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# THE ROLE OF LEGAL DISCOVERY (*RECHTSVINDING*) BY JUDGES IN INDONESIA

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ABSTRACT

In filling the legal void, the judge has the authority to interpret the law. The authority to make legal discoveries is a consequence of the judiciary, where the judiciary may not refuse to examine, judge and decide a case filed on the pretext that the law does not exist or is unclear, but obliged to examine and judge.Judges must be able to make legal discoveries to be able to decide cases so that the justice that the community desires can be realized. Here, judges are more flexible in resolving cases, because they do not only convey the sound of the Law (la Bouche de la loi), but also can make legal discoveries from various sources of legal discovery, because in fact the law exists in society. Wherever there is society, there is law (*Ubi Societas, ibi ius*).

*Keywords: Legal Discovery, Judges in Indonesia, Role of Judges*



## INTRODUCTION

Indonesia is one of the countries in the world that has a heterogeneous (pluralistic) society. This heterogeneity certainly affects human life, because every human being has interests that may be similarities to each another, but often there are also differences, so that conflicts cannot be avoided. Interference of interest or conflict must be prcaseed and not allowed to continue, because it will disturb the balance of the order in society. To protect every human interest in society, one of which is the rule of law.

The function of the rule of law is essentially to protect human interests. The rule of law has the task of striving for a balance of order in society and legal certainty so that the goal is achieved, namely public order [1]. Law is also an order that has a harmonious and complete character. The legal system is a harmonious system because everyone avoids conflicts between them. If, for some undesirable reason, it turns out that the conflict still occurs, then the legal system has prepared an instrument for settlement (legal remedies). It means that the legal system has been equipped with various facilities so that it can work properly.

On the other side, the legal system is also an open system to influence and be influenced by other systems outside of itself. It means that the legal system is also facing changes, so that what was initially assumed to be certain, fair and useful according to law, turns out to be shifting. The law is required to adapt to these changes. Sometimes these changes require substantial changes in the legal system, for example by revoking a new law. There are times when the law is left as it is, but it must be given a new meaning. In this context, this paper will talk about the importance of the role of legal discovery by judges [2].

## RESEARCH METHODS

Legal research is one of the scientific activities, which is based on method, systematic, which aims to study one or several phenomena of certain laws, by analyzing them. The method used for this research is the juridical

normative method, which is a legal method carried out by examining library materials or secondary data. In normative juridical research, library material is basic data classified as secondary data that is in a ready-to-publish state, its form and content have been compiled by previous researchers, and information on each data. Thus, it will be known the problems and problem solving, as well as the results of the research and the final results of the research in the form of conclusions [3].

## DISCUSSION AND ANALYSIS

Legal discoveries can be interpreted as the process of forming a law by judges or other law enforcement officers who are tasked with applying general legal to concrete legal cases.The application of law is the concretization and individualization of general legal regulations (das sollen) by considering certain concrete legal cases (das sein). Van Eikema Hommes argues that the discovery of law is called a logicistic view of justice, where the logical aspects of the analysis are made absolute. Meanwhile, Wiarda stated that it can be mentioned as a heteronomous law discovery.

According to Achmad Ali's opinion, that judges are given the freedom to make legal discoveries, in the sense that it is not just the application of laws by judges, but also includes expanding and shaping regulations in judge decisions, in order to achieve maximum justice. judges may even deviate from the law for the benefit of society.

In carrying out their duties, judges may not take sides with anyone except for truth and justice. However, in carrying out their duties, the process of case examination by judges must also be open, and in determining judgments and making decisions, judges must uphold the values of justice that live in the midst of society. The judge does not only act as the 'mouth' of laws or statutory regulations, but also as the 'mouth' of justice that voices feelings of justice that live in the midst of societ [4]. Article 5 (1) of Law of Republic Indonesia No. 48 of 2009 concerning Judicial Power explains: "Judges and Constitutional Justices are obliged to explore, follow and understand the legal values and the sense of justice that live in society". Judges in law must follow and understand and make the basis for their decisions so that they are in accordance with the sense of justice that lives in society.

The process of adjudicating a case, a judge as a law enforcer who examines, hears and decides cases, including in this case a criminal case, will always be faced with the task of evaluating the evidence presented to him and then gaining confidence from his conscience. After that, he gave the appropriate consideration and decision to a defendant. In deciding a case, a problem that is always faced by judges is that often written law is unable to solve the problems at hand. In this condition, a judge is required to find a law and or create a law to complement the existing law in deciding a case. This is also based on the principle that judges may not reject a case with unclear legal arguments.

According to Montesquieu's opinion, there are 3 (three) forms of state and each country has legal discoveries suitable for each form of state, as follows:

a. In etat despotique, where there is no law, the judge in adjudicating every case of legal discovery is "absolute autonomy".
b. In the ethic republic, there is a heteronomous legal discovery in which the judge applies the law.
c. In etat monarchique, although the judge acts as a mouthpiece of law, he can interpret it with his soul.

From here there is a heteronomous and autonomous legal discovery system. Indonesia is aware of the discovery of heteronomous and autonomous law, so that if there is a legal problem, the judge is obliged to find the sentence no matter how difficult it is, either through legal breakthroughs (control legem), or through legal construction (rechtsconstruction), either by interpreting existing laws or by means of explore existing values and live in society. In order for the verdict to be passed to be accounted for, the judge must be able to find the sentence through legal interpretation [5].

According to Authorities (classified by researchers), that the popular flows of legal discovery, there are two of them:

1. The discovery of free law, is that law is placed as a subordinated function as a means, but not as a legal goal for judges, for judges making discoveries of free law is the main task of creating solutions through the help of laws for concrete cases, so that the cases they face can be resolved satisfactorily, not just the application of the law.The discovery of free law is an excessive flow because judges are given the freedom not only to fill the void in statutory regulations, but judges are also given the freedom to deviate. The critic of this discovery of free law was Achmad Ali who stated that the freedom given to judges would open up opportunities for arbitrariness so that the judge would become king of the law because he has the power to create his own law for all members of society.
2. The discovery of modern law which can be referred to as the Sozilogische Rechtsschule which was born as a reaction against the view of the discovery of free law, the main focus of legal discovery in the Sozilogische Rechtsschule is an effort to fulfill the sense of law in society, so that in practice it is expected that a judge has other knowledge in outside the science of law.

Several types of legal discovery methods are as follows [6]:

a. The Subsumtive Method, is the interpretation of the statutory text by simply applying the syllogism, the interpretation of this model is a characteristic of the way of thinking in this subsumptive system, which is to include cases in statutory regulations.
b. Formal Interpretation Method or also known as authentic interpretation, which is the official explanation given by law and contained in the text of the law or interpretation according to the boundaries stated in the regulation itself, which is usually placed in the explanation section (memorie van toelichting), the formulation of the general provisions, as well as in one of the other article formulations. Example: "all the words environment" in Law No. 23 of 1997 concerning Environmental Management must be interpreted in accordance with the sound of Article 1 (1) of the Law, namely the unity of space with all objects, forces, conditions and living things, including humans and their behavior, which affect the continuity of life and the welfare of humans and other living things.
c. Grammatical Interpretation, which is interpreting the words in the law according to the rules of language and the rules of grammar law. This method explains that the judge tries to find the meaning of the word by tracing which words the legislators use in regulating similar cases and at the same time tracing where and what relationship the legislators use the same words. Interpretation according to language, among others, by looking at the lexical definition. For example: the term "coastal" is defined as "flat sandy land on the beach (by the sea)". (see: WJS Poerwadarminta, General Indonesian dictionary.
d. Historical Interpretation, namely by looking at the history and background of the formation of laws so that the purpose of the formation of laws is known. For example: The words "agrarian law are the implementation of the Political Manifesto of the Republic of Indonesia" in the preamble to Law No. 5 of 1960 concerning basic regulations of Agrarian principles, must be interpreted according to Soekarno's thoughts in his speech on August 17, 1960. At that time, he declared that the state must regulate land ownership and lead its use, so that all land throughout the nation's sovereignty is used to the greatest extent. prosperity of the people, both individually and in mutual cooperation.
e. Systematic Interpretation, which is a method that interprets laws or regulations as part of the entire system of related legislation, judges must understand all parts of regulation concerning related case and are not allowed to separate them, as well as between laws and regulations. Similarly, laws with one another which have the same and similar relationship. Example: Provisions regarding the settlement of disputes outside the court in Articles 31-33 of Law No. 23 of 1997 concerning environmental management is interpreted in line with the provisions of Law No. 30 of 1999 concerning arbitration and alternative Dispute Resolution.
f. Sociological or Teleological Interpretation, an interpretation which is an adjustment between legal regu-

lations and new conditions that are needed by society. For example: the words "controlled by the state" in Article 33 of The 1945 State Constitution of the Republic of Indonesia are interpreted as saying that the state no longer has to monopolize its own management (besturen / beheren function). The government as a representation of the state, it is sufficient to regulate and supervise (regelen and tezichthouden functions). Therefore, for water resources, which in fact are the source of many people's lives, it is not necessary to cultivate state / regional owned enterprises. The right to cultivate water can be granted to individuals or water business entities (Article 9 of Law No. 7 of 2004 concerning water resources).

g. Comparative Interpretation, namely comparing two or more legal rules against a certain case to be taken one of fulfilling the sense of justice, usefulness and legal certainty. Interpretation by comparing regulations in another legal system. Other legal systems referred can be legal regulations of other countries.
h. Futurist Interpretation or called Anticipatory Interpretation, namely solutions that are carried out using invalid regulations that are in the process of being legislated (Draft Bill) or the ideal formulation (ius constituendum). For example: the formula for “coastal area” is interpreted as “The area of water that connects terrestrial and marine ecosystems, which are very vulnerable to changes due to human activities on land and at sea. Geographically, towards land as far as the influence of land, such as river water, sediment, and pollution from land, "According to Article 1 (3) of the Coastal Zone Management Bill. If this bill has been enacted, then its interpretation can no longer be said to be futuristic.
i. Restrictive Interpretation, a method that is restrictive, meaning that statutory regulations cannot be expanded because of their absolute and limited nature. For example: the term “minister assigned to manage the environment” in Article 1 (25) of Law No. 23 of 1997 concerning environmental management, is only interpreted as The Minister of Environment.
j. Extensive Interpretation, is the opposite of the restrictive method, which is a broad interpretation, meaning that what is referred to in law can be expanded for its purpose, for example: the term "minister assigned to manage the environment" in Article 1 (25) of Law no. 23 of 1997 concerning environmental management, is interpreted broadly to include all ministers whose areas of duty are directly related to the environment, namely the Minister for the Environment and the related technical ministers in the cabinet (for example, the Minister of Forestry, Minister of Mining, Minister of Agriculture, Minister of Marine and Fisheries.

The legal discoveries referred Achmad Ali's opinion can be classified as legal discoveries with interpretation, because they are still guided by the statutory text. Meanwhile, legal construction is meant by judges in the face of void or imperfection of laws can be done through several instruments, namely [7]:

a. The Role of Analogies Argumentum, namely the analogy thinking method.
b. Argumentum A Contrario namely if the law stipulates certain things for a certain case, then the regulation is limited to that case.
c. Rechtsverfinding (narrowing of the law), namely concretizing the law or refining the law.
d. Legal Fiction, which is creating something that does not exist or is not yet real, but for legal purposes it needs to be established or considered to exist.

**Role of Judges to Make Legal Discoveries**

According to Achmad Ali's opinion that the laws and regulations that are formed in society are not always able to answer existing problems, even the law is always late to following developments in society, it is not uncommon to be a problem and it has not been regulated by law or already regulated in law but uncompleted, so judges as law enforcers and justice are obliged to explore, understand and follow the developed legal values so that the public can sense fair decisions.

This weakness then requires the concept of legal discovery by judges even though in certain cases legal discovery is limited for the interest of justice. Legal void is very easy to occur if the source of law is only law,

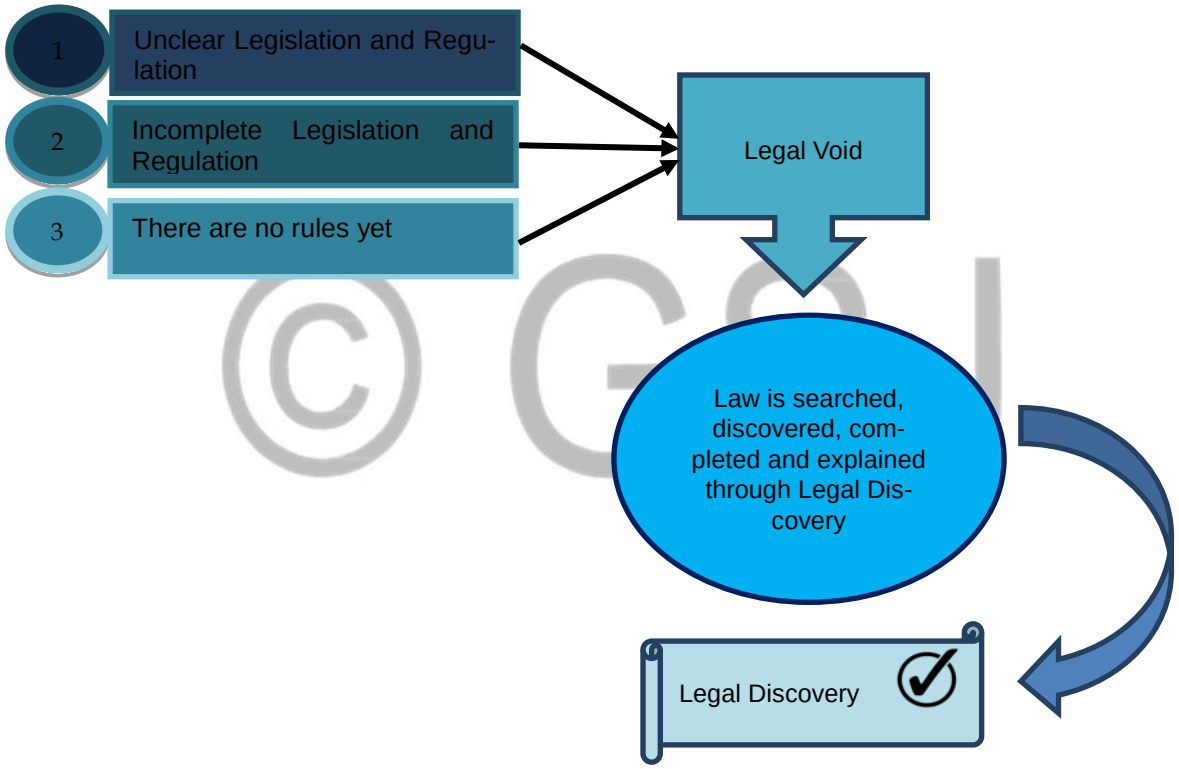
judges are also prosecuted not only the implementer of the law.

In filling the legal void, the judge has the authority to interpret the law. The authority to make legal discoveries is a consequence of the judiciary, where the judiciary may not refuse to examine, judge and decide a case filed on the pretext that the law does not exist or is unclear, but obliged to examine and judge.

If a comprehensive review is carried out, the freedom's principle of judges to carrying out legal discovery must not deviate from the existing law. Legal discovery by judges must always be in the legal system, especially in using the method and discovering sources of legal discovery are already available in the system. In addition, judges in explaining or completing laws must comply the existing legal system**.**

Author describe the legal discovery in a diagram as follows:

**THE LEGAL DISCOVERY'S DIAGRAM**




Thus, judges must have the ability and creativity to be able to resolve and decide cases by seeking and discovering laws in cases where there are no regulations, there are regulations but are unclear, the regulations are in place but incomplete. Judges must be able to make legal discoveries to be able to decide cases so that justice is desired by society. Here, judges are more flexible to resolving cases, because they not only convey the sound of the Law (la Bouche de la loi), but also can make legal discoveries from various sources of legal discovery, because in fact the law exists in society. Wherever there is society, there is law (Ubi Societas, ibi ius), it remains how we dig, so that law enforcement can truly fulfill the sense of justice in society. If a judge makes a legal discovery based on the value of justice to deciding a case, and then the judge's decision becomes law, then the most suitable law will be created with the justice that exists in society [8]. In law enforcement, judges should

stick to the principle that the law is for humans, not humans for the law. Therefore, judges must always be prioritize the value of justice in society, and indirectly always follow the dynamics of change in society.

## CONCLUSION

In filling the legal void, the judge has the authority to interpret the law. The authority to make legal discoveries is a consequence of the judiciary, where the judiciary may not refuse to examine, judge and decide a case filed on the pretext that the law does not exist or is unclear, but obliged to examine and judge.

Indonesia is aware of the discovery of heteronomous and autonomous law, so that if a legal problem occurs, the judge is obliged to discover the sentence, either through legal breakthroughs (control legem) or through legal construction (rechtsconstruction), either by interpreting existing laws or by means of explore existing values and live in society. In order for the verdict passed to be accounted for, the judge must be able to discover the sentence through legal interpretation.

Judge must have the ability and creativity to be able to resolve and decide cases by seeking and discovering law in cases where there are no regulations, the regulations exist but unclear and incomplete. The judge does not only act as the 'mouth' of laws or statutory regulations, but also as the 'mouth' of justice that voices feelings of justice that live in the midst of societ [4]. Article 5 (1) of Law of Republic Indonesia No. 48 of 2009 concerning Judicial Power explains: "Judges and Constitutional Justices are obliged to explore, follow and understand the legal values and the sense of justice that live in society". Judges in law must follow and understand and make the basis for their decisions so that they are in accordance with the sense of justice that lives in society. Because in fact the law exists in society. Where there is society, there is law (Ubi Societas, ibi ius).

## References

[1] Sudikno Mertokusumo, 1996, Penemuan Hukum Sebuah Pengantar, Yogyakarta, Liberty, hlm. 4-11
[2] Sitti mawar, Metode Penemuan Hukum (Interpretasi Dan Konstruksi Dalam Rangka Harmonisasi Hukum), Banda Aceh, hlm. 10-13
[3] Soerjono Soekanto & Sri Mamuji, Penelitian Hukum Normatif (Suatu Tinjauan Singkat), Jakarta: Rajawali Pers, 2001, hlm.
[4] Achmad Ali, 2002, Menguak Tabir Hukum, Gunung Agung, Jakarta, Edisi Kedua, hlm. 138.
[5] Jimly Asshiddiqie. Gagasan Negara Hukum Indonesia. Konstitusi Press, Jakarta. Hal. 11-12]
[6] Lintong Oloan Siahaan. Reran 2006 Hakim dalam Pembaharuan Hukum di Indonesia, Hal-hal yang Harus diketahui(Proses Berpikir) Hakim agar Menghasilkan Putusan yang Berkualitas dalam Jumal Hukum dan Pembangunan Tahun 36 No. 1, Fakultas Hukum Universitas Indonesia, Depok halaman 32-33
[7] Firdaus Muhammad Arwan, 2004, Hukum Dan Keadilan Masyarakat, Pengadilan Tinggi Agama Pontinak, hlm.11.
[8] Hartanto, 2016, Penemuan Hukum Dalam Peradilan Hukum Pidana dan Peradilan Hukum Perdata, Karawang, hlm.61-64