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The Role of Judges in Guaranteeing Legal Certainty and Justice: An Analysis to the Application of Judicial Independence Principle in Criminal Cases in Indonesia

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Abstract: The duty and obligation of a state based on law is to provide protection for the public from all possible crimes, so that the state has a role in conducting prevention and repression of crime, and this cannot be separated from the implementation of criminal law by the state, as a tool to protect the public. The authority of the state to provide criminal sanctions is then delegated to law enforcement officers working in a system known as the Criminal Justice System. The criminal justice system itself is strongly influenced by the community environment and the field of human life. Therefore, the criminal justice system will always experience interaction, interconnection, and interdependence with its environment and sub-systems of the criminal justice system itself. One of the supporting sub-systems that have a very important role in implementing the criminal justice system is the court, which contains judges who are authorized by law to adjudicate. Judges in their capacity as authorities in the legal field have freedom as a form of independence in carrying out their duties. This independence does not mean that judges are freed from all obligations and responsibilities, but the independence of judges has the meaning of their existence as bearers of moral responsibility for upholding justice. This paper discusses the role of judges in ensuring legal certainty and justice in society, especially in handling criminal cases. This paper uses normative and philosophical analysis to the application of judicial independence principle in adjudicating criminal cases in the Indonesian criminal justice system.

Keywords: *the role of judges, legal certainty, justice, the principle of judicial independence, criminal justice system*

A. Introduction

The 1945 Constitution of the Republic of Indonesia (the 1945 Constitution) through Article 1 paragraph (3) stipulates that the Indonesian state is a legal state. The article affirms that the Indonesian state is based on law (*rechtsstaat*), and is not based on mere power (*machtstaat*). As a democratic legal state based on Pancasila and the 1945 Constitution, the Indonesian state upholds human rights and guarantees all citizens at the same time in

law and government, and the state must uphold the law and government with no exceptions. The law determines what must be done, what can be done and what is prohibited to do. The legal objectives to be addressed are not only people who are clearly acting against the law, but also legal actions that may occur, and to state officials to act according to the law. Such a system of legal operation is one form of law enforcement. The nature of the law rests on the idea of justice and moral strength. The idea

of justice is never separated from a legal connection, because talking about the law whether it is clear or vague is always talk about justice. Moral strength is also an element of legal nature because, without morality, it loses its supremacy and independent character. Justice and injustice according to the law will be measured and judged by morality, and morality refers to human dignity. The law only becomes law when fulfilling the principles of justice. The relationship between law and morality leads to the emergence of a formulation that the law cannot be separated from the idea of justice and moral concepts so that the law itself is not tyrannical, morally evil and far from justice. The relationship will have value and benefits if it is realized in moral law and material law, and it is applied in social life (Hartanti, 2007, p. 1).

Justice in the ideals of the law is a struggle of the human revolution which follows the rhythm of the times and space, from the past until now without stopping and it will continue until humans do not engage in activities anymore. Humans as creatures of God that consist of spirit and body have the power of feeling and the power of thought which are both spiritual power, where sense can function to control the decisions of reason to walk above moral values such as good and bad, because what can determine good and bad is the sense of heart (Rasjidi & Cawidu, 1998, p. 17).

Laws written in regulations and laws in unwritten rules are basically abstract and applied to the general public, whereas concrete law is a law that has been applied to certain cases. Courts through judicial decisions play a role in transforming ideas that originate from abstract moral values into concrete events so that the judge's decision actually visualizes abstract principles becomes a concrete rule of law. For example a criminal policy against narcotics abuse, in the case of someone who uses narcotics without rights and against the law for himself in the minimum limit of ownership for consumption one day. This is clearly different from the criminal acts of

narcotics abuse in the category of people who are without rights and against the law of having narcotics and then distributing them illegally (Ariyanti, 2017, p. 254).

Judges' decisions are basically made in order to provide answers to the legal problems posed to them. Because the judges are considered to always know the law (*ius curia novit*), then the judges' decision must contain adequate considerations, which can be accepted reasonably among scientific forums, the wider community, and litigant parties. The judges need to examine in order for the decision to be in line with the doctrine of legal science (Witanto & Kutawaringin, 2013, p. 128).

Determination of conviction is the authority of the judges. Even on this issue, no one can influence the will of the judges in determining how much criminal punishment is appropriate for the accused. It is not surprising that in criminal cases there is often a criminal disparity because the imposition of sentences from each judge will not be the same because the area of conscience is the most abstract area in a dimension of the judge's authority. Limiting the independence of judges in expressing the legal logic of each particular case will ultimately only hamper the process of seeking the true values of justice, even though independence does not mean that it can be carried out freely without being accompanied by juridical responsibilities. The method of interpretation and legal discovery is an attempt for the judge to explore hidden legal meanings, but if that is not possible, the judge must create his own law by setting aside existing rules and creating laws that are deemed to provide good and benefit to the parties in particular and the public (society) in general. Judges must have independence and complete freedom in making decisions. They are free to determine their beliefs based on the evidence presented before the trial, beyond that framework, there must be no things that can affect them in making a decision (Moerad, 2005, p. 24).

Many of the criminal cases decisions are different from the minimum criminal

provisions, for example, cases of corruption, where law enforcement against corruption crimes should be carried out explicitly, comprehensively, sustainably, and with legal breakthroughs (by way of extraordinary way) (Ariyanti, 2015, p. 168). This then raises questions that are often debated among practitioners and academics, namely in relation to the principle of judicial independence, whether the judges may decide a criminal case overriding the provisions of the law, and the judge determines his/her own decision fairly according to his/her own considerations. Maybe for the followers of positivism, they will firmly oppose it because this view assumes that the law is only written regulations, in this case, the law, and the judges may not get out of the provisions outlined by the law (Witanto & Kutawaringin, 2013, p. 122).

It is different if the issue is examined based on the progressive law school as initiated by Satjipto Rahardjo, that the law should keep up with the times; with all the principles in it based on the spirit of following the times that the idea of legal progression is built (Rahardjo, *Membedah Hukum Progresif*, 2006, p. 4). For followers of the progressive law school, it is not forbidden for judges to deviate the law if justice can be obtained by deviating from the law and precisely justice will emerge if the provisions in the legislation are applied. The idea of Satjipto Rahardjo is more to see this legal phenomenon as a reality, meaning that the law is not something that is very perfect and will certainly bring justice if applied as it is, but Satjipto Rahardjo's thoughts emphasize the fact that the law is for human beings, not the other way around those human beings for the law.

Still according to Satjipto Rahardjo, based on legal science, an important part of the trial process occurs when the judge checks and adjudicates a case. Basically what the judges do is to examine the facts that occur, and punish a defendant with applicable regulations. When it is decided about how or what the law is for a case, then at that time law enforcement reaches its peak. By Hans Kelsen

the process of law enforcement carried out by such judges is referred to as *konkretisierung* (concretization) (Rahadjo, 1996, pp. 182-183). In addition, Oemar Senoadji says that in carrying out the principle of judicial independence in order to be able to make the right decision, the judges use an interpretation of *rechtsverfijning* (legal refinement) and do a legal construction as proficiently as possible. Jurists generally and judges, in particular, must go into the midst of the society to know, feel and be able to explore the legal feelings and sense of justice that lives in the society (Kartono, 1982, p. 43).

The absence of a formulation on the rules/guidelines for punishment, especially in special laws outside the Criminal Code which include specific crimes in the formulation of offenses, will cause problems in its application, at least when a judge, who hears the special criminal case, is faced with many factors that alleviate the criminal (Umam, 2010, p. 16). It is here that the importance of the principle of judicial independence in resolving cases based on the justice that is to be achieved. This paper discusses the role of the judge in ensuring legal certainty and justice in society, particularly in dealing with criminal matters. This paper uses normative and philosophical analysis of the application of the principle of judicial independence in the criminal proceedings in the criminal justice system of Indonesia.

B. The Principle of Judicial Independence and the Methods of Legal Finding in Criminal Law

Judicial independence is one of the important principles in the concept of the rule of law. Based on the provisions of Article 1 paragraph (3) the Third Amendment to the 1945 Constitution, the state of Indonesia is a state of law. According to Miriam Budiardjo, one of the characteristics of the rule of law is the principle of the implementation of independent judicial power that is guaranteed constitutionally (Budiardjo, 1982, p. 50).

Based on the provisions of Article 24 paragraph (1) the Third Amendment to the 1945 Constitution, it is constitutionally stated that judicial power is one of the State's powers in conducting judicial proceedings. The provisions of this Article are then re-stated in Article 1 number 1 of Law No. 48 of 2009 concerning Judicial Power, in which the article states that judicial power is the power of an independent State to hold a judiciary in order to uphold law and justice based on the Pancasila and the Constitution of the Republic of Indonesia for the sake of the law of the Republic of Indonesia.

The independent judicial power is a universal principle because basically every state knows the principle of freedom in judicial power, only the form and content differ from one another. The principle of judicial independence is poured into Article 1 paragraph 1 and Article 3 of Judicial Power Act, which forbids any interference by other parties in judicial affairs, except in the cases referred to the Constitution of the Republic of Indonesia. According to Oemar Seno Adji, as quoted by Adonara, the independence of judicial power can be seen from 2 (two) angles, namely: *zakelijk* or functional independence and *persoonlijk* (personal) or *rechtspostionele* (legal status) independence (Adonara, 2015, p. 225).

From these two things, there are at least two aspects that need to be understood; firstly, the independence of judicial power in the narrow sense which means institutional power or in another sense is called structural independence. Secondly, the independence of judicial power in a broad sense also means individual independence or functional independence or normative independence (Adonara, 2015, p. 225).

Judges are one of the predicates attached to a person who has a job with specific specifications in the field of law and justice so that many judges intersect with issues regarding freedom and justice in the context of decisions made on cases (Kamil, 2012, p. 169). To be able to impose a fair judgment, it requires

independent and autonomous moral integrity that is always attached to a judge. The independence of judges is the freedom to determine a court decision on a trial case, which requires that the decision taken must consider the objectivity of the decision without pressure from any party (Kamil, 2012, p. 174). The attitude and actions that must be taken do not stand in the empty space, but they must be accountable for the true values of humanity, for the duty that is the obligation, and for the expectations of others. The attitude taken freely is only adequate if it is in accordance with that objective responsibility (Suseno, 1983, p. 40).

A judge in making a decision on a case that is handled must be based on his ability to think and will freely but in the limitation of responsibility. This means that the position of the judge must make a decision that can be accounted for on the basis of the expectations of others without reducing its objectivity. The basic moral principles used in human existential freedom, especially for judges, must be realized first (Kamil, 2012, p. 170).

In determining the sentence against the defendant, the judge besides being guided by legislation is also given the freedom to determine fair sentences based on a measure of justice according to his/her conscience. The measure of punishment is not the result of juridical analysis, because juridical analysis in the process of legal consideration will stop when determining someone is guilty or not, whereas when a defendant has been proven guilty, then the criminal imposition will be based on the judge's conscience according to the value of justice he/she believes (Witanto & Kutawaringin, 2013, p. 128).

Through his/her independence, a judge will use objective considerations to decide the demands of society on the basis of the demands of justice. It is clear to a judge that the decisions taken must meet the demands and expectations of others, which means the objectivity of the judge becomes the control of the decisions that will be made (Kamil, 2012, p. 171).

C. Legal Interpretation and Principles of Law Finding in Criminal Law

Legal interpretation is an approach to law findings in terms of existing regulations but it is not clear to be applied to a case. Conversely, it can also happen that the judges must examine and hear cases that have no specific rules. In this case, the judges face vacuum or incomplete laws that must be filled or completed, because the judges may not refuse to examine and hear cases on the grounds that there is no law or not complete law. The judge found the law to fill the legal vacuum (Mertokusumo, 2009, p. 37).

The discovery of the law by a judge according to Sudikno Mertokusumo is a process of forming a law by a judge or other legal officers who are given the task of applying the law against concrete legal cases. In other words, it is a concretization process or individualization of legal regulations (*das sollen*), which are general in nature by remembering certain concrete cases (*das sein*). What is important in the discovery of law is how to find the law for concrete cases (Mertokusumo, 2009, p. 37). Whereas according to J.A. Pontier, law finding is a reaction to the problematic situations that people describe in legal terms. Moreover, Pontier states that law finding is directed at giving answers to questions about the law caused by concrete cases (Pontier, 2008, p. 1).

There are two important elements in the discovery of law. Firstly, law/source of law, and secondly is a fact. Initially, the element of law/source of law in the law finding is the acts (laws). This is related to a postulate known as "*De wet is onschendbaar*" (the law cannot be contested) which in Dutch law is explicitly stated in Article 120 *Grondwet*. However, in its development, not all rules are found in the law (the act) (Pontier, 2008, p. 18). Therefore, the element of law/source of law in the law finding does not only cover the acts, but also other sources of law, namely doctrine, jurisprudence, agreement, and customs (Hiariej, 2009, p. 56).

The method of law finding that can be carried out by judges in the practice of justice according to Achmad Ali is divided into two types, namely the law finding with an interpretation method and law finding with a construction method (Hiariej, 2009, p. 56). The method of interpretation is a method for interpreting unclear legal texts so that the legislation can be applied to certain concrete cases (Sutiyoso, 2015, p. 106). Whereas what is meant by the construction method is logical reasoning to develop a provision in the law that no longer adheres to words, but one still has to pay attention to the law as a system (Mas, 2014, p. 159).

The law finding, according to Sudikno Mertokusumo, can be divided into two types, namely (Mertokusumo, 2009, pp. 43-44):

1. Heteronomous law finding is if the judge's discovery of the law is fully subject to the act, the judges only stipulate that the law can be applied to the concrete cases, and then the judges apply it according to the sound of the law.
2. Autonomous law finding is if the judge in making his/her decision is guided by his/her views, understanding, experience and observations or thoughts. Thus, the judges decide on a case that he/she has dealt with according to personal appreciation, without being absolutely bound to the provisions of the law.

According to Eddy O.S. Hiariej, in the context of law finding in criminal law, what is always a problem is how to apply legal regulations that are general in nature to concrete cases. In other words, the biggest problem with the law finding in criminal law is the way to find the law, whether by way of interpretation or analogy (Hiariej, 2009, p. 58).

D. The Concept of Justice and the Judicial Independence in Making Criminal Decisions

The ultimate goal of a judge's decision is to provide justice. The freedom of the judge in carrying out criminal charges is strongly related to justice, because the judge may not use his freedom arbitrarily and freely. The freedom of the judge in its application must be limited by the values of justice. Essentially in the discourse of justice, the justice can be seen in two main meanings, namely in a formal sense that demands that the law applies in general, and in the material sense that demands that each law must be in accordance with the ideals of justice of society (Suseno, 1983, p. 81). If it is viewed in a broader context, the idea of justice develops with a different approach, because the discussion of justice contained in many kinds of literature is impossible without involving existing moral, political and legal theories. Therefore, a single explanation of justice is almost difficult to do (M. Manullang, 2007, p. 96).

In the 19th century, Hans Kelsen developed the Pure Theory of Law. Justice according to Kelsen is a social order that regulates reciprocal relations between humans, which may be realized but does not have to be realized. Justice is a human beings' norm if their behavior is in accordance with the norms of a social order that is seen as fair, that is if the social order that governs the behavior of its members can satisfy everyone (Taufiq, 2014, p. 21). According to Kelsen, Pure Theory of Law is a theory of positive law, it seeks to question and answer the question, "what is the law" and not "how is the law supposed to be". Because of such a starting point, Kelsen argues that justice, as is usually questioned, should be excluded from the law (Rahardjo, 2006, p. 278).

John Rawls builds a theory of justice carefully, in which for him justice does not only cover the moral concept of the individual but also questions the mechanism of achieving justice itself, including how the law contributes to this effort (M. Manullang, 2007, p. 99). Based

on this principle, Rawls emphasizes that the formal elements of justice basically consist of values that direct each party to provide protection for rights guaranteed by law (elements of rights), and this protection must ultimately benefit each individual (elements of benefit) (M. Manullang, 2007, p. 100).

Justice is one of the goals of every legal system, even the most important goal. There are still other legal objectives that are also always the cornerstone of the law, namely legal certainty, expediency, and order. Besides the purpose of the law, justice can also be seen as a value. For good human life, there are four important foundations, namely: justice, truth, law, and morality. However, from the four values, according to the great Greek philosopher, Plato, justice is the highest virtue. According to Plato, "Justice is supreme virtue that harmonizes all other virtues" (Fuady, 2003, p. 52).

John Rawls emphasizes the importance of seeing justice as the main virtue that must be held firmly and at the same time become the basic spirit of various social institutions of a society. Treating justice as a primary virtue means providing equal opportunities for everyone to develop and enjoy their dignity as human beings. Self-esteem and human dignity cannot be measured by economic wealth, so it must be understood that justice extends beyond one's economic status. High and noble human dignity is characterized by freedom. Therefore, freedom must be prioritized compared to economic benefits that can be achieved by someone (Udjan, 2001, pp. 22-23).

As mentioned above, justice is one of the objectives of the law. The purpose of the law is not only justice but also legal certainty and expediency. Ideally, the law does have to accommodate all the three. The nature of law rests on the idea of justice and moral strength. The idea of justice has never been separated from the legal connection, because talking about the law whether clear or vague is always a discussion of justice. Legal rules that contain the values of justice will make it easier for

judges to carry out their decisions because, with high moral integration, judges can apply the rule of law. However, if the legal rules are vague for judges, then the opportunity is open to making decisions based on justice by exploring the legal values that live in society.

The judge's decision in a criminal case will be the verdict of the panel of judges and then it will be the court's decision to hear and decide the case in question. In the trial process, after completion of the examination, the judge will give a verdict in the following matters (Rifai, 2011, p. 94):

1. Punishment if the defendant is found guilty of a crime charged to him/her;
2. Free if based on the results of the examination in the hearing, the defendant's fault for the action he was indicted is not legally and convincingly proven;
3. Released from the lawsuits if the acts charged to the defendant is proven but the act is not a criminal offense.

In his/her decision, the judge is also guided by 3 (three) things, namely: the juridical element which is the first and foremost element; philosophical element, which has the essence of truth and justice; and sociological elements, namely considering cultural values that live and develop in society. The consideration of the judge who creates a fair ruling, in essence, is like the law made by the judge. Therefore, the judge working in the judiciary is a central figure. The aim of the judge is to give consideration in a decision because there must be a valuable consideration. Legal consideration will be full of value if the consideration meets the element of justice, expediency, and certainty. In fact, if there is a clash in the choice of a sense of justice, benefit, and certainty, the judge must be able to prioritize the choice of the value of justice.

The meaning of justice has different meanings because justice can be seen from the side of individuals, groups, and society (Rifai, 2011, p. 135). A judge should not only see

justice from a subjective side, but judges are required to be professionally objective. Judges who meet objective and professional legal considerations will make decisions solely for justice. Justice, as explained before, is the purpose of making law. A good judge's decision is good law. One of the objectives of the judge is to decide a decision because the judge can find a law. One of the duties of a judge as a law enforcer is to make a legal discovery of the case he is handling. In making legal discoveries, a judge should properly pay attention to the concrete legal facts that occur (*das sein*). The concrete facts are then concretized again in the process of establishing a good rule of law (*das sollen*) in order to be able to create the right consideration and conclusion of the decision.

The independence of judges in adjudicating criminal cases that aim to produce a just and accepted decision by the community needs to be guaranteed protection, so that there is no intervention of power and interests. Decisions made on the basis of the rationality of objective legal arguments and strong ethical moral content can be accounted for by justice seekers. Legal guarantees on the freedom of judges in carrying out judicial functions are regulated in the state constitution and laws (Setyanegara, 2013, p. 467).

Regulations on the independence of judges in prosecuting are also regulated in international conventions that guarantee the independence of judges to try and guarantee immunity from all lawsuits. Legal guarantees on the freedom of judges in judging from judicial principles include *ius curia novit* (judges are considered to know the law), *res judicata pro veritate habetur* (judge's decision is always considered correct). Whereas in judging, the judges are acquitted of all lawsuits if the judges are deemed to have committed a juridical technical error, not ethics and morals (Setyanegara, 2013, p. 468).

The independence of judges in imposing criminal sanctions is not without limits. Eva Achjani Zulfa says that there is a principle "*nulla poena sine lege*" that gives a limit to the

judges in deciding criminal sanctions based on the provisions. Although there are provisions, the issue of disparity will still occur because the distance between the minimum criminal sanctions and the maximum sanctions in the provision is too large (Zulfa & Adji, 2011, p. 33). For example, there are two people who commit acts of narcotics abuse for themselves with the same evidence and conditions that are almost the same, for example, just one-time use. Even though the judges both use Article 127 of Law Number 35 of 2009 concerning Narcotics, the sentence imposed may be different (Ariyanti, 2018, p. 32).

The disparity in judges' decisions may also have an effect on the perspective and assessment of the judiciary. It can be seen as a manifestation of injustices felt by some people. However, Andrew Ashworth said that the disparity of decisions cannot be separated from the discretion of judges in imposing sentences in criminal cases (Ashworth, 2005, p. 72). In Indonesia, the disparity in punishment is closely related to the independence of judges. In the verdict, the judge should not interfere with any party. Law Number 48 the Year 2009 on Judicial Power states that a judge shall explore, and understand the legal values and sense of justice in society. In addition, the punishment model regulated in legislation (the formulation of maximum criminal sanctions) also contributes. Even the judges are also obliged to consider the good and bad nature of defendants.

Eliminating the difference between judges' decisions for similar cases is not possible. During this time, efforts made are to minimize disparity by means of making criminal guidelines (sentencing guidelines). The discretion of the judge is very likely misused, so those sentencing guidelines are considered as the best way to limit the independence of judges. The criminal guideline, according to Andrew Asworth, must be a "strong and restrictive guideline" (Ashworth, 2005, p. 101). Likewise, Eva Achjani Zulfa says that the idea of deciding proportional criminal punishment

evolves into the idea of making sentencing guidelines that could reduce the subjectivity of judges in deciding the case (Zulfa & Adji, 2011, pp. 37-38). Judges are legal officers who determine the most sense of justice for the community.

E. Conclusion

The judges' interpretation of the application of the principle of the judges' independence in carrying out criminal convictions is strongly influenced by the paradigm of judges in understanding law both from the dimensions of ontology and axiology, as well as epistemology. Interpretation of the principle of the independence of judges is divided into two views: firstly, the principle of the independence of judges in carrying out criminal convictions must be guided by criminal provisions in the law and may not deviate from the minimum criminal provisions; secondly, the principle of independence of judges in carrying out criminal convictions should not be read and interpreted rigidly, so that in imposing a sentencing verdict on a defendant, the judge must base his/her reasons on the level of the defendant's guilt and not be bound by the minimum criminal sanctions, because the highest reference made by the judges is the value of justice.

Judges, as the spearhead of the enforcement of justice, need to have the same perception about the application of the judges' independence principle in making criminal charges. With the uniformity of the mindset in applying these rules from judges throughout Indonesia, it is hoped that there will be no more disparity in sentencing decisions, leading to public dissatisfaction with the judges' decision. The same understanding of the principle of independence of judges is expected to strengthen and uphold the independence of judges, so that judges can carry out their duties in accordance with the principles of expediency, principles of justice, and principles of legal certainty, without leaving conscience and actual social development.

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