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LEGAL DISCOVERY THROUGH JUDICIAL ACTIVISM BY JUDGES IN CRIMINAL CASES

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ABSTRACT

In exercising the authority to decide criminal cases, Judges sometimes cannot decide proportionally according to their beliefs because they are often faced with binding to written laws that are rigid, both material and formal criminal law. So that in order to resolve disputes it is felt that Judges must play an active role in using a new rule or changing an old rule, that is where Judges create law (Judge made law) through Judicial Activism. The purpose of this study is to describe, examine, and analyze the factors underlying Judges in implementing Judicial Activism practices in criminal cases in order to ensure the upholding of the Objectives of Law, namely Justice, Benefit and Certainty. Then what obstacles are faced, and parameters or benchmarks that can be done so that Judges can implement Judicial Activism in criminal cases. This study uses a sociological juridical approach method, with the research specification being descriptive analytical. The data used in this study are secondary data, obtained through literature studies which are then analyzed qualitatively using Progressive Legal Theory and the Theory of Judicial Freedom and Legal Discovery (*Rechstvinding*). The results of this study are: (1). Judges' decisions that apply Judicial Activism in criminal cases at least consider several factors, including legal developments that always follow a society that moves quickly, in addition, laws or other regulations are not always complete to solve a legal case concretely, and also several other factors. (2). Obstacles that arise in the practice of Judicial Activism in criminal cases are divided into two factors, namely internal factors that originate from the personality and emotionality of the judge himself, then external factors related to the legal system of a country. (3). The solution presented is to encourage judges to use their authority as guaranteed by the Law on Judicial institution to carry out *rechtsvinding* and not just apply the law (*rechtoepassing*) through the method of legal discovery, namely the interpretation method and the argumentation method.
Keyword: Criminal Cases, Judges, Judicial Activism

ABSTRAK

Dalam menjalankan kewenangan untuk memutus perkara pidana, hakim terkadang tidak dapat memutuskan secara proporsional sesuai dengan keyakinannya karena terikat oleh hukum tertulis yang kaku, baik dalam hukum pidana materiil maupun formil. Oleh karena itu, dalam menyelesaikan sengketa, hakim perlu berperan aktif dengan menerapkan aturan baru atau mengubah aturan lama, yang dikenal sebagai pembuatan hukum oleh hakim (*judge made law*) melalui Aktivisme Yudisial (*Judicial Activism*). Tujuan dari penelitian ini adalah untuk mendeskripsikan, mengkaji, dan menganalisis faktor-faktor yang melatarbelakangi hakim dalam menerapkan praktik Aktivisme Yudisial dalam perkara pidana guna menegakkan tujuan hukum, yaitu Keadilan, Kemanfaatan, dan Kepastian. Selain itu, penelitian ini juga mengidentifikasi hambatan yang dihadapi serta parameter atau tolok ukur yang dapat digunakan agar hakim dapat menerapkan Aktivisme Yudisial dalam perkara pidana. Penelitian ini menggunakan metode pendekatan yuridis sosiologis dengan spesifikasi penelitian deskriptif analitis. Data yang digunakan dalam penelitian ini adalah data sekunder yang diperoleh melalui studi kepustakaan, kemudian dianalisis secara kualitatif dengan menggunakan Teori Hukum Progresif serta Teori Kebebasan Hakim dan

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Penemuan Hukum (*Rechstvinding*). Hasil penelitian ini menunjukkan bahwa: (1) Putusan hakim yang menerapkan Aktivisme Yudisial dalam perkara pidana mempertimbangkan beberapa faktor, termasuk perkembangan hukum yang selalu mengikuti dinamika masyarakat, serta ketidaksempurnaan undang-undang dalam menyelesaikan kasus hukum secara konkret. (2) Hambatan dalam praktik Aktivisme Yudisial dalam perkara pidana terbagi menjadi dua faktor, yaitu faktor internal yang berasal dari kepribadian dan emosionalitas hakim, serta faktor eksternal yang berkaitan dengan sistem hukum suatu negara. (3) Solusi yang ditawarkan adalah mendorong hakim untuk menggunakan kewenangannya sebagaimana dijamin dalam Undang-Undang tentang Kekuasaan Kehakiman guna melakukan rechtsvinding dan tidak hanya menerapkan hukum secara formal (*rechtoepassing*), melalui metode penemuan hukum, yaitu metode interpretasi dan metode argumentasi.
Kata Kunci: Aktivisme Yudisial, Hakim, Perkara Pidana

1. Introduction

The Indonesian legal system adheres to Civil Law, namely a written and codified form of law. Of course, the codification of law will not be able to accommodate all the aspirations of the community, especially in this era of reform and transformation, where changes and developments are so rapid that no matter how fast the lawmakers work, the problems that arise in society that require regulation are even faster (Yusra, 2013).

Based on Article 24 Paragraph (1) of the 1945 Constitution it states that judicial institution is an independent power to administer justice in order to uphold law and justice. In Paragraph (2) judicial institution is exercised by the Supreme Court and judicial bodies under it in the general court environment, religious court environment, military court environment, state administrative court environment, and by a Constitutional Court. In line with this, Article 18 of Law Number 48 of 2009 concerning Judicial Institution states that judicial institution is exercised by a Supreme Court and judicial bodies under it in the general court environment, religious court environment, military court environment, state administrative court environment, and by a constitutional court. Furthermore, regarding the authority of the District Court, it is explained in Article 51 of Law Number 2 of 1986 as amended by Law Number 49 of 2009 concerning General Courts, which emphasizes that the authority of the District Court is to examine, decide, and resolve criminal and civil cases at the first level. Judicial proceedings are basically the implementation of the law, in concrete cases where there is a claim for rights or a dispute or violation occurs, the function of which is carried out by an agency by issuing a binding decision and aiming to prevent the occurrence of taking the law into one's own hands (*eigenrichting*) (Sunarto, 2014).

In carrying out the authority to decide on criminal cases, judges are sometimes unable to decide proportionally according to their beliefs because they are often faced with being bound by rigid written laws, be it civil law. material and formal criminal law. In Criminal Law, the principle of legality is known. Montesquieu in his essay entitled: De I'esprit des lois in 1748 who propagated the principle of legality and viewed that judges only function as "mouths of the law" has long been abandoned. Although the principle of legality is still maintained in various countries in the world, it is generally accepted that there is no single lawmaker who is able to regulate clearly and in detail things that will happen in the future. The problem of enforcing the law will always keep judges busy (Farid, 2007).

Meanwhile, based on Article 10 Paragraph (1) of the Judicial institution Law, it states that the Court is prohibited from refusing to examine, try, and decide a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it. Based on this Article, it can be concluded that it is unlawful for a court or judge to refuse to examine, try and decide a case that has been delegated to him. To overcome this, Article 5 Paragraph (1) of the Judicial institution Law states that judges and constitutional judges are obliged to explore, follow and understand the legal values and sense of justice that exist in society.

In any legal tradition, whether civil law or common law, there is often a gap between the law and the development of community life. This results in the emergence of a community need for responsive law to be able to provide answers to problems that arise. In a democratic life, the court is one of the places that the community goes to bridge the gap between law and social reality. For this problem, the Concept of Judicial Activism is needed, which is a philosophy of making judicial decisions, where judges base their considerations

on new developments or developing public policies. These considerations become a direction for them in deciding cases that are being handled because of new developments or may even be contrary to previous decisions. The term judicial activism popular in countries with common law characteristics in the rule of law system. In America and India, the main objective of implementing judicial activism at that time was to protect the legal interests of minorities and the lower class against positive law that acted arbitrarily by finding substantive justice (Amarini, 2019). The practice of judicial activism began with a progressive legal view that emphasized *interessenjurisprudenz*, namely the judge's view of legal regulations not only as formal-logical, but also assessed according to the purpose of the law itself (Hasanah, 2022). The application of judicial activism is aimed at promoting the rights of its citizens such as in the fields of health, housing, and economic issues (César and Rodriguez-Garavito, 2011).

The practice of judicial activism itself is defined as a philosophy of formulating judicial decisions, where judges base their decisions on considerations based on new developments or current political policies. If, in order to resolve a dispute, the judge or judicial institution must use new rules or change old provisions, then that is where the judge creates law (judge made law) (Risnandri, 2023).

In line with this, the court needs the right guidelines to be able to provide decisions that have benefits without damaging the legal order. Therefore, the author is interested in examining how far judges in criminal cases can apply Judicial Activism to ensure the upholding of the Objectives of Law, namely Justice, Benefit and Certainty and what background underlies the judge's application of Judicial Activism. The formulation of the problem in the discussion is as follows:

1. What are the basis for the Judge's considerations and the obstacles to the application of Judicial Activism in criminal cases when linked to the Judge's duties and authority?
2. What parameters or benchmarks can be used to enable judges to carry out judicial activism in criminal cases?
3. Problem Statement

   With respect to the situation described above, the following issues can be developed:

   1. How is the procedure for granting charges against cases of child abuse?
   2. How is the process of resolving cases of violence against children in the justice system in Indonesia?

2. Method

A research method is a method used to achieve a certain result through collecting, processing, analyzing and presenting data carried out systematically and objectively. The type of research in this study is normative legal research carried out through library research (Sari, 2020). This is done by researching literature or secondary data related to the writing being discussed (Sunggono, 2011). This information is then combined to obtain a holistic understanding. This research uses secondary data as the main material. The data analysis method used by the author is a qualitative method by drawing conclusions deductively.

3. Result and Discussion

3.1. Indonesian Judicial Institution

The 1945 Constitution of the Republic of Indonesia or often abbreviated as (UUD 1945) in Article 1 paragraph (3) emphasizes that Indonesia is a state of law. One of the important principles as a state of law is the guarantee of the implementation of an independent judicial institution, free from the influence of other powers. Judicial institution is an independent power to organize trials to uphold law and justice. The description of judicial institution can be found in laws and regulations and one of them is Law Number 48 of 2009 concerning Judicial Institution which Article 1 number 1 emphasizes that judicial institution is an independent state power to organize trials to uphold law and justice based on Pancasila and the 1945 Constitution, for the sake of implementing the Republic of Indonesia's State of Law (Aburaera, 2012). Judicial institution is exercised by:

The Supreme Court and the judicial bodies under it in the following areas:

- General Court

- Religious Courts
- Military Court
- State Administrative Court

Constitutional Court

The Judicial institution Law opens up the possibility of establishing a Special Court with the provision that the Special Court is in the judicial environment under the Supreme Court. The establishment of a Special Court is regulated by law and has the authority to examine, try and decide certain cases. In the United Nations (UN) General Assembly Resolution Number 40 dated November 29, 1985, it is universally emphasized that the Basic Principle on the Independence of the Judiciary as a free, independent and autonomous judicial institution is a judicial process that is free from any restrictions, inappropriate influence, incitement or direct or indirect interference in the judicial process. The Independence of the Judicial institution includes:

Independence of judicial institutions/agencies;

Judge's independence in examining and adjudicating cases.

The freedom referred to as an entity of judicial independence is not unlimited arbitrariness, because judges in examining and trying a case must be subject to the law, must not conflict with morality and order, so that the form of judicial freedom is free from interference from external parties, free from all forms of pressure, both physical and psychological, both from outside and from the judge himself.

The principles for the implementation of judicial institution that apply in Indonesia are (Aburaera, 2012):

a. Justice in the Almighty God
b. Simple, Fast and Low Cost
c. Independence of the Judiciary
d. Openness
e. Similarity, Position, and Treatment

3.2. Progressive Legal Theory

The view on progressive law emphasizes that law is not just text. Progressive law places behavior as a much more important factor in law than regulations that are nothing more than text (Rhiti, 2016). This concept is brought in explaining social situations, especially legal science. Basically what happens is that there is a significant change in the law which is formulated with the sentence "from simple to complex" and "from compartmentalized to one unit". This is what is interpreted as a holistic view in legal science. This holistic view provides a visionary awareness that something in a certain order has interrelated parts and with other parts in one system (Marilang, 2017). Progressive law provides an understanding that law exists not only for the law itself, but for a greater and broader purpose, namely human dignity, happiness, welfare, human glory and humanity. Progressive law is not only obedient to formal bureaucratic procedures but also material-substantive. Law is also not an absolute and final institution, because law is always in the process and becoming (law as a process, law making) (Nafis, 2020). Progressive legal theory opposes the view that judges cannot do anything because judges only follow the law (*La bouche de laloi*), judges carry out what is in the law, even the independence of judges which is a characteristic of a state of law is not visible and is defeated by the superiority of rigid laws (Maskur, 2016). However, basically judges are normatively given freedom by law to judge according to their beliefs without being influenced by anyone and anything. Judges have the freedom to decide cases based on their thoughts and conscience (Hasibuan, 2016). All written works related to progressive law were written and developed by Satjipto Raharjo (Aulia, 2018). The discovery of progressive law put forward by Ahmad Rifai through his book Discovery of Law by Judges in the Perspective of Progressive Law, the discovery of progressive law has 3 (three) main characteristics, namely (Christianto, 2011):

- A visionary legal discovery method that looks at legal problems for long-term future interests by looking at cases by cases;
- A method of legal discovery that is bold in making a breakthrough (rule breaking) by looking at the dynamics of society, but still adhering to the law, truth and justice and taking sides and being sensitive to the fate and condition of the nation and country;

- A method of discovering laws that can bring prosperity and well-being to society and can also bring the nation and state out of the current social depression and instability.

The three characteristics above are more of a requirement for a judge's decision to be called a progressive legal discovery. The basic spirit of progressive legal discovery is basically being able to see long-term interests based on the dynamics of society so as to bring prosperity and welfare to the nation and state. In other words, the main focus of progressive legal discovery is the accommodation of the legal values of society in the judge's decision. Decision judges on a case are no longer understood as a result of rules and facts but rather considerations of legal values in society (Reksodiputro, 2008).

It is important to note that when a judge decides a case based on the legal values of society, it cannot be equated with a judge following the wishes of the masses. Hodio Potimbang quoted Smelser's opinion explaining 6 (six) factors that cause the birth of "mass justice" or factors that determine collective behavior, namely structural conduciveness (social aspects that trigger society such as attacks/destruction), structural strain (structural tension), growth and spread of a generalized belief (the same belief in a wrong act), precipitating factors (situational factors), mobilization of participants for actions (the presence of figures who mobilize society) and the operations of social control. The existence of public demands on a case, either directly or indirectly, can indeed influence judges in considering a case. In this case, judges must pay more attention to legal values. Judges' decisions that are formed due to mass demands will actually give birth to "mass justice" where intervention in the judicial process is justified even though it is very dangerous for an independent judiciary. AM Mujahidin calls this condition “civic engagement” which has an impact on irrational and emotional law enforcement (Mujahidin, 2010). In addition, trial by mass violates the principle of presumption of innocence as a basic principle of the criminal law process which places a person as innocent as long as the judge does not decide otherwise. The assessment of whether or not there is a judge's decision that can be said to be a progressive legal discovery can be seen from the judge's considerations in his decision. Ahmad Rifai mentioned several criminal cases that can be said to be in accordance with the progressive legal discovery method (Rifai, 2010).

Related to the use of legal interpretation as an effort to discover law progressively, judges are required to explore values that are norms that apply in society, meaning that the task of discovering law is a special task for a judge in examining and deciding cases. Every judge is always challenged to find the right law to try and decide a case as mandated in Article 5 paragraph (1) of Law No. 48 of 2009. In terms of formal juridical terms, the recognition of legal discovery in Law No. 48 of 2009 confirms that the source of Indonesian law is not always written rules but also laws in the form of values that apply in society. This hope emphasizes the purpose of law implemented by the judicial institution to uphold law and justice for the people of Indonesia. However, judges still have clear limitations in interpreting, including:

1. In cases where the wording or words and structure of the rules are clear, the judge is obliged to apply the law according to the wording and structure of the rules unless there are inconsistencies, contradictions, or provisions that cannot cover the legal event being tried;
2. Must pay attention to the aims and objectives of establishing a law, unless the aims and objectives are outdated, too narrow and require a looser interpretation;
3. Interpretation is only carried out to provide satisfaction to justice seekers. The interests of society are taken into account as long as they do not conflict with the interests of justice seekers;
4. Interpretation is only carried out in the context of actualizing the application of laws, not to change laws;
5. Considering that judges only decide according to the law, the interpretation must follow the method of legal interpretation and pay attention to general legal principles, public order, legal interests and be legally accountable;
6. In interpretation, judges can use legal teachings as long as the teachings are relevant to the legal problem to be resolved and do not harm the interests of those seeking justice; and

7. Interpretation must be progressive, that is, oriented towards the future (future oriented), not looking back to past legal conditions that are contrary to current conditions and legal developments.

Legal discovery as intended by Bagir Manan cannot be done carelessly but must pay attention to the clarity of legal rules as a basis for support and community values as the basis for actualizing decisions (Christianto, 2011).

3.3. Theory of Judicial Freedom and Legal Discovery (Rechtsvinding)

According to Sudikno Mertokusumo, there are 5 (five) forms of schools of thought in legal discovery, namely:

1. Legism; The legalism school believes that all laws originate from the highest authority, in this case the legislator. This school grew in the 19th century, because belief in rationalistic natural law teachings was almost completely abandoned by people, among other things because of the influence of the *cultuur historisch* school (Pranata, 2016).
2. Legal law; According to this school, between statutes and customary law have equal standing in being sources of law. Because judges are free from the bonds of law, but must work in a closed legal system. Therefore, the goal of the *Begriffsjurisprudenz* school is how legal certainty can be realized, without paying much attention to feelings. justice and the benefits of law for citizens, because he only sees law as a matter of logic and reason (Nur, 2016).
3. Legal interest; This school of thought believes that legal regulations should not be viewed by judges as merely formal-logical, but should be assessed according to the purpose behind the system and realize the timeless ideas of justice and morality.
4. Free Statement; This type of legal discovery school is the school of legal discovery that most strongly reacts to the legal discovery school of *legism* in the 1900s in Germany. Every thought that sees judges as *subsumptie automataat* is considered as something unreal. According to them, judges do not only serve certainty, but have the task of realizing justice.
5. The discovery of modern law; Modern legal discovery holds that legal positivism is only system oriented. In fact, in its essence, law is a tool to solve problems (problem oriented) and protect human interests. The theory of modern legal discovery strongly emphasizes that problem oriented is something that must be used as a basis for legal discoverers.

The interpretation method itself is divided into several parts, including the following:

1. Grammatical Interpretation. Law requires language, law cannot exist without language, language is an important tool for law, laws and regulations are written in written form, court decisions are written in a logical, systematic language, even implementing agreements requires language.
2. Systematic or Logical Interpretation. Interpreting statutory regulations by connecting them to other legal regulations or laws or to the entire legal system is called systematic interpretation.19 In this interpretation, judges see the law as a whole, as a system of regulations.
3. Historical Interpretation. Historical interpretation is the interpretation of the meaning of a law according to its occurrence by examining the history of its occurrence. This interpretation includes interpretation according to the history of the law and interpretation according to the history of the occurrence of the law.
4. Teleological or Sociological Interpretation. Theological interpretation occurs when the meaning of the law is determined based on social goals. Legal regulations are adjusted to new social relationships and situations.
5. Anticipatory or Futuristic Interpretation. This interpretation seeks a solution in regulations that do not yet have the force of law, namely draft laws.
6. Restrictive Interpretation. This interpretation explains a provision of law, the scope of the provision of the law is limited. This method narrows the meaning of a regulation by starting

from its meaning according to language.

7. Extensive Interpretation.Extensive interpretation is an interpretation that expands a statutory provision.
8. Authentic Interpretation. Authentic interpretation is an interpretation made by the maker of the statutory provisions.

Meanwhile, the argumentation method is divided into several parts, including the following (Kurniawan, 2015):

1. Argumentum Per Analogium (Analogy) Method. This method is a method of legal discovery, where the judge seeks a more general essence in an act regulated by law with the act or event that the judge is concretely facing.
2. The Argument a Contrario Method. This method uses the reasoning that if the law stipulates certain things for certain events, it means that the regulation is limited to that particular event and for events outside it the opposite applies.
3. Legal Refinement/Concretization Method. This method is used by narrowing or refining the meaning determined by law and must not be other than what is intended in the law.

3.4. Supreme Court Decisions and Policies Concerning the Implementation of Judicial Activism

In several applications of judicial activism, there are several decisions that have become the jurisprudence and policies of the Supreme Court, as below:

1. Based on the Circular of the Supreme Court Number 03 of 2015 number 1, the Judge examines and decides the case must be based on the Indictment of the Public Prosecutor (Article 182 paragraph 3, and 4 of the Criminal Procedure Code). The prosecutor charges with Article 111 or Article 112 of Law Number 35 of 2009 concerning Narcotics but based on the legal facts revealed in the trial it is proven that Article 127 of Law Number 35 of 2009 concerning Narcotics which this article was not charged, the Defendant is proven to be a user and the amount is relatively small (SEMA Number 4 of 2010), then the Judge decides according to the indictment but can deviate from the provisions of the special minimum criminal penalty by making sufficient considerations. Based on the Circular, the judge in deciding the narcotics case can deviate from the law on the special minimum threat, by considering the purpose behind the system and realizing the idea of justice and morality that knows no time. So, in this case, the judge set aside the legalistic flow to provide justice to the Defendant for the negligence of law enforcement officers (Public Prosecutor) who did not charge the appropriate article.
2. Jurisprudence Number 1/Yur/Pid/2018 in the classification of the crime of Murder, the element of intentionally taking life is fulfilled if the perpetrator attacks the victim with a tool, such as a sharp weapon and firearm, in the body parts that contain vital organs, such as the chest, stomach, and head. In several cases, it was found that the defendant basically did not intend to take the victim's life, but only intended to abuse the victim. However, it turned out that the defendant's attack on the victim resulted in the victim's death because the defendant used a certain tool and attacked the victim in a certain part of the body. This condition raises the legal question of whether the defendant can be said to have intended to take the victim's life. Regarding this question, the Supreme Court is of the opinion that the defendant can be said to have intended to commit murder. This is based on the fact that the defendant attacked the victim with a certain tool to the vital part of the victim's body that could cause the victim to die.
3. Jurisprudence Number 2/Yur/Pid/2018 in the classification of the crime of receiving goods, Goods purchased at prices that are not in accordance with market prices are reasonably suspected of being obtained from crime. The Criminal Code does not provide limitations or explanations on the conditions of goods that can be said to be "reasonably suspected of originating from a crime", including goods in the form of motor vehicles. This condition

causes ambiguity regarding when someone can be said to have sold or bought a motor vehicle that is reasonably suspected of originating from a crime, so that they can be punished under this article. Regarding this problem, the Supreme Court has consistently held the opinion that if an item is sold or purchased below the market/standard price, then the item is reasonably suspected of originating from a crime. This opinion is indeed not stated explicitly in the decisions of the Supreme Court.

4. Jurisprudence Number 3/Yur/Pid/2018 in the classification of criminal acts of receiving legal principles, if someone buys a motor vehicle without being equipped with valid vehicle documents, the person should reasonably suspect that the vehicle originates from a crime. The Criminal Code does not provide limitations or explanations regarding the condition of goods that can be said to be "reasonably suspected of originating from a crime", including goods in the form of motor vehicles. This condition causes ambiguity regarding when someone can be said to have sold or bought a motor vehicle that is reasonably suspected of originating from a crime, so that they can be punished under this article. Regarding this problem, the Supreme Court has consistently held the opinion that if a motor vehicle is obtained without being equipped with vehicle documents, then it is reasonable to suspect that the motor vehicle was obtained from a crime.

Based on several policies and decisions that have become jurisprudence in the application of judicial activism , Judges must strive to ensure that the decisions taken are consistent with previous decisions. Although there is freedom in interpretation, a decision that is the result of judicial activism must have a strong basis and be accepted in the legal system. Judges must ensure that the decisions taken are not only formal or procedural, but also truly provide justice to all parties involved, especially the accused and victims in accordance with the provisions of Article 5 Paragraph (1) of the Judicial institution Law stating that Judges and constitutional judges are required to explore, follow, and understand the legal values and sense of justice that live in society as a basis/basis for making decisions.

4. Conclusion

The discovery of law through judicial activism by judges in criminal cases is a way to achieve justice when existing laws do not explicitly regulate a problem. However, the use of judicial activism must be carried out carefully and wisely to maintain a balance between justice, legal certainty, and the separation of powers between the legislative, executive, and judiciary. Judges must ensure that the decisions taken do not exceed their authority and remain in line with the basic principles of existing law.

The application of judicial activism by judges in criminal cases has a strong basis for consideration to achieve justice, fill legal gaps, and protect human rights. However, this is not free from obstacles that can arise, both in terms of separation of powers, legal uncertainty, and resistance from other parties in the justice system. Therefore, although judicial activism can function to respond to uncertainty or social needs.

To implement judicial activism in criminal cases, judges need to pay attention to several parameters or benchmarks that include legal certainty, substantive justice, the principle of separation of powers, applicable legal basis, and existing social developments. Judicial activism should not be used carelessly, but must be carried out with full consideration and not exceed the judge's authority. By following these benchmarks, judges can create decisions that are fair, rational, and in accordance with the needs of society without damaging the existing legal system.

It would be better for the Supreme Court to provide details on the extent to which a judge can interpret the law or in the formation of law

References

Aburaera, Sukarno. (2012). The Judicial Institution of Indonesia. Makassar: Arus Timur.

Amarini, Indriati. (2019). Implementation of Judicial Activism in Judge's Decision. Journal of Law & Justice, 8(1).

Aulia, M. Zulfa. (2018). Progressive Law from Satjipto Rahardjo. Undang: Jurnal Hukum, 1(1), 159–185.

Christianto, Hwian. (2011). Progressive Legal Interpretation in Criminal Cases. Mimbar Hukum, 23(3), 431–645.

César & Rodriguez-Garavito. (2011). Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America. Texas Law Review.

Farid, Zainal Abidin. (2007). Criminal Law I. Sinar Grafika, Jakarta.

Hasanah, Galuh Nur. (2022). The Existence of Judicial Activism in Constitutional Practice by the Constitutional Court. Journal of Democracy and National Resilience, 1(4).

Hasibuan, Safni Kholidah, Erdianto, & Indra, Mexsasai. (2016). Reconstruction of Judicial Freedom in Deciding Criminal Cases Based on Progressive Law. JOM Faculty of Law, 3(2), 1–15.

Kholidah, Safni, Erdianto, & Indra, Mexsasai. (2016). Reconstruction of Judicial Freedom in Deciding Criminal Cases Based on Progressive Law. JOM Faculty of Law, 3(2), 1–15.

Kurniawan, Rian. (2015). Legal Discovery by Judges in Criminal Cases Based on Law Number 48 of 2009 Concerning Judicial Institution. JOM Faculty of Law, 2(1).

Marzuki, Peter Mahmud. (2011). Legal Research. Prenada Media Group, First Edition, 7th Printing. Jakarta: Kencana.

Marilang. (2017). Considering the Progressive Legal Justice Paradigm. Constitutional Journal, 14(2), 315–331.

Maskur, Muhammad Azil. (2016). Integration of The Living Law in the Consideration of Judges' Decisions in Corruption Cases. Pandecta: Research Law Journal, 11(1), 18–30.

Nafis, Wildan. (2020). Progressive Law and Its Relevance to Legal Reasoning in Indonesia. Journal of Islamic Family Law, 1(2).

Nur, Muliadi. (2016). Rechtsvinding: Discovery of Law (A Comparison of Conventional and Islamic Law Discovery Methods). Al-Syir'ah Scientific Journal, August.

Pranata, Robert. (2016). Legal Discovery and Paradigm: A Study of Legal Philosophy on the Criminal Justice Process at the Semarang City District Court. DIPONEGORO LAW JOURNAL, 5(4).

Rhiti, Hyronimus. (2016). Philosophical Foundations of Progressive Law. Justitia et Pax, 32(1), 33–51.

Rifai, Ahmad. (2010). Discovery of Law by Judges in the Perspective of Progressive Law. Sinar Grafika, Jakarta.

Risnandri, Yogo. (2023). Judicial Activism of Judges in the Expansion of Immaterial Claims in Unlawful Acts (PMH) Cases Against the Decision of Case Number: 305/Pdt.G/2009/PN.Tng.

Sari, Milya. (2020). Penelitian Kepustakaan (Library Research) dalam Penelitian. Jurnal Natural Science, 2(2).

Sunarto. (2014). The Active Role of Judges in Civil Cases. PrenadaMedia Group: Jakarta.

Sunggono, Bambang. (2011). Metode Penelitian Hukum. Jakarta: PT Raja Grapindo Persada.

Yusra, Dhoni. (2013). The Legal Politics of Judges Behind the Discovery of Law (Rechtsvinding) and the Creation of Law (Rechtsschepping) in the Era of Reform and Transformation. Lex Jurnalica, 10(2).