Proceedings
NATIONAL & INTERNASIONAL SEMINAR

6th AFHI CONFERENCE
BANDUNG, 17 - 19 NOVEMBER 2016

collaboration of
AFHI & FH-UNPAS

© 2016
All rights reserved

viii, 620hlm: 17.6 x 25 cm.
ISBN: 978-602-1304-09-9

Pracetak: Luluk Uliyah
Penata letak: Mamat Rahmat Saranani
Edisi pertama: 2016

Penerbit:
Epistema Institute
Jl. Jati Padang Raya No. 25
Jakarta 12450
Telepon : 021-78832167
Faksimile : 021-78830500
Email : epistema@epistema.or.id
Website : www.epistema.or.id
DAFTAR ISI

FALLACIES IN LEGAL REASONING: JUSTIFIED OR NOT?
Shidarta ................................................................................................................. 1

IMPLEMENTATION OF ISLAMIC LAW RELATED TO FAMILY AND INHERITANCE IN THAILAND
Dr. Asman Taalii ....................................................................................................... 15

GLOBAL RESPONSIBILITY, INTERNATIONAL MUTUAL CONSIDERATION IN THE BUSINESS: LAW - THEORY AND REALITY
Prof. Dr. Stefan Koos ............................................................................................. 21

CONFLICT OF LAWS IN MALAYSIAN PLURALISTIC SOCIETY: AN EXAMPLE OF ANTINOMY OF LAW IN A DUAL SYSTEM
Rusniah Ahmad ...................................................................................................... 29

THE GLOBAL MOVEMENT OF CLINICAL LEGAL EDUCATION (CLE): CASE STUDY OF ON THE DEVELOPMENT OF CLE IN MYANMAR
Wendy Morrish ....................................................................................................... 39

LEGAL PLURALISM APPROACH IN RESOLVING ISSUES LAW BETWEEN MUNICIPAL LAW (NATIONAL LAW) WITH SERVANT LAW (CUSTOMARY LAWS)
Anggita Doramia Lumbanraja, SH, MH .................................................................. 51

TRANSPLANTING MEDIATION INTO INDONESIAN CIVIL JUDICIAL SYSTEM
R. Benny Riyanto, Mohammad Djais, Ani Purwanti, Hapsari Tunjung Sekartaji, dan Dewi Nurul Musjarti .......................................................................................................................... 69

JUSTICE EMBODIMENT AS AN ESTUARY OF LAW BASIC VALUES: "A PHILOSOPHICAL ANALYSIS OF CONSTRUCTIVISM PARADIGM"
Mukhlis R., SH., MH .................................................................................................. 77

PENAFSIRAN OTORITATIF DALAM HUKUM PAJAK, ANTARA ADA DAN TIADA
Agus Suharsono ....................................................................................................... 87

INGSUTAN PARADIGMA HUKUM NON-SISTEMATIK MENUJU PARADIGMA HUKUM PROFETIK MELALUI FILSAFAT PANCASILA
Any Farida .................................................................................................................. 103

REKONSTRUKSI SISTEM PERADILAN PIDANA ANAK DALAM IDEALISME NILAI KEADILAN PANCASILA
Ani Triwati ............................................................................................................... 115

KEWENANGAN PEMERINTAH MEMBATALKAN PERDA DAN PERKADA
Dr. Boli Sabon Max, S.H., M.Hum ........................................................................... 125

URGENSI TANGGUNGJAWAB NEGARA DALAM PERLINDUNGAN TKIW
Dr. Devi Rahayu, SH., M.Hum .................................................................................. 139
IMPLEMENTASI KEWENANGAN OTORITAS JASA KEUANGAN (OJK) DALAM PENANGGULANGAN TINDAK PIDANA PERBANKAN: SUATU KAJIAN TENTANG HUKUM DIANTARA TEKS DAN KONTeks
Dhian Indah Astanti dan Subaidah Ratna Juita

PENGETAHUAN OBAT-OBATAN TRADISIONAL INDONESIA DI TENGAH BELANTARA INDUSTRI FARMASI DUNIA (KEARIFAN LOKAL DAN REZIM HKI DAPATKAH DI HARMONISASI?)
Dwi Martini

PLURALISME HUKUM PROGRESIF: MEMBERI RUANG KEADILAN BAGI YANG LIYAN
Eko Mukimto dan Awaludin Marwan

PARADIGMA PROFETIK: SEBUAH TAWARAN DALAM PENEGAKAN HUKUM KEBAKARAN HUTAN
Elviandri dan Farkhani

PEMAKNAAN KONSEP “ANGKUTAN UMUM” UNTUK MODA TRANSPORTASI OJEK BERMOTOR
Ida Kurnia dan Imelda Martinelli

KAJIAN HERMENEUTIS TERHADAP MAKNA KEYAKINAN HAKIM DAN PERANANNYA UNTUK PUTUSAN (VONIS) PIDANA
Jajang Cardidi

INTERNATIONAL PEOPLE’S TRIBUNAL 1965 DAN TANGGUNG JAWAB NEGARA DALAM PENYELESAIAN PELANGGARAN HAK ASASI MANUSIA BERAT PERISTIWA 1965-1966
Manunggal K. Wardaya

ANTINOMI KONSTITUSIONAL DALAM PERUBAHAN UNDANG-UNDANG DASAR 1945
Mochamad Isnaeni Ramdhan

HAK ATAS RUANG HIDUP SUKU ORANG RIMBA DI TAMAN NASIONAL BUKIT DUA BELAS DALAM KONSTRUKSI BERPIKIR ONTOLOGI, EPISTEMOLOGI, DAN AKSILOGI HUKUM ADAT
Muhammad Erwin

MENGGALI AKAR KEFILSAFATAN PANCASILA ATAS PERLAUKAN BERBEDA BAGI ANAK YANG BERHADAPAN DENGAN HUKUM
Muhammad Rustamaji, Soehartono dan Bambang Santoso

TITIK KRITIS HERMENEUTIKA SEBAGAI METODE TAFSIR TERHADAP NILAI-NILAI KEFILSAFATAN HUKUM ISLAM
Muh. Sjaiful

EKONOMI PANCASILA BERPARADIGMA PROFETIK : SEBUAH UPAYA REKONSTRUKSI HUKUM EKONOMI INDONESIA
Nurjannah S

HUKUM LOKAL DI TENGAH PERGERAKAN DAN PERCEPATAN GLOBAL
Prof. Dr. A. Suriyaman Mustari Pide SH., MHum, Prof. Dr. Ir. Abrar Saleng SH., MH
HERMENEUTIKA DAN PEMBENTUKAN UNDANG-UNDANG
Rachmani Puspitadewi.........................................................309

POSISSI ILMU HUKUM DALAM BINGKAI "TIGA DUNIA" KARL POPPER
Rahmi Yunita Alimin.........................................................321

SUATU TELAHH MELEMAHNYA PENGATURAN RAHASIA BANK DALAM KONTEKS KEPENTINGAN UMUM
Rani Sri Agustina dan Agus Prihartono PS..................................329

KEADILAN BERHATI NURANI : SEBUAH TAWARAN RULE BREAKING BAGI HAKIM DENGAN PENDEKATAN LEGAL PLURALISM
Sigit Sapto Nugroho, Hilman Syahrialhaq.................................341

INKONSISTENSI PELAVANAN MEDIK DI INDONESIA: KAJIAN NILAI-NILAI IDEALISME PANCASILA DALAM KEBIJAKAN HUKUM KESEHATAN
Siti Soekiswati.................................................................351

KEKERASAN PENYIDIK DALAM INTEROGASI: KAJIAN FUNGSIONALISASI HUKUM PIDANA PADA DISKRESI POLISI (TINJAUAN FILSAFAT POSITIVISTIK)
Sri Walijinah.................................................................361

EPISTEMOLOGI HUKUM LOKAL
 Sulaiman.................................................................375

KAUSALITAS DALAM KONTEKS TINDAK PIDANA LINGKUNGAN
Dr. Ahmad Sofian, S.H. M.A dan Dr. Surastini Fitriasih, S.H., M.H........................385

PENERAPAN SUSTAINABLE DEVELOPMENT SEBAGAI KONSEPSI GLOBAL DALAM PENGELOLAAN KAWASAN HUTAN KONSERVASI DI INDONESIA
Andreas Tedy Muliyono.........................................................397

MULTIKULTURALISME DAN DISKURSUS ATAS MORALITAS DALAM LOGIKA PLURALISME HUKUM
Ikhwan Alfarisi.................................................................409

PEMBANGUNAN HUKUM DALAM ERA DESENTRALISASI: MENGEMBANGKAN HUKUM LOKAL BERKIPRAH GLOBAL
Kotan Y. Stefanus..........................................................419

KEBIJAKAN PENGAKUAN MASYARAKAT HUKUM ADAT TERHADAP PERLINDUNGAN DAN PENGELOAAN HUTAN ADAT
Mella Ismelina Farma Rahayu..................................................431

KEBIJAKAN PENGAKUAN MASYARAKAT HUKUM ADAT

NILAI-NILAI KEADILAN PANCASILA DAN NILAI-NILAI KEADILAN MENURUT ISLAM DALAM HUKUM INDONESIA, KEMAJEMUKAN DAN PERSATUAN BANGSA INDONESIA
Dwi Yono.................................................................443

DILEMA PENYIDIK: MEMBERIKAN KEADILAN DAN KEPASTIAN HUKUM MELALUI RESTORATIVE JUSTICE DALAM TINDAK PIDANA TERTENTU
Edy Herwiyanto..........................................................453
KONTESTASI ANTARA NILAI KEDAYAGUNAAN DAN KEHASILGUNAAN PERATURAN DAERAH DALAM KONTEKS PENGAYOMAN TERHADAP MASYARAKAT
Dr. H. Muammar Arafat Yusmad, S.H., M.H. .......................................................... 463

HUKUM LOKAL DALAM PENGELOLAAN SUMBERDAYA ALAM DI TENGAH PUSARAN EKONOMI GLOBAL
Nur Sulistyo B. Ambarini .......................................................... 475

REFLEKSI FILOSOFIS KONSEP TANGGUNG JAWAB PADA KONTRAK PENGADAAN BARANG DAN JASA PEMBERINTAH: STUDI KASUS PENGADAAN BUS TRANS JAKARTA
Paulus Aluk Fajar Dwi Santo .......................................................... 485

HAK KEBENDAAN PERDATA DAN HAK ATAS FUNGSI EKOSISTEM (RUANG) ANALISA HUKUM TERHADAP ATURAN PENATAAN RUANG DI INDONESIA
Sandoro Purba .......................................................... 511

KAJIAN FILOSOFIS PRINSIP NON INTERVENSI DALAM HUKUM INTERNASIONAL KOMTEMPORER
Sasmini .......................................................... 525

PETANI KENDENG DALAM PERTARUNGAN EKONOMI VERSUS EKOLOGI
Siti Rakhma Mary Herwati .......................................................... 537

BONUM COMMUNE DALAM PERDA KAB JOMBANG NO. 2-2015 TENTANG PEMBERIAN AIR SUSU IBU EKSKLUSIF
Tomy Michael .......................................................... 549

HUKUM DIANTARA TEKS DAN KONTEKS: DINAMIKA PERJALANAN PEMERINTAHAN DAERAH ATAS PENAATAN INSTRUMEN PERIZINAN LINGKUNGAN HIDUP
Wahyu Nugroho, SH., MH. .......................................................... 557

ABSOLUDITAS KEBERGANTUNGAN HUKUM,KEKUASAAN TERHADAP MORAL DALAM KERANGKA MEWUJUDKAN CITA KEADILAN DALAM NEGARA INDONESIA
Dr. Wenly R.J. Lolong, SH., MH. .......................................................... 575

RITUAL BEGARAP : UPAVA PENYELESAIAN PERMASALAHAN HUKUM DALAM MASYARAKAT SASAK (STUDI DI KECAMATAN PUJUT - LOMBOK)
Yulia Erwin .......................................................... 587

PENGAKOMODASIAN “RIGHT TO BE FORGOTTEN” MENURUT SISTEM HUKUM INDONESIA DAN KEMUNGGINAN PENGATURANNYA DI MASA DEPAN
Shidarta dan Bambang Pratama .......................................................... 599

FILOSOFI PERBANKAN SYARIAH: ANTARA IDEALISME DAN PRAGMATISME
Abdul Rasyid, Ph.D. .......................................................... 611
JUSTICE EMBODIMENT AS AN ESTUARY OF LAW BASIC VALUES
"A PHILOSOPHICAL ANALYSIS OF CONSTRUCTIVISM PARADIGM"

Mukhlis R., SH., MH

Abstract

Justice or a just action is subjectively understanding of every person. A part of the three basic values of law is justice, in addition to the value of legal certainty and utility value. Pancasila as the basic philosophy of the law containing the word 'just' on the second and fifth of its pillar. Constitutionally Article 24 of verse (1) of the 1945 Constitution also contains the word 'just'. The legislation is an operational basis of the law, as mentioned in Article 8 (3) of Law Number 16 of 2009 on Public Prosecution. Article 2 (2) of Law No. 40 of 2009 on the Basic Principles of Judicial Power. Sociologically each individual can understand and interpret the just actions if they are appropriate to the mental construction that is built based on the historical background, religious values, habits and customs value which are believed to be true. Justice is interpreted subjectively on the basis of each personal mental constructs. In the history of the development of science, there are various schools and theories that talk on behalf of justice. Justice in the view of Aristotle, for example, has various restrictions and limitations. The empirical meaning on the nature of true justice is implied from the designation of Judge as God's representative on Earth. Judges are required to present a sense of justice in the struggle of the litigants (including the community as part of the owner's sense of justice). In doing their function, the judges are required to provide a closer sense of the justice of God. So, in deciding a case the judges should always deliver justice subjectively based on pieces of their thinking construction (mental constructs) which are developed by conviction, the process of evidence and legal values that live in the community.

Keywords: Law, Justice and Mental Construction.

A. Introduction

Throughout civilization, perhaps there is nothing else which is most loudly voiced apart from the call demanding for a fair act or decision/a fair law or unfair treatment. Likewise, the most blasphemous behavior which is voiced loudly is about injustice. The question then arises, what is really a justice? Is it something that can be granted or its presence can be felt concretely in the community?

The word „justice” derives from the word „just” or „adil” (in Bahasa Indonesia) which is mostly translated as a fair deed or a fair treatment. The word „fair” is understood in some respects has the same meaning as „not biased, impartial”, as well as understood as „taking side with the right, adhering to the truth”, and „not arbitrary”.

Justice as one of the basic values of law is the estuary of all the values expected by each individual. Justice is manifested in every context of connections made by humans as social beings, creatures and as individual with divinity. As he dream of everyone, justice becomes a valuable commodity in in the implementation. It is considered as something with high worthy.
Prosiding Konferensi Asosiasi Filsafat Hukum Indonesia Ke-6

Pancasila as the staat fundamental norm has outlined through the grains of the nature of justice as set out in the second principle: a just and civilized humanity, and in the fifth principle: social justice for all Indonesian people. Likewise the constitutional foundation of the embodiment of justice is confirmed in Article 24 paragraph (1) of the 1945 Constitution: "the judicial power is an independent power to organize judicial administration to uphold law and justice."

The background to the foundation philosophy (staat fundamental norm) and the above constitutional basis of the leads us to operational and concrete practical when an event occurs. Legal events that occur in the community demand the judge as an institution authorized by the State to conduct judiciary to uphold law and justice. A simple example is when there is a theft. Normatively, the Article 362 stipulates as follows: "Whoever took part or wholly owned by another person with the intention to have it unlawfully is threatened with imprisonment of five years or a maximum fine of nine hundred rupiah."

B. Problems of the Research

Based on the preliminary background as mentioned above, the focused issues to be discussed is how do the the views of different thoughts on theory of justice, and what is the understanding on the philosophical study of justice through the constructivist paradigm? justice would be better understood as it is described systematically (ontology, epistemology, methodology and methods). In addition to using literature study, this analysis method also uses in-depth interviews to several informants who were selected purposefully.

C. The Research Method

This philosophical analysis is using constructivism as a basic belief system or worldview, so that the problem of What kind of justice to be shown by the judge in the case of the theft, which is proven to satisfy the elements of Article 362 of this Criminal Code? The question reminds us of the various forms of stealing which is taken up by the court. The basic values of law which is most prominent in every decision of the judge is whether the value of the rule of law, or the law of expediency value or the value of justice itself. Judicial independence is guaranteed by the constitution and laws to get no intervention by any party. Should the judge punish any thief with a penalty of five years in prison? Or the judge will realize justice in accordance with the legal events depending on the context? When the judge makes a decision exactly as stipulated in Article legislation, what appears here is the common adage "The judge is just as the funnel of law. When the judge acquits or punish with minimal threat, it will also appear another remedy or grievances of the victims.

The issue of the embodiment of justice should be framed with a paradigmatic understanding, so the reality is placed in context. In the broader sense, paradigm is an umbrella of philosophical system which includes ontology, epistemology, and a specific methodology. Each consists of a series of basic belief or worldview that can not simply be exchanged (with a basic belief or worldview of ontology, epistemology and methodology of other paradigms).5

---


---

7 Sukarno Aburahma
8 Karen Lebacqz
9 Karen Lebacqz
10 Karen Lebacqz
11 Karen Lebacqz
12 Be just.
D. Result and Discussion

1. The views of different thoughts on theory of justice

When men agree with the existence of justice, then justice should color all aspects of life, including a relationship with God, with human beings, with the community, with government, with nature and with other God’s creatures. Because of the importance of justice as a value, it is sought by everyone, and it attracts attention of many people because it is labeled as a good thing. Thus, in the context of the history of the development of human civilization, there are many schools or theories of justices presented by some experts or scholars.

Theory of justice by John Stuart Mill describes that he first understood justice when he was confronted with a claim or personal rights and sought to underly these claims with a utilitarian argument. According to Mill, there is no theory of justice that can be separated from the demands of expediency. Justice is a term given to the rules that protect the claims deemed essential to the welfare of society, claims to hold promise, to be treated equally, and so on. The calculations are the main ideas associated with utilitarian. Justice relies on the expediency principle and should not conflict with this principle.

Another theory is proposed by John Rawls that offers a complex and strict theory of justice based on the excellent understanding of the potential use of social contract as the basis of theory of justice. Rawls principle clearly protects the most disadvantaged parties in society. No exchange of their freedom or welfare of the welfare of others is allowed. Fundamental freedoms should be distributed equally and should not be sacrificed for the sake of economic achievements. If income, social status, power and privilege are distributed unequally, then the unequal distribution is allowed only if the conditions make the less fortunate better than the previous conditions.

Justice theory by Robert Nozick considers that the State is rejected in distributive justice. Justice is limited to the individual exchanges commutative space. Nozick argues that in fair trade justice can not make any substantive claim, other than simply contains procedural requirements for equity exchange. Nozick disagrees with justice which requires a special distribution of goods, but agrees with any distribution resulting from the fair choices and the free exchange as far as the starting point and the procedure of the exchange were run fairly.

Various views about fairness or justice theory, including theory of justice as mentioned above (Mill, Rawls, Nozick) and the theory of justice as a common good in Catholics are alike as utilitarian. This includes the view by Reinhold Niebuhr who believes that justice is relative and injustice is also relative. I believe that justice must be in accordance with the provisions of God. The degree of fairness is determined by the quality of a person’s faith or morality. The higher the quality of one’s devotion and closeness with God, it is increasingly easy for him to do justice or justice. Fair in the order of God is in accordance with the condition of the individual, because God’s decision is not accompanied by motivation and specific intervention, as was the

---

7 Karen Lebacqz, op-cit, Pages 21-22.
10 Karen Lebacqz, op-cit page 133.
12 ... Be just. It is nearer to piety! (Qs: Al Maida:8).
case in humans.

2. **Analysis of Constructivism Paradigmatic on Justice.**

Paradigm can be briefly understood as a disciplinary matrix, which functions as a base, a source, as well as a container, from which a discipline of thought and knowledge begin and are expected to continue to flow. In the broader sense, paradigm is an ‘umbrella’ of philosophical system which includes ontology, epistemology, and a specific methodology. Each consists of a series of basic belief or worldview that can not simply be exchanged (with a basic belief or worldview of ontology, epistemology and methodology of other paradigms).

Paradigm is a major philosophical system (as a parent or umbrella) which includes ontology, epistemology and methodology that can not be simply exchanged. It represents a certain beliefs system, which thrusts the way how the world is viewed, understood and studied. In other words, a paradigm associates its adherents with a particular worldview.

In the context of understanding the paradigm with a more systematic, solid and rational perspective, Guba and Lincoln offer five (5) major paradigms. The five paradigms are positivism, postpositivism, critical theory, constructivism (naturalistic inquiry) and participatory. The five paradigms are distinguished from each other by the responses to the three (3) fundamental questions, which included ontological, epistemological and methodological questions. The following table will presented each set of basic belief of the five major paradigms offered Guba and Lincoln.

---


17 Erlyn Indarti, *ibid*, pages 5-6.
Pembahasan Makalah Internasional

Table 1

<table>
<thead>
<tr>
<th>Questions</th>
<th>Postivism</th>
<th>Postpositivism</th>
<th>Critical Theory</th>
<th>Constructivism</th>
<th>Participatory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontology</td>
<td>Realistic</td>
<td>Critical Realism</td>
<td>Historical Realism</td>
<td>Relativism</td>
<td>Participative reality:</td>
</tr>
<tr>
<td></td>
<td>Naive</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>External</td>
<td>External reality, objective, real and partially understandable</td>
<td>Virtual reality, which is formed by social, political, cultural, economic, ethnic, and gender factors.</td>
<td>Multiple Reality which is based on social experiences, individual, local, and specific.</td>
<td>Subjective, objective reality, co-created by mind and given cosmos</td>
</tr>
<tr>
<td>Epistemology</td>
<td>Dualism/</td>
<td>Modified Dualism/</td>
<td>Transactional/Subjectivism</td>
<td>Transactional/Subjectivism</td>
<td>Critical subjectivity in participatory transaction with cosmos, extended epistemology of experiential, propositional, and practical knowing, co-created findings.</td>
</tr>
<tr>
<td></td>
<td>Objectivism</td>
<td>Objectivism</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Researcher and the investigating object are two independent entities, value free.</td>
<td>Researcher and the investigating object are related interactively. The finding is constructed together.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Methodology</td>
<td>Empirical/</td>
<td>Modification, Experimental/Manipulative</td>
<td>Dialogic/Dialectic</td>
<td>Hermeneutic/Dialectic</td>
<td>Political participation in collaborative action, inquiry primary of the practical, use of language grounded in shared experiential context.</td>
</tr>
<tr>
<td></td>
<td>Manipulative</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Empirical testing and research questions; verification of hypothesis; manipulation and control on opposite conditions; especially qualitative method.</td>
<td>Qualification by critical multipliion or triangulation.</td>
<td>There is a dialogue between researcher and the object being investigated, dialectic, transforming the unknown to be known and to breakthrough.</td>
<td>The construction is traced through interaction between the researcher and the object being investigated by hermeneutic technique and dialectic exchange. The construction is interpreted, the goal is distillation/consensus/resistant.</td>
<td></td>
</tr>
</tbody>
</table>


In accordance with the theme of this paper, the author will specifically focus on one type of paradigm - the constructivism.

1. Ontology

Ontologically speaking, constructivism paradigm views justice as something relative, in which there is a multiple reality, based on the experience of social, individual, local and specific. A justice reality can not be understood in absolute perspective, but the justice reality should be understood in its form that is relative and specific.

In the application of Article 362 of Penal Code related to the crime of theft, the judge must look at the context. Any violation of Penal Code Section 362 is different from one case to another case. The normative basis of Article 362 of Penal Code threatens offenders with the threat of a maximum of 5 years in prison or a maximum fine of 900 rupiah. Based on General Provisions of the Criminal Code Book I of the Penal Code, the minimal threat is one day, meaning that it implies for violation of Article 362 is threatened with at least 1 day and a maximum of 5
years punishment.

Judges as officials given the authority to decide should look at each context carefully. The range of distance is sufficient for the judges (one day to five years in prison) to make them more independent in determining the verdict of the most equitable in terms of confidence and awareness of the judge’s sense of justice.  

Judges must present a formal justice, whether the decisions made already meet all formal requirements or not. The decision of District Court’s judge should contain matters referred in Article 197 of Criminal Procedure Code (point f), namely: Article legislation that became the basis verdicts or actions and legislation that becomes the legal basis of the decision should be accompanied by aggravating circumstance and relieving the defendant.

Normatively speaking, there are several reasons for the judges to aggravate and mitigate a case before making a decision. In the Criminal Code there are three reasons that can reduce the severity of punishment. Related to the case of experiments with a criminal offense, article 53 of paragraph 2 and 3 of the Criminal Code on crimes trial (punishment can be reduced a third, if the crime was sentenced to the death penalty, a maximum of 15 years). Then Article 54 explains that probation violation is not punished, if it helps commit a crime. Article 57 paragraph 1 and 2 of the Criminal Code, the punishment for the perpetrator could be reduced one-third if threatened with the death penalty, a maximum of 15 years in prison. The other reason is that the perpetrators are under ages. Thus, in accordance with Article 47 of Criminal Code, a judge can only sentence a criminalised child with the maximum one-third of the principal criminal. If the child was threatened with the death penalty / life imprisonment, the maximum penalty is 15 years.

There are several considerations for judges that can be burdensome the punishment for the defendant. First, his position as a state official. Article 52 of the Criminal Code states that the penalty could be increased one-third of the principal threats. Second, repeated criminal acts / recidive. Third, the perpetrator has the nature of being an evil. This provision is stipulated in articles 486, 487, 488, and the combined criminal acts / sameloon.

In addition to normative reasons for the judge to consider the lightness or heaviness of the decision handed down, the judge also has the practical considerations in every decision. Several reasons could be used by the judge to aggravate the punishment like non-cooperative / kink in the examination process, the accused is a public figure and other practical conditions. In addition, the reason to reduce the punishment is because the perpetrators are still young. They still have a long future, just once committed a crime, of good behavior / cooperative during the review process and other practical reasons that by nature it gives the impression that it can help ease the decision of sentencing by the judge.

To add confidence for the judges to make decision according to the context, the Basic Law on Judicial Power also provides space for the judge to explore the values that live in the community on which to base a decision. This research report illustrates that an understanding of the fair punishment was very specific. The illustration can be seen from the views of various elements of society in Riau that were explored in depth as follows:

---

23 Article 5 paragraph (2) Law Number 48 / 2009 about Judicial Power.
The following is a view of a legal scholar Dr. Erdianto, SH., MHum about the fair in the judgment:

"As a muslim who learn legal system, I think fair is putting things in place, including if we compare and analyse that there is theory of interest law as justice, the theory of interest law as the rule of law, theory of law purporses as expediency. In my opinion it can not be compared between beneficaries and justice. The usefulness and certainty is a means. The end goal is justice. If we associate it with the system of Islamic law where the purpose of the law is maslahat (the usefulness) and mudarat (badness). The scales of beneficaries and mudhorat are the scales in the legal system of Islam. That fits in a modern legal system. The goal of the scales between certainty and expediency is justice. Putting everything in its place is subjective.

Another view comes from the element of law enforcement officers. Presented by Suwarno, SH., MH Police Commissioner as the Head of Riau in Pekanbaru Police Identification.

"I think that a fair indicator is if the sentence can be acceptable to all parties (perpetrators, victims and the community), although justice is difficult to realize. Sociologically victim wants a severe punishment while the perpetrators wants a light punishment, even wants to be free."

Another view comes from the student elements. Lutfi, a student at the Faculty of Law, University of Riau, 2012 generation, majoring at Criminal Law Program.

"A fair punishment is a punishment which equals to the deeds done. If the deed is considered a major offense, the punishment should be severe. Now that justice has not been realized. An action that is categorized a serious mistake can get a light sentence, and stretched versa. This happens because the rules made can be interpreted differently. For example, the penalty for the perpetrators of corruption, why only sentenced to prison, while the thief slipper are also subject to a prison sentence.

The next opinion is from Mrs. Atik, a women activist who leads NGO Flowers Nations in Pekanbaru Riau. These NGOs have always fought and empowered women to fight for their rights from various violence both within the family or in the community.

"A fair punishment is a penalty which fulfils the victim's sense of justice of the crime of which he/she has received. The penalty is not solely seen from a long sentence, or the death of the perpetrator. Victims sometimes feel unfair or fair by different measurements. It is different for each person. There was one case that we handled, sexual violence and pregnant by her boyfriend. The victim has not accommodated the rights entitled to. But eventually it was settled outside the judicial system. In some of the other cases, the victim would request for marriage. However, in the case that we handle, the victim did not ask for marrying. But she required only cost during pregnancy, and the costs incurred during the six years raising her son (there is a calculation for this). If it is brought to court, it sometimes only ends up with three months sentences. After that, the perpetrator is free. So the role of the nation is to make sure what penalties desired by the victim.

Another view is expressed by Dian Suhairi S.Sos, Vice Chairman of Pekanbaru City Council from the Prosperous Justice Party.

"A fair punishment should have several criteria. First, the penalty should have equal rewards worth with the deed done. For example, the life must be rewarded with life. Second, these penalties provide a deterrent effect for offenders and others to never again to do the same, although it has not done that. Third, the punishment can reduce behavior of a crime. If it does not meet that criterion, the theft will remain committed to stealing. The punishment in Arab, for example, stealing will cut off the hand. If he steals again, cut off the feet. This could be
be a record for their grandchildren to not do a thing like that. And that was commensurate with what he has done."

The last view is by the Chairman of Lembaga Adat Melayu Riau, Al Azhar, MA,

"In my very personal view, a fair punishment is when certain rules refer back to values and believed of the people. For example, I am Muslim. I believe that the Qisas is considered fair. But the value of religion is not the only source. The positive law supposes that in some ways conscience can also be a source. If I were victims of the law, I think a fair penalty is when we are imposed to forgive. If not, the harm to the public or for the victim will be more."

From the interviews, it is understandable that there are different views of different parts of the community in Riau (Pekanbaru) related to the reality of the concept of justice in the sentence imposed by judges. Although their overall view share the same points that the justice they want is real justice. Justice which orients at legal interests of victims, in addition to the legal interests of the offender and the community at large.

2. Epistemology

Epistemology is the subjective transactional, meaning that researchers and the objects being investigated are interactively related. Findings were created or constructed together. Before making the decision, the judges must establish a subjective relationship with the defendant or witnesses to be able to dig up enough information. There is an interaction occurring in the hearing interactively. Because of the criminal law, the truth judge is trying to find is the material truth or real truth. So to get a fair judgment, the material or substance of the matter should have been obtained in full before making a decision.

A judge must formally examine and explore the truth of the evidence presented to the court based on the indictment of the public prosecutor. Based on Article 184 of Criminal Procedure Code, there should be five evidences consisting of witnesses, expert witnesses, instructions, letters and testimony of the defendant. To dig out a comprehensive information objectively, the judge must establish two-way communication, so that the results of the examination will find a common thread about criminal events that occur comprehensively. In addition, under Article 183 of Criminal Procedure Code, the judge would only convict on the basis of the two evidences and added with the judge’s conviction. The judge’s conviction should be surely based on his or he values, it should also be based on the legal facts revealed during the inspection process in court.

3. Methodology

There is a process of hermeneutikal dialectic in finding out the truth. This means that the construction of truth is traced through the interaction between the researcher and the object of investigation. The interaction occurs through hermeneutical techniques, and dialectical exchange. The construction is then interpreted with the purpose of distillation. A consensus or resultant is then made.

In finding the material truth, the judge will certainly interpret any facts revealed in court. Judges must sort through information that is believed to be related to the case. Later it will be questioned again to each witness any verifiable reality during the examination. Having traced and contrasted with each other, a constant response will be taken as a conclusion. The conclusion will conclude the general nature of the criminal events that occur. "There are three forms of decision that can be made by the judges." They are free verdict, free from all legal
charges and punishment verdict.

The verdict of punishment is certainly based on the accused article if is legally and convincingly proven, judges will assess the quality of the works and the quality of the defendant's guilt based on all the evidence revealed at the hearing. In general, as an example of a violation of Article 362 of Criminal Code, the judge will impose the appropriate punishment between one day to a maximum of 5 years in prison. Or on the specific criminal offense punishable by a special minimum to the maximum punishment, the judge can make a decision within the range as specified. Or the judges can free all make a verdict under the special minimum, or even a judge can impose a maximum sentence above what is required by the public prosecutor. The judge is not actually a positivistic in enforcing the law in concrete events, but they are doing a constructive thinking.

E. Closing Remarks

1. Conclusions

Theorically, there are many definitions of justice delivered by scholars (John Stuart Mill, John Rawls, Robert Nozick, Version of Catholisme, Reinhold Niebuhr, and other scholars). The theory of justice can not be automatically applied in the event of absolute concrete. There was much criticism of the concept of justice. If the estuary of the nature of justice is restored in morality, the morality is inseparable from the values of divinity (justice within the framework of the values of divinity). To understand the justice in its context, it must be examined in constructivism paradigm, because the justice paradigmatic analysis can be parsed, systematized, compared, and concluded in accordance with sets of basic belief respectively (both ontology, epistemology and methodology).

To understand the justice in the true context, the judge is not guided textually in the legislation. But the law actually provides an opportunity for judges to serve true justice. To get it, the judge would have to consider the reasons that burden and lighten conceptually (the law) and practically. In addition, there is a command in law for the judge to explore the values of justice who live in the community. The final decision of the judge is actually the result of mental constructions built from a variety of mutual interaction, and interpretation of the judge of the facts revealed at the hearing. The judge's final conclusion is the result of a formal proof of the law and supported by the judge's conviction.

2. Suggestions

1. Any theory that was born of his time is not absolutely applicable at the time of the others, because the context of every age has different characteristics.

2. If any of justice is restored on morality, then indeed the the most important thing in realizing justice is the extent to which communities and individuals understand and agree with certain moral values as the basis of justice value (justice value which is closer to God).
References

Adami Chazawi, 2007, Pelajaran Hukum Pidana (bagian 2), Raja Grafindo Persada, Jakarta.
Budiono Kusumohamidjojo, 2011, Filsafat Hukum problematic ketertiban yang adil, Mandar Maju Bandung.