

## Substantive Aspects of Ratio Decidendi in Indonesian Criminal Justice System

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**ABSTRACT:** There is two cases study on this research. First, the ratio decidendi on law decision. Second, the substantive aspects of ratio decidendi in criminal cases. This normative legal research uses statutory approach, conceptual approach, philosophical approach, historical approach, and comparative approach. The primary material in this research is the 1945 National Indonesian Republic Constitution and Law No. 48/2009 on the Judiciary Power. Meanwhile, the secondary materials consist of books, results of experts research, documents issued by authorized institutions, as well as journals or scientific works relating to judicial power. The results of this study concluded into 2 things. First, the position of ratio decidendi in the verdict is very important. Event can be said as the juridical core of a judge's verdict. A judicial consideration in the judge's decision is deemed sufficient if it meets 3 minimum requirements, namely: (1) considerations according to law and legislation; (2) considerations for the sake of bringing about justice; And (3) consideration to realize the benefit. Second, the ratio decidendi in the criminal case must contain 3 substantive aspects, namely: (1) aspects of juridical consideration; (2) aspects of philosophical considerations; And (3) aspects of sociological considerations.

**Keywords:** substantive aspects, retio decidendi, judges, law decision, criminal justice system

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### I. BACKGROUND

The court ruling, especially in criminal cases from the first stage until cassation is still perceived to injure a sense of community justice. For example, the verdict of the Corruption Crime Court (Tipikor) Bandung which freed the Mayor of Bekasi Mochtar Muhammad (Viva News, 2011). Similarly, the Corruption Court of Surabaya, during the period of 1 year to release 9 suspects in corruption (Viva News, 2012). Corruption Court that should be a "scourge" for the corrupt but be the opposite.

Another case of the general crime, is the verdict of "sandal theft" case which ultimately guilty Aal, a mentally retarded child, even though the evidence does not match the alleged one. In again this fact shows the arrogance of the law toward justice. Law and justice in this country seem no longer go hand in hand, even justice tends to be eliminated in law enforcement (Republika, 2013).

The description of the sandal case further justifies that the law is no longer reliable to solve the problem, but it is the problem itself. The case of this sandal complements the previous cases which injure the sense of community justice such as the case of Grandmother Minah in her cacao case, Basar and Kholil in their watermelon case. It shows how sharp the law when it comes to the small people (Umar Sholahuddin, 2011: 64).

These examples above, more convince the author that the judgments are getting further from justice. In extreme authors say, if the corrupt people steal money because they are greedy, not like Bashar and Kholil who stole watermelon because of urgent needs (Kediri Jaya, 2015). both two cases, normatively can be said to have same elements, namely theft, but the substance and orientation are very different.

Meanwhile, at the cassation level almost the same money with the court of first instance. The Supreme Court judge handling the cassation, properly hold the legal values and sense of justice living in the community in deep. But in fact, there are still many decisions found by the Supreme Court of the Republic of Indonesia (hereinafter called "MARI") which tends to ignore the sense of community justice.

One of them is the verdict of MARI who punished Grandmother Rasminah with a sentence of 130 days in prison. Rasminah was accused of stealing 6 plates in June 2010 by his employer report, also Siti Aisyah Soekarnoputri prosecuted by the prosecutor for 5 months imprisonment, but released by the Tangerang District Court judge. Rasminah was detained for 130 days until the suspension of his arrest was granted. Tangerang District Court ruled Rasminah free. On the verdict, the Prosecutor filed an appeal to MARI. Then By MARI Rasminah was sentenced to 130 days in prison on May 31, 2011. However, the appeal's verdict was got

disenting opinion, the chairman of the judges panel (Artidjo Alkotsar) declaring Rasminah free. But Artidjo's voice was defeated by two other members of the Supreme Court, Imam Harjadi and Zaharuddin Utama (Forum Kompas, 2012).

On the contrary, MARI freed the defendant of the corruption for cemetery acquisition in Lebak Bulus area, South Jakarta, worth Rp 27 billion, Andi Wahab (60). whereas, the prosecutor sued Andi Wahab imprisoned for 17 years (Transparency International, 2012). Moreover, during 2011, MARI has released at least 40 Corruptors (Kompas, 2012).

MARI's verdict Increasingly clarify that there is a complex issue with the judicial system in Indonesia, especially regarding the sense of community justice. Artidjo Alkostar, a supreme judge who often disagrees with another judge, declares that in making a judgment a judge must base his judgment on a sense of community justice. Further, he says (Kompas, 2011):

".....It is a juridical duty for a judge, in accordance with the Law on the Principles of Judicial Power (No. 14/1970-*pen*), the judge shall explore the legal values existing in the society. If the judge only decides the case through law virtue, he will be trapped in an empty container. Law without a sense of justice, yes like empty containers. The judge should examine the *meta juridical* nature. That is, the values behind the rules of legislation. How do you grasp the sense of community justice? In Joko Tjandra case for example, I am sure he was proven to do the act. The disadvantaged state money is a lot. The act was done in times of crisis, where many people are starving. This is recorded by my conscience, and I have to pour in the verdict. Very well, if this verdict this case is studied openly. I am also willing to account for it. It's in an open trial."

Artidjo's statements are consistently applied on his decisions. He also proposed zero tolerance against corruption cases. Every perpetrator must be rewarded firmly. "Anyway if it's against the law to be firm, it's corruption has become an extra ordinary crime, which makes the poor, because the country's wealth is corrupted by those who have a chance, so zero tolerance to corruption from this republic" (Tribun News, 2011)

According to Artidjo, the firmness has been applied in the cassation decision toward Anggodo Widjojo the defendant of bribery and prevented trial into investigation of Corruption Eradication Commission (KPK). MARI has imposed a twofold penalty on the appellate court decision that punishes only 5 (five) years in prison. According to the cassation assembly, Anggodo was found guilty of blocking KPK's investigation, with aslo the bribery trial (Tribun News, 2011).

The judge's obligation is to find the law and establish the law a settled matter. Therefore, the judge decision should contain the basic legal considerations (motivating *plicht*) throughout both law application or legal discovery method (Bambang, 2008: 1-14). In essence, the establishment of justice and human respect becomes the conditions for the upholding the State dignity. Dealing with this, the judge as the central figure in the judicial process is required to be an elite figure, in order to uphold justice, so that its existence can provide benefits for the settlement of legal problems that occur in the life of society and state (Sugianto, 2011).

The judge's verdict consisting of the wording (language) actually contains of juridical thinking activities. They will grouping, classifying, then concluding. This activity appears to be applied in the fulfillment of a legal regulation that will be applied toward events put forward by the parties, or in the consideration mindset (motivation), so that between legal considerations and decisions (order) has a logical sequence. Moreover, conceptually the decision must provide individual justice in every case (case) (M. Hatta Ali, 2010: 83).

Furthermore, the authority given to the Judge to take a policy in deciding cases had regulated in Article 5 Paragraph (1) Law No. 48/2009 on Judicial's Power, which determines: "*Constitutional Justices and Judges shall explore, The value of law and sense of justice living in society*".

Under the rule of law, there are legal norms requiring judges to explore, follow, and understand the legal values and sense of justice living in the community. To fulfill the norms, the Judge must take legal discretion. Determining the demand for a sense of justice judges must adopt in deciding a case, theoretically the judges will see "standardized concepts of justice". The concept throughout history has taken many forms, since the Ancient Greeks and Roman justice considered one of the main virtues (cardinal virtue). In this concept, justice is a moral obligation that binds members of society in one relationship to another (Thalib, 2012).

In accordance with the above description, this study will focus on 2 objects; *First, the ratio decidendi*<sup>3</sup> on law decision, Second, the substantive aspects of the judge's judicial considerations in criminal cases.

## **II. RESEARCH METHOD**

This normative legal research uses statutory approach, conceptual approach, philosophical approach, historical approach, and comparative approach. The primary legal material in this research is the 1945 Constitution of the Republic of Indonesia and Law No 48/2009 on the juridical's Power. Meanwhile, secondary legal materials consist of books, research results of experts, documents issued by authorized institutions, as well as journals or scientific works relating to judicial power. Furthermore, tertiary legal materials are used as auxiliary to provide guidance and explanation of primary legal materials and secondary legal materials,

including Indonesian dictionaries, legal dictionaries, newspapers, magazines, and materials through information technology in accordance with the problems that are made.

This research begins with the collection of legal materials relevant to research in the form of primary legal materials and secondary legal materials. Furthermore, makes the classification of legal materials. In this study, the classification is defined as the effort to place (positioning) the meanings contained in the legal material into interrelated arrangements in accordance with the series equations of the elements that exist in the sense itself both logically and systematically (Saptomo, 2007: 88 ). As legal dogmatic research, normative legal materials are processed by structural stages, describing and systematizing legal materials consisting of three levels, namely technical level, teleological level, and external systematic level (Hoecke 2000: 67).

### **III. RESULT AND DISCUSSION**

#### **1. Standing Position And Ratio Decidendi Requirement In Law Decision**

The consideration of the judge's verdict from justice aspect is a basic and core consideration, namely the consideration which should be placed on first and foremost priority over consideration according to law and legislation. This is because, in fact, the consideration for the justice realization is a comprehensive consideration, which includes philosophical, sociological, psychological, and religious considerations.

*Third*, consideration to realize the benefit. Consideration should be made by the judge, especially judges of religious courts, in deciding the decision should be consider two things, namely *maslahat* (advantage) and *madllarat* (*disadvantage*). The judges 'ruling must bring mashlahat and prevent madllarat as it is in the Islamic philosophy law (*ushul fiqh*), "*dar'ul mafasid muqaddam' ala jalbil mashalih*"<sup>4</sup> (Masrum Noor, 2012). The scope of benefit which is the goal of Islamic law according to *ushul fiqh* in sequence are as follows: (a) benefit in maintaining religion; (b) benefit in carrying soul; (c) benefit in preserving reason; (d) benefit in raising generation; And (e) benefit in Purity in keeping treasure.

To know which is *maslahat* and yang *madllarat* depends on the intelligence of judges through the ability of a thorough, objective, and empirical analysis, including his insight into 'urf or tradition, although the results of his study are limited to the mundane benefit of the world.

#### **2. the substantive aspects of ratio decidendi in criminal cases**

##### **a) Aspect of Juridical Considerations**

The aspect of juridical considerations toward the accused crime is the context in the judge's decision. Why is it so? Essentially, the juridical consideration is the provision of the elements (*bestandellen*) of a criminal act whether the defendant's actions have been fulfilled and in accordance with the crime charged by the prosecutor. Furthermore, these juridical judgments will directly affect the order or dictum of the judge's decision.

<sup>3</sup>. The rule of law on which a judicial decision is based.

<sup>4</sup>. Preventing badness is better than welcoming goodness.

Normally, in the judicial practice of the judge's ruling before the judicial considerations are proved and considered, the judge will first withdraw the facts in the hearing which arise and is a cumulative conclusion of the testimony of the witnesses, the statements of the accused, and the evidence presented and examined at Trial. Basically, the facts in the trial are oriented on the dimensions of the *locus* and *tempus delicti*<sup>5</sup>, the *modus operandi* of how the crime was committed, the cause or the background of why the defendant committed a criminal, then how the direct or indirect consequences of the defendant's actions, what evidence which the defendant used in committing a crime, and so forth.

Furthermore, after the facts in the proceedings are disclosed in the judge's decision, then be considered based on the elements (*bestandellen*) and criminal act which have been charged by the prosecutor. Before considering the elements (*bestandellen*), based on practice, usually considered about the things that are correlation between the facts, the crime that is charged, and the element of the defendant's faults.

##### **b) Aspect of Philosophical Considerations**

philosophical aspect is an aspect of truth and justice. Its application desperately requires extensive experience and knowledge and wisdom that is able to follow values in a neglected society. Obviously its implementation is very difficult, because it does not follow the principle of legality and not bound to the system. Legal justice is justice based on law and legislation. In sense, the judge decides only based on the basis of positive law and legislation. Justice like this is justice according to the positive law and legislation. In upholding this justice, the judge or the judiciary just be a law upholder, the judge does not need to seek legal sources outside the written law, and the judge is only seen to apply the law to rational concrete matters. In other words, the judge as a mouthpiece of the law.

As matter of fact, Legal justice which is only obtained from the law, precisely in a condition will cause injustice to the community, because written laws created have a certain behavior that someday the power of behavior will die. Furthermore, when legislation is created the element of justice defends the public, but after enactment, along with changes in the values of community justice, consequently the law on the element of justice will be lost.

Moral justice and social justice applied by judges, with the statement, "*the judge must explore the values of living law in society*" (Article 5 paragraph (1) of Law No. 48/2009). If interpreted in depth, this has entered into the discussion about the *moral* and *social* justice.

Indeed, the implementation of the duties and authorities of a judge is done in the framework of upholding the truth and justice by holding fast to the law, the laws and the values of justice in society. In the judges are mandated so that the laws and regulations are applied correctly and fair, and if the application of laws and regulations will cause injustice, the judge must take the side of justice and override the law or legal regulation. Good law is a law that is in accordance with the living law in society which is certainly appropriate or is a reflection of the values that apply in society (*social justice*). The justice intended here is not procedural justice (*formal*), but substantive justice (*material*) in accordance with the conscience of the judge.

justice according to the Daniel S. Lev concept uses both procedural and substantive terms, whereas Schyut uses the terms formal and material. The component of formal justice is related to the style of a legal system, such as the rule of law or state of law (*Rechtsstaat*). While, the components of substantive justice concerning what is today called social rights and mark the political and economic arrangements in society. The conception of justice is rooted in the desired of social conditions. The concept of justice is essentially still abstract ideas that are more difficult to understand. Furthermore, Procedural justice is defined as a justice derived from a formal decision of the institution established under the laws of the state, including the judgment of the court (Kusumah 1981: 53).

For positivists, judicial decisions can be deduced logically from pre-existing rules without the need to point to social goals, virtues, and morality. However unfair and limited the sound of existing laws. Law is a law order and from there legal certainty can be enforced (Djarmika, 2008).

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#### 5. place and time of criminal act

This positivistic view is opposed by those who hold that the principle of virtue and morality must also be considered in measuring the validity of the law. The adherents of the moral law have a principle that the law must reflect morality. Therefore, laws that abandon the principles of morality, even against morality, may or may not be obeyed under a moral right (Prija Djarmika, 2008).

#### c) Aspect of sociological considerations

As Roscoe Pound writes, Jellinek jurist states, if a legal order must apply in action, then its social-psychological use should be ensured. Roscoe Pound sees the phenomenon that the rules created by the courts and the law, both are constantly failing, in the absence of social-psychological security as Jellinek (Roscoe, 1965: 76-77) puts it.

A legal rule should be the legal nature of a society. R. Wirjono Prodjodikoro said that if a stream can spread its wings among the population in a society that does not embrace a law of law which becomes a rule of law, then it is unlikely that the rule of law will be followed by society (ineffective), so it is said to be a dead word (*Doode leffer*) (Prodjodikoro, 1988: 14-15).

What these lawyers see shows that the social psychology aspect determines the quality of law, including in court decisions, to realize the law effectiveness. Roscoe Pound gives examples of the juristic judicial system (*the Anglo Saxon common law*), the legal rules in the books (*written*) solved and formulated its boundaries, but the judicial process depends on the discovery of facts by the jury, Thus insisting on applying different rules to the rules intended in the books (Prodjodikoro, 1988: 14-15).

In the Western itself there is also an inevitable change. The Western Classic legalistic paradigm was changed in the United States since the 1950s during its justice reform becomes a social justice paradigm in the period of Supreme Court Judge Holmes, Cordozo, Llewellyn, Frank, Gray, and others. Thus, the most important toward judicial reform is the paradigm reform (Achmad, 1997: 478).

As matter of fact, the legalistic paradigm of Western Classics was also frozen in the Netherlands which hold civil law system. Prior to 1919, the term "unlawful acts" was defined as violating the rights of others as prescribed by law. But in 1919, the Dutch Supreme Court (Hoge Raad) made a formulating on the understanding of unlawful acts (*onrechtmatige daad*) is an act or omission that contradicts the rights of others or is contrary to the offender's legal duties or against the decency of both the good and the necessity Which must be taken care of in association with other people or objects, whose consequences have caused harm to others are obliged to pay compensation (Achmad, 1997: 477 and 479). That means, the Dutch Supreme Court since 1919 has changed the paradigm that law is not just what is in the book of law, but also recognizes "good morality" as

part of the law. This good morality is certainly measured from the parameters of the value of the people who embrace it. as it turns out, since 1919 there has been a paradigm shift in the civil law state, where decency as part of social values comes as the consideration of the judge's decision.

At the end of the nineteenth century began to emerge a new legal theory that opposed the teaching of analytical law. This new legal theory conducts an investigation of the realities of modern societies in relation to modern law. The basics of this new stream are based on sociological and metaphysical. However, in its development, United States becomes the development center of this realism movement. This approach was firstly undertaken by Marx in analyzing society, although in some instances Marx's analysis had no direct influence on the science of law (Moegnidjodjodirdjo, 1979: 27).

The new stream commonly called sociological jurisprudence also affects the Continental European legal system. so that emerge Hoge Raad jurisprudence in 1919 which forms the juridical definition of "unlawful acts" which can be said as the juridical-sociological. In the Dutch colonial period, the Dutch government also applied Dutch law in the Hindia-Belanda (Indonesia), so that the jurisprudence of Hoge Raad is also applied in Indonesia, even recognized until now. During Hindia-Belanda government also applied the judiciary based on customary law for indigenous groups in each of their customary territories. It shows that the judicial system in Indonesia is very concerned and cannot be separated from the sociological law. In the Dutch colonial period in Indonesia there was also customary court based on the Ordinance of adat court *Staatsblaad* of 1932 No. 80, in which Article 46 of the ordinance granted the judge the freedom to punish the litigants, in order to carry out any deed necessary for the settlement of cases (Soetikno, 1973 : 106).

In Indonesia, there are various court decisions that become jurisprudence in cases that are decided using customary law. Customary law also appears the developments in the form of jurisprudence. Examples relate to the right to inherit treasure for widows. Initially the principle of customary law determines that inheritance those who have a bond of blood with heirs. However, the supreme court changed the principle by looking at the development of community justice aspirations in Indonesia, thereby determining that according to customary law prevailing throughout Indonesia, a widow (woman) is the heir of her husband's origin, as can be seen in the verdict of MARI No 302 /K/Sip/1960 dated 2 November 1960 (Djamali, 1993: 70-71).

Furthermore, beside of civil law, it seems that in criminal law with its legal principle also recognizes the customary criminal law. Customary criminal act have been decided by the judiciary in Indonesia, Among them can be seen in the collection of Indonesian jurisprudence published by MARI, there are criminal offenses that are also tried, such as the crime of marrying a stepchild or the crime of "*gamia gamana*" (MARI's decision No. 11 K/Kr/1976 dated 7 July 1976) and offense of Adat zina (sexual act outside of marriage) on (MARI's decision No. 93 K/Kr/1976 dated November 19, 1977) (Supreme Court of the Republic of Indonesia, 1993: 186).

The judge in deciding a case sometimes acts as the creator or inventor of the law, acting as a realist who sees reality. Even, Hans Kelsen the pioneer of Pure Law Theory also recognizes, judges at the times also be legislators who can take new action without changing the law, take a concrete judicial decision that is not in accordance with the general norms that have been declared as law. Hans Kelsen distinguishes that the law is a general norm, whereas the judge's verdict is the individual norm. However, Kelsen stated that the validity of individual norms should be justified by general norms, but it can be justified by norms generally relating to the strength of their judicial decisions, it does not matter (Achmad, 1997: 384 ).

#### IV. CONCLUSION

Based on the above discussion, the author can give the following conclusions:

1. The position of legal considerations in the decision is very important. In fact, it can be said as the juridical core of a judge's verdict. A legal consideration in the judge's decision is deemed sufficient if it meets 3 minimum requirements, namely: (1) Considerations based on law and legislation; (2) Consideration to bring on justice; And (3) Consideration to realize the benefit.
2. The ratio decidendi in a criminal case shall contain 3 substantive aspects. Firstly, the juridical aspect consideration which is the verification of the elements (*bestandellen*) of a crime whether the defendant's conduct has been fulfilled and in accordance with the crime charged by the prosecutor. *Second*, the philosophical aspect considerations which is a core aspect of truth and justice. Its application desperately requires extensive experience and knowledge and wisdom that is able to follow values in a neglected society. *Third*, the sociological aspect considerations, considering the law is formed by and for society, so that the law will not be able to stand alone without sociological factors.

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