

How the written legal boundaries in the settlement of criminal cases in Indonesia by Criminal Law Perspective

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Abstract: The purpose of research is to determine how the written legal boundaries in the settlement of criminal cases and to determine the role of the legal discovery by judge in criminal cases based on lack of clarity, incompleteness and legal vacuum in the legislation relating to the criminal cases. The method used in this research was normative legal research. It was conducted by theoretical comparison of law enforcement, the application of law, and how it relates to the fact of legal discovery by judges in Indonesia. The results of research indicate that historically, the criminal law applicable in Indonesia is the adoption of colonial law. Thus, the judges should not make written rules as main indicators in terms of law enforcement given the dynamic development of the current law. This problem makes the position of legal discovery so very important, because of the inability of the law to cover all aspects of human life that are experiencing rapid changes. Therefore, the existence of a law is not always final and perfect. The paradigm of responsive legal by judges is required in realizing ideal law enforcement and in accordance with the values of justice that lives in the community (living law). There are things that are so paradoxical between the principles of legality and authority given to judges to explore the existing values in the community in terms of making a decision. Which is the principle of legality explaining that an act that can be charged with criminal responsibility is an act that if there is a regulation that states it as a violation. So that the proposition of this principle simply wants to explain that the violation of criminal law is a behavior that violates written law. On the other hand, the judge in the matter of resolving a criminal case is not permitted to reject the criminal case that was confronted with him to be tried only for reasons, that the rule of law was unclear or did not exist at all

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1. Introduction

Legal-dogmatic research conducted by legal scholars seems to have decreased in popularity in recent years. It is said that more attention should instead be paid to interdisciplinary or multidisciplinary aspects, thus allowing other fields of expertise, such as sociology or psychology, to play an important role in legal research (de Graaf, 2016). Ideally, the presence of law as made by the legislator is aimed to protect the right and the existing interest in each citizen. It is based on formulation process of a rule of law, the protection of right become a fundamental entity in the process of norm making. So that, in this perspective the law through legislation rules must be applied and enforced fairly to guarantee the right of human is maintained and implemented.

As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. The problem arise later is the activities of very broad human, and also by the need of the activity of human is so dynamic, fluctuate and countless. This shows that it is very unlikely that all human needs are covered in a complete and clear legislation (Tumpa, 2015). Subsequently, this gives the possibility that every law cannot be said as a finite scheme. It can be imagined if there is no possible exception to the meaning of law enforcement that the law is only through positive law, then the meaning of the legal system will be very rigid (Mertokusumo, 2007). Besides that, human beings as true creatures of God have limited abilities, so the products of the laws they make are not completely

complete to cover the entire activities of human life, therefore there is no law that is completely complete or as clear as possible (Rifai, 2014).

This is the role of legal discovery is so important. When a legal problem occurs in the community that is represented by the absence of a positive law that explains the violation through written legal norms. This is in line with the circumstances in which in reality the legislators only set general rules. Whereas generally accepted and abstract provisions cannot be applied directly to concrete circumstances, therefore the provisions of the law must be given meaning, explained and adjusted to the circumstance to be applied to the circumstance (Rifai, 2014).

In reality, there are still acts that violate the law, it noted by the existence of violations of the existing legal rules, especially in matters that have resulted in the emergence of criminal offense with the burden of punishment for legal subjects who have violated them. Legally the authority in the matter of settling criminal offense is on the authority of judicial power. Which a judge is authorized to settle a criminal case confronted by him, in order to establish it in the form of a judge' verdict on matters such as legal relations, the legal value of the conduct and the legal standing of the parties involved in a criminal case.

Seeing the role of a judge is so important in the exercise of its jurisdiction, the judge is required to always be fair and independent and has no interest other than to enforce the law. It is based on a very adverse state of affairs for a legal subject which when a judge is inaccurate in terms of making a verdict on the

matter posed to him. Because it will directly impact the injustice received by the legal subject. In addition, a verdict of judge that are not based on fairness are contrary to the purpose of law itself.

The problem is how the act said to be a violation and contrary to humanitarian values, but the positive law has not governed the law as a violation, but the lawsuit has been appealed to the judge to be resolved in court. Whereas through law based on legislation, in Article 10 paragraph (1) of Act No. 48 of 2009 on judicial power mentioned that:

The court is prohibited from refusing to examine, adjudge, and decide on a case submitted by a reason that the law is absent or unclear, but it is obligatory to examine and adjudge it.

It creates a question on what legal instrument the judges should use in the judiciary to decide on a criminal case whose written regulation is unclear or even absent. The judge as a controller in the presence of the trial in addition to the written law can give a humanitarian touch to the laws and regulations so that the judges consistently use the framework for such humanitarian law enforcement because obviously the law is for man.

In a country law-based (*rechtstaats*), the judicial power is a body that determines the content of the strength of the rules of positive law. It is manifested in the act of examining, appraising and determining the value of a particular human behavior and determining the value of a concrete situation to solve the problem of matters which are imposed impartially under the law as an objective measure.

The judge in examining, adjudging and deciding a criminal case, must first use the written law, that is the legislation, but if the legislation is inadequate or inaccurate with the problem of a criminal case, then the judge will seek and find his own law from other sources of law, such as jurisprudence, doctrine, treaty, liability or unwritten law. This is in line with Act No. 48 of 2009 article 5 verse (1) which explains than, *“Judges and constitutional judge must explore, follow and understand the legal values and sense of justice that lives in the community.”*

The word *“explores”* usually means that the law already exists, in the legislation but it still unclear, difficult to be applied in a concrete case, so that to discover the law must it must try to find it by exploring the legal values that live in the community. If the law is found in the exploration, then the judge must follow it and understand it and make the basis in its decision to be in accordance with the sense of justice that lives in the community (Manan, 2010).

As described above, it indicates that there are things that are so paradoxical between the principles of legality and authority given to judges to explore the existing values in the community in terms of making a decision. Which is the principle of legality explaining that an act that can be charged with criminal responsibility is an act that if there is a regulation that states it as a violation. So that the proposition of this principle simply wants to explain that the violation of criminal law is a behavior that violates written law. On the other hand, the judge in the matter of resolving a criminal case is not permitted to reject the criminal case that was confronted with him to be

tried only for reasons, that the rule of law was unclear or did not exist at all. Judges are given the obligation to explore the values of community and interpret and explain the presence of imperfect laws, with the aim to harmonize them with the objectives of the law itself.

Hence, according to the author is required an understanding about how far the boundaries of written law in the matters of settling a criminal case. In addition, how the role of judge to discover the law as the solving of criminal case that based on the regulation are unclear, incomplete and even nothing. And also, according to the author is required to determine the meaning of judge authority philosophy in the case to explore the values of fairness that living in the community.

1. Method of the Research

The research is a normative-legal research that conducted to find problems or existing legal issues. The result of this legal research is to provide an explanation of what should be about the legal issue that was proposed. Data and information are collected through library research and legal documentation to obtain primary, secondary and tertiary legal materials that relevant to the problem studied.

2. An Ideal Concept of Legal Discovery by Judge in Criminal Case

The problem that often occurs in the constitutional State is the weaknesses in terms of formulating a rule of law, where the hope of the rule of law can provide certainty and clarity represented by the aspiration of the law can cover all aspects of human life. So that through the law, it

is hoped that the creation of certainty will be protected by the rights of citizens and accompanied by the solution. However, because the laws made are static, in which human activities experience changes that are in line with changing human needs, therefore it affects human behavior in terms of interacting with their social environment. When the law is only represented as a positive law, it will make the law very far behind the demands of the community as a solution to problems that occur in the midst of human life.

Because the law through legislation cannot be said to fully cover all aspects of human life, it opens the space for legal discovery made by judges at the trial in terms of resolving a criminal case. This is based on the legislation in Article 5 paragraph 1 concerning judicial power which states the judge is obliged to understand the legal values and sense of justice that lives in communities.

Normatively, the authority of legal discovery is opened to provide an explanation of the provisions of the law that are not yet clear or complete an incomplete normative arrangement and it is also possible to fill the legal vacuum from a law. This incompleteness, lack of clarity and legal vacuum is a consequence of a reality that the text of the law that is created and exists is not so perfect. Moreover, the rate of legislation is so slow in its establishment process compared to the development of community. So that regulations that are unclear, incomplete, or even legal vacuum must be contextualized by a judge in a criminal case. In this case the judge must interpret and explore the content of the norms contained in the law

so that it is in accordance with the development of the values and sense of justice of the community.

If the judge is not given the authority to make legal discoveries, then the legal vacuum resulting from imperfect law can turn into chaos (Ansyahrul, 2001). Hence, to achieve substantive justice values, judges are given the authority to explore the values that develop and grow with the community, even according to the paradigm of progressive law, the judge is possible to create a law if the circumstances require it to be done (Witanto and Kurawaringin, 2003).

Legal discoveries in criminal cases indicate that there are criminal law events, which have not yet been written on the law, have not been explained or the regulation is incomplete. Therefore, the judge is given the authority to interpret and discovering the law in settling a criminal case. Generally, a criminal case is a condition in which an act is prohibited by a rule of law, in which the prohibition is accompanied by a threat or sanction in the form of a particular criminal for the person who violates the rule. But due to the fact that in the field there is a lack of clarity and void in a law, this also applies to legislation relating to criminal cases to provide an explanation of the concrete criminal event but not written norms have been made, the judge here has a very important role to do legal discovery. Legal discoveries made by judges with the connotation of existing criminal regulations but not yet clear or incomplete, making judges must create new laws as complementary and/or existing legal substitutes. Whereas legal discoveries with connotations of criminal law regulations do not yet exist, the judge

is obliged to establish the law that is needed by the community, so that there is no vacuum of law. This argument is based on the existence of the principle of *ius curia novit* that a judge may not reject a case that is brought to the court because the law is absent or unclear (Sutiyoso, 2006).

Legal discoveries on criminal cases arise as a result of incomplete and unclear written legislation related to existing criminal cases. So to decide a criminal case, the judge must make an active effort to find a legal solution, where this active effort is manifested in legal discovery. This needs to be done by the judge because the judge is not only to reject a criminal case but also may not decide on a criminal case. Because judges are law enforcers who are considered to know the law, it means that through legal discovery of the criminal case the judge is present to fill the existing legal vacuum. That is why, law enforcement is often called as legal discovery and not just the application of the law (Manan, 2012).

The judge is required to understand the legal values and sense of justice that living in communities. It is not an easy matter, in essence a judge in deciding a criminal case must be based on the independence and willingness of learning which is realized in rational thinking, based on legal principles, supported by courage and cold mind, free from outsider, and not loses by sympathy or presumption or interference of others, except by a great desire to uphold justice. This can be done only in circumstances if the existing law is unable to capture the sense of justice that lives in the community. The judge must not be a

prisoner of the law, by acting only as a trumpet of the law, but the judge needs to make a legal breakthrough through the legal discovery through his decisions (*judge made law*) even though it sacrifices legal certainty which is one of the fundamental principles in criminal law (Sudirman, 2007).

The judge in the criminal case when commit a legal discovery, it must conduct an assessment and interpretations adjusted to all elements relating to the legal event being tried, both in terms of norms, principles and prevailing legal beliefs in the community in which he lives. In the legal discovery, the judge must move in the world view and the ideology of society which covers all aspects of the life of the community and also animates it. In addition, in deciding on a criminal case, the judge must not only be based on the formal legal provisions if it is felt that behaving like that actually leads to the creation of injustice. But instead the judge must have the willingness and moral courage to base his decisions on social and religious values or values that are relevant to the case being tried. This is very reasonable because the law is made not for the sake of the law itself, but it is made to regulate human life so as to create a safe, peaceful and peaceful atmosphere in the living of communities (Hutahayan, 2019).

For criminal offenses, as it is based on unclear or incomplete rules, or even the legal vacuum, then the judges in terms of resolving the case, it must be based on a framework of thought that law enforcement has such broad meaning. In fact, the community still knows the unwritten law and the judge is an explorer of the legal values, the value

that grows and lives among the people to be published later in the decision. Therefore, the judge must involve into the midst of the community in order to know, feel, and appreciate the feelings of law and justice that live in the community. Thus, the judge can give a decision that is in accordance with the law and the sense of justice of the community. So with a legal condition that is unclear, incomplete, and non-existent, the judge to resolve the criminal case can interpret it to be applied in concrete cases. However, if the method of interpretation of the existing legislation cannot be applied to a case, the judge can make legal construction. Interpretation is an attempt to interpret the words of legislation by believing that the meaning interpreted does come from the original meaning desired by the legislator (Fernandes, 2017). In this case the judge still adheres to the words in the legislation. The various interpretations that can be used by judges to complete a case are grammatical, historical, free, functional, systematic, theological or sociological, official, rational, anticipative or futuristic, interpretation of comparative law, and creative interpretation (Sudirman, 2007). This is very important to be applied to the outdated legislation, especially the colonial era legal products which are now largely incompatible with the sense of justice, but still remain positive in Indonesia. Whereas, the legal construction is an attempt of judge to reason for decisions that are just by not adhere again to the contents of the rules but on condition that they do not ignore the law as a single systematic framework with law enforcement.

Certainly, the judge is not the only one who has the right to interpret the law, but it must be admitted that the role of the judge is very important in terms of legal discoveries. *First*, the judge who embodies the concrete law (in meaning). Through the judge's verdict, the provisions of abstract law become a reality. *Second*, the judge not only states and establishes laws for those who litigate or create laws for the parties, but can also create generally accepted laws. *Third*, the judge guarantees the actualization of the law, including directing the development of the law. For this role, the position of the judge is very strategic in a constitutional State (Suhariyanto, 2015).

3. Factors that Affecting Judge's Verdict in Legal Discoveries

IN Indonesia, the court institutions have existed since the Dutch East Indies. It is just that the court institution was very different from now. In term of the structure, source of law, and its role with the existing court institutions. During the Dutch East Indies, we know *swaprajacourts*, namely the courts in the region of *Zelbeztuur* (regions under the rule of kings and Sultans). This court has the duty to create security, peace, prosperity of the royal government (Muhammad, 2013).

In criminal procedural law as well as in other regulations, including in court practice we know some principles. These principles are not actually stated in the legislation, but must be reflected in the legislation. It is usually outside the formulation of a law. But it is likely formulated in certain articles in a law. There are various factors and circumstances that play a role in the court

process to produce an output or what is called a court decision. These factors include; rule of law, law enforcement (prosecutors, judges, and lawyers), and supporting facilities.

The first is the rule of law. In the case of legal discoveries, the rule of law in question is a court decision. The forms of court decisions can be identified based on article 1 point 11 of the Criminal Procedure Code. This article states that a court decision is a statement of the judge that is pronounced in an open court session, which can be in the form of punishment or free from all lawsuits in the matter and in the manner regulated in the criminal procedural law (Muhammad, 2013).

Before discussing the factors of law enforcement, the author discussing supporting factors as the last factor. We will explain in detail about the factors of law enforcement after discussing the supporting factors. The judge in bring to justice tend to use juridical considerations more than non-juridical. Juridical considerations are consideration of judge based on legal facts revealed in the trial that have been determined as matters contained in the decision.

Meanwhile, non-juridical considerations are the background of the crime, the consequences, the condition of the person, the defendant, the socio-economic condition, and the environment of the defendant's condition, as well as religious factors. Other supporting factors are judicial structural issues. By paying attention to the agenda of issues around the structure of the court institution, the restructuring effort that can be done is to separate executive and judicial powers,

improve the level of welfare of the court components, establish judicial commissions, and improve the authority and organizational structure.

The most important factor regarding legal discovery in court decisions is the law enforcer, especially judges. Requires progressive law-based legal culture to improve court decisions. Progressive law-based legal culture is the process of rebuilding the legal culture of judges in handling cases based on assumptions, concepts and principles of progressive law. The legal culture of judge is intended to be a set of knowledge and beliefs manifested in decisions made as a process and product of the judge' culture in realizing legal values.

The legal culture of judge which contains a system of knowledge and conviction of judges, serves as a guide to action (pattern for behavior) in handling cases in the court, the system of knowledge and conviction of judges determines the way of thinking, the method of law interpretation and the orientation of the judge in law process. This is indicated by the results of the study which resulting several types of judges such as positivistic and non-positivistic judges, textual and contextual judges, materialist judges, pragmatic and idealistic judges. Each type has its own characteristics.

The understanding of judge is greatly influenced his decision. To explain it, let us start with a different legal language with everyday language. The legal language we use today is influenced by terms which are translations of Dutch legal language, where the legal language is made by legal scholars who are more

familiar with Dutch grammar than Indonesian. So, become a legal language has its own specificity compared to Indonesian language in general, especially the language of everyday interaction that has been influenced by the sociological conditions of the local generation.

A deep and broad understanding of the judge is absolutely necessary considering his capacity as a determinant of a person' case. Training and education is needed for judges for the sake of justice. In the case of legal discoveries that will be the judge' verdict and source of law, the epistemology of judge is important for the ideal of justice enforcement.

Legal discovery is usually interpreted as the establishment of law by judges or other legal officers who are given the duty of carrying out the law against concrete legal events. However, the background of the need for a judge to find a legal discovery because the judge should not suspend or refuse to make a decision by the reason that it is incomplete or unclear.

When the law is incomplete or unclear to decide on a case, it is time the judge must find and discover the law (*rechtsvinding*). The prohibition for judges to refuse this case is also regulated in Article 10 paragraph (1) of Act No. 48 of 2009 concerning judicial power. Then, the result of discoveries will become law if followed by the next judge or in other words it become jurisprudence. Hence, the legal discovery can be done by exploring the legal values that develop in the community. Judges can do legal establishment/discovery when the law is incomplete or unclear to decide a case.

4. Conclusion

In Indonesia, by history the criminal law as the adoption of colonial law. Thus, the judges should not make written rules as main indicators in terms of law enforcement given the dynamic development of the current law. Indeed, the current legislation is quite supportive in adjudicating a criminal offense. However, if in a criminal case that is tried by a judge does not have a clear or incomplete rule. This issue makes the position of legal discovery is very important, due to the inability of the law to cover all aspects of human life that are experiencing rapid changes. Therefore, the existence of a law is not always final and perfect (*finite scheme*). The paradigm of responsive legal by judges is needed in realizing ideal law enforcement and in accordance with the sense of justice that lives in the community (*living law*).

In order to create ideal law enforcer, who has moral courage, should the standard of prospective law enforcer is not only use academic indicators, but must also pay attention to the values of morality and personal integrity. In this case, needed to research in advance about the background of prospective law enforcers, their appreciation in spiritual values, and what interests are directed so that the candidates want to become law enforcers. In addition, the legislator must be careful in the process of making the law by looking at and capturing all the phenomena of the existing legal problems with previous analysis and consideration.

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