



## Ultra Qui Judicat Construction on Judicial Freedom in Indonesia

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### **Abstract**

The prohibition for judges to not sentence the defendant if the act is not described carefully, clearly and completely in the indictment of the public prosecutor, it turns out that in practice in court there are judges who deviate from the article charged by the public prosecutor. The judge's action is called the ultra qui judicat principle, that is deviating from what was charged. The main problem in this paper is about the meaning of the Ultra Qui Judicic Principle and the Validity of Decisions in Criminal Cases. The main problems will be analyzed using normative legal research methods using a case approach and data sources from laws and regulations. The results of the study show that the concept of Justice must include new legal norms in the provisions of Article 5 of the Law on Judicial Power, as well as perfecting the types of punishment as stipulated in Article 191 paragraph (1), (2) and Article 193 paragraph (1) of the Criminal Procedure Code and provide confirmation of the general explanation of the Criminal Procedure Code. The current criminal law reform is very appropriate to do, based on the principle of prioritizing justice over legal certainty, the Ultra Qui Judicic principle is specifically used by judges in criminal cases.

**Keywords:** *Ultra Qui Judicat; Construction; Judicial Freedom*

### **Introduction**

Law is considered never complete so that truth cannot be equated with a rule of law. Justice is the goal in a judge's decision. This is in accordance with the provisions of Article 2 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power which states that the implementation which is upheld by the panel of judges who examine cases is the principle of justice, meaning that justice is a form of divine value that is owned and guided by every judge.

The judge said their view was an old phenomenon that was still contemporary to be discussed. Whereas judges have traditionally exercised restraint in public statements, there is an increasing

expectation that they will explain their decision-making to the wider public.<sup>1</sup> Moreover, judges, multiplied, participate in political debates; they expressed their views on legislative reform and took a stand on matters relating to the judiciary.<sup>2</sup> This increases visibility and increases public exposure to new issues regarding the independence of the judiciary. For example, public statements about personal views can raise concerns about the impartiality of judges and judicial authorities more generally.<sup>3</sup> Thus, different interests are at stake here and freedom of expression needs to be considered.

Conceptually, judicial independence has been defined in various ways. Admittedly, the principle is very broad and complex and this creates enormous definitional difficulties.<sup>4</sup> However, the common thread that runs through the various definitions is that judicial independence exists at two levels: first, at the individual level – the ability of a judge to apply his or her judgment impartially and independently to a matter without undue influence; and second, at the institutional level - the ability of the judiciary to control the administration and appointment of court staff.<sup>5</sup>

Justice is interpreted as a personal trait or quality. Subjective justice as secondary justice is a stance or attitude, views and beliefs that are directed to the realization of objective justice as primary justice.<sup>6</sup> Plato argued that the fulfillment of justice can only be found in law and legislation.<sup>7</sup>

In practice, there are incomplete legal norms in the exercise of judicial power, especially the authority of judges in deciding criminal cases. Judges are required to uphold law and justice, upholding the law is synonymous with upholding all statutory regulations, both material and formal. Substantially judges are prohibited from deciding cases outside of the Public Prosecutor's Indictment.<sup>8</sup>

In some of the judge's decisions there are deviations committed by the judge when making his decision, the judge does not implement the provisions of Article 6 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power as the basis for judges deciding criminal cases. Some of the judge's decisions that deviate from the prosecutor's indictment include:

| Decision Description  | Public Prosecutor's Indictment   | Judge's Decision  |
|---|--|---|
| Decision on Criminal Case number 09/Pid/SUS/2011/PN.MGL, namely the crime of violence within the household sphere | Article 44 paragraph (1) Law Number 23 of 2004, regarding the Elimination of Domestic Violence   | Article 44 paragraph (4) of Law Number 23 of 2004, regarding the Elimination of Domestic Violence   |
| Decision on Case Number 17/PID.SUS/TPK/2014/PN.JKT.PST namely Corruption Crime                                    | Article 12 letter c Law of the Republic of Indonesia Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by Law of the Republic of Indonesia Number 20 of 2001 concerning Criminal Acts of Corruption | The judge's decision uses Article 6 paragraph (1) letter a and Article 13 of the Law of the Republic of Indonesia Number 20 of 2001 concerning Corruption |

<sup>1</sup> Seibert-Fohr, Anja, The Independence of Judges and their Freedom of Expression: An Ambivalent Relationship (April 19, 2019). Available at SSRN: <https://ssrn.com/abstract=3375038> or <http://dx.doi.org/10.2139/ssrn.3375038>, p. 1.

<sup>2</sup> See, [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/](https://www.americanbar.org/groups/judicial/publications/judges_journal/).

<sup>3</sup> L SiyoI; JC Mubangizi, "The independence of South African judges: A constitutional and legislative perspective", PER vol.18 n.4 Potchefstroom 2015, p. 303.

<sup>4</sup> Van De Vijver L (ed) The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions (Siber Ink Cape Town 2006), p. 54.

<sup>5</sup> Budlender G "Transformation of the Judiciary: The Politics of the Judiciary in a Democratic South Africa" 2005 SAJHR, p. 715.

<sup>6</sup> Hyronimus Rhiti, Legal Philosophy, Yogyakarta: Atma Jaya University Yogyakarta, 2011, p. 240-246.

<sup>7</sup> Ibid.

<sup>8</sup> Article 6 Paragraph (2) Law Number 48 of 2009 Concerning Judicial Powers.

Observing the decision above, efforts to determine the principle of *ultra qui judicat* as the embodiment of the freedom possessed by judges in making decisions are increasingly coloring the face of the current judge's decisions.

## ***B. Problem Formulation***

This paper aims to analyze and determine the position of the *ultra qui judicat* principle in judge decisions in the criminal justice system and to reconstruct current judicial power.

## ***C. Research Methods***

This research is categorized into the type of normative legal research, this is based on the issues and or themes raised as research topics. The research approach used is philosophical and analytical, namely research that focuses on rational views, critical analysis and philosophy, and ends with conclusions that aim to produce new findings as answers to the main problems that have been determined.<sup>9</sup> It will also be analyzed using descriptive analytical methods, namely by describing the applicable laws and regulations related to legal theory and positive law enforcement practices related to the problem.<sup>10</sup>

## ***D. Discussion***

### **The Meaning of Freedom of Judges**

The authority to make decisions (*besluit*) which is directly sourced from the law in the material sense is owned by the judge in making decisions, this authority is called attributive authority<sup>11</sup>. In making justice decisions based on divine values as a goal that must be upheld in addition to statutory regulations.<sup>12</sup> To realize this, the understanding of material law, formal law and non-legal factors greatly influences individual judges when deciding cases. In addition to determining the concept used, it is no less important to refer to the concept as a standing reference. Mastery of these concepts will give birth to decisions that are reasonable and can be accounted for as well as true and fair.

The judge is the only source of procedural law, therefore every judge is required to be able to master and understand the sources of law, especially those that clearly regulate criminal procedural law. The procedural law does not only contain provisions regarding the ways of adjudicating, but more than that, it means that the procedural law serves as a guide for judges in carrying out trials in order to achieve justice based on evidence, trial facts and the beliefs of the panel of judges. The study of procedural law by the judge is a representation of the judge's ability to interpret every source of law.<sup>13</sup>

In the reasoning of judges in the Netherlands the judge who is asked to answer the question whether an event or deed falls within the scope of the validity of a provision, he will not only pay attention to the words (in sentences) used, but also the spirit (intentions) specific laws and criminal background. Of course, I don't mean to say that judges will be allowed to advance beyond the line set by the law, they obviously cannot deviate. However, apart from this limitation, various legal interpretation rules apply to criminal judges which are also followed and apply in other areas of law.<sup>14</sup>

<sup>9</sup>Compare, Ishaq, *Legal Research Methods and Thesis Writing*, Thesis and Dissertation, Bandung: ALFABETA, 2017, p. 45.

<sup>10</sup>Peter Mahmud Marzuki, *Legal Research*, Kencana Prenada Media Group, Jakarta, 2011, p. 22.

<sup>11</sup>Philippus M. Hadjon, "About Government Authority (*bestuurbevoegdheid*)" *Pro Justitia* Year XVI Number I January 1998, hlm. 94.

<sup>12</sup>Suwitno Y IMRAN, and Apripari, *Determination of the Judges Freedom in Indonesia On The Straf Minimum Rules*.

Authors, *Protection: Journal of Land And Environmental Law*, Vol. 1 No. 1 (2022), p. 8.

<sup>13</sup>Bagir Manan, *Being a Good Judge*, *Journal of Varia Judicial* No. 255 February 2007.

<sup>14</sup>Tristam Pascal Moeliono, 2021, *Translation of Several Parts of the Treatise on Wetboek van Strafrecht voor Nederlandsch Indie Dutch Criminal Code and Indonesian Criminal Code*, Institute for Criminal Justice Reform (ICJR), Jakarta, Pg. 282.

While in legal reasoning in Brazil the similarities between factual circumstances, legal institutions, normative constructs or judicial reasoning become evident where a particular court (judicial bench) shows its convictions and intentions stem from an affirmed need to make decisions (always in the context of its own decisions). It forms the basis for determining the direction and scope of implementation of previous decisions that fall within a given judicial practice, as a complement or in dispute (usually in part) of the same. The absence of star decisis rules in the statutory legal system shifts the implementation of previous decisions from the 'obligation' category to the 'need' category (in the context of the correctness and functionality of the decision-making process).<sup>15</sup>

The judge's ability to qualify, constitutionalize up to the constitution of each case set forth in his decision indicates that the judge can settle cases in court properly. Thus the parties to the case are prevented from acting arbitrarily in upholding law and justice.<sup>16</sup>

As the highest institution, the Supreme Court in exercising judicial power has determined that the judge's decision should consider all aspects that are juridical, philosophical, and sociological in nature, so that the justice to be realized in every judge's decision is legal justice (legal justice) which originates from legal provisions. positive, procedural justice that provides protection based on procedures that must be obeyed by everyone, especially law enforcers who are given the authority by law to uphold law and justice.<sup>17</sup>

## Ultra Qui Judicat

When judges are faced with situations where positive law does not regulate a situation, judges make decisions where these actions are not clearly regulated in statutory regulations, then of course the principle of law becomes the basis for judges in making their decisions. From the 3 (three) decisions described above, the judge decided on the criminal case by imposing a sentence on the defendant with a criminal article that was not used by the prosecutor in preparing the indictment. The judge's considerations in the decision from the philosophical aspect according to the author emphasizes the aspect of justice, while from the juridical aspect the author emphasizes the interpretation of Article 5 paragraph (1) of the judicial power law.

Justice that is oriented to human values. The statutory provisions that have been successfully studied by judges have led them to become a party that becomes the center of community dependency. Attitudes that reflect and articulate the demands of society are the mandate of the principle of administering judicial power. Fulfillment of the demands of society which are actually their rights will determine whether they deserve to be called good law administrators or not. The fair attitude shown by law enforcers can be categorized as an expression of conscience that is quite brave and noble, bearing in mind that with that attitude, law enforcers do not lose their identity and remain victorious because they are able to defeat various challenges that try to be in a just attitude.<sup>18</sup>

The series of trial processes in court which are carried out by the panel of judges solely to seek material truth, namely the real truth, the essential truth or the real truth that is sought through the trial process, especially the trial of evidence which is useful to strengthen the judge's confidence in making decisions. From a judge, truth is born from a conscience towards a fact that requires justice to be upheld. The legal awareness or conviction of the judge directly and clearly stands out from the prosecutor's

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<sup>15</sup>Leszczyński, L. Implementing Prior Judicial Decisions as Precedents: The Context of Application and Justification. *Int J Semiot Law*, Vol 33, 2020, Pg. 237-238.

<sup>16</sup>Bagir Manan, Being a Good Judge, *Journal of Varia Judicial* No. 255 February 2007.

<sup>17</sup>Supreme Court of the Republic of Indonesia, Code of Conduct, Code of Ethics for Judges and Related Papers, Indonesian Supreme Court Center for Education and Training, Jakarta, 2006.

<sup>18</sup>Muhammad Nuh, *Ethics of the Legal Profession, CV Faithful Readers*, Bandung, 2011, Pg. 134.

carelessness in studying the minutes of examination submitted by the investigator, especially in the synchronization of evidence with the selection of the right article.

In achieving material truth through the process of proof it is not always in accordance with what the public prosecutor wants. For example, from examining witnesses, witnesses are one of the pieces of evidence in Article 184 paragraph (1) of the Criminal Procedure Code. In giving a person's statement as a witness there may be differences at the time of examination at the investigation stage and in giving testimony at the evidentiary stage in court, this is due to the fact that the giving of a person's testimony at the investigation stage is forced or under pressure either coming from investigators or it could be from certain parties.

This will greatly affect the material truth that must be sought by the judge through the trial process. It is from the differences in the evidence revealed in this trial that the article proven by the public prosecutor can be different from the article proven based on the facts of the trial. Material truth is the basis of a just decision, with the disclosure of material truth which of course is not in accordance with the article contained in the public prosecutor's indictment, the judge is obliged to make a decision.

The judge's decision which is based on material truth that is inconsistent with the indictment by the author is referred to as a decision that is *Ultra Qui Judicatus*, meaning a decision that deviates from the charges of the public prosecutor. Based on the results of the author's analysis of several decisions that deviate from the indictment, the judge chooses a deviant decision based on the objective of the law of justice. To ensure that the *Ultra Qui Judicatus* principle can be used by judges, the authors provide the following reasons:

1. For the sake of fairness;
2. The defendant, based on the examination of evidence at trial, was proven guilty of committing a crime as stipulated in the provisions of the legislation so that he is still to blame;
3. The judge is bound by material truth as a trial fact;
4. The verdict is punishable by the defendant.

Justice in a court decision is not only seen as the realization of legal objectives, but also seen as a hope, a living feeling in everyone. This means that in practice judges decide criminal cases not based on the contents of the indictment or based on the *Ultra Qui Judicatus* principle the judge has been able to show a fair attitude in handling the case.

The discrepancy between the article indicted by the prosecutor and the article decided by the judge by the author is referred to as a form of deviation or deviation from the indictment. The judge's actions at the principle level are called the *Ultra Qui Judicatus* principle, namely **an act of a judge deciding a case by placing justice as the goal can deviate the charges of the public prosecutor based on elements of trial facts**. This principle has specialties, including:

- a. This principle is specific to judges in deciding criminal cases;
- b. The use of this principle emphasizes the justice of judges deciding criminal cases;
- c. The scope of this principle is found in the facts of the trial.

The principle of *Ultra Qui Judicatus* has the meaning that for the sake of justice the judge can take actions to deviate from the charges drawn up by the public prosecutor. The process of the birth of the judge's actions to deviate from the prosecutor's indictment begins when the judge evaluates each piece of evidence submitted by the parties in the trial, so if the judge finds that there are empty spaces in each trial, especially regarding the examination of evidence, then at that time increase the judge's confidence to take

actions that deviate from the prosecutor's indictment to meet the demands of justice for the judge to decide the case.

As a state based on law, law enforcement as a representative of a rule of law must be able to protect and carry out a just, lawful law enforcement process and provide benefits to parties and society in general. Judges as law enforcers in carrying out their duties and authorities have privileges that other law enforcers do not have, the privilege of a judge lies in the decision to be handed down to the defendant.

Justice as a robe of a judge in deciding cases is inseparable from a value or meaning from the principle where Indonesia is a country based on law, the meaning of a country based on law is to place statutory regulations as the basis for carrying out law enforcement. The judicial power law was born to answer the challenge of creating a clean and authoritative judiciary so that the administration of justice to uphold law and justice based on Pancasila and the 1945 Constitution can be realized properly.

### **Actualization of Pancasila Values in Ultra Qui Judicatum Decisions**

Law Number 12 of 2011 concerning Formation of Regulations has determined Pancasila as a source of legal sources. In administering government, the state is obliged to protect all religions that are recognized as existing and the state is not justified in interfering in the affairs of the faith (belief) of any religion.

The Precepts of Just and Civilized Humanity mean respecting human beings as virtuous beings who have the potential to think, feel, be willing, and be creative. Fair means that decisions and actions taken by government officials or law enforcers are based on objective norms, not subjective, let alone arbitrary and authoritarian. Civilized means cultured, polite, decency/moral.

Bismar Siregar<sup>19</sup> argues that the judge in deciding a case makes justice the main objective of the existing law, to achieve this goal, the judge should be open to various existing demands. That's what eyes are for the judge's heart and ears must be used to feel and analyze every development or demand for justice in society. From the view put forward by Bismar Siregar, the author views that the judge's decision deviates from the prosecutor's indictment. It can be seen from the decisions analyzed by the author; it can be concluded that justice is the goal of the decision.

The community's demand regarding a case that is already in the trial process is for the sake of justice, said justice, which always appears when people come to court. Based on this, Bismar Siregar's opinion is in line with the essence of the principle of Ultra Qui Judicatum. The judge's action to deviate from the public prosecutor's indictment is seen by the author as an attempt by the judge to devote himself to justice if the law/statute consciously/deliberately denies that justice.

The principle of ultra qui judicatum is the basis for judges to devote themselves to justice. Therefore, it takes courage for experts/law enforcers to take actions that deviate from the Criminal Procedure Code and the law on judicial power which limits the judge's actions. The judge's action to deviate from the indictment is part of the judge's freedom. True freedom is freedom that intersects with attachment to norms, so that norms are essentially not obstacles to freedom, but emphasize the meaning of freedom which has more ethical value.<sup>20</sup> When connected with the judge's action in deciding the case, deviating from the indictment emphasizes the meaning of freedom which has ethical value because the judge's action gives birth to a decision that can be accepted by society as a decision that upholds the value of justice the judge decides the case.

<sup>19</sup> Bismar Siregar, *The Law of Judges and God's Justice*, Echoes of Insani Press, Jakarta, 1995, Pg. 35.

<sup>20</sup> K. Bertens, *Ethics*, Gramedia Pustaka Utama, Jakarta, 2000, Pg. 102, 104.

The judge's decision must be based on the indictment, that is the will of the legal norms in the provisions of Article 6 of the judicial power law. The article is interpreted that there is a prohibition for judges to decide outside of the article being charged. By interpreting that the norms contained in Article 6 are essentially not an obstacle to the freedom of judges in deviating from the prosecutor's charges because justice is its main goal. Freedom is a very valuable value possessed by judges to achieve the goals of the law.

Indonesia with the Pancasila legal system has been able to maintain the existence of courts as a place to fight for justice by the parties or the community. In relation to reforming the national legal system, several important related strategies are (a) Establishing principles in the formation of laws that guarantee the existence of a unified national legal system. It is these principles that animate or become the spirit of making a statutory regulation. Of course justice is a basic principle that is universal, but there are other principles that need to be the basis for making laws and regulations such as protection, archipelago, unity, kinship, togetherness which are the wealth of the Indonesian nation. (b) Determine or acknowledge the heterogeneity of law within a single national legal unit which is reflected in customary law and local wisdom which enriches the national legal system. This strategy is intended to produce laws that are rooted in the community itself or reflect the culture of the local community. This also illustrates that law as a rule must be rooted or integrated and even originate from the values that apply in a society. Even the law should be a reflection of the values prevailing in society. Good law is law that is in accordance with the living law. This also illustrates that law as a rule must be rooted or integrated and even originate from the values that apply in a society. Even the law should be a reflection of the values prevailing in society. Good law is law that is in accordance with the living law. This also illustrates that law as a rule must be rooted or integrated and even originate from the values that apply in a society. Even the law should be a reflection of the values prevailing in society. Good law is law that is in accordance with the living law.

Furthermore, that these values cannot be separated from the attitudes and characteristics that (should) be possessed by people who are members of the society that is being developed. The importance of values as living laws in society is also in line with the concept of law put forward by Carls Von Savigny, that laws are not created but rather grow and develop together with society. Habits or values that live in society can be adopted into modern positive law by considering several important aspects, namely: honesty, efficiency, punctuality (punctuality), orderliness (orderliness), diligence, thrifty, rational in mind and making decisions, the ability to suspend consumption (there is perspective) of the future.

In the context of structuring the national legal system, it is not only local wisdom that needs to be considered, but also conventions or global orders which have a very large influence and position in the structuring of the national legal system, including strengthening the conception of the protection of human rights in various laws and regulations that are issued.

The importance of planning for the development of national law as outlined in the National Legislation Program to stipulate bills that are in accordance with the substantive needs of development in other sectors so that law actually contributes to the development of the economic, political and social sectors

## **Construction of the Principle of Freedom of Judges in the Criminal Justice System**

The form of reconstruction is revising the authority to try which is carried out by district court judges in handling criminal cases as stipulated in the provisions of Law Number 48 of 2009 concerning Judicial Power. Article 6 paragraph (2) which states that no one can be sentenced to a crime, unless the court, because of a valid means of proof according to law, is convinced that a person who is deemed to be responsible has been guilty of the act he is accused of. The description of the article is interpreted as a

provision that prohibits judges in their decisions imposing a sentence not based on valid evidence, trial facts and the judge's conviction.

Furthermore, Article 50 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states that in addition to containing the reasons and basis for the decision, the judge is required to include certain articles of the laws and regulations that have to do with the case being handled. In addition, it contains other legal sources which are used as the basis for adjudicating.<sup>21</sup> This means that this article is interpreted as a stipulation that requires the judge's decision to contain certain articles of legislation. With various court decisions that deviate from the indictment of the public prosecutor, it shows that judges are free to make decisions based on valid evidence, trial facts and beliefs. judge.

From the provisions of Article 6 paragraph (2) and Article 50 paragraph (1) of Law Number 48 of 2009 concerning Judicial power and considering the development of criminal law, especially within the scope of the court where the judge has the authority to decide cases where there is a judge's decision that deviates from the indictment based on the Ultra Qui Judicatum principle, construction is needed in the form of legal norms as a guideline or basis for judges.

The construction of the principle of freedom of judges guaranteed by the judiciary power law by using the Ultra Qui Judicatum principle as a complement to existing legal principles is in line with the mandate of the provisions as stipulated in Article 24 of the 1945 Constitution of the Republic of Indonesia which states that the Judiciary is an independent power to administer justice in order to uphold law and justice. The reasons taken into consideration are:

The philosophical reason is that the origin of the authority of judges to decide criminal cases is obtained through the process of attribution from Article 24 of the 1945 Constitution of the Republic of Indonesia, so that the existence of judges as original law enforcers and is the apparatus who first received attribution, in addition to guaranteeing the principle of certainty law and ensure the achievement of justice.

Theoretical reasons are that the considerations for making Law Number 48 of 2009 concerning Judicial Power do not fully consider the meaning of Judicial Power as an independent power to administer justice in order to uphold law and justice. This reason is very strategic by using the Ultra Qui Judicatum principle as part of the judge's freedom to decide cases. The position of the Ultra Qui Judicatum principle as sui Generis is that it has specificities, including that the Ultra Qui Judicatum principle is used by judges, especially in criminal cases, based on the facts of the trial, and emphasized on the fairness of the judge deciding the case.

The construction of the Ultra Qui Judicatum principle as the freedom of judges in the criminal justice system is the formulation of a new paragraph in Article 6 of Law Number 48 of 2009 concerning Judicial Power which accommodates decisions that are not based on the indictment of the public prosecutor.

### **Ultra Qui Judicatum Principle in the Criminal Procedure Code**

According to the author, the reform of the current criminal law is very appropriate to do, based on the statement that the application of criminal law is based on the principle of legality as a material and formal basis. In the Draft Criminal Procedure Code, the discussion on the penal system is based on one of the principles, namely the idea of prioritizing justice over legal certainty. According to the author, this principle is very appropriate for judges in the context of imposing criminal sanctions. Justice is the robe

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<sup>21</sup> Article 50 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power.



of a judge in deciding cases, by prioritizing justice, the judge has implemented values for the sake of justice based on belief in the ONE ALMIGHTY.

Starting from this basic idea, in the sentencing system regulated in the Draft Criminal Procedure Code there are provisions that are not regulated in the current Criminal Procedure Code, namely the responsibility of the judge for the decision to convict the defendant even though there is reason for abolition of the sentence, if the judge considers the defendant to be blamed for the circumstances that are the reason Elimination of punishment for the accused known as the principle of *culpa in causa* or the principle of *actio libera in causa*. Against this principle Moeljatno provides an explanation that this principle is defined as whoever is forced to commit an act for the defense because there was an attack or threat of attack at that time which was against the law against oneself or another against the honor of one's own decency or one's own property or that of another person, will not be punished.<sup>22</sup>

With the principle of prioritizing justice from legal certainty in the Draft Criminal Procedure Code, in addition to not regulating the *culpa in causa* principle or the *actio libera in causa* principle, according to the author, this will open up the same space for the *ultra qui judicat* principle to be included in the Criminal Procedure Code. With reference to the basic idea of the penal system, the author proposes an idea for the sake of balancing victim-oriented justice values represented by the public prosecutor through his indictment, perpetrator-oriented justice values and judge-oriented justice values, so these two principles should be included in the discussion of the formula Criminal Procedure Code in the future. The principle of *ultra qui judicat* resides in the judge.

Ontologically, the value contained in the *ultra qui judicat* principle is the value of justice for judges in deciding cases, this value of justice is very closely related to the profession of a judge. A quality court decision in the context of a criminal case is a decision that is based on legal considerations according to the facts revealed at trial, in accordance with the law and the judge's beliefs without being influenced by various external and internal interventions so that they can be professionally accountable to the public (the truth and justice). A good judge's decision should be able to reflect a sense of justice, truth and that can bring benefit to the general public, nation and state. In addition, judges have views and insights into the future in understanding legal values that live in society,

The formulation of the *ultra qui judicat* principle in the Criminal Procedure Code is based on the expansion of the meaning of the legality principle, the *ultra qui judicat* principle complements the legality principle at the practice stage in the field. The principle of legality as the basis for enforcing the principle of *ultra qui judicat* means that a person is convicted based on the law that was in effect at the time the act was committed and that a person can be convicted based on an unwritten law will be a strong basis for judges to uphold law and justice in the form of a court decision.

The principle of *ultra qui judicat* is positioned as a special principle because this principle can only be carried out by a judge and can only be used during an examination at trial where based on the facts of the trial the prosecutor's indictment cannot be proven, but according to the judge the actions of the defendant remain as a crime because the defendant is based on the tools evidence of violating the article that was not charged by the public prosecutor. So that by using this principle, judges have upheld the principle of legality perfectly, the *Ultra Qui Judicatus* principle can be used as long as it meets 4 criteria, namely:

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<sup>22</sup> Moeljatno, Principles of Criminal Law, cet.2, Bina Literacy, Jakarta, 1984, p. 144.

1. For the sake of fairness;
2. The accused remains guilty;
3. The judge is bound by the facts of the trial;
4. Judgment that convicts the accused.

In line with the expansion of the principle of legality and the position of the principle of *ultra qui judicat*, it is necessary to concretize the following matters: (a) a criminal act is an act of doing or not doing something which is stated by laws and regulations as an act which is prohibited and punishable by punishment. (b) to be declared as a criminal act, in addition to the act being prohibited and punishable by laws and regulations, it must also be against the law or contrary to the laws that exist in society. (c) every criminal act is always considered to be against the law, unless there is justifiable reason.

With the formulation of the principle of action and the action/perpetrator, namely the principle that is based on what was done and who did it, criminal acts and responsibilities obtain clear arrangements, so that judges in examining cases in court do not hesitate anymore in seeking, finding and determine what actions were committed, which law was violated and whether the defendant was the perpetrator. The application of the principle of *ultra qui judicat* which is attached to the judge is intended so that the defendant can be held accountable for his actions, the act in question is that the crime committed by the defendant is a similar type of crime.

For example, in the decision on the criminal case number 09/Pid/SUS/2011/PN.MGL, namely the crime of domestic violence where the public prosecutor in his indictment the defendant violated the provisions of Article 44 paragraph (1) of Law No. 23 of 2004, Concerning the Elimination of Domestic Violence, but in the court decision the judge stated that the defendant was guilty of violating Article 44 paragraph (4) of Law No. 23 of 2004, Concerning the Elimination of Domestic Violence.

Accountability. crime, is always synonymous with the existence of the principle of guilt (principle of culpability) and the principle of legality is *mutatis mutandis* interrelated, therefore in the formulation of laws it must be formulated explicitly. A person can be punished unless by law the act has been explicitly violated. either actively or passively who are subject to criminal sanctions in the law. Furthermore, a person's actions can be punished if the action is done intentionally (*dolus*) or due to negligence (*culpa*) of all kinds. So, the formulation of actions that can be categorized as criminal liability are actions based on mistakes which are limited by the element of intent (*dolus*). For the offense of negligence (*culpa*) it is an exception (exceptional) if it is strictly determined by law, while responsibility for certain consequences of a crime which by law increases the criminal threat, is only imposed on the defendant if he cannot reasonably foresee the possibility of the occurrence the result if at least there is an error. So do not adhere to the doctrine of bearing the consequences purely, but still be oriented towards the principle of guilt.

Substantially, the discussion about criminal responsibility is a very important matter, because it relates to the procedure for regulation of criminal acts. The idea of a balance between the principle of no crime without guilt (principle of culpability/*geen straf zonder schuld* principle) as a principle of humanity and the principle of legality (principle of legality) as a societal principle is an embodiment of criminal responsibility.

In practice, these two principles are seen as elastic, not rigid and absolute, because at certain times they can open up space to apply the principle of strict liability, the principle of vicarious liability, and the principle of granting forgiveness or pardon by a judge (*rechterlijk pardon* or *judicial pardon*). By setting the principle of no crime without fault which is in line with the principle of legality, the Criminal Procedure Code implicitly has strengthened the existence of the *ultra qui judicat* principle at the practice

level of law enforcement and justice by judges. Like a building, the author states that the principle of no crime without error and the principle of legality is a foundation,

The formulation of legal norms offered by the author to regulators who have the authority to revise statutory regulations, especially the Criminal Procedure Code, should be based on the results of in-depth and measurable studies, in the types of criminal decisions, especially decisions that convict the defendant, while still paying attention to the principle of legality in depth. The principle of legality as a fundamental principle is the basis for determining whether a person has committed a criminal act and the act has been regulated in the provisions of the law. In the trial process it can happen that based on the facts of the trial the judge is of the opinion that the act charged against the defendant is proven to be a criminal act so if it is based on the principle of legality then the defendant must be punished,

The types of decisions in the current Criminal Procedure Code do not accommodate the defendant's actions which are examined from the principle of legality as a fundamental principle which states that an act must be given a penalty if the act has been regulated in law, then based on the author's analysis the actions of the accused were not charged but were a criminal act is still punishable by guilt based on:

1. For the sake of justice the judge decides the case;
2. The defendant's actions were proven based on the facts at trial classified as a criminal act so that the defendant was still found guilty;
3. The judge is bound by the facts of the trial;
4. Judgment that convicts the accused.

With the formulation of new legal norms in the types of decisions, *mutatis mutandis* makes changes in the general explanation of the Criminal Procedure Code. An explanation of the judge's decision deviating from the indictment is important to provide an explanation as well as the scope of application of this principle in order to continue the trial process up to the imposition of a court decision. Therefore, based on the description of the new legal norm which states "if the court is of the opinion that the charges are not proven, but the elements of the crime are proven as stipulated in the group/type of crime, then the judge can impose a sentence other than the one charged.

The provisions of these legal norms are used when the judge finds in the facts of the trial, especially the evidence examination trial, it is revealed that the defendant has actually committed a crime in a group/type of crime. This means that the author emphasizes that this principle applies to similar crimes and this principle only applies specifically to judges who decide criminal cases.

The court is of the opinion that the charges are not proven, but the elements of the crime are proven as stipulated in the group/type of crime, so the judge can impose a sentence other than the one charged. The general explanation of this norm is that the judge deviates from the public prosecutor's indictment while still paying attention to similar criminal acts based on the facts of the trial and making justice the goal.

### **Principle of Ultra Qui Judicatur in Judicial Power**

In order to strengthen the position of the function of judges as enforcers of justice, in criminal cases it is necessary to formulate new legal norms as a guide for judges in carrying out their duties and functions through the addition of new articles in the judicial power law which accommodate the principle of Ultra Qui Judicatur with the aim of justice.

When the public prosecutor submits the case file to the Court for trial not only to fulfill his authority to prosecute the accused, but in a broader context the prosecutor is fighting for justice in the

hope that the desired justice will be created from the suitability between the prosecutor's charges and the evidence being assessed. in court proceedings by the judge. According to the authors, this conformity is a legal fact.

One of the discussions on the concept of independence of judicial power is the issue of the freedom of judges as constitutionally affirmed by the State of Indonesia as a constitutional state. As an independent executor of judicial power, the position of a judge as an official of the state judiciary who is authorized to exercise judicial power is very important in upholding law and justice. The judge here is interpreted as a state judicial official who is authorized by law to try.

Pontang Moerad, BM said that an independent judicial power with the freedom of judges is a form of freedom of judicial power. Independent judicial power implies that there is judicial power that is free from the interference of other institutional powers and freedom from coercion, directives or recommendations coming from extra-judicial, except as permitted by law. The implementation of an independent judicial power is reflected in the freedom of judges in examining and adjudicating cases.<sup>23</sup>

The judge's decision that reflects justice becomes the cloak of the judges, justice is placed in the highest position, to achieve this justice a judge must build value. Value is a value to the judge himself, a person's label to the judge himself. So, the value is not the price that is set for a judge, but the value here that is given to the judge by law. The value or value of a judge becomes valuable if it is carried out by building a good name, building the judge's self-image. Public trust in the world of justice is not easy to achieve, there is no quick way to build the values of a judge, the only way to build values is the right way, so the value of a judge will quickly rise.

The value of a judge is determined when the decision is read out, if the decision is well received by the parties, then the value of the judge will automatically increase, meaning that the parties and society in general will perceive that the judge's decision is beneficial to all parties. By the judge's actions deciding cases that deviate from the public prosecutor's indictments, according to the authors, this action will undermine the value of the judge. The judge's choice to convict the accused is an article similar to the crime being charged by the public prosecutor, (3) In the public interest, (4) Avoiding arbitrary drafting of indictments.

The judge's decision that reflects justice becomes the cloak of the judges, justice is placed in the highest position, to achieve this justice a judge must build value. Value is a value to the judge himself, a person's label to the judge himself. So, the value is not the price that is set for a judge, but the value here that is given to the judge by law. The value or value of a judge becomes valuable if it is carried out by building a good name, building the judge's self-image. Public trust in the world of justice is not easy to achieve, there is no quick way to build the values of a judge, the only way to build values is the right way, so the value of a judge will quickly rise.

The value of a judge is determined when the decision is read out, if the decision is well received by the parties, then the value of the judge will automatically increase, meaning that the parties and society in general will perceive that the judge's decision is beneficial to all parties. By the judge's action in deciding cases that deviate from the public prosecutor's indictment, according to the author, this action will pierce the value of the judge, Law Number 48 of 2009 concerning judicial power, one of the chapters governing the principle of administering judicial power in Article 5 paragraph (1) states that as a judge it is obligatory to explore, follow, understand legal values and a sense of justice that lives in society.

Based on these provisions, the author is of the opinion that the principle of *Ultra Qui Judicatus* is the crystallization of the values of truth and justice which is manifested through decisions that are not

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<sup>23</sup> H. Pontang Moerad, BM, Formation of Law through Court Decisions in Perkura Piduna, first printing, Alumni publisher, Bandung, 2005, p124.

based on the article being charged. Judges in deciding cases of deviating from charges are based on legal values and a sense of justice that lives in society. The general explanation for deviating from the indictment is based on the facts of the trial, the elements of the crime were proven to still be in one group/type of crime.

## **Conclusion**

Setting the principle of Ultra Qui Judicatus in the future will be focused on revising the Judicial Powers Act, especially completing the legal norms on the provisions of the Judicial Powers Act, especially on the principle of administering judicial power, as well as revising the Criminal Procedure Code by adding provisions regarding the type of decision which states that the defendant is still blamed based on the facts of the trial as well as similar/group crimes even though the proven article was not included in the prosecutor's indictment. Criminal law reform is currently very appropriate to do, based on the principle of prioritizing justice rather than legal certainty, the Ultra Qui Judicatus principle is specifically used by judges in criminal cases.

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