

Basic Reconstruction of Legal Judgment from Supreme Judges Based On Legal Value and Sense of Justice Developing In the Public

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ABSTRACT

Justice is organized by court as a facility or vehicle for reaching justice. Role of the court in upholding justice is inescapable. So the court is forced to realize abstract ideas of justice. An important instrument of the court is the judge. The legal system of civil law prerequisites the judge to realize justice and main motive in the dynamic of legal reconstruction. The ground of legal judgment from the judge in the appeal, specifically criminal case raises controversies in the academic and practical fields. The controversy shows if decision or verdict of supreme judges is not wholly satisfying the public sense of justice. Whereas the reasoning from the supreme judges is still curtailed by normative rule of law and it tends to be pragmatic. The reasoning is patterned into three patterns of thought: the reasoning of partial judge, reasoning from ethical judge and reasoning of pragmatic judge. New construction of judge's legal judgment relates closely with judge's attitude. Moreover, paradigm of thought from the judge becomes second grounds.

Keywords: Supreme Judges, Legal Value, Sense of Justice

INTRODUCTION

Court's decision, especially in the criminal case starts from first level until appeal level still hurts the public sense of justice. As an example, the Tipikor court's decision of Bandung which released Mayor of Bekasi, Mochtar Muhammad. And Tipikor court of Surabaya, for one year, released 9 accused corruptors. The court that should become "ghost" for the corruptors, in fact, otherwise seems work. Law and justice, in this country, as if are not walking hand in hand anymore, even justice tends to be negated in the law enforcement. Sandal case justified that the law is not reliable thing any longer, for resolving problems. This case and others hurt the public sense of justice such as the case of Nenek Minah, Basar and Kholil. All displayed that the law is very sharp whenever it concerns common people.

The aforementioned cases convince the writer that court's decision far from justice. Extremely the writer says, if the corruptors steal people's money because they are greedy, not because they need it like Bashar and Kholil who stole melon. The two cases normatively can be said they have the same elements, i.e. stealing, but the substance and orientation of the cases are very different.

The paradigm of the court's decision can also be said as the reality of other court's decisions. Theoretically, the existence of court constitutes an agency which serves to coordinate public disputes, and is "house of protector" for people who look for justice, who believe in litigation channel and considered as 'the company of justice' that is capable of managing the disputes and making product of justice acceptable by all people. So the duty and function of court is

not just solving disputes, but also guaranteeing a form of social order. As a legal agency, court must also become media in reaching legal ideal. The ideal is to preserve social order. So that legal function is stressed as social control.

Whereas the prevailing condition at the appeal level is almost the same as the first level court. The supreme judge should learn more deeply legal values and social sense of justice. The fact, however, many decisions or verdicts of Supreme Court disregard social justice.

One of the verdicts is by Supreme Court (MA) that punished Nenek Rasminah with sentence of 130 days in prison. Rasminah was accused for stealing 6 plates, in June of 2010. The report was filed by her employer. Siti Aisyah was prosecuted 5 months by prosecutor but she was released by the judge from the court of Semarang. Rasminah was held for 130 days until the postponement was granted. The court stated that she was free. In fact, the prosecutor filed an appeal to the MA. She was sentenced by MA for 130 days. There were dissenting opinions about it. The chairman of The judges, Artidjo Alkotsar, stated Rasminah was free. But two other judges said differently.

Another case is the case of Prita Mulyasari. MA, in its verdict, granted application of appeal from prosecutor who stated that Prita was proven to damage reputation of RS Omni Internasional, via electronic letter. She was sentenced for six months in prison with one year of probation. Earlier the court of Tangerang freed her from all accusations.

On the other hand, MA discharged the accused corruptor of handover of graveyard in Lebak Bulus, South Jakarta, as much as 27 billion rupiah, Andi Wahab. Earlier the prosecutor charged him with imprisonment for 17 years. In one year, 2011, the Supreme Court had released at least 40 corruptors.

MA's decisions clearly delineate complicated problems in the system of court in Indonesia, especially regarding to the public sense of justice. Artidjo Alkostar said that in making decision, a judge has to base his decision on public sense of justice. Further he said:

...That is juridical obligation for judges, in accordance to UU No 14 of 1970; the judges have to dig legal values which exist in the society. If judges only resolve the case based on those written in UU, they will be trapped in the empty golden box. Law without senses of justice. Judge should examine meta-judicial things. Those are values behind the rules. How do you grab senses-of- justice of the people? In the case of Joko Tjandra for example, I believed he had committed it. The public suffered from losses much money. He did it at the time of crisis, where many people suffered from hunger. This was recorded by my heart, and I must say it in the verdict.

Artidjo consistently apply his statement in his decisions. He also suggested zero tolerance for corruption case. Everyone who commits it, must be punished firmly. According to Artidjo, the firmness had been applied in the verdict of appeal against the accused for attempted-bribe and he prevented investigation by KPK, Anggodo Widjojo. MA punished him double from the verdict of appellate court which only imprisoned him for 5 years.

MA also denied verdict of court which released Bupati Subang, Eep Hidayat, and sentenced him for 5 years in prison and fined him 200 million rupiah, subsidiary three months in prison, and he must returned the corrupted money 2,548 billion rupiah.

Data of verdicts are supported by reports of Komisi Yudisial. The reports were released by Komisi Yudisial Republik Indonesia (KY). Number of public reports about judges' behavior

which were suspected as violation of ethical code received by KY from August of 2005 to December 3, 2010 were as many as 9.876 reports. From the number, as many as 2.412 were registered reports (24%), 1.827 were reports in the form of regular letters (19%), whereas the remaining as many as 5.637 were reports in the form of indirect letters (57%).

From 2.412 papers registered, as many as 2.331 had been stated by team of discussion and part of them have been annotated. From 2.331 papers stated by the team, the annotated papers were as many as 2.254, whereas other 77 papers were still in the process of finishing the annotation, the remaining as many as 81 papers which had been registered but were not made/stated by the team. Based on type or level of court, KY received mostly the reports of violation of ethical code and behavioral direction. From the aforementioned reports, it is very clear that many people feel dissatisfied with judges' decisions.

The aforementioned explanation indicates that there is a fundamental problem against construction of thought from judges in making legal decisions. There are still many judges' decisions which are not in accordance with legal values and public senses of justice, although there are also judges who can realize them

The Ground Of Legal Judgment From Supreme Judges In Making Decision Of Criminal Case/Law

The ground of legal judgment results in various controversies:

First is editorial controversy. This covers; 1). Application of language is not in accordance with EYD. The application of Indonesian language is very important, particularly in legal decision. Legal language in the decision is an integral part of the legal decision (verdict) and judge's decision as well. In the verdict of Prita Mulyasari, for instance, the judge wrote non-standard sentences as follows:

..... menetapkan pidana tersebut tidak usah dijalankan kecuali dalam waktu masa percobaan selama 1 (satu) tahun, Terdakwa melakukan tindak pidana yang dapat di hukum..... 2). Fault in citation, Nomor pokok Perkara in the verdict. Fault in writing the Nomor Putusan in the appeal statement by prosecutor. This occurred in the case of Anand Krisna. The prosecutor incorrectly wrote the number of verdict in the statement. In the Putusan 2489/Pid.Sus/2011, the case of Edi Rostaman, MA incorrectly addressed Pengadilan Tinggi.

.....Membaca putusan Pengadilan Tinggi Pontianak No. 489/Pid/2011/PT.SBY. tanggal 7 September 2011 yang amar lengkapnya sebagai berikut..... the true meaning is Pengadilan Tinggi Surabaya.

Second is substantive controversy

1). Inconsistency of death penalty. Some people say that death penalty violates human rights, and therefore it must be abolished from Indonesian legal system, but at the same time other people say that death penalty does not violate human rights, they even encourage the penalty is applied for some kinds of cases, such as corruption. Constitutionality of the death penalty had been reviewed at Mahkamah Konstitusi in 2007 by some people who were death convicts (criminals) for case of narcotics, but MK via its verdict number 2-3/PUU-V/2007 stated that death penalty does not violate the constitution, although 3 judges have dissenting opinions, who said that death penalty is unconstitutional.

2) Inconsistency of application of articles and indictment. In the case of narcotics, there are some Inconsistencies of court in sentencing the accused for something which is not accused by prosecutor, but it should be accused, particularly the accusation (which is not accused for) contains lower legal threat. In fact, it frequently occurs that prosecutor does not suggest an article which contains lower legal threat.

3). Minimal penalty for corruptors. Djoko sarwoto said that the appeal of the accused for corruption Rp. 5 millions was granted, on behalf of Agus Siyadi had been in accordance with UU Nomor 31 Tahun 1999 juncto UU 20/2011 on criminal act of corruption (Tipikor). In the UU, article 12 A which administers criminal rule of imprisonment and fine, as stated in articles 5, 6, 7, 8, 9, 10, and 11, states that it does not prevail any more the criminal act of corruption under Rp. 5 million. It is judge's discretion.

Third is controversy in paradigmatic thought.

LEGAL REASONING OF HAKIM TINGKAT KASASI ESPECIALLY IN THE CRIMINAL LAW.

Method and Analysis Comprehensively

In the case of prita Mulyasari, the judges did not use comprehensive logic. It can be seen from their legal judgment. MA did not say with adequate reasons that the appeal filed by the prosecutor can be justified. There was no reasoning used by the judges to underlie the opinion that application of appeal can be granted. The prosecutor also did not adequately explain why court's decision can be categorized as decision or verdict which can be appealed.

Decision Contains New Interpretation

Interpretation is one of methods in discovering law, explaining unclear things about text of law in order to the scope of norm can be specified in relation to certain event. In doing legal interpretation on a incomplete or unclear rule, a legal expert cannot do arbitrarily.

Decision Contains New Legal Construction

In the study of legal science there are at least three forms of legal construction. First, construction of analogy (*argumentum per analogiam*). Analogy is the process of construction that is carried out by looking for *ledis* (genus) from a law and then applies it to other things which are not regulated by the law. In the analogy, judges insert a case to the scope of regulating a rule which is actually not inserted that actually is not inserted to resolve the case. Second, construction of legal refinement (*rechtsverfijning*). A legal expert said that in resolving a case, an existing regulation and should be used; in fact it cannot be used. Legal blurring or refinement is carried out when application of written law will result in unfairness, so that the written law should not be applied, or it still should be applied by other way if justice to be reached. Third, *argumentum a contrario*. In this condition, judge will put into effect the existing rule or regulation like in the case of analogy that is applying a rule to a case which it is not meant to be resolved by that rule. The difference is in the analogy, judge will make a positive conclusion, i.e. he applies a rule to the case he is dealing with. In the construction of *argumentum a contrario*, judge comes to negative conclusion, i.e. he is unlikely applying a rule to the case he was dealing with.

Judge Carries Out Process Of Syllogistic Thinking Consecutively

Syllogistic thinking means use syllogism. Syllogism is a process of deriving a conclusion deductively. Syllogism is set from two propositions and a conclusion.

There Is No Jumping Conclusion

Jumping to a conclusion in Indonesian means dengan memutuskan terlampau cepat. The synonym for *jump to conclusions* is *leap to conclusions*, means *to judge or decide something without having all the facts; to reach unwarranted conclusions. (See also rush to conclusions)*. For example in the sentence, *now don't jump to conclusions. Wait until you hear what I have to say. Please find out all the facts so you won't leap to conclusions.*

Force To Conclude

In some decisions made by judges analyzed by the writer, there was one decision or verdict tended to be forced. Conclusion is forced means that legal judgment and decision are not coherent. One of examples of this proposition is the case of prita Mulyasari.

Fit With Value and Senses of Justice

Many of those cases are unfit with legal values and public senses of justice.

FUNDAMENTAL TRANSFORMATION OF JUDGES' LEGAL JUDGMENT AND SENSES OF JUSTICE

Reconstruction of Judges in Legal Standing

Maxine Goodman, Professor in South Texas of Law wrote how a judge in USA to apologize for wrongdoing.

These examples are but a few of the instances when judges apologize in court, either on their own behalf or on behalf of the state. The article posits that judicial apologies are warranted and necessary when a judge is responsible for causing harm to a party or lawyer and when the apology is sincere. To be sincere, the apology must acknowledge the harm and not provide any conditions, like "if this behavior offended anyone." As an example of a proper apology, Justice Scalia apologized, saying "Mr. Bress, I want to apologize to you for accusing you of not printing 2254(d) and (e) in your brief. You indeed did."

Judges should not apologize when they are not responsible for the wrongdoing and their apology is not authentic. These apologies come across as disingenuous and are unlikely to elicit forgiveness. When the apology is politically motivated or compelled by accusation of judicial wrongdoing, the judge,s apology is likely to serve as a confusing gesture, unlikely to help the defended party regain trust in the judge and, by extension, the judiciary (and potentially the legal system). The primary reason for concern over judicial apologies is the need for procedural fairness. Research shows parties are typically more likely to consider a court fair when the judge has treat them courteously, with dignity and respect. According to this approach, a judge treating a party with courtesy is more important for the party's perception of the fairness of a proceeding than the outcome of the hearing or trial. Accordingly, a judicial apology can play a significant role in the party's perception of the court's fairness when a judge who has, for example, lost his temper and chastised a party or lawyer, offers an authentic apology to the party or lawyer.

The writing indicates that judge's attitude is very decisive towards judge's decisions, including judge's apology when his or her decision hurt the parties' justice. The judge's attitude is also part of reflection of judge's responsibility for his or her decisions (verdicts).

Paradigmatic Reconstruction of Judge's Thinking

In his book, Posner wrote how judges think. He clearly wrote,

While Posner primarily describes how judges think, he also talks about judges should think, which is the closest we get to the question on most readers' mind: how does Posner decide cases? Perhaps the reason Posner does not mince words in calling judging political is that he does not consider it an insult. Political judging is not the problem, we learn. It is pretending that it does not exist that bothers him—the ultimate example of which is “legalism,” a blend of originalism and textualism, which treats the Constitution like a contract that cannot change from age to age (save by amendment), and which eschew bendable inquiries into the purpose of legislation or the function of constitutional guarantees.

Paradigm of judge's thinking is very important to determine the content of a verdict. The judge's verdict is part of the output of judge's way of thinking. Therefore, judicial authority is independent one to implement legal proceedings for upholding the law and justice.

CONCLUSION

The ground of legal judgment from the judge in the appeal, specifically criminal case raises controversies in the academic and practical fields. The controversy shows if decision or verdict of supreme judges is not wholly fulfilling the public sense of justice. The controversies are among other things; formal controversy, substantive controversy and paradigmatic controversy of thinking. First, formal and editorial controversy, this concerns procedural law (criminal law) from submission of appeal case. From this aspect, it can be seen that supreme judges tend not to be serious toward faults found in the formal process of submission of appeal. Second, substantive controversies. It means that judge's legal judgment is indicated being constructed by non-judicial problems, so that it can harm justice. This frequently occurs in the case of appeal submission of narcotics. This controversy ranges from judges' inconsistency in deciding punishment (sentence) to difference about verdict concerning the article which is not accused for or suggested by prosecutor. Third, paradigmatic controversy of thought. Difference in legal judgments is natural as a result from differences of knowledge. So that each judge has his/her own pattern of thinking about the case he or she deals with.

b. Judge's legal reasoning in appeal level shows that the reasoning is still surrounded by normative principles and tends to be pragmatic. At least there are 7 points discussed in the legal reasoning; Method and Analysis Comprehensively, Verdict contains new interpretation, Verdict contains new legal construction, Judges carries out process of consecutive syllogistic thinking, there is no jumping conclusion, Conclusion is forced, Fit with value and senses of justice. From the 7 points, judge's legal reasoning is patterned into three patterns of thought; partial judicial reasoning, ethical judicial reasoning and pragmatic judicial reasoning.

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