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# The Upheaval That Happened in the Judge's Decision Returning Evidence to the Public Prosecutor for Use in Other Cases

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***Abstract.*** *The purpose of this research is toexplain the formulation regarding the return of evidence in the Criminal Procedure Code and analyze what upheavals can occur in the judge's decision to return evidence to the public prosecutor to be used in other cases if the case has not been investigated. This study uses an approach normative juridical which in this case relates to the judge's decisionreturn evidence to the public prosecutor to be used in other cases, while the case has not yet been investigated, using descriptive analytical research specifications. The data used are primary, secondary, and tertiary data which will be analyzednormative qualitative. Research problems are analyzed using the theory of legal certainty, theory of proof according to law in a negative way, and several principles of criminal law. The results of the study concluded that:upheaval that can occur in a Judge's Decision that returns evidence to the Public Prosecutor to be used in other cases even though the other case does not yet exist, namely: a. The judge did not implement the provisions in Article 46 paragraph (2) of Act No. 8 of 1981, because there is no relationship between the evidence and the Public Prosecutor for the judge's decision to return the evidence to the Public Prosecutor for use in other cases while the other case does not yet exist . b. Upheaval that could occur in delaying the implementation of the decision, because it is possible for legal action from both the defendant and the public prosecutor related to evidence. c. The Judge has intervened in the Investigation through the Judge's decision, by submitting evidence to the Public Prosecutor to be used in other cases while the other cases do not yet exist. So, a synchronization is needed between law enforcement officials regarding the implementation of the provisions of Article 46 paragraph 2 of the Criminal Procedure Code, so that legal certainty can be created.*

*Keywords: Decision; Evidence; Judge.*

## 1. Introduction

Mardjono Reksodiputro[1]states that in the implementation of criminal justice, there is a legal term that can summarize the ideals of the criminal justice. The term is "due process of law", which in Indonesian we can translate as a fair or proper legal process. A fair legal process (due process of law) must be carried out in the criminal justice system, starting from the legal process at the police, prosecutors, courts to correctional institutions, which must interpret every provision in the Criminal Procedure Code (KUHAP).

The Criminal Justice System (SPP) or known as the Criminal Justice System is essentially identical to the criminal law enforcement system (SPHP). The "law enforcement" system is basically a "power/authority system" to uphold the law. The power/authority to enforce this law can be identified with the term "judicial power". Therefore, the SPP or SPHP is essentially synonymous with the "judicial power system in the field of criminal law" (SKK-HP).[2]The criminal justice system (criminal justice system) is a system in a society to deal with crime problems.[3]It is clear that law enforcement in the Integrated Criminal Justice System involves law enforcers. Prosecutors are one of the most urgent elements in the system. Mardjono Reksodiputro also said that:

“The procedural design of the criminal justice system which is organized through the Criminal Procedure Code, this system can be divided into three stages, namely: (1) the stage before the court hearing or the pre-adjudication stage; (2) the court trial stage or the adjudication stage; and (3) the after-trial or post-adjudication stage.[4]

From the perspective of the criminal justice system, evidence plays an important role in declaring the guilt of the accused. When viewed from the vision of its location within the juridical framework, the aspect of proof is unique because it can be classified in the Criminal Procedure Code group, and when examined in depth it is also influenced by approaches from Civil Law. The evidentiary aspect has started at the investigation stage, up to the imposition of a verdict by the

[1]Mardjono Reksodiputro, Anthology of Problems in the Criminal Justice System -Fifth Book Collection, (Jakarta: Center for Justice Services and Legal Services (formerly the Institute of Criminology) University of Indonesia, 2007), h. 8.
[2]Yudi Kristiana, Towards a Progressive Prosecutor's Office Study of Investigation, Investigation and Prosecution of Criminal Acts, (Yogyakarta: LSHP-Indonesia, 2009), h. 64.
[3]Mardjono Reksodiputro, Human Rights in the Criminal Justice System – A Collection of Third Books, (Jakarta: Center for Justice Services and Legal Service (formerly the Criminology Institute) University of Indonesia, 2007), p. 84.
[4]*Ibid*.h. 17-18.

Judge, and predominantly occurs in court hearings, in the framework of the Judge discovering material truth.[5]

Efforts to determine fair decisions require sufficient, appropriate and logical legal reasoning, because the court is the laboratory of logic and has stakeholders according to the case. A judge in making a decision has the freedom that must be in accordance with the philosophy of Pancasila, the 1945 Constitution of the Republic of Indonesia, and in making decisions he is required to be accountable to God Almighty. The behavior of judges is one of the main barometers to see the success and objectivity of the law enforcement process, which is embodied in their decisions, so that they can measure the integrity of laws and regulations.[6]

Proof is a provision that limits court proceedings in an effort to seek and defend the truth both by Judges, Public Prosecutors, Defendants, and Legal Counsels. Of all these levels, the provisions and procedures as well as the assessment of evidence have been determined by law by not allowing him to freely act in his own way in assessing evidence, including the defendant not being free to defend something he considers to be true outside of the law. Therefore, the judge must be careful, conscious in assessing and considering the strength of evidence found during the trial examination, and based on the limited evidence determined according to Article 184 of the Criminal Procedure Code. In other words, proof is an issue that plays a role in the trial court examination process.[7]For the purposes of this proof, the presence of objects related to a crime is very necessary. The objects in question are commonly known as "Evidence".

Evidence is also known as confiscated objects because the evidence was obtained through a confiscation process by investigators, functioning for the purposes of evidence in investigations, prosecutions and trials. Evidence has benefits or functions and value in proving efforts. The Indonesian Criminal Procedure Code distinguishes between evidence as a basis for determining events and perpetrators, and evidence (*corpus delicti)* as supporting evidence. To limit this research, the discussion will be focused on the issue of "evidence returned to the Public Prosecutor for use in other cases but the case in question does not yet exist" which was dropped in the judge's decision.

## 2. Research Methods

In this study, researchers used a normative legal research approach. The focus point of the study is centered on the legal norms that exist in statutory

[5]Lilik Mulyadi, Criminal Law Anthology Perspective, Theoretical, and Practice, (Bandung: Alumni, 2008), h. 91-93.
[6]Bambang Poernomo, Principles of Criminal Law, (Jakarta: PT. Ghalia Indonesia, 1983), h. 27.
[7]Andi Hamzah, Indonesian Criminal Procedure Code, (Jakarta: Sinar Offset Graphic, 2008), h. 7-8.

regulations. This type of research, referring to the books of Soerjono Soekanto and Sri Mamudji, is normative legal research, which includes research on applicable laws and regulations, comparative law and legal history.[8] However, when referring to Bambang Sunggono, this type of research is classified as Doctrinal Research.[9]

## 3. Results and Discussion

The principle of the freedom of judges to make decisions to achieve justice in society, especially in criminal cases, is still interesting, because with decisions the judge determines what the law and justice are in disputes or violations of the law. If in a criminal case, of course, what is the law and justice in a criminal act submitted by the Public Prosecutor with an indictment to the Court. Thus the task of the judge in law enforcement, including criminal law, is repressive in nature, meaning that it determines the law and justice after concrete cases have occurred and in turn with their decisions the judge creates the law.

Investigation and investigation of criminal acts is a big responsibility that is carried out by an investigator. The goal is to prove a crime in court and obtain a decision that has permanent legal force. However, problems arise when the proof of the crime is not strong, and cannot form the judge's belief that a crime has occurred, which for the judge will be the basis for the sentence against the defendant.[10]

There are many things that can weaken this evidence, one of which is the evidence that is not admissible in court. There are many things that cause evidence to be unacceptable as evidence in court, the process of extracting or taking evidence is unprofessional, there is no match between the case and the evidence presented, or other things that are the fault of the investigator.

Based on the description above, in the theory of proof adopted in Indonesia, judges must have confidence and be supported by sufficient evidence so that judges can decide on a case they are handling. Accordingly, evidence is only a complement in the criminal case process to further convince the Judge in assessing the evidence submitted by the Public Prosecutor. If so, generally new evidence is neededif other evidence does not meet the minimum proof limit outlined in Article 183 of the Criminal Procedure Code.

[8]Soerjono Soekanto and Sri Mamudji, Normative Legal Research, (Jakarta: Raja Grafindo Persada, 2004), pp. 13-14.
[9]Bambang Sunggono, Legal Research Methodology, (Jakarta: PT. Raja Grafindo Persada, 2006), page 81.
[10]Republic of Indonesia, Law Number 8 of 1981 concerning Criminal Procedure Code, Article 183

The judge's decision is the crown and culmination of a case being examined and tried by the judge. Therefore, of course the judge in making a decision must pay attention to all aspects in it, starting from the need for caution, avoiding as little as possible inaccuracy, both formal and material to the technical skills to make it. If these negative things can be avoided, of course it is expected that in the judges there should be born, grow, and develop an attitude or nature of moral satisfaction if then the decision he makes can become a benchmark for the same case, or can become reference material for the public theoretical as well as legal practitioners as well as individual satisfaction if the decision is upheld and not annulled by a higher court.[11]

When a judge is about to pass a decision, he will always try to make the decision as acceptable to society as possible, at least try to make the environment of people who will be able to accept his decision as wide as possible. The judge will feel more relieved when the decision can provide reasons or considerations that are in accordance with the values of truth and justice.[12]

The process of imposing decisions by judges is a complex and difficult process, requiring training, experience, and wisdom. In the process of imposing the decision, a judge must be sure whether a defendant has committed a crime or not, or in a civil case, whether there is a legal dispute that occurred between the plaintiff and the defendant, while still guided by evidence to determine the guilt of the actions committed by a criminal actor, or to determine whether there was a violation of law committed by one of the litigation parties, namely whether the plaintiff or the defendant did it.[13]

After receiving and examining a case, the judge will then pass a decision, which is called a judge's decision, which is a statement by the judge as a state official who is authorized to do so, which is pronounced in a court session that is open to the public, which aims to end or resolve a case or a dispute between the parties, in a case, civil.[14]

As for the judge's decision in a criminal case, it can be in the form of a criminal sentence, if the actions of the perpetrator of the crime are legally and convincingly proven, a decision on acquittal from a crime is proven legally and convincingly, a decision on acquittal from a crime (vrijspraak), in cases where according to the results of an examination at trial, the guilt of the defendant is not legally and convincingly proven or in the form of a decision free from all

[11]Lilik Mulyadi, as contained in Muchsin's HAL Paper, The Role of Judge Decisions on Domestic Violence, Varia Perjudi Law Magazine, Edition No. 260 July 2006, Ikahi, Jakarta, 2007, page 25.
[12]Ahmad Rifai, Legal Findings by Judges in a Progressive Legal Perspective, Sinar Graphic, Jakarta, 2010, page 94.
[13]Ibid., p. 95.
[14]Sudikno Mertokusumo, Indonesian Civil Procedure Code, Liberty, Yogyakarta, 1998, p. 175.

lawsuits (onslaag van alle rechtsvervolging), in the event that the actions of the accused as charged are proven, but the act does not constitute a crime.

The description of the formality of a judge's decision that must be contained in a judge's decision is a formal juridical aspect that must be followed by a judge. In the formal juridical aspect, there are material juridical aspects which form the basis of legal considerations for a decision, namely Article 197 paragraph (1) letter d and letter f of the Criminal Procedure Code.

Article 197 paragraph (1) letter d states the following:

Considerations briefly arranged regarding the facts and circumstances along with the means of proof obtained from the examination at trial which became the basis for determining the defendant's guilt.

What is meant by considerations regarding facts and circumstances along with means of evidence obtained from the examination in letter d, according to the elucidation of Article 197 paragraph (1) letter d of the Criminal Procedure Code states that the facts and circumstances here are everything that existed and what was found at trial by parties in the process including Public Prosecutors, Witnesses, Experts, Defendants, Legal Counsels, and Victim Witnesses.

Based on Article 197 (1) letter f states:

Articles of laws and regulations which form the basis of punishment or action and articles of laws and regulations which become considerations for the legal basis of decisions, accompanied by aggravating and mitigating circumstances for the defendant.

Meanwhile Article 197 paragraph (1) letter h states:

The statement of the guilt of the accused, the statement that all the elements in the formulation of the crime have been fulfilled, along with the qualifications and the sentence or action imposed.

As already described, what is meant in Article 197 paragraph (1) letter f is legal considerations of decisions in criminal cases. It is in the legal considerations of this decision that the scientific work of a judge lies. Considerations of facts that have been proven correct in this legal consideration will be applied to the articles against which the public prosecutor is indicted.

The judge's knowledge of legal regulations is absolutely necessary in considering this decision. Only with extensive legal knowledge, it is possible for judges to carry out legal considerations in a correct, fair and beneficial manner. In essence,

the legal considerations of criminal case decisions are a process of thinking (legal reasoning) of judges. The thought process is carried out and formulated by examining facts that have been proven by the legal articles that are the charges of the Public Prosecutor. Actually the legal considerations are to answer the question, whether the consideration of facts that have been carried out by the judge can fulfill the elements of the article on the criminal act being charged.

The habit of judges in compiling legal considerations for criminal case decisions is to outline all the elements of a criminal act. The elements of the criminal offense contained in the indictment are first described one by one. If the meaning of the element is unclear because it is out of date, for example, then it must be interpreted first. If it contains multiple meanings or is too abstract, it must be explained and concretized. Then only the facts proven in the trial process are translated into the elements of the article. This process is meant by legal circles as the withdrawal of empirical facts (factual guilt) into legal facts (legal guilt).

If the facts proven by the defendant match the criminal law rules charged by the public prosecutor, that is, all the elements of the article charged have been fulfilled, then in the legal considerations of the decision, the defendant is stated to have been legally proven and the judge has gained confidence that the defendant has committed the crime charged to her. For this reason, it will be considered whether the defendant can be blamed for the proven charges. If the defendant is guilty, the judge also considers what type of punishment will be given in accordance with the alternative punishment contained in the proven article formulation. In addition, it is also considered how long the sentence will be imposed in accordance with the general minimum up to the general maximum.

Legal considerations of decisions theoretically contain three aspects, namely aspects of legal certainty, aspects of justice and aspects of expediency.[15]In legal considerations, judges must be based on the law. This is a manifestation of the principle of legality in criminal cases. Therefore, judges in their legal considerations must be based on law and must guarantee legal certainty. This means there is a guarantee that the law must be upheld. Defendants who are proven guilty according to law must be subject to punishment and defendants who are not proven guilty according to law must also be acquitted of charges.

Besides realizing legal certainty, in legal considerations, decisions must also embody the philosophical basis of the freedom of judges, namely justice. Justice is felt by the defendant, the victim of a crime due to the actions of the defendant and justice according to society. Justice is a matter of assessing one's actions and treatment of another person or party which is usually seen from the point of

[15]Mudzakkir, Public Examination of Court Decisions, op cit, page 72

view of the person affected by the crime. For this reason, in legal considerations, the decision of a criminal case must show this sense of justice. The decision to be passed by the judge must also consider the benefits, both for the person concerned and for the community. The community in this case has an interest, because the community wants a balanced order in people's lives.

In order to realize the three ideal aspects of a judge's decision, it is only natural for the judge to be given wide enough freedom to give legal considerations to the decision. The legal considerations in this decision constitute the material juridical aspect of the decision-making process. Based on the legal reasoning model of judges in compiling legal considerations for decisions as described above, there are three things in the form of the principle of freedom of judges in making decisions, namely the freedom of judges to make decisions based on the articles of criminal offenses charged, the freedom of judges to apply elements of acts criminal law and the freedom of judges in imposing punishments.

The conceptual review states that in the process of making a decision in a criminal case, before arriving at a conclusion or a dictum of sentencing, judges successively make decisions regarding matters as follows:

1. The decision regarding the incident, namely whether the defendant has committed the act he is charged with;

2. Regarding the law, namely whether the actions committed by the defendant constitute a crime and whether he is guilty and can be punished;

3. The decision regarding the punishment if the defendant is indeed eligible to be punished.

From the descriptions of the cases cited above, it appears that the basis of each judge's decision is the indictment of the Public Prosecutor. The judge, in considering his decision, apparently did not leave the article on the crime against which the public prosecutor was indicted, even though the indictment was drawn up in various forms of indictment. However, in making decisions on concrete cases, it appears that judges have the freedom to determine which charges are appropriate to apply or not apply according to the type of decision determined by the procedural law.

Indonesian judges recognize the application of heteronomous law as long as the judge is bound by the law, but the application of this law also has a strong element of autonomy, because judges often explain or supplement laws according to their own views. This is based on the stance that Indonesian criminal law is a codex which is far from perfect. To analyze how the freedom of judges in applying criminal law in their decisions, the substance of a judge's

decision will first be explained. According to Mudzakkir, the substance of the process for making a judge's decision is:

1. Empirical facts, namely the actions of people (legal subjects) that violate the rule of law;

2. Legal regulations used as the basis for deciding a case;

3. Legal reasoning, namely the process of withdrawing empirical facts as a basis for making allegations/accusations (factual guilt) into legal facts (legal guilt) or the process of applying laws related to formal law and material law, ideally using legal knowledge;

4. Legal conclusions or dictums which are the result of testing non-legal social facts into legal facts. Of the four decision-making factors, the focus of discussing the freedom of judges here is the third factor, namely legal reasoning. How is the freedom of judges in applying the law related to material criminal law that adheres to the principle of legality.

Judges in deciding cases should apply the law and at the same time create the law, which is a combination of system-minded decisions and decisions that have an mindset on concrete social issues that must obtain that decision. Taking into account the consideration of the contents of the Supreme Court decision, it appears that the Supreme Court has embraced the view of modern legal discoveries. This view of modern legal discovery according to Sudigno Martokusumo can be classified in the gesystematiseerd problemdenken view or a problem oriented view. This view is a criticism of the positivism of laws or legism, so that the view of the syllogistic model cannot be defended any longer. One of the main points of this modern/problem oriented view is that it is not the statutory system which is the starting point, but concrete societal problems that must be solved. Laws are not full of truths and answers, but rather are suggestions for settlement and a guide in legal discovery. The law interpretation method used according to this school is the teleological or sociological interpretation method. Judges should follow every change in each of these eras in interpreting the juridical understanding contained in the Criminal Code. This consideration shows the freedom of judges to apply laws and independently give form to the contents of laws by adapting them according to the needs of the times. but rather a suggestion for settlement and a guide in legal discovery. The law interpretation method used according to this school is the teleological or sociological interpretation method. Judges should follow every change in each of these eras in interpreting the juridical understanding contained in the Criminal Code. This consideration shows the freedom of judges to apply laws and independently give form to the contents of laws by adapting them according to the needs of the times. but rather a suggestion for settlement and a guide in

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In the Amar Ruling above, it appears that judges are no longer seen as mouthpieces for laws or heteronomous, because they have abandoned the notion of legitimacy or positivism in laws. But as a law maker who will independently give shape to the contents of the law by adapting it to the needs, the judge here is autonomous because he is given the freedom to interpret an element of a crime whose meaning is not clear and adapt it to the changing conditions and situations of the times. Interpretation in today's developing era, judges do not seek the results of deducing by using the logic of laws that are general and abstract in nature, but from the resultant actions of weighing all the interests of the value of the dispute. This consideration shows the judge's pattern of thinking (legal reasoning) shifting from deductive (logical subsumtie) to inductive. The pattern of thinking (legal reasoning) of judges here has led to creating knowledge, which means that judges in the process of making decisions use science as a tool to form or interpret law in accordance with their authority in the field of material law or on the basis of legal knowledge, judges carry out legal innovations in solving a problem. case.[16]

If the judge in his legal considerations of his decision states that all the elements of the crime charged by the public prosecutor have been fulfilled, and he has obtained a conviction based on minimal evidence according to the law, then the judge declares that the defendant has been proven to have committed a crime according to the indictment.

The judge in drafting a decision always cites the entire indictment of the public prosecutor as the basis for a decision, and usually begins to consider it by citing all the evidence obtained during the trial process. Citing the evidence obtained during the trial process. The cited evidence found is briefly described. For example, the witness testimony and the defendant's testimony quoted in the decision are only relevant to the case material, meaning that what is relevant is related to the case material according to the contents of the Public Prosecutor's indictment.

From the evidence found, the judge will usually formulate facts and circumstances that have been proven true. In the practice of making decisions by judges, there are judges who formulate the facts in detail but will summarize

[16]Mudzakkir, Op.Cit, p. 13.

them later when considering the elements of the articles that make up the indictment. Here usually the Judge will assess the correctness of each piece of evidence with the Judge's logic, namely by assessing the relationship and link between one piece of evidence and another by paying attention to the principles and theories of evidence that exist according to the Law of Evidence in the Criminal Procedure Code.

With the proof of the public prosecutor's indictment, it is necessary to state in the verdict by stating the qualifications of the crime and what form of punishment was imposed on the defendant. Then regarding the evidence in Article 194 paragraph (1) of the Criminal Procedure Code it is stipulated that in the case of a conviction or acquittal or acquittal of all lawsuits, the court stipulates that the confiscated evidence be handed over to the party most entitled to receive it back whose name is listed in the decision unless According to the provisions of the law, the evidence must be confiscated for the benefit of the state or destroyed or damaged so that it cannot be used again.

Based on the Amar Judge's Decision above when viewed from the Jus Curia Novit Principle which views that every judge knows the law so that he must try every case that is submitted to him. This principle is first found in the writings of medieval jurists (glossators) on ancient Roman law.[17]Ius Curia Novit is a principle which views that "the judge knows the law" (the court knows the law). Therefore, it is the duty of a judge to determine what law should be applied to a particular case and how it will be applied.

This principle has long been known in the Civil Law system so that the parties to the dispute do not need to postulate or prove the law that applies to their case because the judge is seen as knowing the law. On the other hand, in the Common Law system this principle is unknown, it is the parties who must postulate the applicable law, whether it is appropriate or contrary to jurisprudence which must be presented and explained before the judge.[18]Historically, the principle of ius curia novit, which is known in the Civil Law legal system, comes from legislators, namely the legal school that considers that the only thing that is law is a law and there is no law other than that.[19]

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[17]Miftakhul Huda, "Ius Curia Novit", in https://www.miftakhulhuda.com/2011/02/ius-curia-novit.html, accessed on September 9, 2022.

[18]Caslac Pejoviv, "Civil Law and Common Law: Two Different Paths Leading To The Same Goal," in https://www.victoria.ac.nz/law/research/publications/about-nz/law/research/publications/nzacl-yearsbooks/yearbook-6-2000/pejovic.pdf, accessed September 10, 2022.

[19]Dian Andriawan Dg Tawang and Novina Sri Indiharti, Juridical Analysis of the Principle of Ius Curia Novit in *http://portal.kopertis3.or.id/bitstream/123456789/1874/1/Analisis Juridical Against the Principle of Ius Curia Novit in Civil Procedure Law.pdf,* accessed on 10 September 2022.

At that time all applicable laws had been completely codified in a code of laws making it easier for judges to find laws that were in accordance with the facts proposed by the parties to the dispute, especially since there were not as many laws in a country at that time as they are now. Because of this, legislators believed that laws were complete and clear in regulating all the problems of their time. Reflecting on that period, Kelsen's positivism view was true which stated that there could not be a legal vacuum, because if the legal system does not oblige an individual to a certain action, then he is legally free, as long as the state does not stipulate anything then it is his personal freedom. .[20]

The social development of society which also influences the demand for dynamic legal developments causes every legal regulation that is made to always be one step behind the reality of society. This is also influenced by the use of laws and regulations which turn out to contain problems. First, because the laws and regulations are not flexible so it is not easy to adjust to the development of society. Second, laws and regulations are never complete to fulfill all legal events, giving rise to a legal vacuum (recht vacuum).[21]

This problem causes chaos, injustice which leads to bankruptcy of justice, which is a concept that refers to a condition in which the law cannot resolve cases due to the absence of legal rules that regulate them.[22]This fact causes the school of legism to be abandoned and the principle of Ius Curia Novit to become mere legal fiction, and as a reality it is already impossible to realize.[23]

The principle of Ius Curia Novit in Indonesia is derived from Article 5 paragraph (1) of Act No. 48 of 2009 concerning Judicial Power. Article 5 paragraph (1) states "Judges and judges of the constitution are obliged to explore, follow, and understand legal values and a sense of justice that lives in society". This principle is closely related to the principle of rechtweigening or known as the principle of the prohibition of refusing a case which is also derived from Article 10 paragraph (1) of the Judicial Powers Act, which states "The court is prohibited from refusing to examine, try and decide on a case filed on the pretext that the law does not exist or is unclear, but it is obligatory to examine and adjudicate it".

According to Sudikno Mertokusumo, a judge who submits a case to him is obliged to examine and try the case until it is finished even if the law is

[20]Asep Dedi Suwasta, Positive Indonesian Law Interpretation, (Bandung: Ali Publishing, 2011), page 39.
[21]Ibid.
[22]Asep Dedi Suwasta, Op.Cit, p. 37.
[23]Dian Andriawan Dg Tawang and Novina Sri Indiharti, Op.Cit, page 11.

incomplete or does not exist, he is obliged to find the law by interpreting, exploring, following and understanding the legal values that live in in society.[24]

The application of the Ius Curia Novit Principle requires the creativity of judges in using the tools to make it happen in the form of law discovery methods. In practice, not all judges know the law, but because the legal system in Indonesia still adheres to it, first to force judges to apply the Ius Curia Novit Principle, even criminal sanctions are added to Article 22 Algemene Bepalingen Van Wetgeving voor Indonesie (AB) or General Regulations concerning Legislation for Indonesia which states, "Judges who refuse to make a decision on a case, on the pretext that the law does not regulate it, there is darkness or incompleteness in the law can be prosecuted for refusing to try the case".[25]

Even though this criminal sanction has been abolished and only leaves behind the Rechtweigening principle (the principle of the prohibition of refusing cases) in Article 10 of Act No. 48 of 2009 concerning Judicial Power, however this shows the demand for the professionalism of a judge, as well as being a demand for judges to apply the Ius Curia Novit principle. A judge must have deep and broad knowledge and insights about law, even the most recent laws, therefore judges must not stop learning and must continuously update their knowledge and understanding of law and its dynamics.[26]

Judges should not simply surrender to inadequate conditions of legislation because justice seekers (justiciabelen) always have high hopes and believe that cases submitted will be examined and decided according to law and justice. Judges as the last bastion of justice must apply the principle of Ius Curia Novit in every decision. The judge's decision must contain a dispute settlement so that it is the end of a series of examination processes for a case.

Judge's decision according to Artidjo Alkostar is part of the law enforcement process which aims to achieve truth and justice so that the quality of a decision is highly correlated with the professionalism, moral intelligence, and sensitivity of the judge's conscience.[27]Legal considerations in decisions must be logical and in accordance with legal reasoning so as to achieve justice based on legal norms and common sense. If the legal considerations in a decision are not related and compatible so that the decision is not sufficiently considered (Onvoldoende Gemotiveerd), then there will be irregularities which cause the death of common

[24]Sudikno Mertokusumo, Knowing the Law of an Introduction, Liberty, Yogyakarta, 2008, page 137.
[25]Asep Dedi Suwasta, Op.Cit, page 6.
[26]Basuki Rekso Wibowo, "Legal Renewal with the Face of Justice", Varia Judicial, Edition No. 313 XXVII, December 2011, page 11.
[27]Artidjo Alkostar, "Dimensions of Truth in Court Decisions", Varia Judicial, Edition No. 281 XXIV, April 2009, page 36.

sense which even the most ordinary people will feel because it involves conscience. humanity.[28]

Furthermore, according to Artidjo Alkostar, in an effort to find and apply justice and truth, court decisions must be in accordance with the basic objectives, namely the purpose of court decisions, which actually have five things, as follows:

1. It must be an authoritative solution, meaning that the decision must provide a way out of the legal problems faced by the parties.

2. Because delayed justice is also injustice (justice delayed is justice denied), the judge's decision must contain efficiency, namely fast, simple and low cost.

3. The judge's decision must be in accordance with the purpose of the law on which the decision is based.

4. The decision that is formed must contain aspects of stability, namely social order and public peace.

5. There is provision of equal opportunity for the litigants.

The application of the Ius Curia Novit Principle in judge decisions also emphasizes the freedom of judges in making decisions. Judges must be free from the influence of other powers outside the court's power, but also must be free from the influence of their own interests. Freedom for judges in deciding is the key to sound decisions. Without the freedom of judges, it is not possible for decisions that breathe justice, benefit and legal certainty.

The freedom of the judge in essence is also the freedom for the judge in the process of examining a case. The judge is free to give a decision based on the law and his convictions. Judges cannot just be mouthpieces and mouths for laws, even though they are always legalistic. In other words, as said by Bagir Manan, a judge's decision must not merely fulfill legal formalities or merely maintain order, but must also function in encouraging improvements in society and building social harmony in association.[29]

The relationship between the freedom of judges and the principle of Ius Curia Novit is very visible when judges are faced with a legal vacuum or unclear laws, because the freedom of judges in making decisions is in line with statutory

[28]Ibid.
[29]HALA. Mukhsin Ashof, Op. Cit., p. 85.

orders which require judges as enforcers of law and justice to explore, follow and understand the legal values that live in society.[30]

In order to realize justice for justice seekers who request a decision against him, a judge is obliged to explore unwritten law if the basis for it is not found in written law, even if the provisions of the existing law are felt to be contrary to public interest, decency, civilization and humanity or other values. values that live in society, according to Yahya Harahap, judges are free and have the authority to take contra legem actions, namely to make decisions that are contrary to the articles of the law in question.[31]

The magnitude of the judge's authority in giving a decision does not necessarily free the judge to act arbitrarily, therefore limits must be created without compromising the principle of freedom as the nature of judicial power. Regarding this matter, Alfred M. Scott in his book Supreme Court v Constitution, once stated: "a judge who deviates and refuses to follow the existing law, and improvises and establishes the law according to his own will is a usurper who is legally not his authority, he is a tyrant. who runs a judicial dictatorship, and consciously or not (the judge) changes the state order from government based on law to government by individuals and government by individuals is the same as a dictatorship".[32]

To avoid the freedom of judges without control so that they are feared to become arbitrary, according to Bagir Manan there are five limits that judges cannot exceed, namely:

1. The judge only decides based on the law;

2. Judges are prohibited from deciding beyond what is demanded or requested (ultra petita);

3. The judge decides to provide justice and not for other interests beyond that;

4. The judge is obliged to check whether the object of the case or dispute submitted is still within the authority of the court (justiability) or outside the authority of the court (non-justiability); And

[30]Pontang Moerad, Formation of Law through Court Decisions in Criminal Cases, (Bandung: Alumni, 2005, p. 102.
[31]Ibid.
[32]Alfred M. Scott, Supreme Court V Constitution, as quoted again by, Bagir Manan, "Judicial Precedent and Stare Decisis (As Introduction)", Varia Judicial, Edition No. 347 XXX, October 2014, p. 17.

5. Judges must be free from all forms of political games in deciding cases and not interfere with the authority of the legislature as legislators and the executive as a determinant of government policy.

In the context of legal discovery, according to Bagir Manan there are four factors that encourage judges to be obliged to make legal discoveries as follows:[33]

1. Almost all concrete legal events are not fully regulated in the law.

2. Because the provisions of the laws and regulations are unclear or even conflict with other laws and regulations that require choices so that they can be implemented correctly, precisely and fairly.

3. As a result of the dynamics of society, there are various kinds of new legal events that are not described in laws or statutory regulations.

4. The principle of the prohibition of judges to reject cases and also the principle of ius curia novit which requires judges to find the law.

According to Bambang Sutiyoso, the basis for the necessity of judges in making legal discoveries is the existence of the Ius Curia Novit Principle.[34]According to him, when a judge examines a case submitted to him, he faces a case where there are no legal rules or there are legal rules, but the legal rules are not clear, then the judge is obliged to seek the law from legal values and a sense of justice that lives and develops in society. According to Wiarda, there are three systems of legal discovery, namely heteronomous legal discovery, autonomous legal discovery and mixed legal discovery.[35]The discovery of heteronomous law still refers to the classical view that all laws are contained in a complete and systematic manner in statutes and the task of judges is to adjudicate according to or according to the sound of the law (bouche de la loi), while autonomous legal inventions are legal discoveries that are not merely the eye is only the application of legal regulations to concrete events but at the same time is the creation and formation of law. Judges who adhere to autonomous legal findings can examine and decide according to their own appreciation based on their convictions and legal awareness. In its development, the two legal discovery systems have influenced each other so that there is no purely autonomous legal discovery or purely heteronomous legal discovery.[36]

[33]Bagir Manan, "Judges As Law Reformers", Varia Judicial, Edition No. 254 XXII, January 2007, page 10
[34]Bambang Sutiyoso, Legal Discovery Methods of Efforts to Realize Certain and Just Law, UII Press, Yogyakarta, 2006, page 31.
[35]Wiarda, Drie Typen Van Rechtvinding, Loc.Cit.
[36]Ibid., p. 44.

In Indonesia, according to Sudikno Mertokusumo, he knows both heteronomous and autonomous legal discoveries. Judges are bound by the law but judges often also have to explain or complete the law according to their own views. The main source of legal discoveries in Indonesia is statutory regulations, if they are not found then look sequentially at customary law, jurisprudence, international treaties and doctrines.[37]As special characteristics are contained in the Criminal Procedure Code and are not found in other fields of legal disciplines such as Civil Law, not all available interpretation methods are suitable and can be used in the legal interpretation of testing the Amar Decision of the Judge stating the return of documentary evidence to the Public Prosecutor for use in other cases even though the other cases referred to do not yet exist.

According to the author regarding the Amar of the Judge's Decision which stated that the document evidence was returned to the Public Prosecutor to be used in other cases even though the other case referred to did not yet exist, it depended on the attitude of the Defendant and the Public Prosecutor whether to accept the decision or take legal action. If the Defendant or the Public Prosecutor accepts the Judge's Decision, theoretically and practically a court decision can be executed because the decision has permanent legal force.or the decision of the Supreme Court in the examination for cassation.

In accordance with the provisions of Article 270 of the Criminal Procedure Code, the court clerk sends a copy of the court decision to be carried out by the Prosecutor. The Criminal Procedure Code does not regulate how long the clerk will send a copy of the decision to the Prosecutor. The Supreme Court set a time limit for sending, namely in the Supreme Court Circular Letter Number 21 of 1983 dated December 8, 1983, the Registrar is required to send a copy of the decision to the Prosecutor no later than 1 (one) week for cases of Ordinary Examination Procedures and no later than 14 (fourteen) days for the case of the Short Examination Program.In the case of a Supreme Court decision because it has permanent legal force, the Prosecutor can simply execute it with an excerpt of the decision, without waiting for a copy of the decision.

Furthermore, if the Defendant or the Public Prosecutor do not accept the Judge's Decision, the Defendant or the Public Prosecutor can submit a Legal Remedies. In principle, a court decision that does not yet have permanent legal force, because the defendant and/or the public prosecutor do not accept the court's decision by filing legal remedies, the court's decision cannot be executed (executed) by the prosecutor (Article 270 of the Criminal Procedure Code).

[37]Sudikno Mertokusumo, Invention of Law An Introduction, Fifth Print, (Yogyakarta: Atmajaya University, 2010), p. 63.

According to the author, based on the Theory of Legal Certainty, the implications of the judge's decision returning evidence to the Public Prosecutor for use in other cases while the other case does not yet exist, according to the author, the judge's decision is erroneous in interpretation, because the Public Prosecutor is a Prosecutor who is authorized by Law Law to prosecute and carry out judge decisions, so how can a Public Prosecutor who is given evidence by a Judge's Decision be able to follow up on the case in question, while the Public Prosecutor (*Openbar Ministerie*) cannot conduct an investigation, because only the Prosecutor or Investigating Prosecutor (Officier van justitie) can actually conduct an investigation even though the Public Prosecutor and the Investigating Prosecutor are in one institution, namely the Prosecutor's Office, but the provisions of Article 46 paragraph (2) of the Criminal Procedure Code namely, "if the case is is decided, the object subject to confiscation is returned to the person or to those named in the decision, unless according to the judge's decision the object is confiscated for the state, to be destroyed or to be damaged until it can no longer be used or if the object is damaged so that it can no longer be used or if the object is still needed as evidence in another case", is appropriate in the sense of the judge's decision to return the evidence to the Public Prosecutor,if the other case has been delegated by the Public Prosecutor to the Court or the other case has been registered in court.

Whereas in addition to the above, in practice, among judges themselves there are still many disparities in decisions regarding evidence, for example in cases of narcotics or theft that the author has handled, in cases of narcotics or theft whose case status clearly consists of several defendants (more than one defendant). ) and some of the defendants were mentioned in the case file, namely the Wanted Person List (DPO), but the status of the evidence in the judge's decision was then resolved in a way that was returned to the owner, confiscated by the state for destruction,or confiscated by the state for auction and from the author's experience there is no evidence in the judge's decision that was returned to investigators to be used in the DPO case even though the meaning in the DPO is that the person being sought is certain to have the status of a suspect in the investigation.

Apart from the interpretation of the Public Prosecutor or Prosecutor/Prosecutor/Prosecutor Investigator as well as the disparity in the judge's decision, a more substantive implication is the result of the judge's decision whose evidence is returned to the Public Prosecutor to be used in other caseswhile the other cases that do not yet exist are that the Judge has intervened in the investigation into the Decision in a manner that is because the evidence is then returned to the Public Prosecutor, the decision cannot be implemented or cannot be executed or the case has not been completed, this is contrary to the intent of Article 50 paragraph (3) of the Criminal Procedure Code

that the defendant has the right to be tried immediately by a court where this provision must be interpreted that the defendant has the right to have his case resolved immediately or the accused must also immediately receive the results of the trial process with legal status as a convict (the decision on the defendant can be executed) ,So that the Public Prosecutor is forced or ordered by the Judge's Decision to issue a new investigation in accordance with the procedures in force in the Criminal Procedure Code and the applicable laws and regulations until when a minimum of two valid pieces of evidence have been obtained, a suspect can be determined, but what becomes a polemic is how when two valid pieces of evidence are not obtained, or what if at the time of determining the suspect as a result of the new investigation a pretrial effort is carried out from the suspect who is determined then the pretrial is won by the suspect who has just been determined as a result of the judge's decision (MK decision number 21/PUU-XII/ 2014 dated October 28, 2014 concerning the expansion of pre-trial authority, namely the determination of suspects to enter the scope of pre-trial).However, what becomes polemic is what if two valid pieces of evidence are not obtained, or what if at the time of determining the suspect as a result of the new investigation a pretrial effort is carried out from the suspect who is determined then the pretrial is won by the suspect who has just been determined as a result of the judge's decision (MK decision) number 21/PUU-XII/2014 dated 28 October 2014 concerning the expansion of pretrial authority, namely the determination of suspects to enter into the scope of pretrial).However, what becomes polemic is what if two valid pieces of evidence are not obtained, or what if at the time of determining the suspect as a result of the new investigation a pretrial effort is carried out from the suspect who is determined then the pretrial is won by the suspect who has just been determined as a result of the judge's decision (MK decision) number 21/PUU-XII/2014 dated 28 October 2014 concerning the expansion of pretrial authority, namely the determination of suspects to enter into the scope of pretrial).or what if at the time of determining the suspect as a result of the new investigation a pretrial effort was carried out from the suspect who was determined then the pretrial was won by the suspect who had just been determined as a result of the judge's decision (MK decision number 21/PUU-XII/2014 dated 28 October 2014 concerning expansion of pre-trial authority, namely the determination of suspects to enter into the scope of pre-trial).or what if at the time of determining the suspect as a result of the new investigation a pretrial effort was carried out from the suspect who was determined then the pretrial was won by the suspect who had just been determined as a result of the judge's decision (MK decision number 21/PUU-XII/2014 dated 28 October 2014 concerning expansion of pre-trial authority, namely the determination of suspects to enter into the scope of pre-trial). Based on this, it is not impossible for the judge's decision to return evidence to the Public Prosecutor to use in other cases while the other case does not yet exist, which is then carried out by the Investigating Prosecutor by issuing

a new Investigation Warrant. SP3) because a minimum of two pieces of evidence were not obtained or the pretrial determination of the suspect was granted by the Pretrial Judge so that the determination of the suspect was deemed null and void and the investigation deemed null and void, so the author is of the opinion that there must be a common perception of the problem in order to find a legal solution to the incident in order to achieve the judicial process fast, simple,and low cost as well as the right of the accused to obtain settlement of the case.

The author realizes that the principle*Ius Curia Novit*carried out by judges in principle is as a control mechanism for processes and law enforcement regulated in legislation, so that it is legitimate for judges to make decisions by soundly returning evidence to the public prosecutor to be used in other cases while these other cases do not yet exist, but The author also believes that the Judge's Decision can be interpreted that the judge has taken over the duties and functions of the Investigator, which in practice is very likely to cause legal problems in the future.

In this analysis, the author tries to provide an analysis of the issues examined based on several principles of criminal law, namely:

a. The principle of lex scripta means that the Criminal Procedure Code which regulates proceedings with all existing authorities must be written, while the lex stricta principle states that the rules in the Criminal Procedure Code must be interpreted strictly.[38]The Criminal Procedure Code must be interpreted according to what is written because the character of the Criminal Procedure Code is essentially to curb human rights. The interpretation of the Criminal Procedure Code must pay attention to the authority of the state to take all actions in the context of law enforcement, and on the other hand it must also pay attention to the strict limitation of this authority by law, so that in the sense given by Article 46 paragraph (2) of the Criminal Procedure Code, namely ,

"If the case has been decided, the object subject to confiscation shall be returned to the person or to those named in the decision, unless according to the judge's decision the object is confiscated for the state, to be destroyed or to be damaged until it can no longer be used or if the object is damaged until it cannot be be used again or if the object is still needed as evidence in another case.

What is meant in other cases in this article are cases that have been delegated to the court or have been registered in court. So that in this sense the Judge may not include in his decision the return of evidence to the Public Prosecutor if the other case has not been delegated or has not been registered in court, and the

[38]Eddy OS Hiariej, Op.Cit, Access November 8, 2021.

judge also does not need to return evidence to the Investigator other than the request from the Public Prosecutor's demands in the Claim letter, because based on the principle of functional differentiation, every law enforcement apparatus in the criminal justice system has its own duties and functions that are separate from one another, in other words, when an investigator needs evidence, the investigator will certainly exercise his authority.

b. Considering the Ius Curia Novit principle, it can be seen as an expansion of the meaning of the Lex Scripta principle and the Lex Strict principle, which considers that judges can exercise control and law enforcement mechanisms due to the absence of statutory regulations in order to achieve the objectives of the law itself, namely to bring legal certainty, legal benefits, and fairness, apart from that the judge's subjectivity sees the unprofessionalism of the investigation process, so the judge's decision to return evidence to the investigator to be used in other cases while the other case does not yet exist,In this regard, the author considers that a Joint Regulation is needed regarding (the) Special Investigation between the Investigator and the Supreme Court which regulates several matters including the mechanism so that the Pretrial process cannot carry out the investigation or the determination of the suspect, in the case of filing other cases, the case file can be used. the convict who has been terminated only needs to add to the report on the examination of the new suspect referred to in the judge's consideration, because the author thinks the judge in the case of the previous convict has obtained conviction and two valid pieces of evidence in the trial of the previous convict, so why make an investigation from the beginning again when the judge got confidence.in the case of filing other cases can use the convicted case file which has been terminated, it only remains to add the report on the examination of the new suspect referred to in the judge's consideration, because the author believes that the judge in the previous convicted case has obtained conviction and two valid pieces of evidence in the trial of the previous convicted person, so why make an investigation all over again when the judge has won conviction.in the case of filing other cases can use the convicted case file which has been terminated, it only remains to add the report on the examination of the new suspect referred to in the judge's consideration, because the author believes that the judge in the previous convicted case has obtained conviction and two valid pieces of evidence in the trial of the previous convicted person, so why make an investigation all over again when the judge has won conviction.so why make an investigation all over again when the judge has won conviction.so why make an investigation all over again when the judge has won conviction.

c. Based on the principle of functional differentiation, it is necessary to synchronize investigators (Polri and the Attorney General's Office) and the Supreme Court regarding the implementation of Article 46 paragraph 2 of Act

No. 8 of 1982 concerning Criminal Procedure Code regarding the judge's decision to return evidence to the Public Prosecutor for use in other cases while the other cases do not yet exist so that there is no disparity in decisions. This is in accordance with the Principle of Functional Differentiation which means that there is clarity and division of tasks of authority between Law Enforcement Officials (Investigators, Public Prosecutors and Judges) that in every stage of a case from investigation, investigation, prosecution/trial, to execution there is mutual checking between the Apparatuses Law enforcer.

So that the Investigation authority has been intervened by the judiciary by implementing the return of evidence to the Public Prosecutor to be used in other cases where the other case has not yet been investigated. So that the impact of returning the evidence contains several legal problems that must be faced by the Public Prosecutor, however, the judge's decision must ultimately be executed without violating the applicable provisions according to law.

## 4. Conclusion

The upheaval that occurred in the Judge's Decision which returned evidence to the Public Prosecutor to be used in other cases while the other case did not yet exist because: The judge did not implement the provisions in Article 46 paragraph (2) of Act No. 8 of 1981, because there is no relationship between the evidence and the public prosecutor for the judge's decision to return the evidence to the Public Prosecutor for use in other cases while the other case does not yet exist. This has implications for delaying the implementation of the decision, because it is possible for legal action to take place both from the defendant and from the public prosecutor regarding evidence. The judge has intervened in the investigation through the judge's decision, by submitting evidence to the public prosecutor to be used in other cases while the other case does not yet exist, so that the completion of the evidence is seen as a form of intervention by the judge or at least a control mechanism over the process and law enforcement in his decision. who orders the Investigator to issue a new investigation order for the other case referred to and then the Investigator confiscates the evidence from the Public Prosecutor submitted for the Judge's Decision and the Investigator is obliged to complete the investigation regardless of whether the investigation can be increased to the prosecution stage or not.

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