

THE JUDGE'S TASK TO FIND LAW UNDER THE INDONESIAN LAW

By:
Peter Mahmud Marzuki*

ABSTRACT

Under Indonesian law, judge is obliged to find law in addition to apply legal text. The purpose of law finding activity is to resolve the case in the event that law is silent, unclear, or obsolete in order to produce a just and acceptable solution. Hermeneutics is the method of interpretation plays a critical role in law finding activity. Theoretically, Indonesian provision for judge to find law is justified. The limitation of law finding is morality.

Key words: law finding - interpretation - hermeneutics

INTRODUCTION

One of recommendations adopted in the first National Law Seminar in 1963 is that the judge is induced to develop national law based on unwritten law through case law. The implication of the recommendation would be the judge is in charge of finding law. In fact, it was provided in Law No. 19 of 1964 on Judicial Power-the first Indonesian Judiciary Law-that judge as law enforcer as well as justice administrator is obliged to explore, observe, and grasp the existing legal values in society. Since the law was considered to be legal instrument for the President to interfere with judicial power, it was revoked and replaced with Law No. 14 of 1970. Provision concerning

law finding by judge, however, is retained. Subsequently, Law No. 14 of 1970 is substituted by Law No. 4 of 2004. Again, the provision on the judge's task of finding law remains intact. It can be inferred, therefore, that the Indonesian lawmaker assigns Indonesian judge to carry on law finding activity.

The issue of law finding is a typical continental European jurisprudence issue. This is not the case in Anglo-American legal system. The word "law" in English has two meanings.¹ First, it is used to mean a body of precept by which the regime is or ought to be carried on so as to achieve justice.² Second, it refers to an aggregate of precepts constraining conduct by which an ordered society is to be brought about.³ The first in

* The author is a teaching staff to Law School, Airlangga University

¹ Cf. Roscoe Pound, *Law Finding Through Experience and Reason*. Three Lectures, University of Georgia Press, Athens, 1960, p. 1. In this book, Roscoe Pound stated that there are three senses in which the term "law" in English commonly used. In further discussion of his book, he only addressed two meanings of law.

² *Id.*

³ *Id.*