



## DETERMINATION OF THE JUDGE'S FREEDOM IN INDONESIA ON THE STRAF MINIMUM RULES

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### Abstract:

Limiting the freedom of judges in expressing legal logic in each case will, in the end, only hinder the process of seeking actual values of justice. This freedom does not mean being free without being accompanied by legal responsibilities. What is the philosophical aspect of the principle of freedom of judges? Moreover, what is the ideal model for applying the principle of freedom of judges in Indonesia in the minimum rules straf system? The normative research method used in this article uses a statutory, historical and conceptual approach and primary and secondary legal materials that are presented descriptively. The conclusion obtained confirms that the aspect of judges' freedom philosophically in principle begins with the application of the division of powers, namely, legislative, executive and judicial, which is the philosophical basis that the judicial branch of power is an independent branch of power and judges have the freedom to make interpretations, legal findings based on the conscience and conviction of the judge. The ideal model for implementing the principle of judge freedom can be realized through the balance theory, namely that judges in deciding cases are not based on the context of laws and regulations. They must consider aspects of the judge's belief even though the decision is contrary to the law, but as long as it is related to the judge's view, then it can be justified based on the judge's freedom.

**Keywords:** Criminal Law, Freedom of Judges, Straf Minimum Rules

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## INTRODUCTION

In the dynamics of everyday life, conflicts often occur in society. The parties involved are frequently unable to resolve conflicts. It is frequently necessary for a specific institution to intervene to provide an objective resolution to the conflict, the solution of which is, of course, based on objectively applicable rules. An institution usually carries out the judiciary function, which is authorized to examine, assess and make decisions on conflicts. This authority is known as judicial power, which in practice is carried out by judges.

In examining, adjudicating and deciding a case, a judge must use written law as the basis for his decision. If the written law is not sufficient, it is not appropriate to the problem in a case, then the judge seeks and finds his law from other legal sources such as jurisprudence, doctrine, treaties, customs or unwritten law. Law No. 48 of 2009 concerning Judicial Power (Law on Judicial Power), Article 10 paragraph (1) stipulates that "*The court is prohibited from refusing to examine, try, decide on a case that is submitted with no or unclear legal arguments, but is obliged to examine and try it*". The provisions of this article mean that the judge, as the main organ as the executor of judicial power,



is obligatory for the judge to find the law in a case even though the legal provisions are absent or unclear. Therefore, the interpretation and the principle of freedom of judges are two things that cannot be separated.

Court decisions, as well as other decisions made in applying the law, do not depend solely on written rules and regulations but, first and foremost, on the interpretation of the text and the independence of the judge based on the source of the performance used. It often leads to different understandings of statutory provisions, as evidenced by court decisions in different cases against the same provision. Meanwhile, one of the visible values of the law is Predictability which increases the probability that the law will fulfill its function and increases legal security.

One way to increase uniformity in deciding a case is to use a uniform interpretation method. The means to increase uniformity is by providing homogeneous interpretive directions in the form of applicable legal provisions. The juridical and philosophical basis of judicial power as an independent institution and free from all forms of outside interference, as required in Article 24 of the 1945 Constitution, is that judicial power is the power of an independent state to administer the judiciary to uphold law and justice based on Pancasila and the 1945 Constitution, for the sake of the implementation of the constitutional state of the Republic of Indonesia.

Many decisions, decisions, and actions of judges or panel judges have received negative criticism and reactions from the public, which can reduce public confidence in the judiciary. The Supreme Court concluded that the criticism and negative reactions were caused by the lack of or weak control of the head of the court or the weak management of the supervision of the court leadership over the execution of the duties of the judges. This control's weakness is due to confusion in understanding the principle of freedom of judges, which is identified with the freedom of the judiciary.

Therefore, punishment will depend on the judge's independence in deciding considerations that combine the legal and humanitarian dimensions so that criminal law can create a humanistic conception of punishment. Judges, as a judicial subsystem, are the core actors, who functionally carry out judicial power, because they essentially have pillars as a judicial body, which are enforced by law, so that in carrying out their functions, judges are required to understand the scope of their duties and obligations, to examine, hear, decide and solve each case, with a model of mapping cases, translating them, selecting relevant regulations, interpreting, reviewing and formulating settlement formulations.

One of the problems in implementing the principle of freedom of judges is the minimum straf rules system. The minimum criminal system limits the freedom of judges in making decisions. Suppose it is linked between the principle of freedom of judges and the imposition of a crime. In that case, a judge has the principle of unrestrained power in imposing a sentence on a defendant. It is as if there is a limitation on the freedom of judges, which is carried out by state intervention against several law provisions that set the minimum rule.

Limiting the freedom of judges in expressing legal logic in each case will, in the end, only hinder the process of seeking actual values of justice. This freedom does not mean being free without being accompanied by legal responsibilities. Therefore, it is essential to understand and analyze the interpretation and meaning of judges regarding the principle of freedom of judges in imposing criminal offenses against crimes that contain particular minimum criminal threats.

## **METHODS**

This research is categorized into normative legal research types. It 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, critically analytical and philosophical views and ends



with conclusions that aim to produce new findings as answers to the main problems that have been determined. It will also be analyzed using a descriptive-analytical method by describing the applicable laws and regulations related to legal theory and positive law enforcement practices related to these problems.

## RESULT AND DISCUSSION

**Philosophical Aspects and Development of Freedom Principle of Judges in Indonesia.** The historical literature on the development of the freedom of judges begins with judicial power, which is rooted in political authorization. Much of this literature, however, limits itself, at least primarily, to the origins and evolution of the idea of the separation of powers institutions especially looking at the ideas of Montesquieu, John Adams, and several other legal scientists considering the contemporary historical conception of judicial power which begins with the concept of separation of powers. Similarly, there is substantial and compelling literature on the history, theory, and practice of popular sovereignty in early America. Although much of this work touches on the separation of powers, there has been less sustained attention to the substantive role played by the conception of institutional structure in bringing these basic political premises to life.

The separation of powers includes different institutional functions and the structured division of sovereign prerogatives within and outside government institutions. With this in mind, we should read Jean Bodin, Locke, and Wilson with Aristotle, the English Civil War theorists, Blackstone, and the Federalists. It became clear that the institutional separation of judicial powers provided the necessary construction to assert judicial power. These intellectual traditions ensured a constitutional commitment to the rule of law.

The discussion of Judicial Power begins when Madison lauds the "effectiveness" of the British judiciary in 1785, reflecting the prevailing American belief that the independence Parliament gained in the Great Revolution has since been undermined by patronage modes and influence allows the King to control Parliament. Parliament cannot fulfill its duties as the embodiment of legislative supremacy because too many members are "extensions of the royal family". They are willing to become "tools" of the ruling King. Madison's concern with the judiciary's role in America's republican constitution was also fueled by her perception of the abuse of legislative power. However, the main problem lies not in the corruption of America's legislature but in the court's decision-making that is very much in favor of the kingdom.

Madison himself development of providing progressive thinking about the importance of judicial power. Madison argues that the independence of national courts is necessary for "cases in which foreigners or residents of other states may be parties". However, perhaps all else needed is for state judges to swear "faithfulness" to the "general" constitution based on judicial power in the constitutional arrangements. His thinking developed in the weeks that followed. The Virginia plan created "one or more supreme courts, and lower courts to be elected by the National Legislature." Judges will enjoy a term so long as they are well behaved and follow the rules set out in the Parliamentary Settlement Act of 1701. Judges will not be subject to legislative changes. The broad jurisdiction of national courts will include "questions that may involve aspects of transparency, independence of the courts and judicial power", a broad delegation of powers that provides for the freedom of judges to determine sentences based on the judge's interpretation and conviction.

The concept of judicial freedom is understood that the freedom of the judiciary (independent judiciary) must be balanced with judicial accountability. This concept gave birth to judicial accountability, including integrity and transparency, built on the principle of harmonization between legal and social responsibility.





Some practitioners in legal thought, such as the legendary Supreme Court justice Oliver Wendell Holmes, once did the injustices that would arise from the simple application of these general formulas or texts. Then came the famous Holmes Dictum, "The life of the law has not been logic: it has been experienced".

Many things are not contained in written texts, such as the atmosphere and needs that exist at a time, because the morals that the community believes at a particular time cannot be recorded in the text. According to Holmes, the law is also sediment from the historical experience of a nation for centuries, so the law should not be built using a syllogism. "It cannot be dealt with as if it contained only the axioms and colors of a mathematics book".

Based on this, it can be said that the philosophy of the principle of freedom of judges lies in the independence of judges in assessing, interpreting and deciding a case without tendencies, intervention or political influence from other branches of power.

**The Ideal Model for Implementing Freedom Principle of Judges in Indonesia in the Straf Minimum Rules System.** Associated with Judicial Power which is known in the 1945 Constitution of the Republic of Indonesia in Article 24 paragraph (1) that judicial power is an independent power to administer justice to uphold law and justice. The definition of Judicial Power, also stated in Article 1 point 1, Judicial Power is the power of an independent state to administer justice to enforce law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia for the sake of the implementation of the rule of law. From the above understanding, it has the basis that judicial power, even a person who serves as a judge, has an independent nature which means free from interference from the state power or even other extra-judicial.

The freedom of judicial power is influenced by the system of government, politics, economy and so on. Because the judge's task is to enforce law and justice based on Pancasila by interpreting the law and looking for basics and principles that have a basis through the case at hand, the judge's decision will reflect the justice of the Indonesian nation and people. Therefore, the sense of justice for the state, the country, and the people serves as the upper limit of judicial freedom. Pancasila and the interests of the Indonesian state and nation must always be taken into consideration when making decisions.

Based on Article 183 of the Criminal Code Procedure, a judge must decide based on at least two pieces of evidence and the judge's conviction. The judge's belief will arise from the facts that existed at the time of the trial. The evidence presented at the trial will be related to whether it is related and whether the series of facts are relevant to the existing law. If not, the judge should be obliged to find the law, interpret, explore, follow, and understand the legal values and sense of justice that live in a society under Article 5 of the law on judicial power.

Article 5 and Article 10 paragraph (1) of the law on judicial power and the existence of Article 183 of the Criminal Code Procedure provide space or freedom for judges to find laws that should be used in resolving cases that judges are trying. The judge's freedom is not absolute and is limited to a few things. Legal discovery is often interpreted as the formation of law by judges or legal officers who are tasked to implement the law on concrete events.

The dispute resolution process through the judiciary can take place impartially and objectively, so the process must be carried out through procedures that guarantee impartiality and objectivity and are standardized in a set of legal principles called Procedural Law. In a state of law, the rules of procedural law are formulated in writing in statutory regulations, which must be strictly enforced. Deviations from procedural rules should be seen as collusion against the law. Therefore, if a situation forces a deviation for the sake of justice, then this deviation must be accounted for firmly in the consideration (motivation) of the judge's decision in question so that it can be accepted rationally and justified by various parties.



A good judge can make the court indeed the last bastion of justice. Then, in addition to mastering the applicable legal system, he must also have faith in God, good intelligence, wisdom, high morals, maturity, mental maturity, and be polite and patient. This ethical attitude must be reflected in daily behavior so that judges can maintain the dignity and authority of the judiciary. Appointed judges must also have five years of experience as a legal professional (advocate, legal consultant, legal aid services member, internal advocate). While carrying out the legal profession, he demonstrates an ethical attitude, as stated in a letter of recommendation issued by the professional association member.

The judge's interpretation of the principle of freedom of judges in imposing criminal penalties on criminal acts that contain particular minimum threats is strongly influenced by the paradigm of judges in understanding law from the ontological, axiological, and epistemological dimensions. There are differing views among judges in interpreting the principle of freedom of judges when imposing criminal offenses against the specific minimum criminal threat, some are of the view that judges are prohibited and may not deviate from the minimum criminal provisions, but there are also those who are of the view that judges do not bound by the provisions of a particular minimum criminal threat because the highest reference used as a benchmark by the judge is the value of justice.

Around 40 (forty) laws and regulations that contain the threat of special minimum criminal sanctions, only 7 (seven) categories of types of criminal acts that have been deviated in the imposition of punishment are in the form of imprisonment and fines under the particular minimum threat. The 7 (seven) types of criminal acts are Corruption Crimes, Narcotics Crimes, Forest Destruction Crimes, Child Protection Crimes, Human Rights Violations, Terrorism Crimes and Environmental Crimes. Whereas in the imposition of punishment in the form of imprisonment and fines under the particular minimum threat, the parameters used by judges differ and depend on the type of crime.

The judge's interpretation is divided into two significant currents of view. First, most judges interpret that the principle of freedom of judges in imposing criminal offenses against criminal acts with a particular minimum threat must still be guided by the special minimum criminal provisions and must not deviate from these guidelines. Second, some judges interpret the principle of freedom of judges in imposing criminal offenses on criminal acts with a particular minimum threat should not be read and interpreted rigidly. Thus, the sentencing decision of an accused judge must be based on the weight of his guilt and is not bound by special minimum criminal provisions because the judge's highest reference is the value of justice.

According to Mackenzie, several theories or approaches can be used by judges in considering the imposition of a decision in a case, namely as follows:

- a. Balance theory, namely the balance between the conditions determined by the law and the interests of the parties involved or related to the case.
- b. Art Approach and Intuition Theory. What is meant by the theory of the Art and Intuition Approach is that the judge's decision is at the discretion or authority of the judge. As a discretion, in making a decision, the judge will adjust to the circumstances and reasonable punishment for each perpetrator of a crime.
- c. Experience Approach Theory. The experience of a judge can help him deal with the cases he faces daily.
- d. Scientific Approach Theory. The starting point of this knowledge is that the process of imposing criminal penalties must be carried out systematically and carefully, especially concerning previous decisions, to ensure the consistency of judges' decisions.



- e. Ratio Decidendi Theory. This theory is based on a fundamental philosophical foundation that considers all aspects related to the subject matter of the disputed case and then looks for laws and regulations that are relevant to the subject matter of the disputed case as the legal basis for making decisions and judges' considerations must be based on a clear motivation to enforce the law and provide justice for litigants.
- f. Theory of Wisdom. This theoretical aspect emphasizes that the government, community, family, and parents are responsible for guiding, nurturing, educating, and protecting the accused so that they can become helpful human beings for their families, communities and nations in the future.

Based on the opinion above, it can be determined that the judge is a position that represents God to uphold justice based on the principles of applicable law and decide cases with the principles of wisdom and knowledge he has.

In this regard, the ideal model used by judges in their freedom to decide straf minimum rules cases is to use the Balance Theory approach, namely a balance between the conditions determined by the law and the interests of the parties involved or related to the case. Decide cases using the law, but judges have the freedom to interpret, make legal discoveries and even have the freedom to set aside the law if it is contrary to the conscience and belief of the judge. In addition, there is a need for philosophical reconstruction of the law, which explicitly regulates the minimum straf rules by considering the freedom of judges in the constitution, the Law on Judicial Power and the principle of freedom of judges. It minimizes implicit intervention in the judge's freedom in deciding a case.

**CONCLUSION**

Based Aspects of the freedom of judges philosophically, in principle, begins with the application of the division of powers, namely, legislative, executive and judicial, which is the philosophical basis that the judicial branch of power is an independent branch of power and judges have freedom in interpreting, finding laws based on the conscience and beliefs of judges. As for the straf minimum rules case, the ideal model for implementing the principle of judge freedom can be realized through the theory of balance, namely that judges in deciding cases are not based on the context of laws and regulations and must consider aspects of the judge's belief even though the decision is contrary to the law. However, as long as it is related to the judge's belief, it can be justified based on the judge's freedom.

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