

# THE JUDGE'S JUDICIAL INDEPENDENCE IN MAKING LEGAL DECISION IN THE COURT

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**Submission date:** 29-Oct-2019 09:19AM (UTC+0700)

**Submission ID:** 1202463714

**File name:** LAW-239\_ijebel.pdf (223.69K)

**Word count:** 5799

**Character count:** 31311

## 3 THE JUDGE'S JUDICIAL INDEPENDENCE IN MAKING LEGAL DECISION IN THE COURT

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### ABSTRACT

*The judge's judicial independence in sentencing a crime is one of some aspects of judge's authority judicial independence and discretion that is regulated in 1945 Constitution and in other laws. The judge's authority code of conduct is an authority with discretion to determine guilty or not guilty for someone, types of sentences, and degrees of sentence severities. Judge is given duty and authority to accept, examine, make the legal decision, and finish cases that he/she deals with, so that this function should be conducted with full responsibility because judge's legal decision must be accounted for public, state, nation, God and his/herself. The judge's legal decision should reflect the truth, justice, benefit, wisdom, and honesty to be able to provide and reflect the degree of law public awareness. The judge's legal decision is expected to bring benefits for pub<sup>3</sup> nation, and state life in the Republic of Indonesia. Problems to study in this research are as follows: (i) how does the judge's judicial independence in making legal decision on the court? ; (ii) what factors are influencing <sup>20</sup> judge to make the legal decision? This research used normative jurisdiction <sup>12</sup> empirical jurisdiction. This research used primary and secondary data. Primary data were taken directly from informants and secondary data were taken from primary, secondary, and tertiary law materials. Data were analyzed qualitatively. The conclusions are that the Judge in using his/her judicial independence and discretion in making legal decision particularly in the criminal case is theoretically assured by Law. However, these judicial independence and discretion may be wobbly when receiving influences indirectly from outside parties. This depends on the judge's personality; whether he/she had internalized and conducted the principles of judicial independence and discretion or not. Besides, the judge in making legal decision is not out of existing law instruments in written and unwritten laws; however, making interpretations are possible because these are mandated by law. The judge is not only required to make the legal decision based on legal security principle, but the judge is also required to present <sup>2</sup> substantive justice in each of his/her legal decision. Factors influencing the judge to make legal decision on a case are: 1) the way in which the issues are presented; 2) the sources of theory; 3) the personal attributes of the judge; 4) the professional socialization of judge; 5) situational pressures on the judge; 6)organizational pressures on him; 7) the alternative permissible rules of judges.*

Keywords: judge's judicial independence, judge's judicial discretion, justice

### A. INTRODUCTION

#### 1. Background

Court as an institution equipped by a clear and patterned order so that apparatus conducting their tasks and authorities will dominate. A court is also a modern organization. As an organization, it has implementers to drive organizational activities which have particular objectives with all complementary attributes symbol statuses. One of the implementers as a law apparatus is the judge.

A court as an institution and the judge as the implementer are required to give best services. Every individual expect a law provision in a concrete case. The law must be enforced without any deviation: *fiat Justitia et preat mundus* (Let there be justice, though the world perishes)<sup>1</sup>.

Demands of truth, justice, benefit, or law security are highly spotted to the judge because the judge is given authority by the Law to take a legal decision in the name of God (for the sake of justice in the name of God). Thus, good wisdom, intelligence, morality have to be requirements for a judge. Good characters possessed by a judge do not assure producing a good legal decision when the law is uncertain about which justice models the law will incline. In addition, there is a conflict between prioritizing truth or justice and legal security or benefit.

When we see the legal decision introduction, justice is clearly stated to be "For the Sake of Justice in the Name of God", but the Supreme Court is likely to hold legal security as the main reference. Bismar Siregar<sup>2</sup> said that: the judge should not be rigid in

<sup>1</sup> Sudikno Mertokusumo and Pitlo and A.Pitlo, *Bab-bab tentang Penemuan Hukum*, PT. Citra Aditya, Bandung, 1993. Page 1;

<sup>2</sup> Former Supreme Court Judge

conducting law regulation "for the sake of legal security", but he judge must be wise, considering justice values in society<sup>3</sup>. In addition, the concept of Article 18 in KUHP (Penal Code) confirms that the judge should prioritize as much as possible the justice values than legal security<sup>4</sup>.

The discretion of the judge in making legal decision, especially in the criminal case, includes discretion in sentencing particular criminal case, jailing duration, an amount of fine, and so on, and this is basically is not out of the judge behaviors. This judge behavior is normatively outlined by existing legislative regulations, but empirically it depends on judge's will and ability in conducting his/her duty as law enforcer.

The aforementioned empirical reality above drives the author to conduct critical analysis on "the judge's judicial independence in making legal decision in the court". This research is expected to be able to explain how the law enforcer apparatus, especially the judge, conducts his/her function by considering some aspects to provide justice for people.

## 2. Problem Statements

The problems to study in this research are as follows: (i) how does the judge's judicial independence in making legal decision on the court?; (ii) what factors are influencing the judge to make the legal decision?

## 3. Research Method

This research is a law research that incorporates *doctrinal research* (normative law research) and *socio-legal* research (empirical law research). The foundation of doctrinal research is library research including primary and secondary law materials. The primary law materials are KUHP (Penal Code) and KUHAP (Criminal-law Procedural Code). The secondary law materials consist of court legal decisions, and tertiary law materials come from previous research results and dictionaries. Secondary data were collected from informants as complementary data. Data were analyzed using qualitative analysis.

## 4. Theoretical Frames

Bismar Siregar stated that "the foundation of judge's judicial independence and discretion are very depending on his/her personality, and judge's judicial independence does not rely on the Law assurance, but in faith."<sup>5</sup> Meanwhile, Paul Scholten stated that "to follow the legal decision of conscience (*gwtensbeslissing*) is the core of judge's legal decision". The judge does something else than just observing where the scale inclines to go when he/she make the legal decision. The legal decision is an action derived from person's conscience that makes the legal decision<sup>6</sup>.

In addition, Oemar Senoadji stated that in conducting discretion principle to sentencing a right legal decision, the judge conduct interpretation of *rechtsverfijning* (law refining) and law construction as proper as possible. Juries in common and especially a judge should go into society to recognize, feel, and be able to internalize law sense and justice feeling living in the middle of society<sup>7</sup>.

O.W. Holmes, an American judge, argues that it is necessary for a law scholar in his/her profession to observe and study actual social realities objectively and empirically like what had been done by social sciences, especially sociology<sup>8</sup>. Selznick says that law should contain potential to civilize society and law as social order functions not only as society regulator, but to regulate properly and beneficially.

According to Satjipto Rahardjo, in law science, the important part in judiciary process occurs when the judge examines and adjudicates a case. Basically, what the judge do is to examine the occurring realities, and to adjudicate it with prevailing regulations for a case, and at this point, the law enforcement reaches the peak. Such law enforcement conducted by the judge, by Hans Kelsen, is called as *konkretisierung*<sup>9</sup>.

Judicial independence and discretion in making the legal decision is basically not free in terms of absolutely free without restriction, but free based on the law. It is because the judge must explore law that lives in the society. Additionally, the judge should also account for his/her legal decision to God, society, nation and state, and him/herself. Judge's ability in obtaining concrete facts to be law facts subsequently can be applied with existing law norms. How the law uses judge's ability in terms of law science and other knowledge can be seen from judge's legal decision product. The judge's legal decision will also be assessed

<sup>3</sup> Bismar Siregar, *Keadilan dalam berbagai Aspek Hukum Nasional*, CV. Rajawali, Jakarta, 1986. Page 158;

<sup>4</sup> Barda Nawawi Arief, *Bunga RAMPAL Kebijakan Hukum Pidana*, PT. Citra Aditya, Bandung, 1996. Page 92;

<sup>5</sup> Bismar Siregar, *op cit.* pages 73-74;

<sup>6</sup> JJH. Brugguik, translation by Arief Shidarta, *Refleksi tentang Hukum*, PT. Citra Aditya Bakti, Bandung, 1996. Page 227;

<sup>7</sup> Kartono, *Peradilan Bebas*, PT. Pradnya Paramita, Jakarta, 1982. Page 43;

<sup>8</sup> George Gurvitch, *Sosiologi Hukum*, Bharata, Jakarta, 1980. Page 40;

<sup>9</sup> Satjipto Rahardjo, *Ilmu Hukum*, PT. Citra Aditya Bakti, Bandung, 1996. Page 182;

by public whether the legal decision fulfills public conscience on justice or not. However, different perceptions of justice according to the judge and public often occur.

The abolitionism was developed by Louk Hulsman from Netherland when he was the Chairman of Criminal Law and Criminology in Erasmus University, Rotterdam in 1964. Hulsman thought explicitly had abolitionist perspectives in this was evident in his graduation speech *handhaving van Recht* (the maintenance of justice). In his speech, he very concerned with humanity aspects that according to him these could be obtained by justice through conducting criminal law conduct. He argued that criminal law should be seen as a means to reach objectives of enforcement and improvement for injustice in society<sup>10</sup>.

Judge's comprehension and concern to victimology either directly or indirectly will also influence criminal sentencing for the accused. Victimology itself is a young science that the judge's understanding may not be comprehensive, so that the victim of a crime may not yet get enough attention from the judge.

Study regarding the crime victim it is likely not satisfied, so that special victimology to study crime victim also develops which in form of victimology, the study regarding the accident victim in general term, then even it comes with what we call with *new victimology* to study victims regarding the power and human right abuses. The overall objectives of victimology are (1) to analyze some aspects related to victims, (2) trying to give an explanation about causes of victimization, and (3) to develop the system of action to mitigate human miseries.<sup>11</sup> Therefore, the judge in sentencing crime (giving punishment) actually cannot separate from his/her personal views about crime and punishment with considering aspects that influence them, but he/she also cannot be out of punishment pattern and guidance of punishment.

The term of 'the pattern' indicates something to use as a model, reference, or guidance to make or compose sanction system (punishment) of crime. It is meant to differentiate between "pattern of sentencing" and "guidance of sentencing". The guidance of sentencing is a guidance of the judge to the sentence or apply punishment, while the pattern of sentencing is a reference for law makers to compose legislation containing crime sanction. Thus, it can be said that the pattern of sentencing is a reference to compose sentencing, while guidance of sentencing is guidance to apply judge's sentence. It also can be said that pattern of sentencing is a legislative reference for law makers and the guidance of sentencing is a jurisdiction reference for the judge.<sup>12</sup>

Edmun N. Cahn sees a breakthrough for realization is neither in abstract nor static ideas from natural law, and it is not good from acceptance of legalized power only while in its process of improvement or enforcement will raise a sense of injustice. It is an incorporation of mind and deepest sense which is concreted into six statements; demand on equality, reward, human dignity, precise judge's legal decision, proper limitation of government function, and fulfillment of public expectations.<sup>13</sup>

The opinion of Edmun N. Cahn above is closely related to judge's action in using his/her judicial independence and discretion in making the legal decision, because the judge's legal decision must contain justice. The judge must be careful in accepting, examining, make the legal decision and sentencing case. In addition, the judge should be equipped with qualified human resources and having good morality.

## B. DISCUSSION

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### 1. Judge's judicial independence in making legal decision

Judge's judicial independence in sentencing crime is one of judge's authoritative judicial independence and discretion aspects regulated by 1945 Constitution and other laws. Judge's authority code of conduct is an authority with discretion to determine whether a person is guilty or not guilty, what kind of punishment to a sentence, and how severe the punishment. The judge by the law is given duties and authorities to accept, examine, make the legal decision and sentence a case, so that these functions should be conducted with full responsibility because the judge's legal decision must be accounted for public, nation, state, God, and him/herself. In addition, judge's legal decision must represent truth, justice, benefit, wisdom, and honesty, to reflect public law awareness degree. Judge's legal decision is expected to bring benefit for public, nation, and state life in the Republic of Indonesia.

Before making the legal decision in a criminal case, a judge is required to inte<sup>24</sup>ze meanings of judicial independence and discretion and to understand the objectives of criminal penalty and sentencing, so that the judge's legal decision is expected to be the fairest and most truthful. Fair and a truthful legal decision is a legal decision represents public law awareness. The court legal decision quality depends on judge's quality. A judge with knowledge, wide insight, high moral standard, hold the profession ethics firmly will be more reliable to be expected to produce qualified legal decisions, because a qualified judge will be able to think, to make a decision with rational considerations, careful and thorough, predict the case. The legal decision will be beneficial not only for the accused, but also for public and environment.

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<sup>10</sup> Romli Atmasasmita, *Sistem Peradilan Pidana, Perspektif Eksistensisme dan Abolisionisme*, Binacipta, Bandung, 2001, page 97;

<sup>11</sup> Muladi, *Op cit*, page 65;

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<sup>12</sup> Barda Nawaw<sup>17</sup>ief, *Op cit*, pages 167-168

<sup>13</sup> Frieman W, *Teori dan Filafat Hukum dan Masalah-masalah Kontemporer*, translated by Muhammad Arifin, Rajawali Press, Jakarta, 1990. Page 118;

A qualified judge should have good and proper mastery about law, and then use the law correctly and properly in real cases. The judge should also understand public law awareness values so that his/her legal decision will always be based on complete and systematic law considerations (*motiverd*), so that anyone reading or hearing the legal decision will understand the way of judge's thinking in making legal decision.

The judge's personality has great influence on his/her legal decision. Beside rational considerations in making legal decision, emotional aspects, such as how far his/her affection to others, will influence his/her legal decision.<sup>14</sup> Until certain limitations, a judge is free to sentence types and severity of punishments, and how far the judge's judicial discretion in sentencing crime depends on law makers; thus, it depends on adopted political law.<sup>15</sup>

Sentencing and punishment are very important related to judge role in considering the accused case. In addition, the punishment and criminal law effectiveness are still debatable in giving solutions for society social problems. Punishment effectively brings benefits especially for accused and for society in general, however, the criminal law continues to use in overcoming social problems in society until this day. Punishment for some part of society is considered to be inhuman, violating principle and protection for human right, especially when the sentenced punishment is the death sentence or sentenced to life imprisonment.

Actually, there is a correlation between judge's judicial discretion to sentence crime and objective of punishment. The basic principles of objectives of punishment suggested by some theories are as follows:

a. Retributivism theory

Pure retributivism proponents suggest that punishment is proper to accept and is required based on reasoning, justice, and some moral values suggested by Kant. Punishment upon wrong doings is fair because it will rehabilitate moral balance which is damaged by crime.<sup>16</sup>

b. Teleological theory

The teleology proponents see punishment as something can be used to provide benefit related to guilty people; to make people better, or related to the world; for example, to isolate and to rehabilitate criminals and to prevent potential criminals to make the world to be a better place.<sup>17</sup>

c. Teleological Retributivist

The objective of punishment, according to this theory, is plural in nature, because it relates to teleological principles, for example: utilitarianism and retributivist principles in one integrated theory, so that this theory is often called as an integrative stream. This theory teaches possibility to articulate theories of punishment that incorporate "retribution" and "utilitarian", for example, prevention and rehabilitation, and all of them are seen as targets to reach by punishment plans. Sentencing and punishment are activity process for criminal actors with a particular way which is expected to be able to assimilate the convict into the society. The society demands the convict to be treated with something able to satisfy the need of retaliation.

Types of cases and severity of punishment the judge will sentence are actually not beyond of purpose that the judge wants in sentencing certain punishments. Based on a notion that punishment is actually a means to reach a purpose, the first concept<sup>18</sup> is to formulate the purpose of punishment. In identifying punishment concept, it starts from a balance of two main targets; "the protection of society" and "protection and rehabilitation of the criminal". Therefore, the requirements of the punishment according to the concept are also based on mono dualistic thought balance thought between society and individual's interests, between objective and subjective factors. Therefore, the punishment requirements are also based on two fundamental pillars in criminal law; they are "principle of legality (it is the "societal principle") and "principle of culpability" (it is the humanity principle). In other words, thoughts about punishment are closely related to basic thoughts of crime actions and crime responsibilities aforementioned above.<sup>19</sup>

Determining type of punishment is actually the punishment, because this punishment is expected to obtain the purpose of punishment as what the judge thinks in sentencing. Punishment should contain elements with the following characteristics:

1. Humanity, that the punishment should support a person's dignity;
2. Educative, it means that the punishment should be able to make people aware of his/her misdeed and to make him/her to have positive and constructive attitude and mental to prevent crime;

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<sup>14</sup> Sudarto, *Kapita Selektta Hukum Pidana*, Alumni, Bandung, 1981. Page 89;

<sup>15</sup> *Ibid*, page 20;

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<sup>16</sup> Djoko Prakoso, *masalah Pemberian Pidana dalam Teori dan Praktik Peradilan*, Ghalia Indonesia, Jakarta, 1984.

Page 38;

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<sup>17</sup> Muladi, *Lembaga Pidana Bersyarat*, Alumni, Bandung, 2002. Page 38;

<sup>18</sup> Concept of KUHAP (Criminal-law Procedural Code)

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<sup>19</sup> Barda Nawai Arief, *Bunga Rampai Kebijakan Hukum Pidana*, PT. Citra Aditya Bhakti, Bandung. Page 98

3. Justice, it means that the punishment is felt to be fair to the convict, the victim, and society.<sup>20</sup> Judicial discretion of the judge in sentencing is based on modern thinking in criminology, that is influenced by psychology and other social sciences, emphasizing that in sentencing the judge should pay attention to individualism principle according to crime action and its actor. This means that the judge should make distinctions between an accused and other accused, and then determine the most precise punishment according to the accused data.<sup>21</sup> However, the purpose of punishment in Indonesia that is based on the Five Principles (*Pancasila*) is not to inflict miseries but to rehabilitate the convict.

For those who see the criminal law from substantive norms aspects, it is understandable to say that the main issues of criminal laws consist of problems of crime action, guilt, and crime; because all of them are regulated in substantive criminal law norms. However, when the criminal law is seen from value aspect, the main issue is more fundamental; it is about a value concept or basic idea as the spirit of substantive norms from the criminal law itself. Therefore, in the previous elaboration, it is stated that the central issue of criminal law lies in or relates closely to value concept issue (from philosophical, socio-political, and socio-cultural point of views).<sup>22</sup>

The judge's mistake which may rise in conducting his judiciary duty based on 1945 Constitution and Law number 49 in 2009 about Principal of Authority of Judge is a reason to sue judge's mistake in conducting his/her judiciary duty. Dealing with the principle of judge's judicial independence, government (in this case the chairman of Supreme Court of Republic of Indonesia) cannot be accounted for judge's mistake in conducting his/her judiciary duty.

Even though a judge cannot be sued in his/her judicial independence and discretion, but the judge as a law and justice enforcer should explore, follow through, and understand law values living in the society. Additionally, in considering the severity of punishment, the judge must consider the good as well as the bad characteristics of the accused. In making legal decision, the judge is demanded, to be honest, independence, brave to make the legal decision and free from inside and outside influences.

The roles of values cannot be neglected, because these will lead the judge to go to legal decision qualities. The human may not be free from mistakes, and the judge as a human may not always be aware of making mistakes. Mistake and miss recalling of witnesses, their prejudices and pre suppositions may cause punishments and miseries to the accused. The mistakes even may cause a sentence to death. Therefore, a mistake on the legal decision of the court sometimes is too late to be realized, and the accused had been executed for the sentence to death without being guilty; while human only lives for once time (*ein malig*). To prevent mistake, human should be aware of his weakness, so that value system living in the society needs to be internalized.

Human as cultural creature always make an assessment of conditions to give consideration of right or wrong, good or bad, beautiful or ugly, useful or useless about something, and this consideration is called as value. Human tends to have values of truth, virtue, and beauty, because these are useful for human life. Values living in members of society form a system of value functioning as guidance and behavioral reference. The system of value adopted by society becomes a measurement of truth and the virtue of ideal and purpose to obtain in life. This system of value functions as a frame of reference to set up personal life, relationship with other humans, and an environment. As a social creature, a human needs other humans. As a foundation of setting up relationships with other humans, human needs regulation as a reflection of law norms. The system of value becomes a foundation of society awareness to obey law norms. These law norms are called as positive law.<sup>23</sup>

A judge in conducting his/her function should internalize his/her judicial independence, so that this independence has philosophical meaning. Hapsoro said that judge's judicial independence does not mean that the judge may use his/her independence as he/she likes, but the judge should account for his/her legal decision to the law, his/herself, and God.<sup>24</sup>

## 2. Factors influencing judge in making legal decision on a case

There are several factors influencing judge in making legal decision on a case according to William J. Chambliss and Robert B. Seidman:<sup>25</sup> 1) The way in which the issues are presented; 2) The sources of theory; 3) The Personal attributes of the judge; 4)

<sup>20</sup> Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*, Badan Penerbit UNDIP, Semarang, 2001. Page 82;

<sup>21</sup> Eddy Djunaedi Karnosudirdja, *beberapa Pedoman Pemidanaan dan Pengamatan Narapidana*, without publisher, 1999. Pages 3-4.

<sup>22</sup> Barda Nawawi Arief, *Beberapa Aspek Pengembangan Ilmu Hukum Pidana, (Menyongsong Generasi Baru Hukum Pidana Indonesia) Kumpulan Pidato Pengukuhan Guru Besar*, Fakultas Hukum Undip, Semarang. Pages 376-377;

<sup>23</sup> Iulqadir Muhammad, *Etika Profesi Hukum*, PT. Citra Aditya Bakti, Bandung, 2002. Page 8;

<sup>24</sup> Nanda Agung Dewantara, *Masalah Kebebasan Hakim dalam Menangani Suatu Perkara Pidana*, Aksara Baru, Jakarta, 2000. Page 22;

<sup>25</sup> William J. Chambliss & Robert B. Seidman, *Law, Order and Power*, Addison-Wesley, 2000, page 90;

<sup>2</sup> The professional socialization of Judges; 5) Situational pressures on the judge; 6) Organizational pressures on him; 7) The alternative Permissible Rules of Judges.

The seven factors influencing the judge in making legal decision in a case can be explained as follows:

- 1) Materials (The Source of Theory)  
Materials related to the origin, type of case; criminal, civil (special or general), and completeness of submitted documents. The entering case to the court is influenced by:
  - (a) Activities of law enforcer institutions such as police (as filter) and attorney;
    - Police will filter to select cases to enter the court
    - The cases from middle to low-class people tend to prioritize
  - (b) Society access to use court institution is influenced by three factors; (1) level of law knowledge, (2) financial level, and (3) law culture.
- 2) Selected policy (Policy of Judge)
  - (a) In making legal decision, the judge has a tendency to follow law interpretation trend being conducted by other judges in a certain period of times.
  - (b) The judge conducts particular policy adapted to local society developments and government policies (for examples: about corruption, drug).
- 3) Judge's social characteristics (<sup>2</sup> Personal Attributes of the Judge)  
The roles of the judge in conducting his/her duties are influenced by:
  - (a) Personal backgrounds (social class, family background)
  - (b) Education pattern (bureaucratic, democratic, liberal, and so on)
  - (c) Concrete conditions faced by the judge when making the legal decision in a case (whether there are pressures from society or not).

There are many wrong cases, and raising issues into the surface are because of characteristics and personalities of the judge..... "these characteristics are in three dimensions: first, their backgrounds as individuals; second, their backgrounds as lawyers, and third, their situations as appellate judges"<sup>26</sup>. Those three elements above are very determining for the judge to make the legal decision on a case. A judge coming from the bureaucratic family will be different from a judge coming from democratic family.
- 4) Professional Socialization of Judge  
The process of socialization into profession is very difficult<sup>27</sup>. There are three elements of judge professionalism:
  - (a) Formally the modern judges are required to go through formal socialization (education) before taking his position.
  - (b) The judge should be able to equip his/herself with education/knowledge about law concepts, method of making legal decision, case management, and so on;
  - (c) The judge should be firm, staunchly, and independence.
- 5) Situational Pressure of the Judge
  - (a) The judge in conducting his/her job is disciplined by expectation reaction (expectation and demand from society) with order and detail of certain society.
  - (b) The judge is surrounded by expectations and demands for members of society who have organized around judge's duties (even though the judge has judicial independence in making legal decision on a case).
  - (c) The judge also wants status (in his/her carrier), power, and more increasing excellent positions. Junior judge tends to see a high level senior judge.
  - (d) The judge tends to have a social relationship with particular elites.
  - (e) The judge tends to form particular informal environment with a particular culture ( the relationship between ordinate-sub ordinate, task handling, and so on).
- 6) Organizational Problems (Organizational Pressure on Him)
  - (a) Judicature as an organization will form a distinctive environment culture (difficult to understand by outsiders).
  - (b) The court will also conduct rational and economic considerations (to gain benefit and to emphasize burdens that inhibit the organization)
  - (c) The possessed working load is adjusted with human resource abilities and limited time, so that too much working loads will cause the court undergoing crisis and cause organizational difficulties.

The organizational problems often become determining factors of the judge in making legal decision on a case. Thus, in making legal decision on a case, the judge will consider organization interests. *The Supreme Court for many years persistently declined to consider such case, either by an exercise of certiorari powers or by labeling the issue 'political and not judicial. Finally, it did accept such a case (Baker v. Carr)*<sup>28</sup> there are

<sup>26</sup> *Ibid*, page 95.

<sup>27</sup> *Ibid*, page 97

<sup>28</sup> Gustav Radbruch, *Op cit*, in Satjipto Rahardjo, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, 2006. Page 19.

many judges who make their legal decision on cases based on political issues (pressure of society), and not based on the law. This is in order to save the organization.

7) The Alternative Permissible Rules of Law

*The leading-and all important- rule limiting the range of choice by appellate courts of potential major premises to resolve the trouble case brought before them is that any premise which the adopt (and which therefore become a rule of law control all similar cases in the future) must be permissible*<sup>29</sup>. It means the main and most important thing is that the rules restrict range of options; especially the opinion of the Supreme Court will be the main and potential opinion to overcome previous cases, all opinions (which are adopted to be law regulation to control all similar cases in the future) must be allowed, or the similar law cases solution will be allowed for the same case in the future. It is referred as jurisprudence which can be used as a reference for the judge to make the legal decision on a case.

In making legal decision on a case, the judge should pay attention to law values which are suggested by Gustav Radbruch as law basic value. Three basic values suggested by Gustav Radbruch<sup>30</sup> are justice, benefit, and legal security.

- 1) Justice means that in making legal decision the judge should be fair based on facts.
- 2) Benefit means that the judge in making legal decision on a case should be able to overcome problems.
- 3) Legal security means that there are regulations. When the judge's verdict based on the value of the benefit, legal security, and justice is contradictive and causing problems, then the justice value should be prioritized. Because, law is for justice.
- 4) Judge's legal decision should be based on Divine value, and this is compatible with Article 2 clause (1) Law No.48 in 2009 about Judge Power stating that the judiciary is conducted "FOR THE SAKE OF JUSTICE BASED IN GOD". It means that the judge in making legal decision on a case should be based on Divine values such as honest, fair, and truth. In addition, the judge's legal decision should be able to account for God.
- 5) Judge and the constitutional judge must explore, follow and understand law values and sense of justice living in society (Article 5 clause (1) Law No. 48 in 2009). The judge should not only use prevailing legislative regulations in making legal decision on a case, but the judge should also consider the law values and sense of justice that develop in society.

### C. CONCLUSION

1. Judge who uses his/her judicial independence and discretion in making a legal decision in a criminal case is theoretically assured by the Law. However, these judicial independence and discretion may be wobbly when the judge receives influences indirectly from outside parties. This depends on the judge's personality whether he/she have internalized, conducted these principles of judicial discretion and independence or not. In addition, in making legal decision, the judge is not out of existing law instruments in written or unwritten laws, but it is also possible for him/her to conduct interpretation because this is mandated by the Law. The judge is not only required to make the legal decision based on legal security principle, but the judge is also required to provide substantive justice in each of his/her legal decision.
2. There are seven factors influencing the judge in making legal decision in a case: 1) The way in which the issues are presented; 2) The sources of theory; 3) The Personal attributes of the judge; 4) The professional socialization of Judges; 5) Situational pressures on the judge; 6) Organizational pressures on him; 7) The alternative Permissible Rules of Judges.

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