

# The Strategic Role of Judges in Legal Finding

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**Abstract.** The research seeks to comprehensively elaborate the strategic role of judges in legal finding. Overcoming the rigidity of the legal text by Judges encompass interpretation to the legal text concerning circumstances of the case. It is a normative research with a legal reform approach. The results of the study concluded two things. First, the legal finding is extremely fundamental in law enforcement due to rigidity and limited scope of the legal text, hence, further interpretation is needed as of essence of the regulations can be applied to the case. Moreso, in adjudicating cases, the settlement requires concrete legal rules resulting from legal finding activities by judges. In fact, in certain contexts, the legislation does not regulate matters in the dispute being tried, therefore it requires deeper interpretation. Second, judges are the center of legal finding and the most decisive element in how the law is enforced. Through the dialectical process in deciding cases, judges play a major role in determining the law that will be applied in the case. Judges have a strategic role in overcoming legal impasse toward complex social dynamics.

**Keywords:** judge; legal finding; law enforcement

## 1 Introduction

The legal finding is an inherent obligation of judges. Therefore, judges are obliged to explore the law from any sources as we called “*das sollen*”. Generally, the form of law can be a set of basic principles (values), existing applied legal regulations as branch law (*furū*), as well as legal practice in society as living law (*ius operatum*) [1].

The framework of this legal finding oblige the judge to explore the legal circumstances in every case. The result of the method is concretization (individualization) of norms which are then applied to concrete case [1]. Thus, it can be understood that the legal finding leads to the "concretization" and "individualization" of practical legal norms.

Legal finding insist a creative process by the judge in adjudicating every case. Since then, a judge will pay close attention to the circumstances of a case and related legal norms or rules. In this process, the Judge is very likely to find that the gaps between the existing legal facts and set of norms or rules. Applying such norms mereley to the case could possibly raise a new problem, *i.e* causing injustice. Then, how a Judge responds and considers a case to prevent gaps and further injustice problems?

Due to the massive possibility of a gap between rules and the expectation of justice in every disposed case, the law opens up space for judges to stand explorative dialectics and legal finding. The expected results are resolving legal vacuum (*rechtsvacuum*) of a statutory regulation, filling in incomplete norms or legal rules, and clarifying vague norms or rules (*unclear norms*) [2].

Referring the introduction above, we identify two main problems, as follow:

- a. Why legal finding has played a major role in law enforcement?
- b. How Judges lead a fundamental role in legal finding?

## 2 Result and Discussion

### The Major Role of Legal Finding in Law Enforcement

The term of “legal finding” (Ned: *rechtsvinding*) refers to “finding norms or rules of law toward a concrete case”. The definition has been stated by many legal scholars. As Muwahid described,[3] Judge is trying to figure out a set of norms or rules toward concrete case when facing special situation, such as there is no concrete rule, or ambiguity, or vague norms.

Sudikno Mertokusumo [4] defined the term “legal finding” as a process of law-making (*rechtschepping*) by Judge or another law officials who responsible to implement the legal norm toward a concrete case. Sudikno defined legal finding by developing such set of statement based on what he has been witnessing. On a scientific speech, he once acknowledged:

“Due to incomplete or unclear of law statutes, the judge must find the law (toward concrete case). Judge has an obligation to find the practical law (*rechtsvinding*). The law enforcement was constructed by both legal finding and applying such norms to the case. Legal finding is usually defined as the process of law-making by judges or other legal officers who are taking responsibilities to implement legal norms on concrete legal events. This is a process of concretization and individualization of general legal norms by keeping in mind circumstances of a concrete case” [4].

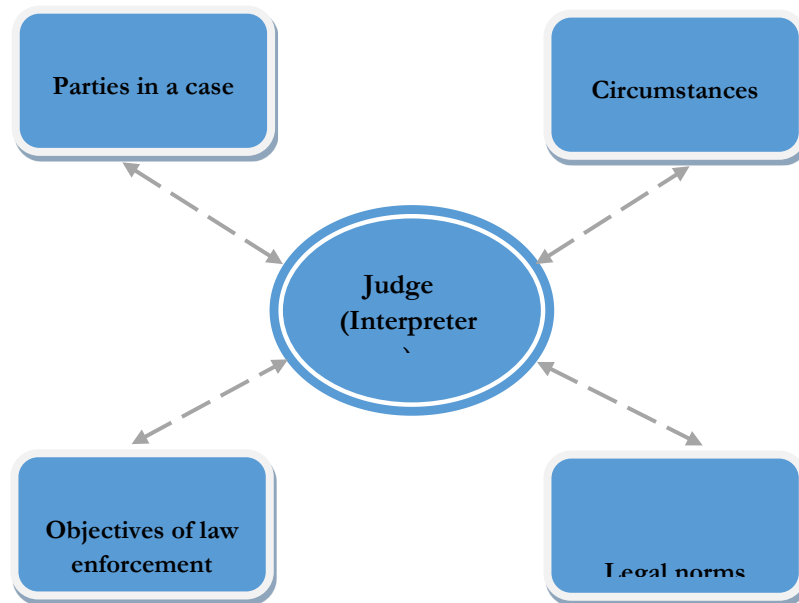
I Dewa Gede Palguna [5] asserted as well, that the conception of legal finding had led us to summarize two perspective of legal finding, namely:

- a. Legal finding was a systematic effort to figure out the most propriate answer of such question: “*what should be the law of a concrete event when statutes has not enacted or failed to provide sufficient rules?*”. Its context explain the legal finding as standing a comprehensive scrutiny to respond the question of law toward legal facts that been figured out in court trial;
- b. Judge needs to find “what should be a law” toward any situation that displayed massive gaps between statutes and legal facts. As a matter of fact, there is no statues can overcome any situations and legal problems in society. Thereupon, Judge should significantly go after the living law. The conception represents the principle “*curia novit jus*” as well [6], a principle means that Judge presumably knows the law whether statutes clarify or not the concrete case to be disposed. Hence, Judges are disallowed to deny of deciding a case due to lack or impresence norms.

We then conclude that legal finding performs 4 (four) main displays in law enforcement, as follows:

- a. Legal finding refers to Judge’s works to figure out principles, norms, or rules toward a concrete case and result either brand new norm (different norm and has never been enacted before) or developed norm (renew, expand, or concretize the scope or meaning of a norm);
- b. A brand new norm or developed norm were resultanted by legal finding which are individual, practical, and casuistic. It distinguish general norms which are teoretical, general perspective, and abstract;
- c. Legal finding involves interactive discussion between interpreter (Judge), parties, circumstances, norms, and the goal of law enforcement. Judge as an interpreter played the

most important role in ensuring the achievement of the objectives of law enforcement. Below we describe how Judge as the center of legal finding:



**Fig. 1.** Judge as the center of legal finding.

- d. Legal finding is the center of law enforcement, particularly in civil law which gave a comprehensive space of interpretation to Judges. It took an unseparable part of law enforcement due to the nature of statutes: *it would never be able to overcome every situation and legal problems in society and tends to couple steps behind the social moves.* Judge should pay a close look at the circumstances and norms provided. Hereinafter, Judge should resolve the gap, if any, and the lack or impresence of norms.

## **The Fundamental Role of Judges In Legal Finding**

### **a. Trajectory of Legal Finding**

In point of fact, legal finding not merely done by Judge, it also been led by any other element of law enforcement, such as society members, advocate, police officers, state attorneys, and even academician. The entire creative process of legal finding was expected to raise the legal awareness and internally being an inseparable part of the society. It was what we known as the most organic legal finding.

Question raised, why then the legal finding was identically addressed to Judges work? It caused by the typical of Judges' work to decide a case in which entangle the whole attribute of legal finding. When deciding a case, Judge directly face parties in the courtroom, then identify their needs, analyze conflicts, conclude legal facts, analyze set of rules, and synthesize legal

problem solve which represents the triadic of law enforcement (justice, certainty, and expediency).

Without belittling the creative process outside Judges, what Judges have done was expected as the heart of law enforcement itself. In the broader perspective, Judges' legal finding have played fundamental role to change, drive, and even reconstruct legal culture in the society.

The developed brand new legal norms which originated from court decisions are legally binding and massive impact to legal reform. Court decisions which represents the triadic of law enforcement have sufficient power to revolutionize the outdated-order of law so as we can create the new order that reflects societies' expectation.

Bagir Manan expressed that despite Judges were not the only one who perform legal finding, Judges played the most fundamental role than any other law apparatus [2]. In Judges' decision, there are interpretation to legal principles and norms which never been always presented in other law apparatus works.

Bagir Manan also asserted, there are some crucial elements that cause Judges' legal finding more significant than any other law apparatus works. *First*, Judges' perform a concrete law to the disposed case. By deciding case, Judges concretize abstract rules into the concrete one. *Second*, Judges were not merely declaring the specific law to a case, but constituting it the general law as well. *Third*, Judges guarantee the actualization of law and the development of state law as well.

We can describe the work of Judges and its significant impact to the legal reform by analyzing particular cases. For instance, court decisions in child custody generally referred Article 105 paragraph (a) of Islamic Law Compilation (ILC) that stated children under 12 years old will be under his/her mother's custody. It such decision have shown us that Judges generally decide child custody just by referring the rule despite comprehensively considering what was the best interest for the child.

The Supreme Court of Indonesia (SC) decision, registered number 110 K/AG/2007 dated on 13 November of 2007, has reinterpreted the meaning and implementation of Article 105 paragraph (a) above. For years, before this case being decided, the issue of child custody was merely to "who takes care the children?" which implies that no matter what circumstances revealed was, Judges will tend to give child custody to their mother if they are under 12 years old. But, since then, the SC's decision reform the consideration of deciding child custody. Despite merely applying Article 105 paragraph (a) into case, Judges should take "for the best interest of the child" into primary consideration before deciding child custody case. It marked the new era of deciding child custody case which asserts that it was no longer to adjudicate child custody cases with a purely normative approach. Moreso, the judge in deciding the case must seriously pay attention to the determination of child custody with the guarantee of realizing the best interests of the child.

We can conclude 2 (two) fundamental perspective in legal finding. *First*, reinterpretation of a rule can be conducted by Judge due to its relevance and purposes we expected to be realized. Judges' legal reform has significant implications both normative and practical issues. Normatively, the legal reform creates either new legal norm or concretize the former norm. Practically, the legal reform provides guidance to stakeholders in implementing that reformed norm. *Second*, by finding law, Judges affirmate new issues and discussions of law enforcement. Judges also affirmate the ideals of law which haven't yet represented in law statutes. Thereupon, it becomes clearer that Judges' function was bridging the ideals of law and the enacted law. Besides, it also drives any enactment to be well-implemented.

## **b. Judge vs. Legislation**

Before discussing the dialectic between judges and legislation, it is necessary to first describe the traditions of judging in two of the world's main legal systems and traditions, namely common law and civil law. These two legal systems display different mechanism of judges in deciding cases, including the creative process involved and being the center of the legal finding process.

Common law is a legal system and tradition centered on legal values that live and develop in society. In this legal system, judges are required to be able to observe, study, understand, and apply these living legal values. This is what causes in the common law tradition, it is not the law that is the center of legal study and development, but the living law or legal values that live in society.

The common law system is adopted by countries such as the United States, Canada, the United Kingdom and their commonwealth countries. Several other countries also follow this system, such as some Arab countries. The common law system prioritizes attention to legal values that live in society. The highest law is actually not what is abstracted in the Act, but what is the will of the people (*ius constituendum*). Therefore, it is not surprising that judges' decisions in the common law system generally reflect their *ius constituendum*.

In contrast to common law, the civil law system relies on law enforcement on the availability of the rules. Codification is the heart of law enforcement in the civil law tradition. Therefore, it is not difficult to understand that in the civil law tradition, there is a will to abstract all phenomena in society in a legal text. It is attempted in such a way as to overcome the entire phenomenon, even though it is later known that such text will never be sufficient. There are limitations to the text, which is organic and static, while on the other hand, the "phenomena" are dynamic and move quickly. It is clearly displayed how the text always steps behind the phenomena that are actually the core of every value, behavior, and law enforcement.

The civil law tradition continues to open up massive space for interpretation of legal texts that are embodied in legislation. Especially for those who are exponents of sociological jurisprudence, the limitations, ambiguity, and/or incompleteness of norms in the law must be overcome by interpretation, or even legal construction. The tradition of promulgation in civil law is not a reason to curb the creativity of jurists, especially judges, in interpreting legal texts so that their application in concrete cases is in line with the spirit of law enforcement.

One of the most notable thing we should restate here is that currently the differences between the two systems and legal traditions are almost disappeared, in other words the two are getting closer because they are increasingly similar in system and application. Both common law and civil law recognize precedent, the difference is only in the binding force. The common law system, even though it emphasizes the legal values that live in society, is currently the countries which are its exponents starting to produce legislation products in the form of laws for certain legal aspects that are deemed necessary to be regulated in an Act.

There is a new awareness in the common law tradition that along with the rapid development of society, changing traditions or legal culture, the law is deemed necessary to be written down. In other words, legal values need to be codified to create a uniform understanding of the law.

As Roberto Mangabera Unger emphasizes, the demands of modern law are to be positive and public. This then gave birth to a written legal tradition in the modern era. Since the writing or formulation of legal texts has become a tradition, since then a problem has also arisen because it does not turn out that the formulated text is able to represent all the meanings of "law" itself, say for example justice [7].

Satjipto Rahardjo asserts that there is always a problem with the gap between the text and the meaning or nature that is governed by the text itself. A legal text, even though it has binding authority, can be interpreted differently. Satjipto gave an example of how the provisions on judicial review (PK, review) are interpreted differently. The article that regulates PK confirms that PK can only be submitted by the convict or his heirs, which provisions in the explanation are stipulated as limitative provisions. In fact, in the history of criminal law enforcement in Indonesia, PKs have been proposed by the Prosecutor and accepted by the Court. This practice illustrates that the meaning of the text regarding PK as “limitative provisions” is not recognized by the Prosecutor and the Court, in fact it can be interpreted differently that PK can be submitted by the Prosecutor in a situation that is very well-founded according to law, say there is a sense of justice that is considered unfulfilled [7].

Another profound illustration is how a legal text was not fully reliable to overcome all the existing legal dynamics, say child custody arrangements. In Article 105 letter (a) of the Compilation of Islamic Law, it is emphasized that children who are not yet 12 years old are raised by their biological mothers. In fact, many legal facts in child custody cases show that children are very close emotionally to their biological fathers. Not a few facts also show that biological fathers are actually more diligent in caring for children, better understand their children's needs. The mother, instead of giving affection to her child, she is actually more busy with her work and loses most of her living time with her children.

Dealing with the Acts, in the context of deciding cases, judges will be involved in dialectical process. There is an activity to dialogue legal texts (and their meanings) with revealed legal facts. Dialogue also occurs with the conception of law enforcement. Judges will deal directly with the normative aspects, practical aspects of the law, as well as the philosophical aspects of law enforcement itself.

As the most general representation of law, legal texts experience complex ontological and epistemological problems. Such a broad archetype of legal dynamics must be abstracted in such a way, as concisely as possible, in a text formulation. Therefore, it is not surprising that judges will often encounter situations where legal texts must be interpreted further, deconstructed, and reformulated their operational meanings.

The descriptions above illustrate that there are unique dynamics in the working system of judges adjudicating cases. In certain cases, there is almost no need for further interpretation of existing legal texts. Subsumption of rules into cases can be done immediately because this method is sufficient to represent the best vision of law enforcement. Meanwhile, in other cases, the judge must re-interpret the legal text or legal construction so that it can be applied to the case being tried. Simply applying the rules in this context has the potential to cause injustice.

### **3 Conclusion**

Two things has been concluded, as follows:

- a. The legal finding is extremely fundamental in law enforcement due to rigidity and limited scope of the legal text, hence, further interpretation is needed as of essence of the regulations can be applied to the case. Moreso, in adjudicating cases, the settlement requires concrete legal rules resulting from legal finding activities by judges. In fact, in certain contexts, the legislation does not regulate matters in the dispute being tried, therefore it requires deeper interpretation;

- b. Judges are the center of legal finding and the most decisive element in how the law is enforced. Through the dialectical process in deciding cases, judges play a major role in determining the law that will be applied in the case. Judges have a strategic role in overcoming legal impasse toward complex social dynamics.

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