Contemporary Issues on Interfaith Law and Society
ISSN 2829-8373 (Print) 2829-8624 (Online)
Vol. 1 Issue 1 (2022) 77–96
DOI: https://doi.org/10.15294/ciils.v1i1.56714
Available online since: January 31, 2022

Contemporary Issues on Interfaith Law & Society
https://journal.unnes.ac.id/sju/ciils/index

Participation of Judicial Decisions as The Form of The Implementation of Moral Values in Case Statement Based on *Rechtvinding Activities* and *Negative Wetjlike Theorie*

Ikhda Zikra [a]✉, Cuong Lan Minh [b]

[a] Research Fellow at Jakarta Legal Training Institute, Jakarta, Indonesia
[b] University of Social Sciences and Humanities Vietnam National University, Vietnam

✉ Corresponding email: ikhdazikra@gmail.com

Abstract

The judge is the spearhead as well as the parameter of justice test conducted by the justice seekers. One of them through decisions issued by the judge, many things that need to be considered and considered by the judge in deciding a case, especially because the justice is universal and the science of law which is a science that is multidisciplinary means not monotonous or only limited to eyeglasses or juridical point of view only but need to pay attention to other values that live, grow, and develop in society both written and written. Article 16 and 28 of Law Number 4 Year 2004 as already amended into Law mandates that judges are prohibited from refusing cases that enter the Court under the pretext that the law does not regulate, it is unclear but is obliged to examine and decide upon the case. Then in article 28 explained that the judge must dig the values

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that exist in society. This is to ensure a sense of justice for the community because the law is not what is contained in the law alone but also pay attention to other laws that are Living Law and Unwritten Law in the form of habits that exist in society, customs, or traditions is still acknowledged and lives, grows, and develops with the community based on the mandate of Pancasila and the Constitution of the Republic of Indonesia which is accommodated in Article 18 B Paragraph (2) that "the state recognizes and respects the unity of society as long as it exists within the community" in its legal considerations shall explore and include these values for the implementation of social justice for all Indonesian people. So, the judge's conviction in deciding a case also greatly affects the content of the decision so as not to negate the existing morality as a unity of values that live and grow in society. HLA Hart acknowledges that law and morals have a very close relationship, even Hart reveals that between law, justice and morality has a very close relationship, even one of the aspects of justice, namely administrative justice, in the law of the minimum nature of law and morality.

KEYWORDS *Justice, Judicial Decision, Moral Value*

Introduction

Whereas as a country which recognizes the higher legal standing in the life of the state and the country, Indonesia has published the statement in our Constitutional Legislation which is accommodated in Article 3 of the Constitution of the Republic of Indonesia states that "*the State of Indonesia is a State of Law*" the next question that arises is what kind of legal state is envisaged in the formulation of this article whether civil law or common law.

There is an ambiguous opinion in determining the answer to the question where historically the law used by the state of Indonesia is a legacy of a Positive Netherlands or civil law that emphasizes the source of the law on the written law that is the law so that what is ordered by the law is the

law, but on the side of the mandate of article 28 of Law Number 4 of 2004 as already amended into Law Number 48 of 2009 on Judicial Power that in deciding the case of judges must also consider the values that exist in the community that is not written in the form of custom customs and so on.

The legal issues that exist in society are not only influenced by the errors and fraud of the conflicting parties but are also at least influenced by the judge's decision in the finalization of the case. Carefulness and activeness of judges in digging the values that exist in the community is required even required for the creation of justice. In the concept of progressive law developed by Prof. Satjipto Rahardjo essentially emphasizes that the law exists for society not society exist for the law means if there is a discrepancy between the society with the rule of the written law that is the law that needs to be addressed is the law because humans are dynamic other than the law that is static so it will more logical when civilization and the development of existing values should not refer to written rules when it is not appropriate or not in line with the community.[1]

In other words, not always the law to be a reference but also must pay attention to other values that live in society one of them is moral value. Article 183 of the Indonesian Criminal Procedure Code as the basis for judges to pass judgment is not necessarily absolute based on the law, the theory of proof is known as the theory of negative proof that other than the provisions of the contents of the article, the judge may refer to other provisions namely other values in order to foster self- decide a case.[2]

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[1] Satjipto Rahardjo, *Membedah Hukum Progresif.* (Jakarta: Penerbit Buku Kompas, 2006). *See also* Satjipto Rahardjo, "Hukum Progresif: Hukum yang Membebaskan." *Jurnal Hukum Progresif* 1, No. 1 (2005): 1-24; M. Yasin Al Arif, "Penegakan Hukum dalam Perspektif Hukum Progresif." *Undang: Jurnal Hukum* 2, No. 1 (2019): 169-192; Lutfil Ansori, "Reformasi Penegakan Hukum Perspektif Hukum Progresif." *Jurnal Yuridis* 4, No. 2 (2018): 148-163.

[2] Eldo Pranoto Putra, and Muhamad Iqbal. "Implementasi Konsep Keadilan dengan Sistem Negatif Wettelijk dan Asas Kebebasan Hakim dalam Memutus Suatu Perkara Pidana Ditinjau dari Pasal 1 Undang-Undang No 4 Tahun 2004 Tentang Kekuasaan Kehakiman (Analisa Putusan No. 1054/Pid. B/2018/PN. Jkt. Sel)." *Rechtsregel: Jurnal Ilmu Hukum* 3, No. 1 (2020): 40-58.

Research methods used by the authors to analyze the case is Qualitative Research to through literature studies and literature review by using reference sources books, journals and legislation. Some characteristik from Qualitative Methode Research: *first* process in using inductive thinking patterns (empirical–rational or bottomup). Qualitative methods are often used to generate grounded theory, that theory arising from data not from such a hypothesis in quantitative methods. On the basis of that research are generating theory, so that the resulting theory be specifically delegated substantive theory. *Second,* Perspective and participant very high iutamakan and appreciated. The interest of researchers shed on how perception and meaning according to the perspective of participants who examined, so the bias is found the so-called phenomenological facts. *Third,* Qualitative Research does not use raw research design. Pene-litian design evolved during the process of research. *Forth,* the qualitative research goal is to understand, looking for the meaning behind the data, to discover the truth, good empirical the empirical truth of sensual, logical, empirical, and logical. *Fifth,* the subjects examined, the data collected, the data source.[3]

Rechtvinding's Activities by Judge in Deciding Cases in the Irrelevance: Between the Act & The Facts that exist in society

Responsibility as well as legal obligations for judges in the form of active participation of judges in digging and understanding the case according to Article 28 of the Law of Justice of the Republic of Indonesia that the judge in deciding the Judgment must see the values, as well as the habits that live in society. "*Judges are required to explore, follow, and understand the legal values and sense of justice living in society.*" That according to the theory of the discovery of the law (*rechtvinding*) if the regulation does not regulate a case, then the judge must act on his own initiative to discover and explore the living law's unwritten legal values. For that, he must plunge into the middle of society to know, feel and able to explore the feelings of law and sense of justice that lives in society. The

3 Satjipto Rahardjo, *Ilmu Hukum.* (Bandung: Alumni, 1986).

discovery of the law is usually defined as the process of legal formation by judges or other legal officers who are given the task of enforcing the law against concrete legal events. This is a process of concretization and individualization of the rule of law which is common with the recall of concrete events. While people prefer to use the term *"legal formation*" rather than "*the invention of the law*", because the term law discovery gives suggestions as if the law already exists.[4]

This legal discovery institution will bring us to the institution of legal interpretation and legal construction. Because in adjusting legislation with concrete events occurring in society, it can not always be resolved by way of facts only by interpretation, but beyond that sometimes years), the judge is forced to seek and form his own law through construction in a way Analogy, *Rechtsverfijning* and *Argumentum a contrario*. According to van Apeldoorn, judges must adapt (*waarderen*) the law with concrete matters that occur in society and judges can supplement (*aanvullen*) the law as necessary. The judge must adapt the law in concrete terms, since the law does not cover any incidents that arise in society. Does not the legislator just set a general guideline of life? Consideration of concrete matters, that is, adjusting the law with the conveying matter is left to the judge. The judge's decision may contain a law in a "*werkelijkheid*" atmosphere that deviates from the law in a "*positiviteit*" atmosphere.[5] The judge adds the law because lawmakers are always left behind on new events that arise in society. The law is a "*momentopname*" only, a "*momentopname*" of the circumstances in which it was made.

Based on these two facts, it can be said that the judge also participates in determining which is the law and which are not or in other words the

[4] Henry Arianto, "Hukum Responsif dan Penegakan Hukum di Indonesia." *Lex Jurnalica* 7, No. 2 (2010): 18013. *See also* Philipe Nonet, and Philipe Selznick, *Hukum Responsif.* (Jakarta: Nusamedia, 2019); Khudzaifah Dimyati, and Kelik Wardiono, "Pola Pemikiran Hukum Responsif; Sebuah Studi Atas Proses Pembangunan Ilmu Hukum Indonesia." *Jurnal Ilmu Hukum* 10, No. 1 (2007): 1-2; Ahmadi Ahmadi. "Kontroversi Penerapan Hukum: Telaah Sintesa Hukum Represif, Hukum Otonom dan Hukum Responsif." *Al-'Adl* 9, No. 1 (2018): 1-18.

[5] Satjipto Rahardjo, *Biarkan Hukum Mengalir: Catatan Kritis Tentang Pergulatan Manusia dan Hukum* (Jakarta: Penerbit Kompas, 2008).

judge runs *rechtsvinding*. Scholten states that running the law is always "*rechtsvinding*". The independence of judges in the discovery and formation of the law, and to determine which is the law and which are not or in the empty space of the law, is not contrary to the law, since such a judgment shall only apply to the parties the litigants only and do not apply as a general rule.

But the judge's judgment based on the law he finds, under certain circumstances, can be followed by other judges in the same matter and ultimately becomes a permanent jurisprudence as well as a formal source of law. The position of jurisprudence in Indonesia is very different from that of a judge who is a "*precedent*" as it is in England and America, as Gray pointed out. Gray theory is known by the theory of All the law is judge made law. A rule becomes a rule of law if the rule has been included in the judge's verdict. Gray's assumption is based on trials carried out in England, in the United States and in South Africa and referred to as a precedent judgment (*Presedenten rechts praak*). The judge shall follow the decision of a judge whose position shall be subject to higher court judgment, shall follow the judgment of another judge of equal standing, but have already made a settlement of such a case, even obliged to follow his own decision which he made earlier in such a case (*stare desicis*). The law derived from a court of precedent is called "*judge-made law*" or "*judiciary law*".[6]

[6] J. Zwart, "Overpeinzing naar aanleiding van het werk van HJ van Eikema Hommes." *Philosophia Reformata* 50, No. 1 (1985): 1-8. *See also* Siti Malikhatun Badriyah, "Penemuan Hukum (Rechtsvinding) dan Penciptaan Hukum (Rechtsschepping) oleh Hakim untuk Mewujudkan Keadilan." *Masalah-Masalah Hukum* 40, No. 3 (2011): 384-392. For further discussion concerning Gray's Tehory, *please also see* John Chipman Gray, *The Nature and Sources of the Law by John Chipman Gray*. (London: Routledge, 2019); Kenneth S. Abraham, "Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured." *Virginia Law Review* (1981): 1151-1199; Stephen A. Siegel, "John Chipman Gray and the Moral Basis of Classical Legal Thought." *Iowa Law Review* 86 (2000): 1513. Furthermore, it also emphasized that judge-made law is a law rooted in a judiciary decision, not an act of legislation made by lawmakers or a regulation created by a government agency with the legal authority to do so. The collective body of judge-made laws in a nation is also known as case law. Many

Especially in England it is often judge made law that is considered more important than the "*Statute law*" (the laws contained in the laws and regulations).[7] The importance of "*judge made law*" was magnified by Gray in his "*All the law is judge made law*" formula. The function of judges who are free to seek and formulate the value of customary law in society, is expected to enable the law to engineer the community in all aspects of life by fulfilling a sense of justice, utility, and legal certainty in a harmonious, balanced, and harmonious manner.

Current condition in Indonesia has developed the ideology to function law as a tool of social engineering, especially in the field of private law into a private national law. Based on such concepts and draft policies, there is no doubt that *adat* law advocates cannot act on other than relying on the ability of judges to develop legal empowerment in society, on the basis of the principles of contingency that must be truly creative. Even in the new order era judicial bodies are idealized to be free judges and power-sharing within the government will be honorably honored but hopes to these bodies as an independent and creative body to pioneer legal reform-through articulation of the law and people's morale seems to be too much.

One aspect of the law's life is the certainty, that is, the law of will create certainty in the relations between people in society. One that is closely related to the issue of certainty is the problem from which the law originated. Certainty about the origin or source of the law becomes important since law becomes an increasingly formal institution. In the context of such developments, the question of "which source is considered legitimate?" Becomes important.[8] On the issue from which the law originated or soured which we may deem legitimate, in the science of law

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nations allow judges to set legal precedents when making high court decisions, adding to the body of law in a nation and providing new interpretation of existing laws. *Please also see* Joel I. Colón-Ríos, "Judge-Made Constitutional Change." *Routledge Handbook of Comparative Constitutional Change*. (London: Routledge, 2020), pp. 217-230; Peter Karsten, *Heart versus head: Judge-made law in nineteenth-century America*. (North Carolina: Univ of North Carolina Press, 1997).

[7] Etika Farida, Hukum untuk Mengisi Kekosongan Hukum dalam Pemeriksaan Perkara Peninjauan Kembali Kasus Korupsi BLBI (Studi Putusan MA No.17 Pk/Pid/2007), *Thesis.* (Surakarta: Universitas Sebelas Maret, 2010).

[8] E. Uttrecht, *Pengantar dalam Hukum Indonesia*, (Jakarta: Balai Buku Ichtiar, 1962).

this can be viewed from within the meaning of the word formal and in the meaning of the word material.

The source of the law in the meaning of the word formal can be seen from the way and the form of the positive law (*ius constitutum*) which has the power of Soetandyo Wignjosoebroto, from Colonial Law to the National Law of Social Political Dynamics in Legal Development in Indonesia which binds the judges and the citizens, with no question of the origin of the contents of the rule of law.[9] The source of the law in the meaning of the word material, can be seen from the view of life and values (*values waarden*) that lives and develops in the society and beliefs and legal awareness of the Indonesian nation (*ius contituendum*).

The ability of our judges seems to be faced with a dilemma, between hope and reality, even more so in this era of globalization. The legal needs of the community are rapidly evolving, so that the judges are "*expected*" to adapt the law to concrete events and make decisions based on laws it finds itself and can eventually become a fixed and authoritative jurisprudence.

The doctrines and traditions adhered to in the courts of Indonesia, have conceptualized judges to the extent of being the mouthpieces of the laws they have found from formal, pre-determined doctrinal sources. Legal and judicial education in Indonesia has already emphasized the deductive way of thinking through the formal logic syllogism, without ever attempting to dissect students as well as the inductive way of thinking necessary to analyze the cases and move from the cases to Formally becoming the source of the law for a person the judge is essentially: any event of how the law proceeds, or in other words from. Where the rules that can bind the judges and the citizens of the community are consisting of laws, customs, customs, jurisprudence, tracts, and doctrines.[10]

Nevertheless, the judge in order to uphold justice and righteousness, forced to see the sources of law in the meaning of the word material, if the sources of law in the formal sense can not be used to solve a case being examined. Here it is necessary to have the independence of judges in the

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[9] Lili Rasjidi, *Hukum Sebagai Suatu Sistem*, (Bandung: Mandar Maju, 2003); Soetandyo Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional: Dinamika Sosial-Politik dalam Perkembangan Hukum di Indonesia*. (Jakarta: HUMA, 2014).

[10] Soetandyo Wignjosoebroto, 2014.

process of adjusting the law with concrete events, enable the judge to participate in deciding, which is the law, and which are not, or act as the inventor of the law in an effort to uphold justice and legal certainty.[11]

According to von Savigny the law is based on a system of legal principles and a basic sense from which for each event can be applied a suitable method (*Begriffsjurisprudenz*). The judge is free to apply the law, but he moves in a closed system. The presumption that the law is a closed entity (*logische Geschlossenheit*), at present is no longer acceptable. Scholten said that the law is an open system (*systeem*), we realize that the law is dynamic that is constantly in a process of development.

This brings consequences, that the judge may even have to fill in the blank space existing in the legal system, provided that the addition does not alter the system. But the judge cannot arbitrarily determine new things, but he must seek a relationship with what has been there.[12] Each law is essentially established *in abstracto* or in an abstract state, i.e., the legislator only formulates general rules applicable to all those under his control, whereas the judge exercises the law *in concreto* or in circumstances concrete, i.e., that only applies between the parties concerned in a particular case.

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[11] Sudikno Mertokusumo, *Bab-bab Tentang Penemuan Hukum.* (Jakarta: Balai Buku Ichtiar, 1962).

[12] Theo Huijibers, *Filsafat Hukum Dalam Lintasan Sejarah.* (Yogyakarta: Kanisius, 1991). In the same context, concerning philosophy of law, some scholars also emphasized that philosophy of law is a branch of philosophy that examines the nature of law and law's relationship to other systems of norms, especially ethics and political philosophy. It asks questions like "What is law?", "What are the criteria for legal validity?", and "What is the relationship between law and morality?" Philosophy of law and jurisprudence are often used inter-changeably, though jurisprudence sometimes encompasses forms of reasoning that fit into economics or sociology. *See also* Jantarda Mauli Hutagalung, "Peranan Filsafat Ilmu dalam Perkembangan Ilmu Hukum." *Krtha Bhayangkara* 13, No. 2 (2019); Mario Julyano, and Aditya Yuli Sulistyawan. "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum." *Jurnal Crepido* 1, No. 1 (2019): 13-22; Mukhlish Mukhlish, and Zaini Zaini. "Fungsi Hukum Prespektif Filsafat Hukum." *Jurnal Fundamental Justice* 2, No. 2 (2021): 87-98; Cucu Rahmawaty, "Philosophy Law Hukum Indoensia Dewasa Ini Ditinjau Aliran Aliran Filsafat Hukum." *Esensi Hukum* 2, No. 1 (2020): 113-122.

The judge in adjusting legislation with concrete mood to uphold justice and truth and legal certainty (*rechts zekerheid*), must be able to give meaning to the contents of the provisions of the law as well as seek clarity by doing interpretations that are adapted to reality, so that the law can apply concretely when confronted with the event.

Theory of Negative Proof

The Negative Proof Theory by Negative Act (*negative wettelijk*). Based on this theory the judge may only impose a criminal punishment if at least the evidence that have been determined by the law exist, coupled with the judge's confidence derived from the existence of the evidence. Article 183 of the Criminal Procedure Code states: "*The judge shall not impose a penalty on a person except where, with at least two valid evidence, he / she obtains the conviction that a crime is actually committed, and that the defendant is guilty of doing so*".[13]

On the basis of the provisions of Article 183 of this Criminal Procedure Code, it can be concluded that the Criminal Procedure Code uses negative evidentiary system. This means that in the case of evidence to be conducted the research is whether the defendant is sufficiently justified by a proof that is prescribed by law (at least two evidence) and if he is sufficient, then it is questioned about whether or not the judge's conviction of the defendant's fault is true.

The theory of evidence according to negative law can be called *negative wettelijk* this term means: *wettelijk* based on the law while negative, the intention is that although in a case there is enough evidence in accordance with the law, then the judge has not been able to impose penalties before obtaining confidence about the defendant's faults.[14]

The limitative evidence set in the law and how to use it is also subject to the provisions of the law. In a law-restricted system or also

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[13] Lili Rasjidi, *Filsafat Hukum: Apa itu Hukum?* (Bandung: Remaja Rosda Karya, 1991). *Also see* Rasjidi Lili, and Ira Thania Rasjidi, *Dasar-dasar Filsafat dan Teori Hukum*, (Bandung: Citra Aditya Bakti, 2004).

[14] Yahya Harahap. *Pembahsan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan*. (Jakarta: Sinar Grafika, 2019).

referred to as a negative law system as its core as defined in Article 183, it can be concluded as follows:[15]

1. The ultimate purpose of verification to decide upon a criminal case, which if fulfilling the verification requirement may impose a penalty; and
2. Standards on the results of evidence to impose criminal sanctions.

The advantage of a negative verification system (*negative wettelijk*) is that in the case of proving the defendant's wrongdoing, the judge does not rely solely on the means of evidence and in the manner prescribed by law but must be accompanied by the belief that the defendant is guilty of criminal act.

This established belief must be based on the facts obtained from the evidence set out in the law, so that in the verification really searching for the ultimate truth, there is very little chance of any misconduct or application of the law used. The lack of this theory of judges may only impose criminal sanctions if at least the evidence already in the form of the law exists, coupled with the judges. Conviction derived from the existence of evidence so that it will slow the time in proving and even decide a case, because on the other side the proof must go through research. But by seeking the truth through such research, then the truths revealed can be justified.

Rechtvinding Activity Undertaken by The Medan High Court Judge in Decision Number No. 144 Pid/1983/PT-Mdn as An Embodiment of Moral Values

Bisma Siregar The High Court Judge of Medan is no stranger to our ears in the execution of the verdict No. 144/Pid/1983/PT-Mdn was dropped in deciding the dispute between the plaintiff of a teenage girl against Martua Raja Sidabutar who was later withdrawn as the defendant.

There are some interesting things in chronological story Martua Raja Sidabutar. The Medan District Court sentenced three months of

[15] Bertens Hans. *The Idea of The Post Modern: A History.* (London: Routledge, 1995).

probation. The sentence was lighter than the public prosecutors, although Martua was found guilty of committing lewd acts with a woman who was not his wife, Katharina Siahaan.

The events that occurred in 1978 in Medan, became interesting when Martua's appeal on the verge of escaping charges. But instead of happy, Martua smiled wryly because the appellate appealed with the second indictment, Article 378 of the Criminal Code. Martua is considered to be a fraud. Punishment was exacerbated to three years languishing in jail. Extensive Interpretation as a Method of Interpretation of the Law Interpreting is one of the most important basic skills for a judge to handle a case brought to him. The judge must be able to interpret a legal case correctly so that in order to obtain one precise legal provision as the basis for judgment. This interpretation here is not a general interpretation but rather an interpretation that specifically aims to understand the law itself, which is called legal interpretation. Interpretation is generally understood as "*process, deed, way of interpreting; attempt to explain the meaning of something less clear "1 or" impressions, views, opinions, interpretations.*"[16]

In the legal field of the definition of interpretation "according to the Black's Law Dictionary" the art or process of discovering and ascertaining the meaning of a statute, will, contract, or another written document. The discovery and representation of the meaning of any meaning used to convey ideas. "

Shows an understanding of the importance of "*interpretation*" not only of ways or deeds but of a skill / art to obtain the true meaning of a legal document. Interpretation is a skill that lawyers, especially judges, must have to understand the intent of the existing law and determine the correct legal basis for the case presented to it. May be either *'authentic'*, when it is expressly provided by the legislator, or *'usual'*, when it is derived from unwritten practice. Understanding and mastery of legal

[16] M. Yahya Harahap. *Pembahasan Permasalahan dan Penerapan KUHAP Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali: Edisi Kedua,* (Jakarta: Sinar Grafika, 2006). *See also* Ali Masyhar Mursyid, "Criticize the Use of Analogy Prohibition in Criminal Law." *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 27, No. 1 (2015): 155-165.

interpretation is really a very crucial basis for the Judge in the face of the case submitted to him.[17] The activeness of the judge in seeking this material truth 90% (ninety percent) is in the hands of the presiding judge in presiding over the court in court.

The judge is actively reflected in every activity undertaken by the presiding judge at the stage of the criminal proceedings, one of which is the legal discovery by the judge. At this stage, the activity of a criminal judge is an implementation of the application of the principle of active judge embodied by the existence of the duties of the judge to explore, discover, understand the values that live in society. This rule requires that judicial discovery of the judge is always dynamic and follows the times. The active judge is also essentially a law enforcer who has full authority in the judiciary and is granted the freedom in administering the judiciary.[18]

Nor does it mean that active judges may act at will, but their active attitudes in the hearing are bound by the responsibility to create laws compatible with Pancasila and the sense of community justice. [18] argues also that: the Judge is active as does a judge seeking an unwritten legal rule as well as habits that live in society, if a case examined is not found a legal rule written as a guide.

However, if the written legal provisions exist but are unclear, then the science and wisdom of the judge can interpret the rule of law positively

[17] Lawrence M. Solan, "Corpus linguistics as a method of legal interpretation: Some progress, some questions." *International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique* 33, No. 2 (2020): 283-298; Attila Mráz, "Legislation as Legal Interpretation: The Role of Legal Expertise and Political Representation." *Exploring the Province of Legislation.* (Chambridge: Springer, 2022), pp. 33-56; Siniša Rodin, "Time, history and legal interpretation." *Maastricht Journal of European and Comparative Law* 28, No. 4 (2021): 433-436.

[18] Johnny Ibrahim, *Teori & Metodologi Penelitian Normatif.* (Malang: Bayumedia Publishing, 2006). Related to judge and justice issue for further discussion, *please also compare to* Marion Fortin, et al. "How do people judge fairness in supervisor and peer relationships? Another assessment of the dimensions of justice." *Human Relations* 73, No. 12 (2020): 1632-1663; Karen Tracy, and Danielle Hodge. "Judge discourse moves that enact and endanger procedural justice." *Discourse & Society* 29, No. 1 (2018): 63-85; Jessica Jacobs, "Will Not the Judge of the Earth Do Justice?, and: When He Was Not." *Southern Review* 57, No. 3 (2021): 368-371.

in such a way as to believe in the sense of justice. This means that the court should not refuse to examine and adjudicate a case filed under the pretext that the law is absent or less obvious, since a judge has been obliged to take an active role in presiding at court, and to decide upon the case he or she examines in accordance with the values which is applicable to be accountable to the people and God Almighty.

The activeness of the judges is applied in running the trial in court to discover a material truth. The judge is active in the verification process at the trial is a judge who seeks to seek the truth. The judge makes logical reasoning in order to clarify the prosecution case by examining the defendant, the witnesses and everything filed by the public prosecutor (such as evidence), in order to ultimately gain confidence in the judgment of the cases.[19]

Thus, the interpretation and application of legal principles extend to unconventional realms, such as equating a woman's virginity to a form of goods in legal discourse. This interpretation situates the act of deflowering a woman as akin to theft or deception, implicating it as a fraudulent act under Article 378 of the Criminal Code. Such legal reasoning represents a remarkable instance of *Rechtvinding*, or legal innovation, within Indonesia's legal landscape. Particularly noteworthy is the role of judicial entities in these *Rechtvinding* endeavors, where judges strive to craft judgments that uphold justice and fairness to the fullest extent possible.

The Lindenbaum-Cohen Case: Shaping the Evolution of Unlawful Acts Beyond Legal Precepts to Include Moral and Ethical Considerations

The Lindenbaum-Cohen case is one of the most frequently mentioned references. The decision of this case is referred to when determining the criteria or scope of the act against the law (*onrechtmatige*

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[19] Eman Suparman, "Menolak Mafia Peradilan: Menjaga Integritas Hakim Menyelaraskan Perbuatan dan Nuraninya." *Jurnal Hukum dan Pembangunan* 47, No. 1 (2017).

daad). This case was terminated Hoge Raad Netherlands in 1919. Samuel Cohen, an owner of a printing company, is trying to spy on and steal the secrets of his rival company Max Lindenbaum. To facilitate his efforts, Cohen 'bribed' employees Lindenbaum for the clerk to open the secret kitchen. Upon learning of such efforts, Lindenbaum sued Cohen to pay compensation under section 1401 Burgerlijk Wetboek (or 1365 Civil Code). At the hearing, Cohen argued that what he did did not violate the law because the law did not regulate it.[20]

Got escaped at appeal level, Cohen was finally convicted in Hoge Raad. The judges of Hoge Raad declare to be unlawful acts of any act (or not acting) that infringes on the subjective rights of others, or against the legal duty of the offender, or against the ethics, propriety, caution, and caution that any person should possess in association with fellow citizens or the property of others. The person who due to his/her mistake caused the loss for the other person shall compensate.

His view as expressed by Noyon. According to them, there are three notions of *'wederrechtelijk'*, namely *'in strijd met het objectief recht'* (contrary to objective law), *'in strijd met het subjectief recht van een ander'* (contradicting the subjective rights of others), and *'zonder eigen recht* '(without rights). Van Bemmelen defines unlawfulness as irrelevant to the unlawful meaning of civil law. What Van Bemmelen means here is the notion given by Arrest. January 31, 1919 in the case of Lindenbaum vs. Cohen, where Hoge Raad argues that unlawful acts must be interpreted as acting or not acting contrary to or infringing: a. Other people's subjective rights; b. The legal obligations of the perpetrator; c. The rules of decency; d. Suit in society. While Pompe has a *'wederrechtelijk'* view it means *'in strijd met het recht'* or against a law that has a broader meaning than *'in strijd met de wet'*, or against the law. The notion of *'wederrechtelijk'* as such, according to him, is in accordance with the notion of *'onrechtmatig'* in Article 1365 Burgerlijk Wetboek (BW), as applied by the decision of Hoge Raad dated January 31, 1919 above. Due to the variety of unlawful

[20] Sri Laksmi Anindita, and Lazuardi Adnan. "Putusan Pengadilan Pidana Sebagai Dasar Pengajuan Gugatan Perbuatan Melawan Hukum Terkait Pelaksanaan Uang Pengganti." *Jurnal Hukum & Pembangunan* 47, No. 1 (2017): 100-133.

notions, Noyon Langemeyer (1954) proposed that the function of the word 'against the law' should be a Decision which precedes the Lindenbaum-Cohen case in the field of civil law concerning the unfair of material law. In this verdict has been very clear by the Judge conducted legal discovery activities or Recht Vinding using the extensive use of the meaning of the act against the law that is not only rigid on the law but also consider the element of propriety and feasibility and it is praiseworthy by legal citizens because of the idea this thought can be used and used as a reference by judges especially in upholding justice by guiding the mandate of Judicial Power Law.

Conclusion

This study highlighted and concluded that the judge can transform and accommodate the moral values in the decisions issued. it cannot be separated from the legal responsibility and obligation of the judge to explore the values that live and grow in society and make it as a benchmark and consideration in falling the verdict. Mandate from Pancasila that is realizing the existence of a social justice for all the people of Indonesia, requires the judge to use a double glance in assessing a case that is from the standpoint of law and point of view of moral values that live and recognized in society as the legal order of the law. So that the concept of progressive law that emphasizes more harmoniously to apply given that humans are dynamic while the statute is static so it is very irrelevant if people who continue to experience such a complex development should be fixated on the text that sometimes is no longer relevant. Where the rules that can bind the judges and the citizens of the community are consisting of laws, customs, jurisprudence, tracts, and doctrines.

Nevertheless, the judge in order to uphold justice and righteousness, forced to see the sources of law in the meaning of the word material, if the sources of law in the formal sense cannot be used to solve a case being examined. Here it is necessary to have the independence of judges in the process of adjusting the law with concrete events, enable the judge to participate in deciding, which is the law, and which are not, or act as the inventor of the law in an effort to uphold justice and legal certainty. Ffor that judge is granted freedom of judgment through a series

of activities of *Rechtvinding* to continue to understand and explore the values of living in society reinforced by the existence of negative evident theory as in the case of Bisma Siregar and Libendaum *vs* Cohen show the law is not just something written in the book but also in action and living in society.

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DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of Interest in the publication of this article.

FUNDING INFORMATION

None

ACKNOWLEDGMENT

None

HISTORY OF ARTICLE

Submitted : May 8, 2021
Revised : August 16, 2021; December 11, 2021
Accepted : January 7, 2022
Published : January 31, 2022