

Conference Paper

Disparity of the Application of Adequate Legal Considerations: The Truth-games in Criminal Court Decisions

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Judges as holders of judicial power have been given freedom and independence in resolving disputes in the daily life of every citizen. However, this freedom and independence in judicial power are limited by the existence of sufficient legal considerations as the basis for formulating decisions through an interpretive process based on legal norms and concrete facts in the process of proving before the trial of criminal cases. Despite these limitations, the judge's ability to make decisions is through communication competence as part of language and legal activities (*berrechten*). This study used an approach using the concept of Power Relations and Social Praxis. This study aims to find the limitations of communication competence as a form of truth-play from judges through trying and deciding criminal cases. The results of this study indicate that a series of laws and regulations open up opportunities for the disparity in decisions to occur by ignoring the principle of sufficient legal considerations.

Keywords: disparity, sentence, power relations, criminal

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1. INTRODUCTION

The establishment of the goal of the rule of law has been formulated and stipulated in Paragraph IV of the Preamble to the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), which is then internalized in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Where Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia contains the meaning of state activities that mainstream the law and do not focus on humans[1], therefore every act in the name of the state must be based on law [2].

In relation to administrative activities, the power and authority to form laws and regulations – as a limitation of that power, the state in creating these legal rules must have a legal policy that discusses how a legal system is developed. , implementing agencies,

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disclosure of information regarding the process of its formation, and awareness of the temporary validity of the law based on space and time[3] , including its function as a legal instrument to resolve disputes—especially, criminal matters.

Judicial power as an element of state power in the judicial sector is one of the high state institutions in charge of the judicial process in terms of dispute resolution both in the field of private law and the field of public law. Therefore, as a consequence of the rule of law, the state is obliged to make material law rules and formal legal rules.

To understand Judicial Power as one of the constituent elements of state power as a whole which is institutionally separate from other forms of state power, it is certainly not possible to understand it historically. Therefore, through the thought of Montesquieu, who saw the need for the separation, it was based on the internalization of his era, through his trias politica theory[4].

Although judicial power or judicial power is part of the integrity of state power, according to Andi Hamzah[5], it is an independent and independent power, and is not under the auspices of any power. However, according to Paul E. Lotulong[6], there is no power or authority in this world that is unlimited, or without limits, except the power of God Almighty in this world and in the hereafter. Judicial power which is said to be independent or independent, is essentially bound and limited by certain signs at the International Commission of Jurist conference that it is stated that independence does not mean that judges have the right to act arbitrarily. The signs that must be remembered and paid attention to in the exercise of that freedom are especially the rule of law itself. Legal provisions, both procedurally and substantially/materially, are by themselves a limitation for judicial power so that in exercising their independence they do not violate the law and act arbitrarily. Judges are subject to the law and cannot act counter-legitimacy.

The freedom of judges in making legal discoveries with legal discoveries as a scientific activity, it is proper to pay attention to the views of Satjipto Rahardjo who asserts that the freedom of judges is an inherent authority in individuals and their duties in judging someone. This freedom is highly dependent on the level and ability of the judge's intellectual and personal morality. Therefore, a court decision is essentially the work of a judge which is determined by the thoughts and mindset of the judge himself.[7]

Thus, one of the signs or regulations that limit the independence and independence of judges is Article 50 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power (Law Number 48 of 2009) which affirms that a court decision must contain reasons

and grounds other than The decision also contains certain articles of the relevant laws and regulations or unwritten legal sources that are used as the basis for adjudicating.

In relation to the Criminal Procedure Code, the obligation to include legal considerations in a court decision is also regulated in Article 197 paragraph (1) letter d of the Criminal Procedure Code which confirms that a sentencing decision contains: considerations that are compiled in a concise manner. regarding the facts and circumstances along with the evidence obtained from the examination at the trial which is the basis for determining the guilt of the defendant.

The judge's consideration is one of the most important aspects in determining the realization of the value of a judge's decision that contains justice (*ex aequo et bono*) and contains legal certainty, besides that it also contains benefits for interested parties so that the judge's considerations must be addressed carefully, well, and careful. If the judge's considerations are not thorough, kind, and careful, then the judge's decision originating from the judge's consideration will be annulled by the High Court/Supreme Court.[8].

Legal considerations in decisions must be logical and in accordance with legal reasoning so that justice can be realized based on legal norms and common sense. If the legal considerations in the decision are not interconnected and appropriate so that the decision is not sufficiently considerate (*onvoldoende gemotiveerd*), then there will be awkwardness that causes the death of common sense that even ordinary people will feel because it involves conscience humanity.[9]

One of the legal phenomena related to the violation of the principle of sufficient legal considerations (*onvoldoende gemotiveerd*) which appeared in the Supreme Court Decision Number 2086 K/Pid/2009 dated January 7, 2010, was a court decision at the Cassation level which canceled the decision of the Medan High Court No.304/Pid/2009/PT.Mdn. dated June 10, 2009, which upheld the decision of the Medan District Court No. 523/Pid/B/2008/PN.Mdn. October 28, 2008. The decision at the Cassation level responds to the Cassation request based on the alleged violation as an adequate legal consideration (*onvoldoende gemotiveerd*) against the decision at the appeal level and at the first instance. In addition, there is also the Supreme Court Decision Number 185 K/Pid/2010 dated April 26, 2010, which is a court decision at the cassation level against the Jambi High Court Decision No. 108/Pid/2009/PT. JBI. dated October 19, 2009, which upheld the Decision of the Sarolangun District Court No. 41 / Pid.B / 2009 / PN.SRLN. August 20, 2009.

However, although the principle of sufficient legal considerations (*onvoldoende gemotiveerd*) has obtained normativization in the Criminal Procedure Code and Law

no. 48/2009, there are disparities in the realm of legal practice. As there was a refusal by the Panel of Judges at the cassation court to the appeal for the decision of the appellate court and the first instance based on the argument that there was an alleged violation of the principle of sufficient legal considerations (*onvoldoende gemotiveerd*). As stated in the Supreme Court Decision Number 1936 K/Pid/2008 dated February 3, 2009, it is a court decision at the cassation level against the East Java High Court Decision Number 70/Pid/2008/PT. SBY. dated March 26, 2008—which upheld the decision of the court of first instance, and the Decision of the Surabaya District Court No. 874/Pid.B/2007/PN.SBY. dated June 20, 2007, and the Supreme Court Decision Number 1980 K/Pid/2009 dated November 12, 2009, is a court decision at the cassation level against the Decision of the Jakarta High Court Number: 194/PID/2009/PT. DKI. dated July 21, 2009, which amended the decision of the North Jakarta District Court No. 124/Pid.B/2009/PN.Jkt.Ut. April 29, 2009.

Basically, the study of 'decision disparities' in Indonesia is not new. There have been many researchers who have tried to examine the issue of disparity from various aspects of the dialectic of judicial power on the ability of judges to find laws based on different material criminal law objects. For example, research conducted by HM. Siregar[10] regarding the disparity of decisions against the crime of theft, who submitted a thesis that the disparity of decisions can occur by referring to Law Number 48 of 2009 concerning Judicial Power (Law Number 48/2009). In other words, decision disparity is legally valid as long as it refers to normative juridical provisions. However, in this view, there is a conflict of meaning (antonymy) between the above conclusions and the following conclusions, where the disparity in decisions can occur due to internal and external influences.

Of course, this conflict of meaning will raise big questions, namely if there is a disparity in the decision whose judges or panel of judges are guided by Law no. 48/2009, then what is the urgency to discuss the factors that occur in the decision disparity itself? In fact, when referring to the object under study, there are only two district court decisions and the difference in judges' decisions, which is only one month apart, is not significant to classify the difference in decisions.

Another study was conducted by Heru Sugiyono and Robinsar Marbun[11], who confirmed that the disparity of decisions was caused by different interpretations of a legal concept based on the ability of the judges themselves. However, the difference in interpretation is actually stated as a form of failure of the legal system in Indonesia. In fact, the two researchers further emphasized that the result of the inability of judges to assess and interpret legal concepts has resulted in losses of justice and losses

in the realization of legal certainty. However, in this study there is also an internal contradiction where the researcher - initially argued that starting from a lack of legal considerations would raise the issue of justice, but these researchers have shifted their conclusions by building an argument by asserting that there is not enough reason in legal considerations to raise the issue of injustice. Therefore, the lack of legal considerations on the grounds of inadequate legal considerations, are two different studies.

The Judicial Commission[12], as a supervisory agency for the implementation of judicial power by the Supreme Court, also publishes the results of its research by conveying several parameters to measure disparity, namely compliance with procedural law, compliance with material law, aspects of legal considerations from judges, sentencing/imposing philosophical sanctions , and the disparity between decisions, both convergent and divergent. In the field of observing the disparity of decisions in corruption cases, where the Judicial Commission is of the view that there is a lack of legal reasoning—especially on each parameter that has been determined, resulting in a horizontal disparity with the divergence model. However, there is a similar pattern in the imposition of retributive decisions, only the adequacy of the reasons in legal considerations and reasoning are different from each other. However, in this study, if examined based on the disparity of decisions on narcotics crimes, it is clear that there is a disparity of decisions, either due to misinterpretation or due to non-compliance with procedural law and material law.

The research conducted by the Judicial Commission mentioned above is a research model that purely applies studies based on normative juridical methods only. Thus, the research group from the Judicial Commission mentioned above does not present an ideological critique of the original intent of the disparity in the decision. However, there is one similarity in various studies that examine the disparity of decisions, namely the existence of internal factors in judges. And external factors emerged that started from within the Defendant which influenced the judge.

This study intends to show that the internal factors in the judge are, in essence, the influence of interior externalization which internalizes and functions as a paradigm in judges examining, adjudicating, and deciding a criminal case. Therefore, it is appropriate to ask how the game of truth as a practical measure on the independence of judges in constructing sufficient legal considerations from a court decision?

2. METHODOLOGY

This study uses a legal research method by utilizing secondary data in the form of court decisions, both from the court of the first instance and the court of appeal, and the court of cassation, with an emphasis on the reasoning through linguistic activities, especially written language. Based on the object of research, the researcher—in addition to using research approaches commonly used in Legal Studies, also uses approaches from the Social Sciences, including the Power Relations Theory from Michel Foucault and the Theory of Practical Action from Pierre-Felix Bourdieu.

The approach through the Power-Relation Theory from Michel Foucault in this study is used to reveal and describe every decision in a language game that is packaged through knowledge that has been determined by the owner of power, especially judicial power. While the approach through practical action theory is used to reveal the existence of interests that are able to change the habits of every power holder. Thus, capital and fields become instruments for the trinity of power to realize legally valid decisions through language skills.

3. RESULTS AND DISCUSSIONS

Before entering into the subject matter of this research, it is necessary to describe in more detail the object of this study, which is divided into two major groups in the tradition of dispute resolution through the submission of an appeal to the Supreme Court, namely as follows:

1. The attitude of the Supreme Court in granting the appeal for reasons of violating the principle of sufficient legal considerations:
2. No. 2086 K/Pid/2009;

The argument put forward by the Defendant is that the High Court took over the decision from the First Level Court, without any reason for having approved the decision of the First Level Court.

1. No. 185 K/Pid/2010

The argument put forward by the Defendant is that the Panel of Judges at the Court of Appeal directly upheld the decision of the judge at the First Level Court, without giving any consideration or legal reasons to strengthen the decision of the first instance court. Therefore, this is the reason why the decision of the Court of Appeals (judex

facti) is less than perfect/not sufficient/does not provide a basis for legal considerations (onvoldoende gemotiveerd). The defendant argued this with reference to the Decision of the Supreme Court of the Republic of Indonesia No. 04/K/MIL/2000, Decision of the Supreme Court of the Republic of Indonesia No. 189/K/AG/1996, and the Decision of the Supreme Court of the Republic of Indonesia No: 367 K/Pid/1998.

1. No. 2022 K/Pid/2011

The argument put forward by the Defendant is that the Panel of Judges of the High Court sentenced him to imprisonment for two years and six months without giving sufficient reasons and not using any legal basis as an argument for why he was sentenced and why the defendant was sentenced. increased penalties.

In addition to this argument, which was approved by the Supreme Court, the Defendant also submitted another argument, namely the inaccuracy of the First and Appeal Courts in explaining the meaning of justice and the application of the elements of Article 378 of the Criminal Code.

1. No. 723 K/Pid/2012

The argument put forward by the Defendant was that the Court of First Level and Appeal had sentenced the victim to imprisonment without considering mitigating reasons, namely the existence of a peace agreement and compensation for the victim's losses.

1. No. 250 K/Pid/2013

In this case the Public Prosecutor acting as the Petitioner for Cassation, with the argument that the Court of Appeal without sufficient legal arguments has reduced the length of imprisonment that has been imposed by the Court of First Level.

1. The attitude of the Supreme Court that it does not approve of the cassation lawsuit on the grounds that the principle of sufficient legal considerations has been violated:

2. No. 1936 K/Pid/2008

The defendant argued that the Court of Appeal which upheld the decision of the First Level Court by argumentation was due to the absence of something new, so it did not need to be considered again. As a result, the Court of Appeal handed down a criminal decision, without any argument.

However, the Supreme Court stated that the considerations were correct and in accordance with the law. Also, without explaining whether the parameters are meant by "correct and in accordance with the law/laws".

1. No. 1980 K/Pid/2009

According to the Defendant as the Petitioner for Cassation, that the Court of Appeal did not provide comprehensive legal considerations and did not provide clear and detailed considerations/descriptions, namely simply stating that "After the Panel of Judges at the Appellate Level studied and examined carefully the case file.... ." without elaborating on what matters are the basis for these considerations. Thus, the Cassation Petitioner is of the view that the decision is based on legal considerations that are incorrect, wrong and have not provided sufficient legal considerations (Onvoldoende Gemotiveerd).

Against this objection, the Supreme Court stated that the arguments of the Cassation Petitioner had entered the evidentiary process. Meanwhile, the reasons for the legal action for cassation have been limitedly determined in Article 253 of the Criminal Procedure Code.

1. No. 1650 K/Pid/2011

In this case, the Cassation Petitioner takes issue with the description of the High Court's considerations which confirms that Considering, that after the High Court studied the case file and the official derivative of the decision of the Cibinong District Court Number 950/Pid.B/2010/PN.Cbn. dated December 14, 2010, as well as the memorandum of cassation which turned out to be nothing new that needed to be considered, the High Court agreed with the judgment of the Judge of the First Instance in its decision that the Defendants had been legally and convincingly proven. guilty of committing the crime that was charged against them and the considerations of the First Instance Judge are taken over and become the material for consideration by the High Court itself in deciding this case at the appellate level.

According to the Cassation Petitioner, such a model of consideration—not a consideration, causes a decision that has insufficient consideration (onvoldoende gemotiveerd), and therefore must be annulled. Because, according to the Cassation Petitioner, the Court of Appeal acted unilaterally, even though the Memorandum of Appeal from the Public Prosecutor did not bring up anything new, but was considered by the Court of Appeal.

Meanwhile, the Supreme Court rejected the reasons from the Cassation Petitioner because they were not in accordance with the requirements in Article 253 paragraph (1) of the Criminal Procedure Code.

1. No. 1720 K/Pid/2012

The defendant, in this case, argued in the appeal that the Court of Appeal had wrongly applied the law because it did not give sufficient and adequate consideration to the decision of the Sintang District Court. The Panel of Judges at the Appellate Court only directly upheld the judge's decision in the first instance, without giving any consideration or legal reasons why the decision was upheld. Therefore, this is the reason why the decision of the Court of Appeals is incomplete/inadequate/does not provide a basis for legal considerations (onvoldoende gemotiveerd).

Meanwhile, the Supreme Court rejected the appeal by arguing that the reasons regarding the assessment of the results of evidence that are appreciative of a fact, the arguments submitted by the Petitioners in the cassation stage cannot be considered, because the examination at the cassation level only relates to not being applied or whether a legal regulation is not applied properly, or whether the court has applied the procedural law in accordance with the law, and whether the Court has acted beyond or violated its authority, which is regulated in Article 253 of the Criminal Procedure Code.

1. No. 1347 K/Pid/2016

In this case, according to the Cassation Petitioner, the decision of the Court of Appeal must be deemed insufficient (onvoldoende gemotiveerd), because it has unanimously accepted the decision of the first instance court, and has taken the considerations of the first instance court into its own decision, without explaining the legal considerations. which has been assessed correctly and correctly, which is contrary to the rules of law.

With respect to the argument from the Petitioner for Cassation, the Supreme Court is of the opinion that after all, the reason relates to the evaluation of the results of evidence that is appreciative of a fact. The arguments submitted by the Petitioners in the cassation stage cannot be considered, because the examination at the cassation level only relates to not being applied or whether a legal regulation is not applied properly, or whether the court has applied the procedural law in accordance with the law, and whether the Court has acted beyond or violated its authority, which is regulated in Article 253 of the Criminal Procedure Code

Referring to the legal phenomenon above, when compared between applications received and applications that were rejected, basically, there are similarities in filing

a cassation legal remedy, namely the issue of the application of the law by judges at the appellate level and at the first level. The two groups mentioned above, in their arguments, have both tested the process of proof in the trial. However, it turns out that the Supreme Court as the holder of judicial power, at the final level, has no uniformity in carrying out an action to seek an appeal.

In principle, an interpretation of the law itself is indeed an arena of play that can be done creatively[13]. This creative game becomes very wild when the legal system in Indonesia does not strictly accommodate the concept of jurisprudence, like common law countries.

Of course, in general, there has been a single narrative in the legal process, that there are still extraordinary legal remedies, namely Judicial Review. However, it should be noted that normatively, the process of submitting a judicial review cannot be a reason to stop the execution of the final decision of a cassation decision. Therefore, the power of the Supreme Court, which is free and independent, is a power that will always produce knowledge that is legitimized from the concept of the trinity of power. Thus, the emergence of the decision itself has coincided with the rites of truth (regime of truth)[14].

The regime of truth has been constructed into a game—as a dynamic strategy, which is intact within a certain institutional system through legal instruments as its justification and legitimacy. The game of truth made by this power is, in the end, a legitimate attempt to dominate society[15]. Thus, each Judge will be able to carry out a language strategy—through a decision, to be able to shift the dialectical ability between interior internalization—as a habitus, based on mastery over the arena and capital—that is, the trinity of power, which he possesses[16]. Because, according to Bourdieu, habitus is indeed transposable[17], it can play by following the flow of interests that arise from within the judge in playing interpretive games.

An interpretation of the reasons for submitting an appeal, in the realm of criminal procedural law, is in a state of dichotomy as a result of the 'intentional' formulation and design that provides an opportunity to play with meaning. Where, the reasons that have been expressly regulated in Article 253 paragraph (1) of the Criminal Procedure Code are (1) only with regard to not being applied or not applying a legal regulation as it should, or (2) whether the court has applied the procedural law according to the laws, and (3) whether the Court has acted beyond or violated its authority.

Based on the authoritative text above, if you look at Article 2 *jo* Article 3 of the Criminal Procedure Code, it is expressly stated that the procedural law used is only the legal text that exists and is regulated in the Criminal Procedure Code. However,

the coherence of legal reasoning is disrupted by the existence of Article 52 of Law Number 14 of 1985 concerning the Supreme Court—as last amended by Law Number 3 of 2009, which authorizes the Supreme Court to use reasons other than the reasons stated above has been filed by the Cassation Petitioner.

Based on this authoritative text, the legislators have given the Supreme Court an opportunity to "play around" with creative interpretations that shift the meaning—arbitrarily, to Article 2 *jo* Article 3 of the Criminal Procedure Code. This phenomenon is what Bourdieu affirms as a 'transposable' phenomenon of habitus through internalization and externalization activities through court decisions as a game of truth. However, the prejudice or pre-understanding[18] of a decision reader, cannot be separated from the existence of a situation in a social phenomenon with the emergence of an ideological aspect (interests)—as an attempt of binary contamination to shake positivistic thinking, from interested parties[19], [20], [21], [22].

4. CONCLUSION AND RECOMMENDATION

Every Judge, within the Supreme Court institution, has an awareness of the ownership of the trinity of power as capital in playing in the law enforcement arena—especially in the judicial power, which is legitimized by law and legislation. The legal system in Indonesia, which does not recognize absolute submission to jurisprudence, has led to a disparity in decisions. Although, this research does not want to deny disparity, however, the independence and independence of judges is the main cause for the emergence of truth-games through creative patterns in interpreting laws and regulations. Juridical facts show that even with respect to the legality principle contained in a law, connotative meanings can be deliberately raised through *habitus* and capital ownership. As a result, every truth game that arises from a judge's decision has the potential to move dynamically and irregularly.

Referring to the conclusions mentioned above, it is necessary to overcome the spread of legal texts that regulate how to make legal considerations that must be considered sufficient legal considerations. Thus, the activities of vertical and horizontal harmonization became the main agenda that was immediately carried out to avoid the diversity of the truth-games in measuring compliance as sufficient legal consideration.

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