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Ex Aequo et Bono as a Manifestation of Legal Justice for Society

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Abstract
One of the principles that can be taken by judges as part of the implementation of the freedom of judges in the enforcement of the verdict is by the way of applying the principle et aequo et bono. The application of the principle of ex aequo et bono still invites a lot of debate. Furthermore, the existence of the principle ex aequo et bono is sometimes considered Contrary to the arrangement of the ultra petita principle.
This research aims to identify the existence of the principle of ex aequo et bono in civil event law in Indonesia and analyze its application practices to find out how the implications of applying the principle in the fulfillment of justice for society. The research was conducted by approaching the legislation and consideration of judges using primary legal materials in the form of Law No. 48 of 2009 on Judicial Power and secondary legal materials in the form of written works relevant to the application of the principle of ex aequo et bono to be analyzed comprehensively.
The results showed that the application of the principle of ex aequo et bono is basically a juridical act that has a legal basis and the Judge remains bound by the terms of speech. The application of the principle of ex aequo et bono provides an opportunity for judges to perform ex officio actions based on the view of justice so that the judge's decision serves as a counterweight that is not only limited to deciding the case, but also resolving the problems that have been filed.

Keywords: Civil law; Ex Aequo et Bono; Freedom; Judges; Verdict

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Introduction

Indonesia is a country that makes law as an important element in the life of the nation and state. High respect for the law, one of which is the recognition of the existence of judicial power. Judicial power is then designed to be exercised independently and

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independently with the aim of holding a court based on law and justice. The independence of judicial power then becomes an important element for the implementation of judicial power.

Judicial power has a strategic position in the rule of law. Judicial power has judicial authority as the owner of a judicial body that enforces the law to achieve the goals of the rule of law. The court as the executor of judicial power plays an important role as the main pillar of the formation of justice in society. Furthermore, judges as the most important unit in administering justice, are responsible for the implementation of judicial practice.

A judge basically has freedom in the process of making a decision. The freedom in question is the freedom to make decisions that are far from intervention from other parties. Decisions handed down on the independence of judges will avoid public opinion that judges are biased. Freedom from interference from other parties is not limited to the process of examining and adjudicating cases, even in legal findings, judges are required to be free from the threat of punishment for their decision.

The facts show that the freedom to exercise judicial authority according to statutory provisions cannot be said to be absolute, because in carrying out their duties, judges must follow the Pancasila guidelines by interpreting the law and seeking the legal basis and the underlying principles. The outcome of this decision will be fair to the community.

Normatively, in several provisions of civil procedural law, judges are essentially given space to be active in resolving cases. The active attitude of the judge in the examination is defined as one of the implementations of the independence of the judge. The ability to be active must be accompanied by restrictions that should not be done so that judges cannot act arbitrarily. This is in accordance with traditional Indonesian

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thinking that prioritizes the protection of the public interest, the judge has the authority to play an active role in guiding the process from beginning to end. When a case is brought before a judge, the state must settle the case in such a way that the law can be restored and the case can be terminated absolutely.

Talking about the practice of trial examination, it is not uncommon in examining a case a judge is faced with people who tend to be ignorant of the law. People basically understand that when they have a legal interest they can file cases in court, however, many people still don't know how to proceed in court. A small example is the matter of how the parties are still wrong in constructing their claims in a lawsuit or application. As a result, what many parties want cannot be fulfilled. Based on this, the role of judges in making decisions is very important.

The stipulation says that basically everyone can file a case in court and the difference is only for people who are not yet adults or who have memory problems. On that basis, everyone without exception has the right to get a decision according to what is expected so that the judge's decision ultimately becomes the resolution of a dispute in court.

One of the principles that can be taken by judges as part of the implementation of judges' freedom in making decisions is by applying the ex aequo et bono principle, where judges in making decisions no longer adhere to the contents of the petitum or the judge can make decisions that exceed the application submitted. the parties. Judicial practice explains that the main claim is often presented in the form of a primair petitum together with a substitute claim contained in a subsidiary petitum, with the intention that the court is more inclined to grant the request. This form of application is in the hope that if the main lawsuit is rejected, there is still the possibility that the decision of the kabul

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will be given on the basis of the independence of the judge and the judiciary using a subsidiary petitum. According to the decision of the Supreme Court,

Basically, judges are not prohibited from making decisions in accordance with the subsidiary petitum which contains the ex aequo et bono principle. The judge's freedom in making decisions is not without limitations, often the Ex Aequo et Bono principle in question can create an understanding as if it is contrary to the Ultra Petitum Partium principle. The latter principle requires that the judge in making a decision does not exceed what is demanded by the parties and also does not make a decision on claims that are not submitted by the parties. In accordance with the provisions of other articles in the statutory provisions, the freedom of judges to decide matters that are not requested or exceed those requested by the parties are expressly prohibited. Likewise, procedural law in Europe, both ancient and modern,

Problem Statement

The development of legal issues, affects the paradigm shift of judges in the decision-making process. Judges have the opportunity to deal with people who seek justice who tend to be ignorant about procedural law. Inevitably, the ex aequo et bono principle is applied for the purpose of deviating from the ultra petitum partium principle. Then, adjudicating based on the ex aequo et bono principle also means giving the judge the power to decide fairly if the judge considers something different from what was requested by the plaintiff. The practice of using subsidiary petitum in making decisions does not mean that it has never existed at all. It can be interpreted that the fulfillment of a sense of justice can be done by applying the principle of ex aequo et bono in making decisions by judges.

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The concept of applying the ex-aequo-et-bono principle, which still causes differences of opinion among law enforcement officials, especially judges, needs more attention. The existence of the ex aequo et bono principle is sometimes considered contrary to the regulation on the ultra petita principle which is regulated in the procedural law itself. On the other hand, from the perspective of fulfilling a sense of justice for the community, judges are also expected to be able to resolve the issues raised by the parties. Based on the description above, the legal issue that will be studied is the application of the Ex Aequo et Bono Principle in Fulfilling Legal Justice for the Community.

Method

This paper is a normative legal research that focuses on research on legal principles, legal rules and legal principles related to the judicial process. In accordance with the keywords that will be discussed in this study, namely the application of the Ex Aequo et Bono Principle, this study will examine and examine written sources by studying, studying and reviewing library materials that are the subject of discussion and discussion then analyze court decisions related to the application the principle of ex aequo et bono.

This study uses an approach to laws and regulations and judges' considerations in making decisions by applying the ex aequo et bono principle based on existing provisions to produce descriptive data. To answer legal questions, primary legal materials and secondary legal materials are used which will then be analyzed using a regulatory approach and a conceptual approach. Pieter Mahmud Marzuki explained that legal materials are official documents in the form of all publications on laws. Legal publications include statutory regulations, government regulations, textbooks, legal dictionaries, legal

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journals, and commentary on court decisions. The collected legal materials are analyzed qualitatively, comprehensively and completely, namely: first, interpretation, in this case, understand the thoughts contained in the primary and secondary sources of legal material that are the object of research to find clarity on the developing rationale. Second, looking for internal coherence, namely adjusting the theory used in analyzing the subject matter in the formulation of the problem. Third, describe and then discuss. Based on the results of the discussion, conclusions are then drawn in response to the formulation of the problem to be studied.

Discussion

1. The Concept of the Ex Aequo et Bono Principle in Indonesian Civil Procedure Law

Everyone has the right to file a lawsuit in court. However, even though the parties believe they have a legal interest, in filing a lawsuit in court, not all parties understand and know the law. On the basis of this ignorance, many parties misunderstood their demands in the trial, therefore, the Panel of Judges had to face a situation where the judge still had to comply with the applicable procedural law but could also accommodate the interests of the parties. In some practices, a large number of parties will take the path of listing ex aequo et bono by placing it in a subsidiary petitum, meaning that the litigants intend to submit legal justice to the examining judge per case.kara.Seeing this reality, it is possible for the judge to make a decision based on the ex aequo et bono principle as desired by the parties while still considering justice for the parties. However, of course, it is not that easy for a judge to suddenly make a decision based on a subsidiary petitum which contains the ex aequo et bono principle, considering that there is a risk to make a decision that exceeds what is demanded by the parties.

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Decisions based on the application of the ex aequo et bono principle based on a subsidiary petitum, can basically be justified as long as it is in a framework that is in accordance with the primary petitum core. On the other hand, the situation is different when the main demands and the demands of the subsidiary are listed separately, the decision making by selecting part of the main claim and part of the replacement claim by the judge is considered an act that exceeds the limits of authority, so it is not justified as stated in the Supreme Court's Decision Number 882 K. /sip/1974. If the part of the petition states that the petitum primair and petitum subsidiary are mentioned, the court can only choose one of the two. Judges are prohibited from exercising their procedural freedom by granting a primair petitum or taking a small part in a subsidiary petitum.

The dynamics of the application of civil procedural law illustrates that the application of the ex aequo et bono principle is often seen as contradicting the regulation on the ultra petita principle. The principle referred to last, is a common principle that we commonly encounter. The Ultra Petita principle applies in the case that the judge is present when the judge assesses the facts constructed in the petitum and is answered with amar. The verdict must not exceed the petitum both qualitatively and quantitatively.

Mukti Arto herself in her book "The Discovery of Islamic Law for Realizing Justice" has fully explained the purpose of applying the ultra petita principle, namely to: first, respect the civil rights of the plaintiff in determining qualitatively and quantitatively the object to be sued; second, to guarantee the protection of the Defendant's rights from actions that exceed the limits of the judge himself so that the Defendant does not feel disadvantaged, and thirdly, to protect the Plaintiff from the possibility of winning unreasonably. For reasons of fairness, judges are prohibited from making more decisions than necessary or unnecessary. Departing from this purpose,

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The application of the Ultra Petita principle can be seen as an obstacle for judges in providing legal protection and justice for all involved in the judicial process in order to uphold justice, so that the Ex Aequo et bono principle is present as a concrete step to break through the prohibition. If explored more deeply, there is a connection between the Ultra Petita principle and the Ex Aequo et bono principle. Mukti Arto has described the connectivity in question as follows:

1. Many people misunderstand that between the two are opposites. but this assessment is inadequate because both have the same function, namely realizing justice. The positions between the two are different and opposite from each other, but in reality they are united towards the same foundation, justice.
2. Both are in one effort to provide legal protection and justice for those who seek justice;
3. The prohibition of ultra petita and the application of the ex aequo et bono principle apply proportionally in their respective places;
4. The authority of ex qequo et bono is outside the subject matter and is not to answer the petition
5. regarding the subject matter but only completes it in the context of providing legal protection and justice for the parties;
6. The ultra petita prohibition is lex generalis while the ex officio authority is lex specialis.

Decisions based on Ex Aequo Et Bono are actually decisions that uphold the principles of justice and propriety. Not only that, its existence is also implicitly supported by the provisions of the law. In contrast to the ultra petita principle which has been manifested in the provisions of positive law, and has become permanent jurisprudence, the Ex Aequo Et Bono principle itself is still a pure principle and has not been concretized

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in positive law. However, that does not mean that on this basis, the principle of Ex Aequo Et Bono cannot be applied in making decisions because in fact judges are also required to resolve a case even though they must explore the values that live in society. On this basis, the principle of Ex Aequo Et Bono becomes a way to obtain justice based on the law.

2. The Ex Aequo et Bono Principle as a Solution to Fulfill Legal Justice

The judiciary is basically the executor of the law in the event of a claim for certain rights or a dispute or violation of the law, whose function is based on binding and independent and independent decisions which are intended to prevent vigilante action.

Fence M Wantu has described related to Civil Court which is a procedure in defending civil law material. People rely on courts as a place to settle disputes in the field of civil law that occur in society. Civil justice is expected to guarantee justice and public order in society. Civil justice in Indonesia refers to the civil law justice system, where the role of judges is solely to enforce the law. On the other hand, in the common law justice system, the judge is the law maker. In Indonesia's civil justice system, which is based more on civil law, judges are always bound by law because they lack independent thinking.

The function of the judiciary is carried out by judges to enforce law and justice independently and independently and always understand what values live and develop in society. The existence of the principle of freedom of judges to examine and resolve a case partially guarantees a fair decision, and judges are obliged to refer to statutory regulations and other legal sources in deciding cases such as jurisprudence, customs, legal awareness, legal principles, because every decision justice is based on a rule. The independence of the judge or the independence of the judiciary does not mean that the

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judge can set his own rules to resolve the dispute he faces, but that the judge must interpret the rules.

Ideally, the purpose of law is related to justice, expediency, and legal certainty, but in real terms there can be a clash between justice and legal certainty, and between justice and expediency. Sudikno also emphasized that every judicial decision is said to be ideal when it contains 3 (three) components of legal objectives as stated by Gustav Radbruch, the decision must contain elements of justice, benefit and legal certainty proportionally. Of the three, the issue of justice is the most frequently discussed issue. This is inseparable from the application of the law itself which is considered identical to the fulfillment of a sense of justice. In fact, according to some legal experts, it is not synonymous with justice, but rather the goal of fulfilling the law.

Legal thought needs to return to its basic philosophy, namely law for humans. With this philosophy, humans become the determinant and point of legal orientation. The law is in charge of serving humans, not the other way around. Therefore, the law is not an institution that is separated from human interests. For progressive law, the process of change is no longer centered onregulations, but on the creativity of legal actors to actualize the law in the right space and time.

In the opinion of Soetandyo Wignjosoebroto in his book "Paradigm Laws, Methods and Dynamics of the Problem", stated about the legal principles in his discussion of "Legal Study Methods with Laws Concepted as Principles of Justice in the Moral System of Natural Law Doctrine" states that the principle of justice which is in the moral realm generally formulated very general and often unwritten and open to any interpretation by anyone when it is needed, although generally formulated as mere principles, but this abstract norm in practice of life serves as a guide for people in behaving and behaving in everyday life.

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In some cases, problems can arise if the judge wants a decision that is fair to the plaintiff and the defendant, so that if the judge prioritizes interest in the decision, this does not benefit the general public. Often and vice versa, if the judge in his decision prioritizes the benefit of the wider people, then a sense of justice will be imposed on certain people only. The judge's decision will be useful not only when the judge actually applies the law and tends to seek justice, but also for the interests of the parties and society in general. In this sense, the principle of expediency is the goal of the application of the law.

Thus, so that the law can be said to fulfill justice, various measures or criteria of justice are needed. The basic measure or criteria of justice that is intended can be in the form of justice that applies anywhere and anytime, meaning that justice must be placed on the basis of a relative place and time so that balance will be realized in society, meaning that the judge's decision does not only provide justice for the disputing parties, but also other parties, especially the community:

The principle of freedom of judges means that in carrying out justice, judges are free to examine and decide a matter and are not intervened by other authorities. The freedom of judges is not absolute, and broadly, the freedom of judges is limited by the system of government, politics, and economy. In Indonesia, the freedom of judges is limited by Pancasila, the Constitution, laws, public order and morality, dignity, interests, or the will of the parties. In line with this view, freedom in running the judiciary is not absolute, because the mission of judges is to uphold law and justice based on Pancasila and their decisions reflect the sense of justice of the Indonesian people.

Although judicial power is the universal ideology of the rule of law and democratic society. However, as long as the application of the law becomes the basis for evaluating

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decisions, judges' freedom is more relative than absolute. Legally recognized freedom and independence in this case are limited only to support law and justice based on Pancasila. To fulfill this role, judges are granted the following relative freedoms of autonomy:

1. Seek and find the principles and principles that are used as the basis for weighing decisions;
2. Given the freedom to interpret the law in accordance with a justified system, not based and in a wrong way.

The relative freedom in which the decisions taken are limited to reflect the sense of justice of the Indonesian nation and people. Therefore, the judge's freedom to apply these provisions is not without limitations and remains bound to the correct standard. Judges can use ex aequo et bono and show that it should be based on merit or compliance. Then the suitability or propriety that is used as a basis is still within the framework of the primair petitum soul and the argument of the lawsuit. In the sense that it is inappropriate if the decision on the subsidiary's claim exceeds what is not required by the plaintiff in the primary lawsuit, or exceeds what is required.

Yahya Harahap mentions another reference in his book Civil Procedure Law. On the one hand, ex aequo et bono decisions may not exceed the principal petitum primair, so that the decisions taken do not violate the ultra petita outlined in Article 178 paragraph (3) of the HIR. On the other hand, the decision must not come at the expense of the Defendant's interests. Sudikno also stated that in adjudicating a case, judges are always faced with these three principles: the principle of legal certainty, the principle of convenience, and the principle of impartiality. According to him, the three principles must be implemented without compromise, namely by balancing the three, or according to the principle of priority in question, or according to the case.

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Court practice tends to make it difficult for judges to adapt these three principles into one decision. In this situation, the judge must choose one of three principles to decide the case, and it is not possible to include the three principles in the decision. According to Soetandyo Wignjosoebroto, in his discussion of legal principles in his book "Law Paradigms, Methods and Dynamics of the Problem", a method of studying law by using law conceptualized as the principle of justice in the moral system of natural law". The law of justice, which is generally formulated in the realm of decency, is generally very broadly formulated and generally only in the form of principles, but in many cases it is not written down and is required.

The application of the Aequo et Bono principle which is based on the principle of justice is very relevant to the sense of justice taught by Aristotle and John Rawls. In his understanding, Aristotle states that justice is a virtue related to the relationship between humans. Fair can mean according to law and what is proportionate and proper. A judge can be said to be fair when he makes a decision as it should.

Conclusion

The application of the Aequo et Bono principle which is based on the principle of justice with an approach towards the values of justice is justified to fulfill justice for the justice-seeking community. However, its implementation cannot simply be implemented. This is because the freedom of judges in making decisions relating to judicial authority is not absolute and tends to be relative. So there is a concrete benchmark as a stepping stone in order to apply the Aequo et Bono principle in the decision-making process. Although the regulation is still abstract, and has not become a positive law as the ultra petita principle, the application of the Aequo et Bono principle is still justified. This is inseparable from the function of the judiciary itself to enforce law and justice

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independently by understanding the values that live and develop in society. The principle of ex aequo et bono can be applied based on feasibility or propriety. Then the suitability or propriety that is used as a basis is still within the framework of the primair petitum soul and the argument of the lawsuit. In the sense that it is inappropriate if the decision on the subsidiary's claim exceeds what is not demanded by the plaintiff in the primary lawsuit, or exceeds what is demanded. The implication of the application of the ex aequo et bono principle is to provide more legal justice to the community because it will provide a way out of legal problems that occur so that it will bring justice not only to the disputing parties,

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