



BALTIC JOURNAL OF LAW & POLITICS

A Journal of Vytutas Magnus University
VOLUME 15, NUMBER 2 (2022)
ISSN 2029-0454



Cite: *Baltic Journal of Law & Politics* 15:2 (2022): 1925-1934
DOI: 10.2478/bjlp-2022-001121

DETERMINATION OF THE ULTRA QUI JUDICAT ON JUDGE FREEDOM CONSTRUCTION

Suwitno Y. Imran", (Doctoral candidate)

Fakultas Hukum Universitas Brawijaya, Malang, Indonesia

E-mail: suwitno@ung.ac.id

Sudarsono (Promotor Team)

Email: sudarsono@ub.ac.id

Nyoman Nurjaya (Promotor Team)

Fakultas Hukum Universitas Brawijaya, Malang, Indonesia

Email: inyoman@ub.ac.id

Nurini Aprilianda, (Promotor Team)

Fakultas Hukum Universitas Brawijaya, Malang, Indonesia

E-mail: nurini.aprilianda@ub.ac.id

Received: July 05, 2022; reviews: 2; accepted: October 10, 2022.

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 Judicat* 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) KUHP 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 Judicat* principle is specifically used by judges in criminal cases

Keywords

Principle, *Ultra Qui Judicat*, Judge Freedom

I. Introduction

Because the law is never regarded comprehensive, truth cannot be equated with a rule of law. The purpose of a judge's ruling is justice, 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 essence of justice is the execution of the trial as affirmed by the panel of judges evaluating cases, It indicates that justice is a manifestation of divine principles that each judge owns and guides.

There is indeed a legal vacuum in the administration of judicial power, particularly judges' authority in criminal proceedings. Judges are expected to uphold the rule of law and justice, Enforcing the law is synonymous with enforcing all material and formal rules and regulations. Substantially, courts are barred from judging matters that are not part of the Public Prosecutor's Indictment.¹

There are deviations made by the judge when making a judgement in some judicial decisions, The judge disregards the provisions of Article 6 paragraph (2) of Law No. 48 of 2009 concerning Judicial Power as the foundation for judges to resolve criminal cases. Among the judge's rulings that differ from the prosecutor's indictment are:

Verdict Description	Public Prosecutor's Indictment	Judge's Verdict
Verdict in Criminal Case No. 09/Pid/SUS/2011/PN.MGL, namely criminal acts of domestic violence	Article 44 paragraph (1) of Law Number 23 of 2004, concerning the Elimination of Domestic Violence	Article 44 paragraph (4) of the legislation Number 23 of 2004, concerning the Elimination of Domestic Violence
Verdict in Case Number 17/PID.SUS/TPK/2014/PN.JKT.PST, namely Corruption Crimes	Article 12 letter c of the Law of the Republic of Indonesia Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by the Law of the Republic of Indonesia	The judge's Verdict uses Article 6 paragraph (1) lettera and Article 13 of the Law of the Republic of Indonesia Number 20 of 2001 concerning

Taking into consideration the verdicts above, attempts to establish the ultra qui judicat principle as the expression of the decision-making freedom enjoyed by judges are progressively influencing the faces of judges' decisions today. The purpose of this study is to define and identify the position of the ultra qui judicat principle in judge judgments in the criminal justice system, as well as to rebuild present judicial power.

II. The Meaning Of Judge Freedom

In addition to statutory regulations, justice based on divine values must be upheld. Towards that end, awareness of material law, formal law, and non-legal

¹ Article 6 (2) of Law No. 48 of 2009 Concerning Judicial Power

issues has a significant influence on individual judges when judging cases. In addition to defining the idea used, the concept reference as a standing reference is critical. Mastery of these ideas will result in judgments that are both accurate and fair, as well as fair and responsible (Knapp & Jongerden, 2020).

Since judges are the only source of proceedings, every judge must be able to learn and comprehend legal sources, particularly those that clearly regulate criminal procedural law. The procedural legislation does not only contain regulations about prosecuting tactics, but it also serves as a guide for judges in carrying out trials in order to achieve justice based on evidence, trial facts, and the panel of judges' convictions. The judge's understanding of procedural law reflects the judge's capacity to interpret each source of law (Romano, 2020).

The competence of judges to qualify, constate, and conclude each case as specified in their judgment suggests that the judge can appropriately resolve issues in court. As a result, the parties in the case are safeguarded against arbitrary acts in preserving the rule of law and justice (Yesiltas, 2021).²

As the Supreme Court's highest institution in exercising judicial power, it has determined that the judge's decision should take into account all aspects of a judicial, philosophical, and sociological nature, so that the justice that is desired in every judge's decision is legal justice derived from legal provisions. Positive, procedural justice provides protection based on processes that must be followed by everyone, particularly law enforcement officers who are authorized by law to execute the rule of law and justice.

III. ULTRA QUI JUDICAT PRINCIPLE

When a judge is presented with a circumstance in which positive law does not govern a situation and the judge makes a judgment whose action is not clearly regulated in the legislation, the legal principle, of course, becomes the judge's foundation in making his decision. Of the 3 (three) decisions described above, the judge decided the criminal case by imposing a sentence on the defendant with a criminal article that was not used by the prosecutor in the preparation of the indictment. According to the author, the judge's considerations in the judgment highlight the justice component, whereas the author emphasizes the interpretation of Article 5 paragraph (1) of the law on judicial power from a legal standpoint.

A deviation or diverging from the indictment is defined as a difference between the article charged by the prosecution and the article determined by the judge by the author. At the most basic level, the judge's action is known as the **Ultra Qui Judicat principle, which is an action by a judge determining a case with justice as a purpose to diverge from the public prosecutor's indictment based on the facts of the trial.** This principle has specialties, among others:

- a. This principle is devoted to judges in deciding criminal cases;

² Bagir Manan, *Menjadi Hakim yang Baik*, jurnal Varia Peradilan No. 255 February 2007

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

The concept of *Ultra Qui Judicat* states that, in the sake of justice, the judge may diverge from the indictment presented by the public prosecutor. The process begins when the judge assesses each 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 immediately increase the judge's confidence to take deviant actions from the prosecutor's indictment to fulfill the demands of justice the judge decides the case.

As a representation of a legal state, law enforcement must be able to safeguard and carry out a law enforcement process that is fair, has legal clarity, and benefits the parties and society in general. Judges, as law enforcers, have advantages that other law enforcers do not have in carrying out their responsibilities and authority; the privilege of a judge rests in the decision to be handed down to the defendant.

Justice as a robe worn by judges in resolving cases cannot be separated from a value or meaning of the concept where Indonesia is a nation based on law, the definition of a state based on law being the use of laws and regulations as the foundation for carrying out law enforcement. The legislation on judicial authority arose in response to the task of establishing a clean and authoritative judiciary in order to properly administer justice in order to protect law and justice based on Pancasila and the 1945 Constitution.

- a. Reconstruction of the *ultra qui judicat* principle in the criminal justice system

IV. Actualization of Pancasila Values in the Ultra Qui Judicat Decision

Law No. 12 of 2011 Concerning the Establishment of Regulations has designated Pancasila as the source of legal source. The state is obligated to safeguard all faiths whose presence is acknowledged in the administration of government, and the state is not permitted to meddle in matters of faith (belief) of any religion.

The Precepts of Fair and Civilized Humanity, means respecting humans as virtuous beings who have the potential for thought, taste, intention, and creativity. Fairness implies that judgments and actions performed by government authorities or law enforcement are based on objective principles rather than subjective, arbitrary, or authoritarian standards. Civilized means cultured, polite, virtuous / moral.

Bismar Siregar³ contends that while considering a case, judges make justice the major purpose of the current law, and that in order to reach this goal, the judge's eyes, heart, and ears must be utilized to touch and examine any changes or requests societal justice. According to Bismar Siregar, the author believes that the judge's judgment that differs from the prosecutor's indictment may be

³ Bismar Siregar, **Hukum Hakim dan Keadilan Tuhan**, Gema Insani Press, Jakarta, 1995, p. 35

determined that justice is the purpose of the decision based on the choices studied by the author.

This justice, who always appears when people come to court, noted that community expectations for a case that is already in the trial process are for the purpose of justice. Based on this, Bismar Siregar's opinion is in line with the essence of the *Ultra Qui Judicat* principle. The author interprets the judge's decision to diverge from the public prosecutor's indictment as an endeavor by the judge to commit himself to justice if the law/law consciously/deliberately denies such justice.

The principle of *ultra qui judicat* as the basis for judges to devote themselves to justice. As a result, taking acts that diverge from the rules of the Criminal Procedure Code and the legislation on judicial authority, which limits the judge's activities, requires the bravery of experts/law enforcers. The judge's action to deviate from the charge is part of the judge's freedom. True freedom is freedom that intersects with attachment to norms, so that norms are not essentially a barrier to freedom, but emphasize the meaning of freedom which has more ethical value.⁴ Deviating from the indictment stresses the notion of freedom, which has ethical worth since the judge's conduct gives rise to a choice that may be recognized by the society as a decision that respects the principle of justice, and the judge decides the case.

The judge's decision must be based on the indictment, that is the will of the legal norm in the provisions of Article 6 of the law on judicial power. The article is understood as a limitation on judges making judgements outside of the scope of the article charged. By reading that the principles provided in Article 6 are not an impediment to judges' ability to deviate from the prosecutor's indictment because justice is the primary purpose. Freedom is a very valuable value possessed by judges to achieve the objectives of the law.

With the Pancasila legal system, Indonesia has been able to keep the court as a location where parties or the community may struggle for justice. In relation to reforming the national legal system, several important related strategies are:

Establish principles in the formation of laws that guarantee the unity of the national legal system. These principles inspire or become the essence or spirit of statutory regulation creation. Of course, fairness is a universal fundamental value, but there are other principles that must be the foundation for developing rules and regulations, such as protection, the archipelago, unity, kinship, and togetherness, which is the Indonesian nation's riches.

Establish or acknowledge legal heterogeneity within a single national legal entity as reflected in customary law and local wisdom that 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. Legal culture is a factor of the passage of the law by good because the legal culture views the law more from the standpoint of the individual or entity that operates it.⁵ This also

⁴ K. Bertens, **Etika**, Gramedia Pustaka Utama, Jakarta, 2000, p. 102, 104

⁵ Muhtar, M. H. (2019). **Model Politik Hukum Pemberantasan Korupsi Di Indonesia Dalam Rangka Harmonisasi Lembaga Penegak Hukum**. *Jambura Law Review*, 1(1), 68-93.

demonstrates that legislation, as a rule, must be based or united and even stem from societal principles. Even the law should be a reflection of the values that apply in society. Good law is law that is in accordance with the living law.

Furthermore, it is said that these values cannot be separated from the attitudes and traits that people who are members of the building community should have. The relevance of values as living laws is also consistent with Carls Von Savigny's legal idea, according to which law is not created but evolves and develops with the society. Habits or values that exist in society can be incorporated into current positive legislation by taking many crucial factors into account, namely: honesty, efficiency, punctuality, orderliness, diligence, frugality, rational in thought and decision making, ability to postpone future consumption (perspective).

In the context of structuring the national legal system, it is necessary to consider not only local wisdom, but also conventions or global arrangements that have a significant influence and position in structuring the national legal system, including strengthening the concept of human rights protection in various laws and regulations that have been enacted.

The significance of planning the development of national law, as outlined in the National Legislation Program, in order to establish a bill that is consistent with the substantive needs of development in other sectors, so that the law truly contributes to the development of the economic, political, and social sectors.

V. The Construction Of The Principle Of The Freedom Of Judges In The Criminal Justice System

The form of reconstruction is to update the judicial authority exercised by district court judges in criminal cases, as specified in the terms of Law No. 48 of 2009 Concerning Judicial Powers. Article 6 paragraph (2) indicates that no one may be condemned to a crime unless the court is persuaded, based on legal evidence, that a person who is regarded to be accountable committed the act for which he is charged. The article's description is understood as a clause that prohibits courts from imposing offenses that are not founded on legitimate evidence, trial facts, or the judge's conviction.

Furthermore, Article 50 paragraph (1) of Law Number 48 of 2009 Concerning Judicial Power says that, in addition to the reasons and justification for the judgment, judges are obligated to specify specific pieces of law pertaining to the issue being handled. In addition, it contains other legal sources that are used as the basis for adjudicating.⁶ This indicates that this article is read as a requirement requiring the judge's ruling to include specific legislative provisions. Various court rulings that depart from the public prosecutor's indictment demonstrate that the judge is free to make his decision based on credible evidence, trial circumstances, and the judge's conviction.

Based on the provisions of Article 6 paragraph (2) and Article 50 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power, and taking into account the

⁶ Article 50 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power

development of criminal law, particularly within the scope of the court where the judge has the authority to decide cases where the judge's decision deviates from the indictment stated based on the *Ultra Qui Judicat* principle, construction in the form of legal norms is required as a guide or basis for judges.

The use of the *Ultra Qui Judicat* principle as a supplement to existing legal principles in the construction of the principle of judicial freedom guaranteed by the law on judicial power is consistent with the mandate of the provisions as stipulated in Article 24 of the 1945 Constitution of the Republic of Indonesia, which states that the Power of Attorney The judiciary is an autonomous power that administers justice in order to protect the rule of law and justice. The reasons taken into consideration are:

The philosophical reason is that the origin of the judge's authority to decide criminal cases is obtained through the attribution process of Article 24 of the Republic of Indonesia's 1945 Constitution, so the existence of judges as law enforcers is original and is the first apparatus to receive attribution, in addition to ensuring the principle of certainty. law and guarantee that justice is served.

Theoretical explanation is that the consideration of drafting Law Number 48 of 2009 about Judicial Power does not completely address Judicial Power as an autonomous power to administer justice in order to maintain law and justice. This reason is very strategic by using the *Ultra Qui Judicat* principle as part of the freedom of judges to decide cases. The *Ultra Qui Judicat* principle's *sui Generis* stance is distinguished by the fact that it is employed by judges, particularly in criminal cases, based on trial facts, and stresses the justice of judges in determining cases.

The establishment of a new paragraph in Article 6 of Law Number 48 of 2009 about Judicial Power that accommodates decisions that are not based on the public prosecutor's indictment as part of the *Ultra Qui Judicat* concept as part of the independence of judges in the criminal justice system.

VI. Regulation of the Ultra Qui Judicat Principle in the Draft Criminal Procedure Code

According to the author, the present criminal law reform is highly suitable, based on the declaration that the execution of criminal law is founded on the legality principle as a material and formal foundation. In the Draft Criminal Procedure Code, the discussion of the criminal system is based on one of the principles, namely the idea of prioritizing / prioritizing justice over legal certainty. According to the author, this principle is very appropriate for judges in the context of imposing criminal sanctions. In judging cases, justice is a judge's robe; by valuing justice, the judge has adopted ideals for justice based on the ALMIGHTY God.

Starting from this basic idea, in the criminal system regulated in the Draft Criminal Procedure Code concept, there are provisions that are not regulated in the current Criminal Procedure Code, namely the responsibility of the judge for the decision to punish the defendant even though there is a reason for eliminating the

crime, if the judge considers the defendant to be blamed for the occurrence of the circumstances that became the reason the abolition of the crime against the defendant, known as the *culpa in causa* principle or the *actio libera in causa* principle. This concept, according to Moeljatno, is defined as "anyone is obliged to act in defense because there is an assault or threat of attack at that moment which is against the law against himself or others against his own dignity or property or property of himself or others".⁷

Apart from the absence of the *culpa in causa* or *actio libera in causa* principles, the author believes that the principle of prioritizing justice over legal certainty in the Draft Criminal Procedure Code will create space for the *ultra qui judicat* principle to be included in the draft Criminal Procedure Code. The author proposes an idea for balancing the victim-oriented justice value represented by the public prosecutor through his indictment, the perpetrator-oriented justice value, and the judge-oriented justice value by referring to the basic idea of the criminal system, so these two principles should be included in the formulation's discussion. upcoming Criminal Procedure Code The judge is the ultimate arbiter of this *ultra qui judicat* premise. The author believes that the affirmation of the Draft Criminal Procedure Code, which states firmly prioritizing justice over legal certainty, will strengthen the judges' authority to give birth to new types of punishment, namely decisions that deviate from the prosecutor's indictment, and strengthen the authority of judges as regulated in the Judicial Powers Act, which states that trials are carried out for justice based on belief in the one and only God.

Ontologically, the value contained in the *ultra qui judicat* principle is the value of justice for judges in deciding cases, the value of justice is closely related to the profession of a judge. A quality court decision in a criminal case is one that is founded on legal considerations based on the facts presented in court, the law, and the judge's belief, and is not influenced by numerous external and internal interventions, so that it can be professionally accounted for to the public (the truth and justice). A good judge's decision should reflect a sense of justice, truth and can bring benefits to the general public, nation and state. In addition, judges have future views and insights in understanding legal values that live in society, so that their decisions do not lag behind the times.

VII. Ultra Qui Judicat Basic Arrangement in the Concept of Judicial Power

To strengthen the position of judges as justice enforcers in criminal cases, new legal norms as a guide for judges in carrying out their duties and functions must be formulated through the addition of a new article in the judicial power law that accommodates the *Ultra Qui Judicat* principle with the goal of justice.

When the public prosecutor delegates the case file to the Court for trial, it is not only to fulfill the prosecutor's authority to prosecute the defendant, but also

⁷ Moeljatno, **Azas-azas Hukum Pidana, cet.2**, Bina Aksara, Jakarta, 1984, p. 144

to fight for justice in the hope that the desired justice is created by the compatibility between the prosecutor's indictment and the evidence that is judged. The author's conformance is stated to be a legal fact.

The question of the freedom of judges as constitutionally recognized by the State of Indonesia as a state of law is one of the discussions concerning the idea of judicial independence. The status of judges as state judicial authorities with the capacity to execute judicial power, as executors of judicial independence, is critical in protecting law and justice. Judges here are defined as state court officials who are authorized by law to try.

According to Pontang Moerad, BM, an independent judiciary with judge independence is a symbol of judicial authority freedom. Independent judicial authority indicates that there is judicial power that is free from interference from other institutional powers, as well as freedom from coercion, instructions, or suggestions that come from extra-judicial sources, unless otherwise authorized by law. The independence of judges in investigating and adjudicating matters reflects the establishment of an independent judicial power.⁸

Judges' decisions that embody justice become their robes; justice is elevated to the highest position; and in order to attain justice, a judge must develop ideals. The label of persons to the judge is a value to the judge himself. So the value is not the amount established for a judge, but rather the value assigned to the judge by law. A judge's value or worth increases if he or she builds a good name and improves his or her self-image. Public trust in the judiciary is difficult to create; there is no simple solution to increase a judge's worth. There is just one way to develop value, thus a judge's value will swiftly grow if done correctly.

The value of a judge is determined when the judgement is read; if the decision is favorably accepted by the parties, the value of the judge increases, implying that the parties and society in general believe the court's decision is advantageous to all parties. With the judge's action in deciding cases that deviate from the indictment of the public prosecutor, according to the author, the action will pierce the value or value of the judge, the author's reasons that the legal considerations in the decision deviate from the prosecutor's indictment are (1) For the sake of justice the judge decides the case, (2) That the article chosen by the judge to convict the defendant is an article similar to the criminal act indicted by the public prosecutor, (3) for the public interest, (4) avoiding the preparation of arbitrary indictments.

Based on the foregoing analysis, Law Number 48 of 2009 respecting judicial power has to be updated in order to ensure and enhance the stance of justice that has been the standard of judges in determining cases thus far, as well as to provide judges with the fundamental ability to enforce justice. The formulation of legal norms offered by the author to regulators is to revise it by adding one paragraph in Article 5 which states:

⁸ H. Pontang Moerad, BM, **Pembentukan Hukum Melalui Putusan Pengadilan Dalam Perkura Piduna**, first edition, penerbit Alumni, Bandung, 2005, p.124

“Judges and constitutional judges are obliged to decide cases that deviate from charges/demands for the sake of legal values and a sense of justice that live in society”.

Based on the phrase legal norms, in the explanation of Law Number 48 of 2009 concerning judicial power in Article 5, it is: Deviating from the indictment, namely a court decision in a criminal case based on the facts of the trial, demonstrating that the article accused by the public prosecutor was not proven, but based on valid evidence it was proven to be a criminal act regulated in the article not charged by the public prosecutor and deviating from the claim, namely court decisions in civil cases.

VIII. Conclusion

In the future, the *Ultra Qui Judicat* principle will be regulated by revising the Law on Judicial Power, specifically incorporating new legal norms in the provisions of Article 5 of the Law on Judicial Power, as well as perfecting the types of punishment as regulated in Article 191 paragraph (1), (2), and (3) of the Criminal Procedure Code, and providing confirmation on the general explanation of the Criminal Procedure Code. Criminal law reform is currently very appropriate to be carried out, based on the principle of prioritizing / prioritizing justice over legal certainty, the *Ultra Qui Judicat* principle is specifically used by judges in criminal cases.

References

- Knapp, M., & Jongerden, J. (2020). Peace committees, platforms and the political ordering of society: Doing justice in the Federation of Northern and Eastern Syria (NES). *Kurdish Studies*, 8(2), 297-312. <https://doi.org/10.33182/ks.v8i2.534>
- Romano, D. (2020). Sub-state actors and foreign policy risk-taking: The Kurdistan Regional Government of Iraq. *Kurdish Studies*, 8(2), 339-369. <https://doi.org/10.33182/ks.v8i2.533>
- Yesiltas, O. (2021). Rethinking State-Non-state Alliances: A Theoretical Analysis of the US Kurdish Relationship. *Kurdish Studies*, 9(2), 189-204. <https://doi.org/10.33182/ks.v9i2.589>