

Passive Judge Shift In Civil Judges In Indonesia: Regulation And Relevance Of Legal Currency

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Abstract

Law enforcement is essential to create justice and legal certainty in people's lives. One of the law enforcement actors is a judge who has the duty and authority to decide on cases. Applicable principles bound judges in carrying out their duties, one of which is passive in resolving civil disputes. Through the principle of passive judges, the limits of what judges in Indonesia can do when examining cases in court, however, tend to in practice show that there has been a shift in this principle. Based on the normative legal research method and qualitative juridical analysis, the results is the practice of resolving civil disputes, judges are not merely passive, but in certain cases, judges may even be required to be active. The passive nature means that the judge cannot determine the extent of the dispute and only the disputing parties determine when the case will be filed and the case will be terminated, including in terms of granting compensation. In its development, it requires the activeness of judges who not only lead the trial but also to dig up legal facts. The ambiguity of the principles as regulated in the law has created legal uncertainty, so it is advisable to consider shifting passive and active judges to be integrated into Indonesia's civil procedural law in the future.

Keywords: civil procedural law, judge, law enforcement, legal certainty, principle, regulation

I. Introduction

In Indonesia, judges are the spearhead of the court to provide legal considerations and decide cases. This situation is uncommon from what happens in common law countries, where there is a role for the jury. Through the judicial power mandated in Law No. 48 of 2009, it gave an independent state the power to administer justice to uphold law and justice based on Pancasila.

Judges act independently. The purpose of the judge's freedom to hear and decide cases is so that the court can carry out its duties as well as possible so that it can decide based on truth and justice. To find truth and justice, judges are authorized to make legal discoveries. The judge's authority to make legal discoveries is based on the principle of freedom of judges (Manan, 2007).

In finding the law, it also applied the principle of freedom of judges when judges qualify concrete events to become legal events. The parties have qualified for concrete events in each of the arguments put forward in court, but the judge is free to accept or reject the qualifications given by the parties (Butarbutar, 2011).

Judges in carrying out the task of examining, adjudicating, and deciding a case must be guided or subject to the legal principles contained in the legislation, one of which is a passive judge (Sarwono, 2011). According to Article 4 paragraph (2), judges in examining civil cases are passive in the sense that the scope or subject matter submitted to the judge for examination is determined in principle

by the litigants and not by the judge. Judges only help justice seekers and try to overcome all obstacles and obstacles to achieve justice (Article 4 paragraph (2) of Law No. 48 of 2009). So, the passive understanding is only that the judge does not determine the extent of the subject matter. In research from Mertokusumo (2013), The HIR system states that judges are active, but in RV they adhere to the principle of passive judges.

The principle conflict between passive or active judges in the decision of civil disputes in principle affects legal certainty and the judge's authority in acting. In theory and practice, there is a contradiction between how judges act, whether actively or passively (Wijayanta et al, 2010). The author's hypothesis shows that the development of the type of dispute affects the existence of the passive judge principle. For example, nowadays various lawsuits are filed with demands that the judge decides on immaterial compensation claims, which are sometimes not based on the existence of evidence because the type of losses are abstract.

This article will basically analyze the consistency of the application of the passive judge principle in the practice of resolving civil disputes in Indonesia and how it will be arranged to provide legal certainty. It investigates because based on the pre-study there has been a shift in principle which is no longer absolutely done passively but judges have acted actively, therefore it is important to determine the boundaries of these passive and active judges. The existence of this confusing principle in practice has created legal uncertainty so that it is necessary to think about how to solve it in the future.

2. Research Methodology

As part of the research results, we wrote this article using normative legal research methods. The main data used is secondary data in the form of literature review, statutory regulations, but to support secondary data, they complemented it by secondary data, namely interviews with district court judges, which are then analyzed by qualitative juridical authors.

3. Results and Discussion

Consistency in the Principle's Application of Passive Judges in the Practice of Settlement of Civil Disputes in Indonesia.

The task of the judge is to receive, investigate, try, and decide every civil case that is forced to him. The judge is gratified to assist justice seekers and try to overcome all obstacles and handicaps to achieve a fast, simple, and low-cost trial. Consequently, judges must be active in resolving these targets.

In the settlement of civil cases, it based the authority and duties of judges on the law along with various existing principles. There is a principle that states judges act passively. Then it becomes a debate to know to what extent judges should act passively. While there is a provision that the judge may not reject a case that is submitted to him, if there are no rules then the judge must explore the values that live in a society (the essence of the provisions in Article 10 of Law No. 48 of 2009 concerning Judicial Power). Likewise, in theory, if there are unclear rules in the legislation, the judge can make legal discoveries, either as legal interpretations or analogies. The judge can search and find the law which is then stated in the decision. Does this show that the judge has acted actively? The principle of the judge acting passively became a debate in the end.

The principle of law is a very important element in the formation of legal regulations. Therefore, the author will describe a brief discussion related to this issue, hoping to bring a closer

understanding of legal principles. Legal principles are basic rules and legal principles that are abstract and underlie concrete regulations and law enforcement. In English, the word "principle" is formatted as "principle". Concrete regulations such as laws must not conflict with legal principles, as well as in judicial decisions, implementation of the law, basic law. Because the legal principle is general, which means it can apply in various situations, it opens opportunities for deviations or exceptions. To open exceptions, the legal principles make the legal system flexible, flexible, and flexible. Thus, the principle of law complements the legal system. According to new research without legal principles, the legal system becomes rigid (Mertokusumo, 2019).

Normatively, H.I.R., R.Bg., and R.v. do not explicitly mention the terms of the principle of active judges and passive judges. In various legal literature, these two principles are also not defined definitively and systematically. Some legal scholars interpret the principle of passive judges as being that judges are waiting for the case to be submitted by the parties. In research from Saputra (2019), some other legal scholars interpret the passive judge principle as a judge playing the role of doing nothing (Rian, 2019).

Sudikno Mertokusumo is one of the jurists who recognizes the existence of the principle of active judges and passive judges and consistently uses both terms in his references. He put forward his theory that the passive judge principle is not related to the total or absolute passivity of the judge in examining and deciding cases for the parties but is related to the scope or breadth of the subject matter of the dispute which is basically determined by the litigants and not by the judge. While principle of active judges is a principle that must be upheld by judges in examining and deciding civil cases, because judges are the leaders of the trial who must try to resolve disputes effectively and fairly and overcome all obstacles and obstacles for justice seekers in carrying out a fair trial.

It reflected the embodiment of the principle of active judges in several provisions of H.I.R. Therefore, the H.I.R. system considered applying the principle of an active judge. H.I.R. System is certainly different from the R.v system. which strictly adheres to the principle of passive judges. The role of judges in the trial, according to R.V. very limited. However, R.V. is considered only as a guideline because it is no longer applicable as it should be. The provisions in the RV apply as long as they are not found in the HIR/RBG.

As explained by L.J.van Apeldoorn, the reasons for still upholding the passive judge principle that accompanies the active judge principle in civil procedural law are:

- a. The initiative to file civil cases is always carried out by interested parties and has never been carried out by judges. This is a rational thing because civil procedural law regulates how to defend private interests and only the parties know whether they want their special interests to be defended or not.
- b. Before the judge gives a decision either because of an agreement to take the path of peace (Article 130 H.I.R.) or other reasons for revocation of a lawsuit (Article 227 R.v.) the parties have the power to stop the event they have started.
- c. The extent of the dispute submitted to the judge depends on the parties. In other words, the judge is obliged to determine whether the things proposed and proven by the parties are relevant to their demands.
- d. If the parties agree on certain matters with one party admitting the truth of the things submitted by the other party, then the judge does not need to investigate further whether the things proposed are true. He must accept what is determined by the parties. This is a difference between civil procedural law and criminal procedural law. In

a criminal procedure, the judge cannot simply accept the truth of the defendant's confession and cannot give a decision based solely on the defendant's confession, which is not corroborated by other things. This confirms that in civil procedural law, the judge's conviction very attached judges are very attached to the evidence presented by the parties to the evidence presented by the parties, whereas in criminal procedural law, evidence alone is not sufficient but must also be strengthened (beyond reasonable doubt).

- e. Civil judges may not examine the truth of the decision oath (oath that decides and determines) which has been made by one of the parties to hang the decision on the oath. If the oath has been taken, the judge in a civil dispute may not check whether the oath is false or not. He must accept the things that are done on oath as something that is his.

To complete the data in this study, we conducted interviews with judges, practitioners, and academics. The resource persons comprising 2 judges argued that the judge acting passively means as long as the judge does not regulate the scope or subject of the lawsuit, as well as the demands of the dispute that have been determined by the parties. Therefore, the subject matter of the dispute is determined by the parties who submit, while the event that is the dispute proposed by the parties bound the judge. The judge acts passively in the sense that only the disputed event must be proven. The judge cannot add or reduce the subject of the dispute and even take the role of asking the parties to submit or add the evidence. This argument is in line with the opinion of academics who state that judges are passive because it only bound them to the dispute. However, judges must remain active in leading the trial.

In its development, there is a need for judges to act actively, such as a third-party mediating (mediator) at the reconciliation stage in court, as well as the existence of a single judge when leading a small claims court. According to new research, as it ran the Small Claims Court in other countries, the judge, throughout the trial continues to seek peace for the parties (Afriana & Chandrawulan, 2019; Afriana & Ikhwanasyah, 2017; Marjo & Rofikoh, 2020). Therefore, the judge acts actively when overseeing the trial so that the parties undergo the trial process under the procedural law. Judges act actively when providing instructions, legal information to litigants so that the case is submitted becomes clear about the case, making it easier for judges to examine, hear, and examine cases (Article 119 HIR/143 RBg, Article 132 HIR/156 RBg, Article 119 HIR/143 RBg, Article 132 HIR/156 RBg, Article 4 paragraph (2) of the Judicial Power Act).

The contradiction between the principle of an active judge and the principle of a passive judge is usually associated with the prohibition against *ultra petitem partium*, namely the prohibition for judges to decide more than what is required under the provisions of Articles 178 (2) and (3) H.I.R. However, in its development, there is Supreme Court jurisprudence which states that judges can grant more than what is required in the *petitum* as long as it is still in accordance with the *posita*. The Supreme Court's decision dated November 10, 1971, also allowed the judge to grant more than what was demanded as long as it was in accordance with the material incident and there were subsidiary demands as *ex aequo et bono*. In addition, it was also emphasized in the 1971 decision that in the procedural law applicable in Indonesia, both criminal law and civil procedural law, judges must be active. Although the legal system in Indonesia does not fully implement the principle of the binding force of precedents, jurisprudence is one source of positive procedural law in Indonesia, and in civil procedural law, there is a theory about the binding of the parties to the decision (*gezag van*

gewijsde) by upholding the principle of *res judicata. pro veritate* habiteur. Therefore, this jurisprudence is binding as long as it is believed to be true and has not been proven otherwise.

The active attitude of other judges can be found when judges make legal discoveries. The discovery of the law is carried out to find the law so that the judge can decide the case. The discovery of the law is an important part of realizing or enforcing the law. The discovery of law is not just a breakthrough, as is usually said, but the discovery of law to solve legal problems or concrete conflicts by seeking or finding the law by using the legal discovery method. To find the law used methods or methods of discovery of law. There are several methods of legal discovery, namely interpretation or interpretation according to language, systematic or logical, historical, teleological, sociological, analogy, and *argumentum a contrario*. The result of a legal discovery can be a law because it has binding power as a law or a source of legal discovery. The results of legal findings by judges that are contradictory are legal because they are decisions that have the binding legal power and are also a source of legal discovery.

In an article, it was quoted that the judge's activity was also prosecuted because in H.I.R. In what is currently adopted, the parties are given the freedom to speak on their own without having to represent other parties who are given special powers to do so. This contrasts with the R.V. which clearly states that litigation activities in civil courts must be represented, a matter that is reaffirmed in Article 186 of the Reglement op de Rechterlijke Organisatie en het Beleid der Justitie (R.O.) which states that the only person entitled to represent is a Bachelor of Law (*verplichte procureurstelling*). Several judges, including judges in religious courts, saw the extraordinary inequality when one litigant was represented by a powerful advocate while the other party was not. Of course, many ordinary people do not understand the procedure in court, so often they are completely blind to the law and experience extraordinary difficulties, both in getting their lawsuits granted and in defending themselves from the plaintiff's attacks. This situation, of course, requires the wisdom and activeness of a judge who upholds the value of impartiality to ensure that each party in the proceedings gets the same rights and obligations (*audi et alteram partem*) to achieve justice through the courts. This is already an instruction from Article 5 (1) of Law Number 48 of 2009 which states that courts judge according to the law without specifying against people, while paragraph (2) states that courts assist justice seekers and try to overcome all obstacles and handicaps to get justice. Finish a simple, quick, and economical trial.

Setting the Principle of Judges Acting Passively or Actively to Legal Certainty

According to new research... (Djamaluddin, 2021; Kelsen, 2008), the law is a system of norms. Norms are statements that highlight aspects of "should" or *das sollen*, by consisting of some rules about what we must do. Norms are the product of calculated human action. Laws consisting of general rules give as guidelines for individuals to manage in society, both to fellow individuals and with nation. These rules come limitations for society in overwhelming or operating against individuals. The existence of these rules and achieving these rules generate legal certainty.

Normative legal confidence is when adjustment is carried out and declared with certainty because it adjusts clearly and reasonably. It is clear in the sense that it does not cause doubt (multi-interpretation) and is logical. It is transparent in the sense that it comes a norm system with diverse norms so that it produces not crash or ideal norm conflicts. Legal certainty refers to the application of a clear, permanent, consistent, and consequent law whose implementation cannot be influenced by subjective circumstances. Certainty and justice are not only moral demands, but also facts that characterize the law. An uncertain and unjust law is not just a bad law (Kansil et al., 2009). According

to Utrecht, legal certainty contains two meanings, namely first, the existence of general rules to make individuals know what actions may or may not be done, and second, as legal security for individuals from government arbitrariness because, with the existence of general rules, individuals can know what the State may charge or do to individuals (Syahrani, 1999).

Juridical-Dogmatic teachings which are based on the positivist school of thought in the legal world, which tends to see the law as something autonomous, independent because, for adherents of this thought, the law is nothing but a collection of rules. For adherents of this school, the purpose of the law is nothing but guaranteeing the realization of legal certainty. Legal certainty is realized by law with its nature which only makes a general rule of law. The general nature of the rule of law proves that the law does not aim to achieve justice or benefit, but solely for certainty (Ali, 2002). Legal goals that are close to reality are legal certainty and legal benefits. The Positivism emphasizes legal certainty, while the Functionalists prioritize the usefulness of the law, and if perhaps "summum ius, summa injuria, summa lex, summa crux" so harsh law can hurt, except justice can help it, thus although justice is not the sole purpose of the law, the most substantive goal of the law is justice (Rato, 2010). Legal certainty ensures justice. Norms that promote justice must function as rules to be obeyed. According to Gustav Radbruch, justice and legal certainty are durable parts of the law. It clarifies that justice and legal certainty must be considered that they must preserve the security and legal order of a country.

Van Apeldoorn stated that legal certainty is something that is determined by law in concrete matters. They define legal certainty as a guarantee that the law is implemented. Legal certainty is just able protection against arbitrary actions, so a person can obtain something that is expected under certain circumstances.

Based on what was stated by Van Apeldoorn, if it is seen from the existing regulations in HIR and RBG which state that judges act actively, but the developing doctrine places the condition of judges acting passively, confusing in the context of law enforcement by judges. Therefore, through this research, it is recommended that it is necessary to affirm in the Civil Procedure Code regarding active and passive limits for civil judges.

As a country based on the civil law tradition, the basic principle which is the goal of the law is legal certainty. To achieve legal certainty, the law becomes the primary source of law. In line with the civil law system, a codification system was developed so that the law became systematic. The fundamental nature of civil law is that the law acquires binding authority because it is incorporated into regulations in the form of laws and systematically organized into codification or compilation. To achieve legal certainty, a regulation must clearly and unequivocally regulate and provide limits on the object on which it is based. The existence of provisions that regulate expressly and apply in general will provide legal certainty so that the formulation and regulation are clear. Principle of Judges Acting passively or actively to Legal Certainty.

Considering that the age since it was first promulgated until now has reached more than a century, the regulation of civil procedural law requires various adjustments and legal reforms (law reform) to have relevance to current judicial practice. The renewal of civil procedural law is necessary to respond and accommodate the dynamics and legal developments that occur in society. In the current practice of civil courts, many legal developments are taking place, both regarding legal institutions and procedures that are not regulated in civil procedural law.

As described sooner, the major principle that establishes the basis of the civil law system is that the law has covered power because it is comprehended in regulations as laws and regularly

determined in clear regulations or compilations This basic principle to the main value which is the goal of law in this legal system is legal certainty.

A statutory regulation must clearly and unequivocally regulate and provide limits on the object (thing) it regulates. The provisions that regulate expressly and are general because legal certainty requires the creation of general regulations or accepted rules. For this reason, we must know the legal rules in advance for sure, therefore it is necessary to have clear formulation and regulation in the legislation. Because there has been a shift from the attitude of judges in examining and deciding civil cases, based on the philosophical foundation of developmental and progressive legal theory, they felt it necessary to formulate the attitude of judges in the Civil Procedure Code in the future.

Conclusion

In the practice of resolving civil disputes in Indonesia, judges have consistently applied the principle of judges being passive. However, in certain cases, it is possible even if judges are required to be active, which means that judges are active as the mandatory implementation of the Law on Judicial Power. Judges must explore values. The values that live in the community and not in the capacity to determine the extent of the dispute. Whereas what is meant by judges acting passively in HIR/RBG are judges in resolving civil case disputes, meaning that judges may not submit civil cases to the court for examination and trial and judges may not add or subtract and determine the extent of the subject of the dispute or the subject of the case and the judge must not hinder the parties if the parties are going to end the dispute. For the sake of legal certainty relating to the enforcement of civil law, it is necessary to be firm in considering the principle of active judges in the formulation of the national civil procedural law.

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