

Juridical Studies Concerning Punishment Against Elderly

Taufik Yahya¹ Fatriansyah² dan Moh Yasin³

1.Doktoral Student of Law at Law Faculty of The Jambi University, Telanaipura Jambi 36122 Indonesia

2.Doktoral Student of Law at Law Faculty of The Jambi University, Telanaipura Jambi 36122 Indonesia.

3.Lecture

Abstract

Rule criminal can be laid against the offender aged prevailing at this time is the form of imprisonment. The imposition of imprisonment, it is not effective when viewed from the achievement of the nature of the criminal prosecution and achievement of the goals of the law. Judging from the nature of punishment, imprisonment can only achieve retributive of punishment that retaliation against criminal acts committed by a lawbreaker, but imprisonment is not able to achieve the goal of preventive so others deterrent perform the same actions and objectives rehabilitative or recovery the offender so that he realized his mistake and constructed such that in time, he can get back into society as citizens who obey the law. Meanwhile when viewed from the purpose of law, the imposition of imprisonment against perpetrators of criminal acts elderly are also ineffective. Although able to meet the achievement of the principles of justice and the legal certainty the imposition of imprisonment does not have the legal expediency. Conception renewal of criminal law may be filed relating to the setting of punishment against the perpetrators of the crime of aging is to adopt the provisions of the Criminal Code concerning the reduction of crime and alternative sentencing such that the obtained setting punishment against perpetrators of criminal acts elderly are able to meet the objectives of the law and the objective of sentencing in effective.

Keywords: *Punishment, Elderly.*

1. Introduction

President Susilo Bambang Yudhoyono expressed concern over the handling of legal cases that afflicts the elderly and the disabled, whose punishment is equated with normal adults. Furthermore, he stated that: There is the elderly who are aged 70 years and stealing tuber to survive getting punished and imprisoned with those convicted public. This punishment is highly disproportionate to the marginalized and children. Indeed, for justice is a process that never stops and is to carry out the mandate of the nation and the state. Therefore, it is fitting to those who are marginalized, granted clemency¹

Commitment of the President to grant clemency in the form of a reduction of sentence, remission, or exemption to the elderly inmates, different views public. Some communities, including legal circles discourse respond with indifference and skepticism. They essentially argue that the crime is a crime, so no need of whether the perpetrator of children, disabled or elderly. This community is of the opinion that the granting of pardon by the President precisely violates the basic principle in law enforcement, namely the principle of equality before the law.

Therefore, this community is of the view that all the actions of a person meets the elements of the offenses referred to in the Book of the Law of Criminal Law and or statutory criminal outside the Criminal Code, the person should be sentenced to prison without having to consider the circumstances of the accused that. Meanwhile, the people who agree, welcomed the discourse of clemency in the form of a reduction of sentence, remission, or exemption to the elderly inmates, with enthusiasm because they consider granting clemency for offenders elderly, is a manifestation of the basic principles of the rule of law that law enforcement process fair.

Besides, they are in the group of supporters of granting clemency argued that the idea of the President's, precisely can be used as entry point into reform of criminal law such that the Criminal Code as the legal umbrella of the material and the legislation criminal outside the Criminal Code, it can become a legal means effective enforcement of the law with justice, not only for victims of crime and the public but also for the perpetrators of criminal acts itself as citizens still have their rights protected.

Associated with law enforcement as fair, presumably the author needs to summon the opinion expressed by Mardjono Reksodiputro that the purpose of law enforcement is the main occurrence of due process of law, which included the rights of suspects, defendants and convicts are protected and considered as part of civil rights and because it's part of Human Rights.²

Based on expert opinion the criminal law that much attention to the protection of the rights of offenders are, in case it was clear that although a civilian, has undertaken an act reprehensible (in this case a criminal offense), their civil rights does not remove or disappear. Referring to the description above, it can be concluded

¹ www.metrotvnews.com accessed on December 14, 2016.

² Mardjono Reksodiputro, *Criminology and Criminal Justice System, set Writing Second Book*, Justice Service Center and Corporate Law (at the Institute of Criminology), University of Indonesia, Jakarta, 2007, Pg. 53.

presumably understanding that to achieve the goal of law enforcement that a fair legal process, must be supported by 2 (two) pillars namely criminal law and criminal procedure effective.

Discussion regarding the effective criminal law can not be separated from the existence of criminal law policy in law enforcement. Sources of political policy or criminal law is a criminal policy or the policy of crime prevention. Explanation of the criminal policy, among others proposed by Mardjono Reksodiputro. He explained that: Policy crime prevention in the broadest sense is essentially an all the efforts made by the government (the state) and the public to the possibility of crime (and those who have the potential to commit a crime) or after the occurrence of the crime (investigation, examination, judicial and guidance for the offender).¹

From the above opinion, may be concluded that the criminal policy is an effort to protect the public from crime to support the efforts of the public welfare. Therefore, the criminal policy is essentially an integral part of the effort to achieve public welfare are the main objectives of social policy. Criminal policies for the reduction of crime, according to Peter G. Hoefnagels as quoted by Barda Nawawi Arief, can be reached in three ways, namely: criminal law application, prevention without punishment and influencing views of society on crime. Correspondingly, Barda Nawawi Arief found crime prevention in general can be done through non-penal policy and penal policy, which is implemented in an integrated.²

Based on expert opinions above, may be withdrawn understanding that efforts in drafting legislation criminal both in accordance with the development of community life both in terms of the policy aspect and from the aspect of social, political, has an important role and strategic efforts to protect people from a wide range crime that continues to grow and evolve with the development dynamics of community life. In other words, it can be concluded that efforts in drafting legislation criminal both in terms of policy aspects (social, criminal and criminal law) as well as from the aspect of social and political as well as the establishment of a criminal justice system that is good, has an important role in the political constellation of development. The effectiveness of the criminal law will determine the quality of achievement or effectiveness of law enforcement.

Meanwhile, the criminal procedure law is closely related to the criminal justice system. In the perspective of the Criminal Justice System Indonesia, we recognize the conception of "Integrated Criminal Justice System". Integrated Criminal Justice System is built from sub-systems based on the formal criminal law codification of the Code of Criminal Procedure enacted by Law No. 8 of 1981. Thought criminal law expert who thus firmly and clearly that, would now find momentum amid a heated debate on whether special consideration in criminal punishment, as a reaction to the granting of pardon by the President to the children, the disabled and the elderly.

Related to this, a series of questions might be hanging our heads. The questions include whether it required special consideration in criminal punishment against vulnerable groups, particularly the elderly, whether this form of criminal sanction that should be in prison and whether special considerations and the alternative sentencing precisely aligned or contrary to the principles of sentencing.

2. Results and Discussion

a. Effectiveness Analysis Of The imposition of the Criminal Prison Against Accused elderly

Opinions about the purpose of the law, may be used as a foothold in analyzing the effectiveness of the imposition of imprisonment against the accused elderly. According to Gustav Radbruch was quoted as saying Sudikno Mertokusumo law functions as a protection of human interests, and through the enforcement of the law is the law becomes a reality. In upholding the law, there are three elements that must always be considered, namely justice (*Gerechtigkeit*), legal certainty (*Rechtssicherheit*) and benefits (*Zweckmassigkeit*). Based on the opinion of legal experts mentioned above, would be drawn in the sense that law enforcement efforts, there are 3 (three) legal purpose to be achieved namely the achievement of the principles of justice, rule of law and the legal principle of expediency for the community.

Based on the opinion of legal experts mentioned above, would be able to conclude the sense that it is associated with the effectiveness of the imposition of imprisonment for the defendant elderly, the question that must be answered is whether the imposition of imprisonment for the defendant elderly are able to meet the objectives of law, through the creation of justice, legal certainty and usefulness of criminal punishment in question, both for the victim, the community, and for the criminal itself.

To determine the achievement of the principles of justice or to gauge whether the principles of fairness in the imposition of imprisonment of defendants in the elderly has been met or not, the author uses Mardjono Reksodiputro opinion, about the understanding of the criminal justice system and due process of law, as a basis. As has been explained previously that Mardjono Reksodiputro explain the meaning of the criminal justice system following the criminal justice system is a system in a society to control crime is within the tolerance limits of society with the main aim to prevent people becoming victims of crime, completed crime occurred, so that the community satisfied that justice had been served and the guilty convicted, and see to it that those who

¹*Ibid.*, Pg. 9.

²Barda Nawawi Arief, *Capita Selecta Criminal Law*, Citra Aditya Bakti, Bandung. 2002. Pg. 4.

have committed crimes do not repeat his actions.¹

In another occasion, he describes the process of law as the primary law enforcement purpose. More he explained that "the purpose of law enforcement is the main occurrence of due process of law, which included the rights of suspects, defendants and convicts are protected and considered as part of civil rights and because it's part of Human Rights".²

Referring to the expert opinion of criminal law, the writer is of the opinion that although it is very difficult to determine the right of justice, but as long as the guilty have been convicted, and the punishment it has fulfilled the principles of due process of law, the imposition of imprisonment against the defendant elderly, is already fulfilling the principle of justice, both in terms of the sense of justice of victims of crime, community justice and fairness for the defendant's own elderly.

Achievement of the above principle of justice, of course, is merely to set a limit on what is meant by justice according to law. That is, justice is intended to create a balance between the interests protected by law through legislation a good criminal. So that the meaning of the principle of justice becomes more comprehensive, it would require the concept of justice is essential, it is necessary put forward a model of justice that is often referred to as restorative justice models. According Muladi restorative justice model has several characteristics, namely :

1. Crime is defined as an offense against another person and is recognized as a conflict;
2. The focus on solving the problem of accountability and liability in the future;
3. The character of normative built on the basis of dialogue and negotiation;
4. Restitution as a means of improving the parties, reconciliation and restoration as a primary goal;
5. Justice formulated as relations of rights, judged on the basis of the results;
6. Objective attention to the improvement of social deprivation;
7. Community is a facilitator in restorative process;
8. Role of the victim and the offender are recognized, both in matter and completion of the rights and needs of victims. The offender is encouraged to be responsible;
9. Accountability offender is defined as understanding the impact of the actions and to help decide on the best;
10. The criminal acts to be understood in the overall context, moral, social and economical; and
11. Stigma can be removed through restorative actions.³

Another opinion expressed by Romli Atmasasmita that: Restorative justice puts a higher value on the direct involvement of the parties to the perpetrators and victims of crime. Victims are motivated to be able to restore him as a result of a crime, while offenders are encouraged to take responsibility as a step in correcting errors caused by crime and in building social value system. Community involvement actively strengthen the community itself and bind a community of values for mutual respect and love between people. The government's role is substantially reduced in monopolizing the judicial process. Restorative justice requires the cooperative efforts of the community and the government to create an environment where victims and perpetrators can reconcile their conflicts and improve their wounds.⁴

Based on expert opinions above, it would be clear that if the imposition of imprisonment against the defendant elderly, in accordance with the rules of fair legal process, then the imposition of imprisonment of from the point of law in compliance with the principles of justice. However, justice according to the law will better meet the public's sense of justice, if the perpetrators of criminal acts among the elderly, victims of crime and society, able to "cooperate" in achieving the justice that is restorative.

In achieving restorative justice is, a criminal in this case the perpetrators of criminal acts elderly, victims of crime and society, "working together" in a way that the criminal seniors received shall be punished, but he still has a chance to improve themselves and their lives, an obligation to help recover damages and "wounds" are perceived victims and the people accept him back into the community as law-abiding citizens. With the "cooperation" that is so, then there will be a harmonization process in the life of society in order to achieve justice more meaningful than mere legal justice.

Furthermore, the next question should be asked to examine the effectiveness of the imposition of imprisonment against the defendant elderly is whether the criminal punishment, in compliance with the principle of legal certainty. As mentioned earlier that the principle of legal certainty is an important principle to achieve due to the principle of legal certainty aims to prevent not to the right of the strongest prevailing. What has been set in the law, it must be adhered to and become a court decision. That is, there was an act may be punished except on the power-law regulations existing and valid at the time.

¹Mardjono Reksodiputro, Human Rights in the Criminal Justice System, set Authorship Third Book, Service Center for Justice and Legal Service (at the Institute of Criminology) University of Indonesia., Jakarta, 2007, Pg.14

²*Ibid.*

³Muladi, *Capita Selecta Criminal Law*, Publisher University Of Diponegoro, Semarang, 1995, Pg. 127-129.

⁴Romli Atmasasmita, *Criminal Justice System, Perspective of Existentialism and abolitionism*, Binacipta, Bandung, 1996, Pg. 101.

Based on the above explanation, it would be able to conclude the understanding that achievement of the principle of legal certainty, measured by how far the legislation is applied appropriately. Therefore, if we want to do the assessment of the effectiveness of sentences in prison for the criminal elderly from the point of legal certainty, the assessment should be made of the provisions of the legislation governing the imposition of imprisonment against perpetrators of criminal acts elderly.

In the Criminal Code, there are arrangements regarding punishment associated with being a criminal, which involves the negation of criminal and penal reductions. The provisions on criminal annihilation, set on anyone who commits a criminal act, but according to the provisions of the Criminal Code, the criminal can not be held accountable, or in other words, the Criminal Code regulating the perpetrators of how the above actions, he can not be convicted or sentenced. The provisions governing the denial or elimination of criminal, enshrined in Articles 44, 48, 49, 50 and Article 51 of the Criminal Code. Under the provisions of the Criminal Code mentioned above, R. Susilo argued that: Record Act argue that in certain circumstances, there is sufficient reason to abolish or reduce crime, it means that do not penalize a criminal offense in certain laws that , the circumstances which may be mentioned as :

1. Because sick or imperfect minds;
2. Because immature;
3. Because of unavoidable power (*overmacht*);
4. Because emergency defense (*noodweer*);
5. Because to abide by laws and regulations (*wettelijk-voorschrift*);
6. Because official order (*ambtelijk bevel*).¹

Referring to the provisions of the Criminal Code and the criminal law expert opinion, it can be concluded that the Criminal Code set 5 (five) groups of perpetrators of criminal acts that can not be held criminal liability. The group is a criminal offender who are ill or deficient minds, criminal offender whose criminal conduct because of the power that can not be avoided, because the defense emergency, because running the legislation and because running the command positions, while reduced the sentence is a criminal who immature or not yet old enough or criminal child.

Referring to the provisions of the legislation, would be taken notion that the sentences of imprisonment against perpetrators of criminal acts elderly, there is no violation of laws and regulations. Therefore, it can be concluded that the imposition of imprisonment against perpetrators of criminal acts elderly, already meet the goal of achieving the second law principle of legal certainty.

Furthermore, the third question is whether the imposition of imprisonment against perpetrators of criminal acts elderly have been able to achieve the third goal of achieving legal principle of expediency law. To answer these questions, according to the author can be traced on whether the imposition of imprisonment against perpetrators of criminal acts elderly have been able to achieve the objective of sentencing. Opinion was departing from the understanding that achievement usefulness principle of criminal law can be measured by how far the purpose of punishment has been achieved.

From the fundamental purpose of the dropped criminal mentioned above, the authors argue that it seems only one definite goal can be achieved by imposing imprisonment against the defendant elderly, namely the function of retributive or retaliation against criminal acts committed by a criminal who has elderly. Meanwhile, for the two functions of sentencing more the function of preventive and rehabilitative services, according to the author studies are necessary prior to the conclusion whether the imposition of imprisonment against the perpetrators of criminal acts who are elderly, have a preventive effect so others deterrent perform the same actions and capable Similarly to recover the offender so that he realized his mistake and constructed such that in time, he can get back into society as citizens who obey the law.

To answer these questions, it is necessary to first discuss who exactly and how the psychological state of a man referred to as the elderly. The discussion about it being important, because only with proper understanding, it can be determined whether the person is elderly, can take an action so that it can make deterrent action and change its behavior.

In the perspective of the psychology of growth, Taufik Bahaudin an expert on behavior management explained that the age of seventy years and above, generally show symptoms of psychological form of memory loss, poor cognitive skills and verbal and non-functioning of relative ability to respond to environmental changes that are likely to experience disoriented behavior.²

Based on the expert opinion of this psychology, it became obvious it seems that the level of theory, is difficult to expect criminal prosecution or the imposition of imprisonment against the defendant elderly, will be able to make the perpetrators of such offenses would be a deterrent against the punishment he received and realized his mistake and is able to be developed such that the time, he can get back into society as citizens who

¹Sidik Sunaryo, *Criminal Justice System*, Publisher University Of Muhammadiyah Malang, Malang, 2004, Pg. 10.

²Taufik Bahaudin, *Brainware Management*, PT Elex Media Komputindo, Jakarta 2003, Pg. 69.

obey the law.

The question is whether the achievement of the objective of sentencing the preventive and rehabilitative functions theoretically difficult to implement, it is difficult also taken place at the level of implementable in the field. As has been discussed above that the Indonesian criminal justice system, the responsibility of supervising inmates, lies on the shoulders of Corrections. The question that could be asked is whether the Correction in this case the function implemented by the Correctional Institution, is able to provide guidance to convict convicts elderly so that the elderly can in prevention and rehabilitation.

In that case, it can be concluded at the end of this section that the imposition of imprisonment against perpetrators of criminal acts are elderly, are not effective when viewed from the achievement of the fundamental nature of punishment or criminal punishment purposes. Imprisonment can only achieve retributive of punishment that retaliation against criminal acts committed by a lawbreaker, but imprisonment is not able to achieve the goal of preventive so others deterrent perform the same actions and objectives rehabilitative or restoration of the offender so that he realized his mistake and constructed such that in time, he can get back into society as citizens who obey the law. Meanwhile when viewed from the purpose of law, the imposition of imprisonment against perpetrators of criminal acts elderly are also ineffective. Although able to meet the achievement of the principles of justice and the rule of law, the imposition of imprisonment does not have the benefit of law, good for the community, the country all the more for the perpetrators of the crime.

b. The Arrangements Conception Criminalization Against Perpetrators of the Crime of Elderly

Associated with the conclusions presented in the previous section that the imposition of imprisonment against the perpetrators of criminal acts are elderly, have not been able to meet the objectives of the law, especially the principle of expediency law, then if we really want the implementation of punishment is effective, there is no other choice but to set up a comprehensive and systematic criminal punishment against perpetrators of criminal acts in the elderly both the criminal Code and criminal law beyond the criminal Code such that the legal arrangements have legal benefits.

Associated with the efforts of arrangement provisions concerning criminal convictions against the elderly, then it is necessary to first put forward the impact that occurs if no arrangements regarding criminal convictions against the elderly as applicable today. In the absence of special arrangements to criminal punishment against perpetrators of criminal acts are elderly, then to perpetrators of criminal acts over the age of seventy years, which in general is already senile, frail, deaf and suffering from acute disease, the enacted provisions of punishment as applicable to adults in general. The imposition of punishment in general as discussed in the previous section, a punishment which tends not bring any benefit to the community.

Based on the above explanation, would have been to do the reconstruction of the law against the conception of special arrangements imposed punishment against perpetrators of criminal acts elderly. In connection with the reconstruction of the law, concerns the president as quoted on the home page of this thesis, may be used as consideration. President essentially said that "There is the elderly who are aged 70 years and stealing tuber to survive getting punished and imprisoned with those convicted public..."¹

Based on the concerns of the President's, would be withdrawn understanding that, considering the circumstances of the offender elderly are concerned, the President wants special treatment in the determination of criminal past and the type of punishment imposed on perpetrators of criminal acts elderly, which is not the same as a criminal on the adults in general.

According to the author, the President's desire can be translated that when compared with criminal sanctions against adults, then to perpetrators of crime are elderly should be the reduction of crime and criminal stelsel alternative arrangements besides imprisonment. Then the desired pattern of criminal prosecution against the perpetrators of criminal acts elderly resemblance to the criminal setting against children, as outlined in Article 45 and Article 47 of the Criminal Code.

Based on the provisions Article 45 and Article 47, one can draw the notion that there are two (2) forms of punishment that can be imposed on children, namely the imposition of penal action and imprisonment. Criminal actions that may be imposed is the form of the return of children to their parents, guardians or caregivers and juvenile criminal offenders submission to the Government. While if the judges convict jail, then the sentence was reduced one-third of the adult criminal.

The author argues that the terms of the reduction of crime and punishment against children alternatives mentioned above, can be considered for adoption or absorbed in defining the conception of punishment against the offender aged. Related to this, the authors propose an alternative conception of the reduction of crime and punishment of the perpetrators of criminal acts elderly as follows :

1. In the case of a criminal prosecution against elderly people for committing a criminal act in the form of the offense, the judge may determine: ordered that the guilty be returned to the family, or caregivers, without any criminal;

¹ www.metrotvnews.com, accessed on December 14, 2016.

2. In the event of a criminal prosecution against elderly people for committing a criminal act in the form of a misdemeanor or criminal offense with a penalty of less than 3 (three) years, the judge can determine: ordered that the guilty be submitted to the government without any criminal;
3. In the case of a criminal prosecution against elderly people for committing a criminal act in the form of a criminal offense with a penalty of over 3 (three) years, judges punish the maximum sentence by mistake with the main, set or acts that deserve to be reduced by one-third;
4. In the case of a criminal prosecution against elderly people for committing crimes in which the crime was punishable by death or life imprisonment, then sentenced to prison forever fifteen years.

The author believes that if the reconstruction of the criminal law reform on setting the punishment for the perpetrators of criminal acts who are elderly can manage the reduction of criminal and sentencing alternatives as mentioned above clearly and unequivocally, the application of the provisions of criminal offenders, especially for the elderly will be more effective.

3. Conclusion

- a. In order for criminal prosecution against perpetrators of criminal acts elderly to be effective, it should be setting the criminal reductions and alternative sentencing with the conception as follows:
 - In the case of a criminal prosecution against elderly people for committing a criminal act in the form of the offense, the judge may determine: ordered that the guilty be returned to the family, or caregivers, without any criminal;
 - In the event of a criminal prosecution against elderly people for committing a criminal act in the form of a misdemeanor or criminal offense with a penalty of less than 3 (three) years, the judge can determine: ordered that the guilty be submitted to the government without any criminal;
 - In the case of a criminal prosecution against elderly people for committing a criminal act in the form of a criminal offense with a penalty of over 3 (three) years, judges punish the maximum sentence by mistake with the main, set or acts that deserve to be reduced by one-third;
 - In the case of a criminal prosecution against elderly people for committing crimes in which the crime was punishable by death or life imprisonment, then sentenced to prison forever fifteen years.
- b. In order for conception renewal of criminal law governing criminal convictions against aging can be immediately applied, then it is urgent to do some changes or amendments to the Criminal Code in force at the moment, so that the formulation of the provisions of the foregoing, it can be adopted in the Draft Law Criminal Code Act and can also be passed into law

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