

Legal Exception in The Practice Of Detentioning Criminal Action for Violence on Children

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Info Artikel	Abstract
<p>Received: 13/04/2020 Revised: 26/06/2020 Accepted: 25/06/2020</p> <p>Keywords: Certainty, Law, Violence. Son</p> <p>Kata Kunci: Kepastian, Hukum, Kekerasan Anak</p> <p>P-ISSN: 1412-310x E-ISSN: 2656-3797</p>	<p>The issue of certainty because it is always associated with the law, provides the consequence that legal certainty here always questions the legal relationship between citizens and the state. As a value, legal certainty is not merely always related to the state, because the essence of legal certainty is a matter of protection from the arbitrary actions of the authorities. The existence of legal certainty is a hope for justice seekers of the arbitrary actions of law enforcement officers who sometimes are always arrogant in carrying out their duties as law enforcers. Because with the existence of legal certainty the public will know the clarity of their rights and obligations according to law. Without legal certainty, people will not know what to do, do not know what is right or wrong, are prohibited or not prohibited by law. This legal certainty can be realized through a good and clear naming in an Act and the application will also be clear</p> <hr/> <p>Abstrak</p> <p>Persoalan kepastian karena selalu dikaitkan dengan hukum, memberikan konsekuensi bahwa kepastian hukum di sini selalu mempersoalkan hubungan hukum antara warga negara dengan negara. Sebagai sebuah nilai, kepastian hukum tidak semata-mata selalu berkaitan dengan negara, karena esensi dari kepastian hukum adalah masalah perlindungan dari tindakan kesewenang-wenangan aparat. Adanya kepastian hukum merupakan harapan bagi pencari keadilan terhadap tindakan sewenang-wenang dari aparat penegak hukum yang terkadang selalu arogansi dalam menjalankan tugasnya sebagai penegak hukum. Karena dengan adanya kepastian hukum masyarakat akan tahu kejelasan akan hak dan kewajiban menurut hukum. Tanpa ada kepastian hukum maka orang akan tidak tahu apa yang harus diperbuat, tidak mengetahui perbuatannya benar atau salah, dilarang atau tidak dilarang oleh hukum. Kepastian hukum ini dapat diwujudkan melalui penoramaan yang baik dan jelas dalam suatu Undang-Undang dan akan jelas pula penerapannya.</p>

INTRODUCTION

Normative legal certainty is when certain regulations are made and promulgated because they regulate clearly and logically. Clearly in the sense of not causing doubt (multi-interpretation) and logical. Clearly in the sense that it becomes a norm system with other norms so that they do not clash or cause norm conflicts. Legal certainty refers to the implementation of clear, consistent, consistent and consistent laws whose implementation cannot be influenced by circumstances that are subjective. Certainty and justice are not just moral demands, but factually characterize the law. A law that is uncertain and does not want to be fair is not just a bad law¹.

¹CstKansil, Christine, S.T Kansil, Engeliën R, PalandengdanGodlieb N Mamahit, 2009, *Kamus Istilah Hukum*, Jakarta: Sinar Grafika, p.385

According to Utrecht, legal certainty contains two meanings, namely first, the existence of general rules that make individuals know what actions may or may not be done, and secondly, in the form of legal security for individuals from government arbitrariness because with the existence of general rules that individuals can know what may be charged or done by the State to individuals². Conceptually, the essence and meaning of law enforcement lies in the activity of harmonizing the relationships of values that are set out in good ways that are manifested in a series of values to create, preserve, and maintain peaceful social relations. Furthermore, he said, the success of law enforcement might be influenced by several factors that have a neutral meaning, so that the negative or positive impact lies in the contents of these factors. These factors which are closely interrelated, are the essence and benchmarks of the effectiveness of law enforcement. These factors are³.

- a. Law (the law).
- b. Law enforcers, those who form and apply the law.
- c. Facilities or facilities that support law enforcement.
- d. Society, that is where the law is applied.
- e. Cultural factors, namely as a result of work, creativity and taste based on human initiative in the association of life.

In a developing country, the legal function is not only as a means of social control or a means of maintaining stability, but also as a tool for reform or change in a society, as stated by Roscoe Pound (1870-1874) Jurisprudence Sociological figure who said that the politics of criminal law (criminal law policy) as one of the efforts in overcoming kejahatan in rational criminal law enforcement. Rational criminal law enforcement consists of three stages, namely the stage of formulation, the stage of application, and the stage of execution, namely:⁴

- a. Formulation stage, is the stage of criminal law enforcement in abstracto by the legislative body. In this stage, the legislators conduct activities to choose values that are in accordance with the present and future circumstances and situations, then formulate them in the form of criminal legislation to achieve the best results of criminal legislation, in the sense of fulfilling requirements for fairness and effectiveness. This stage can also be called the legislative policy stage.
- b. Application stage, the stage of criminal law enforcement (the stage of applying criminal law) by law enforcement officials starting from the police, prosecutors to the court. At this stage law enforcement officers enforce and apply criminal legislation that has been made by the legislators. In carrying out this task, law enforcement officials must uphold the values of justice and usability. This second stage can also be called the judicial policy stage.
- c. Execution Stage, namely the concrete enforcement stage (implementation) of criminal law by the criminal implementing apparatus.

In this stage the criminal implementation apparatus has the duty to enforce the criminal rules that have been made by the legislators through the application of the criminal law determined by the court. The implementing apparatus in carrying out their duties must be guided by the criminal legislation that has been made by the legislators and the values of justice and usability.

The three stages of criminal law enforcement are seen as a rational effort or process that is deliberately planned to achieve certain goals. The ideals of the law of the nation and state of Indonesia are the main ideas contained in the Preamble of the 1945 Constitution, to build an independent, united, sovereign, just and prosperous nation. The legal ideal is Pancasila⁵.

²RiduanSyahrani, 1999, *Rangkuman Intisari Ilmu Hukum*, Bandung : Citra AdityaBakti, p. 23

³SoerjonoSoekanto, 1983, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*. Jakarta: Raja GrafindoPersada, p. 5

⁴Muladi dan Barda Nawawi Arif, 2014, *Bunga Rampai Kebijakan Hukum Pidana*. Bandung : Citra AdityaBakti, p.173

⁵RoeslanSaleh, 1996, *Pembinaan Cita Hukum dan Asas-asas Hukum Nasiona*, Jakarta: KaryaDuniaPikir, p. 15

PROBLEMS

1. What is the legal certainty in the practice of detention in criminal acts of violence against children
2. Practices of law enforcement in the West Pasaman District Court jurisdiction

RESEARCH METHODS

The problem approach method used in this study is the sociological juridical legal approach, namely research by examining the applicable legal norms and relating to the facts found in the study. If law as an empirical social nature is assessed as an independent variable that influences and impacts on various aspects of social life, the study is a sociological legal study (socio-legal research).⁶

DISCUSSION

1. Legal Certainty In The Practice Of Detention In Criminal Acts Of Violence Against Children

Certainty is a matter (condition) that is certain, provisions or provisions. The law must be absolutely certain and fair. It must be a code of conduct and fair because the code of conduct must support an order that is considered reasonable. Only because it is fair and carried out with certainty the law can carry out its functions. Legal certainty is a question that can only be answered normatively, not sociology.⁷

According to Kelsen, law is a norm system. Norms are statements that emphasize the "should" or *das sollen* aspects, including some rules about what should be done. Norms are deliberative human products and actions. Laws that contain general rules are guidelines for individuals behaving in society, both in relationships with individuals and in relations with the community. The rules become a limit for society in burdening or taking action against individuals. The existence of these rules and the implementation of these rules give rise to legal certainty⁸

According to Gustav Radbruch, law must contain 3 (three) values of identity, which are as follows⁹.

1. The principle of legal certainty (*rechmatigheid*), this principle is viewed from a juridical perspective.
2. The principle of legal justice (*gerechtigheit*), this principle considers from a philosophical point of view, where justice is the equal right for all people before the court.
3. The principle of legal use (*zwechmatigheid*) or *doelmatigheid* or utility.

Legal goals that are approaching realistically are legal certainty and legal usefulness. The Positivism places more emphasis on legal certainty, while the Functionalists prioritize the usefulness of the law, and it can be argued that "*summa ius, summa injuria, summa lex, summa crux*" which means strict laws can injure, except justice which can help them, thus although justice is not the sole legal objective but substantive legal purpose is justice¹⁰.

All three elements must be compromised, must receive proportionally balanced attention. But in practice it is not always easy to work out a proportionally balanced compromise between the three elements. Without legal certainty, people do not know what to do and finally anxiety arises. But too much emphasis on legal certainty, too strict to obey the rule of law consequently rigid and will cause a sense of injustice¹¹. Of the three basic legal ideas GustafRadbruch, the legal certainty that requires that the law can function as a rule that must be obeyed certainly not only on how the regulation is implemented, but how the norms or material content in the regulation contains the basic principles of law¹²

The law is in charge of creating legal certainty because it aims to create order in society. Legal certainty is a feature that cannot be separated from the law, especially for written law. According to Fence

⁶Amiruddin & Zainal Asikin, 2004, *Pengantar Metode Penelitian Hukum*, Jakarta: Raja GrafindoPersada, p.133

⁷Dominikus Rato, 2010, *Filsafat Hukum Mencari: Memahamidan Memahami Hukum*, Yogyakarta: Laksbang Pressindo, p.59

⁸Peter Mahmud Marzuki, 2008, *Pengantar Ilmu Hukum*, Jakarta: Kencana, p.158

⁹Dosminikus Rato, 2010, *Filasafat Hukum Mencari dan Memahami Hukum*, Yogyakarta: PT Presindo, p.59

¹⁰Riduan Syahrani, 1999, *Rangkuman Intisari Ilmu Hukum*, Bandung: Citra Aditya, p. 23

¹¹Peter Mahmud Marzuki, 2008, *Pengantar Ilmu Hukum*, Jakarta: Kencana, p.58

¹²Theo Huijbers, 1982, *Filsafat Hukum Dalam Lintasan Sejarah*, Jakarta: Kanisius, p.162

M. Wantu, "law without the value of certainty of law will lose its meaning because it can no longer be used as a code of conduct for everyone".¹³

Legal certainty according to Jan Michiel Otto defines it as the possibility that in certain situations:

- 1) There are rules that are clear (clear), consistent and easily obtained, issued by and recognized because of (power) state.
- 2) Authorities (government) apply these legal rules consistently and also obey and obey them.
- 3) Residents in principle adjust their behavior towards these rules.
- 4) Judges (judicial) who are independent and do not think of applying the rules of law consistently when they resolve legal disputes.
- 5) Concrete judicial decisions are implemented¹⁴

According to Sudikno Mertokusumo, legal certainty is a guarantee that the law must be implemented in a good manner. Legal certainty requires an effort to regulate law in legislation made by the authorized and authoritative parties, so that the rules have a juridical aspect that can guarantee the certainty that the law functions as a rule that must be obeyed¹⁵.

The doctrine of legal certainty stems from Juridical-Dogmatic teachings which are based on the positivistic school of thought in the world of law, which tends to see law as something autonomous, independent, because for adherents of this thought, law is nothing but a collection of rules. For adherents of this school, the purpose of law is nothing but guaranteeing the realization of legal certainty. Legal certainty is realized by the law by its nature which only makes a general rule of law. The general nature of the rule of law proves that law does not aim to bring about justice or expediency, but merely for certainty¹⁶.

In terms of legal certainty, according to Teubner, the law that can satisfy all parties is responsive law and responsive law that is only born from if there is democratization of legislation. Without democracy (community participation) in the legislation process the results will never give birth to an independent law. The law is only as a legitimate desire of the government, in such conditions there is government action deemed contrary to law. Community interests are ignored because the law is independent because its meaning refers to itself (justice, certainty, usefulness).¹⁷

Legal certainty is a guarantee regarding the law that contains justice. The norms that promote justice must truly function as rules are obeyed. According to Gustav Radbruch justice and legal certainty are fixed parts of the law. He believes that justice and legal certainty must be considered, legal certainty must be maintained for the security and order of a country. Finally, positive law must always be obeyed. Based on the theory of legal certainty and the value to be achieved, namely the value of justice and happiness¹⁸.

Legal certainty is a guarantee that a law must be carried out in a good or proper way. Certainty is essentially one of the aims of the law. Legal certainty often leads to the flow of positivime because if the law does not have identity it is no longer used as a guide or role model for everyone's behavior. But the law is very closely related to the political power that blows the law there¹⁹.

2. Practices of law enforcement in the West Pasaman District Court jurisdiction

In cases of criminal acts of violence against children committed by adults, detention of the suspect or defendant is carried out. This can be seen in the West Pasaman District Court Decision Number 92 / Pid.Sus / 2018 / PN Psb against Convicted KhoirPgl. Khoir Bin Adli and Decision Number 29 / Pid.Sus / 2018 / PN Psb against Convicted Ade Irma Safitri.

¹³The law is in charge of creating legal certainty because it aims to create order in society. Legal certainty is a feature that cannot be separated from the law, especially for written law. According to Fence M. Wantu, "law without the value of certainty of law will lose its meaning because it can no longer be used as a code of conduct for everyone.

¹⁴Soeroso, 2011, *Pengantar Ilmu Hukum*, Jakarta: PTSinar Grafika, p. 3

¹⁵Zainal Asikin, 2012, *Pengantar Tata Hukum Indonesia*, Jakarta:Rajawali Press, p.10

¹⁶Achmad Ali, 2002, *MenguakTabirHukum (SuatuKajianFilosofisdanSosiologis)*, Jakarta:Toko Gunung Agung, p.82-83

¹⁷Gunther Teubner, 2012, *Substantive and Reflexive Elements in Modern Law*, Law and Social Review, Volume 17 Nomor 2.Dikutip oleh TeguhPrasetyo dan Abdul Halim Barkatullah, *Filsafat, Teori, danl lmuHukum*, Jakarta: Raja Grafindo, p. 317

¹⁸*ibid*, p. 95

¹⁹Awaludin Marwan, 2010, *Teori Hukum Kontemporer Suatu Pengantar Pos moderenisme Hukum*, Yogyakarta: Rangkang Education, p. 24

- Against Convicted Khoir, the convicted detained with a series of events as follows:
1. Investigators from April 11, 2018 to April 30, 2018;
 2. Extension of Detention by the Public Prosecutor from May 1, 2018 until June 9, 2018;
 3. Public Prosecutor from 23 May 2018 to 11 June 2018;
 4. Extension by the Deputy Chair of the District Court, from 11 March 2018 to 9 May 2018;

In the Khoir case, it was known that the Public Prosecutor charged Khoir with the Subsidair Indictment. Primair indictment based on Article 76 C jo. Article 80 paragraph (2) of the Child Protection Act, while subsidair charges are based on Article 76 C jo. Article 80 paragraph (1) of the Child Protection Act. Chronology of the incident in the crime namely, Convicted Khoir on Wednesday 27 December 2017 at approximately 17:00 West Indonesia Time took place at the Palm Plantation in JorongAekNapalNagariBatahanRanahBatahan District, West Pasaman Regency or at least at a place that was included in the area the law of the West Pasaman District Court has placed, allowed, committed, ordered to commit or participate in violence against children. The Defendant's actions were carried out in the following manner:

Convicted Khoir is looking for durian using a motorcycle owned by witness Ikhsan. Then, Convicted Khoir saw witness Tuti's motorcycle parked on the roadside near the oil palm plantation, then Convicted Khoir tried to find witness Tuti into the oil palm plantation together with witness Ikhsan, inside the palm oil plantation the Convicted Khoir found 1 (one) another parked motorbike unit, convict Khoir along with witness Ikhsan continued walking up to approximately 200 (two hundred) meters from the highway and saw witness Tuti sitting together with witness Hadi, then convicted Khoir along with witness Ikhsan hiding behind a coconut oil palm within 10 (ten) meters to observe Tuti's witnesses and Hadi's witnesses, Convicted Khoir saw witness Hadi inviting Tuti's witnesses to be like husband and wife but Tuti's witness tried to refuse but Hadi's witness still insisted by pulling his hand until finally they made relations like husband wife, see witness Tuti having a relationship like husband and wife with witness Hadi, Convicted Khoir together with witness Ikhsan immediately approached witness Hadi and witness Tuti, Convicted Khoir immediately slapped the right cheek of witness Tuti using the back of his right hand 3 (three) times, after that convicted Khoir approached witness Hadi and held the neck of the back of the witness Hadi used his left hand to bring witness Hadi to where Tutistood and slapped the left cheek of witness Hadi 3 (three) times using the right hand of the Convicted Khoir, then witness Ikhsan tried to stop the convicted Khoir by saying, "Never mind, just bring them to tuti house ", hearing what Ikhsan's witness said, Convicted Khoir stopped hitting witness Hadi and went to witness Tuti's house riding a motorcycle riding witness Hadi, witness Tuti and witness Ikhsan each riding his own motorcycle, on the treatment of Convicted Khoir The witness Hadi and his family reported the incident rsebut to RanahBatahan Sector Police for further examination process.

The act of the Convicted Khoir resulted in the witness Hadi experiencing head swelling and pain, left ear bleeding and when he heard something ringing, as contained in the visum et repertum from the UPT Health Office of the Silaping Health Center, RanahBatahan District, Pasaman Barat Regency Number: 445 / 55 / Ver / Pusk-Sil / I / 2018 dated January 19, 2018 on behalf of HadiHendrawan, with the results of the examination, the victim found a hole in the left ear there was a reddish liquid. The doctor concluded that the examination of the victim of a man who, according to a request for a post mortem aged fifteen, found fluid in the left ear canal due to blunt force. This injury does not cause illness or obstruction in carrying out his job, position / livelihood.

That based on the Tsanawiyah Madrasah National Examination Certificate Number: DN-08 0054960 issued by the Ministry of Education and Culture of the Republic of Indonesia issued in West Pasaman Regency by YUNIARNIS G, S.Pd as the Head of the Madrasah Tsanawiyah S Ypp Al Barkah West Pasaman Regency on 02 June 2017, witness Hadi was born on February 4, 2002 and at the time of the incident above witness Hadi was not yet 18 (eighteen) years old.

Meanwhile, in Ade's case it was found that the Public Prosecutor charged Ade with the Subsidair Indictment. Primair indictment based on Article 76 C jo. Article 80 paragraph (2) of the Child Protection Act, while subsidair charges are based on Article 76 C jo. Article 80 paragraph (1) of the Child Protection Act. Chronology of the crime, which is: begins on a day and date that can no longer be remembered in 2017, or at least at some time is still in 2017, located in PTPN VI Afdeling IV Housing JorongLanggamNagariKinaliKec. KinaliKab. West Pasaman, or at least in a place that is still within the jurisdiction of the West PasamanDistrict Court that has the authority to examine and try this case.

CONCLUSION

Through the declaration of children's rights, children are expected to obtain their rights through special protection and must obtain opportunities guaranteed by law and other means, in order to make them able to develop themselves physically, psychologically, morally, spiritually socially in a healthy, normal situation according to freedom of his dignity.) and the principle of proportionality (the principle of proportionality). Efforts to protect children need to be carried out seriously. This starts from the conception of child protection which is whole, comprehensive, and comprehensive. The child protection law also lays down the obligation to provide protection to children based on the principles of non-discrimination, the best interests of the child, the right to life, survival and development, as well as respect for the opinions of children ways as well.

SUGGESTION

So that law enforcers, especially public prosecutors, in applying the provisions regarding detention must comply with applicable legal principles and be carried out very wisely, to avoid legal uncertainty both normatively and practically.

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