the role of judges in realizing justice: A Criminal Justice Perspective

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The Role of Judges in Realizing Justice: A Criminal Justice Perspective

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Abstract

The judge occupies the most strategic position in creating justice through its verdict. The strategic position of the judge not only included legal authority, but also legal obligations which constituted the power attached to the judge as well as to the court. Type of the research is a normative legal research (doctrinal research). The results of the research show that the role of judges in in legal discoveries to realize a justice is very required, given the legislation that cannot accommodate all contemporary legal issues. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. The weaknesses of these legislation require a concept of legal discovery by the judge even though in certain cases is limited to justice. The verdict of judge that close to the justice are not decisions that his reasoning put the judge as law horn, but the judge must be able to interpret the law actually in accordance with the needs and developments that occur in the midst of community life. It because the legal discovery is also one of the duties of the judge in exploring the sense of justice that lives in society (living law). In addition, requires law enforcers, especially judges can be more responsive and progressive in solving legal problems, that is by making legal discoveries if necessary to realize substantive and responsive justice.

Keywords: Criminal Law; Criminal Justice System; Judge; Law Enforcement

1. Introduction

Indonesia is a country based on the law so that it cannot be seen as textual only. However, the law exists for society not for the opposite, therefore it should be dynamic and in accordance with the law that lives in the community (as a living law), in the sense that in the development of the community, the law must be able to follow the development of the community as well.[1] Certainly, the law must be coming from communities or cultures, so that it does not tend to impose but a natural awareness born of the person as good something to be independent and humane.

The law must not be seen as a finite scheme, but it must continue to move, change, adapt to the dynamics of human life. Therefore, the law must continue to be reviewed and explored through progressive efforts to reach the truth and a noble goal of justice. Humans as main actors behind legal life are not only required to be able to create and making the la), but also the courage is able to breaking the law when the law is unable to present the spirit and substance of its existence, namely creating harmony, peace, order and community welfare.[2]

Nowadays, in fact, the law is understood only limited to the formulation of laws, the law enforcers are forced even some safely put themselves only into law horn without any space and willingness to act progressively. The community is also forced to obey all legal provisions, even though the law has deprived them of their independence, suppressed their basic rights, even to become a tool of the ruler crime against the people. The law is not only *ordegenic* (order/rule), but also *criminogic* (crime). Legislation products that certainly have noble intentions and objectives, actually in its implementation can cause distortions in the established community structure and prove beneficial.[3]

In this context, the judge occupies the most strategic position in creating justice through its verdict. This is in accordance with the opinion of George F. Cole that *the judge is the most important figure in the criminal court. Decisions of the police, defense ottorneys and prosecutors are greatly affected by judges in rulings and*

[1] Tumpa, H. (2015). "Penerapan Konsep Rechtsvinding dan Rechtsschepping oleh Hakim dalam Memutus Suatu Perkara." *Hasanuddin Law Review, 1*(2), 126-138.

[2] Sadjipto Rahardjo, *Penegakan Hukum Progresif*, Kompas, Jakarta, 2010, Page. 1. Compared to John Rawls. 1999. *A Theory of Justice (Revised Edition)*. The Belknap Press of Harvars University Press: Cambridge.

[3] *Ibid*. Page. 4

sentencing practices.[1] Therefore, the main task of the judge is to try, examine and decide a case.

The strategic position of the judge was also affirmed by Muladi that the scope of the judicial power is not only included legal authority, but also legal obligations which constituted the power attached to the judge and the court to implement the functions of examining, adjudicating and deciding. The responsibilities widely cover 3 (three) things, namely: administrative responsibility (case management); procedural responsibilities (judicial management on the basis of applicable procedural law); and substantive responsibilities (relating to the link between facts and applicable law).[2]

The judge in examining, adjudicating and deciding a case must first use the written law as the basis for their decision. If in the written law is not enough, it is not appropriate to the problem in a case then the judge seeks and discovers their own law from other legal sources such as jurisprudence, doctrine, treaties, customs or unwritten law. Act No. 48 of 2009 Article 10 paragraph (1) on the Judicial Power states that "the court is prohibited from refusing to examine, adjudicate, decide upon a case that is proposed with the reason of absent or unclear legal, but obliged to examine and adjudicate it."[3]

The provisions of this article indicate that the judge as the main organ of the court and as the executor of the judicial authority is obligatory to find or discover the law in a case even though the legal provisions are absent or unclear. However, either the creation of law or the discovery of law by the judge in its consideration must be attached to a number of restrictions, namely considerations based on norms, morals, and doctrines[4] can give meaning to the rules that are already exist.

Judge by its position (*ambtshalve*) is not just a mouth or a law horn (*bouche de la loi*) but being a translator or interpreter through legal discovery, or legal construction in the form of interpretation, even creating a new law (*rechtsschepping*) through the sentencing. The substance of legal discovery for the judge is a serious effort to find the law *in concreto*, and therefore a judge has a comprehensive collection of legal knowledge *in abstracto*. In line with this, Slamet Sampurno stated that:

> *A judge is a decider of whether a country will truly be a Constitutional state or not. How the law is enforced, to whom the law "servitude", what the consideration of a legal decision is imposed on a person or institution, depends on the mindset and the paradigm of the judge*.[5]

A case example that can be seen from this reality is legal discovery by judges on corruption crimes as seen in the verdict of corruption the Former-Regent of Lampung Tengah Andi Akhmad Sampurna Jaya who was sentenced freely by the judge. The problematic of the judge' decision on the law is considered not to fulfill the sense of justice of the people, become an option issue which must be accepted, considering the principle of law *Judicata pro veretate habitu*, which means the verdict of the judge must be considered correct. Although in the study of legal theory many judge' decisions on corruption cases that do not provide legal certainty and a sense of public justice, because empirically show that some corruption cases are allegedly the result of judicial mafia political conspiracies that are full of interventions of interests of interested parties, but in the end the decision must be considered correct.[6]

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[1] George F. Cole, *The American System of Criminal Justice*, Brooks/Cole Publisihing Company Pacific Grove, California, 6th Edition, 1992, Page. 470.

[2] Muladi, *Demokratisasi, Hak Asasi Manusia, dan Reformasi Hukum di Indonesia*. Habibie Center, Jakarta, 2002, Page. 224.

[3] In the Latin adage, it is known as "*Ius Curia Novit*" that can be used as legal principles and contained in the Civil Code, which is part of *Code Napoleon* in France. At first the principle was interpreted narrowly, namely "*the judge may not refuse to examine the case by the reason of absent or unclear legal*." This interpretation is based on a growing belief at that time, that the codified written law has completely contained rules about all legal events and legal relations that may occur in all aspects of human life. But then it turned out that the codified law was never complete and was always left behind by developments in society. Therefore, the principle was interpreted broadly, namely giving authority to the court (*judge*) to discover the law (*rechtsvinding*) to adjudicate the case that was brought to him, when the codified law had not regulated it.

[4] The results of research on the Judges' Verdict on Human Rights as conducted by the Judicial Commission with *the Norwegian Center for Human Rights* and the Center for Law and Human Rights Studies at the University of Indonesia, on the conclusion of page 70 stated "the judges rarely apply legal doctrines as a basis for legal considerations in the decision he made."

[5] Slamet Sampurno, *Eksistensi Hakim Dalam Penegakan. Hukum,* Rangkang, Yogyakarta, 2014, Page. 7.

[6] Igm Nurdjana, *Sistem Hukum Pidana dan Bahaya Laten Korupsi "Prespektif Tegaknya Keadilan Melawan Mafia*

As an example of the judge' decision above, we need to deeply examine whether the opinions about these decisions are considered controversial because they do not fulfill the sense of justice in the community or even the decision to ensure the upholding of justice and protection of human rights. In the frame of legal philosophy, this case is not only limited to grammatical issues. The philosophical framework invites legal thinkers to reviews issues holistically. Not only based on normative rules and language narrowness, but must be widely analyzed in terms of ethics, morality and humanity, through a critical approach.

2. Method of the Research

It is a normative legal research or library research.[1] The location of the research was the Supreme Court of the Republic of Indonesia and the Judicial Commission, by considers that the both institutions were centers of Indonesian judicial institutions that dealt with the problems of judges in Indonesia.

3. Application of Legal Discoveries on Criminal Offenses in Realizing a Justice

Legal research is a research that contains prescriptions to study the coherence of a legal event with the rule of law, the rule of law with legal norms, legal norms with the principles of law, and the principles of law with ethics. Meanwhile, the function of research is to find the truth. Self-prescription is a presentation, to determining what is commanded and prohibited by the rule of law, and how to adjust it to the applicable law in Indonesia.

In essence, targets in legal studies are norms or rules, namely a set of commands about what to do, and a prohibition on what not to do. In addition, legal discovery is also a target in legal studies. This is because the legal order is not perfect, the law must be discovered.[2]

The legal is not merely a law, but also a habit or values that live in society. The judge, however, as law enforcement is not just a law horn (*la bouche de la loi*), but it is not a trumpet that blow freely by society (*la bouche de society*).[3] The judge stands balanced in its middle has the right to interpret the law and is obliged to explore the sense of justice that lives in communities. However, justice in the discoveries and judgments of judges will not be achieved without legal instruments as the basis of independence and judicial power.

Legislation has many problems were not flexible, never complete to cover all legal events or lawsuits and bring about what is commonly called legal vacuum or *rechstvacuum*. Precisely is the void of legislation being not a legal vacuum. The weaknesses of these legislations then require a concept of legal discovery by judges although in some cases the discovery is limited to justice. Legal vacuum is very easy occurs if the law source only is the law. The role of judge is required and not just as a law trumpet.

In order to fill this legal vacuum, the judge has the authority to interpret but specifically to criminal justice, analogy is not allowed. The authority of the judge to legal discovery is also a consequence of the judicial principle in which "the court shall not refuse to examine, adjudicate, and decide on a matter by the reason that absent or unclear legal but it is obligatory to examine and adjudicate it."

A legal discovery by a judge referring to the four principles above may give rise to a verdict that provides legal certainty, justice and prosperity in the community. In interpret a rule of law, the judge should refer to several principles, as follows:

a. Principle of objectivity which implies that interpretation should be based on the literal meaning and nature of the rule of law and must be made clear so that it can be used for further development.
b. Principle of unity which implies each norm should be read as one unseparated text.
c. Principle of genetic which implies in interpreting, the existence of the original text should be the primary consideration as well as the grammatical, cultural and social conditions of the establishment of the law and the intent of the law makers.

Hukum", Pustaka Pelajar, Yogyakarta, 2010, Page. 62.

[1] Peter Mahmud. *Penelitian Hukum*. *Kencana,* Jakarta, 2014, Page 59.

[2] Sudikno Mertukusumo. 2004, *Penemuan Hukum Sebuah Pengantar,* Liberty,Yogyakarta. Page 2.

[3] Achmad Ali. 2002. *Menguak Tabir Hukum*. Gunung Agung Jakarta. Second edition. Page. 73

d. Principle of comparison which implies in discovering needs to be compared with other legal texts about the same thing at a time.

The criminal law in communities is intended to provide a sense of security to individuals and groups in their daily activities. Article 1 paragraph (1) of the Criminal Code which reads "no act punishable, but on the strength of the criminal provisions in the law existing in advance of that act" the principle of legality is the basis for determining whether any criminal offense shall be set beforehand by a rule of law or at least by an existing rule of law or before the person commits an act.

The principle of legality is a principle that states that no act can be punished, except on the basis of the strength of criminal provisions according to the existing Act first in advance.[1] Actions that can be punished are divided into positive actions, it means as "*doing something*." While, negative actions are intended "*not doing something*."[2]

Not doing something that is obligatory and doing something that is prohibited is a criminal offense. Meanwhile, according to Moeljatno that the criminal provisions according to the Act, if referring to Article 1 of the Criminal Code, means the criminal rules in the legislation.[3] It can be concluded that the principle of legality is a concrete legal regulation whose meaning is contained in the Criminal Code of each country as a standard definition of the principle of legality itself.[4]

Legal discovery is an activity that conducted by judges (in their duties) and also by people working in the legal field, such as lecturers, prosecutors, lawyers, and people who work in law firms, in solving legal problems. It is a deductive argument, from a concrete rule of law as a major premise, legal event as a minor premise, and the legal discovery itself in the form of judge decision as a conclusion.

If rests on the principles of criminal law interpretation, four of the seven principles, namely the principles of proportionality, relevance, compliance, and materiil are more directed to unwritten rules and constantly evolving in the community.[5] Even if we refer to some jurisprudence, there are decisions of judges who make legal discoveries with extensive interpretation methods, which do not have a principal difference by analogy.

In criminal cases the decision-making is conducted by independent judges through a trial process. The process plays a role in determining how decisions will be made. On the other hand, decisions that are felt fair by the people depend on the fair, transparent and accountable trial process. All court decisions are legal and *inkracht* if they are said in open trial publicly.[6]

The basis of legal that used by the judge in sentencing a decision outside the article charged by the public prosecutor is through jurisprudence. There are several decisions of the Supreme Court that are guided by the *judex factie*, which then makes the decision guided by it become jurisprudence.

The jurisprudence includes decisions of the Supreme Court No. 818 K/Pid/1984, No. 42 K/Kr/1956, No. 693 K/Pid/1986, and No. 675 K/Pid/1987. Basically, these decisions assert that the defendant could be punished with a delict outside the contents of the indictment which was similar to the delict that was charged, because the delict is included in it.

However, there are also different judgments by the Supreme Court in both cases. While, the judge in decision No. 238 K/Pid.Sus/2012 states that the verdict imposed by the judge must be in accordance with the indictment, in fact the judge on the decision of the Supreme Court No. 2497 K/Pid.Sus/2011 refused the appeal in which in other words it does not imply the *judex factie* which puts the verdict outside the prosecutor' alleged article. Though the two cases were decided by the chairman of the same jury, namely Prof. Komariah Emong Sapardjaja, and also in a short time.

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[1] Eddy O.S Hiariej. *Pemikiran Rammelink mengenai Asas Legalitas*. Jentera Jurnal Hukum, Edisi 16 – tahun IV, April – Juni 2007, Page 124.

[2] T.J. Noyon & G.E. Langemeijer, 1947, *Het Wetbook Van Strafrecht*. Vijfde Druk, Eerste Deel Inleiding Boek I, S. Gouda Quint – D. Brouwer En Zoon, Uitgevers Het Huis De Grabbe – Arnhem, Page. 54.

[3] Moeljatno. *Asas-Asas Hukum Pidana*. Rineka Cipta, Jakarta. 2000, Page. 26.

[4] Eddy O.S Hiariej. *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana*. Penerbit Erlangga, Jakarta. 2009, Page. 24.

[5] Ibid, Page 84.

[6] Article 195 of Act No. 8 of 1981 on Criminal Procedural Law

When more tend to the justice, then the verdict of judge will rule out legal certainty. If following the provisions of Article 191 paragraph (1) of the Criminal Procedure Code, then the judge has set aside justice by releasing the defendant who has clearly been guilty of an offense despite his crime is not alleged.

4. Ideal Concept of Law Discovery by Judge in the Future

Developing a dignified Indonesia is a conscious effort to improve the standard of living of Indonesian people, especially the development or improvement of the quality of human resources. Starting from law enforcement, corruption eradication, livelihoods, economic and social welfare, and human and humanitarian development efforts. The rules that used must be a rule refer to a social contract that has been agreed upon.

In a legal-based law enforcement requires various ideal approaches. Making legal discovery on criminal justice is also one of them. According to the author, there are several approaches needed in conducting legal discovery on criminal justice to realize a justice.

In order to realize the vision of building Indonesia dignity, required an understanding of the subjects of the dignity is Indonesia human beings. The social fact of Indonesian peoples is plural, requires that by understanding the difference is the only solution so that we can unite. Self is true but it is possible become wrong. Others is wrong, but it is possible become true.

The basic principle can only be enforced through democracy. That every individual should be given the right to voice their aspirations and the individual must merge in the agreed upon social contract. Again, the rule of play about democracy as a way to unity the pluralism has been confirmed in the 1945 Constitution as the constitution of Indonesia. The constitution became the unification of the plural or diverse Indonesian nation.

For the constitution as the highest law in a State can serve in accordance with the will of the people, it must be built a constitution based on the views of life or the ideology of nation. Ideology is a reference to the formation of the nation' legal system, including its constitution. In the context of Indonesia, the constitution must be built on the ideology of the State and the Indonesian nation, namely Pancasila ideology. To realize good governance requires an organ in which the ideals can be carried out.

In a constitutional State, there are at least 12 (twelve) principles that constitute the establishment of the constitutional State in question. The twelve principles were law supremacy, equality in law, legality principle, restriction of power, independent organs of government, free and impartial courts, civil service arbitration tribunal, administrative judiciary, human rights protection, being democratic, serve as a means of achieving the objective of the State, as well as transparency and social control.[1]

The constitutional State and its twelve principles can be implemented as the national legal system. The system is an interrelated unity and work for the realization of a particular purpose. The legal elements are structure (institutional), substance (principle of rule), and culture (behavior of legal subjects determined by the principle of rules).

By involving the dimension of human rights, the 1945 Constitution can be said to be a human rights constitution that embodies the constitutional rights of citizens. In this argument, the discovery of law in criminal justice must be grounded. The discovery of law is intended for the protection of human rights, and the 1945 Constitution explicitly supports the constitutional rights of the citizens of that country.

The progressive law-based legal discovery is legal discovery based on the character and progressive legal paradigm, including the presumption that the law is not an absolute and final institution, because the law is always in the process of being. Such a concept of law always encourages judges to decide cases contextually not only confined to the sound of the text of the Act alone.

On the other hand, it is supported by academics of law faculty at Leiden University, namely Van Vollenhoven, Ter Haar, and his students who are also from the native, namely Soepomo. The purpose of this group does not refuse codification and unification, they only refuse European cultural colonization of indigenous culture, including its legal system known as customary law. It was the hard efforts of this pluralist group which then

[1] Teguh Prasetyo. *Membangun Hukum Berdasarkan Pancasila*. Nusamedia, Bandung., pg. 23

maintained the existence of customary law until 1942 and became a seed for the birth of indigenous intellectual, especially law education.[1]

If person considers that in modern society, every problem is only the court as a way to settle the dispute, then it is a false assumption. there are still ways to settle disputes outside the court, including mediation, arbitration and consolidation. There are communities that are dominated by litigation methods such as peoples in the United States. On the other hand, there are also people dominated by non-litigation methods such as Korea and Japan.[2]

Not all cases must be resolved in court. The United States is a country that has a lot of attention to the existence of courts and judges. Therefore, the concept of realism in the United States is so dominant.[3] The realist approach has been charged as the cause of confusion and the excessive role of judges in forming and making laws. Such a view assumes that the law is not what the court does, but that the court is the institution that carries out the law.

If the judge tends to continue to follow the law, it will be very easy to predict what the judge decides in many cases. After all, the law is earlier than the court. A legal definition which states what the court decides is the same as saying that the drug is what written on a doctor' prescription paper.

Legal discovery is a midpoint between the necessity to submit to the law with the judge freely in deciding a case. It has long lived and developed in indigenous law communities. It stands in balance between *la bouche de la loi* (law horn) and *la bouche de society* (community horn). It aims to uphold social justice for all Indonesians.

5. Conclusion

The urgency of the role of judges in in legal discoveries to realize a justice is very required, given the legislation that cannot accommodate all contemporary legal issues. The weaknesses of these legislation require a concept of legal discovery by the judge even though in certain cases is limited to justice. The verdict of judge that close to the justice are not decisions that his reasoning put the judge as law horn, but the judge must be able to interpret the law actually in accordance with the needs and developments that occur in the midst of community life.

The research recommends that a rule of law is needed that specifically regulates the legal discoveries by judges, in order to fill the legal vacuum in facing the problematic of human is increasingly complex. It because the legal discovery is also one of the duties of the judge in exploring the sense of justice that lives in society (*living law*). In addition, requires law enforcers, especially judges can be more responsive and progressive in solving legal problems, that is by making legal discoveries if necessary to realize substantive and responsive justice towards the development of era.

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[1] Soetandyo. *Dari Hukum Kolonial Ke Hukum Nasional*. Epistem Institute, Jakarta.
[2] Achmad Ali. *Op.Cit.,* Page 13.
[3] Ibid, Page 29.

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