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THE LAW OF JUDICIARY POWER SYNERGIZING THE POSITIVISM AND HISTORICISM

Christiani Widowati and Indira Retno Aryatie*

Abstract

Judiciary Power. Indonesia applies *Civil Law System*; that considers legislation as the primary legal source. Preferring legislation as a legal source is one characteristic of positivism. The Civil Law System, however, mentions that judges are obligated to see the values in society if the legislation does not set for that. It implicitly refers to societal law, including common Law. Taking the common law as a legal source is the characteristic of historicism as well; mentioning that the soul of a nation (*volkgeist*) derives from the values living in society. Basically, these two schools are contradictory to one another in their perspective of law. Positivism sees that state-made law is the only applied law. The law of Judiciary Power synergies between these two schools and takes a common low as a legal source for judges to make a decision.

Keywords

Law of Judiciary Power, Positivism, Historicism, Common Law, Legal Source

* Faculty of Law, Airlangga University, Surabaya, Indonesia.

Correspondence: Christiani Widowati, Faculty of Airlangga University, Surabaya, Indonesia. Email: widowati@fh.unair.ac.id

Introduction

The Constitution of the Republic of Indonesia, UUD 1945, particularly in Article 1 subsection (3), firmly mentions that Indonesia is a state law. It notes that having state and nation should be legal-based. In conceptual perspective, every state law has particular characteristics, as follow (Abdul Hamid, 2016).

a. Acknowledgement and protection of human rights

b. Independent, autonomous, and impartial judicature

c. The division of power in national power management system

d. The application of legality of law in all its forms; any national action should be democratically law-based, and the law is "supreme" ovel all else, and every individual is the same in law.

Indonesia has a legal act regulating the power of judiciary as mentioned in Act No. 48 2009 about Judiciary Power. This act has been confirmed as the bearer of an authority, so that the Law of Judiciary Power may belong to positive law. It derives from a free translation of the term "*ius positum*"; a state-made law as the bearer of a legal authority as mentioned in the legislation (Bruggink, 1999). Article 1 subsection (1) of the Law of Judiciary Power firmly mentions that Judiciary Power is the authority of an independent country to organize a judiciary for the sake of law and justice based on Pancasila and the Constitution of the Republic of Indonesia 1945, in order to implement the law state of the Republic of Indonesia. This legislation may be more clarified by Article 24 subsection (1) of the Constitution 1945 that Judiciary Power is an independent authority to organize a judiciary for the sake of law and justice.

As the follower of *Civil Law System*, Indonesia takes legislation as the primary legal source. It indicates that any legal cases will be firstly solved by referring to the legislation as a written law; which is the product of the country, commonly called positive law. *Civil Law System* has a key principle that law has authority to bind as it is manifested in Law and systematically structured in particular codification or compilation. This fundamental principle is applied, given that the primary value as the goal of law is a legal certainty, and it may only be realized when individuals' legal actions in their societal life is set under a written law. With this goal of law and based on the applied legal system, judges may not be free to make legal regulations with general binding power. They may only function to determine and interpret regulations in their authority boundaries. Thus, the legal source of this legal system is Law, enacted

by the executives based on the authority of law (the provision of national administrative law) and particular custom accepted as law by the society as long as it is not against the law (Abdoel Djamali, 2016). Judges always prefer legislation in investigating, judging, and deciding any cases they encounter. This far, it seems that judges tend to be positivists as they take legislation as the primary legal source. Although there is an acknowledgement on customs the society has considered as law (*living law*), it is limited since the legislation will always be preferred whenever a contradiction happens between legislation and the living law. This preference of legislation as a legal source is the reflection of positivism.

Positivism is a school of legal discipline identifying law through positive one. The logical juridical consequence of this school is, indeed, not recognizing any state-made law, including common law. Common law is a law living in a society, and is established and maintained by the society, and not mentioned in the legislation. As a system, the law has parts that may have classification or categorization. In its forms, it may be classified into written and non-written law. The former is mentioned in legislation, and the latter is the otherwise (Sudikno Mertokusumo, 2007). Hence, the term "*written*" here is whether it is mentioned in legislation or not. Common law is classified into non-written law as it is not mentioned in legislation, although some of them are "set up". Common law is made and maintained by a society in hereditary way over generations, and it lives in the society. Thus, it needs to look into the society to find out the actual common law.

The Law of Judiciary Power also prefers legislation as a legal source. This is as mentioned in Article 50 subsection (1) of the Law of Judicial Power that a judicial decision, besides having reasons and base of the decision, should also contain particular acts from pertinent legislation or non-written legal source applied as the basis of judging. It seems that the law of Judiciary Power does not aim to implement or advocate positivism, as this regulation keeps recognizing the laws outside the legislation. When the Law of Judiciary Power recognizes common law as a legal source, it may seem that it is the reflection of historicism; a school of legal discipline claiming that law derives from values the society considers as law, and it is commonly seen as the soul of nation (*volgeist*).

Overall, it is apparent that the Law of Judiciary Power has synergized between positivism and historicism, although those two schools of thought is contradictory to one another. Positivism claims that the only law applies is made by the state,

commonly called positive law containing legislations and not recognizing any of law outside the legislations. On the other hand, historicism claims that law is the soul of nation (*volgeist*), which derives from the values living in a society, and thus, it should always reflect the living law in society. The actual manifestation of the synergy between these two schools of thought is seen in the implementation of common law as a legal source for judges to make decision for cases as set in this act.

Therefore, the research problem of this study consisted of two problems, as follow.

1. Has the Law of Judiciary Power considered common law as an absolute or restricted legal source for judges to make decision for any cases they encountered?
2. Have judges, in fact, implemented common law as a legal source for their judgment, particularly in case of contradiction between common law and legislations?

RESEARCH METHOD

This study is a normative-juridical research. As a legal research, it followed a series of phases, including (Peter Mahmud Marzuki, 2005):

1. Identifying several legal facts and eliminating any of irrelevant matters to determine a legal issue to be solved.
2. Collecting legal materials and any other non-legal ones relevant to the issue.
3. Analyzing the issue based on the data collected.
4. Making a conclusion in the form of argumentation addressing the issue.
5. Providing prescription based on the arguments in the conclusion section.

Legal Material

The legal materials of this study consisted of primary law (i.e., the Constitution 1945, Act No. 48 2009 about Judiciary Power, Act No. 12 2011 about Legislation, and judges' judgments with fixed legal power that used common law as their legal source to judge cases). Besides, it also consisted of secondary law, including literatures and articles of law as well as any sites relevant to the focus of this study.

The Analysis of Legal Material

These legal materials, both primary and secondary, were all collected and analyzed using several approaches, as follow.

1. *Statute Approach*

The focus spot of this analysis is Act No. 48 2009 about Judiciary Power as a legal source in regulating the authority of judiciary to do their judicial function in Indonesia. With this approach, any provision in Law of Judiciary Power would be examined, particularly the legal source considered as reference for judges to make judgment for cases they encountered.

2. *Conceptual Approach*

It analyzed the concept of positivism and historicism. In conceptual way, these two schools were different in their perspective of law. Positivism saw that the only applied law was positive law; making other legal regulations not made by the state were excluded. Historicism, however, claimed that law should reflect the soul of nation (*volgeist*); the values living in a society.

3. *Case Approach*

It analyzed cases with fixed legal power which substance showed a contradiction between legislation and common law.

Discussion

Indonesia has claimed itself as a law state, indicating that the nation and country of the Republic of Indonesia is based on law. One characteristic of a law state is the organization of judiciary implementing a Judiciary Power in independent way without any interference from any party. This has actually been mentioned in the Constitution of the Republic of Indonesia 1945, particularly on Chapter IX about Judiciary Power. This provision is also mentioned in more detail in Act No. 48 2009 about Judiciary Power. It seems much clearer in Act No. 48 2009 that "the Constitution of the Republic of Indonesia 1945 asserts that Indonesia is a law state. Consistently, one fundamental principle of being law state is the assurance of organizing an independent judiciary power that is free from any other power influences for the sake of law and justice. Article 24 subsection (1) of the Constitution 1945 asserts that Judiciary Power is an independence to organize a judiciary for the sake of law and justice."

It is undeniable that the definition of law may refer to the applied law of a state, and the manifestation is in the form of positive law. However, this may be the case if the definition relates to the perspective of the society itself. People are likely to see law as a fair norms providing protection for every individual's interest as the member of a

society. Therefore, the values may reveal beyond the state-made legislation. These values is defined as the value of justice in the context of society. The certainty of law refers to the availability of a shared legal norm for all parties, and it contains regulations of any legal problems in the society. With such certainty, it may effect on legal protection for every member of the society since anything has been set up in that legal regulation. It is often found that this certainty is seen restrictively in the context of written norm; legislation. However, many non-written norms are found as well in the concept of legal certainty which basically points to regulations as reference to solve any concrete legal problems.

The Position of Common Law as a Legal Source in Law of Judiciary Power

Article 2 subsection (2) of Law of Judiciary Power mentions that "the judiciary of a state applies and implements law and justice based on Pancasila." In this article, it is clear that the Law of Judiciary Power prefers on law and justice. In this case, law should be in a whole, both written and non-written. Written law is in the form of legislation, commonly called as state-made law or positive law (*ius positum*), and non-written law is in the form of norms living in a society to provide rules for the society. Both of them aim to create justice. Justness is the primary goal of enacting the Law of Judiciary Power. Being just is seen as providing rights and obligation for every individual in proportional manner.

Article 5 subsection (1) of the Law of Judiciary Power mentions that "general judges and constitutional judges must seek for, apply, and interpret the values of law and the sense of justness living in a society." This provision is associated to the explanation of Article 5 subsection (1) of the Law of Judiciary Power that the provision of this article is intended to make the judgment of the general judges and the constitutional judges correspond to values of law and the sense of public justness. It is much clearer on Article 2 subsection (2) of the Law of Judiciary Power that the justness intended in Judiciary Power is those in society. Therefore, it needs to always make preference on societal justice. Hence, judges should be more capable to give their focus on the concept of societal justice.

Article 10 subsection (1) of the Law of Judiciary Power mentions that "judiciaries are not allowed to refuse to investigate, judge, and make decision for any cases filed to them under a pretext that the law for the cases is either unavailable or unclear. They are obligated to investigate and make judgment for it." Judges should investigate, verify, and make judgment for every case they encounter, whether the legislation for the case

is available or not. Here it is what we call as the principle of *ius curia novit*, indicating that judges are assumed having good understanding on law, and thus, they are not allowed to refuse any cases. Carrying out laws by judges is called law discovering (*rechtsvinding*).

Law discovering is a process of enacting a law by judges or other legal officials assigned to implement a general legal regulation on concrete legal incident. Furthermore, is notes that law discovering is a process of actualizing or individualizing the legal regulation (*das sollen*) in general, given on certain concrete incident (*das sein*) (Sudikno Mertokusumo, 2009). In its concrete interpretation, law discovering is seeking for or determining an appropriate law for particular cases. This law discovering activity may actually be conducted by anyone seeking for justice, particularly by judges since their judgment has a binding power as law. Moreover, their judgment is applied as a legal source in the Indonesia legal system.

The interpretation of law discovering is apparent in judiciary due to their function as a judicial body. Hence, they may keep the principle of positive law on its track and anticipate the demand of social behavior development wanting to have a new law. For the sake of legal certainty leading to justice, however, law discovering by judges remains in the context of merely complementing positive law that may still not address the demand of social development. Therefore, in order to assure the freedom of individuals feeling threatened by judges' authority, the judges should keep taking the legislation into account besides other legal norms. It aims to make sure that judges will never be despotic in making judgment which may violate the human rights (Zainal Arifin Hoesein, 2016). It is clear that judges get their attempt to discover law for merely complementing the provision of positive law, given the dynamic in society. Therefore, when conducting law discovering activity, judges should at first take positive law as their reference in the form legislation. If the provision is unavailable, they may subsequently refer to non-written norms applied in society without going through the process of enactment.

Two methods of law discovering the judges may use to investigate and make judgment are legal interpretation and legal construction methods. The former refers to the method of law discovering by judges when they investigate a case which basic law of legislation is obscure to be implemented. This obscurity may be due to several reasons, such as the fact that legislation is the result of human thought which indeed has many errors and flaw within, especially when it relates to the dynamic of society. Otherwise,

legislation should always be responsive on the dynamics in order to regulate any societal problems. The obscurity of implementing the legislation may also be due to the fact that the organization of the provision is still abstract and general. Therefore, it needs to be actualized at first in order to be useful for solving particular cases. It is apparent when we read the explanation of each article of the existing legislation assumed to be quite clear (Christiani Widowati, 2016). The legal interpretation that judges may consider are as follow.

a. Grammatical interpretation through language, word structure, and pronunciation.

b. Teleological or sociological interpretation on the aims and purposes of legislators associated to the current social reality. In other word, it relates the normative aspect on the legislators' intention with the reality in society.

c. Systematical interpretation by connecting a law to one another, both in similar and different legal field, in order to get a complete interpretation.

d. Historical interpretation by investigating the history or the process of legislation.

e. Comparative interpretation through law comparison across countries

f. Futuristic interpretation through anticipation by holding on particular legal norms with no legal power yet (*ius constituendum*).

g. Restrictive interpretation by limiting the scope of law which refers to its literal terms.

h. Extensive interpretation by expanding the boundaries of grammatical interpretation in order to reach the social dynamics (Sudikno Mertokusumo).

On the other hand, the constructive method the judges may apply in legislation are as follow.

a. *Argumentum per analogiam:* abstracting the principle of a provision to be applied "as if" expanding its applicability on a concrete incident that has no regulation yet.

b. Law refinement (law restriction): abstracting the principle of a provision to be applied "as if" restricting its applicability on a concrete incident that has no regulation yet.

c. *Argumentum a contrario:* abstracting the principle of a provision to be applied with the opposite meaning and purposes over a concrete incident that has no regulation yet.

d. *Argumentum a fortiori:* abstracting the more heavy legal consequences of a violation on an provision that has not been applied, and considering the more light legal consequences of particular violation on a provision that has been applied (Shidarta, 2013).

In law discovering by judges, both in law interpretation and construction, they may accommodate the legal values in a society so that their judgment may reflect the justness of the society. It is consistent to the purpose of the implementation of Judiciary Power as mentioned in Law of Judiciary Power.

Article 50 subsection (1) of the Law of Judiciary Power mentions that "the judicial judgment should not only contain the reason and basis of the judgment, but also particular articles of the pertinent legislation or non-written norms used as the base for judgment." This provision firmly sets that there are two kinds of legal sources the judges may use to investigate, verify, and make judgment on particular cases, including written and non-written laws. Thus, it is considerably appropriate that judges are positivistic in making judgment for particular cases, as the positivism only recognizes legislation or positive law as a legal source. However, this article shows that the law of Judiciary Power provides chances for non-written law as a legal source to judge a case. Non-written law is not clearly explained here, hence, it indicates that any provisions of law outside the positive law or state-made law (i.e., societal norms) including those categorized into non-written law belong to common law.

Common law is defined as a set of non-written rules with sanctions that regulates the people of Indonesia and it derives from customs based on the genuine values of Indonesian people, and it has *religio magis*, communalistic, factual, visual, flexible, dynamic, and traditional color. The term '*traditional*' here is defined as things that should be sustainably preserved over generations (Joeni Arianto Kurniawan and Christiani Widowati, 2011). Similar to the characteristic of a law, common law has a system within as well. it consists of some parts with relation to one another in order to make a complete understanding on that law.

Article 53 subsection (1) of the Law of Judiciary Power mentions that "in investigating and making judgment for a case, judges should be responsible on their decision and

judgment." Subsection (2) mentions that "the decision and judgment as mentioned in subsection (1) should contain the judges' legal consideration based on a right and appropriate legal reason and nature." These two provisions provide rules that judges has authority to do law discovering (*rechtsvinding*) to judge a case, especially when selecting which legal sources to use as their basis of judgment, whether written or non-written legal sources. This may be seen in judges' legal considerations relevant to the facts they get and make those considerations as the basis of their judgment, commonly called as *ratio decidendi* (Peter Mahmud Marzuki, 2013). Indeed, the judges should be fully responsible on their judgment, given that their judgment qualified as jurisprudence is classified into a recognized legal source in Indonesia legal system. Some criteria for legal judgment to be qualified as jurisprudence are as follow.

a. The judgment has fixed legal power.

b. It is for cases with no legal rule yet, or due to obscure legislation.

c. It contains truth and justice.

d. It has been recursively applied by the subsequent judges in making judgment for the same case.

e. It has been through examination or notation by judges jurisprudence team of the Supreme Court of the Republic of Indonesia.

f. It has been recommended as a qualified judgment with fixed jurisprudence (Ahmad Kamil dan M. Fauzan, 2004).

Following those all articles of the Law of Judiciary Power, some points may be found as follow.

First, the term "common law" is not mentioned in the provision of Law of Judiciary Power. It only mentions the term "non-written legal source" that is later implicitly seen as one of which the common law does exist within since, in fact, it is classified into non-written law (i.e., legal provisions outside the legislation enacted).

Second, judges may use both written and non-written legal sources as their considerations to make judgments for cases (*ratio decidendi*) without partially preferring one of those two sources. Therefore, judges are free to select between them, and any of them selected is merely for the sake of justice in the context of society.

Third, the emphasis on rules that relate to Judiciary Power, especially for judges, aims to uphold the justice in the context of society. It is considerably appropriate, given that law does exist for society, and thus, it should provide rules and protection for the society.

Forth, judges have authority to use their preferred legal source, whether written (i.e., legislation) or non-written, as their legal consideration (*ratio decidendi*) for making judgment. However, they should be responsible on their judgment. Therefore, it is clear that the judges' judgment has both binding power and influence to the society in general, and to every justice seeker in particular.

Fifth, when the judges' law discovering is defined as an attempt to complement the legislation in order to address the dynamic of society, the judges should take legislation as their primary reference before applying any non-written legal sources at the second spot. This idea should be in line with a thought that the aim of regulating and implementing the Judiciary Power is for the sake of justice in society. Therefore, the judges may use non-written legal sources that derive from the legal values in society whenever the legislation may not reflect the justice for the society.

Judges' Attitude on Making Judgment for Cases when They Encounter a Dilemma between Legislation and Common Law

Justice is probably based on the regulations mentioned in legal law through interpretations, or based on a custom law, or even based on any particular practices by society. In the absence of legislation, common law and other societal practices, judiciary should keep making judgment. The basis of the judgment is moral, as justice is a kind of moral. In this case, moral does not only refer to any actions that relate to morality, but also referring to considerations on whether the actions may threat the existence of society. When the legislation is not quite enough to create justice, the judiciary should make it although they have to take aside or even break the legislation, if needed. Its fundamental reference is that justice is not merely black-on-white letters. Such judicial judgment is called as *ius contrac legem*. The term is from Latin; *legem* refers to declination, derived from the word *lex* that refers to law, while *ius* refers to a guide to reach justice. The term *ius* creates the term *iustitia* that refers to justice. In Bahasa Indonesia, the term *ius* is defined as law. Therefore, the term *ius contra legem* is defined as "law against legislation", indicating that the judicial judgment may be fair yet against the existing legislation (Peter Mahmud Marzuki,, 2013). This *ius contra legam* implies that judges implement their judiciary power merely for the sake of justice as

mentioned in the Law of Judiciary Power. Thus, it is possible for judges to get rid of any legislation as a written legal source for the sake of justice. It indicates that they prefer using non-written legal sources derived from the societal legal values which more reflect the justice. And, common law is one of non-written legal sources.

Judges have authority to make law (*judge made law*), especially when they encounter particular cases with not rules yet, but has already been filed. In the process of analyzing and establishing a law for such cases, they should look into any legal values the society has sustainably preserved. Those values include: religion, custom, culture, and people intelligence, social-economy, and etc. Judges also have authority to get away from any obsolete written norms as it may not be capable to provide justice for the society. It is called *contra legem*. They should clearly and sharply fill up their legal considerations in using *contra legem* body by taking various aspects of law into account (Ahmad Kamil and M. Fauzan). It seems that they play an important role to connect between *civil law system* and *common law system*. Although Indonesia tends to take *civil law system* as preference, the judges are ones deciding when it should take either *civil law system* or *common law system* as the legal source through a judiciary, called *contra legem.* Indeed, it should put the legal values and interest of the society in front, given that law is for society. The selection of which legal sources to be used, whether written or non-written sources for the sake of justice in case of investigating, verifying, and judging a case is actually seen in judicial judgment taken as the legal materials of this study. The substances of the case show a contradiction between written law (i.e., legislation) and non-written law (common law). In this case, those two legal sources provide different rules on particular legal cases.

The Verdict of the Supreme Court No. 2406K/PDT/2002

Legal facts:

1. Balinese common law mentions that inheritance is divided in equal manner to all of the sons, including I Ketut Cekeg and I Mangku Kelentengan.
2. I Ketut Cekeg has conducted *sentana marriage* (i.e., marrying out of kinship) with Ni Ketut Ganti, and the marriage is legalized in Banjar Telabah, Batu Bulan, Sukawati, Gianya.
3. I Ketut Cekeg has conducted his second marriage with Ni Nyoman Manis.

4. Following Balinese common law, I Ketut Cekeg may not ask for any inheritance since he has conducted a *sentana marriage* and out of his original kinship. Thus, the inheritance belongs to I Mangku Kelentengan.

The judge's judgment sets that:

1. Based on Act No. 1 1974 about Marriage
2. Based on Act No, 39 1999 about Human Rights
3. Based on the Constitution 1945
4. Every citizen along with their positions on law (Article 2, 3(2)). Article 4 of Act No. 39 1999 asserts that everybody has equal rights in law, and every child has rights over their parents' assets.
5. The provision of common law may be put aside by the law (prevailing law over common law), and for the sake of justice and advisability, the judges should consider current social facts that more reflect the living law in a society.
6. It is decided that I Ketut Cekeg and I Mangku Kelentengan are the heirs of the late I Wayan Kelantungan
7. The disputed land is the inheritance of the late I Wayan Kelantungan, and it should be inherited by I Ketut Cekeg and I Mangku Kelentengan.

From the verdict, it indicates that the judges prefer using legislation and put aside the concept of common law in relation to the rules of inheritance for the Balinese. Traditionally, the Balinese follow patrilineal kinship system. It is a system of kinship which family line is derived from the males. This system solely puts the role of males in front. Only sons may continue the kinship line of their fathers, both biological and adopted sons.

For the Balinese with no either biological or adopted sons, they may conduct a *sentana marriage*; altering the legal status of a daughter to be a son in legal norms. This may bring particular legal consequences, as the daughter will have rights and responsibility as a son. Her right is receiving her father's inheritance, and her obligation is to continue the line of kinship from her father. She will marry a man that has been out from his father's kinship and turned to be female in his legal status. It implies that the prospective groom will go into the kinship of his wife and may not continue his father's kinship line. This is what we call *go-out marriage* for males. *Go-out* here indicates that a

man is out from his original kinship and goes into his wife's kinship. The children of such marriage may continue their mothers' kinship. The subsequent consequence of such marriage for a man is that he lose his rights on his father's assets.

By preferring the legislation, it seems that the judges have ignored the values of living norms in Balinese common law. Thus, their judgment does not reflect the justice the Balinese believe in over generations. They believe that their common law has reflected justice in a societal concept. In this case, a ma conducting *go-out marriage* may make his rights and responsibility change. He is no longer has either rights on his father's assets of responsibility to continue his biological father's kinship. This is the concept of justice for the Balinese, yet the judges have ignored on their verdict.

The Verdict of the Supreme Court of the Republic of Indonesia No. 3199K/Pdt/1986

The Verdict of the Supreme Court of the Republic of Indonesia No. 3199K/Pdt/1986 about the dispute of common law for the Minahasa inheritance related to the organization of Baku Piara as a legal body of custom marriage in Minahasa. A brief summary of the case is as follow (Aulia Chandra dan Christiani Widowati, 2006).

a. Kristina Ganap Aling is a legal wife of the late Hermanus Ganap. She has 7 children, including Juliana H. Ganap, Rodi Netty H. Ganap, Antonius H. Ganap (the late), Boie Marie H. Ganap (the late), Adolfina Mientje H. Ganap, Sipora H. Ganap, and Julien H. Ganap.

b. During the marriage, they had shared assets. One of those is a plant area that is now becoming a disputed object.

c. During the marriage, the late Hermanus Ganap had already had a together-living with Martensi Harimisa under the rule of *Baku Piara,* and they had two children.

d. Without any prior announcement, Martensi Harimisa had already built a semi-permanent house on the disputed area, and it might disadvantage Kristina Ganap Aling and her children.

e. Martensi Harimisa won in the level of Public Court. however, Kristina Ganap Aling won in the level of High Court, and it nullified the verdict of Public Court.

f. At cassation level in the Supreme Court, Martensi Harimisa won the case by considering the presence of common law *Baku Piara* in Minahasa. The relationship under *Baku Piara* was recognized by the common law of Minahasa as its legal body of custom marriage. It finally set that the disputed area was a shared asset between

> the late Hermanus Ganap and Kristina Ganap Aling, as well as between the late Hermanus Ganap and Martensi Harimisa, although they were not recognized as a married couple based on Act No. 1 1974.

From this verdict, it indicates that the judge of the Supreme Court has accommodated the societal values of Minahasa, which recognizes a custom marriage named *Baku Piara.* Although Act No. 1 1974 does not provide the rule of *Baku Piara*, the judge defines *Baku Piara* as a legal marriage under the local common law and through a law construction method in the form of *argumentum per analogiam* (analog). The judge has analogized the term *Baku Piara* with the term *marriage* as set in Act No. 1 1974. The concept of marriage in Article 1 of Act No. 1 1974 refers to a physical and spiritual bonding between a man and a woman as a spouse aiming to make a happy family ever after based on a belief in the one and only God. Furthermore, Article 2 subsection (1) mentions that "Marriage is legal as long as it is under the rules of each of the religions and belief." In addition, the subsection (2) mentions that "each of marriages is filed based on the applied rules." In relation to the case summary, based on Act No. 1 1974, a *Baku Piara* relationship between Martensi Harimisa and the late Hermanus Ganap is not legal. *Baku Piara* is a legal body of marriage for the Minahasa, and it is recognized by the people although no legislation sets it. This is categorized into a "a new thing" due to no legislation for it yet. Therefore, the judge may do a law discovering through a law construction. In this case, the judge had used the construction method *argumentum per analogiam* by abstracting the principle of marriage mentioned in Act No. 1 1974, which was in turn applied to *Baku Piara* as one with no legal rule yet. Marriage and inheritance are categorized into civil law, and thus, it is possible to apply a law construction called *argumentum per analogiam* on a case of *Baku Piara* (Christiani Widowati). It defines that judges may consider the legal values of a society as a justice in the societal context, particularly for the Minahasa. Traditionally, the Minahasa recognizes *Baku Piara* as a legal body of marriage. Based on Act No. 1 1974 about Marriage and Government Regulation No. 9 1975 about the implementation of Act No 1 1974, the *Baku Piara* between Martensi Harimisa and the late Hermanus Ganap is not a legal marriage. However, in the dictionary of Bahasa Indonesia, the term *Baku Piara* is defined as a living-together relationship without having marriage. Hence, the children of such relationship may not be seen as legitimate children, but merely illegitimate ones. Following Article 42 of Act No. 1 1974, the legitimate children are the ones born as the result of a legal marriage, and Article 43 of Act No. 1 1974 sets that illegitimate children are one born outside a legal marriage and only have a civil relationship with their mothers and mothers'

family. In one part, the Minahasa see and recognize *Baku Piara* as a custom marriage without having legitimation from Religious Affairs or Registry Offices. In deeper investigation, however, it seems that there is a legal protection for women along with their children in relation to *Baku Piara*. Therefore, it is fair to equalize *Baku Piara* with a legal marriage (Christiani Widowati). This verdict is in turn defined as an attempt to uphold a justice for those with *Baku Piara* in Minahasa. In concrete manner, it refers to proportionally giving rights and responsibilities toward *Baku Piara* relationship.

Conclusion

The Law of Judiciary Power has provided a position to Common Law as a legal source for judges in investigating, verifying, and judging particular cases they encounter. In providing legal consideration (*ratio decidendi*), they may select whether written (i.e., legislation) or non-written legal sources (e.g., common law in a society) to be used. The decision of using one of those legal sources is seen as the implementation of judiciary power aimed to uphold a justice in the societal context. Although it is not explicitly mentioned in Law of Judiciary Power, each of its articles implicitly provides a position for Common Law to become reference or legal source for judges to investigate, verify, and judge particular cases they encounter. In addition, the Law of Judiciary Power does not give any priority to which legal sources the judges should take. Therefore, they have authority to select the sources for the sake of justice.

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