

Rechtsvinding by Judges in Judicial Process

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Abstract- As the spearhead of law enforcement, the position of judge is very significant and prestigious, because based on the consideration and decision, the law is upheld and justice is given to the litigants. In his authority, the justice seekers entrust their fate to judge and therefore the quality of judges becomes crucial to their existence in shaping and enforcing the authority of law. One of judge assignments in performing his judicial function is to decide cases that have been filed upon him. Judge must not refuse to examine and hear as well decide the case presented to him with unclear law reasons or law provision has not been set. The limited scope possible to be accommodated by rule of written law against any concrete events encountered by society who then confronted the judge to examine, hear and decide, has given rise to consequences for the judge to perform rechtsvinding in spacious sense. There are three (3) stages must be conducted by judge in deciding a case, namely ascertain facts, qualify the incident and constituted legal events. Rechtsvinding is an obligation of judges, this is caused by several factors, as follows: First; as stated beforehand, that almost all of the events is not completely depicted within concrete law precisely in legislation. Second; provisions of a legislation, or sometimes conflict with other provisions, thus it requires clarity to be implemented appropriately, correctly and fairly; Third: due to the dynamics of society, there is a variety of new legal events that are not depicted in the legislation; Fourth obligation to rechtsvinding also arises because there is a variety of new law events that is not depicted in the legislation, there is a variety of events that has not depicted yet in the legislation; Fifth: obligation to rechtsvinding also arises due to provisions or the legal principle that prohibits judges to reject a case with unclear law reason or law provisions has not been set.

Index Terms- Rechtsvinding, judges, judicial process

I. INTRODUCTION

Indonesia as a State of Law based on Pancasila and in accordance with the basis of the Constitution of the Republic of Indonesia Year 1945, ever since the construction has had lofty ideals, among others is assured to prosperous society. In realizing a fair social order in societal circumstance, nation and state governed, therefore the lofty ideals of justice must be undergone explicitly by the state, in order to ensure the implementation and execution of all aspects in society life order in the broadest sense. One of guaranteed embodiments judicial in Indonesia, is the establishment of an independent judicial power bodies apart and their influence from intervention agencies of other governmental power. Independent judicial authority is expected to be realized through the role of judges in the country's judiciary in fair, honest, and free. This is in accordance with Article 1 of Law

No.48 Year 2009 on Judiciary Ascendancy as an independent state authority to conduct judiciary to uphold law and justice based on Pancasila and the Constitution of the Republic of Indonesia Year 1945, for implementation of the State of Law of the Republic of Indonesia.

Freedom of judiciary power, in which the execution to be handed over to judicial authority is one of the trademarks of the state law. In essence of freedom is an innate trait in every court. The freedom of judicial power is the duty of the judge to uphold the law and justice based on Pancasila by interpreting law with seeking a legal basis and principles of its ground, through cases that confronted to him, until the verdict reflects the sense of justice of nation and people (Soedikno Mertokusumo, 1985)[1]. Powers carried by the judge is state power in the judiciary, in the context of state services to the people seeking justice, legal protection based on the foundations of justice which appropriate on living legal sense and trusted by society.

Judicial independence is required, because of the many cases that must be resolved, but because the law commands, sometimes even a judge is required to find the law to a case that is not necessarily written rules. Abdul Kadir Muhammad (1985)[2] asserts that in the state based on law or state law, the independence of judges in exercising justice is a characteristic that essential. In examining and deciding the case, the judge shall be free not to be under the influence of any power.

Judicial independence in their professional manner regulated by law, and thus, things that lead to disruption in the workings of judges can be categorized as an act of obstructing the legal process, or even can be categorized as an abuse of the court. Implementation of the judicial authorities handed over to the judicial institutions with the prior task to receive, examine and adjudicate as well resolve any matter submitted to him [3]. One of the judge priorities in performing his judicial function is to decide cases that have been filed upon him. Judges may not refuse to examine, hear and decide the case filled to him by reason of none or unclear rules.

Article 10 Subsection 1 of Law Number 48 Year 2009 states that the Court prohibited from refusing to examine, hear and decide a case filed by motive that law does not exist or is unclear, except obliged to examine and hear it. The consequences of Article 10 Subsection 1 of Law Number 48 Year 2009, which does not justify the Court in the sense of judge to refuse to examine and decide a case with unclear reasons or unclear laws, the Law has mandated to judge to exercise his function as law enforcer and justice upholder in order to follow and understand the legal values that live in society.

The values that live in the community need to be explored by the judge, because these values are generally very crucial in considering a case, this corresponds to the value of justice in society, even the society at a time more respect for the values espoused in comparison with positive law which applies if there

is a conflict of norms. Article 5 Subsection 1 of the Law Number 48 Year 2009 states that a judge as law enforcer and justice upholder shall explore, and understand the legal values that live in the society. Abdul Kadir Muhammad (1985)[4], stated that the judges after obtaining event that certainly has occurred, then the judge assess whether the events occurred is unlawful or not, then a judge determines the legal regulation which of occupy events occurred, in such circumstances means that there is *rechtsvinding* by the judge.

Legal facts show distrust in law enforcement efforts by the judge in the form of a court judgment that has led apathy by society, even the pros and cons accompanying the court's ruling, even cynical accusations of people seeking justice keep expressed that the judge in his ruling has underwent deterioration effort of law and is loaded with engineer act and discriminatory against the weak (Sukarno Aburaerah, 2004)[5]. The limited scope that can be accommodated by rule of written law against any concrete events encountered by citizens and hander upon judge to examine, hear and decide, has given rise to consequences for the judge to perform *rechtsvinding* in a broader sense. The intention is the *rechtsvinding* must be implemented by judges but not limited merely to rules of written law, but also more widely in unwritten law.

Demands to judges to perform *rechtsvinding*, is to answer any legal dispute encountered by society and confronted upon the judge in order to obtain a fair settlement in accordance judge's verdict, especially to a concrete legal event which has not been set explicitly in legislation. Moreover, the judge in deciding a case brought before him tend to passively decide to not perform *rechtsvinding* beyond the law and is only intended to legal certainty without flexing the values of justice and truth.

Therefore, according to Cardozo, asserted when the existing rule of law is no longer able to solve the problem, then the judge must establish a new law for the case against him (W. van Gerven, 1973)[6]. The judge in charge of judicial quantity and intensity of quite large case should perform *rechtsvinding*, given the complex problems facing by society is varied and when confronted upon the judges, there is no reason to reject it. The ability of a judge will be seen from the quality of the decision he did. Decision quality is the result of thinking capability of the judge concerned along with sufficient knowledge of law and various supporting science that he possessed. According to above description thus what becomes the problem, is directed on how judges perform *rechtsvinding* in the judicial process? And what factors are causing the judge perform *rechtsvinding* by exclude the legislation in deciding a case?

II. DISCUSSION

A. The *Rechtsvinding* by Judge in Judicial Process

The judge in the hearing and deciding the case, apparently encounter the fact that existing laws cannot be firmly to answer and resolve disputes that exist in society. Judges should seek its own legal apparatus to find it (Sudikno Mertokusumo, 1993)[7]. Problems of people's lives are very complex and impossibly not covered by legislation thoroughly and clearly. Hence genuinely that there is no legislation that can cover the entire issue of people's lives as complete and as clear as possible.

To respond all the problems of a complex society that is not found in any written law, the judge must conduct the *rechtsvinding* from other law sources. Other law sources are jurisprudence, doctrine, treaties; customs and unwritten law. According to Bernard Arief Sidarta (2000)[8], there are 6 (six) track law-making process, one of which is through the judicial process.

As the spearhead of law enforcement, the position of a judge is very significant and prestigious, because based on the consideration and decision, the law is upheld and justice is given to the litigants. In his authority, those justice seekers bailed their fate to the judge, and therefore quality of judges becomes as crucial to their existence in shaping and enforcing the authority of the law.

The concept state law confirms that it is the obligation of judges in order to reinforce and develop the law in practice in the judiciary. The processes and ways judges thinking to develop and *rechtsvinding* can be divided in 2 (two) ideology as follows: first Conservatism and second is Progressivism (Sudikno Mertokusumo, 1993)[9]. Conservatives ascertain judges that law possibly implemented to an event and then judges apply them according to legislation prescript. Thus, *rechtsvinding* is no other than the implementation of the law coercively or syllogism. This ideology was adopted in Indonesia, or more precisely in the Dutch East Indies, as stated in Article 20 and Article 21 *Bevalingin van Algemene Wetgeving* (AB) which states: "Judges must judge according to law". The flow of this classic ideology has been abandoned because the judge is entitled to perform *rechtsvinding*, and judges are not necessarily tied to the legislation prescript. Judge may take the arguments of rules of law implicitly in legislation by conducting systemization, refining and processing it as well logical deciphering of legislation into a variety of legal principles (Sudikno Mertokusumo, 2004)[10].

As reaction towards way of thinking above thus progressive ideology opinion addresses judge is no longer and merely funnel of legislation. A judge must be independent, on self appreciation to *rechtsvinding*. In the verdict, judge must be guided by law, or by his own thoughts. Progressivism believes legislation is not complete, and the written law is not the only source of law. Legislation is not identical with law, because law is only a stage in the formation process of law, and the judge must find completeness in the process of practice in court.

Furthermore, the ideology that allows *rechtsvinding* by judges in the judicial process is the *Freirechtbewegung* ideology. This ideology asserts that not all laws exist in the legislation, because beside legislation, there are still other legal sources which possibly be used by judge in *rechtsvinding*. According to this ideology judges are not solely devoted to the rule of law, but shall realize justice. Judges must respect the law, but not merely abreast legislation either must utilize legislation as a means of finding a solution to law dispute of any concrete event which confronted upon him. Thus the judge did not just become interpreter of the legislation but including as the creator of law. The *rechtsvinding* called free *rechtsvinding* (Sudikno Mertokusumo, 2004)[11]. Article 5 subsection (1) of the Law No.48 Year 2009 states that a judge as law enforcement and justice shall explore, and understand the values of law in society, legally and philosophically implied that Indonesian judges have

the obligation or the right to perform *rechtsvinding* and invent law, until his verdict is in accordance with the law and a sense of society justice.

According to Paul Scholten, there are laws in human behavior. Hence, law is not solely contained in regulation nor legislation. "Excavation" is that basically referred to the *rechtsvinding* (*rechtsvinding, law making*) and not the law invention (Bambang Sutyoso, 2006)[12]. Society needs legal certainty in every action, moreover Indonesia is included in *Mix Legal System* which imposes plenty legal systems (Achmad Ali, 2012)[13]. This means the numerous of legal system in Indonesia will provide easier choices for the judge to explore the laws of legal systems, thus must firstly describe the concrete legal event and then dig up the law in society that is valid and can be implemented until sense of justice for society concerned can be fulfilled.

Furthermore, in an attempt to resolve a case that proffered upon him, then there are three (3) phases to be conducted judge in deciding the case, namely ascertain facts, qualifying the incident and constituting legal events. According Sudikno Mertokusumom, ascertains fact of assessing whether or not a proposed concrete event before the court, either criminal or private cases, and required proof. Therefore, matter that shall be proven is a concrete fact or event.

In the qualifying stage event that the judge assessing the concrete events (facts) is to categorize and classify any legal events (theft, adultery, blackmail, continuously bickering, physical mistreatment and so on) by arranging rules as logical activity. In this process the judge occasionally not merely implements the rules but also should invent law. The next stage is ascertaining or conferring justice in which judges determine its legal constitution, upholding the justice, which determine the law of legal relationship among law events and the legal subject (the defendant or plaintiff).

The judges are commonly convinced that the law (verdict) they have generated is able to accommodate and anticipate similar lawsuits and related to the substance contained in the verdict. Therefore, the decision has been ascertained, was ensured has accumulated sense of justice and includes collateral benefit if implemented. Judges who encounter concrete events before trial, by just solely implement involved decision (regulation).

The judge in adjudicating a case law determining the law *in konkreto* to a specific event, thus the court judgement is law. Verdict of the Court shall have binding force since spoken and have the force effect after the decision has permanent legal force, whereas after the decision implemented; the decision can be a source of law. The existence on *rechtsvinding* invented by judges on concrete events, then it means that once judges are also forming the law, only the establishment of law by the judge is concrete law. This is in contradiction with law formation made by the legislators because the legislators establish legal objective abstract.

Sense of justice is an abstract, can be felt and thought but could not be seen. Each person has a sense of varies fairness levels, as well as perceived by the judge. In a similar case, a judge gives an assessment of the different justice to every case. In adjudicating a case, judges actively directing a fact in correlation to legislation if a case will be heard. The fact was

taken and the conclusions of the judges with a belief that the fact that compliance with existing resources. If once there is a fact or event that is very difficult to be directed to comply with the existing legal resources, then most likely the fact (the case) will be declared acceptable because it is accordingly to law.

The judge in deciding a case by using logical reasoning, knowledge and experience, so judge will not be talkative in making decisions. Experience has also become one of the factors that affect the sense of justice of judges. Private personal ties between the judge and the defendant may affect the subjectivity of judges in deciding the case. Aspect mentioned could be racial aspects such as religion, gender and ethnicity, there are also other factors such as social factors, political and economy. Experience affects the mindset of judges such his views on fairness in deciding the case, whether the experience was there before acquired judge profession or during occupying the position of a judge.

Oliver Wendell Holmes (Lili Rasjidi dan I.B. Wyasa Putra, 2003)[14] emphasized the life of law is not logic, but rather experience. Oliver Wendell Holmes' insight has affected legal realism. Further, Johnny Dewey in his book entitled "*Logical Method of Law*" that in his view, logic is a theory referring to investigation concerning the possible consequences, a process in which its general principles possibly to be implemented as a tool that must be justified by ongoing work. If mentioned process is arranged in law, it indicates barely to the belief in the propriety of judge decision beforehand that has been prepared with confidence on the general principles should be abandoned and replaced with flexible logic and experience-based. Thus according to Dewey, the law is a process based on experiments where logic is merely one of elements of other elements to point out in a conclusion. In deciding a case, judge is mandated to separate personal experience with social prejudice sense but either experience while serving as a judge, and has passed through several experiments for handling the case and by those matters judge obtained reference in deciding the case to satisfy the justice for all parties.

When a decision has transformed to the form of legislation (jurisprudence), the transformation is not without troubles. The inability to understand policy and substances as well the legal content of the legislation by non-expert people scattered in various ethnic units is a major problem in law enforcement process. The substance of state law and the law moral substance of society are not only out of tune, but further will resort to dispute and possibly open a gaping space. Such conditions obviously a living proof of the existence of legal gaps in the development of law in Indonesia. If the solution were not found, the phenomenon of legal gaps is possibly be turned into a *legal conflict* and *cultural conflict*, hence it is not uncommon that gaping space may aim to a situation that is diametrically opposite and may induce more grave conflict in society later on. Such conditions would greatly affect the quality of decisions and *rechtsvinding* of judge.

For the interests of justice, expediency and certainty of law, judges are obliged to be able to perform *rechtsvinding* not just limited to the usage of *rechtsvinding* methods in existing science of law that is the opinion of legal experts, whereas the opinion of legal experts is not stored as *rechtsvinding* method; but rather as a source of law that would have the force as law if

relied upon by the judge in deciding a case. *Rechtsvinding* method is directed to an event with special sense, concrete, and individual. Hereby, the *rechtsvinding* methods are 'practical' and more usable in legal practice.

The role of judges is enormous and heavy in upholding truth and justice apparently can be seen from the judge's ability to perform *rechtsvinding* in order upholding truth and justice. But reality shows almost none event correctly depicted in a rule of legislation. In order a rule of law applicable to legal event, hence the judge should interpret or elaborate explanation to correspond accurately to occurred legal event. Interpreting or elaborating explanation is commonly called the finding of law or "*rechtsvinding*", "*legal vinding*".

B. Factor of Judge Conducting *Rechtsvinding*

Finding the law is an obligation of judges, this is caused by several factors, as follows: First; as previously stated that almost all of the events are not completely depicted concrete law precisely in legislation. Second; provisions of a legislation, or sometimes conflict with other provisions, thus requiring clarity to be implemented appropriately, correctly and fairly; Third: due to the dynamics of society, there is a variety of new legal events that are not depicted in the legislation; Fourth: obligation to *rechtsvinding* also arises because there is a variety of new law events that is not depicted in the legislation; Fifth: obligation to *rechtsvinding* also arises due to provisions or the legal principle that prohibits judges to reject a case with unclear law reason or law provisions has not been set.

It is undeniable that the four factors that led the judges are allowed to seek legal norms derived from the public is a necessity. These factors also that restricts judges from being arbitrary in deciding a case, as is sometimes the case is decided by the judge not to give justice to the society (in essence), because the judge ignored the four factors above in seeking legal relation to disconnect a case, the judge considered abuse in deciding a case, so that the four factors mentioned above becomes binding indicator of judges in performing *rechtsvinding* in the judicial process.

III. CONCLUSION

In the era of reform and transformation nowadays, legal issues (dispute) in society is continuously happening and demanded legal settlement through the judicial process. To fill the vacuity of law, qualified judges is necessary, which obliged to play role to conduct *rechtsvinding*. Judges should interpret or

elaborate explanation that a legal rule may actually correspond to the legal events that occurred. Interpreting or elaborating explanation is commonly called the finding of law or "*rechtsvinding*", "*legal vinding*".

Factors which caused judge to perform *rechtsvinding* is that almost all of the events are not completely depicted concrete law precisely in legislation, and sometimes conflict with other provisions, thus requiring clarity to be applied appropriately, correctly and fairly. Then new legal events happening frequently which is not illustrated in the legislation, so that the duty of *rechtsvinding* arise because of the provision or principle of law that prohibits judges to refuse to decide case with unclear law reasons or law provision has not been set.

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