the invaluable property of this country. They must be treated, managed, and be preserved deftly. The historical and ancient objects that meet the qualification determined by the law is usually called as cultural heritage. This cultural heritage is prone to damage, loss, and ruin. It is caused by either natural factor or the human' behavior.<sup>1</sup>

Cultural heritage is precious object from the ancestors, and almost in every spot of this archipelago contains an object which can be classified as cultural heritage. Unfortunately, the

<sup>1</sup> Danang Ari Wibowo. *Perlindungan Hukum Terhadap Benda Cagar Budaya Studi Kasus Di Pengadilan Negeri Surakarta*, Publikasi Ilmiah Magister Ilmu Hukum Universitas Muhammadiyah Surakarta, 2016, hal. 2.

government, either the central or regional government, provide less concern and priority regarding treatments and preservations of cultural heritage. As we can see in both printed or electronic media, there is plenty of thievery against the cultural heritage.<sup>2</sup>

One of the vandalism on the cultural conservation object occurred in Mojokerto, which has been decided by the District Court of Mojokerto number 52/ Pid.Sus/ 2018/ PN. Mjk. In that decision, the Judge state that the defendant, Fendi Andriyanto Bin Badri, has been legally and conclusively proved guilty by committing crime for “intentionally not to report the findings that are presumed as a cultural conservation object and because of it, the judge sentences the defendant with 7 (seven) month of imprisonment and Rp.1000.000,- (one million rupiahs) penalty and if that penalty is not paid, it shall be substituted with 2 (two) months of imprisonment.

By concerning and understanding the background of problems described above, the problem statement will be formulated as follow: What is the judge’ consideration on the decision of the District Court of Mojokerto number: 52/ Pid.Sus/ 2018/ PN. Mjk?

### **Methodology**

The type of research method employed in this research was normative legal research or is also can be called as doctrinal legal research. In legal research, there are several approaches. By this approach, the researchers will obtain information from various aspects regarding the issues which the answer is being sought. The approaches used in the legal research are statute approach, case approach, and conceptual approach.<sup>3</sup>

The sources of legal research can be distinguished into the primary and the secondary legal material. The current research employed primary legal document, namely: 1) Law no.8 of 1981 about the Code of Criminal Procedure; 2) Law of Republic of Indonesia no. 11 of 2010 about Cultural Conservation; 3) the Decree of the District Court of Mojokerto number: 52/ Pid.Sus/ 2018/ PN.Mjk. Meanwhile, the secondary legal material comprised the scientific paper and research that relevant to the current research such as thesis, dissertation, or legal journals, legal dictionary, and books concerning the issue being studied.<sup>4</sup>

### **Result and Discussion**

Nowadays, many discoveries of cultural conservation objects have been made by the community. However, because of their lack of its sustainability, they do not report it to the concerning Office. The Decree of the District Court studied by the researcher was the Decree of the District Court of Mojokerto number: 52/ Pid.Sus/ 2018/ PN. Mjk. According to that decree, the defendant has done an excavation by damaging and disassembling the ancient brick structure. In that decree, the Public Prosecutor claims that the defendant, Fendi Andriyanto, is proved guilty by committing a criminal act “intentionally not to report the findings of presumed as the Cultural conservation structure” as it is regulated and penalized in the indictment 102 of Law no. 11 of 2012 about Cultural Conservation. Therefore, the public prosecutor proposes a claim in the form of 1 (one) year imprisonment subtracted with the period of the defendant being detained and the instruction that the defendant is still detained, and Rp.1000.000 (one million rupiahs) penalty three months subsidiary.

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<sup>2</sup> *Ibid*

<sup>3</sup> Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Kencana Prenada Media Group, Jakarta, 2014, hal. 133.

<sup>4</sup> *Ibid*, hal. 196

Whereas, the Judge made a decision which stated that the defendant, Fendi Andriyanto Bin Badri, has been legally and conclusively proved guilty by committing crime for “intentionally not to report the findings that are presumed as a cultural conservation object and because of it, the judge sentences the defendant with 7 (seven) month of imprisonment and Rp.1000.000,- (one million rupiahs) penalty and if that penalty is not paid, it shall be substituted with 2 (two) months of imprisonment.

Based on the description above, the Judge’ notion that is different from the Public Prosecutor’ claim, has been already correct and just for the defendant. The punishment subjected to a criminal is a just thing in various perspective of the theory of punishment.<sup>5</sup> However, in penalizing a criminal, the justice and the benefits of the punishment form shall also be considered. It is expected that the punishment is not violating the human rights of the criminal.

The punishment shall emphasize on the harmony, conformity, and balance between individual and community’ interest.<sup>6</sup> According to Romli Atmasasmita, proper law enforcement occurs when the system of criminal judicature works objectively and impartial. Moreover, it also concerns and considers the values that are living and growing in the community.<sup>7</sup>

The Judge’ decree is the result of the hearing process in the court. While, the court itself, as the final place for the justice seeker, because of it, the judge’ decision in the court shall fulfill what is being demanded by the justice seeker. Therefore, the judge, in deciding a case, is still based on the legal certainty, justice, and the benefits.<sup>8</sup>

### ***1. The Judge’ Decree that Reflects the Legal Certainty***

The judge’ decree is the part of the law enforcement processes which is aimed at obtaining legal truth, or at obtaining legal certainty. The Judge’ decree is the law enforcer’ product that is based on the legally relevant element from the result of the legal process during within the court.<sup>9</sup> The criminal act committed by the defendant needs a liability from the perspective of act quality. Every person is responsible for their behavior. The judge, by considering it, asserted that the punishment burdened to the defendant had been fair.

Radbruch asserts a fundamental notion regarding legal certainty. There are four things regarding the definition of legal certainty. The first is that the law is positive, it is legislation; Second, that law is based on the fact, or the law that is stipulated is certain. Third, that the fact shall be formulated by a

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<sup>5</sup> Gargi Roy, Is Capital Punishment Acceptable, International Journal of Humanities and Social Science, Vol. 4 No. 2, Special Issue, January 2014, P. 95.

<sup>6</sup> Alriani Lingga, Dasar Pertimbangan Hakim dalam Menjatuhkan Putusan Pidana Bersyarat (Studi Kasus Putusan 128/Pid.Sus/2015/PN.Sim), artikel pada Jurnal Hukum Universitas Atma Jaya Yogyakarta, 2015, hal. 9.

<sup>7</sup> Romli Atmasasmita, Sistem Peradilan Pidana (Criminal Justice System) Perspektif Eksistensialisme dan Abolisionalisme, Putra Bardin, Jakarta, 1996, hal 39, dijelaskan Herbert L. Packer telah mengetengahkan dua teori Keadilan dalam lingup “the criminal justice system,” pertama “crime control model” dan kedua “due process model.”

<sup>8</sup> Fence M. Wantu, Mewujudkan Kepastian Hukum, Keadilan, dan Kemanfaatan dalam Putusan Hakim di Peradilan Perdata, Jurnal Dinamika Hukum, Vol, 12 No. 3 September 2012, hal 482.

<sup>9</sup> Artidjo Alkostar, Fenomena-Fenomena Paradigmatik Dunia Pengadilan di Indonesia (Telaah Kritis Terhadap Putusan Sengketa Konsumen), Jurnal Hukum Ius Quia Iustum, Vol. 26 No 11, Mei 2014, FH UII Yogya, hal. 1.

precise procedure to be readily applicable and to prevent a fault in defining it. Fourth, positive law may not be easily changed.<sup>10</sup>

Concerning the analysis on the Decree of District Court of Mojokerto number: 52/Pid.Sus/2018/PN.Mjk., the judge tended to maintain the norms of written law from the existing positive law. The legislation is enforced for the sake of legal certainty. It is clear that the judge referred to the article 102 of Law no.11 of 2010 about Cultural Conservation which states that: "Anyone intentionally failing to report the invention as referred to in Article 23 (1) shall be subjected to sanction in terms of imprisonment for maximum 5 (five) years and/ or penalty of maximum Rp500,000,000.00 (five hundred million rupiahs)". Therefore, the elements are as follow:

- a. Individual Element: Law of the Republic of Indonesia no.11 of 2011 does not describe what is meant by "anyone", however, based on theory, doctrine or jurisprudence which define that human as the perfect subject of law, as the actor of an act, which if such act meet the elements of an action that is formulated as a criminal act, to him the accountability can be asked. The defendant, in this case, had been admitted that his identity in the public prosecutor' letter of the indictment, and during the hearing process, it was not found that the defendant is mentally injured, if the actions meet all elements of criminal being charged, he could be responsible for his action. Consequently, he met the qualification as "anyone," therefore, the defendant met the first element.
- b. The element of "intentionally failing to report the findings of an object presumed Cultural Conservation Object, Building presumed as Cultural Conservation Building, Structure presumed Cultural Conservation Structure, and/ or location presumed Cultural Conservation site."

Intentional, according to M.v.T. (*Memorie van Toelichting*), is "Punishment subjected only to who has committed forbidden behavior, known and desired", In this definition, Intentional is defined as: "Want and know" (*willens en wetens*), means a person who wants to do an act deliberately, should want and realize it and/or its consequence, in other words, deliberate can be defined as wanting and knowing what is done, the person who does such act consciously want that act, and know or realize the consequence of his act.

In the regulation on article 23 of Law of Republic of Indonesia no.11 of 2010 determines that, in this invention, anyone who finds what is presumed of cultural conservation shall report his findings to the authorized institution in cultural field, Police of State of Republic of Indonesia, or the concerning agency not later than 30 (thirty days) as of the discovery. The defendant' act, of course, belongs to the criminal act since he does not report his finding of ancient brick structure which is included in the category of cultural conservation. Based on the description above, the second element has been fulfilled.

Furthermore, the judge implements the theory of balance, the theory of scientific approach, and the theory of *ratio decidendi*. The theory of balance emphasizes on balance among the requirements determined by the law and the concerned party. The theory of scientific approach, in subjecting punishment shall be systematic and prudent and shall be equipped with knowledge of law so that the decision could be accountable. While, the theory of *ratio decidendi* is the theory that is based on the philosophical foundation by considering all aspect related to the case, and then looking for the relevant legislation.<sup>11</sup>

<sup>10</sup> Sanjaya, A. W., Kewenangan penyidikan tindak pidana pencucian uang yang dilakukan oleh anggota Tentara Nasional Indonesia. Tesis. Jember: Program Studi Magister Ilmu Hukum, Fakultas Hukum Universitas Jember, 2015, hal. 169-170.

<sup>11</sup> Sekar Pramudhita, Analisis Dasar Pertimbangan Hakim dalam Menjatuhkan Pidana Terhadap Pelaku Tindak Pidana Pemalsuan Surat (Studi Kasus Putusan No. 30/PID/2013/PT.TK). Jurnal Hukum Universitas Lampung, 2014, hal. 7.

## 2. *The Judge' Decision that Reflects a Justice*

It is difficult for the parties in dispute to find the measurement for the concept of justice. Justice for a party, does not mean justice for the other parties.<sup>12</sup> In order to find and implement justice, the judge' decree should be in line with its main purpose, first, the judge' decree should do authoritative solution, it shall give way out of legal problem faced by the parties, second, the judge' decree shall contain efficiency, it shall be quick, simple, low-cost, since the delayed justice is an injustice, third, the judge' decree shall be in line with the purpose of the constitution that became the basis of that court' decree; fourth, the judge decree should contain the aspect of stability namely social and community order; and fifth, the judge' decree should contain fairness, it means giving same chances for the litigant.<sup>13</sup>

Just, on its nature, can be defined as placing something in its place, and giving anything to anyone whose hold the right for it, which is based on a principle that everyone holds *equality before the law*. The judge, in his legal reason and consideration, shall be able to accommodate all provisions exist among the community in the form of behavior and unwritten law when preferring the principle of justice as the basis of writing decision for a case.<sup>14</sup>

Article 183 of Code of Criminal Procedure states that "A judge shall not penalize a person except when with two legal evidence materials he has come to the conviction that a criminal act has been committed and that it is the defendant who is guilty of perpetrating it." The Judge of District Court of Mojokerto, in penalizing the defendant, referred to the evidence materials which are legal according to the law stated by article 184 paragraph (1) of Code of Criminal Procedure which states as follow:

### a. *The Witness' Testimony*

The witnesses' testimony that became the basis of the judge' consideration is the testimony from the sworn witnesses. In this case, the Judge invited a witness from the Center of Preservation of Cultural Heritage of East Java and three witnesses who assisted the excavation done by the defendant. In his testimony, the witness stated that the location of the damaged cultural conservation object was in Bendo sub-village, Kunitir Village of Jatirejo District of Mojokerto Regency, it was the part of Trowulan Geographical Spatial Unit as the National Cultural Conversation area stipulated in the Decree of Minister of Education and Culture of Republic of Indonesia 260/M /2013, 30 December 2013. That decree stated that the National Cultural Conservation Area involved three districts of Mojokerto Regency, those were Trowulan, Sooko, and Jatirejo District, it also included three districts of Jombang regency namely Mojoagung, Mojowarno, and Sumobito Regency.

### b. *Letter*

The fundamental aspect 'letter' as the evidentiary tool is regulated in the article 184 paragraph (1) item C of the Code of Criminal Procedure. Then, substantially, article 187 of the Code of Criminal Procedure determined "letter" as: "The letter as intended in article 184 section (1) letter c, made under an oath of office or strengthened by an oath, can be:

- 1) a record and other letter made in official form by or in front of a competent public official, which contains information about, an event or a situation he has heard of, witnessed or experienced, accompanied by a clear and firm reason for the information;

<sup>12</sup> Fence M. Wantu, *Op.Cit*, hal 484.

<sup>13</sup> *Ibid*, hal 485.

<sup>14</sup> *Ibid*

- 2) a letter made under the provision of a law regulation or a letter which is made by an official concerning a matter coming under his responsible management and which is meant as a proof for something or a situation;
- 3) a statement by an expert which contains an opinion based on his expertise it something or about a situation officially asked him;
- 4) another letter which is only useful if it has some connection with the content of another evidence material." In this case, evidentiary tool "letter" used by the Judge was the police investigation report, the court investigation report, and the public prosecutor' letter of the indictment.

### **c. Indication**

Article 188 paragraph (1) of Code of Criminal Procedure defines indication as "an act, event or situation which because of its concurrence whether between one and the other or with the criminal act itself, indicates the occurrence of a criminal act and the person committing it."

### **d. The Defendant' Testimony**

In that case, the defendant' testimony stated during the trial is in accordance with the evidence materials, his testimony also confirmed the witness' testimony and the public prosecutor' indictment.

The panel of Judges, in their consideration on the Decree of The District Court of Mojokerto number: 52/ Pid.Sus/ 2018/ PN. Mjk explains the purpose of *restorative justice*, it is to reach the optimum justice for all parties involved, and is not only focused on the penalization. According to the writer, the judge, in subjecting penalty, has been in line with the purpose of penalization, it is not because a person has committed a crime, whereas, it is to prevent a person committing a crime. The essence of penalization is not only as a vengeance. It is more tended to educate the defendant to prevent him from committing a crime in the future.

The writer also appreciates that the Panel of Judges, in deciding the case, employing the integrated theory, besides assuming that vengeance as the principle of punishment, the weight of the sentence may not exceed the fair reckoning.

### **3. The Judge' Decision that Reflects Benefits**

The judge' decree will reflect meritoriousness when the judge does not merely implement the law textually and pursue justice, but when it also lead to merits for the litigants' interest and communities' interest in general. It means that the judge, in implementing the law, shall consider the final result later, whether or not his decision brings merits or expediencies for all parties. The judge, in enforcing the law, is expected to refer to the purposes and benefits of law for the litigant and the community.

Since the judge' decision is a law, he shall maintain balance in a community by restoring the community' order to the beginning (*restitution in integrum*). The community expects that the court decision will bring merits and benefits for the community. It is expected that the judge' decision, at least,

can restore the balance order of the community, in other words, for the criminal, sanction are given, while the harmed party, obtain the compensation or get back its right.<sup>15</sup>

Article 102 of Law no. 11 of 2010 about Cultural Conservation only states about the maximum punishment and does not state explicitly about the minimum sentence. On the decision above, the judge imposed the penalty which was lighter than the maximum sentence and was lower than the public prosecutors' indictment. It occurred because the defendant admitted and repented his act, moreover, the defendant had never been punished. The punishment aimed to make the defendant not committing such act. Essentially, the punishment aims to improve the criminals' personality, to make a person regrets his criminal act, and make some criminals could not commit crime.<sup>16</sup>

### **Closing**

Based on the discussion on the main problem, it could be concluded that, in subjecting punishment, the judge emphasized on three aspects. First, the element of legal certainty, to emphasize that law or regulation is enforced in accordance with the constitution. Second, the aspect of justice which shall consider all aspect regarding the case. Third, the aspect of legal benefits which view that the crime committed by the defendant shall be subjected by the punishment that is in line with the purpose of punishment so that they do not commit their act in the future. It is essential for the judge noticing every material requirement since, in criminal law, the one being sought is the material truth, not the formal truth.

### **Suggestion**

It is necessary to have socialization regarding the procedure of reporting the findings of Cultural Conservation object to avoid guilt in utilizing such cultural conservation object. Moreover, the linkages of all parties in preserving cultural conservation object are necessary, both the stakeholders and all *community* who care about the preservation of cultural heritage.

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<sup>15</sup> Ibid, hal 485-486.

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