Justitia Jurnal Hukum, 16 (1), 2021: 155-172
ISSN: 2579-9983, E-ISSN: 2579 6380
DOI: 10.36501/justitia.v1i2.

Civil Justice as An Option for Fulfilling Environmental Justice Through The Principles of Ius Curia Novit and Rechtsvinding

Elly Kristiani Purwendah
Faculty of Law, Wijayakusuma University of Purwokerto
email: ellykpurwendah@gmail.com

Seguito Monteiro
Faculty of Law, Universidade Dili Timor Leste
email: monteiro.dili@gmail.com

Rusito
Faculty of Law, Wijayakusuma University of Purwokerto
email: rusito11@gmail.com

Eti Mul Erowati
Faculty of Law, Wijayakusuma University of Purwokerto
email: erowatieti@gmail.com

Agoes Djatmiko
Faculty of Law, Wijayakusuma University of Purwokerto
email: agoesdjatmiko@gmail.com

Article history: Received 31-03-2022, Accepted 08-04-2022, and Published 10-04-2022:

Abstract

Civil trials on the principle of ius curia novit and rechtsvinding become a breath of fresh air for justice seekers seeking their laws that fulfill the ideè des rechts (rechtssicherheit: legal certainty, zweckmässigkeit: expediency, and gerechtigkeit: justice). The principle of ius curia novit which means that the judge is considered to know the law becomes a space for judges in making legal discoveries (rechtsvinding). The implementation of laws by judges is not merely a matter of logic and proper use of the mind, but rather the provision of juridical forms rather than basing on juridical experience and judgment rather than basing on abstracts, because the law cannot be complete, only one stage in the process of forming a law that is forced to seek its completeness in the legal practice of the judge. The judge's wiggle room in fulfilling the sense of justice for justice seekers in the environment as the decision No. 374 / Pdt.G / LH / 2019 / PN.Jkt.Pst which granted the lawsuit of the plaintiffs (Advocacy Team of the Capital Movement (Initiative to Clean the Air of the Universe Coalition)

based the findings of the judge's law, basing on Decision Number: 36 / KMA / SK / II / 2013 concerning the Enactment of guidelines for handling environmental cases.

Keyword: ius curia novit, rechtsvinding, onrectmatigedaad, lawsuit, environment.

1. Introduction

Environmental cases that are resolved through litigation (judicial institutions), both criminal justice, civil justice and state administrative justice can be said not to meet the expectations of the community, both victims and environmentalists. This of course is given the law of events of each judiciary that has basic principles that actually make it difficult for justice seekers to access fair laws for them through court rulings. Criminal justice with the principle of material truth (beyond reasonable doubt) requires the judge's confidence in considering the law and the final result which is only in the form of body sanctions for perpetrators and fines that are not for the benefit of environmental victims. While the state administrative court with limited object of lawsuit is only about the Decree of State Administration / TUN Officials or TUN Agency.

Civil Justice with the discretion of the scope of the case that can be examined by the Panel of Judges based on the claim of private rights or basing civil relations and all kinds of subjective violations, then the competence of civil justice in the scope of the general judiciary becomes the last escape or *laatste toevlucht* (Mertokusumo 1984) from the seekers of justice who ask for the protection of the law, because of the delayed trial, the slow resolution of cases is justice that is delayed so that there is no justice (*justice delayed is justice denied*) (Mertokusumo 1984). Civil justice is an opportunity to provide justice for environmental law enforcement in view of Article 10 Paragraph 1 of the Constitution which states that the court is prohibited from refusing to examine, prosecute and decide a case filed under the pretext that the law does not exist or is less clear, but is obliged to examine and prosecute it. With this, the civil court despite having absolute competence in the scope of civil relations, but open for justice seekers to seek the law, or look for judges (wo kein klagger ist, ist kein richter) to get the law. Good law according to Gustav Radbruch is one that contains three things that are the mind of the law (ideè des rechts) in the form of legal certainty, expediency and justice (Putro 2010). A ruling that is legal for the parties (the absolute competence of the civil court is the private interest of the parties) how can it be to meet the three elements ideally and proportionately, namely, legal certainty (rechtssucherheit), expediency (zweckmassigkeit) and justice (gerechtigkeit).

Demands for the right to a good and healthy environment (Article 28H Paragraph (1) of the 1945 Constitution) can be filed through a Lawsuit against the Law / PMH or onrechtmatigedaad. The basis of the PMH lawsuit became the basis of environmental lawsuits through civil courts which the Supreme Court of the Republic

of Indonesia ordered by environmental judges to be guidelines in handling environmental cases.

This writing will begin with a basic thought on why civil justice with its legal discovery (rechtsvinding) becomes a new hope to be able to access the expected environmental justice and how the basic consequences of ius curia novit in the application of the case and how acts against the law become the most important joint as the basis of a lawsuit that can affect many civil interests of victims in accessing a good and healthy living environment.

This writing uses the method of conceptual approach approach, because it aims to provide a point of view analysis of problem solving seen from the aspects of legal concepts behind it, or even can be seen from the values contained in the incarnation. The secondary data used in this writing is in the form of legal materials both primary, secondary and tertiary. Qualitative data analysis is carried out by deductive methods.

2. Discussion and Result

2.1. Discovery of The Law and Principles of Ius Curia Novit in Civil Justice

Judges in deciding cases are not only expected to be able to explore, seek and find legal values in people's lives theoretically, but must be able and expert in extracting events from legal facts that occur at trial, then associate with legal sources and teachings of legal theory and the prevailing rule of law. This is called the discovery of the law (rechtsvinding) which is then formulated through legal considerations in the verdict (motivation of the verdict / motivering verdict) through a ruling called creating the law (constitution: giving the law) or rechtschepping. According to DHM Meuwissen, (Gultom 2013) The discovery of the law is the whole thinking of a judge with a method (legal discovery) delivering and bringing it to a legal ruling. In a special sense, the discovery of the law is the process and work carried out by judges who determine whether or not to be true according to the law in a concrete situation tested on the conscience. According to Sudikno Mertokusumo, legal discovery is the process of forming laws by judges or other legal officers who are given the task of applying the law to concrete legal events. In other words, it is a process of concreteization or individualization of the rule of law (das sollen) which is general in nature by remembering certain concrete events 9das sein). What is important in the discovery of the law is how to find or find the law for concrete events (Mertokusumo 1998). Sudikno Mertokusumo (Mertokusumo 2004) He said that, whose profession makes legal discoveries is mainly a judge because every day is faced with concrete events or conflicts to resolve, so it is conflictive in nature. So that the results of legal findings by judges have binding power as a law because it is poured in the form of a ruling, as for the results of legal findings by judges are also a source of law. The judge's ruling is the application of the rule of law that applies to the facts of the law.

According to Paul Scholten, the discovery of the law by a judge is something other than just the application of rules to its events, sometimes and even very often it happens that the rules must be found, both by way of interpretation and by analogy or rechtssvervijning (legal reconctification) (Dkk 1983). John Z Loudoe said that the discovery of the law is the application of provisions to the facts and the provisions must sometimes be formed because they are not always contained in existing laws (Loudoe 1985).

The discovery of the law is defined as the process of concreteization or individualization of the rule of law das sollen which is general in nature by remembering the concrete events of a certain das sein. The judge is always faced with concrete events, conflicts or cases that must be resolved or resolved and to be sought by the law. Problems related to legal discovery are generally attached to the profession of judges (Lotulung 2013). The judge must master correctly with regard to the discovery of the law because the judge is considered to know the law (ius curia novit), so that the judge must not refuse to examine, adjudicate and decide a case filed by the parties on the pretext that the law does not exist or is less clear, but is obliged to examine and adjudicate it.

The judge must choose the applicable rule of law to be established, interpret it to determine the model of behavior contained in the rule of law and determine its meaning to determine the area of application and interpret all the facts presented in the trial by the litigants to determine the facts can be used as legal facts that can be included in the territory of application of the existing rule of law (Mujahidin 2014). The discovery of the judge's law was once used as a posita (proposition) of the plaintiff (on point 18, page 10, the lawsuit of the Capital Movement Advocacy Team (Initiative to Clean the Air of the Universe Coalition) dated July 4, 2019 which states that, Article 5 paragraph (1) of Law No. 48/2009 states "Judges and Judges of the Constitution are obliged to dig, follow, and understand the values of law and the sense of justice that lives in society" and Article 10 paragraph (1) of Law No.48/2009 which states "The Court is prohibited from refusing to examine, to adjudicate, and decide a case brought on the pretext that the law does not exist or is less clear, but is obliged to examine and prosecute it." The lawsuit is based on a citizen lawsuit (CLS) that is not from the Indonesian civil event legal system, but the panel of judges through its judicial performance activism with the method of legal discovery accepted cls lawsuit because it has met the formal requirements of the procedure CLS lawsuit mechanism considered in the subject matter, based on the Decree of the Supreme Court of the Republic of Indonesia Number 36 / KMA / SK / III / 2013. This is the discovery of the law made by the panel of judges, namely in the case that the law does not exist, incomplete or unclear then the judge is obliged to dig up the existing law, in this case through the MARI Decree on the Implementation of guidelines for handling environmental cases.

The discovery of the judge's law as the judge's obligation in finding his law is a consequence of the Principle ius curia novit which means that, the judge is considered to know the law, the matter of finding the law is the business of the judge and not both parties (Mertokusumo 2010), What must be proven is the event and not the law. The law does not have to be filed or proven by the parties but ex officio is considered to be known and applied by the judge (Article 178 Paragraph 1 HIR, Article 189 Paragraph 1 Rbg and article 50 Paragraph 1 Rv) (Mertokusumo 2010). Ius curia novit, the judge is considered to know that the law has the consequence that the judge must not reject the case brought against him on the basis that the law exists but is not clear, there is but is incomplete even if the law does not exist at all. In the Ruling for The Government's Unlawful Action Lawsuit from the Capital Movement Advocacy Team (Universe Coalition Air Clean Initiative), the judge decided to base the MARI Decree on the Implementation of guidelines for handling environmental cases, which regulate citizens' lawsuits / CLS.

2.2. Acts Against the Law as an Important Instrument for The Enforcement of the Right to a Good and Healthy Environment

Politically, justice is accommodated in the concept of ecology where the government is required to open equal opportunities and access for all groups and members of society in participating in determining public policy (especially in the field of the environment and in utilizing nature for the vital benefit of humans) (Keraf 2010). Environmental protection that is expected to meet justice for victims is expected to be the basis of accountability for environmental losses made by polluters. Therefore, environmental loss liability can be seen in ex ante (before the occurrence of losses) and ex post (after the occurrence of losses). Ex ante accountability has a preventive function, the possibility of someone must be responsible so as to encourage the person to be more careful in carrying out obligations. If a person will not be responsible for the results of his actions (theoretically called no liability), then he will lose the incentive to be careful. In this condition of no liability, the victim is the only party who must act carefully. In ex post civil liability has two functions, first, providing opportunities to victims to have their losses replaced by those who caused the loss.

According to Coleman, structurally civil liability relates to the question of which of the victims and the perpetrators (injurers) must bear the loss, substantively civil liability relates to the obligation for those who cause harm to the victim to compensate for the loss (Coleman 1992). Civil liability provides a legal basis that requires polluters, the cause of pollution, to pay compensation to victims of pollution. Second, civil liability provides an opportunity for victims to seek a court ruling in the form of a court order. The court order is referred to as mandatory injunction (mandatory court order), which means as a court order requiring the defendant to recover losses (rectificiation of physical damage) that has occurred. In this regard, civil lawsuits actually already have a preventive function. Third, according to Van Dam

civil liability has a function as recognition (recognition) and satisfaction (satisfaction). Civil liability serves to indicate the existence of a legal recognition that a person is guilty or liable for damages. Civil liability serves to indicate a legal recognition that a person is guilty or liable for a loss. The recognition of error or liability is sometimes sufficient, in France it is called the symbolic franc and in England or America it is called nominal damages (Dam 2006).

Fourth, civil liability serves as punishment for adverse acts. The purpose of punishment can be seen from punitive damages practiced in the United States. Punitive damages by Van Dam are defined as, "extraordinary high awards of millions of dollars awarded by juries who want to punish the tortsfeasor for his wrongful conduct". (Dam 2006) According to Schwartz et al, punitive damages are awarded for intentional torts (Victor E. Schwartz 2000). Punitive damages are said to be:

> *sometimes called exemplary or vindicative damages, or smart money, consist of an additional sum, over and above the compensation of the plaintiff for the harm suffered, awarded for the purpose of punishing the defendant not to do it again, and of dettering others from following defendant's example*. (Victor E. Schwartz 2000)

Punitive damages exceed the real damages of the plaintiff given to cause a deterrent effect for the defendant and for others not to follow his actions.

Civil liability applies in the context of pollution liability to the environment. Civil liability is a way of enforcing environmental law outside of administrative law enforcement and criminal law. Enforcement of civil law can be done procedurally formally through the courts (litigation) and peacefully outside the court (non-litigation) or commonly known as alternative dispute resolution (alternative dispute resolution). Civil liability has procedural aspects and substantive aspects. Procedural aspects are interpreted as the right to sue can be used in the context of enforcing environmental law. Substantive aspects are interpreted as the basis for accountability for losses due to pollution or environmental damage. Civil liability discussed in the context of civil liability for pollution or environmental damage, as a form of civil liability in the corridors of environmental law enforcement is a civil responsibility as a form of unlawful acts.

The responsibility of unlawful acts is present to protect one's rights. Civil liability in acts against the law underscores that the rights and obligations when a person commits a good deed of error or negligence or injures another person and the act causes harm to others. Acts against the law in Indonesia normatively always refer to the provisions of Article 1365 of the Civil Code. The formulation of norms in this article is very unique because it is more about the structure of norms than the provisions of complete legal substance. Therefore, this Article requires materialization outside the Civil Code. Article 1365 of the Civil Code specifies that any unlawful act that causes harm to others, obliges the person who committed the act to compensate for the loss (Tjitrosudibio 2003). Article 1365 BW does not provide formulation of the claim for damages, this article only regulates if a person suffers damages due to

unlawful acts committed by others, can file a claim for damages in the Court. The act against the law accommodated in the Indonesian legal system is an act against the law in broad formulation as the understanding of the term onrechmatige daad Dutch after 1919. Acts against the law are defined as, contrary to the rights of others; contrary to its own legal obligations, or; contrary to good decency, or; contrary to the necessity that must be heeded in the association of society regarding other people or objects (Djojodirdjo 1979). Prosecution of unlawful acts (onrechtmatige daad) is based on :

1. the claimant must prove the elements, must prove all the elements, that is, the fault of the perpetrator;
2. claims of return on the original state (restitutio in integrum);
3. in the event that there are several debtors who are responsible for suing (aansprakelijk), then in the event of a claim for compensation due to onrechtmatige daad, each of these debtors is responsible for the entire damage even if it does not mean the liability of the lawsuit is liability (Djojodirdjo 1979)

Acts against the law experience an expansion of the understanding of deeds (daad), for further acts against the law are understood as, contrary to the rights of others, or; contrary to its own legal obligations, or; contrary to good decency, or; contrary to the necessity that must be heeded in the association of society regarding other people or objects (Djojodirdjo 1979). In the Ruling for The Government's Unlawful Action Lawsuit from the Capital Movement Advocacy Team (The Universe Coalition Air Clean Initiative), the Panel of Judges stated that the defendants had neglected to carry out their obligations in fulfilling the right to a good and healthy environment, which resulted in poor air quality in DKI Jakarta, causing harm to the plaintiffs and the people of DKI Jakarta, among them are the onset of various diseases related to air pollution

3. Conclusion

Curia Novit principle which means that the judge is considered to know the law, has consequences as an obligation for the Judge in the Civil Court to carry out his duties (judicial avtivism) in examining the case filed against him, so that the judge in the civil court must not refuse to examine the case on any basis, that the law is unclear, incomplete or even nonexistent. The law is in the community, the judge is obliged to dig up the existing law. This is as Article 5 paragraph (1) of Law No. 48/2009 states "Judges and Constitutional Judges are obliged to dig, follow, and understand the values of law and the sense of justice that lives in society" and Article 10 paragraph (1) of Law No.48/2009 which states "The Court is prohibited from refusing to examine, prosecute, and decide a case filed on the pretext that the law does not exist or is unclear, it is mandatory to examine and prosecute it." In the Ruling for The Government's Unlawful Action Lawsuit from the Capital Movement Advocacy Team (Initiative to Clean the Air of the Universe Coalition) in the form of a Citizen Lawsuit / CLS, the judge based on the Decree of the Supreme Court of the Republic of

Indonesia Number 36 / KMA / SK / III / 2013 concerning the Implementation of Guidelines for Handling Environmental Cases.

References

Coleman, Jules. 1992. *Risks and Wrong*. Cambridge University Press.

Dam, Cees van. 2006. *European Tort Law*. Oxford: Oxford University Press.

Djojodirdjo, M.A. Moegni. 1979. *Perbuatan Melawan Hukum*. Jakarta Pusat: Pradnya Paramita.

Dkk, J.C.T. Simorangkir. 1983. *Mula Hukum*. Bandung: Bina Cipta.

Gultom, Binsar M. 2013. "Peran Hakim Sebagai Pembaharu Hukum Untuk Mewujudkan Pengadilan Yang Bersih." *Majalah Hukum Varia Peradilan*: 136.

Keraf, Sonny. 2010. *Etika Lingkungan Hidup*. Jakarta.

Lotulung, Paulus Effendi. 2013. *Hukum Tata Usaha Negara Dan Kekuasaan*. Yogyakarta: Salemba Humanika.

Loudoe, John Z. 1985. *Menemukan Hukum Melalui Tafsir Dan Fakta*. Jakarta: Bina Aksara.

Mertokusumo, Sudikno. 1984. *Bunga Rampai Ilmu Hukum*. Liberty Yogyakarta.

———. 1998. *Penemuan Hukum Sebuah Pengantar*. Yogyakarta: Liberty.

———. 2004. *Penemuan Hukum*. Yogyakarta: Cetakan Ketiga Liberty.

———. 2010. *Hukum Acara Perdata*. Yogyakarta: Universitas Atma jaya.

Mujahidin, Ahmad. 2014. *Antara Penerapan Dan Keadilan,*. Varia Peradilan.

Putro, Widodo Dwi. 2010. *Kritik Terhadap Paradigma Positivisme Hukum*. Yogyakarta: Genta Publishing.

Tjitrosudibio, R. Subekti dan. 2003. *Kitab Undang-Undang Hukum Perdata*. Jakarta: PR. Pradnya Paramita.

Victor E. Schwartz, Kathryn Kelly dan David F. Partlett. 2000. *Prosser, Wade, and Schwartz's Torts: Cases and Materials*. New York: Foundation Press.