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# Judicial Liability Decision in Effort to Provide Acces to Justice for Justice Seeker in Indonesia

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**Abstract:** Judicial liability would strengthen judicial accountability by bringing judicial wrong actions of the parties aggrieved litigants and the public. Their chances of a lawsuit over the legal responsibilities create greater public accountability in the judiciary and applying greater discipline in the performance of professional judges. Legal liability for judicial action should therefore, be explored as a mechanism that controlled society to support various existing proposals to strengthen the professional court of, so that, the judge's decision does not merely provide legal certainty alone but also justice and expediency. The institutional concept of judicial liability can not be abandoned. Legal responsibility to the judicial action is a topic that accompanied the establishment of the Judicial Commission which was established by the third amendment to the Constitution of RI. The focus of the discussion on the Judicial Commission today has been on his role in fighting against judicial inappropriate behavior. Everyone agreed that if judges behave badly, they need to be given sanction but what happens to those who have been harmed and suffered losses as a result of judicial action are inappropriate. Policy-making may not want to answer these questions but the parties aggrieved litigants in need of answers. Judicial commission will thus have a discussion about the problems of legal responsibility for judicial action can not be avoided. The legal responsibility for the actions of judicial actually helped shape the judicial process in Indonesia. Legal cases filed which the parties want to change a court decision based on the judicial action is wrong or inappropriate, outside the normal appeal channels. This is a small step toward tort, so that, people who feel aggrieved by the decision of the judge to get access to justice.

**Key words:** Judicial liability, justice, decision, inappropriate, commission, Indonesia

## INTRODUCTION

The blur picture of law enforcement in Indonesia has become public opinion and raised until today. The cases of Prita Mulyasar (Anonymous, 2004) Mbah Mina (Duh, 2011) ann recently grandmother Asyani are law matters picture that have become public consumption, even those cases are part of "prevented justice" (The case of preverted justice is not just translate that justice has been wrong to punish someone but justice can not give justice. Clear cases are the cases of Sengon and Karta).

People disappointing appear because there is not fulfilled of the hope toward justice to actualize the truth, justice besides the actualize of peacement and the usage (The benefit is a prerequisite and the achievementto get happiness, happiness is an integral part can't be separated from the purpose of the law. The concept of benefit is better known in legal terminology maqashidus Islam terms Sharia enactment is the objectives of Islamic Sharia Law (Anshori and Yulkarnain, 2008). Until today, part of society believe that justice as the last bastion to seek justice (Sulistyono, 2005). However, people believe as become inversely proportional with the fact of deterioration court. The deterioration of court contradict with the 'natural tendency' as the existing of judiciary as means to overcome the law conflict (The main function of court is to complete conflict).

The decision of court only to create fair decisions procedure. Court decision, also seem more likely to win the party who has financial and power. The access to justice (Access to Justice is meants as "Justice as so, administered has to be available to all, on an equal footing. This is the deal but one which has never been attained ue largely to inequalities of wealth and power and an economic system which maintains and tends to increase the indequalities. Efendi (2010) Pty Limited 2000 which translates more or less are: justice as it is run must be available for all, hs the same position. This is an ideal but it never be achieved because there is inequality of wealth and power and economic systems that maintain and tend to increase inequality) supposed to be evenly distributed to all levels of society can not be achieved, so

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that, only the elite people who can enjoy it as the implications of this justice, justice became a place for mafia law and market article (Jambak, 2011) for example, the administrative court judge bribery case involving OC Kaligis (DPR., 2012).

More than that, the judge's decision does not meet the court's sense of justice and truth, so, it has been alleged priory that the judge do corruption practices (DetikCom, 2012, 2017) but is it true that law enforcement in Indonesia in general are insensitive and do not have a conscience anymore the roar of community spirit who crave justice, truth and the worth of humanity?

By looking above the law enforcement, legal break through required to substantially restore and maintain law purposes. One model that can be defined is the concept of judicial liability. So far, the decisions of the judges can not be held accountable by the public which judges legally binding. However, in other words the judge can not be prosecuted for their decision despite evidence that the decision is not in accordance with the logic and legal reasoning. Norma law provides only for a mechanism for parties to appeal or cassation if an objection against the decision.

In a simple understanding judicial liability is the responsibility of judges to the judgment either in the civil and criminal aspects or judges can be prosecuted either civil or criminal against the decision that has been made. In the context of Indonesia basically the responsibility of the civil law can be attached either to the individual judge or the state. But the state can not be accountable for mistakes made by the judge in the execution of their duties. The mistake of judicial duties still allow to put forward of a civil lawsuit against the judge. State can not be accounted for rechtterlijk handelingen as long it is judicial nature. It can be accounted for if the act does not have the judicial nature.

In the judicial history of law, accountability arrangements regarding the judge's ruling decision in court (Judicial liability), originally set out in article 1365 BW which said "any unlawful or break the law act which inflict harm on others, require the guilty to indemnify or change the loss". In country of continental European countries, the act against the law abbreviated PMH known as omrechtmatige daad or Anglo Saxon with the term of tort whose meaning is growing continuously not only done by individuals but also legal entities included by the authorities.

In Netherlands before year of 1919, PMH only considered the extent of violating the articles written law. However, since, the case of Linden Baum Versus Cohen year of 1919, omrectmatige daad not only onwetmatige daad but in the extent they are: the act that contrary to the rights of others, the act that which are contrary to its own legal obligations, the act which is contrary to morality, the act which contrary to the prudence or necessity in good society.

In the law itself, it is know three categories of PMH it is PMH because of guilt, PMH without guilt (without the element of fault and negligence) and MPH because of negligence. In addition to the expanding meaning of understanding MPH, according to Wirjono Prodjodikoro in the year of 1942 there is important decision of the Supreme Judicial In Netherlands (Ostermann-arrest), determinate that the government under Article 1401 BW Netherlands (Article 1365 BW Indonesia) responsible for any deed, instrument equipment does not only violate the civil law but also breaking the law of the public.

In this decision, Civil Law is allowed to set the field of government administration justice. State responsibility for the unlawful act committed by the equipment of government known as onrechtmatige overcheidsdaad. The act equipment of government can be assumed inappropriate in society if the government has powers under public law to use it for purposes not intended by the public law or in the French language is dietour de pouvoir. As it can be said, that the act of government is inappropriate in society if it is arbitrary action (willekur) study jurisprudence or legal study developed by legal scholars such Prof Meyers, usually concludes that Article 1368 BW can not be applied against the judge who was wrong in carrying out judicial duties. In some countries such as Malaysia, Philippines, Pakistan, United State with different legal systems but have an identity constitutional as free judiciary including judges free from civil accusation it usually with the provision that what is implemented by the judge is in good faith, except of Belgium and France there are additional unless the judges accept bribes or perform a denial of justice.

In Netherlands, it is suitable with MA decision year of 1972, that is decision of benchmark in the case of Mrs. X against dutch government. Prof. A.W (TON) Joengbloed, approve the decision, the state in principle can not be asked accountable legal decision that is not based on the law, unless the judge in preparing the case does not heed the fundamental legal principles and it can be said that there is no fair and impartial treatment of the case. Then he said the breach of fair trial principle as it is ruled in the Article 6 ECHR which can be granted the claim of compensation and when the offense is recognized, we are basically talking about the legal responsibilities of strict state/strict liability.

Meanwhile, in Belgum there has been development of traditional view where Supreme Court (Cour de cassation) redefining the legal responsibility for the actions in case

of bankruptcy judicial famous ANCA (RW1992-1003, 396). Belgium Supreme Court (MA) said declare the law be held accountable for damages caused by judicial error in a civil case when a judge acts or can decisively be assumed to act within the limits of their authority.

From the consideration of the Supreme Court, the state is the subject of legal arguments as well as private party. None of the country's laws to exclude the courts from the obligation to act in day-to-day or of the obligation to pay compensation if careful attention to are violated. Independence about perceived violations of the court, MA believes it is too excessive. While assuming a violation of separation of powers, according to the Belgian Supreme Court, the judiciary alone determine whether there is any legal responsibility in this case (and not other the authority of the state). And also, that the legal responsibility here is not attached to a particular state power but to the country as a whole entity and other arguments. Meanwhile, several countries are rather exaggerated both the court system and the legal system but which recognizes the principle of freedom for the court and the judge.

## YUDICIAL LIABILITY MODEL IN COMMON LAW SYSTEM AND CONTINENTAL EUROPE

From the discussions that have been stated above concerning the development of the accountability concept of the judge's decision. Then it can be state that the concept of l judicial liability divided in two great thought, namely:

**First; British or America Model:**. In a model system of English or the United States who hold no responsibility laws of the country except in the cases specified clearly. Pompe said, immunity is seen as an important element for the judge can take the controversial decision without fear including fear of law accusation.

Pompe quoted the statement of Lord Denning said that in the case of Sirros V. Moore (1974) 3WLR 458 C.A: He should not have to turn the pages of his book with trembling fingers, asking himself: if I do this, shall I be liable in damages. In English, specifically provide judges immunity in performing tasks related judicial independence and impartiality while others such actions related to the administrative functions there is no immunity.

British or American Models can be summarized as a rule do not except that no legal responsibility by the state except in cases specified clearly. Historical doctrine is based on state immunity which meant the state can not be sued unless there is a rule that specifically allows it. Maybe a bit late and with a few notes that such a liability is recognized. Besides partial confession and the doctrine of state immunity essentially has not yet left behind until now.

In England, Crown Proceeding Act Article 2 (5) specificity give immunity ti judges "implement or intend to implement any responsibilities that are judicial. The logic is that a judge can not accept orders from the king, the king in turn can not be asked accountable for mistaken judicial action.

In England as well as in the United States, the terms of this immunity is that judges act in their judicial function boundaries and the development of law in this matter has led to define exactly what meant judicial function is. In the UK, the basic principle established in case of Sirros V Moore.

As well as in the United States, efforts are directed to define the judicial action by the United States Supreme Court should be given immunity (Stump vs. Sparkman 435 US 349 (1978). Other measures such as administrative actions not given immunity. The Supreme Court of the United States developed two test tool for defining the judicial action: a. whether an action is often performed by a judge (which is determined by the nature of the act) b, Does a judge act within his or her jurisdiction (which is defined by the reasonable expectations of the parties litigant) (Bambang, 2008).

**Second, the continental European Model:** Model European continental which emphasizes the responsibility of states for the wrongdoing of its organs, explained Sebastian Pompe in German law that "judges are explicitly excluded from the constitutional provisions about the legal responsibilities of the state over its organs (Article 34 of the Constitution, the second sentence) but only involves action judicial. Also, two categories of judicial acts are specifically excluded: to deny justice (denials of justice) and the delay is not proper the (improper delays) also contributed to the weaknesses that exist still legally defensible.

The continental European Model might better be called as a model yes but the system of law as a principle accept legal responsibility for the wrong actions of one country that are done by their organs, unless such actions are protected by immunity. The result is that the continental legal system in general is comprehensive enough in regulating the legal responsibilities of the state.

A good example is Article 34 of the German Constitution (which came from the mid 18th century) which generally sets the state must be responsible for the behavior of the wrong organ or officers. Because a lot

depends on whether public officials have acted according to official or position capacity or not the legal developments in the continental system to a certain extent reflects the debate in the England model/United states.

Thus, under German Law, judges are explicitly excluded from the provisions of the Constitution about the responsibilities of the state law on organs (Article 34 of the Constitution, the second sentence) but only involving 'judicial acts'. Also, two categories of judicial acts are specifically excluded; to deny justice (denial of justice) and the delay is not worth (improper delays) also contributed to the weaknesses that exist still legally defensible.

Jurisprudence means that immunity does not apply to all judicial action but only for the actions made by an independent judge who decided correctly and a final judgment in a dispute (in the sense of a final and binding). The responsibility of the state law appears only if the final court decision is a criminal act. Also, the failure to appeal was to eliminate the right to claim and a claim for compensation.

The continental European Model moves to shape and ready to translate legal responsibilities as the legal responsibility of the state and not as legal responsibilities of public officials (such as the model of the English/American). The aggrieved party must file a law claim against the state and not against individual officials (as in the UK/USA) and indemnity obligations exist in the country. The question then is whether the state can request reimbursement of the indemnity it pays, to the officials who caused the state to pay compensation of the (right to recover).

In German Constitution give mandate to state in asking for changing the official, however, specificity giving exception on judges. Constitution or others Continental State legislation such in Belgum Constitution, refuse the right of state in asking the changing of compesation which is caused by judge in running his official function. As the consequences not like in Britain or United State Model, the correlation between the responsibility of Court Law and Court in dependency become not so clear. "Trembling Finger" in Denning argument to limit law responsibility is not so clear in continental model.

In Indonesia, itself, the development of judicial liability can be observe from MA decision which showed the same development such as MA decision Number 421 K/Sip/1969 date of November 22nd 1969, in the case of Oentoeng Sediatmo against Attorney General which sate "Before there is UU about State Administration Court, so, the the court of the first instance (PN) has authority to examine and decide the claim to the state". Then decision of MA No. 981 K/SIP/1972 date of October 31st 1974 which says: "Based on action jurisprudence which is done by the state official is under PN jurisdiction.

In the case of Criminal Law in Indonesia, there are concrete case regarding to judicial liability; they are Sengkon and Karta case. This case is assumed as the lost of court. They are judged as guilty in doing murdering and each of them were punished 12 and 7 years in prison. Then, however, it was a proof Gunel and riends and Elly and friends did murdering to Suleman and wife that accused to lawsuit of Karta. Finally, through PK (herzlening, they were judged as not guilty. The decision of supreme court was canceled by MA on January 31, however, the disput of Sengkoof Karta had ever been jailed in the. Eventhought they were not guilty. The sentence of Appelate Court was cancelled by MA on 31st January 1981. However, Sengkon-Karta were in jail for 6 years, eventhought they were not guilty. They institute a suit for compensation based on the act against law who done by the authority which is known with onrectmatige overheidsdaad. Finally, Court of first Instance of Central Jakarta on July 1t 1982 refused accusation of Sengkon-Karta.

The problem of judicial liability in the Civil Law had been anticipated by Supreme Court (MA). The prohibition charging judgein civil law judge is ruled by a circular letter of Supreme Court No. 09 year of 1976 date December 16th 1976, about: the Accusation to the court and judge.It means, what was written in SEMA signed by the Head of Supreme Court Oemar Seno Adji suitable with what it was conveyed in the conference among the heads of Supreme Court all of Asia Pasific for the 7th (Adji, 1980, 1999). Beside that, regarded on what judge can be pleaded for Petrial based on Article and KUHAP, MA has ever made Circular Letter No.: 14 year of 1983, about: The judge can not be in petrial position. In other words, judge in Indonesia can not be sued for what they sentence or decide.

## JUDICIAL LIABILITY CONCEPT IN INDONESIA LAW CONTENTS

**In further judicial liability concept in Indonesia context need to be considered of its norm by the following reason:** First, in philosophical perspective. In the basic Philosophical matters is the the achievement the purpose of law. It is very clear the main of existence law is to make justice. Justice is put as basic from the purposes of law as an sich. According to Wignosoebroto (1995), the position of justice is a hearth from the law. The 26 Law is not law if it doesn't give justice. Satjipto Rahardjo said if justice is put as the purpose of law, so, it has to be fulfilled and and realized with the maximum.

Rahardjo (2007) said that legally enshrined in Article 24 Paragraph 1 Constitution in 1945 that "the judicial power is an independent power to organize judicial administration to uphold law and justice". Thus, the relationship between law and justice in the constitution is very clear is the relationship interrelated.

Legal justice does not necessarily run without institutions that implement them. Justice organized by the court as a medium to get justice to the role of the judiciary in upholding justice is a necessity. So that, justice is forced to make abstract ideas of justice. Legally, Article 2, Paragraph 2 of the Law No. 48 of 2009 on the second amendment of Law No. 4 of 2004 regarding the power of Justice stated that "the country's judiciary to implement and enforce the law and justice based on Pancasila".

The important instrument of judicial institutions is a judge. So, the judges who embody fair or not a ruling issued by the court. Profession judges in Article 5 (2) of Act 48 of 2009 on the second amendment of Law No. 4 of 2004 on the judicial authorities that "judges and constitutional judges must have integrity and a personality that is not dishonorable, honest, fair, professional and experienced in the field of law".

The role of judges in creating justice and order in and for the community is nyata. In creating justice, the judge concerned must conduct legal discovery. According Mertokusumo there are several terms related to the term. "The discovery of the Law: it can be means "Implementation of Law", "Application of the Law", "Law Reform" or "Creation of Law".

The implementation of the law can be interpreted execute the law without any dispute or violation, the application of the law means applying the provisions of the legislation that the abstract nature of the concrete events. Formation of legal formulate regulations generally applicable to everyone. While the creation of this law gives the impression that the law was merely written rules only, so if it is not set in the written rules, the obligation of judges to create it. Of these three terms, according Mertokusumo, a more appropriate term is the discovery of the law because in accordance with the provisions of Article 27 of the Law of Judicial Authority.

Justice is supposed to be created by judge substantive justice. So that, justice is the orientation from the construction of the judge's decision. In a deeper perspective, justice is positioned as the main purpose of the law. Justice is with the existence of the law. The idea of normative ideals of justice can be attributed to the Greek idea of nomos. The normative idea lies in to the needy to uphold the supremacy of the constitution over the power of government. Such an idea has already emerged in ancient Greece through what is called nomos and physis. The approach emphasizes the equality of everyone before the law which means nomos is the same with physis, must bring every person subject to nomos. View the contrary, everyone is equal and therefore, everyone is not the same, nomos is not the same with physis, causing certain people in a position to refuse nomos.

Substantive justice should be based on the similarity measure and freedom. First, is the greatest freedom that similar principles (principle of greatest equal liberty). According to this principle every person has the same rights over the whole system which consist of freedoms and matching with these freedoms. Second, the equation which above chance (the principle of fair equality of opportunity). The core of the principle of fair equality of opportunity refers to those who less have the opportunity to achieve prosperity prospects, income and authority. For the equality, it takes the different principle, namely that the social and economic differences must be set in order to provide the greatest benefits for those who less fortunate.

Rawls procedural justice consists of three kinds. Besides perfect procedural justice, it is also known for two other types. Namely: the imperfect procedural justice refers to the availability of procedural well previously designed. But the end result may be different from the original draft. While pure procedural justice departing from the absence of an independent criteria that precedes a procedure and all it takes is the process of formulation of the concept of justice is right and fair to ensure the end result is a true and fair anyway. In the perspective of national law, the law and justice will not be separated from the root of Indonesia. A nation that is ideologically based on the philosophy of Pancasila. Sudjito concedes that a national law will favor justice when supported by a holistic law that refers to Pancasila.

The obligation of judge is to find the law and establish laws against a case is resolved. For that in the judge's decision must contain the basic legal considerations (motivating Plicht) using the method of application of the law and legal discovery methods 38. Because basically the enforcement of justice and respect for the nobility of human values is a prerequisite for upholding the dignity of the nation. In connection with that, the judge as the central feature in the judicial process is required to become an elite figure in order to uphold justice, so that, its existence is able to provide benefits to the settlement of legal issues in the life of society and state.

**Second, from a sociological perspective:** Judiciary as the last bastion of seeking justice are also required to make improvements both on the administrative system and the judicial system itself. Because in reality the Court an institution that actually is feared by the public. In the perception of ordinary people, they are very afraid of the judicial institutions, that is why it is not a media tribunal to seek justice but became a nest of mafia law legal willing pawn for the satisfaction and personal interests.

Today, society is often disappointed by the judge's ruling that declared that giving punishment is too light and the judge accepts bribes, heard and read plain, simple and even may be assessed by the judges as slander, unfounded accusations and so forth 0.41. But that is their simple construction in accordance with the range capability abstracting against the judge's decision was disappointing. This case and other cases may further reinforce the facts about the strong frame of mind and way of formal legalistic point of view the judges, so that, the tendency of monopolistic model of legal interpretation centered on the ruler (judge), so, prominently.

Such interpretation is indeed ensure the values of certainty but on the other hand has undermined the values of justice. Moreover, the judge's ruling is increasingly proving that justice is only meant as a mechanical procedure and procedural as revealed by Daniel S. Lev, who said that the Indonesian legal process is only intended to pursue legal value fulfillment of procedural fairness-fairness-based procedural procedural law formal of existing rules and not to pursue legal value sybstantif, i.e., those related to the fundamental assumptions about the distribution and the use of resources in the community, what is considered fair and not by the public and so on. So that, there is a massive injustice.

The procedural legal process will also bear the decision that reflects procedural fairness. Nonet and Philip (2010) and Philip Selznik said that legal process that run by law only as regards the exclusive jurisdiction of the form of the articles stiff and not touching the interests of society. Law then just seen as the rules and procedural propriety finally pushed "A narrow concept of the rule of law". The aim of the law is to bring bureaucratic legalism and formalism. Therefore, the law then is legalism, the focus of the rules and tend to narrow the scope of the facts that have legal relevance. The consequences of this legalism, the court decision is considered correct in abstracto if formal procedures are met regardless of substantive justice.

**Third, in a theoretical perspective:** Very fundamental theoretical problem of this proposition is the difficulty a judge decides a case that can accommodate three legal objectives namely fairness, certainty and legal expediency. Moreover, justice which is tried to be formulated in legal norms would also be obviously limited to justice to be understood and perceived by forming the laws and legal norms are also limited when it is formed. On the other hand, a sense of justice are constantly evolving in line with developments in society itself. Those things can cause dry legal practice of justice or even the application of laws that are contrary to public sense of justice. Sense of justice is often torn because the spirit of the law and the reality is different.

Differences conception of justice is very sharp and very strong and cause friction. Justice is generated by the state is tend to formal justice (formal justice). Thus, the concept of justice which sometimes differ from justice desired by the people. People crave the justice of massive social justice (social justice).

Law and justice can indeed be two different substances but they must be understood and enforced as a whole. Justice in this case is not only as legal justice positive but it also includes the value of justice that is believed and developed in the community or it is called substantive justice. Law actually made and enforced to achieve justice. However, law and justice are not always aligned. It happens because the justice as values are not easily realized in the rule of law. The value of justice is abstract and it is not always rational can not be entirely contained within the prescriptive legal norms. Law formulated in general terms to accommodate a variety of events as well as the possibility of developing the law in the future.

Law and justice can indeed be two different substances but must be understood and enforced as a whole. Justice in this case is not only legal justice positive but it also includes the value of justice that is believed and developed in the community or the so-called substantive justice. Law actually made and enforced to achieve justice. However, law and justice are not always aligned. It happens because the justice as values are not easily realized in the rule of law. The value of justice is abstract and not always rational can not be entirely contained within the prescriptive legal norms. Law formulated in general terms to accommodate a variety of events as well as the possibility of developing the law in the future.

Justice seekers have regarded that justice inherent in the laws established by the state. Though the law is a double-edged sword. The law can be a reference of the fairest and most nurturing but also can be used as a tool to define the powers and those who have interests. So, there will be those who become victims of unjust laws because the law can claim truths to the realm of the

infinite. How the law will be used, whether for good or bad (in the sense of the law misused) is depending on how the law is formed and who has the power to shape the law.

In a state of law, law enforcement and justice is one of the functions of the sovereignty of a state. Storey (2001) in his Territory the Claiming of Space, insists on the role and functions of the state, namely: set up the state's economy provide for the needs and interests of the public, especially health and transport provides the legal and justice for the people; to safeguard and keep the territorial state territory and the security of its people from external threats.

It is need to be questionable whether the state already provides the legal and justice for its people. Is the legal tools which provided by the state and law enforcement has been reflected justice in society. Law enforcement is the center of the entire 'life activity' of law. Law enforcement can not be solely considered as the process of implementing the law as the opinion of the legalistic. Justice is not just running a formal procedure in the legislation in force in a society, upholding the values of justice more important than just running a variety of formal procedures of legislation. Sense of justice not only stands on the only law enforcement on the basis of articles in the law is rigid and does not recognize the value of substantive justice. In the minds of the jurists, the judicial process is often simply translated as a process and adjudicates fully by the positive law based solely. These views were formal legistis dominaes the thinking of law enforcement, so what is the sound legislation, that will become law.

The main weakness of this view there is the rigid law enforcement not discretionary and tend to ignore the sense of justice because he prefers the rule of law. Prosecuting in reality not a mere juridical process. The judicial process is not only the process of applying the articles and the sound of the legislation but a process that involves behavior the behavior of the public and take place in a given social structure. Galanter (2001) in a study conducted in the United States can show that a judge's decision is just supposing any endorsement of the agreements reached by the parties. In a sociological perspective, the judiciary is multi functional institution and is a place for "record keeping", "site of administrative processing", "ceremonial changes of status", settlement negotiation", "mediation and arbitration" and "Warfare".

Court who represent the main face of law enforcement is required to able give not only legal certainty but also justice, social useful and social empowerment through the decisions of the judges The failure of the judiciary in realizing the goal of law has encouraged the growing distrust of the institutions of law and institutions of law. For that a court decision should really be considered morally, that is sense of justice.

The judge as holder of the sword of justice must always be knowledgeable in applying the law. Ensuring the legislation applied correctly and fairly. If the application of the legislation would lead to injustice, the judge should rule out the side of justice and legislation. Judge is not the oral law (la la bouche qui est judge prononce les paroles de la loi). In the words Gustaf Radbruch, that there is justice outside the law (ubergezets liches rechst) and unjust laws (fezets liches unrech). Lawrence M. Friedman said that the law was not like a cloak of lead in our bodies but it is in the clouds, it can't be looked and be fee are judge as holder of the sword of justice must always be knowledgeable in applying the Law 54. Ensuring the legislation applied correctly and fairly. If the application of the legislation would lead to injustice, the judge should rule out the side of justice and legislation. Judge is not mouth of law (la la bouche qui est judge prononce les paroles de la loi). In the words Gustaf Radbruch, that there is justice outside the law (ubergezets liches rechst) and unjust laws (fezets liches unrech). Lawrence M. Friedman said that the law was not like a cloak of lead in our bodies but were in the clouds, can be looked and felt as soft as the air in the normal touch, smooth as glass as fast as a soap bubble. In such conditions such as the legal paradigm is the system of law and the judge made law enacted mysteriously dwells in the mind and conscience of every judge to shield its independence. The spirit of the law is justice, so that, if a decision to be unjust, then accountability to their judicial powers at all levels, the judges themselves and to God.

It should be understood that the debate about the duties of judges as law enforcement, subject to the laws and the text of his duties as the upholder of justice even have to get out of the provisions of the law are classic isues. Today the issue is no longer a line between the civil law tradition that makes a judge only as mouthpieces legislation and common law tradition that makes the judge as a maker of legal justice, although, they had violated the Act. Both are regarded as complementary needs 56. Based on the changes in the Constitution of the Republic of Indonesia in 1945, two things are placed in strong position. Article 24, Paragraph 1 states, the judicial power is an independent power to organize judiciary to enforce 'law' and 'justice'. Article 28, Paragraph 1 also emphasized that everyone has the right to recognition, security, protection and 'legal certainty'. So, the emphasis is not on the rule of law but legal certainty.

In the time the changing of constitution the principle was emphasized in Constitution of 1945 because in the past, the efforts to enforce the rule of law often it was used as tool to defeat the searcher of justice. In the name of law, justice seekers often subordinated to the arguments contained in Constitutions and then a lot of constitution has characters of conservative, elitive, positivistic-instrumetalistic or as a means of justifying the will of official. That is why, when making changes to the 1945 Constitution with low standar affirms the principle of justice in the constitution in the judicial process. The judges are encouraged to explore the sense of substantive justice (substantive justice)in the community than shackled from certain of constitution (procedural justice). On each decision also always be confirmed, the decision was made "For the sake of justice based on God Almighty" and not "For the sake of legal certainty under the Constitution". This formed the basis of which allow the judge to make a decision for justice even if needed in breaking of the provisions of formal laws that impede justice.

Judge's decision that his form consists of the wording (language) which actually contains the thinking judicial of the researcher (Judge). He will control, systimize and conclude.

For the individual the most important thing decision has sense of fairness. But because of this matter, there are two sides of the conflict, then there is a perception that in addressing the interpretation of a judgment. The losing side tended to say, unfairly, there is collusion and various other tone that discredit the court.

Furthermore, the authority given to the judge to take a discretion in deciding the case, ruled in Article 5 Paragraph 1 Law No. 48 year 2009 regarding the power of justice which determines: Judge and Judge Constitution shall explore and understand values the value of law and justice which live in society.

Based on the rules of these laws there are norms of the law obliges the judge to explore and understand the values of law and justice that live in the society. To fill these norms then the judge must take the wisdom of the law. Determination on the demands of a sense of justice that have to be implemented by the judge in deciding a case in theory Judges will see "concepts of justice that have been standard". The concept of justice throughout history have many kinds, since it was in ancient Greece and Roman justice is considered one of the main goodness (Cardinal Virtue). In this concept of justice is a moral obligation that binds the members of one community against others.

## CONCLUSION

From theoretical of exploration explanatory above researchers conclude that the issue of legal liability for the actions of judicial (judicial liability) is relevant in Indonesia with several arguments. The first argument is that judicial liability would strengthen judicial accountability by bringing judicial wrong actions of the parties aggrieved litigants and the public. Their chances of a lawsuit over the legal responsibilities create greater public accountability in the judiciary and applying greater discipline in the performance of professional judges. Legal liability for judicial action should therefore be explored as a mechanism that controlled society to support various existing proposals to strengthen the professional court of. So that, the judge's decision does not merely provide legal certainty alone but also justice and expediency.

The second argument, the institutional concept of judicial liability can not be abandoned. Legal responsibility to the judicial action is a topic that accompanied the establishment of the Judicial Commission which was established by the third amendment to the Constitution of RI. The focus of the discussion on the Judicial Commission today has been on his role in fighting against Judicial inappropriate behavior. Everyone agreed that if judges behave badly, they need to be given sanction but what happens to those who have been harmed and suffered losses as a result of judicial action are inappropriate. Policy-making may not want to answer these questions but the parties aggrieved litigants in need of answers. Judicial commission will thus have a discussion about the problems of legal responsibility for judicial action can not be avoided.

The third argument case that the legal responsibility for the actions of judicial actually helped shape the judicial process in Indonesia. Legal cases filed which the parties want to change a court decision based on the judicial action is wrong or inappropriate, outside the normal appeal channels.This is a small step toward tort, so that, people who feel aggrieved by the decision of the judge to get access to justice.

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