

CONSTRUCTION OF LEGAL DISCOVERY BY JUDGES IN SETTLEMENT OF CIVIL MATTERS

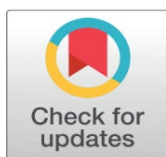
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ABSTRACT

The purpose of the study is to analyse the legal findings of judges in resolving civil cases. The research in this dissertation is included in the type of Normative research using a legal material study approach supported by a literature study or literature that is closely related to the object of the study. Based on the results of the study, the researcher can conclude that in the case of the Decision and Determination of the Gorontalo District Court Number: 1 / Pdt.P-Kons / 2023 / PN.Gto Jo. Special Criminal Decision Number 177 / Pid.Sus / 2022 / PN Gto, the construction of the decision that was previously prepared in Concrete since the Legal considerations in the criminal case until it became a norm in the form of a Civil Determination which can be used as a basis for filling the regulatory gap regarding the return of mining evidence in conditions of the absence of rules or regulations that regulate.

Keywords: Legal Discovery, Judge, Civil Case

1. INTRODUCTION

The judicial process in handling cases shows a legal method that still adheres to the teachings of syllogism, namely a legal view of law that is legist, law is identified with statute, or law is the same as statute. The only source of law is statute because statute is considered complete and regulates all legal issues, so that judges may not do anything other than apply the law strictly as it is. Judges are merely mouthpieces or trumpets of the law (*The mouth of the law*), ignoring the unwritten laws that live in society. The text of the law is the only source of law, so that the law becomes the sole

means of interpretation in providing justice. Justice as a product of the court process is limited only to formal justice, namely justice that is built based on the logical deduction of the text of the law.^[1]

The existence of the Judicial Institution, in addition to carrying out judicial duties, in terms of examining, trying and deciding disputes between the parties to the case, is also required to be able to carry out legal functions as one of the instruments in a broader framework as a social engineering tool. "*a tool of social engineering*".^[2]

In carrying out its function and role as a Judicial Institution, the Judicial Institution is bound by formal law, namely procedural law regarding the process of resolving disputes in court proceedings, and is binding on all parties and cannot be deviated from. In its development, the Court not only examines cases containing disputes or so-called contentious lawsuits, but is also authorised to examine unilateral voluntarist cases (*ex parte*) which are solely for the benefit of the Parties.

In its development, the judicial body is required to be more open, transparent and able to answer every legal need of justice seekers and furthermore, can bring changes to a new, more progressive and measurable system of norms and values. Law emerged because humans live in society. Law regulates rights and obligations in living in society, and also regulates how to implement and maintain those rights and obligations. Civil law is an important instrument that regulates rights and obligations in living in society.^[3]

As a party making a request and also a recipient of the distribution of justice, it can play a dual role as a subject and an object of law. Humans are the driving force behind the order of life in the legal community because humans are supporters and implementers of rights and obligations. Thus, formal and material civil law greatly determine and regulate how rights and obligations can be fulfilled in a balanced and fair manner.

In addition, written law (statutes) is never complete because it is racing against the legal interests of society that continue to change over time. Society requires a comprehensive and complete set of norms to regulate the lives of society.^[4] However, legal norms often lag behind the development of society; for this reason, laws need to be continuously developed so that they remain up to date and by the time (*up to date*).

To overcome the legal vacuum, the role of judicial power is greatly needed. Judges are expected not only as mouthpieces of laws and regulations, but are expected to be able to explore the values of justice in society, so that it is expected that if there is a legal vacuum or if laws and regulations are felt to be incomplete or unable to fulfill the sense of justice amid society, the role of judges is required to always be ready to seek and find norms as well as restore the sense of justice in society.

This is in line with the mandate of Article 5 of Law Number 48 of 2009 concerning Judicial Power, which states that judges and constitutional judges are required to explore, follow, and understand the legal values and sense of justice that live in society. A good judge is a judge who can realise a sense of justice in society even though there are no adequate laws and regulations.

The implementation and development of laws and regulations occur through the courts with judges' decisions. When associated with Soetandyo Wignjosoebroto's opinion, legal reform through judges' decisions is included in the category of legal reform in the sense of *law reform*. Updates to the substance of law in this context, especially unwritten law, are carried out through a legal discovery mechanism as stipulated in the provisions of Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power, which gives judges and constitutional judges the authority to explore, follow and understand the legal values and sense of justice that exist in society regarding problems or issues that have not been regulated, in the sense that there is no regulation in written law or in the case of finding a formulation of regulations that is not clear in written law.^[5]

So far, the judge's mindset in legal discovery is still bound by formal legality or formal justice. Legal discovery produces justice that tends to hurt the public's sense of justice. The process of finding a just law is only based on the law, whereas a sense of justice can be found outside the law.

The public expects legal certainty because with legal certainty, the public will be more orderly. In essence, the law is tasked with creating certainty and order. Through law enforcement in the judicial environment, it is hoped that the judge's decision, in addition to being able to realise order and legal certainty, must also realise a law that fulfils a sense of justice. Consequently, the independence of judicial power in the hands of judges must be interpreted and implemented to realise the ideals of law that are based on justice, benefit and legal certainty.

Judges in deciding a case, in their legal considerations there are always have laws and regulations as a legal basis. Based on the author's analysis, in reality, there are still cases with almost the same objects and case positions, but with

different considerations of the judge's decision. The case in question is a request for consignment of Land Ownership Royalty payments for evidence of a criminal case in the Decision of the Gorontalo District Court Judge.

Based on the above, the author is interested in conducting a scientific study on 'Legal Discovery by Judges in Settlement of Civil Cases in Indonesia, which is narrowed down to judges in the general court environment as enforcers of law and justice, within the framework of law enforcement, especially civil law, along with the relevance of law to the development of an increasingly complex society, certainly, written law or statutory regulations will always be felt to be imperfect in resolving civil cases submitted to them, so that judges are required to explore, follow and understand the legal values and sense of justice that live in society.

2. RESEARCH METHODS

For this dissertation research, in the research method section, the author will use the Approach through the Normative Legal Research method. Normative legal research is legal research conducted with an approach to legal norms or substances, legal principles, legal theories, legal arguments and comparative law. In this connection, the orientation of normative legal research is law in books, namely observing the reality of law in various norms or legal rules that have been formed.^[6]

Normative legal research essentially studies laws that are conceptualised as norms or rules that apply in society, and become a reference for everyone's behaviour. According to Soerjono Soekanto and Sri Mamudji, normative legal research is defined as legal research that is conducted by examining library materials or secondary data alone.

3. DISCUSSION

The provisions in Law Number 48 of 2009 concerning Judicial Power and Law Number 49 of 2009 concerning General Courts above provide the basis for consideration for judges in making legal discoveries. Judges must be independent in the sense of being free, but not completely free, with responsible freedom. The judge's task is basically to give a decision in every case brought before him. In every case faced by the judge, he must be able to resolve it as well as possible, so that those seeking justice (justiciable) can feel the protection of their rights. If a legal event arises, but the laws and regulations are not or are less clear or may not even exist, then that cannot be used as a reason for the judge to refuse to resolve the case.

Moreover, in civil cases, the judge's freedom in finding the law will be bound by the matters put forward by the parties, the written norms of law in civil cases, the judge cannot decide more than what is demanded by the parties concerned as regulated in *inherzaiene inlands rectlement* (HIR) Article 178 paragraph (3) states: "he (judge) is prohibited from ruling on matters that are not claimed or will approve more than what is claimed". In judicial practice, it is often broken by judges on the grounds of justice in society. In civil matters, the judge's decision does not apply to the general public (*since omnes*), but only applies to the parties to the case (*pratiijacte*), according to Article 1917 (2) of the Civil Code which stipulates, "that the power of a judge's decision only applies to matters decided in the decision". In such circumstances, legal experts know that the law will never be complete. That is where the role of the judge lies in discovering the law to adjust the statutory regulations to the reality prevailing in society in order to be able to make a legal decision that is truly just by the objectives of the law.

Furthermore, by observing several schools of thought related to the duties of judges and legislation, then based on several policies contained in laws and regulations related to the world of justice or those that regulate judicial power, namely the 1945 Constitution of the Republic of Indonesia, Law Number 48 of 2009 concerning Judicial Power, Law Number 49 of 2009 concerning the Second Amendment to Law Number 2 of 1986 concerning General Courts and Law Number 5 of 2004 concerning the Supreme Court. Judges in exercising judicial power are free based on the law and the sense of justice of the community. Thus, it can be said that in Indonesia, in carrying out of the duties and obligations of judges is a combination and/or collaboration of several schools of thought. In resolving (civil) cases, the sources of law that can be used are not only based on laws or judicial practice, but some laws grow and develop in society or can be qualified as customary law.

Thus, judges in carrying out their duties and obligations are not only routinely practical but must also be scientific, considering the nature and characteristics of carrying out their duties which require judges to always study and learn

developments in legal science so that the legal considerations used in making decisions are truly by the law and the sense of justice in society.

In carrying out the main duties of a judge, in resolving civil cases brought before him, the judge has the obligation and duty to make legal discoveries. (*legal finding*). Considering the development and progress of society along with the development and progress of technology, information and science that is so rapid, then in interacting or relating between one citizen and another citizen also adjusts to the development and progress of technology, information and science. In the implementation of relations between one citizen and another citizen there is also the potential for conflict or dispute, so that one party will file a lawsuit in accordance with *point d'interest*, *point d'action* either based on the occurrence of an unlawful act (*tort*) or based on a breach of contract (*default*) according to the claim of rights.^[7]

On this basis, it requires judges not only to understand the provisions of legislation and judicial practices but also to follow the developments and progress of technology, information and science, so that they can lead trials quickly and correctly and confirm legal considerations in making decisions, so that the decision can be implemented in a timely, effective and binding manner for the parties to the case.

It is further understood that judges in carrying out their duties must be fair and impartial by the provisions of civil law and civil procedure law, which provide objective guarantees in examinations before the trial. The objectivity of judges as one of the prerequisites in implementing judicial independence and demonstrating the independence, integrity of judges in enforcing the law, which must be oriented and/or based on the law and the sense of justice of the community.

In simple terms, it can be explained that in enforcing the law three elements must always be taken into account as *reason for entering* namely: legal certainty justice (*rechtssicherheit*), and utility (*practicality*) and justice (*justice*). The law must be implemented and enforced. Everyone expects that the law can be established in the event of a concrete event. How the law is, that is what must apply. "*Let justice be done, let heaven pass, and let the world perish*" (even if the world collapses, the law must be upheld). That is what legal certainty wants.

Society expects legal certainty. Because with legal certainty, society will be more orderly. On the other hand, society expects benefits in the implementation or enforcement of the law. Society is very interested in the implementation or enforcement of the law, and justice is considered. The implementation or enforcement of the law must be fair. In community life, a legal system is needed to create a harmonious and orderly community life.^[8]

In reality, the laws or regulations that are made do not cover all cases that arise in society, making it difficult for law enforcers to resolve the cases. To resolve a case, sometimes judges face the problem of the absence of laws and regulations that can be directly used to resolve the case in question; therefore, judges must make legal discoveries. (*legal finding*).

The policy regarding the requirement for judges to make legal discoveries (*rechtsvinding*) is stated in Article 5, paragraph 1, of Law Number 48 of 2009 concerning Judicial Power. It is implied in it, both legally and philosophically, that judges have the obligation or right to make legal discoveries and create laws, so that the decisions they make are by the law and the sense of justice of the community. This provision applies to all judges in all judicial environments and at all levels, both first instance judges, appeals and cassation or supreme court judges.

To resolve a civil case brought before him, a judge must at least carry out the stages of establishing the facts, qualifying the events and legal events. Constituting the facts is assessing whether or not a concrete event presented in court is true, and this requires proof. So what must be proven is the fact or concrete event, while the qualifying stage means grouping or categorising the concrete event into a group or class of legal events by applying the rules as a logical activity. Here, the judge has not applied the rules but must name the legal event.

Next is to Constitution or giving its constitution, namely, the judge determines the law, gives justice, namely, determining the law of a legal relationship between a legal event and a legal subject (between the parties in the case). Related to the judge's duties, examining and trying and resolving cases submitted to him, the next stage is to formulate the legal rules that have been found in a complete decision format.

In practice, these stages do not always run smoothly and judges face the fact that the concrete event presented to them is logically not included in a certain group or class of legal events because of the unclear or non-existent regulations that can be directly applied to the concrete event, or the fact that in the legislation related to the concrete event, the words or sentences of the law are unclear, or the law is incomplete in the sense that it does not regulate a concrete case submitted to the judge. On the other hand, judges are prohibited from refusing to try a case submitted to them because the law does not exist or is unclear, as stipulated in Article 10, paragraph (1) of Law Number 48 of 2009 concerning

Judicial Power. This is connected with the obligation of judges to state which Articles of legislation or unwritten law are the basis for judging, as stipulated in Article 50, paragraph (1) of Law Number 48 of 2009 concerning Judicial Power.

As a consequence of these conditions, the provisions of Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power are appropriate, where judges (including civil judges) are obliged to explore, follow and understand the legal values and sense of justice that exist in society and/or must make legal discoveries.^[9]

About the discovery of the law, judges can take several steps, first, if the regulation is unclear, the judge interprets the wording of the law using various methods of interpretation, such as authentic, systematic, historical, teleological, sociological and other interpretations; second, if the regulation is incomplete, the judge will reason. (*reasoning*); third, if the regulation is outdated, the judge can interpret it so that it can be applied to the concrete event that is the point of dispute between the parties; fourth, if it has not been regulated in the regulation, the judge can use the method of analogical interpretation or a *contrario* interpretation or by exploring the legal values and sense of justice that live in society; fifth, if the regulation is contrary to the sense of justice that lives in society, the judge can carry out extensive interpretation and restrictive interpretation or explore the legal values and sense of justice that live in society to be applied as the reason and legal basis for the judge's decision.

After that, the stages and results of the discussion of the legal discovery method carried out by the judge must be clearly described in the legal considerations of the judge's decision, in addition to which it must also mention the articles of the laws and regulations that were discovered or the unwritten laws that were explored as the reasons and legal basis for the judge's decision.

A case that is brought to court is for no other reason than to obtain a resolution and problem-solving through the hopes and desires of those seeking justice. (*the justice bell*). For a case to be decided fairly, the facts of the case must be known, namely, which events are true and which events are false.

To determine which events are right and wrong can be done through the process of proof in court which before reaching the proof stage (*konstataasi*) is continued by naming the legal event or qualifying, then reaching the constitutional stage, namely seeking, finding, explaining the legal rules before all that must first go through the stages of the trial process starting from the registration of the case, to the trial first attempted and carried out the mediation or peace stage between the parties, and if the mediation or peace process is not achieved then continued to the trial for proof which finally at the stage of reading the verdict. The stages of the process are carried out at the District Court level, which in general has been regulated in civil procedural law and various other laws and regulations. To obtain harmony, timeliness, orderly court costs, it is necessary to regulate it in the standard operating procedure (SOP).

The main and most numerous activities of judges are at the trial stage, which is a series of judges' activities in making legal decisions. Basically, what is done by judges in trials is a series of processes that start from constituting concrete events, qualifying concrete events, or having meaning to determine the legal event, and constituting or giving law or justice, which basically all of that is a conflict that must be attempted to be resolved. (*legal problem identification, legal problem solving and decision making*). Therefore, judges are always faced with concrete events and cases or conflicts, for which they must then seek legal solutions and resolve them by the community's sense of justice.^[10]

The discovery of law through the trial stage is the process of forming law by judges who are tasked with applying law to concrete events. More concretely, according to Sudikno Mertokusumo, it can be said that the discovery of law by judges is the concretization, crystallization, or individualization of legal regulations or *das Sollen*, which are general by considering concrete events or *das Sein*, so that these concrete events need to be sought for general and abstract laws. These concrete events must be met with legal regulations and must be connected with their legal regulations so that they can be covered by legal regulations; conversely, legal regulations must be adjusted to their concrete events so that they can be applied.

The law must be found because the concrete event or conflict that must be resolved must first be converted into a legal event; the concrete event must first be translated into legal language. Apart from that, the law must be sought when the legal regulations are unclear or incomplete. The law must also be found because the legal regulations must be adjusted to the development of the situation. What is sought in finding the law is basically "legal definitions" "applicability or not", and validity or not". In finding the law, the source of the law must first be sought. If the judge wants to find the law for a concrete event or conflict, then the law must first be sought in the law. The highest source of law is that, compared to other sources of law, it guarantees legal certainty. If the law does not regulate it, then efforts must still be made to find the law through reasoning or argumentation.

Even if the legal problem is successfully selected and formulated, it still needs to be known and determined again which legal field it belongs to, whether it is family law or other law (breach of promise - unlawful act). After the legal problem is formulated or the concrete event is stated, then the legal event must be found and determined, and then the law is applied to the legal event and then a decision is made. This is because the law, especially the written law, is unclear or incomplete, so the law needs to be sought and found. Therefore, legal discovery is needed. It is widely known that legal regulations are unclear and incomplete. It is impossible for there to be a complete legal regulation that is as complete as possible or as clear as possible. This is natural because human interests are countless in number and type, so it is impossible for there to be one legal regulation that can regulate human interests completely, clearly and clearly.

The concretisation or individualisation of law is related to the existence of concrete events or conflicts. Legal scholars who work in their profession are always faced with concrete events or conflicts that must be solved or resolved. Concrete events or conflicts must be solved, and to solve them, legal rules must be sought. Law or *das Sollen* is abstract. Abstract law cannot be directly applied to concrete events. Therefore, the law must be concretised first by connecting and adjusting to concrete events, then the legal event is sought, and then the law is applied.

One of the functions of law is as a tool to create certainty and justice. Efforts that should be made to create certainty and justice are that the law must be implemented properly. In addition, it has also been understood that law is a means of renewal, or as a means of engineering, by the expression that law, "*law as a tool of social engineering*". The concept of Rescou Pound is not separated from the principle of "judge made law", thus the meaning of law in "*law as a tool of social engineering*" is a law made by a judge or it can be said that Pound's concept can be interpreted as the role of a judge in making and/or passing a decision with an orientation towards carrying out social reform.

The implementation of the law can take place peacefully, normally but can also occur due to violations of the law. In this case, the law that has been violated must be enforced, and it is hoped that in this law enforcement, the law becomes a reality so that order and justice are realised. Basically, a good law is a law that is able to accommodate and distribute justice to the people it will regulate. The close relationship between law and the socio-cultural values of society shows that good law is a law that reflects the values that live in society.^[11]

In terms of law enforcement, everyone always expects that the law can be determined in the event of a concrete event, in other words, that the event must not deviate and must be determined by existing (applicable) law, which in the end legal certainty can be realized. However, it should be remembered that in law enforcement, the three elements must always be considered to realise the essence of the function and purpose itself, namely: legal certainty (*legal certainty*), benefit (*practicality*) and justice (*justice*). Without legal certainty people do not know what to do, which will eventually cause anxiety. However, too much emphasis on legal certainty, too strict adherence to the rules of the law will also result in rigidity and not exclude the possibility of creating a sense of injustice. Whatever happens, the rules are as such and must be obeyed and implemented. Farsani (2025)

Sometimes the law often feels cruel when strictly enforced (*a hard law, but still written*). Talking about law in general, people generally only look at legal regulations in the sense of rules or regulations, especially for practitioners. While we are aware that the law is not perfect, the law can't regulate all human life activities completely. There are times when the law is incomplete, and there are times when the law is unclear. In the event of a violation of the law, law enforcers (judges) must implement or enforce the law. Judges cannot and should not suspend or refuse to issue a verdict because the law is incomplete or unclear. Judges are prohibited from refusing to issue a verdict on the pretext that the law is incomplete. Therefore, because the law that regulates concrete events is incomplete or unclear, in this case, law enforcers (judges) must seek, explore and study the law; judges must find the law by doing.

Legal discovery (*rechtsvinding*). Legal discovery is generally defined as the process of law formation by judges or other legal officers who are tasked with implementing the law regarding concrete legal events.

According to the research results, there are several decisions at the cassation level at the Supreme Court, where the process of forming a decision by the judge goes through four stages that must be passed, namely establishing the facts, qualifying the name of the event and constituting the legal event. applying legal rules in the format of the decision. The decisions in civil cases include:

- 1) Decision of the Gorontalo District Court Panel Number 1/Pdt.P-Kons/2023/PN.Gto Concerning the Validity of Depositing Payments of Non-Tax State Revenues (PNBP) mineral and coal regarding the evidence of the criminal case in the form of 8,500 sacks of black stones, amounting to Rp. 204,000,000 (two hundred and four million rupiah) from the Applicant to the Respondent.

- 2) Decision of the Gorontalo District Court Panel Number 2/Pdt.P-Kons/2023/PN.Gto Concerning the Validity of Depositing Payment of Land Ownership Royalty Payment for evidence of criminal cases in the form of 8,500 sacks of black stone,s amounting to Rp. 3,944,000 (three million nine hundred and forty-four thousand rupiah) from the Applicant to the Respondent.

The two judges' decisions above are legal products carried out by judges by the principle of "judge made law", in carrying out their function as a means of renewal, or to carry out social and community engineering efforts, by the expression that law, "*law as a tool of social engineering*". Judges have the duty and role to make laws or it can be said that this concept shows the role of judges in making and or passing decisions with an orientation to carry out legal reform, so that the pattern of legal settlement in society can be engineered and adjusted to the living legal values and the sense of justice of society.^[12]So according to the researcher, judges in such conditions have a role to carry out legal reform, and it is clear that judges have formed laws or by the principle of judge made law, so that in addition to the existence of laws and regulations which are legal rules, such judges' decisions can also be categorized as legal rules, especially in the meaning of 'law' as an instrument for solving problems or as a means of reform.

John Austin stated in the theory of will that the belief of the legislators that the laws they produce can accommodate and anticipate violations of the law related to the material contained therein is justified, considering that the legislators have ensured that the law was made by accommodating the full will of all stakeholders. Therefore, the laws produced are certain to have accommodated a sense of justice and contain guarantees of benefit if implemented. Judges who encounter concrete events(*empiric*)who are brought before the court, by themselves, only have to apply the law. So, applying the law by itself guarantees the upholding of justice and benefits.^[13]

Judges in carrying out their duties must be fair, objective according to the law, and not discriminate or be impartial and must carry out by the provisions of civil procedural law, which provide objective guarantees in examinations before the trial. Judges in examining and trying civil cases or civil lawsuits will face two parties who have conflicting interests, namely the plaintiff and the defendant, both acting for and on behalf of themselves or through their attorneys. Furthermore, the judge acts as a neutral and impartial third party to objectively try the case by the law and justice in the civil case and the end, the judge provides a legal conclusion in the form of a decision that is binding on the parties.

4. CONCLUSION

The discovery of law in resolving civil consignment cases is closely related to previous criminal decisions. Where legally, the Panel of Judges has considered the actions of the Defendants. The law must be fair, have benefits and provide legal certainty not only for the actions of the Defendants but also for the wider community, so that the Panel of Judges assesses from a legal aspect the application of the law progressively by considering the legal bases that are expressly regulated in the law. *a quo*. Based on these considerations, the imposition of criminal penalties is only based on its benefits to provide protection not only to the local mining community or group but also to the defendant for the greatest possible purpose for the welfare of the local mining community.

CONFLICT OF INTERESTS

None.

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