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Progressive Legal Perspective in Providing Legal Protection for Educators.

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Abstract: Education plays an important role in building the civilization of a nation and the development of society. The Indonesian Constitution has guaranteed the implementation of education as stipulated in Article 28 C paragraph (1) of the 1945 Constitution. The government is also obliged to play an active role in the implementation of the national education system in order to improve faith, piety, and noble character in order to educate the nation's life, as the goal of the Indonesian state. It is not easy for a Teacher to provide education to students, on the one hand the Teacher needs to provide an understanding of knowledge and on the other hand the Teacher must provide an understanding of attitude and discipline. One of the cases that occurred was in 2012, when a Teacher took disciplinary action against 4 of his long-haired students by shaving the student's head, but one of the students did not accept the action and reported the teacher actions to his father and then reported the teacher to the Police. Although there are legal rules governing the protection of teachers, there are still legal cases experienced by teachers. Therefore, it is necessary to conduct an assessment with regard to (1) What are the obstacles to legal protection for educators? (2) How does progressive law view legal protections for educators to avoid criminalization? and (3) How is the resolution of conflicts between the Teacher and the student handled when carrying out disciplinary duties.

Keyword: Progressive Law, Criminalization, Legal Protection, Teacher.

INTRODUCTION

Education plays an important role in building the civilization of a nation and the development of society. Through education, people will acquire knowledge to develop their own potential, have spiritual strength, self-control, personality, intelligence, noble character and skills needed by themselves, society, nation and state. National education is based on the culture of the Indonesian nation and based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

The Indonesian Constitution has guaranteed the implementation of education as stipulated in Article 28 C paragraph (1) of the Constitution of the Republic of Indonesia which basically states that everyone has the right to self-development through meeting basic needs, getting education and benefiting from science, technology, art, and culture to improve the quality of life and human welfare.

The government is also obliged to play an active role in the implementation of the national education system in order to increase faith, piety, and noble character in order to educate the life of the nation, as stated in the fourth paragraph of the Preamble to the 1945 constitution.

John Dewey defines education as a process of forming intellectual and emotional fundamental skills towards nature and fellow human beings (Hasbullah 2003, p. 2).

National education has the function of developing soft skills in the context of character building and developing hard skills in order to improve the quality of Human Resources (HR) in accordance with the goals and ideals of the Indonesian people.

The teaching profession as meant in Law Number 20 of 2003 concerning the National Education System is educational staff who are qualified as teachers, lecturers, counsellors, tutors, instructors, facilitators, and other designations according to their specialty, and participate in organizing education.

Teachers as educators have complex roles and tasks. Teachers are not only required as teachers to convey knowledge, skills, guidance and carry out assessments of students. However, teachers as educators also have roles and duties to develop personality, discipline, and morals as the goals of the national education system.

The development of the world of Indonesian education cannot be separated from the role of Ki Hajar Dewantara as the Father of Indonesian Education. Ki Hajar Dewantara distinguishes between education and teaching. According to Ki Hajar Dewantara, education (opvoeding) is a way of making demands on all the powers possessed by children in order to be able to achieve the highest happiness and safety as human beings and members of society. Whereas teaching (onderwijs) is part of education, meaning teaching is the process of imparting knowledge for life skills (Bandrang, 2022).

According to Ki Hajar Dewantara, the philosophical framework for learning refers to 7 (seven) profiles of Pancasila Students, namely Faith and Fear of God Almighty, Noble, Creative, Mutual Cooperation, Global Diversity, Critical Reasoning and Independent (Bandrang, 2022).

In accordance with Ki Hajar Dewantara's opinion and the goals of national education, an educator must be able to guide students according to educational goals and the nature of the times, so that students have good moral values or character. In order to realize this, discipline is needed, therefore educators will certainly try to instill positive discipline in students. In instilling discipline the teacher's position can act as a punisher, guilt maker, friend, monitor and manager (Bandrang, 2022).

It's not easy for a teacher to educate students, on the one hand the teacher needs to provide an understanding of knowledge and on the other hand the teacher must provide an understanding of manners. Knowledge without attitude is like fire without firewood, and attitude without knowledge is like a body without a soul.

Teachers in carrying out their heavy duties and functions certainly try to try various ways to realize educational goals. The rapid development of the era also has an impact on the fading of norms, culture, and morals of students. This sometimes provokes teachers to take strict discipline, such as pinching, speaking in a high tone, or carrying out disciplinary punishments such as shaving one's hair or carrying out raids on school attributes.

The actions taken by the teacher often clash with child protection and human rights, students who do not accept punishment by the teacher then report to their parents and their

parents return to report the teacher's actions to the police on the basis of violence against children or abuse or unpleasant behaviour.

Based on data from the Women and Child Police Departement in 2021, there were 594 cases of reporting violence against children with a ratio of 34.74% carried out by teachers. One of the cases that occurred was in 2012, where a teacher took disciplinary action against 4 (four) of his students who had long hair by shaving the hair of 4 (four) students, but one of the students did not accept and reported the teacher's actions. to his father and then reported the teacher's actions to the police with multiple article snares, namely Article 77 letter a and Article 80 paragraph (1) of the Child Protection Act and Article 335 paragraph (1) of the Criminal Code concerning unpleasant acts.

Based on Article 40 paragraph (1) letter c Law Number 20 of 2003 concerning the National Education System jo. Article 39 of Law Number 14 of 2005 concerning Teachers and Lecturers states that the Government, Regional Governments, Communities, Professional Organizations, and/or Education Units are required to provide protection to Teachers in carrying out their duties, this protection includes legal protection, professional protection, and protection occupational Health and Safety. Furthermore, Article 40 of Government Regulation Number 74 of 2008 concerning Teachers as amended by Government Regulation Number 19 of 2017 also states the same thing, that teachers receive protection while carrying out their duties.

Even though there have been legal regulations governing the protection of teachers, there are still legal cases experienced by teachers. The need for protection for teachers is not just protection for their welfare, but also needs legal protection for carrying out their duties. Therefore, it is necessary to conduct a study regarding (1) What are the obstacles to legal protection for educators? (2) How does progressive law view legal protection for educators to avoid criminalization? and (3) How is the conflict resolved between teachers and students when carrying out disciplinary tasks?.

METHOD

This research is a legal research on the issue of legal protection for the teaching profession, so the approach used is a legal approach, and this legal research essentially seeks the truth, and the criteria for truth in the science of law consist of coherent, correspondence and pragmatic truth criteria. (Anthon F. Susanto & Gialdah Tapiansari B., 2016) by looking at law as a means of carrying out social change. The main data used in this study are secondary data and primary data.

Primary data is obtained directly from the source through field research and secondary data is obtained from literary sources such as documents, literature books, research reports, and journals. Data collection techniques were carried out by conducting literature studies on laws and regulations, judge's decisions, studies on research results, books and journals related to research problems, while field research was carried out through interview techniques. Analysis is carried out by describing the results of the study or the results of data processing to develop the concept of criminal law reform.

RESULTS AND DISCUSSION

The Obstacles of Legal Protection For Educators

Legal protection for educators (teachers) normatively and substantively exists in Law Number 20 of 2003 concerning the National Education System, Law Number 14 of 2005 concerning Teachers and Lecturers, and Government Regulation Number 74 of 2008 concerning Teachers as amended by Government Regulation Number 19 of 2017, to be precise in Article 40 paragraph (1) letter c of Law Number 20 of 2003 concerning the National Education System jo. Article 39 of Law Number 14 of 2005, concerning Teachers

and Lecturers jo. Article 40 Government Regulation Number 74 of 2008 concerning Teachers.

The existence of a legal substance that regulates legal protection for educators does not mean that legal protection for educators does not have obstacles. According to Lawrence M. Friedman, that law includes 3 (three) components in its enforcement, namely: (M. Friedman, 2001, p. 7).

1. Legal substance, namely rules, norms and real human behaviour patterns, including decisions issued or new rules drawn up.
2. Legal structure, namely in the form of a framework, a part that survives, a part that provides boundaries.
3. Legal culture, which is a system of thought and social forces that determine how the law is used.

In relation to the barriers to legal protection for educators, so that law enforcement can run optimally, 3 (three) components are needed as referred to above. There are several obstacles, obstacles to legal protection for educators, among other things (Budoyo, 2022, p. 100):

1. The existing laws are not yet optimal.
2. Educators understanding of the Indonesian Teacher Code of Ethics (KEGI) is not yet optimal; And The role of the Indonesian Teacher Honor Council and School Committee is not yet optimal.
3. The role of the parent committee is not yet optimal, whose role is not only to supervise teachers but also to supervise students' behaviour.

Indonesian Laws and Regulations regarding the legal protection of Educators (Teachers) in carrying out their duties. The teacher as a transfer of knowledge also has a disciplining role for students. In instilling discipline the teacher's position can act as a punisher, guilt maker, friend, monitor and manager (Bandrang, 2022).

Law Number 14 of 2005 concerning Teachers and Lecturers jo. Government Regulation Number 74 of 2008 concerning Teachers as amended to become Government Regulation Number 19 of 2017 has become limited since the enactment of Law Number 13 of 2002 concerning Child Protection as amended to Law Number 35 of 2014.

Based on Article 9 paragraph (1a) of Law Number 35 of 2014 it states that every child has the right to receive protection in the education unit from sexual crimes and violence committed by educators, educational staff, fellow students, and/or other parties. The presence of Law Number 35 of 2014 concerning Child Protection is seen as the beginning of the emergence of the criminalization of teachers. The existence of this article is the legal basis for students and parents concerned to make complaints to the authorities, in this case the local police (Fadel Ahmad et al., 2020, p. 3).

The existence of the Child Protection Act creates a dilemma for teachers, on the one hand teachers are required to enforce discipline and school rules, but on the other hand teachers are haunted by criminal threats when their students do not accept the disciplinary action given (Fadel Ahmad et al., 2020, p. 3). Existing laws and regulations do not provide limitations regarding the size of disciplinary action against students, thus making this an obstacle.

The not optimal understanding of the Indonesian Teacher's Code of Ethics has also become one of the obstacles to legal protection for educators (Budoyo, 2022, p. 100). In 2013, the Congress of the Indonesian Teachers' Association was held and ratified the Indonesian Teacher's Code of Ethics, but there are still many teachers who are not aware of the existence of this Code of Ethics. Professional ethics is an attitude of life in the form of justice to provide professional services (Nawawi, 2019, p. 100).

The Indonesian Teacher Honorary Council (DKGI) and School Committees should

play an important role in the process of enforcing discipline in the education environment. The Honorary Council is a complete organ of the Teacher organization called PGRI which was formed to carry out its duties in providing advice, opinions, considerations, assessments, enforcement, and violations of discipline and teacher professional ethics. Meanwhile, the School Committee as an independent body to improve the quality, equity and efficiency of education management is an element that is also responsible for improving the quality of education (Misbah, 2009, p. 3).

The School Committee has the role of giving consideration, supporting the education system, controlling the education system, and mediator (Baedowi, 2015, p. 290). Problems that exist in schools should be resolved in advance by the School Committee as a mediator, if they are related to professional ethics and cannot be resolved by deliberation by the School Committee, then a report can be made through the Indonesian Teacher Honorary Council.

The criminal law process is essentially a last resort or commonly known as the *ultimum remedium* principle. So that if there are mistakes or violations in the school environment, the existing efforts should be taken. Directly taking criminal law measures means that the role of the Indonesian School Committee and Honorary Council for Teachers has not been optimal so that it has become an obstacle for teachers in obtaining legal protection. If the school committee in each education unit is able to carry out these four roles properly, it is assumed that the school committee can have an impact on performance in the education system (Hasbullah, 2006, p. 99).

The absence of a legal system as stated by Lawrence M. Friedman (legal substance, legal structure, and legal culture) results in the obstruction of legal protection for educators, in this case teachers.

Progressive Legal Perspective in providing legal protection for educators.

Differences in perceptions in the process of educating between teachers and parents cause misunderstanding of the ways and patterns of students carried out by teachers. Parents object to the way the teacher disciplines their children by pinching, twisting, or shaving their hair as a form of discipline, so that the teacher is criminalized for this action (Nawawi, 2019, p. 168). In addition, the presence of Law No. 35 of 2014 concerning Child Protection is considered as the beginning of the emergence of the criminalization of teachers (Fadel Ahmad et al., 2020, p. 3).

Soejono Soekanto defines criminalization as an action or deed that is determined by the authorities regarding certain actions that are considered by the community or groups of people as not acts that can be punished as criminal acts (Soekanto, 1981, p. 62). Meanwhile, from a value perspective what is meant by criminalization is a change in values that causes an act that was previously not a disgraceful act to become an act that is considered disgraceful and needs to be punished (Luthan, 2009, p. 2).

There are 3 (three) principles in criminalization that need to be considered. First, the principle of legality, namely that no act can be punished except for existing laws. Second, the principle of subsidiarity, namely that criminal law must be placed as a last resort (*ultimum remedium*) in overcoming crime. Third, ass equality, namely a criminal law system that is clear and simple, is fair for proper criminal punishment (Luthan, 2009, pp. 4–10).

Criminalization has several criteria, according to Soedarto the criteria for criminalizing an act, namely the act is liked or hated by society, the cost of committing criminalization must be in accordance with the benefits obtained, it adds to the burden on law enforcement officials or not, and whether the act hinders the ideals of the Indonesian nation (Arief, 1996, pp. 38–40).

Criminalization is a complex problem. The complexity of this criminalization can be influenced by very fast social developments or changes, differences in values, norms, and

educational backgrounds (Luthan, 2009, p. 3). This criminalization occurs because of changes in law which are the resultant of changes in society (Luthan, 2009, p. 4).

In essence the law exists for humans, not humans for the law. So that every time there is a problem in the law, the law that needs to be reviewed is not the human being who is forced into the legal scheme (Aulia, 2018, p. 166). According to Satjipto Rahardjo, humans do not start a meaningful life by making a legal system, but build a society, then law is born (Rahardjo, 2006, pp. 55–56).

Satjipto Rahardjo has a well-known theory, namely the theory of progressive law. Progressive law is part of a process of searching for the truth that never stops. Progressive law which can be viewed as a concept that is seeking identity, departs from the empirical reality of the workings of law in society, in the form of dissatisfaction with the performance and quality of law enforcement in Indonesia (Mahfud MD, 2009, p. 368).

Law exists for humans, so it has consequences for the way of judging, the way of progressive law rejects attachment to the text of rules rigidly, but instead leaves it to human behavior (Aulia, 2018, p. 167), so it is called interactional law, namely substantial law. Thus, the notion of progressive law does not merely understand the legal system in a dogmatic nature, but also aspects of social behavior in an empirical nature, so that it is expected to see human problems as a whole orientated to substantive justice (Mukhidin, 2014). So that substantive justice must take precedence over procedural justice, this is solely in order to present law as a solution to humanitarian problems.

Progressive law functions as a "liberation" force, namely freeing oneself from legalistic-positivistic types, ways of thinking, principles and legal theory. With this "liberation" feature, progressive law prioritizes goals over procedures. The "liberation" in question is not an unlimited act, because whatever is done must still be based on the "logic of social decency" and "the logic of justice" and not solely based on "regulatory logic". This is because the law aims to create justice and prosperity for all people.

The progressive law developed by Satjipto Rahardjo is also synonymous with "legal resistance" in the form of rule breaking. According to Suteki, the process of presenting justice can be carried out through three main activities, namely: first, using spiritual intelligence to wake up from legal adversity, giving an important role to dare to seek new paths (rule breaking) and not allow oneself to be constrained by old ways, carrying out old laws. and traditional which clearly hurt the sense of justice more. Second, the search for deeper meaning should become a new criterion in implementing the law and as a rule of law. Each party involved in the law enforcement process is encouraged to always ask conscience about the deeper meaning of law. Third, the law should be implemented not according to the principles of logic alone, but with feelings, concern and involvement (compassion) for weak groups (Nugroho, 2014, pp. 75–76).

The role of the teacher is not only required as a teacher to convey knowledge, skills, guidance and carry out assessments of students. However, teachers as educators also have roles and duties to develop personality, discipline, and foster morals as the goals of the national education system.

Ki Hajar Dewantara's opinion and the goals of national education, an educator must be able to guide students in accordance with the goals of education and the nature of the times, so that students have good moral values or character. In order to realize this, discipline is needed, therefore educators will certainly try to instill positive discipline in students. In instilling discipline the teacher's position can act as a punisher, guilt maker, friend, monitor and manager (Bandrang, 2022).

Based on the point of view of progressive law, as a "liberation" force that emphasizes substantive justice associated with criminalization criteria, the teacher's action of taking disciplinary action in the form of shaving a student's hair that is not in accordance with

school rules is not a criminal act. These disciplinary actions are indeed disliked by some students and parents of students, but if criminalization is carried out the costs in the law enforcement process are not in accordance with the benefits obtained, and these disciplinary actions do not hinder the ideals of the Indonesian nation, by carrying out these disciplinary actions educators in In this case, the teacher has tried to realize the goals of national education so that students have good personality, discipline, moral values and character. Therefore, teachers in carrying out disciplinary duties on students need to get legal protection.

If the disciplinary action taken by the teacher becomes a crime, then the goals of the national education system will not be achieved, just as knowledge without manners is like fire without firewood, and manners without knowledge is like a body without a soul. So that the teacher does not only provide knowledge, but also needs to apply discipline, moral values, and good character.

Conflict Resolution between teachers and students in disciplinary term

When students enter an educational institution, parents have handed over the authority to educate their children to the teacher at school. Therefore, teachers who have been given by parents the power to educate their children at school and the discretionary rights that exist in their positions can apply physical and psychological punishments in a reasonable and measurable manner. Schools have independence according to the doctrine of sovereign immunity and there are school regulations and school committees consisting of parents and teachers who regulate and oversee the relationships of parties and activities in schools. Based on the *in loco parentis* doctrine, it gives the meaning that authority to teachers is a delegation of power owned by parents which is given to teachers to educate their children (Hall & Manins, 2001, p.119).

The teacher legally has a position as a parent at school and therefore has the right to apply corporal punishment in the framework of disciplining children within reasonable limits.

The criminal law process is essentially a last resort or commonly known as the *ultimum remedium* principle. If students or parents of students do not accept the disciplinary action taken by the educator, in this case the teacher, it is better to resolve it first in the internal realm.

The School Committee has the role of giving consideration, supporting the education system, controlling the education system, and mediator (Baedowi, 2015, p. 290). Problems that exist in schools should be resolved in advance by the School Committee as a mediator. The School Committee acts as a mediator to provide an understanding of school rules and actions taken by students which have an impact on the imposition of disciplinary sanctions by the teacher.

If it is deemed that the actions taken by the teacher are related to professional ethics and cannot be resolved by deliberation by the School Committee, a report can be made through the Indonesian Teacher Honorary Council.

The Indonesian Teacher Honorary Council (DKGI) and School Committees should play an important role in the process of enforcing discipline in the education environment. The Honorary Council is a complete organ of the PGRI organization which was formed to carry out its duties in providing advice, opinions, considerations, assessments, enforcement, and violations of discipline and teacher professional ethics.

Meanwhile, the School committee as an independent body to improve the quality, equity and efficiency of education management is an element that is also responsible for improving the quality of education (Misbah, 2009, p. 3).

It is not appropriate if criminal law is used as *primum remedium*. The principle of

primum remedium which means criminal law is the main choice in upholding the law (Singal et al., 2021, p. 202). If the criminal law process is to be pursued, law enforcement officials need to prioritize restorative justice mechanisms. This mechanism emphasizes the conditions for creating justice and balance for perpetrators and victims (Fadel Ahmad et al., 2020, p. 5).

CONCLUSION

Based on the discussion as above, it can be concluded as follows:

1. Legal protection for educators (teachers) normatively and substantively exists in Law Number 20 of 2003 concerning the National Education System, Law Number 14 of 2005 concerning Teachers and Lecturers, and Government Regulation Number 74 of 2008 concerning Teachers as has been amended by Government Regulation Number 19 of 2017, precisely in Article 40 paragraph (1) letter c of Law Number 20 of 2003 concerning the National Education System jo. Article 39 of Law Number 14 of 2005 concerning Teachers and Lecturers jo. Article 40 Government Regulation Number 74 of 2008 concerning Teachers. In implementing the legal system, 3 (three) elements are needed, namely legal substance, legal structure, and legal culture. There are several obstacles, obstacles to legal protection for educators, among other things (1) The existing laws and regulations are not yet optimal; (2) Educators' understanding of the Indonesian Teacher Code of Ethics (KEGI) is not yet optimal; and (3) the role of the Indonesian Teacher Honor Council and School Committee is not yet optimal. The absence of a legal system as stated by Lawrence M. Friedman (legal substance, legal structure, and legal culture) results in the obstruction of legal protection for educators, in this case teachers.
2. Criminalization is a change in values that causes an act that was previously not a disgraceful act to become an act that is considered disgraceful and needs to be punished. There are 3 (three) principles in criminalization that need to be considered, including the principle of legality, the principle of subsidiarity, and the principle of equality. Criminalization has several criteria, according to Soedarto the criteria for criminalizing an act, namely the act is liked or hated by society, the cost of committing criminalization must be in accordance with the benefits obtained, it adds to the burden on law enforcement officials or not, and whether the act hinders the ideals of the Indonesian nation. According to Satjipto Rahardjo, humans do not start a meaningful life by creating a legal system, but build society, then law is born, so that it is known as progressive legal theory. Progressive law does not only understand the legal system in a dogmatic nature, but also aspects of social behaviour in an empirical nature, so that it is expected to see human problems as a whole orientated to substantive justice. Based on the point of view of progressive law, as a "liberation" force that emphasizes substantive justice associated with criminalization criteria, the teacher's action of taking disciplinary action in the form of shaving a student's hair that is not in accordance with school rules is not a criminal act. These disciplinary actions are indeed disliked by some students and parents of students, but if criminalization is carried out the costs in the law enforcement process are not in accordance with the benefits obtained, and these disciplinary actions do not hinder the ideals of the Indonesian nation, by carrying out these disciplinary actions educators in In this case, the teacher has tried to realize the goals of national education so that students have good personality, discipline, moral values and character.
3. When students enter an educational institution, the parents have handed over the authority to educate their children to the teachers at the school. Based on the *in loco parentis* doctrine, it gives the meaning that authority to teachers is a delegation of power owned by parents which is given to teachers to educate their children. The teacher legally has a position as a parent at school and therefore has the right to apply corporal punishment in the framework of disciplining children within reasonable limits. The

criminal law process is essentially a last resort or commonly known as the *ultimum remedium* principle. It is not appropriate if criminal law is used as *primum remedium*. The principle of *primum remedium* which means criminal law is the main choice in upholding the law. Problems that exist in schools should be resolved in advance by the School Committee as a mediator. The School Committee acts as a mediator to provide an understanding of school rules and actions taken by students which have an impact on the imposition of disciplinary sanctions by the teacher. If it is deemed that the actions taken by the teacher are related to professional ethics and cannot be resolved by deliberation by the School Committee, a report can be made through the Indonesian Teacher Honorary Council.

4. The need for harmonization and restrictions on laws and regulations regarding student discipline in schools and capacity building for educators in accordance with the Indonesian Teacher Code of Ethics and increasing the role of the School Committee and the Indonesian Teacher Honorary Council, so that an ideal legal system is realized as the theory put forward by Lawrence M. Friedman.
5. There needs to be a shared understanding between parents and teachers in the process of providing education and discipline in accordance with the goals of the national education system which does not only emphasize the provision of knowledge, but what is no less important is the formation of moral values or good character and discipline.
6. It is necessary to increase the role of the School Committee which acts as a mediator to provide an understanding of school rules and the logical consequences of breaking the rules. In addition, it is necessary to
7. strengthen the function of the Indonesian Teacher Honorary Council in resolving problems that occur internally in schools involving teachers, because in essence the criminal justice process is the last legal remedy (*ultimum remedium*). If every direct action is carried out by means of criminal law (*primum remedium*) then it will be difficult to achieve legal objectives.

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