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# THE URGENCY OF THE FORMATION OF IUS CONSTITUENDUM IN THE IMPOSITION OF SUSPENDED SENTENCE TO ESTABLISH THE PRINCIPLE OF LEGAL CERTAINTY IN INDONESIA CRIMINAL LAW SYSTEM

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**ABSTRACT**
In handling a case that comes to him, a judge is required to present the maximum sense of justice to the parties. Including in the context of criminal justice, both to the defendant and to the victim. Indonesia, through the Criminal Code (KUHP), provides flexibility to judges including the possibility to give conditional penalties to defendants, or what is often referred to as probation. The concept is that within a certain period of time determined by the judge, the convict has to meet both the general and special requirements set by the court. However, the problem that occurs is the absence of technical guidelines regarding the imposition of the general and special conditions, which are allegedly able to cause disparities in each decision. Therefore, through this paper that uses this normative juridical research method, the authors tried to examine the problems and ideas of forming technical regulations regarding conditional penalties as Ius Constituendum in order to realize legal certainty in the future.

**KEY WORDS**
Ius Constituendum, legal certainty, suspended sentence.

Criminal law in its development has always and will continue striving to establish legal reform in the sense of material criminal law corridors or substantive criminal law, as well as in formal criminal law corridors or in terms of criminal procedural law and its implementation or what is called *strafvollstreckungsgesetz*.[1] The whole continuity is none other than establishing a national legal framework aimed at fulfilling the national interest which is based on the Pancasila as well as the basic constitution, namely the 1945 Constitution of the republic of Indonesia (UUD NRI 1945).

As for the body of criminal law itself, the development of the legal field is not only limited to structural development in the context of a dynamic legal institution in a criminal law mechanism, but also needs to accommodate substantial development in another sense as a product of a legal system. These legal products are embodied culturally through the provisions of criminal law, which in another sense are in the form of attitudes and values that have impacts on the enforcement of an ongoing legal system.[2]

In the context of criminal law reform, it is always related to the main problems that are intertwined with the other three main problems that become the main focus of criminal law which are prohibited acts, individuals who commit prohibited acts, and the sentence itself. In regard to the sentence, recently there are concerns that need to be considered and solved. These problems are related to public dissatisfaction with the criminal administration in the context of liberty deprivation. In various studies, its implementation can cause harm to individuals affected by misery and to society in general. In the Unitary State of the Republic of Indonesia, these problems are always given efforts to reform criminal law policies, especially those related to the criminal administration of liberty deprivation which incidentally is a punishment with a non-institutional nature which is transformed into a suspended sentence or *voorwaardelijke veroordeling*.

[1] *Muladi, 2008, Conditional Criminal Institution, Bandung: Alumni, p. 4.*
[2] *Ibid.*

According to Muladi, the outcome of the conditional criminal institution is to avoid and provide attenuation to the negative impacts of the liberty deprivation crime. This is because these negative impacts often hinder efforts to reincarnate the convict into the community.[3] Thus, the benefit of the existence of this conditional punishment is to avoid negative impacts that can damage people's lives by confining or limiting the freedom of the convicts in correctional institutions.

Regarding this conditional criminal institution, it can refer to Article 14a of the Criminal Code which states that “suspended sentence can only be imposed if it meets the conditions: a) In a decision that imposes imprisonment, as long as no longer than a year. So, in this case, a suspended sentence can be handed down in conjunction with imprisonment on the condition that the judge does not want to hand down a sentence longer than one year. Then what determines is not the sentence that is threatened for the crime committed, but the sentence that will be inflicted on the defendant himself; b) Suspended sentence could be imposed in connection with the imprisonment, provided that it does not include imprisonment in lieu of fines. Concerning this imprisonment, no limitation needed because the maximum of the imprisonment is one year; c) In the case of fines, then suspended sentence can be imposed with limitation the judge must be sure that the payment of fines will really burden the defendant."

Moreover, referring to Article 14b, a probationary of 3 years is appointed for crimes and violations stated in Article 492, Article 504, Article 505, Article 506 and Article 536 of the Criminal Code. As for other violations, a probationary of two years is given. Furthermore, Article 14c of the Criminal Code stipulates that in addition to the general requirement that the convict no longer commits a crime, the judge can also stipulate special conditions which is within a shorter period of time than his probationary period, a convict must indemnify part or even all of the losses that arise from the act he has committed. In addition, it is also possible to stipulate other special conditions related to the behavior of the convict which must be met during his probationary. However, it should be noted that even these conditions should not reduce the religious and political freedom of the convict.

Therefore, if the requirements, both general and specific, are not successfully fulfilled, referring to Article 14f paragraph (1) of the Criminal Code, the judge, with the recommendation of the competent authority in executing the decision, may order that criminal sanctions be carried out or on behalf of the judge who issued the decision to warn the convict. Regarding authorized officials who could order to execute decisions, it is regulated in Article 14d of the Criminal Code about officials who are in charge of being supervisors so that the conditions given in the decision are fulfilled. Subsequently, paragraph 2 of Article 14d stipulates the assistance that can be given to the convict in fulfilling special conditions, in which the judge can make an obligation to a legal institution or the chief of a shelter house or by certain officials.

In general, suspended sentence could be defined as a system of imposing criminal sanctions decided by a judge, but its execution depends on certain conditions. In other words, the sentence imposed by the judge no longer needs to be run if the convict succeeds in obeying or not violating the conditions laid down on him. The existence of this suspended sentence certainly has a purpose of its own. Conditional criminal institutions have the intention to provide opportunities for prisoners to improve themselves so that they would not commit crimes within a predetermined period of time.[4] Thus, the urgency of conditional criminal institutions arises from the thought or argument that not everyone who is proven to have committed a crime (convict) should be imprisoned. However, for the violation committed for the first time, in order to prevent the negative impact on the community, the prisoner is given the opportunity to improve himself in the community or outside the prison.[5]

Based on this thought, a conditional criminal institution can be referred to as the provision of law (criminal) on the freedom of a convict in which the judge can determine a

[3] *Ibid.*
[4] *Sapto Handoyo D.P, 2018, “Pelaksanaan Pidana Bersyarat dalam Sistem Pemidanaan di Indonesia”, Pakuan Law Review, Volume IV Nomor 1 Januari-Juni 2018, p. 26.*
[5] *Muladi, Op.Cit., p. 66.*

general condition which is during the determined probation period, the convict would not commit a crime, and can be accompanied by special conditions aimed at the behavior of the convict. This suspended sentence could be carried out if the judge imposes a one-year maximum sentence.

The term probation sentence which is often used basically does not exist in the Criminal Code. The Criminal Code regulates the term as suspended sentence with similar definitions. Thus, suspended sentence is a criminal process for the convict that does not need to be carried out unless one day, within a predetermined period of time, the convict commits a criminal act or violates the conditions agreed upon by him rather than the judge. In other words, the actual sentencing decision still exists, but its implementation is not carried out.

With regard to the punishment, it must be given accordingly to the convict's personal circumstances. In this context, suspended sentence is used as an alternative in imposing criminal sanctions to prisoners. The imposition of sanctions here is not only to protect the community, but also to be able to foster prisoners. Thus, the judge is required to give the right decision so that the sense of justice for the parties is fulfilled, especially for the convict. Judges need to consider personal matters such as the defendant's personality, the elements of the criminal act, and the defendant's behavior during the trial, whether he is cooperative or not. This is important so that when the convict is undergoing a probationary period, he will be able to reflect and return to the community showing good attitude and not violating the conditions set by the judge.

In order for the convict to successfully fulfill the requirements, there are officers who are authorized to supervise the person's attitude. If during the supervision the convict commits a crime or violates the stipulated conditions, the person would be brought back to court and his criminal sentence would be executed. However, the terminology "suspended sentence" is also considered as inappropriate. This is because the terminology implies indecisiveness to the decision and its execution. In fact, what is indecisive is the implementation or the execution of criminal sanctions that have been contained in the judgement. Suspended sentence is actually a form of criminal sanctions implementation outside prison.

The imposition of suspended sentence by judges practically and generally targets convicts of assault and battery whose provisions can be found in Article 351 of the Criminal Code. The legal considerations used by judges when imposing suspended sentences on these convicts are juridical arguments which refer to Article 184 of the Criminal Procedure Code which provides an assessment in the form of justifications, forgiveness, and abolition of judgments in imposing suspended sentence. Judges can also pay attention to certain conditions, circumstances, or particular reasons except attitudes and actions that are judged from the convict's daily behavior. In the internal structure of the Supreme Court, there is a legal basis referring to the Circular Letter of the Supreme Court (SEMA) 2017 Number 1 concerning the Formulation Enforcement of the Supreme Court Plenary Meeting of 2017 as Implementation of Duties for the Court guidelines. In the SEMA it is stated that the suspended sentence on probation must be followed by special conditions in which the criminal period with special conditions must be longer than the criminal period with general conditions, yet could not be longer than 3 years.[6]

Therefore, the case of assault and battery was later appointed as a case specification in this paper to analyze the basis of judge's considerations in applying suspended sentence. Whether in making decision, the judge has taken all aspects in it into account, such as prudence to avoid both formal and material inaccuracies, as well as technical skills in imposing suspended sentences. This is because a judge who is very careful in formulating suspended sentence would release a decision based on true justice as well as creating fulfillment of the legal certainty.[7]

[6] *Circular Letter of the Supreme Court (SEMA) 2017 Number 1 concerning the Formulation Enforcement of the Supreme Court Plenary Meeting of 2017 as Implementation of Duties for the Court Guidelines*
[7] *Andi Hamzah, 2001, Bunga Rampai Hukum Pidana dan Acara Pidana, Jakarta: Ghalia Indonesia, p. 3.*

Technical arrangement regarding suspended sentence also needs to be compared in order to broaden the horizons of thinking to make this research richer and more comprehensive. The arrangement should be in the form of clear guidelines about the application of suspended sentence which should accommodate the core, the outcome, and the parameters that should be considered in imposing a suspended sentence. In addition, the absence of guidelines raises judges' subjectivity as a consideration in deciding a case.

From the fundamental ideas explained above, including legal phenomena and legal issues as well as the urgency of this research, the authors are interested in writing current research paper.

Based on what is elaborated on the introduction, the problems raised in this research are as follows:

- What is the judge's consideration in imposing a suspended sentence?
- What is the urgency of *Ius Constituendum* formation in imposing a suspended sentence in order to actualize the principle of legal certainty?

## RESULTS AND DISCUSSION

In the Indonesia positive legal framework, referring to Article 1 paragraph (5) of Law Number 48 of 2009 about Judicial Power, normatively what is called "judge" refers to judges in the Supreme Court and judges under the general courts, religious courts, military courts, state administrative courts, and special courts. Besides the Law on Judicial Power, the definition of a judge is also mention in Article 1 point 8 of the Criminal Procedure Code which states that a judge is a "state court official who is authorized by law to adjudicate". Judges are often considered as God's representatives in the world to enforce law and justice. According to Ai. Wisnubroto, a judge is "a concretization of law and justice which abstractly describes judges as God's representative on earth to enforce law and justice".[8]

In accepting, examining, and deciding cases, especially criminal cases, a judge should rely on the principles of being free, honest, and impartial in trial court according to the procedures stipulated in the criminal procedural law, where could be found at Article 1 point 9 of the Criminal Procedure Code. Moreover, judge's responsibility in holding a trial in general is to adjudicate which includes receiving, examining and deciding cases[9], as well as adjudicating with the principle of a simple, fast, and low-cost trial.[10]

Judges are obliged to carry out their main duties and functions through safeguarding the independence of the judiciary[11] with their efforts through adjudicating mechanisms that do not discriminate between individuals. It is also based on Article 5 of the Law on Judicial Power, "judges are obliged to explore, follow and understand the legal values and the sense of justice that live in society; have integrity and impeccable personality, be honest, fair, professional and experienced in the field of law, and must comply with the judges code of ethics and code of conduct". In addition to being responsible to God Almighty, judges also have responsibilities to the state, society, and justice seekers. Judges need to keep this in mind in deciding cases by including legal arguments based on appropriate reasons and legal basis.

The word "independence" in the judicial power system in this country is used in judicial institutions in the form of independent judicial power or judicial independence. The term judicial independence is a principle embedded in the constitution. However, practically, at the social and individual level, there are various forms of interpretation within its scope. Many argue that judicial independence is not absolute because judges are justice and law

[8] *Aloysius Wisnubroto, 1997, Hakim dan Peradilan di Indonesia (dalam Beberapa Aspek Kajian), Yogyakarta: Universitas Atma Jaya, p.2.*
[9] *Pasal 50 Undang-Undang Nomor 2 Tahun 1986 tentang Peradilan Umum sebagaimana telah diubah beberapa kali dengan Undang-Undang Nomor 49 Tahun 2009 tentang Perubahan Kedua Atas Undang-Undang Nomor 2 Tahun 1986 tentang Peradilan Umum.*
[10] *Pasal 2 ayat (4) Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman.*
[11] *Pasal 3 Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman.*

enforcers.[12] Thus, because of the uncertain interpretation, judges could not be separated from the element of responsibility. That is, once again, because judicial independence is not absolute freedom without limits, so there is a tendency that this independence could reach arbitrariness.[13]

Judicial independence in the normative context could be found in the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), the Law on Judicial and Supreme Court independence which have been amended several times. Article 32 paragraph (5) of Law Number 14 of 1985 jo. Law Number 5 of 2004 concerning the Supreme Court which does not provide a concrete explanation. Thus, in terms of meaning and understanding of judicial independence, it is necessary to put forward the contextual framework of judicial power independence. Moreover, considering organizationally, judges are personnel of the judiciary subsystem as the implementing officials of judicial power, so that the judicial independence needs to always be in the way of the judicial power institutions independence. This has also been stipulated in Article 3 of Law Number 48 of 2009 concerning Judicial Power "in carrying out their duties and functions, judges are obliged to maintain the independence of the judiciary".

At the philosophical scope, the judgement was originally a decision by its nature which are both individual and assembly. However, when the verdict is decided, that is when a judgement is seen as a court decision (institutional decision). This is because after the decision is sentenced by the judge in a trial that is open to the public, the decision has been transformed into a decision of the judiciary and is automatically owned by the public. In Article 24 of the 1945 Constitution of the Republic of Indonesia, it is explained regarding judicial power, that: “1) Judicial power is exercised by a Supreme Court and others, the Judicial Institution according to the law; 2) The composition and powers of the judicial institution are regulated by law”.

Judicial power is defined as "the power of an independent state to administer justice in order to enforce law and justice based on *Pancasila*, for the sake of the implementation of the constitutional state of the Republic of Indonesia" and this provision can be found in Article 1 of Law Number 4 of 2004 about Judicial Power. The term "independent" has the impression of not being bound by anything and not being pressured by anyone. Independence is an action that does not depend on anything and anyone. Another meaning is also the independence to do whatever acts according to the wishes of the independence itself. If "independence" is used as an attribute of judges, then in the context of judicial independence in carrying out judges’ duties, judges are not bound by anything or pressured by anyone and are independent to do anything in carrying out their duties and responsibilities, which according to Frans Magnis Suseno, is defined as individual and extended independence.[14]

Umar Seno Aji and Indriyanto stated that historically, strengthening the terminology of judicial independence has become an account discoursed nationally so that it seems like there is extra-judicial interference. That kind of impression is one of Anglo Saxon countries’ characteristics which adhere to the rule of law, whether in countries with liberal, neo-liberal or socialist ideological systems. Countries with multiple system patterns have referred to the concept of impartial judicial independence. Thus, the characteristics of a democratic state recognize the existence of an independent and impartial judiciary as a principle adopted in the rule of law. Research on the judiciary’s internal condition, including the conditions of the judges, is needed as a starting point as an effort to realize the will of Freedom & Partial Judiciary.[15]

According to Umar Seno Aji, there are two perspectives used in judicial independence[16], namely functional independence or *zakelijke* and *rechtspositionele* or

[12] *Miriam Budiarjo, 1991, Aneka Pemikiran tentang Kuasa dan Wibawa, Jakarta: Sinar Harapan, p.1.*
[13] *Kees Bertens, 1999, Sejarah Filsafat Yunani, Yogyakarta: Kanisius, p.94.*
[14] *Frans Magnis Suseno, 1987, Etika Dasar Masalah-Masalah Pokok Filsafat Moral, Jakarta: Pustaka Filsafat, p.33.*
[15] *Oemar Seno Adji dan Indriyanto Seno Adji, 1980, Peradilan Bebas dan Contempt of Courts, Jakarta: Diadit Media, p.15.*
[16] *Oemar Seno Adji, 1987, Peradilan Bebas Negara Hukum, Jakarta: Erlangga, p.252-253.*

*persoonlijk* independence. In his view, Umar Seno Aji stated: “the independence of the judiciary has two aspects:

1. In a narrow sense, the judicial independence means institutional independence or in another words, it could be said as structural independence, external independence or collective independence; and
2. In a broad sense, the judiciary independence includes individual independence, internal independence, functional independence, or normative independence. The definition of personal independence could also be seen from two perspectives: personal independence which is judge’s independence from fellow judges or colleagues’ influence; substantive independence which is judge’s independence from any kind of power, either when deciding a case or when carrying out his duties and responsibilities as a judge.[17]

The judge's view, according to Bagir Manan[18] “could be unobjective in deciding cases because:

1. Influence of the power. The panel of judges is powerless to face the will of the higher power holders from both within and outside the judiciary itself (e.g., from governors, regents, ministers and others);
2. Influence of the public. Excessive public pressure could cause fear or anxiety to the panel of judges so they would possibly form decisions in accordance with the coercion of the public concerned;
3. Influence of the parties. The influence of the parties could be sourced from the commercialization relationship of the case. Cases become a commercial commodity, meaning that those who pay more would win.”

However, according to Artidjo Alkosar[19] “in order to seek as well as carry out justice and truth, the judgement needs to be adjusted to the basic objectives of a decision which the principle are as follows:

1. Carrying out an authoritative solution, which means providing a way out of the legal problems faced by the parties (plaintiff vs defendant; defendant vs prosecutor), and no institution other than a higher judicial institution could affirm a court decision;
2. Containing efficiency which is fast, simple, and low-cost because delayed justice is an injustice;
3. In accordance with the purpose of the law which is used as the basis for the court's decision;
4. Containing aspects of stability which are social order and public peace;
5. Containing fairness that is providing equal opportunities for litigants.”

Based on the views and arguments regarding judicial independence in holding cases above, it could be extracted that the principle of judicial independence in carrying out their duties as judges means that judges are not bound or pressured by anything and anyone, and are free to do anything. The meaning of such independence is defined as individual or extensional independence.

As for the application of the judicial independence in deciding cases accommodated by them, judges must be free from any kind of interventions by extra-judicial powers such as executive, legislative, and other extra-judicial powers in society, including the press. In examining and adjudicating a case, judges are free to determine their own way of examining and adjudicating. Judicial independence has the meaning of independence in the context of judicial institutions. So, the logical consequence is, both in general and in certain cases, the chief of the court may direct or guide the judges by giving instructions or advice, which would not reduce the meaning of judicial independence.

The considerations taken by judges in reality in order to make decisions on criminal cases they handle are actually similar to judges' considerations in deciding cases of other

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[17] *Firman Floranta Adonara, 2015, “Prinsip Kebebasan Hakim dalam Memutus Perkara Sebagai Amanat Konstitusi”, Jurnal Konstitusi, Volume 12 Nomor 2, Juni 2015, Jakarta: MK-RI, p.225.*

[18] *Bagir Manan, 2004, Sistem Peradilan Berwibawa (Suatu Pencarian), Jakarta: FH-UI Press, p.20.*

[19] *Artidjo Alkostar, 2008, “Dimensi Kebenaran dalam Putusan Hakim”, Varia Peradilan No. 281, Jakarta: Mahkamah Agung, p.37.*

criminal acts. There are always considerations that accommodate the reasons for eliminating the defendant's responsibility in criminal cases, whether it is reasons for forgiveness, reasons for justification, or other considerations that relieve or even burden the defendant. These considerations are then brought to the judicial deliberation and the results would be included in the decision. In addition to the elements of articles contained in the lawsuit, the judges, in considering to decide the case, would head to the judicial deliberation to determine a valid and convincing sentence to the defendant who is proven to have committed a crime.

In special conditions, when judges are faced with the fact that when examining and deciding cases, it seems that the existing law is deemed inappropriate to be applied. So, like it or not, judges, by themselves, are required to find law that actually contains justice elements as well as benefits and legal certainty so that the decision would be complete. In the condition where the existing norms are deemed inappropriate to be applied to a case, judges who are facing this kind of situation would generally consider the special things resulting from the interpretation and legal construction as forms of legal findings.[20]

Regarding judge's stages and perspectives toward special considerations as the composition of supporting legal findings, these could then be categorized into two streams: conservative and progressive.[21] From the judgement which is a judge's masterpiece, it could be seen whether the judge tends to use conservative or progressive perspectives, although in reality, of course, the judge does not implicitly state which view he belongs to in order to consider cases. In fact, the considerations and views used by judges in deciding the cases they handle often vary in their stance. For example, in one specific case, the judge uses progressive perspectives in considering the case he is handling, but on the other hand, the uses conservative perspectives in considering another case.

If judges tend to use written rules as the main source in deciding cases, they are generally categorized as conservative perspectives users. In other words, in handling cases, they usually tend to stick to values and norms which are considered as legal positivism. In this case, judges are playing safe in order to maintain legalistic stability. Judges in that kind of framework never think about creating new values and even engineering a new social system through their decisions based on the current development. These types of judges basically only make sure that a law could always be applied to an event literally.[22]

On the other hand, decisions made by judges who follow the progressive would not only act as mouthpieces for the law in its application, but also dare to take considerations that could even reach new legal findings on the basis of written legal thinking, and not a single source of law. For judges who follow the progressive views, laws are not identically judged as legal. This is because law is only one stage in the process of legal formation. Judges need to explore their comprehensiveness in court session in the form of special considerations establishment in handling a case.[23]

Regarding suspended sentence and its provisions, it is necessary to make a comparison between the regulations used in Indonesia and in other countries. For example, a country which historically has an affinity with Indonesia, which also adheres the law positivism, in this context, Netherlands. So, it is actually necessary to compare the provisions of the suspended sentence in our country with the Netherlands.

Moreover, suspended sentence, as stated above, is independence of a sentence imposed on a person which is dependent on a general condition set by the judge which states that in a certain period of time or what is often referred to as a probationary period, the convict is required to not commit any criminal offense. In addition, special conditions are also applied regarding prisoners' behavior in the community during their release. If the judge decides to impose a maximum sentence of one year, this suspended sentence could be applied. Suspended sentence becomes a phrase used in the Criminal Code instead of the

[20] *Sudikno Mertokusumo, 2014, Penemuan Hukum; Sebuah Pengantar, Yogyakarta: Cahaya Atma Pustaka, p.37,*
[21] *Ibid., p.8-11.*
[22] *Lintong O. Siahaan, 2006, "Peran Hakim dalam Pembaruan Hukum di Indonesia", Jurnal Hukum dan Pembangunan Volume 36 Nomor 1 (2006), p.35.*
[23] *Ibid., 35-36.*

probationary legal which is often used practically, but definitively, indeed, has the same meaning.

The suspended sentence based on Andi Hamzah and Siti Rahayu's view is the imposition of a sentence to the convict but the sanction does not need to be run. This condition is excluded if one day, within the determined period of time or in other words probationary period, the convict commits another crime or violates the conditions stipulated as an agreement between himself and the judge. So, actually, the criminal sanction still exists but it is just not implemented.[24]

This is because the sentence needs to be imposed appropriately by considering the personal circumstances of the convict. This is where the suspended sentence institution then appears as an alternative in giving sentence to the convict. Sanctions here are used not only in the context of protecting the community, but also, at the same time fostering the convict. Judges still have to make the right decisions and also strive to fulfill justice for the convict. The judges also need to consider the convict's personality and manners during trial. Suspended sentence is intended to provide a chance for the convict so that during predetermined period of time, he could show self-improvements to the community and not violate the conditions set by the judge.

Suspended Sentence Institutions in Dutch and Indonesian criminal law are actually the influence of similar institutions developed in the United States, Britain and Western Europe.[25] These kinds of institutions firstly appeared in the United States as a probation in 1887. The role of these probation institutions is to create possibility in delaying the execution of a crime by placing the convict in a probation supervised by a probation officer.[26]

The development of probation institutions could be said as significant and rapid until recently they get into countries such as Belgium, England and France. However, in France and Belgium, the role of probation has changed, not as an institution such as a suspended sentence, but more as an institution to delay the execution of a crime. Thus, there is no longer a need for a probation officer to supervise.[27] This is different from the concept adhered to the United States and England, where the judge determines the time to execute the defendant in probation in which the sentence has not yet been determined, but certain conditions are still determined during the probation period.

The officer which called the probation officer, has the authority to make the defendant fulfill the predetermined conditions. If during the probation period the defendant are proved to be repeating committing a crime or violating the conditions, then the defendant will be brought back to court to be sentenced. However, regarding the terminology, there is also an argument which stated that it is not appropriate because it seems like the sentence depends on that particular condition; in fact, the dependent one is only the execution. Suspended sentence itself is basically a type of application of witnesses outside the mechanism of the Correctional Institution (LP) along with other criminal sanctions such as eradicating children by way of prison or handed over to the state through the decision of juvenile court for children who violate the law, the integration process or assimilation, conditional release, and continued guidance.

The authors encapsulate an example of a case in case decision Number: 376/Pid.B/2020/PN Mks, carried out by Nuralim Zaenuddin as the defendant against a victim of abuse Irwati, who had a 4.3cm x 3.2cm bruise on her left chest due to a blunt trauma and needed to receive incentive treatment as the result of the visum et repertum Number: VER/066/VII/2019/FORENSIK of July 7, 2019 issued by Bhayangkara Hospital Makassar. The Prosecutor (JPU) charged the defendant with Article 351 paragraph (1) of the Criminal Code, which is threatened with a maximum imprisonment of two years and eight months. The Prosecutor demanded the defendant to be sentenced 10 (ten) months in prison minus the period of detention he had served. However, the panel of judges decided: "to impose a

[24] *Andi Hamzah dan Siti Rahayu, 1983, Suatu Tinjauan Ringkas Sistem Pemidanaan di Indonesia, Jakarta: Akademika Pressindo, p.31.*
[25] *Muladi, Op.Cit., p.33.*
[26] *Ibid.*
[27] *Ibid., p.65.*

suspended sentence by previously sentencing a 6 (six) months imprisonment, in which the sentence does not need to be run unless during the probation period of 10 (ten) months, the convict commits a crime."

The judge in the above case should have been able to impose a more optimal sentence on the defendant, considering that the criminal act committed causing physical and psychological suffering to the victim and moreover, the perpetrator of the abuse was a male against a female victim. The imposition of suspended sentence in the form of imprisonment for 4 (four) months with 6 (six) months probationary, as decided by the judge, is relatively insensitive to the victim's suffering as a result of the criminal act that has been proven to be committed by the defendant. Similar things happen to other judges' decisions in similar cases, where the given punishment tends not to give any deterrent effect to the perpetrators and could not be used as a lesson for other parties not to commit similar acts.

The existence of suspended sentence institution turned out to raise pros and cons. The basis that supports the existence of suspended sentence institution is based on the ideas that: a) suspended sentence provides an opportunity for prisoners to improve their self-quality in the society, as long as their welfare is considered to be more important than the risks that the community could potentially suffer if they are released into the community; b) prisoners are able to carry out daily habits as normal human beings with the values that exist in society; and c) preventing the occurrence of stigma caused by the deprivation of liberty. Meanwhile, things that could cause contra that could also be used as legal issues are the absence of balanced elements of justice in imposing suspended sentence on parties who are criminally harmed, especially related to the issue of disparity in conviction. This disparity could then lead to injustice, especially for victims. This is because there might be differences in considerations between legal decisions due to differences in the judge's understanding of the imposition of this suspended sentence. So, in this condition, a guideline is needed for judges in imposing cases so that they could provide justice to all parties, not only for perpetrators but also for victims.

This is also related to the discussion of legal certainty that could not be separated from the validity of an applicable law. There are at least seven requirements that must be met in an effort to create valid legal rules:

- Be formulated in a formal form such as an article in the legislation;
- Must be legally made by the authorities, for example laws by a parliamentary alongside with the government;
- Legally, the rules made could not be canceled;
- No juridical defects such as antinomies were found in the formal rules;
- The legal rules must be applicable by the bodies authorized to enforce the law;
- The legal rules must be accepted and obeyed by the community;
- These rules must be in accordance with the spirit of the nation.

However, aside from the requirements above, the rule of law must also not literally follow moral rules, political rules, or economic rules in order to maintain the principles of justice, legal certainty, predictability, public order, protection of basic rights, benefits, and other legal principles.[28]

Still related to the validity of the law, the principle of legal certainty is challenged for its validity which must also be followed by the existence of morality. According to Fuller, the law must possess and accommodate morality both internally and externally. The ideal legal certainty must involve an element of morality in its formation in order to achieve a good law enforcement. Generally, every law that contains morality internally and externally needs to be carried out without denying the morality content of a particular applicable law and does not only carried out what is ordered by the authorities. Because without morality, a law could be interpreted as unfair and could be difficult to apply to the community.[29]

Thus, special arrangements are needed regarding the imposition of suspended sentence on perpetrators of criminal acts that have been regulated in the Criminal Code.

[28] *Munir Fuady, Teori-Teori Besar (Grand Theory) dalam Hukum, Penerbit Kencana, Jakarta, 2014, P.109-111.*
[29] *E. Fernando M. Manullang, Legisme, Legalitas dan Kepastian Hukum, Penerbit Kencana, Jakarta, 2016, P.132-133.*

These arrangements could be in the form of laws and regulations contained in the hierarchy of laws and regulations in Article 7 point 1 of Law Number 12 of 2011 concerning the Establishment of Legislations which explicitly contains the types and hierarchies of laws and regulations that apply in the Indonesian state administration. Laws are the product of written legislation which holds the third place in the hierarchy, after the 1945 Constitution of the Republic of Indonesia and the MPR Resolutions, and before PP, Presidential Regulations, Provincial Regulations, and Regional Regulations. Laws have an equal position with Government Regulations in Lieu of Laws. It could also be in the form of guidelines set forth in the internal regulations of the Supreme Court such as the Circular Letter of the Supreme Court of the Republic of Indonesia. It could also be accommodated in the Criminal Code Bill (RUU KUHP).[30]

## CONCLUSION

In the implementation of criminal procedural law in Indonesia, normatively, judges have the independence to handle cases given to them as long as they are able to provide a sense of justice for all parties. In the case of certain petty crimes and considering the individual condition of the accused, the Criminal Code allows judges to impose a suspended sentence or what is often called as probation. In this suspended sentence institution, the convict is given a second chance to improve his behavior in society in a non-institutional manner he meets the general and special requirements. The general requirement here is that within a predetermined period, the convict is not allowed to commit any kind of crime. While the special requirement is determined by the judge based on the defendant's individual considerations such as compensating for the losses caused by his doings or being well behaved. In the implementation of this suspended sentence, there is a supervision to ensure that the convict has fulfilled the general and special requirements that have been agreed between the judge and the convict within the probationary period.

However, the problem is that up to this time, there are no technical guidelines regarding the imposition of suspended sentence. The Criminal Code (KUHP) itself, in its formulation of regulations regarding suspended sentence, does not provide technical requirements or guidelines which state about under which circumstances a defendant of a criminal offense could be subject to this suspended sentence. Thus, it is feared that in the future there would be disparities due to differences in judgment that could possibly rise the sense of injustice because of this legal uncertainty. Therefore, the authors suggest that it is necessary to create technical arrangements regarding suspended sentence which could be established through laws and regulations according to the hierarchy in Article 7 of Law Number 12 of 2011 concerning the Establishment of Legislations, regulated in internal regulations such as the Circular Letter of the Supreme Court (SEMA), as well as being accommodated in the Draft Criminal Code (RKUHP).

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