



**CONSIDERATION OF THE JUDGE OF THE STATE COURT OF
SURABAYA IN THE CRIME OF RACISM
(STUDY OF JUDGMENT 3147/PID.SUS/2019/PNSBY)**

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ABSTRACT

This study discusses the judge's considerations and progressive law in court decisions against defendants for racism crimes. Judges in their considerations and decisions have not fulfilled the aspects of justice and expediency. The purpose of this study is to analyze the judgments of the Surabaya District Court judges in imposing a sentence on the perpetrators of the crime of racism in the decision number 3147/Pid.Sus/2019/PNSby and to analyze the decision number 3147/Pid.Sus/2019/PNSby in terms of progressive legal theory. The method used in this research is normative juridical. The results of this study are the judge's consideration of the case decision number 3147/Pid.Sus2019/PNSby disagrees with the judge's considerations regarding the criminal conviction given to Syamsul Arifin as a defendant in a criminal act of racism. Based on the facts, Syamsul Arifin was proven guilty and one of the evidences was the circulation of a video stating that the defendant deliberately used the word "monkey" aimed at Papuan students at the Jl. Kalasan No. 10 cities of Surabaya. The impact of the circulation of the video was a wave of demonstrations or demonstrations that occurred in various cities such as Jayapura, Sorong and Manokwari, resulting in the mass burning of the Manokwari City DPRD building. The riots that occurred had bad consequences because they threatened national security. The judge's decision in this case will be of no benefit to the community, especially the Papuan people, because the sentences given to the defendants are light and short. The application of sanctions can be categorized as less effective and this judge's decision does not meet the progressive legal theory because it has not fully met the values of certainty, justice and expediency. The judge should have considered the consequences of the defendant's actions that created national tension, resulting in many riots in various parts of the Indonesian state.

Keywords: *Racism, Judge's Judgment, Progressive Law*

1. Introduction

The emergence of racism in Indonesia cannot be separated from the colonial legacy Dutch. The reason is that the system of grouping in society is enforced the Netherlands in its colonies. During Dutch rule, people Indonesia is divided into three groups, based on their ethnicity. The European group is the highest stratum, consisting of Dutch people. The Foreign East group is the

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second layer, which contains Chinese and ancestry Arab. The last layer is the indigenous people, the indigenous people of Indonesia. The concept of racism in Indonesia can be traced back to groups European and indigenous peoples. The European community, namely the Dutch, consider their race to be higher or higher in rank than race other. Racism emerged when the Dutch sent natives as accomplices the hands of the colonial government to regulate politics in Papua. Superiority in it which made acts of racism between the Dutch colonial indigenous peoples occur.²

Perpetrators of acts of racism appear in various elements or dimensions Public. In general, acts of racism originate from insults and stereotypes³ on different skin complexions and physical appearances. Racism makes inequalities in society so that negative prejudice arises. Part Most cases of racial discrimination are the result of fear and ignorance.⁴ Racism is a driving force for social discrimination, genocide, segregation⁵ and violence that can lead to division and serious problem, it can even be a threat to the country. There are many a form of racism that affects the mental and physical health of the victim acts of racism. Most racism is towards minorities, so can damage the social order of a country and create conditions anxiety and peace.⁶

The crime of racism is regulated in Law Number 40 Years 2008 on the Elimination of Racial and Ethnic Discrimination. A form of racism that carried out in an insulting manner using harsh words regulated in Article 16 Law Number 40 of 2008 concerning Elimination of Discrimination Race and Ethnicity. That state :

"Everyone who intentionally shows hatred or hatred towards others based on racial and ethnic discrimination as referred to in Article 4 letter b number 1, number 2, or number 3, shall be punished with

² Ridwan, MF, & Sofianto, K. (2019). Racism in the Novel Bumi Manusia by Pramoedya Ananta Toer:

A Study of the Sociology of Literature. Diglosia-Journal of Education, Indonesian Language and Literature, 3(2), 1-11.

³ Stereotype is an unbalanced assessment of a group of people.

⁴ Prayoga, W. (2020). *Designing Educational Information About Racism Through Comic Strip Media*. (Doctoral dissertation, Indonesian computer university).

⁵ Segregation is an idea of thought of certain social groups in the community space.

⁶ Asmara, DO (2019). *Racism Causes The Causes Of Complaints In The Black Mutiara Land*.

imprisonment for a maximum of 5 (five) years and/or a fine at most Rp. 500,000,000.00 (five hundred million rupiah).”

Based on the provisions of the article described above that the racism cannot be considered a trivial matter because of the consequences caused very harm. For this reason, the judge should sent a verdict must pay attention to psychological aspects and anxiety that occur as a result of the actions taken by the perpetrator. Like the case in front of the Papuan student dormitory Jl. Kalasan No. 10 cities of Surabaya. A Tambaksari District officers are on duty to carry out monitoring in the that location.

There was a red and white flag incident that was posted by the party Tambaksari sub-district fell into a ditch. So there is friction between residents and residents of the Papuan Student Dormitory and chaos, a subdistrict officer issued the word "Monkey" which is aimed directly at Papuan students who are in the hostel. Because of this, an official from the Tambaksari sub-district accused of violating Article 16 of Law Number 40 of 2008 concerning Elimination of Race and Ethnic Discrimination. In decision number 3147/Pid.Sus/2019/PNSby regarding the crime of racism, the judge handed down. Sanctions against defendants for criminal acts of racism are only in the form of imprisonment 5 (five) months and a fine of Rp. 1.000.000,- (one million rupiah) subsidiary 1 (one) month of confinement.

Try compare with decision number 2664/Pid.Sus/2017/PNSby the judge sentenced the defendant. The crime of racism in this case is in the form of 2 (two) years in prison. Based on the comparison of the two decisions above, it can be drawn the conclusion that the imposition of criminal sanctions decided by the judge in the violation of Article 16 of Law Number 40 of 2008 concerning Elimination of Race and Ethnic Discrimination decision number 3147/Pid.Sus/2019/PNSby is very far from the previous verdict number 2664/Pid.Sus/2017/PNSby and different from the provisions contained in Article 16 of Law Number 40 of 2008 concerning Elimination of Race and Ethnic Discrimination stating that the imposition of a maximum of 5 (five) years, but in the case of a decision 3147/Pid.Sus/2019/PNSby only

sentenced to 5 (five) months and a fine Rp. 1.000.000,- (one million rupiah) subsidiary 1 (one) month confinement.

The application of the progressive concept should take into account human rights and universally applicable principles, so as not to appear arbitrary, because it should be when applying the concept of progressive law. Law enforcers first learn the characteristics of the law progressive. As in the decision number 3147/Pid.Sus/2019/PNSby in the depth of the judge's reasons and the basis for imposing the sentence is not clear and does not adequately address the aspects of fairness and expediency.

2. Research Method

The type of research used is normative, namely research which analyzes the decision of the Surabaya District Court with the number Perkera 3147/Pid.Sus/2019/PNSby which has permanent legal force. Study normative law is defined as research on statutory rules both in terms of the legal hierarchy (vertical) and the relationship statutory harmony (horizontal). This research uses qualitative analysis, namely by explaining the existing data in words, not statements with numbers In legal research there are several types of problem approaches. The approach used in this paper is the Case Approach (*case approach*) and the Legislative Approach (*state approach*). The author tries to build a legal argument from a case perspective concrete events in the field. This approach aims to find the value of the truth and the best solution to legal events that happens with the principles of justice.

3. Research Results and Discussion

3.1. Considerations of Judges of the Inner Surabaya District Court Drop Criminal Racism In Decision 3147/Pid.Sus/2019/PNSby

3.1.1. Position Case

On Friday, August 16, 2019 in front of the Dormitory Papuan Students Jl. Kalasan No. 10 cities of Surabaya. Event happened started when it started with the Defendant SYAMSUL ARIFIN at that time being in the Papuan Student Dormitory as a sub-district

officer Tambaksari while on duty carrying out monitoring at the location. This is due to the occurrence of the red and white flag that was installed by the District Party on Jl. Kalasan No. 10 Surabaya City or front Papuan Student Dormitory has fallen into a ditch. And at the moment there has also been friction between the local residents and the occupants Papuan Student Dormitory and causing chaos, then because the Defendant SYAMSUL ARIFIN as an officer from the District Tambaksari who was also present with the residents in front of the student dormitory Papua is annoyed with the flag that has been installed by the Parties. The sub-district in front of the Papuan Student Dormitory has fallen to the in the ditch so that the Defendant SYAMSUL ARIFIN issued the words "MONYET" aimed at Papuan students who are part of the Papuan race and ethnicity who are. Residents of the Papuan Student Dormitory in front of the Papuan Student Dormitory which at that time was crowded with residents around the Papuan Student Dormitory which then went viral on social media regarding the Defendant's video said "MONYET" which triggered Papuans to feel annoyed with the expression "MONKEY" against Papuan students in Indonesia the Surabaya.

3.1.2. Public Prosecutor's Claim

- a. Declaring that the Defendant SYAMSUL ARIFIN has been proven guilty commit a crime "intentionally showing hatred or" hatred towards others based on racial and ethnic discrimination as referred to in Article 4 letter b number 2, namely making a speech express, or say certain words in public or other places that can be heard by others "as" regulated in Article 16 of Law Number 40 of 2008 concerning Elimination of Race and Ethnic Discrimination in the First Indictment Public Prosecutor
- b. Sentencing the Defendant SYAMSUL ARIFIN with imprisonment for 8 (Eight) months reduced for the Defendant

is in custody, by order the Defendant to remain in custody and a fine of Rp. 1.000.000,- (one million rupiah) subsidiary 1 (one) month of confinement.

c. Determine the evidence in the form of:

- 1) 1 (one) blue t-shirt with orange sleeves
- 2) 1 (one) blue jeans
- 3) 1 (one) black hat
- 4) 1 (one) unit Xiaomi Redmi Note 5 Plus color black with IMEI number 868209035912623 and 868209035912631 seized for destruction.

d. To determine that the Defendant should be charged with a court fee of Rp.5,000, - (five thousand rupiah).

3.1.3. Judges' Considerations

The Surabaya District Court Judges in their decision number 3147/Pid.Sus/2019/PNSby considers the following:

a. Everyone's Elements.

Considering that the element of each person or whoever is a formal formulation of an offense regulated in law;

Considering, that each person's element is only related to subjective element of the formulation of the offense therefore according to the Assembly The judge of the essence of the subjective formulation of the offense is only relating to people, namely the Defendant as the person who was proposed to the trial by the Public Prosecutor because he was accused of having commit a criminal act;

Considering that at the trial the Public Prosecutor had confronted a Defendant named SYAMSUL ARIFIN, born in Surabaya on October 10, 1981, age 38 years, male gender, Indonesian nationality, place of residence Jl Setro Baru Utara V No 100 Kel Dukuh Setro, Tambaksari Sub-district Surabaya, Islam, Civil Servant Jobs;

Considering, that after the Defendant's identity was matched in the trial turned out to be the same as the identity of the Defendant as mentioned in the description of the indictment of the public prosecutor, therefore According to the panel of judges, it is he who is meant by the public prosecutor in the indictment;

Considering, that during the examination, The defendant is in good physical and mental health so that to him can be asked for criminal responsibility which charged against him;

Considering, that based on the legal considerations, According to the panel of judges, this element must be deemed to have been proven according to law;

b. The element intentionally shows hatred or hatred to others;

Considering, that the element intentionally shows hatred or hatred towards others;

Considering, that on Friday the 16th of August 2019 took place in front of the Papuan Student Dormitory Jl. Kalasan No. 10 Surabaya City riots broke out between the masses consisting of from several mass organizations with Papuan students who are in dormitory related to refusal to raise the red and white flag which is installed in front of the Papuan student dormitory, where Previously, students who lived in Papuan dormitories had bent over the flagpole and the red and white flag was pointed at in a ditch/sewer installed by the District assigned to the Defendant to commemorate his birthday Independence of the Republic of Indonesia;

Considering that the community has accused students at the Papuan dormitory on Jalan Kalasan have done destruction of the flagpole and make a red flag The white flag that was installed on the flagpole fell into the ditch because in

previous years Papuan students refused waving the red and white flag on the road in front of the Papua dormitory on the grounds that they are not part of the Unitary Republic of Indonesia;

Considering, that the atmosphere caused anger local residents and all components of society who know the incident included the Defendant so that the Defendant with hatred towards the actions of the Papuan students has throwing the words “Monkey” as an expression of anger and hate the behavior of Papuan students who are not respect the national symbol, namely the Red and White Flag and also being antipathetic towards the Unitary State of the Republic of Indonesia;

Considering, that based on the legal considerations, then this element must be deemed to have been proven according to law;

c. Elements based on racial and ethnic discrimination as referred to in Article 4 letter b number 2, namely making a speech expressing, or say certain words in public or other places which can be heard by others;

Considering that the elements of racial and ethnic discrimination are in the form of a speech expressing, or throwing words certain places in public or other places that can be heard by other people, so that the statement can be heard by others;

Considering, that based on the facts revealed in the trial, that on Friday the 16th of August 2019 located in front of the Papuan Student Dormitory Jl. Kalasan No. 10 Surabaya City riots broke out between the masses consisting of from several mass organizations with Papuan students who are in dormitory related to refusal to raise the red and white flag which is installed in front of the Papuan student

dormitory, where Previously, students who lived in Papuan dormitories had bend the flagpole and the red and white flag is directed at in a ditch/sewer installed by the District assigned to the Defendant to commemorate his birthday Independence of the Republic of Indonesia;

Considering that at that time the Defendant had issued the words "monkey" at the crime scene on the street Kalasan Number 10 Surabaya which can be heard by others, intended so that the statement can be heard by others namely Papuan students who are in Papuan dormitories because they suspected of being the perpetrator of the destruction of the Red and White flagpole as a the coat of arms of the Indonesian state installed in front of the Papua dormitory and bend the flagpole so that the flag was directed into the sewer and it was seen as an insult against the national coat of arms and injuring the national feeling of everyone including the Defendant;

Considering, that the word monkey addressed to students who come from the Papuan tribe/Papuan race who bend the flagpole so that the flag is red and white directed into the sewer/water channel;

Considering, that the word monkey is aimed at exclusively against Papuan students who are suspected of bend the red and white flagpole so that the flag directed to the water channel / sewer because they do not recognize it as a part of the Unitary State of the Republic of Indonesia;

Considering that the discrimination of taste in the case of a quo addressed to Papuan Students in the Papuan Dormitory Street Kalasan Surabaya which does not recognize the Republic of Indonesia is not a whole Papuan race and also students. It was Papua who damaged the red and white flag

so that in the a quo case is a race that commits an unlawful act insulting the national emblem;

Considering, that the insult is not meant for Papuaanssch students not for people another Papua outside the scope of the Papuan dormitory on Street Kalasan Surabaya but because of the Defendant's actions there is a criminal threat in Indonesian positive law, as a consequence of the state the law every violation of the law must be subject to criminal sanctions;

Considering, that based on legal considerations according to the Panel of Judges, this element must be considered has been proven according to law;

Considering, that because of all the elements of the first indictment of the Public Prosecutor Article 16 of the Republic Act Indonesia Number 40 of 2008 concerning Elimination Racial and Ethnic Discrimination has been proven, the Defendant must found guilty and must be given the appropriate punishment by his actions;

Considering that thus the defense The Defendant and the Defendant's Legal Counsel will serve as factors that mitigate the sentence to be imposed by the Assembly to the Defendant;

Considering, that during the examination of this case, The defendant is in custody, the period of detention that has been served by the Defendant must be deducted from the length of the Defendant detained;

Considering, that because the Defendant was dropped the same punishment as the period of arrest and detention has been carried out by the Defendant, then the Defendant is ordered to released from custody as soon as this verdict is pronounced;

Considering, that with respect to the evidence submitted in court will be determined in the decision below this;

Considering that in order to impose a criminal against the Defendant, it is necessary to first consider aggravating and mitigating circumstances for the Defendant;

From the consideration of the Surabaya District Court judge against the decision number 3147/Pid.Sus/2019/PNSby can concluded if the judge considers the following matters:

- 1) Syamsul Arifin is proven according to law to have committed an act crime of racism and declared as the accused to the trial by the Public Prosecutor;
- 2) The defendant intentionally showed hatred or feelings hate by throwing the words "monkey" over behavior Papuan students who are antipathy to the State the Unitary Republic of Indonesia;
- 3) The elements of the Public Prosecutor's indictment are proven and the defendant is subject to Article 16 of the Law of the Republic of Indonesia Number 40 of 2008 concerning the Elimination of Racial Discrimination And Ethnicity.

3.1.4. The Decision of the Judges of the Surabaya District Court

The judges of the Surabaya District Court in their decision number 3147/Pis.Sus/2019/PNSby, on January 28, 2020 handed down the defendant's decision as follows:

- a. Stating that the Defendant, SYAMSUL ARIFIN, has proven legally and convincingly guilty of committing a crime intentionally showing hatred or hatred towards people others based on racial discrimination as referred to in Article 4 letter b number 2 juncto Article 16, which is

- throwing certain words in a public place that can be heard by others as in first indictment of the Public Prosecutor;
- b. Sentencing the Defendant SYAMSUL ARIFIN by therefore with imprisonment for 5 (five) months;
 - c. Sentencing the Defendant to pay a fine of Rp. 1.000.000,- (one million rupiah) subsidiary 1 (one) month confinement;
 - d. Determine that the sentence is deducted entirely from its duration the defendant was detained;
 - e. Order the Defendant to be released from custody shortly after this decision is pronounced;
 - f. Determine evidence in the form of:
 - 1) 1 (one) CD containing a video about riots on the street Kalasan No. 10 Surabaya; remain attached to the case file;
 - 2) 1 (one) blue jeans;
 - 3) 1 (one) black hat;Seized for destruction;
 - 1) 1 (one) unit of black Xiaomi Redmi Note 5 Plus with IMEI numbers 868209035912623 and 868209035912631;
 - 2) Returned to witness Agung Prasetyo;
 - g. Burden the Defendant to pay court fees of Rp. 5,000, - (five thousand rupiah);

3.1.5. Analysis of Judges' Consideration

This study analyzes the basic considerations of Court judges The State of Surabaya in imposing a crime with a case number 3147/Pid.Sus/2019/PNSby against the defendant Syamsul Arifin the perpetrator racism crime. A process in a court must end with a decision or verdict containing the imposition of sanctions in the form of criminal (criminal) and in the judge's decision express his

opinion on what is being considered and what is the verdict. Prior to this process, there is a process that must be carried out first, namely in the form of evidence in the sentencing of the defendant. Indictment from The Public Prosecutor becomes the judge's consideration in imposing decision by considering whether the elements of the act the defendant is proven legally to have committed the crime or not. The fulfillment of the elements of the defendant's actions which are Formal requirements are considered by the panel of Judge's consideration in imposing a decision against the defendant must reflect a sense of justice and have full trust based on valid evidence at trial. The evidence must not conflict with the basic legal arrangements in Indonesia.

The aspect of juridical considerations becomes proof of the elements of what is a crime charged by the Public Prosecutor fulfilled and appropriate. Based on evidence and information from 11 (eleven) witnesses who have given their statements stated that the defendant was found guilty of committing a criminal act racism against Papuan students in the hostel on Jl. Kalasan No. 10 Cities Surabaya. In criminal law, the defendant violated Article 16 of the Law Number 40 of 2008 concerning Elimination of Racial Discrimination and Ethnicity.

In addition to the juridical considerations, there are non-juridical considerations owned by the judge. Includes, the reasons behind the emergence of the defendant's desire to commit acts of racism against Papuan students at the Jl. Kalasan No. 10 cities of Surabaya. According to the testimony of the witness, it was stated that the incident was almost similar to the events in 2018 and already predicts that something happened because the same before. Consequences of the defendant's action sparked riots in Manokwari and a wave of student demonstrations Papuans.

Sentencing or punishment by the judge against the defendant Syamsul Arifin is imprisoned for 5 (five) months and sentenced the defendant to pay a fine of Rp. 1.000.000,- (one million rupiah) subsidiary 1 (one) month confinement. Based on Article 16 of the Law Number 40 of 2008 concerning Elimination of Racial Discrimination and Ethnicity, the maximum threat of imprisonment is 5 (five) years and/or a maximum fine of Rp. 500,000,000.00 (five hundred million rupiah. Very how far is the criminal sentence given by the panel of judges of the defendant.

Syamsul Arifin because the impact of his actions sparked riots in Manokwari and the wave of demonstrations in Papua due to the viral video defendant. This study does not agree with the judge's consideration regarding the punishment given to Syamsul Arifin as a defendant in the crime of racism is too light. Based on facts the facts, Syamsul Arifin was proven guilty, with one of the evidences a video circulated which confirmed that the defendant intentionally hurled the word "monkey" aimed at Papuan students in Dormitory Jl. Kalasan No. 10 cities of Surabaya. The impact of the circulation of the video this is a wave of demonstrations or demonstrations taking place in various cities such as Jayapura, Sorong and Manokwari as a result the City DPRD building Manokwari was burned by the masses. The riots that occur have consequences bad because it threatens national security.

The judge should have considered this, because an act of racism is not justified and is not allowed because it is tantamount to violating human rights (HAM). In accordance with Article 28I paragraph (2) The 1945 Constitution stipulates that everyone has the right to and free from discriminatory treatment on any basis and entitled to protection against discriminatory treatment.⁷ Even though the defendant did this because the student was Papuan

⁷ <https://www.komnasham.go.id/index.php/peraturan/2020/12/09/33/standar-norma-dan-setting-number-1-about-elimination-discrimination-ras-dan-ethnis.html> , Accessed January 7, 2022

Dormitory Jl. Kalasan shows hostility towards the State, Government and Society of Indonesia in general.

This should not be taken into consideration judge who eases the sentence of the defendant. It is better for the judge to see and pay more attention to the impact that given to the defendant's actions. Paying attention based on the facts that given by one of the witnesses that the previous year the incident this kind of thing has happened before. It should be material the same in order to achieve equality and justice.⁸ According to research

In this case, the implementation of Article 28I paragraph (2) and 28H paragraph (2) of the Law 1945 has not been fully implemented to the maximum. Criminal conviction against the Defendant is considered too light in view of the impact result of his actions. Consideration, so that an incident like this does not happen again. The right to be free from discrimination also includes protection specific to certain groups that are categorized as groups vulnerable to racism. Article 28H paragraph (2) of the Law. The 1945 Constitution stipulates that everyone has the right to get facilities and and special treatment to obtain opportunities and benefits.

3.2. Decision Number 3147/Pid.Sus/2019/PNSby Judging from Legal Theory Progressive.

Satjipto Rahardjo proposes the idea of progressive law in the era of 2002. The origins of progressive law can be traced back to deterioration of the law and court system and public discontent to its performance. This idea was well received, so often used by many people.⁹ The law must be able to follow development of the times, based on the morality component of resources human beings, namely law enforcement.¹⁰

⁸ *Ibid*

⁹ Achmad Rifai, *Achieving Justice with Progressive Law*, (Makassar: CV. Nas Media Pustaka, 2020), p. 1

¹⁰ Satjipto Rahardjo, *Loc. Cit.*

Progressive law basically has the goal of encouraging law enforcement agencies to be bolder in making breakthroughs in enforce the law in Indonesia. This idea to overcome injustice experienced by justice seekers (justiciabelen), in fact, law enforcement is an arrangement of processes to describe of legal purposes. Bearing in mind that the goal of the law is to create justice and truth based on moral values. Law is able work to realize the values of morality in the enforcement the law is the achievement of legal objectives.

Failure to realize these legal values into a insecurity or a dangerous threat to the law that apply. The success or failure of law enforcement is also a determinant become a barometer of legal legitimacy in the midst of social reality.¹¹ It is hoped that progressive law will become a tool in obtaining a fairness and benefit for all parties concerned. So deep law enforcement avoids justiciabelen dissatisfaction with law enforcement performance.

In line with the era of globalization and technological developments that quite rapidly, progressive law comes from the word progress which means progress. Progressive law sees law with a view like flow, because there is no law that is permanent in the world this. The first progressive legal paradigm is strengthened, humans become the point legal turnaround. Second, progressive law is not fixated on regulations and applicable laws.

The three progressive laws provide a big role for human actions to avoid the application of written laws that rigid, which would be an over-reliance on regulations. From this it can be concluded that progressive law is a law that strive for self-expression so that it has the quality of being civil servants and create wealth and satisfaction. The effort carried out to improve the development and sustainability of the law in the present.

¹¹ Achmad Rifai, *Loc. Cit.*

The modern rule of law is usually a rule of law progressive in terms of initiatives to serve the public interest by better, which always comes from the government. This is a picture of the country the law that Indonesia wants.¹² One of the principles of the rule of law is the existence of legal guarantees for the implementation of judicial independence, and the maintenance of law and justice without the influence of elements other state institutions in the administration of justice. in terms of the rule of law, a country under the rule of law must have the following elements:

- 3.2.1. The rule of law (the supremacy of the law)
- 3.2.2. All are equal before the law (equality before the law)
- 3.2.3. Human Rights guaranteed by the Constitution (constitution based on human rights)

Access to justice is basically a principle that relating to human rights as part of the main principles of the state law, namely as stated and confirmed in Article 28, 28A to 28J of the 1945 Constitution and also as enshrined in the Universal Declaration of Human Rights. Humans as a form of guarantee and protection of human rights so as to achieve justice.

Justice is a principle that cannot be fully accepted by everyone, but the consequences cannot be justified. For example, if a law is applied incorrectly to a case that involving people seeking justice, then the legal consequences this cannot be justified. Errors in applying the law in a court decisions result in a loss of public trust against the judiciary. This error also causes loss to one of the litigants. Principle of justice requires that rights and obligations be balanced by taking into account laws, rights, morals, and values that exist in society.¹³

To maintain an independent judiciary and not impartial, enforcement must be carried out in accordance with the rule of law applicable. If the judiciary does not provide the proper distance to the existing political institutions in a country, it will lose its legitimacy and

¹² Satjipto Rahardjo, *A State of Law That Makes Its People Happy*, (Yogyakarta: Genta Press, 2008), page 118

¹³ Achmad Rifai, *Loc. Cit.*

its presence in a country will be in vain. Law enforcement agencies are the backbone of all activities law, from drafting laws to law enforcement and legal assessment. Law enforcement is a process by which actions Different humans are used to create rules that can be agreed by both parties. Therefore, law enforcement considered not only to be a system of applying the law, such as statements of legal experts.

The law enforcement system has scope broader than just opinion. It involves aspects of human behavior. From this understanding, it can be seen that legal issues definitely striking is “law in action” rather than “law in books”. Law enforcement is a form of business in the implementation of the law as it should be, to maintain its implementation so that it does not there is an error that can be violated can be enforced and enforced repeat. Law enforcement is carried out through appropriate legal action applicable regulations in the form of warnings, warnings, certain obligations, and are subject to sanctions such as imprisonment and criminal sanctions dead.¹⁴

The essence of establishing the law is justice. Justice has various meanings depending on the perspective. In various countries, problems arise related to enforcement of justice in the realm of law. The concept of justice that has been arranged neat in one country is not necessarily appropriate if applied in other countries. Although there can be mutually influencing or integration between one another's thoughts about meaning justice especially that which has an all inclusive nature.¹⁵

On a philosophical level, of course, every country has roots their own thoughts, depending on the fundamental norms the country and the socio-cultural life of the country. For reveal the meaning of justice from a philosophical point of view, the right tool is hermeneutics. The search for justice from a hermeneutic perspective in the context of law enforcement

¹⁴ Abdul Kadir Muhammad, *Ethics of the Legal Profession*, (Bandung: Citra Aditya Bakti, 2001), p. 115

¹⁵ Susilo, AB (2011). Fair Law Enforcement in the Perspective of Philosophy of Legal Hermeneutics: An Alternative Solution to the Problems of Law Enforcement in Indonesia. *Perspective*, 16(4), 214-226.

must be framed with a scientific perspective law, in order to bridge and facilitate its implementation.

The justice created in the judge's decision always refers to what written in the text of the law. So far, the law emphasizes that justice is created according to the text of the law. However, currently many parties are calling for judges in Indonesia to be more open to justice rather than relying on the text of the law. Judges are expected to make legal discoveries through their decisions, while still pay attention to the values of justice that live in society, although it is hard to find in law.

The judge's decision is a form of statement that determine the fate and legal rights of a person, both the application of the law bad or not. Therefore, all the powers of the judge must be implemented to uphold law and justice. But on the one hand, it cannot be separated from the responsibility of the judge's decision. With Thus, the court decision declared in the title of the decision, "For justice based on God Almighty" contains meaning that the application of law to decide the truth and justice must be held accountable both before God and before humans.

Decisions made by qualified judges with value a high philosophical level is a form of judge professionalism in investigations, decisions and case decisions. Decisions that have quality, philosophical values based on fulfilled legal facts and legal arguments sufficient so that the results of the decision are not disputed by the parties involved different and not wrong in its application.

The judiciary is the pillar of society and is the foundation for litigants through law. When the roles and functions judges have materialized as a strategic and central part of judiciary. Even though they have contributed in fulfillment of their institutional mission, judges are expected to contribute to process of public service in accordance with law, justice and truth.¹⁶

Judges are not legal spokespersons who not only have to make decisions determined by law in carry out its functions, but also must

¹⁶ Satjipo Rahardjo, *The Other Side of Law in Indonesia*, (Jakarta: Kompas Media Nusantara, 2003), p. 209

enforce the law full. This collection of conclusions is principally governed by in Law Number 48 of 2009 concerning Judicial Power legal values, and the creation of justice in society must also be taken into account when making decisions. To make a decision, judges must master several disciplines (interdisciplinary). Because this learning allows them to make changes law.

The main aspects when assigning value to judicial decisions, including justice (*ex aequo et bono*) and legal certainty, are law enforcement balance. Furthermore, these considerations must be benefit the parties involved, so that the judge's consideration should be treated with caution and dismissed by the Court High Court or Supreme Court.¹⁷ The attitude of law enforcement officers in particular judges must have sincere and sincere personal integrity because there is guidance and strengthening of law enforcement, so that judges as law enforcers can make quality decisions.

Honesty is the most important thing a person must learn judges to make decisions with integrity and dignity. However, the honesty of judges in deciding cases is greatly influenced and determined by the legal environment itself. As a logical consequence, increased honesty can result in case decisions that can be accepted with satisfaction and responds to a sense of community justice. Besides relying on legal norms, Indonesian people really miss the presence of judicial decisions based on morality and personality.

The case of racism by SYAMSUL ARIFIN against Papuan students in the Papuan Student Dormitory. SYAMSUL ARIFIN as Tambaksari sub-district officer while on duty carry out monitoring at the location due to an incident. The red and white flag installed by the District Party on Jl. Kalasan No.10 City of Surabaya or in front of the Papuan Student Dormitory has fallen to in the ditch.

¹⁷ Mukti Arto, *Practice of Civil Cases in Religious Courts*, (Yogyakarta: Pustaka Pelajar, 2004), p. 140

At that time there had also been friction between local residents and Papuan Student Dormitory Occupants and causing chaos, then because the Defendant SYAMSUL ARIFIN as an officer of the Tambaksari Subdistrict who was also present with the residents in front of the dormitory Papuan students feel annoyed with the flag that has been installed by the Party. The sub-district in front of the Papuan Student Dormitory has fallen to the in the ditch so that the Defendant SYAMSUL ARIFIN issued the words "MONYET" aimed at Papuan students who are part of the Papuan race and ethnicity who are residents Papuan Student Dormitory in front of the dormitory.

Papuan students who were crowded around the dormitory at that time The Papuan student who later went viral on social media about Defendant's video saying "MONKEY" which triggered citizens Papuan people are annoyed with the expression "MONYET" towards Papuan students in Surabaya. Aggravating circumstances the defendant is the act of the defendant disturbing the community, the situation. The mitigating factor is that the Defendant behaved politely, the Defendant did this is because the students in the Papuan Dormitory walk Kalasan show hostility towards the State, Government and Indonesian society in general and the Defendant have never punished.

For this action, the panel of judges decided that Syamsul ARIFIN is proven legally and convincingly guilty of committing a crime criminal act of intentionally showing hatred or hatred towards other people based on racial discrimination as referred to in Article 4 letter b number 2, which is throwing certain words in place public that can be heard by others. Second, imposing a sentence against the Defendant SYAMSUL ARIFIN therefore with a criminal imprisonment for 5 (five) months. Third, punish the Defendant to pay a fine of Rp. 1.000.000,- (one million rupiah) subsidiary 1 (one) month confinement. Fourth, stipulate that the sentence is deducted entirely from the length of time the defendant was detained. Fifth, ordered that the Defendant released from custody shortly after this verdict was pronounced. Sixth, determine evidence in the form

of: 1 (one) CD containing a video about riots on Jalan Kalasan No. 10 Surabaya. remain attached to the case file; 1 (one) pair of jeans blue; 1 (one) black hat; Seized for destruction; 1 (one) unit of black Xiaomi Redmi Note 5 Plus with IMEI numbers 868209035912623 and 868209035912631; Returned to witness Agung Prasetyo. Seventh, burdening the Defendant to pay case fee of Rp. 5,000, - (five thousand rupiah).

Based on Article 1 paragraph (1) of Law Number 40 Years 2008, Racial and Ethnic Discrimination is any form of discrimination, exclusion, restriction, or election based on race and ethnicity, which results in the revocation or reduction of recognition, acquisition of or the exercise of human rights and fundamental freedoms in a equality in the civil, political, economic, social and cultural fields. To understand whether or not a court decision is appropriate as a progressive decision, the benchmark is the value of certainty, justice, and the usefulness of law. Legal certainty is closely related by synchronizing judge decisions on the basis of existing legal sources and apply, including laws and regulations, legal cases, doctrines, treaties and customs. When viewed from the aspect of legal certainty, seen from the criminal procedure and the principles applied by the judge, then the decision basically fulfills the things that must be in a court decision as stipulated in Article 197 jo. Article 199 KUHAP.

This decision is also supported by two valid pieces of evidence as stipulated in Article 183 jo. Article 185 of the Criminal Procedure Code required by law, the application of legal evidence is appropriate by law and the defendant is given the right to be represented by lawyer in accordance with the provisions of Article 56 paragraph (1) of the Criminal Procedure Code. Besides application of criminal procedural law, there are also procedural principles that included in this decision, including the principles of general justice, direct investigation, the principle of defense, and the principle of objectivity.

When viewed in terms of legal certainty, it can be seen from the regulations the applicable legislation, the judge takes into account the Law Number 40 of 2008 concerning Elimination of Racial Discrimination and Ethnicity and Law Number 8 of 1981 concerning Law Criminal Procedure with what is based on standard procedures in the event. Based on the rule of law analysis, any person with intentionally showing hatred or hatred towards another person in a form of action by saying certain words in a public place and other places where others can hear referred to in Article 4 letter b number 2. On this basis, the jury found that Syamsul Arifin has been shown, with *res judicata* and evidence persuasive, that he had committed a crime, "intentionally showing hatred or hatred towards others on the basis of racial discrimination as defined in Article 4 letter b number 2, i.e. throwing certain words in a public place that can be heard "by someone else".

However, in this case the judge has not fully complied provisions of Law no. 48 of 2009 concerning Power Justice, respecting human disposition, where judgment the law and the basis for imposing the sentence are vague or unclear and not fully meet the aspects of justice and expediency. Which becomes the basis of the judge in determining the length of imprisonment is in the form of aggravating things, including the defendant's actions are disturbing society, while softening things are in the form of the defendant's decency, investigators did this because the students in the Papuan Dormitory on Jl. Kalasan is hostile to the state, government and society Indonesia in general and the defendant was never convicted.

According to this study, this is not sufficient to determine verdict against the defendant, the judge must decide based on the reasons more rational, especially by using other sources of law in the form of doctrine and case law. Moreover, the determination of the decision in terms of legal substance is more than just a formal standard. Principles truth and

justice contained in social ethics, including: forms of social action and social norms other than law.

So what is meant here as a component of legal substance are all the principles and standards used by the community and government as a reference. In this case, the legal substance includes Law No. 40 of 2008 concerning the Elimination of Discrimination Race and Ethnicity, the addition of other unwritten legal principles such as violation of so-called adat or customary values, including in this case the principles of decency and truth that are enshrined in Public.

Judge's decision in case number 3147/Pid.Sus/2019/PNSby., should consider the consequences of the defendant's actions create national tension so that there are many riots in the various regions of Indonesia. The verdict given to the defendant should be able to provide remorse for his action and undo the intention not to repeat the action so that it can provide benefits and justice for the community (general deterrence) and the perpetrators themselves (special deterrence).

In the decision it is felt that it will cause injustice for the community, especially the Papuan people, because here the judge is only lightly sentenced the defendant to a prison term of 5 (five) months and sentenced the defendant to pay a fine of Rp. 1.000.000,- (one million rupiah) subsidiary 1 (one) month confinement. The imposition of sanctions very short of the demands of the Public Prosecutor who sentenced the criminal 8 (eight) months and sentenced the defendant to pay a fine of Rp. 1.000.000,- (one million rupiah) subsidiary 1 (one) month confinement and also the imposition of sanctions against court decisions with the number case 2664/Pid.Sus/2017/PNSby defendant Drs. Alfian Tanjung, M.Pd., sentenced to imprisonment for 2 (two) years considering the article imposed the same, namely subject to Article 16 jo. 4 b number 2 Act Number 40 of 2008 concerning the Elimination of Race and Ethnic Discrimination.

The judge's ruling in this case will be useless for the community, especially the Papuan people because the verdict given to the defendant lightly and briefly. Application of the sanctions can be categorized as less effective and this judge's decision does not meet progressive legal theory because it has not fully met the value of certainty, justice and expediency.

4. Conclusion

The consideration of the panel of judges in making a decision against the defendant should reflect a sense of justice and have full conviction based on valid evidence at trial. Research does not agree with the judge's considerations related the imposition of criminal sanctions given to Syamsul Arifin as a accused of racism. Based on the facts, Syamsul Arifin was proven guilty and one of the evidences of the circulation of the video stated that the defendant deliberately used the word "monkey" which aimed at Papuan students in the hostel on Jl. Kalasan No. 10 Cities Surabaya. The impact of the circulation of the video is a wave of demonstrations or demonstrations that took place in various cities such as Jayapura, Sorong and As a result, the Manokwari City DPRD building was burned by the masses. The riots that occurred caused bad consequences because it was very threatens national security. The judge should have take this into account, because an act of racism does not justified and not allowed because it is the same as violating the rights Human Rights (HAM). Appropriate determines that everyone has the right and free from discriminatory treatment on any basis and are entitled to protection for treatment that is discriminatory.

Progressive law basically has the aim of encouraging enforcement law to be more daring to make breakthroughs in carrying out the law in Indonesia. This idea is to overcome the injustice experienced by justice seekers (justiciabelen), essentially law enforcement is a series of processes to describe the purpose of the law. The judge's ruling in this case will be of no use to the community, especially the Papuan people because of the verdict given against minor and brief defendants. The application of the sanctions can categorized

or classified as less effective and the judge's decision in this does not meet the progressive legal theory because it is not fully meet the values of certainty, justice and expediency. Should be a judge considering the consequences of the defendant's actions national tension so that there were many riots in various Indonesian territory.

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