

ACTOR SEQUITUR FORUM REI: A THEORITICAL STUDY

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ABSTRACT

The *actor sequitur forum rei* principle is the primary basis for determining the relative competence of civil courts in countries that adopt civil law systems. In this article, the role of the *actor sequitur forum rei* will be examined theoretically by analyzing theories related to personal jurisdiction, categorization of jurisdiction, and procedural justice theory. The analysis results indicate that *actor sequitur forum rei* is founded on the theory of power and is classified as a "connected" jurisdiction with a general nature, as jurisdiction is linked to the defendant's domicile. It enables the defendant to be sued in the forum of their domicile at any time and for any reason. Additionally, according to procedural justice theory, *actor sequitur forum rei* is shown to provide the defendant with protective aspects.

Keywords: actor sequitur forum rei; civil court jurisdiction; personal jurisdiction; relative competence.

INTRODUCTION

The concept of the jurisdiction (English: jurisdiction; Latin: *ius-dicere, juris-dictio*)¹ is closely related to the existence of a set of legal rules and the authority to take action on behalf of the law.² This authority includes the power to create, apply, and enforce laws within territorial boundaries. In the study of international relations and politics, the concept of jurisdiction is closely linked to the concept of state sovereignty.³

In legal studies, particularly in the study of law in Indonesia, the concept of jurisdiction can have various meanings, namely: power, authority, competence, and jurisdictional area, with a gradation of essence between them. For example, the terms power and authority are more commonly used in the study of public law, particularly constitutional law, and administrative law, as one of the instruments that state authorities or public legal entities possess to carry out their functions.⁴ Meanwhile, the terms competence and jurisdictional area are more commonly interpreted in the study of procedural law. The term absolute competence specifically refers to the jurisdiction of a court to adjudicate certain types of cases. In contrast, relative competence is the territorial jurisdiction of a court to adjudicate a case based on the presence of a subject or the location of the object of the case.⁵ Without a legitimate authority or jurisdiction, the court's law enforcement, through its verdicts, will not receive legitimacy.

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¹ Emile Benveniste, *Dictionary of Indo-European Concepts Society*, HAU Books, Chicago: 2016, p. 395-404.

² Shaunnaugh Dorsett dan Shaun McVeigh, "Questions of jurisdiction", in: Shaun McVeigh (Ed.), *Jurisprudence of Jurisdiction*, Routledge-Cavendish, New York: 2007, p. 3.

³ Blandine Kriegel, *The State and the Rule of Law*, Princeton University Press, New Jersey: 2001, p. 15-32.

⁴ Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, Jilid II, Sekretariat Jenderal Mahkamah Konstitusi RI, Jakarta: 2006, pg. 11; Philipus M. Hadjon et al., *Pengantar Hukum Administrasi Indonesia*, UGM Press, Yogyakarta: 2008, p. 28.

⁵ Zainal Asikin, *Hukum Acara Perdata di Indonesia*, Prenadamedia Group, Jakarta: 2015, p. 88.

Personal jurisdiction refers to a court's authority to hear a case based on the legal status of the parties involved, which in Indonesian legal doctrine - as derived from Dutch legal doctrine - is known as relative competence.⁶ The concept of court jurisdiction is necessary to determine the appropriate forum in a multi-forum legal system. Hence jurisdiction is a structural concept used to allocate cases, set boundaries, and regulate the relationships between various forums.⁷

In the process of enforcing civil law in court, personal jurisdiction becomes a crucial issue in two aspects: (1) in the context of national civil procedural law; and (2) in the context of international civil law if there are foreign elements in the civil legal relationship. In the context of national civil procedural law, personal jurisdiction – or relative competence – is used to determine which first instance court has the authority to adjudicate and decide the case.⁸ On the other hand, if there are foreign elements in the civil legal relationship, personal jurisdiction becomes an issue in international civil law and is used to determine which court of which country has jurisdiction to adjudicate and decide the case.⁹ Personal jurisdiction is determined by the legal doctrine adopted, international conventions on international civil law that are binding on contracting states, and national civil procedural law regulations in a country.

The principle of *actor sequitur forum rei* serves as the basis standard for civil law countries to determine the personal jurisdiction of courts in civil cases. This article aims to identify and find the theoretical foundation of the *actor sequitur forum rei* principle. Therefore, the research questions to be addressed are: (1) What is the theoretical basis of the principle of *actor sequitur forum rei* the basis of personal jurisdiction of courts?; and (2) how does the theory of justice contribute to providing a foundation for the principle of *actor sequitur forum rei*?

METHODS

The research conducted to answer the problem statement is doctrinal legal research using a conceptual approach through a literature review. The research was conducted by gathering and documenting secondary data through the exploration of primary legal materials such as regulations or legal instruments relevant to the discussion, in this case, Regulation (EU) No. 1215/2012 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,¹⁰ Principles of

⁶ In Dutch legal doctrine, the term "*relatieve competentie*" is used to refer to the authority of a court based on territorial jurisdiction, which is then received as "*kompetensi relatif*" in Indonesian legal doctrine as "relative competence." In this writing, the terms personal jurisdiction, relative competence, and authority will be used interchangeably, referring to the same meaning. See: Marieke van Hooijdonk dan Peter Eijvoogel, *Litigation in the Netherlands*, Wolters Kluwer, The Hague: 2012, p. 19.

⁷ Scott Dodson, "Jurisdiction and Its Effects", *The Georgetown Law Journal*, Vol. 105, 2017, p. 621.

⁸ M. Yahya Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyidikan, Pembuktian dan Putusan Pengadilan*, Sinar Grafika, Jakarta: 2005, p. 179.

⁹ In international civil law, there are three main issues, namely: (1) which country's court has jurisdiction to hear and decide on a case; (2) which country's law applies to determine the rights and obligations of the parties; and (3) whether the decision can be recognized and enforced in another country. See: Arthur T. von Mehren, *Adjudicatory Authority in Private International Law*, The Hague Academy of International Law, The Netherlands: 2007, p. 1.

¹⁰ Regulation (EU) No. 1215/2012 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters is a regional-level regulation that applies to European Union member states and regulates issues related to court jurisdiction, as well as the recognition and enforcement of civil and commercial decisions.

Transnational Civil Procedure¹¹, and Rules of Transnational Civil Procedure¹²; and secondary legal materials in the form of expert opinions contained in reference books, legal academic journals, and research reports. The data collected was then analyzed using content analysis to sort and link its relevance to the discussion to obtain an answer to the problem statement. Conclusions will be drawn from the results of the analysis to determine which theory underlies *actor sequitur forum rei* so that the principle is theoretically justified.

DISCUSSION

Relational Theory, Power Theory, and Instrumental Theory.

Relational Theory, Power Theory, and Instrumental Theory In essence, no specific theory can comprehensively explain adjudicatory authority, and it is more likely a combination approach of existing theories.¹³ The theories regarding adjudicatory authority have developed from traditional societal relationships to more complex social relationships within the context of a sovereign state. Three theories have been developed to explain adjudicatory authority: relational theory, power theory, and instrumental theory.¹⁴

The relational theory was developed from feudal traditional societal relationships. According to relational theory, adjudicatory authority arises from the context of the relationship between lords and tenants. In this relationship, the tenant pledges loyalty to the lord, and in return, the lord provides protection and justice to the tenants.¹⁵

When the lords united and formed a hierarchical system led by a king, the monarchy system began to emerge, where state authority gained its justification in power theory to maintain and ensure societal order and security.¹⁶ This power theory is supported by Jean Bodin, Thomas Hobbes,¹⁷ and John Austin.¹⁸

In the next stage, deviating from the social contract developed by Thomas Hobbes, which required the formation of order and security through the people giving authority to the state;¹⁹ John Locke - and likewise, Jeremy Bentham - who held instrumental and utilitarian views, believed that the social contract to create order within society was not built on an agreement between the people and the ruler, but rather on free individuals within the society. These individuals make explicit or

¹¹Principles of Transnational Civil Procedure are principles adopted by the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) as standards in cross-border civil adjudication processes.

¹²Rules of Transnational Civil Procedure are model rules provided by ALI and UNIDROIT for adoption as civil procedure law, particularly in cross-border disputes.

¹³Arthur T. von Mehren, *Op.Cit.*, p. 19-21.

¹⁴*Ibid.*, p. 18.

¹⁵*Ibid.*, Milana Karayanidi, *Rethinking Judicial Jurisdiction in Private International Law: Party Autonomy, Categorical Equality and Sovereignty*, Hart Publishing, Oxford: 2020, p. 164.

¹⁶Arthur T. von Mehren, *Loc.Cit.*

¹⁷Richard Stanley Peters, *Hobbes*, Penguin, London: 1967, p. 43.

¹⁸Herbert Morris, "John Austin", in: Paul Edwards (Ed.), *Encyclopedia of Philosophy*, MacMillan, New York: 1967, p. 210.

¹⁹J.C.A. Gaskin, *Thomas Hobbes Leviathan*, Oxford University Press, Oxford: 1998, p. 117.

implicit agreements by forming legislative and executive bodies that exercise state power.²⁰ The instrumental theory is one of the bases for democratic countries to exercise their power based on the rule of law. However, the two previous theories - relational theory and power theory - still play a role in some aspects.

The problem arising from the three theories of adjudicatory authority is when faced with a case that is connected to more than one legal system. Based on the strictly applied relational theory, if one party has a social, political, and economic relationship with a forum, but the other party has no relationship with that forum at all, can that forum be said to have authority over both parties? In this case, the relational theory will only work if the parties have the same connection to a forum. In other words, a "lord" has the authority to decide only for their own "tenant".²¹ Based on this proposition, the relational theory is unable to provide a basis for adjudicatory authority when disputes involve parties of different nationalities (multistate situations).

A similar issue is faced by instrumental theory as well. The instrumental theory, which emphasizes consent, never assumes that individuals make agreements (social contracts) with more than one community; except in the same community, agreements to settle a dispute occur within different courts' jurisdiction.²² Based on the strict application of instrumental theory, the state court only has the authority to adjudicate parties who are citizens themselves because they are deemed to have made agreements to submit and be bound by the legal system in that country, while with foreigners - because they come from outside the system - instrumental theory considers that there is no such agreement. Instrumental theory, outside the concept of social contracts as a basis, provides a specific basis in the court's jurisdiction based on a choice of court agreement.

The power theory appears more capable of explaining the relationship between a forum and parties with different nationalities or domiciles. Simply put, the power theory only requires that the defendant is within the forum's territory. In contrast, the forum will have jurisdiction over the plaintiff when the plaintiff files a lawsuit through the forum, and thus, the plaintiff is deemed to have voluntarily submitted to the forum's power.²³

The Three Categories of Jurisdiction

These theories form the basis for determining the court's jurisdiction, along with the facts of the existing legal relationship, such as contracts, torts, bankruptcy, marriage, adoption, and custody. The jurisdiction regime of a civil case can be grouped into three categories: (a) "consensual" jurisdiction; (b) "connected" jurisdiction; and (c) "universal" jurisdiction.²⁴ The first two categories

²⁰James Gordon Clapp, "John Locke", in: Paul Edwards (Ed.), *Op.Cit.*, pg. 499-500; D.H. Monro, "Jeremy Bentham", in *Ibid.*, p. 284; William Uzgalis, "John Locke", in Edward N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy*, Spring 2020 Edition, <https://plato.stanford.edu/entries/locke/#SociContTheo>, [accessed on 15 February 2020].

²¹Arthur T. von Mehren, *Op.Cit.*, p. 20.

²²*Ibid.*, p. 21.

²³*Ibid.*

²⁴Jonathan Hill, "The Exercise of Jurisdiction in Private Internasional", in: Patrick Capps (Eds.), *Asserting Jurisdiction*, Hart Publishing, Portland: 2003, p. 49.

are the jurisdiction of the court in civil cases that can be found and applied in almost all countries, while the third category is the influence of public international law - although not yet widely accepted - which has recently developed in international civil law.²⁵

a. Consensual Jurisdiction

A court upholds consensual jurisdiction - without considering the fact of any connection between the subject matter of the dispute or the parties involved with a particular forum - when the parties voluntarily submit themselves to the jurisdiction of the relevant court. Submission to the jurisdiction of a court is made in two ways: (1) by explicitly agreeing to a forum selection clause (choice of forum); or (2) by an implicit agreement that arises when in a lawsuit, one of the parties (the defendant) does not immediately object to the jurisdiction of the court that is examining the dispute.²⁶

Although "consensual" jurisdiction is formed based on the agreement of the parties to choose a particular court forum, there are limitations that prevent the parties from agreeing to a forum for certain cases. These limitations can take the form of the type of case (*ratione materiae*) that is not within the jurisdiction of the selected court but rather the jurisdiction of another court; or a prohibition on choosing a forum based on the principle of exclusive jurisdiction, such as disputes over property rights (*ius in rem*) over an immovable property falling within the jurisdiction of the court located where the property is situated (*forum rei sitae*). Similarly, there may be a prohibition on making forum selection agreements to protect weaker parties in imbalanced legal relationships, such as consumer and labor disputes.²⁷

b. Connected Jurisdiction

Connected jurisdiction is a category of court jurisdiction over a dispute that generally applies in all countries.²⁸ It is recognized that, in the absence of any barrier that renders jurisdiction invalid, the court will have authority where there is a connection between the court's jurisdictional area and the subject matter or parties (subjects) of the dispute.²⁹ It should be emphasized that the connection is substantial. A lack of substantial connection may lead to the potential for parallel proceedings with another court, creating uncertainty and inefficiency in resolving the dispute. To avoid parallel proceedings (as the jurisdictional system is based on an open territorial principle), it is necessary to identify the basis for the legitimacy of a jurisdiction:

- 1) Exclusive connected jurisdiction

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Scott Dodson, *Op.Cit.*, p. 641. "Connected jurisdiction" according to Scott Dodson gives rise to "general jurisdiction" which requires "forum relationships", it is said: "*The Court's recent general-jurisdiction cases make personal jurisdiction's status as a doctrine of forum relationships clear. ... Even on the world stage, personal jurisdiction is about forum relationships, helping define boundaries and reduce friction between the authority of American courts and the authority of international tribunals.*"

²⁹ Jonathan Hill, *Op.Cit.*, p. 50.

Exclusive connected jurisdiction generally applies when the forum state strongly connects to the disputed subject matter.³⁰ Some types of cases that use exclusive connected jurisdiction include: (i) cases concerning rights in rem over immovable property, which falls under the jurisdiction of the forum where the property is located; (ii) cases concerning the status of a legal entity and the validity of its actions, which fall under the jurisdiction of the forum where the legal entity was established according to the law; (iii) cases related to registration on a public register, which fall under the jurisdiction of the forum where the register is held; and (iv) cases concerning intellectual property rights, which fall under the jurisdiction of the forum where the intellectual property is registered.³¹ This jurisdiction is "mandatory" and does not allow disputing parties to agree to choose another forum.

Exclusive connected jurisdiction has been accepted as a universal principle in the Principles of Transnational Civil Procedure, which states that the court where the movable property is located has jurisdiction over cases concerning the status of rights in rem over the property.³² Therefore, the court's jurisdiction in cases concerning the movable property is not based on the domicile or residence of the defendant but rather on the location of the movable property.

In Indonesia, which still applies dualism in regulating Civil Procedure Law, there are differences in the regulation of court jurisdiction in cases involving the movable property.³³ Article 118 paragraph (3) of the HIR, which applies in Java and Madura, regulates that if the defendant's domicile is known and the case involves movable property, the competent court is the court where the defendant's domicile is located (*forum rei*). The court where the movable property is located will only have jurisdiction if the defendant's domicile is unknown. Meanwhile, Article 148 paragraph (5) of the RBg, which applies outside Java and Madura, stipulates that the court with jurisdiction in disputes involving immovable property is the court where the immovable property is located (*forum rei sitae*), regardless of whether the defendant's domicile is known or not. In an effort to renew Indonesia's Civil Procedure Law towards achieving unified regulations,³⁴ it is necessary to adopt universally applicable principles, including the principle of exclusive jurisdiction of the court where the immovable property is located in the case to be examined relates to the status of the immovable property.

³⁰ *Ibid.*

³¹ Regulation (EU) No. 1215/2012, Article 24.

³² ALI/ UNIDROIT, Principles of Transnational Civil Procedure, Principle 2.1.2.

³³ Efa Laela Fakhriah, *Perbandingan HIR dan RBg Sebagai Hukum Acara Perdata Positif di Indonesia*, Cetakan Ke-2, Keni Media, Bandung: 2016, p. 207-209.

³⁴ Regarding efforts to reform Indonesian Civil Procedure Law., see: Badan Pembinaan Hukum Nasional (BPHN), *Hasil Penyelarasan Naskah Akademik Rancangan Undang-Undang Tentang Hukum Acara Perdata*, Kementerian Hukum dan Hak Asasi Manusia, Jakarta: 2019, https://www.bphn.go.id/data/documents/na_ruu_haper.pdf [accessed on 2 January 2023].

2) General or Specific Connected Jurisdiction

General Connected jurisdiction will have the consequence that the forum state will have the authority to examine all cases involving an individual. The place of residence of an individual will be a significant connecting factor determining general jurisdiction so that the court whose jurisdiction covers an individual's place of residence will have the authority to examine all cases related to that individual that place them as a defendant in a case.³⁵ This general jurisdiction is recognized in Article 4(1) of Regulation (EU) No. 1215/2012, which states:

“Subject to this regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”³⁶

Meanwhile, for legal entities, general jurisdiction lies with the forum state where the legal entity is registered and authorized or the forum state where the legal entity has its statutory seat according to its articles of association.³⁷ Regarding connected jurisdiction, the Principles of Transnational Civil Procedure establish the following standards:

“Jurisdiction over a party may be exercised – When there is a substantial connection between the forum state and the party or the transaction or occurrence in dispute. A substantial connection exists when a significant part of the transaction or occurrence in the forum state, when individual defendant is a habitual resident of the forum state or a jural entity has received its charter of organization or has its principal place of business therein, or when property to which the dispute relates is located in the forum state.”³⁸

In civil cases arising from personal rights (*rights personam*), a case can connect with several potential forums that may declare their jurisdiction over it. For example, in a business contract, the place where negotiations are conducted, the place where the contract is agreed upon, the place where the parties carry out their business activities, the place of contract performance, and the law of the country that applies to the contract may become forums that can claim jurisdiction.³⁹ It is where specific connected jurisdiction exists. In certain legal relationships,⁴⁰ a person can be sued outside of the forum with general jurisdiction (outside of the defendant's residence).

³⁵ Abba Mayss, *Principles of Conflict of Laws*, 3rd Edition, Cavendish Publishing, London: 1996, p. 53.

³⁶ Regulation (EU) No. 1215/2012, Article 4(1).

³⁷ ALI/ UNIDROIT, Rules of Transnational Civil Procedure, Rule 4.2.3.

³⁸ ALI/ UNIDROIT, Principles of Transnational Civil Procedure, Principle 2.1.2.

³⁹ Jonathan Hill, *Op.Cit.*, p. 51.

⁴⁰ In Regulation (EU) No. 1215/2012, Article 7, several legal relationships that may give rise to special jurisdiction are identified, including: contracts, torts, claims for damages, maintenance, civil claims related to criminal offenses, branches or agencies of a company, guardianship, and salvage in transport.

In a contract, the forum state where the contract is performed will have jurisdiction to adjudicate the case. It is based on the assumption that the place of contract performance is where the delivery of goods occurs or the service is provided.⁴¹ As for claims based on unlawful acts, the forum state where the loss occurs will have jurisdiction over the case.⁴²

3) Protective Connected Jurisdiction

In general, jurisdiction regulations in civil cases treat parties equally, so if a dispute arises from a contract, Party A can sue Party B in the forum state where Party B is domiciled or in the forum state where Party B should perform its obligations. In this case, Party A is considered to have the ability - both in terms of position and resources - to file a lawsuit against Party B in the established forum. However, in reality, there is a legal relationship where the parties positions are not equal, so if equal treatment is applied, it will cause injustice or difficulties for one party.⁴³ In conditions where the parties in a contractual legal relationship are not equal - both in terms of bargaining power and resource control - state intervention is required as a form of protection, including regulating protective connected jurisdiction.

In consumer contracts, between consumers and business actors, and employment contracts, between employees and employers, the parties' positions are not equal, for which protection is provided through the determination of protective connected jurisdiction. The regulation of protective connected jurisdiction has been adopted in Regulation (EU) No. 1215/2012. Protective connected jurisdiction in this regulation is also applied to disputes arising from insurance relationships to protect the insured party.⁴⁴

If a consumer wishes to sue a business actor, the consumer can sue in the forum state where the business actor is domiciled or in the forum state where the consumer is domiciled. The forum state where the branch office of the business actor is located is also considered as the domicile of the business actor, while for the consumer to be able to sue in the forum state where the consumer is domiciled, it is required that the business actor has a branch office there or intentionally markets its products within the territory of the forum state where the consumer is domiciled.⁴⁵ Meanwhile, if a business actor wishes to initiate a case by suing a consumer, the business actor can only sue in the forum state where the consumer is domiciled.⁴⁶

In Regulation (EU) No. 1215/2012 regarding disputes in the employment relationship, it is regulated that if an employee wants to sue an employer, the case can be under the jurisdiction of the forum state where the employer is domiciled, where the

⁴¹ Regulation (EU) No. 1215/2012, Article 7(1).

⁴² Regulation (EU) No. 1215/2012, Article 7(2).

⁴³ Jonathan Hill, *Op.Cit.*, p. 52.

⁴⁴ Regulation (EU) No. 1215/ 2012, Article 10, 11, 12, 13, 14, 15, 16.

⁴⁵ Regulation (EU) No. 1215/ 2012, Article 17, 18(1).

⁴⁶ Regulation (EU) No. 1215/ 2012, Article 18(2).

company branch is located, or where the employee usually performs their work.⁴⁷ Meanwhile, if the employer wishes to initiate a case by suing the employee, it can only be done in the forum state where the employee is domiciled.⁴⁸ Regulation (EU) No. 1215/2012, which regulates protective connected jurisdiction, is also applied to disputes arising from insurance relationships to protect the insured party.⁴⁹

c. Universal Jurisdiction

Traditionally, in public international law, certain crimes allow the perpetrator to be prosecuted in any country's court. This principle of universal jurisdiction applies to crimes such as piracy on the high seas⁵⁰ and now also to other types of international crimes, such as war crimes and crimes against humanity.⁵¹ However, it appears that universal jurisdiction has not yet had a significant impact on issues of international civil law, although the concept of universal jurisdiction has been proposed in the preliminary draft of The Hague Conference on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,⁵² suggesting that national courts, in certain circumstances, may exercise jurisdiction in civil cases if there is a violation of international law, even if there is no close connection between the case and the forum state.⁵³

The application of universal jurisdiction provides an opportunity for national courts that do not have factual connections to the case to declare that they have jurisdiction if a violation of international law is unacceptable in the context of civilized nations. In adjudicating civil law, a violation of international law may occur if the competent court has denied justice, such as denying access to justice, discriminatory treatment in the judicial process, intervention in the judicial process, or bias. In such situations, another national court based on universal jurisdiction may declare jurisdiction over the case and have the power to examine and decide it, even if the court has weaker connections to the case than the court that denied justice.⁵⁴

Redirection to Procedural Justice Theory

The determination of jurisdiction or authority of a court in a civil case also has an explanation based on the theory of procedural justice. The concept of justice refers to Aristotle's idea, which is divided into two types, namely "distributive justice" and "corrective justice". Distributive justice is

⁴⁷ Regulation (EU) No. 1215/ 2012, Article 20, 21.

⁴⁸ Regulation (EU) No. 1215/ 2012, Article 23.

⁴⁹ Regulation (EU) No. 1215/ 2012, Article 10, 11, 12, 13, 14, 15, 16.

⁵⁰ Max Sorenson (Ed.), *Manual of Public International Law*, Macmillan, London: 1968, p. 365.

⁵¹ Malcolm N. Shaw, *International Law*, 4th Edition, Grotius Publication, Cambridge: 1997, pg 473.

⁵² The Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1 February 1971.

⁵³ Jonathan Hill, *Op.Cit.*, p. 54.

⁵⁴ Zachary Douglas, "International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed", *International Comparative Quarterly*, Vol. 63, Issue 4, October 2014, p. 895.

related to the distribution of outcomes or resources among members of a social group according to their benefits and sacrifices, while corrective justice is related to restoring fairness when injustice occurs.⁵⁵ Referring to what was developed by Aristotle, the concept of procedural justice is related to the procedures in which social groups (including governments, private institutions, and families) apply the requirements of corrective and distributive justice to a specific case.⁵⁶ In the context of modern states, procedural justice is related to the adjudicative method, where legal norms are applied.⁵⁷ Furthermore, if focused on the civil justice system, procedural justice determines the conditions under which corrective justice norms in a case must be applied fairly.⁵⁸

In the civil justice system, the adjudicative law enforcement procedure in court is based on the civil procedural law that systematically regulates jurisdiction, the process of pleading and counter-pleading, evidence, verdict, and legal remedies for a higher court. The jurisdiction of the court that complies with the statutory provisions established by the authorities is one of the requirements for obtaining legitimate authority. Without legitimate authority, the entire process has no legal force. Such a view is solely based on the theory of power. On the other hand, procedural justice theory suggests that the process must involve the participation of the litigants in the entire law enforcement process. With such participation, the litigants are bound by the court's verdict and will comply voluntarily.⁵⁹ Christopher Peters analogizes the participation of the litigants in the adjudication process in court to the formation of laws by the legislature.

“judicial decisions are to a very great extent products not of the unilateral decree of a judge or panel judges, but rather of a process of participation and debate among the parties to the case that greatly restricts the decisional options available to the court. In this sense, judicial resemble the decisions made by a democratic legislature after debate and a fair hearing at which all relevant views have been aired.”⁶⁰

In the context of procedural justice theory, the court's personal jurisdiction is a necessary authority that must be accessible to the parties involved to allow them to participate in the adjudication process.

The availability of jurisdiction to the parties enables them to argue their respective positions and strengthen their arguments while proving their case. This, in turn, provides the judge as the adjudicator with sufficient information about the case being adjudicated, allowing the judge to make rational and legally sound decisions to enhance the accuracy of the ruling on the substantive issue being sought. Thus, three aspects of procedural justice are achieved through the participation of parties: first, providing equal opportunities for the parties to express their opinions and prove them

⁵⁵J.A. Smith dan W.D. Ross (Eds.), *The Works of Aristotle*, Vol. V, Oxford University Press, Oxford: 1949, p. 1131b25-1132b20.

⁵⁶Lawrence B. Solum, “Procedural Justice”, *Southern California Law Review*, Vol. 78, No. 1, 2004, p. 238.

⁵⁷*Ibid.*

⁵⁸*Ibid.*

⁵⁹*Ibid.*, p. 278-279.

⁶⁰Christopher J. Peters, “Adjudication as Representation”, *Columbia Law Review*, Vol. 97, No. 2, 1997, p. 347.

in the adjudicative forum;⁶¹ second, based on the arguments and evidence presented by the parties, the judge will be able to accurately decide on the substance of the issue; and third, with participation and high accuracy in the ruling, the decision gains legitimacy to bind the parties and create obligations for them to comply with it.⁶²

The Role of Actor Sequitur Forum Rei Principle

The *Actor Sequitur Forum Rei* principle is the main basis for determining the relative competence of civil court jurisdictions in countries that adopt the civil law system, such as Germany, France, the Netherlands, and Indonesia. This principle uses the domicile or residence of the defendant as a reference to determine the competent court forum to examine and adjudicate the lawsuit. The use of domicile or residence as a reference is based on the legal concept that it signifies where a person (legal subject) is always present to exercise their rights and obligations, even if in reality, they are physically absent from that place.⁶³

The defendant's presence within a court's jurisdiction is an important factor in determining the court's jurisdiction over the defendant. It also applies to courts in common law countries with different standards or criteria. While courts in civil law countries use domicile or residence as a reference, common law systems apply the doctrine of the defendant's physical presence to determine jurisdiction. Traditionally, courts in England have followed the doctrine that anyone can petition an English court to declare its jurisdiction in an in personam case against a defendant who is physically present in the court's territorial jurisdiction, even if the defendant is just passing through (fleeting the stay) without intending to make that place his or her domicile or residence.⁶⁴ The English court will assert jurisdiction as long as the writ of summons is properly served on the defendant. In this case, it is not required that the plaintiff or defendant have any particular connection to the territorial jurisdiction of England as long as the defendant is physically present within that jurisdiction.⁶⁵

As a balancing mechanism against the doctrine of physical presence applied by English courts, the defendant is allowed to raise an objection using the doctrine of forum non-conveniens by arguing and proving that: (a) there is another more appropriate forum and justice can be more easily and inexpensively achieved; and (b) pursuing jurisdiction in another forum will not prevent the plaintiff from obtaining the justice that should be obtained if the lawsuit were filed in an United Kingdom's

⁶¹This aspect is in line with and necessary to fulfill the requirement of natural justice, *audi alteram partem*, see: Lawrence B. Solum, "Natural Justice", *The American Journal of Jurisprudence*, Vol. 51, Januari 2007, g. 65-105.

⁶²Lawrence B. Solum, *Op.Cit.*, (Note 52), p. 273; Tom R. Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law", *Crime and Justice*, Vol. 30, 2003, p. 283.

⁶³Sri Soedewi Masjchoen Sofwan, *Hukum Badan Pribadi*, Yayasan Badan Penerbit Gadjah Mada, Yogyakarta: 1972, p. 23; Soetojo Prawirohamidjojo, *Hukum Orang dan Keluarga*, Airlangga University Press, Surabaya: 1991, p. 12; H.F.A. Vollmar, *Pengantar Studi Hukum Perdata*, terjemahan oleh I.S. Adiwimarta dari judul asli, *Inleiding tot de Studie van het Nederlands Burgerlijk Recht*, Rajawali, Jakarta: 1983, p. 44.

⁶⁴John O'Brien, *Conflict f Laws*, Cavendish Publishing, London: 1999, p. 181-182.

⁶⁵*Ibid.*, p. 182.

court.⁶⁶ In its development, the doctrine of forum non-conveniens was reformulated by establishing three questions to test objections based on the doctrine, namely: (a) is there another forum?; (b) is the UK forum or foreign forum more appropriate?; and (c) if UK is not the appropriate forum, are there justice interests that require the plaintiff not to be required to pursue litigation in a foreign forum?⁶⁷ In the last two statements, the court must balance various existing factors while applying these criteria that may differ from one case to another.⁶⁸

Based on the series of theories that have been proposed, the principle of *actor sequitur forum rei* finds its basis as personal jurisdiction in civil cases according to the power theory. However, there is some influence on certain aspects based on the relational theory. In the view of the power theory, the *actor sequitur forum rei* places the presence of the defendant who resides within a country's territory under the power of that country. Through the courts of that country, the plaintiff seeks to have that power exercised over the defendant or their assets.⁶⁹ Meanwhile, by filing a lawsuit in the defendant's place of residence, the plaintiff has submitted to the authority of that court. On the other hand, *actor sequitur forum rei* makes the forum where the defendant resides a jurisdiction that the plaintiff can always use - generally and under any circumstances - and simultaneously, the defendant cannot evade a lawsuit filed in the forum where they reside.⁷⁰

The *actor sequitur forum rei* principle also has a protective aspect for the defendant. The principle requires the plaintiff to "come to" the forum where the defendant resides or is domiciled, so there is a burden that the plaintiff must bear as the initiating party. In contrast, for the defendant, this principle allows them to become more "accustomed" to the forum, meaning they have a better understanding of the laws, traditions, and language that apply in the forum. The costs are lower because the defendant does not have to attend a forum outside their residence or domicile. In terms of jurisdiction categories, *actor sequitur forum rei* is a "connected" and general jurisdiction category, which means that in all types of cases and at any time, the defendant can always be sued in the forum where they reside or are domiciled, and the defendant cannot argue that the court does not have personal jurisdiction over them.

CLOSING

The *actor sequitur forum rei* principle serves as the foundation for a court's jurisdiction in civil cases. This principle is based on the theory of power, which focuses on the defendant's presence in the forum's jurisdiction, while the plaintiff who files the lawsuit in that forum is considered to submit

⁶⁶ *MacShannon v. Rockware Glass Ltd.* [1978] AC 795 (Lord Diplock).

⁶⁷ *Spiliada Maritime Corporations v. Consulex Ltd.* [1987] AC 460. See: John O'Brien, *Op.cit.*, p. 202.

⁶⁸ *Ibid.* See also: Ronald A. Brand dan Scott R. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under The Hague Convention of Court Agreement*, Oxford University Press, New York: 2007, p. 22.

⁶⁹ Ralf Michaels, "Jurisdiction Foundations", in Jurgen Basedow et al., *Elgar Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham: 2016, tersedia di https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6386&context=faculty_scholarship, pg. 14-15. See: Arthur T. von Mehren, *Op.Cit.*, pg. 161. See also: Alan Reed, "Optimal Rule-Selection Principles in Anglo-American Contractual Jurisdiction", *Tauro International Law Review*, Vol. 11, 2008, p. 26.

⁷⁰ Ralf Michaels, *Op.Cit.* p. 11.

to the authority of that forum. The theory of power provides a basis, especially when the parties involved are subject to different legal jurisdictions.

The defendant's domicile or place of residence serves as a substantial connection for the principle of *actor sequitur forum rei* to determine the competent forum. The jurisdiction of this forum falls under the category of connected and general jurisdiction so that in almost all types of civil cases, the defendant can be sued in the court whose jurisdiction includes the defendant's domicile or place of residence. The principle of *actor sequitur forum rei* also has a basis in the theory of justice, specifically procedural justice, which requires parties to easily access the forum and present their arguments and evidence in the case.

The role of the principle of *actor sequitur forum rei* as the basis for determining the jurisdiction of a court in civil cases can be maintained because it has a theoretical foundation in both the theory of power and the theory of procedural justice. However, exceptions need to be regulated in certain situations to realize procedural justice. For example, to protect the weaker party in a civil legal relationship, such as the relationship between consumers and businesses or employees and employers, it is necessary to regulate that the court where the weaker party is located has jurisdiction over disputes in that legal relationship. It provides easier access to justice through the judiciary for the weaker party.

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