

IMPACTS OF LIVING LAW ON JUDGES' DECISIONS IN CIVIL DISPUTES IN NORTH SUMATERA

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Abstract - *The function of the judiciary cannot be separated from judicial power in accordance with the Constitution of the Republic of Indonesia stating that judicial power is the power of an independent state to administer justice in order to uphold law and justice based on Pancasila for the sake of the implementation of the Republic of Indonesia. The judge as the originator of the law translates or gives meaning so that a rule of law or a legal understanding can actually be in accordance with concrete legal events to avoid misuse. Thus, legal discovery can be made with instruments or methods of interpretation, analogy, legal refinement (rechtsverwijning), legal construction and argumentum a contrario. This research is empirical with a sociological jurisprudence method that can see law in a real sense, for example, how law works in a society. The results of this study are that judges at the District Court and the Religious Court decide cases by looking at customary law and customs. The judges consider living law by looking at the characteristics of the case and the availability of written law as a source of law. Three obstacles faced by judges in using living law in deciding cases in courts are internal and external. Internal obstacles include to find a legal basis that enforces positive legal provisions, to categorize trends in society as living law or not, and to define the living law itself. Basically, there are no external obstacles because if the parties involved in the cases dissatisfied with the decision, they can take available legal remedies such as appeal, cassation, and review.*

Keywords: living law, judge, law, existence, civil disputes, impacts.

INTRODUCTION

Positive law designates a collection of written and unwritten legal principles and rules which are currently applicable and binds in general or specific but enforced by or through the government or courts in Indonesia. The object of positive law denotes all positive legal provisions, meaning that the applicable law is “hic et nunc” or, in other words, applies ‘here and now’.¹ Indonesia adheres to the principle of positive law, recognizing the existence of written and unwritten laws. Article 18 B of the 1945 Constitution states that the state recognizes and respects communities implementing customary law and their traditional rights if these laws are active and in line with the development of society and the principles of the Unitary State of the Republic of Indonesia, as regulated by law. According to the legal doctrine and legislation, laws are regulatory legal acts that adjust and control the most important relations, while bylaws have less legal force and must be adopted on the basis and in compliance with the laws.²

Law as a system can live, grow, and develop within itself.³ Therefore, as a country that upholds the rule of law, Indonesia enables legislators to anticipate various situations. However, the legislation itself is a moment opname, a reflection of reality captured at the time of its issuance. To suit the dynamics of society, the government must form laws in a planned, integrated, and systematic manner.⁴ In practice, the law is often unable to meet the needs of society, even though it is a well-

¹ Mohammad Koesno. *Dasar dan metode ilmu hukum positif*. Airlangga University Press. (2010), p. 3.

² Gylunaz Eldarovna Adygezalova & Petr Mihajlovich Kuryduk. Trends in the ‘Living’ Law Development in Russia: The Lawmaking of Other Authorities, *Journal of Advanced Research in Law and Economics*, Volume IX, Spring, 1(31): 15 - 19, (2018). DOI: 10.14505/jarle.v9.1(31).02. Available from: <http://journals.aserspublishing.eu/jarle/index>.

³ Dimiyati Khudzaifah & Kelik Wardiono. *Metodologi Penelitian Hukum*. p. 4. (2004).

⁴ Andi Irman Putra. *Penulisan Kerangka Ilmiah Tentang Peran Prolegnas Dalam Perencanaan Pembentukan Hukum Nasional Berdasarkan UUD 1945 (Pasca Amandemen)*. BPHN Departemen Hukum dan Hak Asasi Manusia. p. 1. (2008).

known fact that the government cannot quickly revise the law. In this context, the principle of *het recht hink achter de feiten aan* applies, meaning that the law can never keep up with the changing times. Therefore, the country needs a legal system that can follow the dynamics of its society that adheres to legal pluralism.

1. Progressive Law

Progressive law is a power that refuses and wants to break the status quo. Maintaining the status quo accepts the existing normativity and system without any attempt to see its weaknesses and overcome them. Progressive law will look for various ways to break the status quo. This nature is an action paradigm, not a rule. Thus, regulations and systems are not the sole rulers of society. Progressivism requires the support of enlightened legal thought found in a progressive academic community. The power of progressive law does not entirely deny the presence of positive law but always asking "what can I do with this law to give justice to the people?" In short, it does not want to be a prisoner of the system and the law. Justice and the happiness of the people are above the law.⁵

Judicial functions are closely related to its power; judicial boundaries show that these two things are a unity that is almost impossible to separate. The Constitution of the Republic of Indonesia states that Judicial Power is the power of an independent state to administer the judiciary to enforce law and justice based on Pancasila for the implementation of the State of Law of the Republic of Indonesia. This statement implies that judicial power is a separate entity from government and legislative power. Therefore, in addition to being free from the influence of the two other powers, judicial power also has the authority to apply and interpret existing laws. If necessary, it can also create a new legal structure in carrying out its function as a law enforcement agency and a protector of society.⁶

As one of the officials holding judicial power and carrying out the judicial process, including the civil court process, the judge plays a crucial role in decision-making. Judge's decisions in court should ideally not cause new problems in society, meaning that the quality of judge decisions affects the authority and credibility of the court as an institution.⁷ Courts and their judgments increasingly affect social and political relations, while social and political conflicts are being resolved in the courts; thus, further leads to individuals and groups in political and civil society resorting to legal strategies to 'advance their interests'.⁸ In practice, judges often encounter flawed civil laws. Judges must overcome these legal flaws by discovering laws applicable to the situation to produce an ideal decision. As law enforcers, judges are not only enforcers of law but also justice through legal discovery. Therefore, in addition to being law enforcers, judges are also law reformers.⁹

The Law on Judicial Power Number 48 of 2009 allows judges to discover laws in a legal vacuum. Article 5 Paragraph (1) of the Law on Judicial Power Number 48 of 2009 states that Judges and Constitutional Justices are obliged to explore, follow, and understand the legal values and sense of justice in society. Based on this law, judges can freely make discoveries and reforms by exploring, following, and understanding living laws and a sense of justice in society.

Justice is the opposite of injustice. Where there is justice, there is also injustice.¹⁰ The two are usually juxtaposed, and in the context of legal studies, there are many examples of injustice as the antithesis of justice in law. Judges always face and try to resolve concrete events, conflicts, or cases. For this reason, they need to seek the law. Therefore, it is crucial to discover laws for concrete events.¹¹ As law discoverers, judges translate or provide meaning to the law so that a rule of law or

⁵ Philippe Nonet and Philip Selznick. *Hukum Responsif*. p. 16. (2007).

⁶ RMJ Koosmargono. *Penemuan Hukum oleh Hakim Dalam Penyelesaian Perkara Perdata di Pengadilan Negeri*, Presented on a discussion Bagian Hukum Acara Fakultas Hukum Universitas Diponegoro on Friday, 23 November 1995. p. 5.

⁷ Fence M. Wantu. *Mewujudkan Kepastian Hukum. Keadilan dan Kemanfaatan Dalam Putusan Hakim di Pengadilan Perdata*. Jurnal Dinamika Hukum, Vol. 12 Number 3 September 2012. p. 481.

⁸ Sieder et al., dalam *The Mexican Supreme Court and the Juntas de Conciliacion y Arbitraje, 1917-1924: The Judicialisation of Labour Relations after the Revolution*. William J. Suarez-Potts. J. Lat. Amer. Stud. 41, 723-755. Cambridge University Press 2009. Doi:10.1017/S0022216X09990575. Hal. 726.

⁹ Yakup Ginting, cited from an article "Bapak Yakup Ginting, S.H., C.N., M.Kn., Meraih Gelar Doktor Ilmu Hukum Bidang Hukum Perdata." on 1 May 2012, website www.pt-banjarmasin.go.id.

¹⁰ Inge Dwisvimiari. *Keadilan Dalam Perspektif Filsafat Ilmu Hukum*, Universitas Sultan Ageng Tirtayasa, Jurnal Dinamika Hukum, Vol. 11 Number 3 September 2011. p. 523.

¹¹ Sudikno Mertokusumo. *Penemuan Hukum (Sebuah Pengantar)*, Liberty: Yogyakarta. 2007. pp. 37-38.



a legal understanding can be under concrete legal events that occur. To avoid legal abuse, judges conduct legal discovery with instruments or methods of interpretation, analogy, legal refinement (rechtsverwijning), legal construction, and argumentum a contrario.¹²

2. Law and Benchmarks

According to Bagir Manan (in Sunarto, 2014¹³), there are several benchmarks as to the definition of judging according to law, namely:

1. According to law, judging is one of the principles of realizing a state of law. Every decision must have a substantive and procedural legal basis that existed before the unlawful act or violation of the law occurred;
2. Adjudications must be interpreted beyond the meaning of written and unwritten law. In certain cases or circumstances, the law includes definitions that bind parties, accepted principles of morality, and public policy (goede zeden en openbaar orde);
3. In society, the living law is the law that the judge considers in making decisions. However, society does not have to follow the living law as they can rule it out due to not meeting new social demands;
4. Under the prevailing legal tradition, the law is obliged to prioritize the application of written law, except if it will cause injustice or conflict with decency or public order. Judges are not the “mouth” or “mouthpiece” of the law but rather the “mouth of the mouthpiece” of justice.

Therefore, it is intriguing to analyze how judges decide a case using living law as the basis for their decisions. The problems raised in this study are as follows: how does living law influence judges in deciding a case in court, what specific criteria is used by judges in deciding a case, and what obstacles are faced by judges in deciding a case in court? The specific objectives of this research are to discover how judges apply living law in deciding court cases, to determine when judges use living law in deciding a case and whether judges use specific criteria in applying living law, and to classify the obstacles faced by judges in using living law in deciding court cases.

This research utilizes the empirical legal research method using a sociological jurisprudence research model. The empirical legal research method functions to see the law realistically and examine how it works in society. As this research examines social relations, this empirical legal research can also be considered socio-legal. This research uses primary and secondary data. Primary data is obtained mainly from empirical research, namely those conducted directly at District Courts under the Medan High Court. Secondary data is obtained from literature reviews, namely reviews of various literature or library materials related to the research problems or materials and often referred to as legal materials.

The authors collected data through interviews and observations. In-depth interviews were conducted directly between researchers and respondents to obtain valuable information related to the research. The authors observed the use of living law as a basis for the decisions of judges. Observation aims to obtain comprehensive data on human behavior according to reality, a relatively complete description of social life or one of its aspects, and to explore the human life under study. The authors conducted this research at 2 two District Courts and two Religious Courts in North Sumatra. The authors collected data in two ways, namely, literature study to collect secondary data, and field study to collect primary data.

3. Living Law, Judge’s Decisions, and Court

The definition of living law is the law that lives in society, in this case, Customary Law, Islamic Law, and Western Law. The Living Law is a catalyst (positive or negative) in the development of National Law.¹⁴ When freely translated, the meaning of “law” is the rules that live in society. In other words,

¹² Herowati Poesoko. *Penemuan Hukum oleh Hakim Dalam Penyelesaian Perkara Perdata*, Jurnal Hukum Acara Perdata Adhaper, Vol. 1 No. 2 July - December 2015. p. 228.

¹³ Sunarto. *Peran Aktif Hakim dalam Perkara Perdata*. Kencana: Jakarta. 2014. p. 61.

¹⁴ Andi Fariana. Artikel. The living law. (2015). www.dosen.perbanas.id.



it is a habit that lives and develops in society, which over time society considers as the right thing to do and ultimately develops into a law that society recognizes. According to Soepomo, customary law is a living law as it embodies the lives of the people. Per its nature, customary law continues to grow and develop alongside society.¹⁵ Living laws are the rules used in ongoing relationships and sourced from customs or habits.¹⁶

Kusumaatmaja views the two functions of law, namely, maintaining public order and guaranteeing legal certainty and social renewal, as highly relevant when faced with positive law that applies in Indonesia. Eugen Ehrlich, leader of the sociological jurisprudence school, also recommends these functions, stating that positive law that is good and, therefore, effective is positive law that follows living law which, as the inner order of society, reflects the values that live in it. E. Ehrlich encourages the legal system in Indonesia to ensure that the positive law that applies in Indonesia remains effective in dealing with changes and developments. In addition, the dynamics of society must become law that lives in society by exploring, following, and understanding the legal values in society.¹⁷

Living law refers to the theories of Eugen Ehrlich, who broke with the notion law as a phenomenon which is exclusively restricted to the application of legislation and judicial decisions (jurisprudence), he stated that living law is valid precisely because it is “that which, whilst not established by statute, dominates life”.¹⁸ The people of Indonesia are increasingly marginalizing the existence of customary law as the living law (Abubakar, 2013).¹⁹ Customary law, which was originally a living law and able to solve various problems in Indonesian society, is increasingly fading out of existence. At present, empirical data shows that there are many problems when customary law faces positive law. Example cases include traditional rights of a community confronted with the interests of investors through state law.²⁰

Even so, the laws and regulations in Indonesia still provide a special place for living laws to exist in green geotourism in the Kars Area of Pangandaran. The harmonization of law between the rules and regulations and the living law, is reflected under the rules of the implementation of Geo-tourism in Selasari Village, Parigi Sub-District, whereas the Article 1 point 23 of the Regulation of Selasari Village No. 2 of 2019 concerning the Development of Tourism Village contains a nomenclature of “cultural tradition” as a value system of belief by certain group of people therein, and under such belief, there are values, attitudes, as well as social-cultural procedures believed as fulfilment to the life of society.²¹

In the living law theory, some believe that the law and the regulation-making processes should consider the values and legal norms that live and apply in society. If a law contradicts the values and legal norms that live and apply in society, they will reject this law. The living law of Indonesia is customary law. Customary law can also be used as a source of law by judges if the law so orders.²² Adat laws are non-statutory laws most of which are customary laws and a small part of Islamic law. Adat laws also include case laws based on judges’ decisions that contain legal principles applicable in respective jurisdictions. Adat laws finds its roots in traditional culture. Adat law (therefore) is a

¹⁵ Iman Sudiyat. Asas-asas hukum adat bekal pengantar. Yogyakarta: Liberty Yogyakarta. 1991. p. 8.

¹⁶ Cut Asmaul Husna TR. Penemuan dan pembentukan hukum “the living law” melalui putusan hakim, www.scribd.com. p. 64.

¹⁷ Dhono Yusra. Politik hukum hakim dibalik penemuan hukum (*Rechtsvinding*) dan *Penciptaan Hukum (Rechtsschepping)* pada era reformasi dan transformasi. Lex Jurnalica, Volume 10 Number 2, August 2013. p. 67.

¹⁸ Josilene Ferreira Mendes and Noemi S. Miyasaka Porro. Social conflicts in times of environmentalism: living law rights to land in settlements with a conservationist focus. *Ambiente & Sociedade*. Sao Paulo v. XVIII, n.2. p. 93-110. abr.-jun. 2015. Hal. 93. <http://dx.doi.org/10.1590/1809-4422ASOCEx06V1822015en>

¹⁹ Lastutui Abubakar. Journal. Revitalisasi hukum adat sebagai sumber hukum dalam membangun sistem hukum indonesia. *Jurnal Dinamika Hukum*, Vol. 13 Number 2, May 2013. p. 319.

²⁰ Dhono Yusra, *Loc. Cit.*

²¹ N. Kurniati, R Hindersah, D.E. Sukarsa. Legal aspect of green geotourism development of the karst area in Pangandaran: synchronization between the regulation and the living law. International Seminar and Congress of Indonesian Soil Science Society 2019. IOP Publishing. IOP Conf. Series: Earth and Environmental Science 393 (2019) 012066doi:10.1099/1755-1315/393/1/012066

²² Sulastriono and Aristya. Penerapan norma dan asas asas hukum adat dalam praktik peradilan perdata, *Jurnal Mimbar Hukum* Vol. 24 No. 1 February 2012. pp 1-186.



living law, because it is an actual manifestation of people's sense of justice. According to its own inner quality, adat law continually in a state of growth and development just like the life itself.²³

Concerning the judge's decision, the provisions of Article 178 HIR/189 RBg state that when a judge completes a case examination, the Panel of Judges conducts deliberation to decide. The court considers the examination process complete if it has passed the response stage from Defendant under Article 121 HIR and Article 113 Rv, accompanied by a second declaration from the Accuser based on Article 115 Rv and a final reply from Defendant. Finally, the court continues with the process of proof and conclusion stages. Following these stages, the Panel of Judges declares the examination closed and pronounces the verdict. The Panel of Judges will conduct deliberation before the pronouncement to determine their decision to the litigating party.

The goal of court examinations is for the judge to make a decision that will settle the case.²⁴ This decision will determine the rights and legal relationship of the parties to the object in dispute. The judge will present various aspects related to the decision in the description. In a decision, the law is the basis of the decision, and justice is its spirit. The decision must have a legal basis, both written and unwritten. Material law (substantial law) and formal law (procedural law) embody the legal principles adopted by a state of law.²⁵ To ensure that a decision in a civil case does not contain defects, it must contain the principles of decision as described in Article 178 HIR, Article 189 RBg, and Article 19 of Law Number 48 of 2009 concerning Judicial Power. According to Harahap²⁶ the principles of decision, specifically in civil cases, are to contain a clear and detailed rationale, to adjudicate all parts of the lawsuit, unable to grant more than what is demanded, and spoken in public, which adheres to several principles (the principle of openness to the public is imperative, the legal consequences of violating the principle of openness, in the case of a closed examination, the panel pronounces the decision in an open trial, spoken in court, and radio and television can broadcast live examinations from the courtroom).

With reference to court, law Number 48 of 2009 concerning Judicial Power (Law on Judicial Power) is the legal basis for the state justice system, which regulates trials and courts in general and does not explicitly define the terms trials and court. However, Article 2 Paragraph (1) and (2) of the Law on Judicial Power stipulates that trials are conducted "for the sake of justice based on God Almighty," and state trials apply and enforce law and justice based on Pancasila. Article 4 of the Law on Judicial Power explains that courts judge according to the law without discrimination, assist justice seekers, and attempt to overcome all obstacles to achieve a simple, fast, and low-cost trial. The two definitions above conclude that a trial is a process of applying and enforcing the law for the sake of justice, while a court is a place for trials and assists justice seekers to achieve a trial.

4. Methods

The legal research used in this research is empirical legal research with a sociological jurisprudence model. The empirical legal research method is a legal research method that functions to be able to see the law in a real sense and research how the law works in a society. Because in this empirical legal research is researching people in the relationship of life in society, the empirical legal research method can also be said to be sociological legal research. The research involved primary and secondary data in which the first was obtained mainly from the results of empirical research, namely research conducted directly at the District Court within the scope of the Medan High Court area. The secondary data was taken from the results of a literature review or review of various literature or library materials related to research issues or materials which are often referred to as legal materials. The data collection technique used in empirical research with the sociological law research model is carried out by conducting interviews and observations. Interviews were conducted by conducting in-

²³ Supomo. Positioning adat law in the Indonesia's legal system: historical discourse and current development on customary law. Bono Budi Priambodo. Udayana Journal of Law and Culture. Vol. 02, No. 2, July 2018, 140-164. Hal. 152.

²⁴ Subekti. Hukum acara perdata. Bandung: Bina Cipta. 1997. p. 122.

²⁵ Harifin A Tumpa. Penerapan konsep rechtsvinding dan rechtsschepping oleh hakim dalam memutus suatu perkara. Jurnal Hasanuddin Law Review, Vol. 1, Issue 2, August 2015. p. 129.

²⁶ M. Yahya Harahap. Hukum acara perdata. Second Edition, Jakarta: Sinar Grafika, 2017. pp. 888-898.



depth interviews directly between researchers and respondents to obtain useful information for data collection in order to obtain useful information for research. Observations were made by observing the phenomenon of the use of living law as a basis for judges' considerations in making decisions. According to Soerjono, observation aims to obtain comprehensive data from human behavior according to their beliefs, to get a relatively complete description of social life or one of its aspects, and to conduct an exploration of the human life under study.

This research was conducted in two District Courts and two Religious Courts in North Sumatra. The research object is a variable or what is the focus of a research. As for the object of this research are judges at District Courts and District Court Decisions that use living law as the basis for considering decisions. The research design is a unified, detailed, and specific plan for how to acquire, analyze, and interpret data. The research design contains general matters and conditions underlying the implementation of these activities. The earliest step in research is to identify the problem so that the scope of the research would not depart from the research objectives themselves.

In the form of sociological jurisprudence research, the researcher first looks at the phenomena that occur in the research object and then relates it to statutory regulations. The results of the research will later be related to the results of interviews and observations of several judges who were selected based on purposive sampling techniques. The final step in any research process is writing a research report. Research that is not published or disseminated would be of little use in the development of science and will not have high practical value. Therefore, it is an obligation for researchers to complete a series of research into a form of written scientific report and can be accounted for. The data collection was obtained from literature study for secondary data and from field study for primary data.

DISCUSSION

Influence of living law on judges in deciding court cases

The influence of living law in district court decisions is different from that of a religious court. In district courts, living law affects the decisions of judges. If there are no written regulations on a specific matter, judges can utilize living law in deciding a case if it does not conflict with the law and morality. In addition, in land-related cases, especially customary land, judges will examine its history/origin. This situation often occurs in land ownership cases between communities that do not have written evidence of ownership. In Simalungun, for example, each region has a land clearer (sipukka huta) that becomes the landlord and has the authority to distribute their land to their people. Therefore, the Panel of Judges often refers to the clan of the sipukka huta in land ownership disputes between communities that do not have written land rights. The panel obtains details on the sipukka huta from witness testimonies and their general knowledge.

Land disputes have also occurred between communities and the government where a community claims the ownership of the disputed land, even though the government owns written proof of ownership of the land. In such cases, the Panel of Judges will often favor written proof of ownership (such as freehold titles and usufructuary rights) rather than verbal evidence. Therefore, the government is almost always the victor in land rights disputes. In similar cases involving communities and private companies, the Panel of Judges will still favor written proof so that private companies are often victorious. However, the judges of Sidikalang and Simalungun District Courts still refer to customary law and societal habits.

Living law also influences decisions in the religious court. For example, in applications for marriage confirmations (itsbat) in customary marriages, the judge will verify the marriage through witness testimonies. In addition, for couples married before the issuance of Law Number 1 of 1974, the Supreme Court Circular Letter Number 3 of 2018 concerning the Enforcement of the Results of the Plenary Meeting of the Supreme Court Chamber of 2018, as a Guide to the Implementation of Court Duties in the Legal Formulation of the Civil Chamber section General Civil Code number Five states that lawsuits for divorces whose marriages are not registered in the civil registry can be accepted and granted, as long as the couple held the marriage in a religious/customary manner before the issuance of Law Number 1 of 1974 jo. Government Regulation Number 9 of 1975.



The judge must fulfill the elements of justice, legal certainty, and proportional benefit to create a perfect decision. In this case, legal certainty is the existence of written laws that apply in society. In making decisions related to living law, judges often face conflicts between legal certainty and justice and benefit, considering that the law that lives amid society, in general, is unwritten. Therefore, judges require sufficient experience to formulate a decision that fulfills the elements of justice, legal certainty, and benefit.

The practice of implementing living law in society follows the views of 2 (two) legal experts. Kusumaatmaja views the two functions of law, namely, maintaining public order and guaranteeing legal certainty and social renewal, as highly relevant when faced with positive law that applies in Indonesia. Eugen Ehrlich, leader of the sociological jurisprudence school, also recommends these functions, stating that positive law that is good and, therefore, effective is positive law that follows living law which, as the inner order of society, reflects the values that live in it. E. Ehrlich encourages the legal system in Indonesia to ensure that the positive law that applies in Indonesia remains effective in dealing with changes and developments. In addition, the dynamics of society must become law that lives in society by exploring, following, and understanding the legal values that live in society.²⁷

In the living law theory, some believe that the law and the regulation-making processes should consider the values and legal norms that live and apply in society. If a law contradicts the values and legal norms that live and apply in society, they will reject this law. The living law of Indonesia is customary law. Customary law can also be used as a source of law by judges if the law so orders.²⁸

To ensure that a decision in a civil case does not contain defects, it must contain the principles of decision as described in Article 178 HIR, Article 189 RBg, and Article 19 of Law Number 48 of 2009 concerning Judicial Power. According to Harahap²⁹ the principles of decision, specifically in civil cases, should contain a clear and detailed rationale, to adjudicate all parts of the lawsuit, not grant more than what is demanded, and be spoken in public, which adheres to several principles, such as, openness to the public is imperative, legal consequences of violating the principle of openness, in the case of a closed examination, the panel pronounces the decision in an open trial, spoken in court, and radio and television can broadcast live examinations from the courtroom.

The Criteria Used by Judges in Using Living Law in Deciding Court Cases

In deciding court cases, the judge will consider using living law in the following cases:

Case characteristics

District court judges commonly utilize living law in civil cases as they generally involve social conditions. In civil cases concerning land, a common occurrence in the Sidikalang District Court, customary law becomes the basis for transferring rights. By using customary law as the basis for the legal actions of the parties involved, judges will explore the existence of customary law in Sidikalang and how it is regulated. In this stage, judges will usually use living law, provided it does not conflict with the applicable written regulations. In religious courts, the application of living law is limited to civil cases, specifically individual civil cases such as marriage.

Availability of written law as a source of law

In general, judges use living law as the basis for decisions when written law is unavailable or is considered unable to accommodate their needs in resolving a case. As long as the living law does not conflict with applicable law and decency and accommodates the settlement of a case, judges can use the living law as the basis for their decision.

Obstacles Faced by Judges in Using Living Law for Decisions

In using living law for decisions, judges face internal and external obstacles. Internal obstacles include finding a legal basis that enforces the provisions of positive law, determining whether trends in society are living law, and defining the living law itself. In implementing living law, external

²⁷ H. Abd. Halim Syahrani, in Rasyid Rizani, Sosiologi hukum dalam pandangan Eugen Ehrlich, www.pa-banjarmasin.go.id, accessed on 9 May 2021.

²⁸ Sulastriyono and Aristya, *Op. cit.* pp. 1-186)

²⁹ M. Yahya Harahap, *Loc. Cit.*

obstacles do not exist. If the parties involved are not satisfied with the decision, they can take available legal remedies such as appeals, cassations, reconsiderations, and others.

CONCLUSION

The conclusions can be drawn as the followings:

1. The practice of the influence of the living law in deciding a case, as long as there are no written regulations governing it and this does not conflict with the law and decency, the living law can be considered by the judge in deciding the case. The practice of implementing living law in society is in accordance with the views of legal experts, namely Kusumaatmaja's view of the two functions of law, namely as a means of maintaining public order and guaranteeing legal certainty as well as a means of community renewal, when confronted with positive law applicable in Indonesia is certainly very relevant and recommended by Eugen Ehrlich (leader of the sociological jurisprudence school) in his view that good and therefore effective positive law is positive law that is in accordance with living law which as the inner order of society reflects the values that live in it. .
2. In deciding a case in court, the Judge considers using living law in the following cases:
 - a. Case characteristics.
 - b. Availability of written law as a source of law.
3. The obstacles faced by judges in using living law in deciding a case in court are divided into internal obstacles and external obstacles.

Internal barriers include:

- a. Finding a legal basis that enforces positive legal provisions.
- b. Categorizing trends in society as living law or not.
- c. Defining the living law itself.


Basically, there are no external obstacles in applying living law because, if the parties involved in the decision are dissatisfied with the decision, they can take available legal remedies such as appeals, cassation, judicial review, and so on.

ACKNOWLEDGEMENT

The authors pay gratitude to the Universitas Sumatera Utara (USU) and the Faculty of Law, USU, Medan, Indonesia for their moral supports before and after the field research was carried out, as well as during the preparation of manuscript writing.

REFERENCES

- [1] Abubakar, L. *Revitalisasi hukum adat sebagai sumber hukum dalam membangun sistem hukum indonesia*. Jurnal Dinamika Hukum (Law Dynamics Journal), 13(2), 319, (2013).
- [2] Adygezalova, G. E., & Kuryduk, P. M. Trends in the 'living' law development in russia: the lawmaking of other authorities. *Journal of Advanced Research in Law and Economics*, IX (31), 15-19, (2018). <http://journals.aserspublishing.eu/jarle/index>. DOI: 10.14505/jarle.v9.
- [3] Dwisvimiari, I. *Keadilan dalam perspektif filsafat ilmu hukum*. Jurnal Dinamika Hukum (Law Dynamics Journal), 11(3), 523, (2011).
- [4] Fariana, A. *The living law*. www.dosen.perbanas.id. (2015).
- [5] Ginting, Y. *Meraih gelar doktor ilmu hukum bidang hukum perdata*. www.pt-banjarmasin.go.id. (2012).
- [6] Harahap, M. Y. *Hukum acara perdata*. 2nd Ed. Jakarta: Sinar Grafika. (2017).
- [7] Husna, C. A. *Penemuan dan pembentukan hukum "the living law" melalui putusan hakim*. www.scribd.com. (no date).
- [8] Khudzaifah, D & Wardiono, K. *Metodologi penelitian hukum*. (2004).
- [9] Koesno. M. *Dasar dan metode ilmu hukum positif*. Surabaya: Airlangga University Press. (2010).
- [10] Koosmargono, R. M. J. *Penemuan hukum oleh hakim dalam penyelesaian perkara perdata di Pengadilan Negeri*. Presented on a discussion on *Bagian Hukum Acara*. Semarang: Fakultas Hukum Universitas Dipenogoro. (1995).
- [11] Kurniati, N., Hindersah, R., & DE Sukarsa, D. E. *Legal aspect of green geotourism development of the Karst area in Pangandaran: synchronization between the regulation and the living law*. *International Seminar and Congress of Indonesian Soil Science Society*. IOP Conf. Series: Earth and Environmental Science 393, p. 7, (2019). doi:10.1099/1755-1315/393/1/012066.

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- [12] Mendes, J. F., & Porro, N. S. M. *Social conflicts in times of environmentalism: living law rights to land in settlements with a conservationist focus*. *Ambiente & Sociedade*, XVIII (2), 93-110, (2015). <http://dx.doi.org/10.1590/1809-4422ASOCEx06V1822015en>.
 - [13] Mertokusumo, S. *Penemuan hukum (sebuah pengantar)*. Yogyakarta: Liberty. (2007).
 - [14] Nonet, P. & Selznick, P. *Hukum responsif*. (2007).
 - [15] Poesoko, H. *Penemuan hukum oleh hakim dalam penyelesaian perkara perdata*. *Jurnal Hukum Acara Perdata Adhaper (Journal of Adhaper Civil Procedure Law)*, 1(2), 228, (2015).
 - [16] Putra, A. I. *Penulisan kerangka ilmiah tentang peran prolegnas dalam perencanaan pembentukan hukum nasional berdasarkan UUD 1945 (pasca amandemen)*. Jakarta: BPHN Departemen Hukum dan Hak Asasi Manusia. (2008).
 - [17] Sieder et al. *The Mexican supreme court and the juntas de conciliacion y arbitraje, 1917-1924: the judicialisation of labour relations after the revolution*. In William J. Suarez-Potts. *J. Lat. Amer. Stud*, 41, 723-755, (2009). Doi:10.1017/S0022216X09990575.
 - [18] Subekti. *Hukum acara perdata*. Bandung: Bina Cipta. (1997).
 - [19] Sudiyat, I. *Asas-asas hukum adat bekal (pengantar)*. Yogyakarta: Liberty Yogyakarta. (1991).
 - [20] Sulastriono & Aristya. *Penerapan norma dan asas asas hukum adat dalam praktik peradilan perdata*. *Jurnal Mimbar Hukum (Journal of Legal Pulpit)*, 24(1), 1-186, (2012).
 - [21] Sunarto. *Peran aktif hakim dalam perkara perdata*. Jakarta: Kencana. (2014).
 - [22] Supomo. *Positioning adat law in the Indonesia's legal system: historical discourse and current development on customary law*. *Udayana Journal of Law and Culture*. 2(2), 140-164, (2018).
 - [23] Syahrani, H. A. H. *Sosiologi hukum dalam pandangan Eugen Ehrlich*, in Rasyid Rizani. (2021). www.pa-banjarmasin.go.id.
 - [24] Tumpa, H. A. *Penerapan konsep rechtsvinding dan rechtsschepping oleh hakim dalam memutus suatu perkara*. *Jurnal Hasanuddin Law Review (Hasanuddin Law Review Journal)*, 1(2), 129, (2015).
 - [25] Wantu, F. M. *Mewujudkan kepastian hukum: keadilan dan kemanfaatan dalam putusan hakim di peradilan perdata*. *Jurnal Dinamika Hukum (Law Dynamics Journal)*, 12(3), (2012).
 - [26] Yusra, D. *Politik hukum hakim di balik penemuan hukum (rechtsvinding) dan penciptaan hukum (rechtsschepping) pada era reformasi dan transformasi*. *Lex Jurnalica*, 10(2), 67, (2013).