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Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

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"Legal Reconstruction in Indonesia Based on Human Right"

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

PROCEEDINGS
The 5th International Conference and Call for Paper Faculty of Law 2019
Legal Reconstruction in Indonesia Based on Human Right

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Reconstruction Of Misdemeanor SettlementBased On Pancasila Value

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Abstract

Misdemeanor is still processed using conventional trial in Indonesia, despite a very small loss generated. Supreme Court takes a stance to the slow process of amending KUHP (Penal Code) by publishing Supreme Court's Regulation (Perma) No.02 of 2012 about the Adjustment of Misdemeanor limit and Fine Size in Penal code.

Perma No.02 of 2012 is the legal product issued by Supreme Court intended to the Judge. The position of Polri (Republic of Indonesia's Police) and Attorney as public prosecutor cannot be subjected automatically to Perma No.02 of 2012. The Judge assessed the presence of Perma No.02 of 2012 as a non-binding regulation so that its implementation can be overridden. Kinship culture to settle has not developed yet within society, as indeed there has been no legal foundation governing it.

This research recommended the reconstruction of Penal Code by giving an opportunity of schikking between the accused or the defendant and the victim of misdemeanor. This schikking use is the imposition of restitutive sanction, giving more advantages, justice, certainty, and legal equilibrium.

Keywords: Perma, reconstruction, schikking

A.PRELIMINARY

Indonesian Penal Code (KUHP) has been effective since 1918. Indonesian Penal Code was derived from Dutch Penal Code born in 1886. Since its enactment in Indonesia, it has never been amended yet. The discussion about the amendment of Penal Code has been initiated since 1964. However, it has not been fruitful yet until today. As a result, the Penal Code has no longer been able to follow the social development of society.

Globalization era within society develops very rapidly in line with the society's social development changing dynamically. Currency value in Penal Code has never been readjusted since 1960. The currency value built on the price of gold at that time. Compared with the price of gold in 2012, the price has jumped 10,000 times higher. This uncorrected difference makes the thieving crime that should be imposed with Article 364 is imposed with Article 362 of Penal Code.

Nenek Minah who picked three cocoa fruits from PT. Rumpu Sari Antan-owned plantation was sentenced with 1 month and 15 days imprisonment and 3-month probation by Purwokerto District Court's Judge on November 19, 2009. Nenek Minah was indicted with Article 362 of Penal Code about thiev-

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ing.[13] Kolil (50) and Basar Suyanto (41) two thieves of a watermelon in Kediri were finally sentenced with 15 day imprisonment and 1-month probation, respectively. Both of them were indicted with article 363 clause 1 no.4 of Penal Code. The verdict was imposed on December 16, 2009 in Kediri District Court.[14]

The Judge of Palu District Court of Sulawesi Tengah, Romel Tampubolon sentenced AAL (15), a student of Vocational High School in Palu, evidently stealing sandal. The sentence is imposed on January 5, 2012. Despite being considered as guilty, Judge Romel Tampubolon does not impose punishment to the defendant. The judge sentenced AAL by returning him to his parents to get building.[15]

The cases occurring above encourage Supreme Court to publish Supreme Court's Regulation (Perma). Supreme Court publishes Perma No. 02 of 2012 about the Adjustment of Misdemeanor Limit and Amount of Fine in Penal Code.

The publication of Perma No.02 of 2012 is not obeyed suddenly by all judges in Supreme Court setting. Many mild criminal cases are processed not referring to the Perma, for example, Karanganyar District Court's verdict.

A. Problem Statement

1. How effective is the Perma No.02 of 2012 in Karanganyar District Court?
2. How is the ideal settlement of misdemeanor corresponding to Pancasila Values?

B. Discussion

1. The effectiveness of Perma No.02 of 2012 in Karanganyar District Court.

The effectiveness of Perma No.02 of 2012 when studied using Friedman theory can be seen from the following three elements:[16]

a. Legal structure

b. Legal substance

c. Legal culture

The first factor is legal structure. Perma No.02 of 2012 is the legal product issued by Supreme Court intended to the Judge. The law enforcement process is not only dealt with by the judge, but also involving the investigators consisting of Republic of Indonesia's Police Officers (Polri) and the public prosecutor.

The position of Polri and Attorney as public prosecutor cannot be subjected suddenly to Perma No.02 of 2012, because these two institutions are not the one under Supreme Court. The institution imposing accusation to the suspected is Attorney ad Public Prosecutor. These institutions are subjected to Penal Code only rather than to Perma.

The second factor is Perma's substance itself still controversial. It is because Perma is intended to be a regulation revising Penal Code. Supreme Court does not have an authority in legislation or in developing the public-binding regulation, but it remains to be authorized to develop the inward-binding regulation (*interne regeling*).[17]

The existence of Perma No.02 of 2012 in Karanganyar District Court has not been enacted fully. The Judge in Karanganyar District Court sees the existence of Perma No.02 of 2012 as non-binding regulation, so

13 http://news.detik.com/berita/1244955/mencuri-3-buah-kakao-nenek-minah-dihukum-1-bulan-15-hari accessed on August 16, 2019 at 10.05 Local Time.

14 http://nasional.news.viva.co.id/news/read/114367-divonis_15_hari__pencuri_semangka_bebas accessed on August 16, 2019 at 10.46 Local Time

15 http://www.hukumonline.com/berita/baca/lt4f0486c16639d/terdakwa accessed on August 16, 2019 at 10.15 Local Time.

16 Achmad Ali, *Kepurukan Hukum di Indonesia, Penyebab dan Solusinya*, Ghalia Indonesia, Jakarta, 2002, p. 2.

17 Maria Farida Indrati, *Ilmu Perundang-undangan 1(Jenis, Fungsi dan Materi Muatan)*, 6th edition, Kanisius, Yogyakarta, 2009, pp. 104-105.

that in its implementation it can be overridden.

The ineffective implementation of Perma No.02 of 2012 can be seen from the trial of case involving Sutar alias Gowok Bin Minto Dikromo and case involving Hartono bin Wasno Marso Wirono. Sutar was indicted breaking Article 362 of Penal Code with cash money loss of IDR 300,000 (three hundred rupiahs), sentenced with 4 (four)-month imprisonment. Hartono was indicted with Article 363 no (1) clause 3 and Article 362 of Penal Code with the loss of *WimCycle*-branded bicycle and sentenced with 5 (five)-month imprisonment. These two cases were trialed by the chamber of judge.

Legal culture shows that the perpetrator of misdemeanor remain to be processed up to the trial because the culture of settling the crime with kinship principle has not developed yet within society. It is understandable as indeed there has been no legal foundation governing it.

2. Misdemeanor Settlement Model Based on Pancasila Value

European countries are generally very disappointed with condemnation rehabilitation model, so that Germany and Austria[18] apply clinical treatment. Alfons Wohl[19] states that reforming criminal law system can be accomplished by means of releasing the delict makers after they have been apparently acceptable to themselves and to community.

German penal code divides conventional delict into felony, misdemeanor, and violation.[20] Article 153 of German Penal Code governs the termination of prosecution conducted by public prosecutor. It can be done when the court and the defendant agree with certain imposition, for example damage recovery, money distribution to government body, or public service. In Netherlands, there is *schikking* in settling the economic crime. *Schikking* is peace or peaceful forfeiture.

The existence of Pancasila[21] as the state philosophy or *staatsidee* (state image) functioning as *filosofischegrondslag* and *commonplatforms* or *kalimatunsawa* among fellow members of society in the context of living within state in the first agreement supporting constitutionalism suggests the essence of Pancasila as an opened ideology. This *schikking* use is consistent with the values contained in Pancasila, in the fourth and fifth principles.

The fourth principle is contained in the items number 3, prioritizing discussion in decision making for common interest, and number 4, discussion to achieve consensus enclosed with kinship spirit. The fifth principle is contained in item number two, developing just attitude to the fellows.

The explanation of Republic of Indonesia's 1945 Constitution mentions inner or spirituality circumstance or called *Rechtsidee*[22] several times, defined as the legal ide-

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18 Andi Hamzah, *Perbandingan Hukum Pidana*, Sinar Grafika, Bandung, 2008, p. 16.

19 *Ibid*., p. 17.

20 German Penal Code sees the violation as out of its coverage. In Latin term, it is called *crimedelitcontravention*. So, violation is not delict. See *ibid*., p. 18.

21 Jimly Asshiddiqie, *Hukum Tata Negara dan Pilar-Pilar Demokrasi*, Konstitusi Press, Jakarta, 2006, p. 289. Definition of *kalimatun sawa'* is to find out meeting point amid diversity and difference. See Zuhairi Misrawi, *Al Quran Kitab Toleransi; Inklusivisme, Pluralisme dan Multikulturalisme*, Fitrah, Jakarta, 2007, p. 13.

22 The explanation of 1945 Constitution mentions that such main ideas involve spirituality (inner) circumstance of Indonesia's Constitution. These main ideas realize the Legal Ideal (*Rechtsidee*) mastering the law of state foundation, including written (Constitution) and non-written laws. Constitution creates these main ideas in its articles. See Sujadi, *Pancasila sebagai Sumber Tertib Hukum Indonesia*, First Edition, Lukman Offset, Yogyakarta, 1999, p. 76.

als but it does not mention Legal Principle.[23] Legal principles are the highest statement of *Rechtsidee* in a legal order. The definition of *Rechtsidee* contains the following points:[24]

a. *Rechtsidee* gets its statement inside legal principles.

b. *Rechtsidee* is related to justice value

c. *Rechtsidee* is a social wish concerning law and a measure of justice all at once.

d. *Rechtsidee* determines the content of positive law.

e. *Rechtsidee* has dual functions: regulative and constitutive.

f. Legal is dedicated to ethical value

Legal principles have important position in Indonesia's National Legal System. It is understandable that although the legal principles are not expressed verbally and explicitly in the Explanation of 1945 Constitution, the understanding on its existence can be felt. The reflection on whole content of 1945 Constitution can actually capture the presence of signal presupposing the moral principles in living within state and law. The moral principles intended are:[25]

a. Divine Principle (3rd and 4th paragraphs)

b. Humanity Principle (1st, 2nd, and 4th paragraphs)

c. Unity Principle (2nd,3rd, and 4th paragraphs)

d. Democratic principle (2nd,3rd, and 4th paragraphs)

e. Justice principle (1st, 2nd, and 4th paragraphs)

Criminal justice condition in misdemeanor referring to Penal Code is not limited to applying procedural justice. Penal Code should be reconstructed in order to realize substantive justice today.

The reconstruction intended is that the suspected or the defendant in misdemeanor case is given right to do schikking with the victim. It should be attempted first before being filed to the court session. However, *schikking* can be done by means of reconstructing Penal Code, rather than by issuing Supreme Court's Regulation (Perma) such as Perma No.02 of 2012 above.

The process of achieving *schikking* between suspected or defendant with victim should be attempted seriously. Criminal law should be positioned to be *ultimumremidium*. The use of criminal sanction, according to Muhammad Topan, should fulfill the following principles:[26]

a. Benefit principle aims not only to benefit the victim, but also to benefit the public and as the preventive attempt to prevent the crime from occurring.

b. Justice principle is not intended absolutely to protect the victim of crime, but also to give the feeling of justice to

23 Legal Principle is "the heart" of regulation and law. It is called so because, firstly, it is the broadest foundation of law and regulation's birth. Those law and regulation in turn can be returned to those principles. Secondly, legal principle is reasonably to be called the foundation of law and regulation's birth or *ratio legis* of law and regulation. This legal principle's power will not be used up by producing a law and regulation, but it will keep existent and produce next regulations. See Satjipto Rahardjo, *Ilmu Hukum*, ctk. VI, PT Citra Aditya Bakti, Bandung, 2006, p. 47. A legal principle (*rechtsbeginsel*), according to Paul Scholten, is not a rule of law (*rechtsregel*). Being called a rule of law, a legal principle is so common that it is nothing or says not too much (*of niets of veel te veel zeide*). The directly application of legal principle through subsumption or categorization as rule is not possible; therefore, the more concrete content should be established. It is the duty of law science to investigate and to find the legal principle in positive law. See Maria Farida Indrati S, *op. cit.*, p. 253.

24 *Ibid*., p. 78.

25 *Ibid*.

26 See Eddy O.S. Hiariej, *Prinsip-prinsip Hukum Pidana*, 1st Edition, Cahaya Atma Pustaka, Yogyakarta, 2014, p. 236.

the perpetrator of crime.

c. Balance principle means to recover the impaired balance of society order into original condition (*restitutiodesintegrum*)

d. Certainty principle generally means to protect the victim of crime, even there should be a distinctive law if necessary to govern the protection of crime's victim.

The principles of criminal sanction imposition give very detailed requirements. However, considering Soerjono Soekanto's legal effectiveness theory, the detailed requirement cannot surely be met well. It is because there is a factor affecting it, the role of law enforcer. The role of law enforcer in negative sense is to conduct *schikking* illegally. It means that law enforce does something that indeed has not been governed yet in the law. This deed can be categorized into *strafbaarfeit*.[27]

The use of *schikking* will give more usefulness, justice, certainty, and balance. Such sanction imposition is restitutive in nature,[28] prioritizing the condition recovery. The use of *schikking* in the frame of criminal law reformation should be legalized into legislation form, so that it will impossibly generate multi-interpretation, particularly among law enforcers.

The *schikking* achieved should be legalized with the Head of District Court's stipulation. It is intended to be evidence for the parties and law certainty for the suspected or the defendant. This Head of District Court's stipulation can be the starting point to recover the condition occurring due to accident. The restitutive sanction function is achieved and can realize a transparent law enforcement, and to bring the substantive justice into reality.

C. Conclusion

1. Conclusion

a. Supreme Court's Regulation (Perma) No. 02 of 2012 cannot be enacted effectively as it is the product of regulation issued by Supreme Court constituting *interneregeling* intended to the judges, but the effect of Perma includes the coverage of whole justice process, so that Polri institution as investigator and attorney institution as public prosecutor are not bond to this Perma. Many judges also argue that Perma can be overridden.

b. The reconstruction of Penal Code can be accomplished by creating the opportunity of conducting *schikking* between the suspected or the defendant and the victim of misdemeanor. This *schikking* use is the imposition of restitutive sanction, giving more usefulness, justice, certainty, and legal balance. This reconstruction should be conducted on Penal Code; the issuance of Supreme Court's Regulation or similar is not enough.

2. Recommendation

A regulation's development should refer to legal principles and legislation procedures, so that the regulation issued will be enacted effectively. Law and regulation should keep following the community's social change and globalization development occurring within society. The regulation not following the community's social change will impact on the ambiguous implementation of corresponding regulation. On the other hand, such regulation will not give justice and law certainty. The measure to be taken to provide law reform in Penal Code is to revise it.

27 See Purnadi Purbacaraka in Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, PT Raja Grafindo Persada, Jakarta, 2007, p. 72.

28 There are two types of sanction: restitutive sanction, the sanction to attempt recovery, and retributive sanction, the sanction to take revenge. See Soetandyo Wignyosoebroto, *Hukum dalam Masyarakat; Perkembangan dan Masalah*, Second Edition, Bayu Publishing, Malang, 2008. p. 138.

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