

Moral and Legal Update of Landmark Decision in Judicial Activism Perspective

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Abstract

The essence of the main duties of a judge is to receive, examine, try and decide cases submitted to court. In carrying out their duties, they often face concrete events that must be decided, while the existing laws and regulations are not necessarily complete and clear. Therefore, judges in deciding cases can carry out *rechtsvinding*. Legal finding (*rechtsvinding*) is also an important component in landmark decisions because it is related to the breakthroughs made by judges in carrying out their duties. In the perspective of judicial activism, *rechtsvinding* and landmark decisions are closely related because in practice they can significantly change the existing norms in modern law.

Keywords: *Judge's decision, rechtsvinding, landmark decision.*

Introduction

The discussion of law enforcement cannot be separated from the role of the judiciary as the executor of judicial power. The exercise of judicial power essentially has an important role in upholding law and justice in Indonesia. In court, the judge is the main component who has the task of receiving, examining and deciding cases submitted to him. The role of judges is vital given the authority they have in deciding cases in court.

The court at the normative level functions to administer the judiciary to uphold law and justice, and is also an important aspect of the implementation of the constitutional state of the Republic of Indonesia. In court, a court decision is the final result of the case settlement process in court. This court decision is a statement by a judge as a state official who is authorized to do so, pronounced in court and aims to end or settle a case or dispute between the parties¹.

A judge's decision in a court process can be referred to as a crown of judges which contains legal

considerations at its core. Apart from being the settlement of cases or disputes, judges' decisions also function as reformers, not only at the normative level, but also at the practical level, especially in relation to the dynamics of community law. Rapid changes in society often because a legal gap between law in the books and law in action. It is in this context that judges are required not only textually based on rules but also contextually by making legal breakthroughs by conducting re-screening.

Rechtsvinding is a breakthrough in law enforcement in Indonesia because judges in carrying out their duties are based on a deeper meaning of the law, not only based on the sound of the law, so that judges' decisions in addition to guaranteeing legal certainty can also reflect justice². Indonesia can be called a country that adopts a civil law system, so that it does not recognize judge made law as in the Common Law system, however, judge decisions have a role in legal reform.

Judges in conducting *rechtsvinding* are closely related to judicial activism, where judges not only base the provisions of the law, but also dare to leave the text of the law. Judicial activity, if it is understood more deeply, also relates to efforts to produce important court decisions or landmark decisions. In this regard, this article will analyze the *rechtsvinding* and landmark decision from the perspective of judicial activism.

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Analysis and Discussion

Judges play an important role in the judiciary and have the authority to receive, examine and decide cases. As a country that inherits a civil law system from the Netherlands, this condition affects judges in carrying out their duties. In the civil law system, one of the characteristics that can be observed is related to law as the main source of law. Thus the law can be said to be the source of law for judges in deciding cases. On the other hand, the view that laws are considered clear, complete and can be used to solve all problems is not quite right. Given the rapid development of society in its deliberations, it is often not followed by provisions in laws. Legal issues as rules can be explained by some indicators³. First, the existing legal regulations are out of date. The existing legal regulations are no longer in accordance with the current ideals of society which are constantly moving and developing dynamically.

Second, the existing legal regulations are not harmonious or have not been integrated into a positive legal system. The existing legal regulations are no longer in accordance with other legal regulations due to the existence of new legal regulations (legislation) in other areas of life, both in substance have a high position (regulate/provide a basis/umbrella act).

Third, there are aspects of human life that have not been regulated by law. This problem arises after the existing legal regulations cannot be refined through legal science technology to respond to the problems of daily life.

Fourth, the practice of implementing or enforcing the law that is felt directly by the community (law in action/law in *concreto*) is not in accordance with the law in the positive law (law in book/law in *abstracto*) because it is not implemented or not enforced law enforcement officials should have been due to irregularities in law enforcement and application.

Generalization of case settlement by using law as the main source of law by judges in practice is not always appropriate. It is in this context that judges can *rechtsvinding*. Mertokusumo (2002) stated that what is meant by *rechtsvindingis* usually the process of forming a law by a judge or other legal apparatus assigned to the application of general law regulations on concrete events¹. *Rechtsvindingis* the process of concretizing or individualizing general legal regulations (*das sollen*) by remembering certain concrete events (*das sein*).

Considering that statutory regulations may not be complete completely or clearly as clearly as possible, when dealing with a case that must be decided, Indonesian judges can carry out *rechtsvinding* as regulated in some regulations.

Article 10 Paragraph (1) Law number 48 of 2009 concerning Judicial Power which explains that the court is prohibited from refusing to examine, hear and decide a case that is filed on the pretext that the law does not exist or is unclear, but is obliged to examine and judge it⁴.

Article 5 paragraph (1) of Law number 48 of 2009 concerning Judicial Powers, stated that judges and constitutional judges are obliged to explore, follow, and understand the legal values and the sense of justice that live in society⁴.

Rechtsvinding carried out by judges is basically related to judicial activism in the context of realizing justice. The terminology of judicial actives according to the Black's Law Dictionary is a philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.

Parameters or restrictions on judicial activism cannot be equated from one country to another. These differences are caused by differences in the system and structure of the state administration, the history of the role of the judiciary, and what the public hopes for the judiciary today⁵. Canon (1982) creates a general concept and structure by categorizing six dimensions of judicial activism which consist of: (1) majoritarianism (2) interpretative stability (3) interpretative fidelity (4) substance/democratic process distinction (5) specificity of policy and (6) availability of an alternative paymaker⁶.

In the context of Indonesian courts there is a close relationship between *rechtsvinding* and judicial activism by judges. The practice of judicial activism shows that judges are not shackled by positive norms in the Law as in the flow of *legism*. Judicial activism is carried out by judges through *rechtsvinding* with the aim of realizing justice in deciding cases. *Rechtsvinding* in the perspective of judicial activism is important considering that not all cases can be decided based on positive law, especially law as the main source of law for judges. Judges who carry out reconstruction in the perspective

of judicial activism are a combination of knowledge or intellectuality, namely relating to the reasoning of the judge and the experience of the judge as a profession. The importance of experience in the profession of judge is as stated by Holmes (1991) as the life of the law has not been logic, it is has been experience⁷. The felt necessities of the time, the prevalent moral and political theories, institution of public policy avowed with their fellas.

The view that judges are not mouthpieces of the law but must carry out surveillance in carrying out their duties is also in line with progressive law in Indonesia. According to the viewpoint of progressive law, law is for humans not the other way around so that in addition to guaranteeing legal certainty, law should also pay attention to the value of justice for society. Based on the characteristics of a progressive law, the progressive method of retro finding is detailed in some characters⁸. First, it is a visionary method of legal discovery by looking at legal issues for the long term interest in the future by looking at case by case. Second, it is a method of legal discovery that is courageous in carrying out a breakthrough (rule breaking) by observing the dynamics of society, but is still guided by law, truth and justice and is impartial and sensitive to the fate and condition of the nation and country. Third it is a method of legal discovery that brings welfare and prosperity to society and can also bring the nation and state out of the downturn and social instability it is today.

Judges in the view of progressive law have the meaning of daring to make legal breakthroughs with the main objective of realizing justice. Judicial activism in the context of the Indonesian legal system is also an implementation of the provisions of Article 5 and Article 10 of Law number 48 of 2009 concerning judicial power⁴. Apart from that, the results of judges 'judgment in judicial activism are also closely related to the effort to realize quality judges' decisions. The quality of judges 'decisions and the professionalism of judges cannot be separated from the ability of judges' legal reasoning on a case. With legal reasoning, it will reflect how judges guide and make appropriate legal arguments in their decisions.

One of the judges' decisions with quality is in the form of important decisions or landmark decisions. Black's Law Dictionary which is called Landmark Decision is a decision of the Supreme Court that significantly changes the existing Law. In countries

with a Common Law legal system, every decision can be ensured that it always follows the existing precedent, decisions that create new precedents must be supported by the new *decidendi* ratio. This is what has the potential to be called a landmark decision⁹.

A decision can be categorized as a landmark decision if it meets the criteria of decision that has permanent legal force; decisions containing *rechtsvinding*; decisions that are able to answer social dynamics problems; decisions that reflect the direction of legal development; decision is made for the first time and has not been followed by another judge¹⁰.

One of the important things in a landmark decision is *rechtsvinding*, so that the judge's decision in this case contains a legal breakthrough, including a breakthrough in positive legal provisions.

Landmark decisions in Indonesia can come from decisions of the Supreme Court or the Constitutional Court which can be in the form of jurisprudence or non-jurisprudence. In a landmark decision, in essence, it must contain *rechtsvinding* by the judge. With this *rechtsvinding* in the perspective of judicial activism, it is an attempt by a judge if there is an incompleteness or absence of norms in positive law in deciding cases. This judicial activism is also related to the behavior of judges in deciding cases against objective criteria or are results obtained against possible results¹¹.

rechtsvinding and landmark decisions in the perspective of judicial activism are related to one another. A landmark decision has to offer a judgment conducted by a judge in case of incompleteness, unclear norms in positive law or no one has even regulated it. *Rechtsvinding* can be called an effort if there is a legal gap between law in the books and law in action. Landmark decisions that contain *rechtsvinding* are also a form of judicial activism for judges in realizing justice in their decisions.

Conclusion

Judges are the core actors in the court who exercise judicial power in Indonesia. In carrying out their main duties, judges will base their decisions on statutory provisions, however, not all cases have been regulated by law or regulated but are not yet complete or clear. In response to this condition, the judge must *rechtsvinding* as an effort to decide the case submitted to him. *rechtsvinding* also has an important role in creating landmark decisions as part of judicial activism by judges.

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