

## The Concept of Judicial Liability

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### ABSTRACT

*Judges are judicial officers who are authorized by laws to try. The adjudicating authority is exercised by making decision (verdict) against a case after examining it in the litigation. In performing their duties, judges cannot escape mistakes in making decisions against a case in criminal law. Those mistakes can certainly injure related parties in the criminal law cases. But, judges are frequently considered as people who have legal invulnerability (immunity); who cannot be prosecuted or claimed for compensation for their wrongdoings. As for judges' mistakes in making decisions, an idea of judicial liability (judges' legal responsibilities) is developing recently. The judicial liability is an idea that enables those parties in litigation claim for compensation as a result from mistakes made by judges in settling or deciding cases.*

**Keywords:** Judicial, judicial liability, legal invulnerability, legal responsibilities

### INTRODUCTION

There are three kinds of judicial product that comes from trial investigation in the litigation; those are verdict, confirmation of decision, and peace agreement. Verdict is the summary or conclusion of the trial or litigation. Whereas judicial decision (verdict) is judiciary statement pronounced in the open trial, it can be sentencing or be free from all legal charges leveled against the defendant according to the procedure regulated in the KUHAP.

According to Sudikno Mertokusumo, judicial decision made by judge, as public official authorized to do that, is pronounced in trial and aims to settle a case or dispute between parties. The decision meant by Sudikno is judiciary decision in civil law, because there is difference of judiciary decision in civil law and in criminal law.

Article 1 no 1 of KUHAP states that verdict is judiciary statement made or pronounced in open trial, it can be sentencing or be free from all legal charges in accordance with procedure regulated in this criminal law.

According to Lilik Mulyadi, verdict in criminal law is decision pronounced by judges because of their authorities in trial open for public after exercising process of criminal procedural law or litigation generally contains summary of sentencing or freeing the defendant from all legal charges made in writing with the objective is to settle the case.

As a general rule, there are three possibilities in the content of judiciary decision, those are decisions (verdicts) of sentencing, freeing and discharging the defendant from all legal

charges. Decision is an important aspect in settling the case in criminal law. Judge can only pass sentence on the defendant whenever justification exists as specified by law and supported by judge's faith in those justification. This is called system of justifying based on negative laws (Negatief Wettelijke Bewijs Theorie), and Indonesia adheres to this system.

Judge is a judicial officeholder, who is authorized to try, or to judge, by laws. Judge has important position and role for upholding the law. Therefore, there are some values followed by judge in exercising his or her authority. Here value means quality of something useful for human life.

Judiciary role in deciding the truth through judicial process is but the decision (verdict) means the truth is decided or applied via the decision. Therefore judge should be able to make decision as fair as possible.

In viewpoint of quality, there are three kinds of judiciary decisions: First, declatoir. This decision is explanatory, declaring legal condition. Second, constitutive. This decision negates or results in new legal condition. Third, condemnatoir. This decision defines relationship of a legal condition with sentencing on one of parties.

Judiciary authority for judging a case makes judge to be said as representative of God expected to be able to investigate and decide the case before him or her justly and wisely. In fact, decisions made by judges cannot satisfy all parties, including disputed parties in courtroom. Nevertheless, judge is expected to make decision as justly as possible in accordance with legal facts in court based on clear principle of law (principle of legality), and it is accompanied by judge's faith as well.

Basically exercise of judge's duties and authority is to uphold the truth and justice, based on the law and values of justice which are alive in the society.

In addition to considered as unfair by one of disputed parties, judge sometimes also makes mistake in making decision. When this occurs, judge cannot be prosecuted or claimed for compensation. Judge should not be legally invulnerable, including making mistake in judging (judicial liability).

Judicial liability is an idea or concept that enables the litigant claims for indemnity as a result from judge's mistake in settling or deciding lawsuit. This has not been regulated clearly by Indonesian rules of law.

### **Judge's Decision**

Indonesian Supreme Court had decided that judiciary decision must considers all juridical, philosophical, and sociological aspects, so that justice needs to be achieved, realized and can be asked for responsibility in the judiciary decision (verdict) is the justice oriented to legal, moral, and social justice.

Juridical aspect is the first aspect with reference to prevailing laws. Judge must consider whether the laws are fair, useful, or develops legal certainty if they are upheld, because one of the legal objectives is to create justice.

Philosophical aspect centers on the truth and justice, whereas sociological aspect considers cultural value that is alive in society. Philosophical and sociological aspects, the application really requires vast experience and knowledge and also wisdom or policy capable of following values in marginalized community.

Judge in deciding a case always faces three principles; those are principles of legal certainty, justice and usefulness (benefit). As suggested by Sudikno Mertokusumo, the three principles should be implemented by way of compromise, i.e. by applying them proportionally. But, in judicial practice, it is very difficult for a judge to accommodate the three principles in one verdict. The judge has to choose one of the three principles to decide a case. It looks like a line, the judge moves between two border points in the line, i.e. whether he or she will stand at point of justice or point of legal certainty, whereas point of usefulness is in the middle.

When judge makes decision closer to the principle of legal certainty, then he or she will go further from the point of justice, and vice versa. Here the limits of judge's discretion. With logical reasoning, a judge will determine when he or she stands at the point of legal certainty, and when he or she has to stand at the point of justice. It isn't true that judge inquires and makes decision against a case discretionarily.

There are some factors which influence judge's decision making. According to Loebby Luqman factors influencing decision making: Firstly, raw input, i.e. factors relating to race, religion, formal education and so forth. Secondly, instrumental input, i.e. factor that relates to profession and formal education. Thirdly, environmental input, i.e. influential factor in judge's life such as organizational circle and so forth.

Decision of judicial or judicative body is the norm aiming at concrete phenomenon called special norm. The special norm is application and formation of law that rest on general norm in the form of laws and habit. General norm is also application and formation of law resting on basic norm in the form of constitution.

Hans Kelsen suggested that judicial decision (verdict) is an act of applying general norm, and at the same time is formation of specific norm, and this specific norm does not just bind certain cases, but it will bring about a general norm in similar cases which possibly have to be brought in a verdict in the future.

According to Ahmad Rifai, judge's decision can be morally asked for liability, that is to God, and to the constitution, that is Constitution of 1945 as upper limit and values of human rights (HAM) as lower or bottom limit.

A judge in inquiring and deciding a case cannot only look at one principle. In every case filed to him or her, judge's decision is changeable from one principle to another.

Judge who is an officeholder, who is authorized to try, considered as representative of God, frequently regarded as the party who is certainly right. In fact, judge cannot escape mistake in making decision against a criminal case. The judge's mistake can certainly injure related parties in the criminal law cases. But, judges are frequently considered as people who have legal invulnerability; who cannot be prosecuted or claimed for compensation, or other charges.

In criminal law in Indonesia, there had been concrete case in 1981 related to judicial liability, namely the cases of Sengkon and karta. The case is considered as judicial deviation. The judge found the defendants guilty of murder, sentenced both 12 and 7 years. But it was found out later that Gunel and Elly committed murder of man (Sulaeman) and wife as charged on Sengkon-kara. Finally, via judicial review (hezianning), they were found not guilty. Supreme Court invalidated appellate court's decision (verdict) on January 31, 1981.

Mistake made by judge on aforementioned case is fatal, because the defendants had been imprisoned for 6 years.

Decision that is not based on law can be approached by different procedure, for example by using principle of fair trial as criteria in defining whether a decision is illegal or not. This procedure does not question basic quality of justice and judicial activity. Whereas decision that is not based on law covers judicial decision contradictive to the law, or with other words, it is legally incorrect. Judicial decision can also be incorrect when it violates the principle of fair trial.

### **Judicial Liability**

Judge is very powerful man in the judicial system. Judge's authority and responsibility for trying a case, result in the consequence to the judge is demanded for responsibility in upholding the law and justice, by not discriminating people as judge's oath is pronounced before taking the authority.

Basically, there are three judiciary responsibilities; those are moral, legal, professional responsibilities. Moral responsibility is the responsibility in accordance with prevailing norms and values in the professional circle, personally or institutionally. Legal responsibility is the responsibility for carrying out duties by not violating legal signs. Professional technical responsibility is responsibility for carrying out duties professionally in accordance with prevailing technical criteria.

According to Sebastian Pompe, the idea of judicial liability related to criminal and civil responsibilities. The criminal liability aims at judicial act involves corruption, and puts legal status in criminal sanction personally. Civil liability puts the judge in likelihood to pay compensation.

In the legal practice, people assume that judge cannot be criminalized or asked for compensation because of his or her fault. He or she is not responsible to anyone, only to God. Chief of court or upper level of court is not allowed to influence judge in making decision.

The idea of judicial liability needs to be applied and developed in Indonesia because several reasons. Firstly, this strengthens judicial accountability by confronting incorrect judicial act to the disadvantageous disputed party, and the public. Secondly, judicial liability is the topic accompanying formation of Judicial Commission (Komisi Yudisial) based on third amendment of Indonesian Constitution. Thirdly, the idea of judicial liability actually results in judicial process in Indonesia. Cases are filed, where parties want to change judicial decision based on incorrect judicial act.

The concept of judicial liability is divided into 2 major thoughts as follows:

#### **England/America Model**

In the system of England/America model that follows non-liability of state except for cases specified clearly. According to Pompe, immunity is seen as an important element, so judge can make controversial decision without being afraid, including afraid of lawsuit. In England, it specifically grants legal immunity to the judges in exercising judicial authorities related to independence and impartiality, whereas other duties such as those related to administrative function there are no legal immunity.

Lawsuit of compensation against public officeholders has to be aimed at the officeholder in question, not at the state, and compensation consequently has to be borne by the same officeholder. One of consequences from this approach is burden of proof resides in the litigant, and it can be heavier. More importantly, the litigated public officeholder in coping with lawsuit can influence the way he exercises his authority and duties.

### **Model of Continental Europe**

This model emphasizes state accountability on mistakes made by its organ. This model is a legal system as a principle, to accept state legal accountability for incorrect action (misdeed) carried out by state's organ, except if the action is protected by immunity.

It can be concluded that American model puts responsibility for judge's mistake on the judge, not on the state; model of the Continent emphasizes that mistakes made by judge as public officeholder become responsibility of the state. Therefore, if judge makes judicial mistake, state is responsible for compensation.

Indonesia can adopt both of them, but with clear definition and limitation, which responsibility will be put on state, which one will be put on the judge. Or Indonesia can use the concept such as one used in England/America. Accountability for judiciary decision is imposed on the judge, by considering that judge has been granted an authority by the state to make a policy in deciding and settling a case via the Act No 48 of 2009, in article 5 point (1). Based on the law, rules of law contained in it states that judge is obliged to dig, follow and learn legal values and sense of justice which are alive in community. To fulfill the norm, judge must take legal policy.

It can be said that authority for judging has been transferred from the state to the judge. In carrying out his or her duty of judging, judge must dig, follow and learn legal values. Therefore, burden of responsibility for judge's decision resides in the judge his or her self. So, the judge must take the responsibility for his or her decision.

In Indonesia, judicial liability for decision making begins to be discussed and it is going to be regulated in new laws of Supreme Court. Ignatius Mulyono said that judge who makes mistake in making decision can be imposed sanction, administratively or criminally. He suggested that criminal sanction is the appropriate sentencing if judge uses incorrect legal ground on purpose.

The idea of judicial liability is not to influence judiciary independence in inquiring and making decision. It is to professionalize judges in making decision. Because judge, according to Ignatius, is final gate to go, do not make decision arbitrarily. Judicial liability also results in negative effect; it can diminish judge's independence in trying and deciding a case in court. Todung Mulya Lubis suggested that strong justification is needed to punish judges who make mistake in the decision making. It can be considered that, among other things, whether incorrect decision making is committed on purpose, collusively, by conspiracy, which violate judge's oath or not.

### **CONCLUSION**

The concept of judicial liability is the concept where a judge can be asked for liability for verdict or decision he or she makes, by way of criminal and civil laws. This has not been regulated clearly in Indonesian laws, but it is necessary to be considered to be applied

immediately in Indonesia for improving judge's professionalism in making decision against a case. Concept of judicial liability that is suitable to be applied in Indonesia is one that puts the accountability to the judge individually, not to the state, as applied in America/England.

Concepts of accountability for judge's decision has to be well designed in order to provide more usefulness than negative effect for judicial area in Indonesia, and one does not judge that it can lessen judge's independence in exercising his or her authority.

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