

## IMPLEMENTATION OF JUDICIAL ACTIVISM IN JUDGE'S DECISION

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### **Abstract**

The task of the judge in realizing justice is inseparable from the decisions that are made. A qualified judge's decision is obtained through the judge's thought process through a choice of judges that reflects judicial activism. The problem in this research is how judicial activism is used by judges in issuing decisions and how the implementation of judicial activism in decision making. Judicial Activism is the choice of decision making by judges in order to realize justice. Judicial activism in the Indonesian judicial system is regulated in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power. The law requires judges to explore the law and sense of justice that lives in society. The implementation of judicial activism is carried out by judges through means of legal discovery. Through means of legal discovery, judges play an active role in realizing justice as a law that lives in a dynamically developing society.

*Tugas hakim dalam mewujudkan keadilan tidak terlepas dari putusan yang dihasilkan. Putusan hakim yang berkualitas diperoleh melalui proses berpikir hakim melalui pilihan hakim yang mencerminkan judicial activism. Permasalahan dalam penelitian ini adalah bagaimanakah judicial activism digunakan oleh hakim dalam mengeluarkan putusan dan bagaimana implementasi judicial activism dalam pengambilan putusan. Judicial Activism merupakan pilihan pengambilan putusan oleh hakim dalam rangka mewujudkan keadilan. Judicial activism dalam sistem peradilan di Indonesia diatur dalam Pasal 5 ayat (1) Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman. Implementasi judicial activism dilakukan oleh hakim melalui sarana penemuan hukum. Melalui sarana penemuan hukum, hakim berperan aktif mewujudkan keadilan sebagai hukum yang hidup dalam masyarakat yang berkembang dinamis.*

**Keywords:** judicial activism, judge's decision, legal discovery.

## Introduction

Judges, at all levels, occupy a central position in the judicial process. In this central position, it is hoped that law and justice can be enforced. The problem that needs to be resolved by judges is how abstract justice that contains certain values can be used as a guide in its application. The work to realize ideas and concepts of justice in a concrete form so that they are accepted by society is the work of law enforcers, especially judges. Judges are expected to have the ability to translate the values of justice in matters faced with them through their decisions.<sup>1</sup>

Just good judges are expected to produce quality decisions. There are many views about the criteria of good judges, among others: having legal skills, having adequate experience, having integrity, having good health, reflecting community representation, having good reasoning, having a broad vision, having language and writing skills, able to enforce state law and act independently and impartially and have administrative and efficient capabilities.<sup>2</sup>

The decision of a qualified judge is a reflection of the expertise and ability of the judge in deciding the case. Oemar Senoadji revealed that the verdict was like a “crown” for a judge. A crown for a king is a symbol of authority and greatness. Between decisions and judges are two things that are inseparable because court decisions are the product of a judge so that a quality decision reflects a qualified judge.<sup>3</sup>

Judges' decisions are not dropped in a vacuum, but to give justice. Law enforcement, in addition to realizing legal protection for the community so that there is order, must also be able to realize justice. Therefore a judge's “sensitivity” is needed for justice to bridge between legal certainty and justice. The sensitivity of judges is done by taking the concept of judges' decisions that reflect judicial activism.

The provisions of judicial activism in Indonesia are carried out in the context of realizing justice as contained in Article 5 paragraph (1) of Law Number 8 of 2009 concerning Judicial Power which requires

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<sup>1</sup> Esmi Warassih, “Pemberdayaan Masyarakat Dalam Mewujudkan Tujuan Hukum (Proses Penegakan Hukum dan Persoalan Keadilan)”, *Speech for Inauguration of Associate Professor*, Semarang April 14, 2001, p. 18.

<sup>2</sup> Mustafa Abdullah, Research Report of Judges' Decision in 2007. Available on the <http://klubyudisial.website.go.id>

<sup>3</sup> Paulus Efendi Lotulung, *Hukum Tata Usaha Negara Dan Kekuasaan* (Jakarta: Salemba Humanika, 2013), p.83.

judges to explore the sense of justice that lives in society, and Article 10 paragraph (1) Courts are prohibited from refusing to examine, hear, and decide on a case filed under the pretext that the law does not exist or is unclear, but is obliged to examine and prosecute it.

The duties of judges in the framework of providing justice can use extensive power as a judge-made law. If the legislation does not have an answer and there is no court decision regarding a similar case that will be decided, then the judge will look for answers to the opinions of legal scholars. If the opinion of the legal expert is not found to be used as a guideline by the judge to decide the case, the judge can use the means of legal discovery.<sup>4</sup>

Based on the background as described above, there are two problems discussed in this paper, namely what is the meaning of judicial activism used by judges in issuing decisions, and what is the implementation of judicial activism in the justice system in Indonesia?

The research method used is normative juridical research or library research. This legal research also includes doctrinal research that aims to find positive legal materials that will be used to develop theories and answer existing problems. The approach used is the statute approach, conceptual approach and case approach. Dogmatic legal research on dogmatic, theoretical and philosophical levels relies on primary legal material, namely official regulations and legal decisions.

### **Judicial Activism in Judges' Decisions**

The term judicial activism is known in the Anglo Saxon common law doctrine which demands the activeness of judges for the formation of law in comparison with the legislature. If a judge or court resolves a dispute must use a new rule or change an old rule, that's where the judge creates the law "judge-made law" in other words the judge's decision is legal.

Judicial Activism is a philosophy of making judicial decisions in which the judges base judgments on decisions, among others, on the views of judges on new developments or developing public policies and so on. These considerations are the direction for judges in deciding cases because of new developments or contrary to previous decisions

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<sup>4</sup> Indriati Amarini, *Keaktifan Hakim Dan Peradilan Administrasi*, (Purwokerto: Universitas Muhammadiyah Purwokerto Press, 2017), p. 318.

in the same case. The term Judicial Activism is very popular in countries with common law traditions,<sup>5</sup> but in its development, it is also adopted in countries with traditions, not common law.<sup>6</sup>

The definition of judicial activism can be seen in the Black's Law Dictionary, as follows: Judicial activism as a philosophy of judgment whereby judges allow their personal views about public policy among other factors ... Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law. It is sometimes used as an antonym of judicial restraint”

Related to the notion of judicial activism, Richard A. Posner quoted Oliver Wendell Holmes as saying that judges make laws (not only finding and applying laws): “to resolve the dispute the court must create a new rule or modify an old one that is law creation. Judges defending themselves from accusations of judicial activism sometimes say they do not make law, they only apply it. It is true that in our system judge are not supposed to and generally do not make new law with the same freedom that legislatures can and do; they are, in Oliver Wendell Holmes’ phrase, confined from molar to molecular motions. The qualification is important, but the fact remains that judge make, and do not just find and apply law.<sup>7</sup>

Ronald Dworkin calls the term Judicial Activism the philosophy of decision making as follows: I shall call these two philosophies by the names they are given in the legal literature-the programs of judicial activism and judicial restraint-though it will be plain that these names are in certain ways misleading.<sup>8</sup>

In a country with an Anglo Saxon legal system, the term judicial activism is very popular. This can be seen in judicial activism in India as a necessity or the oxygen of the rule of law: “Justice is the bread of the nation-it is always hungry for it. And, it is well known that justice delayed is justice denied. The role of judicial activism in India has been to provide a safeguard to the common man and indigent against an intensive system. This noble task, taken upon itself by the courts, has

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<sup>5</sup> Bagir Manan, “Judicial Precedent dan Stare Decisis (Sebagai Pengenalan)”, *Varia Peradilan*, No. 347 October 2014, p. 2.

<sup>6</sup> Gu Peidong, “A Study on Several Issues of Active Justice”, *China Legal Science*, vol. 4, 2010, p. 1.

<sup>7</sup> Bryan A. Garner (ed.), *Black's Law Dictionary, eighth edition* (Toronto: Thomson West, 2004).

<sup>8</sup> Ronald Dworkin, *Taking rights seriously* (London: A&C Black, 2013) p. 137.

provided succor, relief and requisite legal remedies to the needy and deprived, over the past few years of judicial intervention and cementing”.<sup>9</sup>

Likewise with Judicial activism in the United States, it can also be done in the context of the courts protecting minorities in a country: “The origins of judicial activism in the protection of minorities. Judicial activism in support of the rights and interests of Blacks no longer would rise the special questions it once had.”<sup>10</sup>

Judicial activism is also known in China which does not adhere to the civil law tradition and also the common law tradition. As Kelik Wardiono argued that the Chinese legal system developed according to its own historical flow regardless of the development of Anglo-American legal systems, as well as European-continental civil law, although at a certain point there was an intersection between the legal systems.<sup>11</sup> However, the Chinese legal system is built on the foundation of sources of law, principles, institutions, and institutions that are different from other legal systems in the world so that they appear as a separate legal system.

Likewise, judicial activism also exists in Chinese law, but in its implementation, it is different from Judicial Activism in the United States. This was stated by Gu Peidong in, “A Study on Several Issues of Active Justice”, as follows: “As a judicial notion and practice, the Chinese style judicial activism has a theoretical link with the Western style judicial activism and has as well presented some similar features as a phenomenon. Nevertheless, owing to the different political and judicial systems in different states, the Chinese style judicial activism and western style judicial activism is somehow different. In general. The Chinese style judicial activism should be viewed as a unique from in the context of the worldwide rule by law milieu. The Western style judicial activism is coupled with judicial independence, a more eager pursuit for the explicit rules of social behaviors and a more mature professional

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<sup>9</sup> Vikrant Pachnanda, “The Judicial Shelter-Activism or Overreach?”, *India Law Journal*, vol. 1, issue 1, 2007. Available at [http://www.indialawjournal.com/volume1/issue\\_1/judicial\\_hallow\\_activism.html](http://www.indialawjournal.com/volume1/issue_1/judicial_hallow_activism.html) accessed on Wednesday 10 December 2017.

<sup>10</sup> Robert M. Cover, “The Origins of Judicial Activism in the Protection of Minorities”, *The Yale Law Journal*, vol. 91, no. 7 (1982), p. 1287.

<sup>11</sup> Kelik Wardiono, “Sistem Hukum Cina: Sebuah Tatanan Yang Terkonstruksi dalam Lintasan Li dan Fa”, *Jurnal Ilmu Hukum*, vol. 15, no. 1 (2012), p.71.

judiciary. Therefore, different Chinese circumstances call for a restrained judicial activism with a different model in practice. Meanwhile, renovation and development is required and the corresponding safeguarding mechanism needs to be established: firstly, a harmoniously interactive relation between judiciary and politics should be sought; secondly, a mechanism should be set up for the effective supervision conducted by the highest judicial body over the lower courts; thirdly, an effective and orderly internal judicial adjudicating mechanism should be established".<sup>12</sup>

Zhang Zhi further stated in his writing that the concept of justice in China emphasized positive justice, as follows: "Judicial activism is an exotic phrase and it has the particular context and implication, which is quite distinct from its use in China. Judicial activism emphasized by Chinese justice is on the basis of judicial duties fulfillment which is not the expansion of justice and does not have normal constraint of judicial restraint. Accordingly, in terms of the general function from of Chinese justice the more appropriate expression should be positive justice".<sup>13</sup>

The same opinion was expressed by Yang Jianjun as follows: "Fundamentalist sense of judicial activism refers to the core of the administration of justice in the process of legislative justice. The term judicial activism introduced to China was given a lot of new meaning after then, the Chinese legal circles about the understanding of what is judicial activism is diverse, very inconsistent, and most people carried out according to their own understanding of elucidate many of them accretion, distortions of the definition, or even incorrectly relaying erroneous theories of the fallacy. Dynamic administration of justice in China, started there was not only inadequate theoretical foundation for the defects, are also facing a judicial career and the judicial activism of the sharp conflict of contradictions. But the transformation of social reality also demands that China must be accompanied by the two tasks, i.e. the full practice of judicial professionalism and the Chinese-style judicial activism. Although there are many inadequacies, the emergence of judicial activism question is still worthy of serious treatment".<sup>14</sup>

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<sup>12</sup> Gu Peidong, "A Study on Several...", p. 1.

<sup>13</sup> Zhang Zhi, "The Function From of Chinese Justice: Judicial Activism or Positive Justice?", *Journal of Renmin University of China*, vol. 6, 2009, p. 1.

<sup>14</sup> Yang Jianjun, "The Development of Judicial Activism in China", *Journal of Northwest University of Political Science and Law*, vol. 1, 2010, p. 8.

## **Implementation of Judicial Activism in the Judicial System in Indonesia**

The implementation of judicial activism in Indonesia is carried out in the context of realizing justice in society as contained in Article 5 paragraph (1) and Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power. The law requires the judges to explore the law and the sense of justice that lives in the community<sup>15</sup>. Sudikno Mertokusumo said that the word *dig* was assumed that the law was there, but it was hidden so that it would still have to be explored on the surface. Thus the law exists but must still be extracted, sought and found. Scholten said that “there is a law in man itself”. Whereas every time humans in society behave, act or work.<sup>16</sup> The implementation of this article is also important because it is in line with the Carbonnier's plea that: “It has always been that thousands of years have been demanded by judges who think”.<sup>17</sup>

This is related to the obligation of judges to explore the law and justice of society due to the law as a dynamic scheme that continues to move. This is in line with the thoughts of Eugen Ehrlich that the focus of legal development does not lie in legislation nor in court decisions or in the field of law but in society itself.<sup>18</sup> Furthermore, Eugen Ehrlich revealed that the habits that live in local communities could be present along with the official law promulgated by the state. For him, the law of the state law is always related to the issue of disputes and claims that end with the fall of the verdict in the Court.

Satjipto Rahardjo argues that law is not a final “finite scheme” scheme but continues to move, change, and follow the dynamics of human life.<sup>19</sup> Therefore the law must continue to be dissected and

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<sup>15</sup> The word ‘obligation’ has the meaning of having to (1) do, (2) have to implement, (3) it should be. See, Kamus Bahasa Indonesia published by Pusat Bahasa Departemen Pendidikan Nasional 2008.

<sup>16</sup> Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar* (Yogyakarta: Liberty 2007), p. 47.

<sup>17</sup> Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial prudence) Termasuk Interpretasi Undang-undang (Legisprudence)* (Jakarta: Kencana, 2013), p. 479.

<sup>18</sup> Hadi Suyoto, “Komitmen Hukum Dan Kritik Legalisme Bagi Hakim”, *Varia Peradilan*, vol. 25, no. 293 April 2010, p. 65.

<sup>19</sup> Satjipto Rahardjo, *Penegakan Hukum Progresif* (Jakarta: Kompas Media Nusantara, 2010), p. 1.

explored through progressive efforts to reach the light of the truth in reaching justice.

The concept of legal understanding is what is decided by in concrete judges and systematized as a judge-made law which is thus influenced by a school of philosophy at the turn of the 19th century, namely Pragmatic philosophy is a school of philosophy that emphasizes attention orientation towards reality. Law is not what is written beautifully in the law, but what is done by law enforcement officials, police, prosecutors, judges or anyone who performs the function of implementing the law. The originator of this thought was Oliver Wendell Holmes (1841-1935) in his prominent essay the path of law. According to Holmes, a legal expert must face the symptoms of life as a realistic reality. What determines the fate of perpetrators of crime is not the formulation of sanctions in the law but questions and decisions of the judge.

In addition to Holmes, John Chipman Gray in his research concluded that American judges are not individuals who are non-legal elements in dropping their decisions. In addition to the element of logic as the main factor in their decision making, they are also strongly influenced by their personal subjectivity, prejudice, and other non-logic elements. Gray's assumptions were strengthened in a variety of historical reasons by showing the magnitude of the political, economic and quality influences of individual American and British judges in deciding the cases he was handling. As Oliver Wendell Holmes revealed that the law is not a closed logical system but an open logical system. "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of book of mathematics."<sup>20</sup>

Holmes interpreted formalism as a school that emphasized formal legal thinking and logic-deduction like mathematics. Legal formalism cannot be separated from Christopher Langdell's teachings at the end

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<sup>20</sup> Steven J. Burton, *Judging in Good Faith* (New York: Cambridge University Press, 1992), p. 3.



of the 19th century. Langdell put the law in the category of exact sciences that work like physical laws on the basis of causal relationships. The pattern of causal relationships can be studied in the law library by analyzing cases like physicists using laboratories.

Furthermore, the affirmation of other realist legal thinkers is William James, who emphasized the importance of avoiding everything that seems absolute and original. Attention should be directed at what is real. Things that were more extreme came from John Dewey and Jerome Frank. According to Dewey, logic is not a single element in the creation of law (the realization of the law in reality) but merely a direction. While Frank's psychoanalytic method asserts that for psychological reasons actually, every case requires the creation of its own law.

The law requires its presence to overcome various problems that occur. The existence of law is very necessary for regulating human life. The purpose of the law is to protect human interests in defending their rights and obligations. In order to enforce legal rules, an institution called judicial power is needed. Judicial power is held by state justice bodies. The main task of the judiciary is to examine, hear, decide and settle cases filed by justice seekers. As stated by Bagir Manan,<sup>21</sup> "...that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution or dispute and a highly visible symbol of government under the rule of law" ... Judges, both individuals and together, must respect and uphold the judiciary as an institution of public trust and do their utmost to raise and maintain trust in accordance with the prevailing legal system. The judge is an arbitrator, both concerning the facts or the law to resolve the dispute and appear as the main symbol of the state based on the law.

The core actors who functionally carry out judicial power are judges. Soejono Koesoemo Sisworo stated that the task of judges was formulated as "the most graceful" namely an independent power tool that held a judiciary to enforce law and justice based on Pancasila for the implementation of the Republic of Indonesia Law which in every

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<sup>21</sup> Bagir Manan, "Peranan Pedoman Tingkah Laku Hakim Sebagai Penjaga Kekuasaan Kehakiman yang Merdeka", *Majalah Varia Peradilan*, no. 282, May 2009, p. 8.

decision must contain the head sentence “For Justice Based on Godliness the One”.

In carrying out judicial power, the judge must understand the scope of duties and obligations as stipulated in the legislation. After understanding the duties and obligations, the judge must work professionally in carrying out and completing the work. The professionalism of a judge is carried out with the active role of the judge through a choice to make decisions that use judicial activism in the judicial process. Justice as a process must consist of certain elements, namely: (1) the existence of general binding abstract legal rules that can be applied to a problem, (2) The existence of a concrete legal dispute, (3) There are at least two parties and, (4) The existence of a judicial apparatus authorized to decide disputes. According to Sjahran Basah, the elements of the judiciary are more complete including the existence of formal law in the context of the application of the law *rechtoepassing* and finding the law *rechtsvinding in concreto*. Thus the Judiciary is everything related to the task of deciding cases based on law, finding the law *in concreto* in maintaining and guaranteeing the adherence to material law by using procedural methods determined by formal law.<sup>22</sup>

Law in the form of a judge's decision only binds certain parties. This is different from the law made by the legislature in the form of generally binding laws. In connection with the law in the sense that the legislative and legal products in the sense of a judge's decision have advantages and disadvantages. The law guarantees legal certainty, while its weaknesses are slow and static. Whereas the judge's decision is of lower certainty compared to the law, but the level of elasticity is far higher than the law.

The legislative member may make any law based on his authority, but ultimately in the hands of the interpreting judge who determines the meaning of each phrase, every word, every sentence in the formulation of legislation so that the law is alive, developing is not outdated. As Ronald Dworkin said that every time a judge decides a case, then at that time he is theorizing about what the law is.<sup>23</sup> Furthermore, through the

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<sup>22</sup> Nawa Angkasa, “Analisis Kedudukan Dan Fungsi Yudikatif Sebagai Pemegang Kekuasaan Kehakiman dalam Sistem Negara Hukum Di Indonesia”, *Nizham Journal of Islamic Studies*, no. 01, Jan 2017, p. 11.

<sup>23</sup> H.M. Fauzan, “Merebut Kepercayaan Publik Terhadap Pengadilan”, *Varia Peradilan*, no. 266, Jan 2008, p. 53.

decisions of qualified and creative judges can make various legal breakthroughs.

Judges are not legislators because their job is to adjudicate or examine and try. The task of making the law is in the realm of legislation. However, it is the judge who determines what the law requires. As Dworkin's opinion, quoted by Satjipto Rahardjo, the Judge actually also "made the law" at a higher level. This is because the judge decides that the law is not done by reading the text (textual reading) but exploring moral reading.

It is also seen in the long history that judges only applying the law or judges are only the mouths of the law. As stated by Mathias Klatt as follows: Anglo-American Legal philosophy has long struggled with how to differentiate legislation and adjudication. Traditionally, the judiciary is supposed to interpret and to apply the law rather than invent and make new law, the latter task being exclusively reserved for the legislature. This old ideal of the judges as '*bouche de la loi*' was rigidly adhered to in England, for example, during the 'age of strict literalism', that is, between 1830 and 1950. The judiciary was seen as merely the enforcing agent for decisions already made by the legislature. According to this view, adjudication did not involve any creativity. Rather, it consisted of mere retrieval of the 'fixed' meaning of a norm. This can be called the discovery model of judicial interpretation, in which the accompanying literalist method of legal reasoning exercises near-absolute predominance.<sup>24</sup>

Related to the law in the sense of law as a legislative product (political product) so that it needs interpretation from the judge. As stated by Ahmad Rifai that the building of the Indonesian legal system is a law as in a civil law system, where judges are the implementers of laws, not lawmakers (law), as do judges who adhere to the common law system, but the judges in Indonesia it can do legal discovery (*rechtsvinding*) through its decisions.<sup>25</sup> This can be done as long as the judges must not hit the contents and philosophy of legislation.

Interpretation is important because there are many interests in the lawmaking process, as explained by Antonin Scalia and Bryan A. Garner

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<sup>24</sup> Mathias Klatt, *Making the Law Explicit the Normativity of Legal Argumentation* (London: Hart Publishing, 2008), p. 18.

<sup>25</sup> Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif* (Jakarta: Sinar Grafika, 2014), p. 129.

as follows: "...when necessary to achieve favorable consequences for certain targeted groups of people, such as minorities, women, factory workers, the poor, homeowners, businesspeople, tenants, landlords, taxpayers, government workers, children....".<sup>26</sup>

In addition, the assumptions that were built at the time of formulating the law have also shifted. As stated by Harifin A. Tumpa that a positive law always has limited time, space and circumstances.<sup>27</sup> Here in lies the location, function, and role of the judge as law enforcement and justice. Deviations from an existing legal role can be interpreted flexibly. This is in line with the function of judges who are obliged to look for values of justice in the application of progressive and responsive laws. However, a legal rule that occurs because of the exclusive factors mentioned above, cannot be interpreted generally, as if replacing the rules set out in the law because the judge is not a legislator. The rules that occur in an exclusive manner only apply casually.

Judges have the role of realizing total justice,<sup>28</sup> namely bringing closer or bridging justice and certainty or legal justice and moral justice which in practice is not easy. Aharon Barak argues that a good judge is a judge whose legitimacy is able to create and create law more than just a law that can bridge the law with its people namely: "A good judge, is a judge who, within the bounds of the legitimate possibilities at his dispose, makes the law that, more than other law, he is authorized to make, best bridges the gap between law and society and best protect the constitution and its values."<sup>29</sup>

Therefore, it requires wisdom with high instincts and a clear conscience that can be obtained with sufficient experience, extensive knowledge, and honesty. As stated by Mackenzie,<sup>30</sup> that there are several theories or approaches that can be used by judges in considering the decision in a case, namely: *First*, Balance Theory is the balance between the conditions determined by the law and the interests of the parties

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<sup>26</sup> Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Toronto: Thomson West, 2012), p. 1.

<sup>27</sup> Harifin A. Tumpa, "Problem Hukum Keluarga Antara Realita Dan Kepastian Hukum", *Varia Peradilan*, no. 286 (2009), p. 5.

<sup>28</sup> Artidjo Alkostar, "Membangun Pengadilan Berarti Membangun Peradaban Bangsa", *Varia Peradilan*, vol. 20, no. 38 (2005).

<sup>29</sup> Jimly Maruli, "Dicari: Putusan Yang Progresif," *Varia Peradilan*, vol. 25, no. 293 (2010), p. 78.

<sup>30</sup> Bagir Manan, "Hakim dan Pemidanaan", *Varia Peradilan*, vol. 19. no. 249 (2006), p. 7.

relating to the case such as the existence of a balance relating to the interests of the community, the interests of the plaintiff, the interests of the defendant. *Second*, the Art Approach Theory or Intuition, namely the art approach used by the judge in making a decision is more determined by instinct or intuition than the judge's knowledge. *Third*, the Scientific Approach Theory. The starting point of this theory is the thought that the decision-making process must be carried out systematically and carefully. This scientific approach is a kind of warning that in deciding a dispute, the judge may not be solely on the basis of intuition or instinct alone, but must be equipped with the knowledge of the law and also the scientific insight of the judge in dealing with a matter that he must decide. *Fourth*, experience approach. The experience of a judge is something that can help him in dealing with cases faced daily because with his experience a judge can find out how the impact of the verdict was dropped. *Fifth*, the theory of ratio decedent. This theory is based on a fundamental philosophical foundation that considers all aspects related to the disputed subject matter, then seeks legislation that is relevant to the subject matter of the dispute as the legal basis for the decision and consideration of the judge must be based on clear motivation to enforce law and provide justice for the parties to the dispute. *Sixth*, Wisdom Theory. This theory can be used by judges so that the decisions handed down can fulfill the dimensions of justice, namely formal justice and substantive justice at once.

Judicial activism of a judge can be seen in the behavioral perspective of jurisprudence.<sup>31</sup> One of them is Richard A. Posner in "How Judge Think" said that there are many factors that influence judges which are personal, namely: "Ringing changes on the political might seem to exhaust the possible no legalist factors in adjudication. It does not begin to. The possible other factors (call them personal) include personality traits, or temperament (and thus emotionality at one end of the temperament spectrum and emotional detachment at the other end) which are more or less innate personal characteristics".<sup>32</sup>

In addition to factors that are personal in nature also from institutional factors "Institutional factors such as how clear or unclear

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<sup>31</sup> Antonius Sudirman, *Hati Nurani Hakim dan Putusannya Suatu Pendekatan dari Perspektif Ilmu Hukum Perilaku (Behavioral Jurisprudence) Kasus Hakim Bismar Siregar*, (Bandung: Citra Aditya, 2007), p. 32.

<sup>32</sup> Richard A. Posner, *How Judges Think...*, p. 10.

the law is, salary and workload, and the structure of judicial promotion also influence judicial behavior". In addition, from the aspect of mastering science, Richard A. Posner added that judges "are not professors" with mastery of general knowledge not like professors with special knowledge (specialists) as follows: "...Realism about judges is sorely lacking there. Law is taught as if judges were second class professors, professors manqué-legal analysts lacking the specialized knowledge of the law professor."<sup>33</sup> Furthermore, the judge is said to work like a "computer" (machine) that: "The motivations and constraints of operating on judges and the judicial mentality of results, are ignored, as judges were computers rather than limited human intellects navigating seas of uncertainty ...."

The judge's mindset as a "machine maid" was also conveyed by Jerome Frank as follows: "...*The law is not a machine and the judges are not machine servants. There has never been and there will never be a set of rules that have been determined and established equally for all societies. Human action is not the same mathematical unit; Individual positions cannot be eliminated as in algebraic equations because equal equations on both sides can change. Life revolts against all efforts that oversimplify the law. New cases will continue to provide new aspects ... the compiled abstract rules must be changed and adjusted, static formulas are turned on...*"<sup>34</sup>

Related to this, Satjipto Rahardjo termed a positive-legalistic way of lawing like an automatic machine.<sup>35</sup> He quoted the opinion of Paul Scholten who referred to as *hanteren van logische figuren* Oliver Wendell Holmes referred to as "a book of mathematics". Such a legal method is like drawing a straight line between two points. One point is the law (article) and the other point is the fact that happened. Everything runs linearly. Judicial activism is important in order to realize justice as Satjipto Rahardjo quotes Paul Scholten that justice is (indeed) in the law, but (still) must be found *Het recht is wet, run het moet nog gevonden waeden* (the law is law, it must still be found). The opposite way of thinking is judicial passivity which is the judge's way of thinking because of the

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<sup>33</sup> Richard A. Posner, *How Judges Think...*, p. 377.

<sup>34</sup> Jerome Frank, *Hukum & Pemikiran Modern* (Bandung: Nusa Cendekia, 2013), p. 179.

<sup>35</sup> Satjipto Rahardjo, "Hukum Progresif : Aksi Bukan Teks", In *Memahami Hukum Dari Konstruksi Sampai Implementasi*, ed. by Satya Arinanto and Ninuk Triyanti, (Jakarta: Raja Grafindo Persada, 2010), p. 3.

working pattern of a judge who is only (accustomed to) receiving a case, as Richard A. Posner said as follows: ...The curious judicial passivity that result from judges being accustomed simply to decide whatever is brought to them to decide, rather than to initiate anything...”<sup>36</sup>

Likewise, H.L.A. Hart stated that, “...*the legal system is fully or even basically consists of regulations. There is no doubt that the court indeed packs its trial, there is always a choice with a certain impression that their decisions are a necessary consequence of certain regulations whose meaning is clear and clear ... In the most important cases there is always a choice ... the tradition that the judge ‘picking up ‘and’ making no law ‘and they present their decisions as if they were deductions made smoothly from pre-existing regulations without any interference to vote on the part of the judge’.*”<sup>37</sup>

The judge is the foremost “guardian” in law enforcement by examining the extent to which the ability of the law is “testing the limit of law” as has been done by several judges in Indonesia namely Chief Justice Bismar Siregar, Chief Justice Adi Andoyo Soetjipto, Hakim Benyamin Mangkoedilaga. According to Bismar Siregar, laws and laws are only a means of seeking justice. For the sake of justice for Bismar Siregar, a judge is a law. The judge is God's representative on the earth so that he has the right to decide according to his conscience even though the law itself has not regulated the sentence. Some controversial decisions, which have added a sentence of up to 10 times the prosecution's demands for the marijuana trade, changed the sentence for a teacher who molested his student from a sentence of 7 months to 3 years and requested that the defendant rape family in Bekasi be sentenced to death even though the positive law applies only imposed a 12-year prison law because the sentence was not balanced with the atrocities committed by the defendant.

Judicial activism needs to be done through considerations in decisions in order to realize justice as a law that lives in a dynamically developing society. Judges are asked to do what is the essence of judicial functions. If done correctly, the task of the judge is not easy. Judges must balance conflicting human interests in order to achieve a good social situation. If this legal power is not implemented properly, the people will suffer.<sup>38</sup>

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<sup>36</sup> Richard A. Posner, *How Judges Think...*, p. 377.

<sup>37</sup> H.L.A. Hart, *Konsep Hukum* (Bandung: Nusamedia, 2013), p. 19.

<sup>38</sup> Jerome Frank, *Hukum & Pemikiran Modern*, p. 180.

## Conclusion

Judicial activism is the choice of decisions made by the judge in realizing justice. The duty of judges to realize justice is inseparable from the verdict produced. The provisions of judicial activism in the justice system in Indonesia are contained in Law Number 8 of 2009 concerning Judicial Power, namely Article 5 paragraph (1) which requires judges to explore the sense of justice that lives in society, and Article 10 paragraph (1) which states that the Court is prohibited from refusing to examine, hear, and decide on a case filed under the pretext that the law does not exist or is unclear, but is obliged to examine and try it. Implementation of the duties of judges in order to provide justice for the public and justice seekers, the judge can use broad powers as a judge-made law. If the legislation does not have an answer and there is also no court ruling regarding a similar case that will be decided, the judge will look for the answer to the opinion of the legal scholar. If the opinion of a legal expert is not found, the judge is justified in using the means of legal discovery. Through means of legal discovery, judges play an active role in realizing justice as a law that lives in a dynamic developing society.

## Bibliography

- Abdullah, Mustafa, *Laporan Penelitian Putusan Hakim Tahun 2007*. Available at <http://komisiyudisial.go.id>
- Ali, Achmad, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence) Termasuk Interpretasi Undang-undang (Legisprudence)*, Kencana, Jakarta, 2013.
- Alkostar, Artidjo, "Membangun Pengadilan Berarti Membangun Peradaban Bangsa", *Varia Peradilan*, vol. 20, no. 38, 2005.
- Amarini, Indriati, *Keaktifan Hakim Dan Peradilan Administrasi*, UM Purwokerto Press, Purwokerto, 2017.
- Angkasa, Nawa, "Analisis Kedudukan dan Fungsi Yudikatif Sebagai Pemegang Kekuasaan Kehakiman dalam Sistem Negara Hukum di Indonesia", *Nizham Journal of Islamic Studies*, vol. 1, no. 1 (2017): 84-109.
- Burton, Steven J., *Judging in Good Faith*, Cambridge University Press, New York, 1992;
- Cover, Robert M., "The origins of judicial activism in the protection of minorities", *Yale LJ* 91 (1981): 1287.



- Dworkin, Ronald, *Taking rights seriously*, London: A&C Black, 2013.
- Fauzan, M. "Merebut Kepercayaan Publik Terhadap Pengadilan," *Varia Peradilan*, no. 266, 2008.
- Frank, Jerome, *Hukum & Pemikiran Modern*, trans. Rahmani Astuti from Jerome Frank, *Law and the Modern Mind*, Bandung: Nusa Cendekia, 2013.
- Garner, Bryan A., *Black's Law Dictionary, eighth edition*, Toronto: Thomson West, 2004.
- Hart, H.L.A., *Konsep Hukum*, trans. M. Khozin, Bandung: Nusamedia, 2013.
- Jianjun, Yang, "The Development of Judicial Activism in China", *Journal of Northwest University of Political Science and Law*, vol. 1, 2010, 8.
- Klatt, Mathias, *Making the Law Explicit the Normativity of Legal Argumentation*, London: Hart Publishing, 2008.
- Lotulung, Paulus Efendi, *Hukum Tata Usaha Negara Dan Kekuasaan*, Salemba Humanika, Jakarta, 2013;
- Manan, Bagir, "Hakim dan Pidanaan", *Varia Peradilan Edisi*, no. 249, 2006.
- Manan, Bagir, "Judicial Precedent dan Stare Decisis (Sebagai Pengenalan)", *Varia Peradilan*, no. 347, 2014.
- Manan, Bagir, "Peranan Pedoman Tingkah Laku Hakim Sebagai Penjaga Kekuasaan Kehakiman yang Merdeka", *Varia Peradilan*, no. 282, 2009.
- Maruli, Jimly, "Dicari: Putusan Yang Progresif", *Varia Peradilan*, vol. 25, no. 293, 2010.
- Mertokusumo, Sudikno, *Penemuan Hukum Sebuah Pengantar*, Yogyakarta: Liberty, 2007.
- Pachnanda, Vikrant. "The Judicial Shelter-Activism or Overreach?" *India Law Journal*, vol. 1, issue 1, 2007.
- Peidong, Gu, "A Study on Several Issues of Active Justice", *China Legal Science*, vol. 04, 2010.
- Posner, Richard A., *How Judges Think*, Cambridge, Cambridge: Harvard University Press, 2010.
- Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Bahasa Indonesia*, Jakarta: Pusat Bahasa Departemen Pendidikan Nasional, 2008.
- Rahardjo, Satjipto, "Hukum Progresif: Aksi Bukan Teks", In *Memahami Hukum dari Konstruksi Sampai Implementasi*, ed. by

- Satya Arinanto and Ninuk Triyanti, Jakarta: Raja Grafindo Persada, 2010.
- Rahardjo, Satjipto. *Penegakan Hukum Progresif*, Jakarta: Kompas Media Nusantara, 2010.
- Rifai, Ahmad. *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif*, Jakarta: Sinar Grafika, 2014.
- Scalia, Antonin and Bryan A. Garner. *Reading Law: The Interpretation of Legal Texts*, Toronto: Thomson West, 2012.
- Sudirman, Antonius. *Hati Nurani Hakim dan Putusannya Suatu Pendekatan dari Perspektif Ilmu Hukum Perilaku (Behavioral Jurisprudence) Kasus Hakim Bismar Siregar*, Bandung: Citra Aditya, 2007.
- Suyoto, Hadi, "Komitmen Hukum Dan Kritik Legalisme Bagi Hakim", *Varia Peradilan*, vol. 25, no. 293 (2010).
- Tumpa, Harifin A., "Problem Hukum Keluarga Antara Realita dan Kepastian Hukum", *Varia Peradilan*, no. 286 (2009).
- Warassih, Esmi, *Pemberdayaan Masyarakat Dalam Mewujudkan Tujuan Hukum (Proses Penegakan Hukum dan Persoalan Keadilan)*. Semarang: Universitas Diponegoro.
- Wardiono, Kelik, "Sistem Hukum Cina: Sebuah Tatanan Yang Terkonstruksi dalam Lintasan Li dan Fa", *Jurnal Ilmu Hukum*, vol. 15, no. 1 (2012).
- Zhi, Zhang, "The Function From of Chinese Justice: Judicial Activism or Positive Justice?", *Journal of Renmin University of China*, vol. 6 (2009).