

A Judicial Philosophy Study of Criminal Judge's Independence And Impartiality Principle

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Abstract

Independence and Impartiality become one of the criminal judicature principal which must be implemented by a judge in administering justice of criminal case. In this case, it covers the judge's act in receiving, examine, and decide the criminal case. Through this article entitled: A judicial philosophy of independence and criminal judge impartiality, it raises some problems such as, what the principles of judge's independence and impartiality in administering justice a criminal case are and how the implementation of the principle of judge's independence and impartiality in a criminal case. This is a kind of normative law study using normative-qualitative analysis technique. Based on the result of study, philosophically, it can be seen that the principle of judge's independence and impartiality in administering a justice of criminal case consisting of a supreme mandate to defend a law, justice and truth. Otherwise, from the judicial aspect, the implementation of principle of judge's independence and impartiality in criminal justice can be known from the judge's study towards the authentication done by the judge written in a verdict, whether or not there is a belief of judge towards the proof instrument shown in the court in an authentication process.

Keywords: Independence and Impartiality Principle, Criminal Judge, Criminal Judicature.

INTRODUCTION

Independence or freedom is one of the fundamental and basic rights owned by every individual. Therefore, each person must respect, appreciate the rights by that independence. In the other word, no one is allowed to do as one likes which can raise the threat, disturbance towards the existence of the rights.

Independence which includes that right is valid within each aspect of human life, covering in the law field as well.

Independence in the law field as known as judicature independence/ justice authority independence is admitted as the universal principle. Seeing the historical side of it as the universal judicature, this statement can be understood from the doctrinal statement which says, "The justice authority independence idea was stronger since the 19th century. At that time, it changed into an obligation defended by understanding the independence developed methods in the western countries."¹

Keeping attention of the doctrinal statement, it can be viewed that justice authority independence is an extremely principal thing which holds an important thing related to judicature field.

Justice authority independence which is one of the judicature principles has several some aspects. Shimon Shetreet classifies the independency of judiciary into four points, like: (i) "Substantive independence (independence of case decision); (ii) personal independence (the assurance of working period and position, term of tenure); (iii) internal independence (e.g. independence from colleague); (iv) collective independence (e.g. Judicature participation in an administrative court, including determining the court budget)."²

Judicature independence covering judge independence in administering justice of criminal case is as one of the judicature principle which must be implemented by the judge as the center of apparatus of judge's authority.

The meaning of "to adjudicate" in criminal judicature context as explain in the common rules of Indonesian law regulation Number 8 Year 1981 about Criminal Law, chapter 1, section 1, point 9, stated as, "A series of judge's act to receive, examine, and decide the criminal case based on free and honest principle and impartial in the court and according to the rules in the law regulation.

Paying attention to the term "to adjudicate", it gives a clear explanation that adjudicating is one of the Judge's duty as the center of apparatus of judge's authority initiating from receiving and examining the case until making a verdict. The implementation of the adjudicating in the criminal judicature which should be done based

¹ Boy Nurdin, *Kedudukan Dan Fungsi Hakim Dalam Penegakan Hukum Di Indonesia*, (Bandung: Penerbit P.T. Alumni, 2012), hlm. 182.

² Shimon Shetreet, *Judicial Independence: New Conceptual Dimension and Contemporary Challenges* dalam Cetak Biru Pembaharuan Mahkamah Agung Tahun 2003, hlm. 7.

on formal a juridical rule that is determined formal-legalistically in the law regulation of Indonesia Number 8 Year 1981 about Criminal Law as popular as a law book (*KUHAP*). The section formulation of a Law Book includes law norm which should be used as the orientation by the judge in adjudicating the criminal case both in action and behavior in the court towards the accused people. So, those norms can be sad as the rules to lead the judge to execute the judicature, to adjudicate the criminal case can be done based on the formal-juridical rules which have been determined in the law book. The term adjudicating in this context is meant by free, honest and impartial in the court.

Discussing on the term of free, honest and impartial is the principles which are believed in the criminal session as the authority for the judge and should be implemented to adjudicate the criminal case.

The independence principle is explaining about the judge who adjudicate (receive, examine, and decide) the criminal case should be free from intervention, pressure, enforcement from others both internal and external. In this case, the judge is given the authority to adjudicate the criminal case based on the formal-juridical rules in which it is determined in a law book and added by the judge's belief.

Otherwise, the term honest, it is a balance between what the judge believes and the verdict in the court. Everything decided is from the judge's belief.¹

To be continued, the impartial principle is the moment when the judge adjudicates a criminal case should fairly behave towards the accused people. If the impartial principle is studied, this principle defends the human right including the right to get everything the same in a law field. The judge finally is supporting to realize the equality principle in the law field (equality principle).

Among the independence, honest and impartiality principle those are an integral relationship. Without judge's independence, the judicature cannot honestly and impartial run. On the other hand, the judge cannot be honest and impartial if he/she is not in the independent place. The judge's independence in adjudicating the new criminal case can be well-implemented if the judicature honestly and impartial runs. It can be seen and felt from the process and the essential of judge's decision. In the judicature context, the independence principle cannot be separated with impartial principle and the other way around.

Based on the explanation above, this article raises several issues, such as: what the nature of judge's independence and impartiality to adjudicate the criminal case is and how the implementation of judge's independence and impartiality principle in a criminal judicature is. From the research questions above the study is done to obtain the deeper understanding related to the law issue. This should be based on the juridical philosophical argument so that the result can be constructed.

RESEARCH METHOD

A research can be classified into a scientific research if in the process of writing uses the writing method which is scientific. So, the scientific writing consists of academic values and can be responsible scientifically.

In relation to the writing method, this article is a legal research which uses normative law qualification. The used approaches are the statue approach, the analytical and conceptual approach, and the philosophy approach. The substances are primary, secondary and tertiary. The data collections methods are by using library research and systematical method. The collected data are then normative-qualitative analyzed.

RESULT AND DISCUSSIONS

1. The Nature of Judge's Independence and Impartiality in Adjudicating the Criminal Case

Independence and impartiality principles are one of the criminal session laws which should be implemented by the judge to adjudicate the criminal case. Those principles are closely related to the purpose of law enforcement.

The law enforcement is "an activity that harmonizes the relationship of values mentioned in the norm and the act is as the series of elaboration in the last phase of values to create, maintain and defend the peace of life fellowship."²

The next opinion states that, "to enforce the law is a process to reach the justice, while the justice is a point which is wanted to earn from that law enforcement."³

The goal of the law enforcement is about getting the peace of human life. This means that the recovery towards the broken peace or keeping the peace. In other words, the goal of law enforcement is to create the peace within human life and raise the justice value. The justices are felt the same by every individual.

The efforts of returning the balance of human life through creating the broken peace back, for instance, it is because there is a trespassing towards the norm or basic principle formed in the law norm and are qualified as

¹ Darmoko Yuti Witanto dan Arya Putra Negara Kutawaringin, *Diskresi Hakim Sebuah Instrumen Menegakkan Keadilan Substantif Dalam Perkara-Perkara Pidana*, (Bandung : Alfabeta, 2013), hlm. 20.

² Soerjono Soekanto, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*, (Jakarta: Rajawali, 1983), hlm. 2.

³ Darmoko Yuti Witanto dan Arya Putra Negara Kurawaringin, *Op. Cit*, hlm. 19.

the attitude or criminal act in which one of them can be executed through law enforcement like resolving a criminal case from criminal judicature.

Through the criminal case handling in criminal judicature, it is expected to create the harmony in human life because of reaching the justice for all the individuals. One of them is through the implementation of independence and impartiality principle in criminal case in which the judge should implement this as the apparatus of justice caretaker.

In connection with criminal judicature organizing, the judge adjudicates the criminal case which becomes one of the efforts of law enforcement if it is seen from the goal aspect. In this case, it is closely related to the goal of criminal law session, that is, to seek, find the tangible truth of a criminal case.

Philosophically, the implementation of judge's independence and impartiality principle in adjudicating the criminal case becomes an effort to realize the accommodated values in independence and impartiality principle.

Discussing on this issue, there are some definition about values according to a group of doctrinal people.

Darji Darmodiharjo and Shidarta, state that:

“Value is a beneficial quality of thing for human life, both physically and spiritually. For human being, value is for the basic thing, reason or motivation in acting and showing attitude whether or not it is consciously done. It is different from the fact that can be proved by the empirical evidence that is not that way with the value, related to the willingness, future hopes and expectation and all the things about spiritual of the human. In its practice, value is not concrete and subjective.”¹

Another idea, “value is a quality of thing which is beneficial for the needs and necessity of human life both physically and spiritually.”²

It can be understood that value is a thing that is abstract and beneficial for human life and it is related to the human's expectation based on the spiritual consideration.

If the definition of value is connected with the truth and justice value, it is an expectation. The willingness to be reached in resolving the criminal case through criminal judicature can be said that the truth which is expected is the real truth, which popular as tangible truth.

The definition of tangible truth according to a group of doctrinal people, Darmoko Yuti Witanto and Arya Putra Negara Kutawaringin, state that:

“In criminal case, verification minimal principle is valid and it is needed the belief of the judge. This way does not exist in civil case. The judge is not allowed easily to believe with the showed evidences in the court but he/she must examine and analyze precisely whether or not the evidence instruments containing the truth which can be responsible.”³

According to Darmoko Yuti Witanto and Arya Putra Negara Kutawaringin, the definition of tangible becomes the purpose of the criminal law session, namely, “the truth based on the tangible attitude.”⁴

Tolib Effendi quotes the idea from Andi Hamzah, the meaning of tangible truth is:

“The truth is almost close from a criminal case by implementing the rules of honest and accurate criminal session law in purpose to find the doer who can be accused in doing the law trespassing and being continued to ask for examining and deciding from the court in order to find whether it is proved that a criminal act has been done and whether the intended person can be accused.”⁵

So, it can be accepted that the tangible truth is the real truth of a case. The tangible truth mentioned cannot be easily accepted only by showing the evidence instruments but the judge will use her/his belief to make a judgment from the evidences.

The other value, philosophically, it may be reached in adjudicating from the criminal judicature organizing by implementing judge's independence and impartiality principle. This can build the justice values.

These are the definition of justice as an understandable value from the group of experts.

Roscoe Pound quotes the idea from Plato, state that: “Justice is the supreme virtue which harmonizes all other virtues.”⁶ (Justice is the highest kindness).

Thomas Aquinas is quoted by H. Wildan Suyuthi Mustofa, says that “The essence of law is justice, thus, law should contain a justice. The injustice law is not its law.”⁷

¹ Darji Darmodiharjo & Shidarta, *Pokok-Pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia*, (Jakarta: PT. Gramedia Pustaka Utama, 1999), hlm. 249.

² Shidarta, *Moralitas Profesi Hukum Suatu Tawaran Kerangka Berfikir*, (Bandung: Refika Aditama, 2009), hlm. 21.

³ Darmoko Yuti Witanto dan Arya Putra Negara Kutawaringin, *Op. Cit.* hlm. 166.

⁴ Darmoko Yuti Witanto dan Arya Putra Negara Kutawaringin, *Op. Cit.* hlm. 183.

⁵ Tolib Effendi, *Dasar-Dasar Hukum Acara Pidana Perkembangan Dan Pembaharuannya Di Indonesia*, (Malang: Setara Press, 2014), hlm. 5.

⁶ Munir Fuady, *Aliran Hukum Kritis Paradigma Ketidakberdayaan Hukum*, (Bandung: Citra Aditya Bakti, 2006), hlm. 52.

⁷ H. Wildan Suyuthi Mustofa, *Kode Etik Hakim*, (Jakarta: Kencana Prenada Media Group, 2013), hlm. 99.

Bismar Siregar points out, “The judge must interpret the law regulation to be more functional as the living law because the judge cannot merely enforce the formal rules but he/she should find the existing justice within society.”¹

Hence, the justice as a value is a good priority when it is related to the aim of law and the essence of law enforcement.

The existence of justice as a value can be a priority connected with the implementation of judge’s independence and impartiality in adjudicating the criminal case, that is, a justice which accommodates existing values and norms within society.

Philosophically, the justices which are being the eagerness, future hopes of people, justice seekers, and all the societies are not only legal justice but also moral and social justice. The meaning of legal justice is “A justice based on the law and regulation.”²

The meaning of moral and social justice can be understood from the statement, “Judge must dig existing values in a society (vide section 5 verse 1 law regulation Number 48 Year 2009).”³

In this case, a judge gets the supreme mandate to implement the judge’s independence and impartiality principle to organize the criminal judicature starting from receiving, examining the case and deciding the verdict of it. This aims at the judge does not merely implemented the juridical rules from a case but it is expected to dig deeper and find the living law within the society so that in this context, it is only as the funnel of law regulation. This case is related to the non-analytic reasoning.

Edgar Bodenheimer gives the elaboration about the non-analytic reasoning which he points out freely. The characteristics of non-analytic reasoning are:

- a. There is an expansion of the rationality definition
- b. Rationality in non-analytic reasoning expands until each effort to convince the ordinary people about the values and truth of normative proposition
- c. In non-analytic reasoning, judge uses a holistic point of view to solve the case in making the verdict.⁴

Thus, a judge in adjudicating the case should consider about the existing values and norm in a society so that the judicature process can be fairly done according to the parties and society. The final result of criminal judicature which is in the form of a verdict can be acceptable for all parties. The judge’s verdict is expected to give contribution and positive changes for both the intended parties and society. The judge’s hoped to give the satisfaction, safety, agreeable, peace and harmony for the society. Besides, the verdict is also expected to give fearful effect to the doer so that they do not redo anymore. This also can be a lesson for the doer and society to always obey the regulation.

2. The Implementation of Judge’s Independence and Impartiality Principle in Criminal Judicature

The judge’s independence and impartiality is one of the principles in a criminal case session in Indonesia. It is emphasized to be applied by the judge in adjudicating the criminal case. This is one of the ways to enforce the law and justice in a social life. The judge’s independence and impartiality principle is one of the criteria which should be existed in a legal country and it should be put in the constitution.

In relation to the judge’s independence, especially Indonesia, as the legal country, it is guaranteed in section 24 verse 1 the basic law of Indonesia Republic Year 1945, initiated, “judicial authority is an independent authority to organize the judicature to enforce the law and justice.”

The judge’s independence is administered in chapter I (Common Rules) section 1 verse 1 of the basic law Number 48 Year 2009 about the judicial authority which states, “Judicial authority is a independence national authority to organize the judicature to enforce the law and justice based on the five principles and basic law of Indonesia Republic Year 1945 on behalf of legal nation of Indonesia Republic.”

The coordination of judge’s independence and impartiality principle can be found in a basic law of Indonesia republic Number 3 Year 2009 about the second amendment of law regulation Number 14 Year 1985 about Supreme Court with the essence of Section 32 verse 5, namely, “Supreme Court do the highest supervision towards the coordination judicature in all judicature fields in running the judicial authority.”

Finally, it can be concluded that judge’s independence is guaranteed in our constitution of nation and the related law regulation, such as the law regulation of judicial authority and the law regulation of Supreme Court.

In line with the formulation of law regulation mentioned previously, the essence of the law regulation is identic which means the independence principle owned by the judge as the center of apparatus of judicial has a

¹ *Ibid.*

² Ahmad Rifai, *Penemuan Hukum oleh Hakim Dalam Perspektif Hukum Progresif*, (Jakarta: Sinar Grafika, 2011), hlm. 127.

³ *Ibid.*

⁴ Edgar Bodenheimer, *Seventy Five Years of Evolution In Legal Philosophy*, (*American Journal of Jurisprudence*, 1978), volume 23.

trusted authority as the apparatus is a judicature principle which should be implemented in a criminal case judicature. So, the law can be enforced in Indonesia. It needs to be underlines that the judge's independence as the part of judge's authority independence in its practice should be well-limited meaning that the judges cannot do merely as they want. The practice should be in line with the Five Principles of Indonesia Year 1945, the existing law regulation, justice and morality.

Dealing with the judge's independence and impartiality, in adjudicating the criminal case, the judge should be obey the juridical rules formulated in the law regulation of Indonesia Republic Number 8 Year 1981 about Criminal Session Law or it is as popular as the Law Book (*KUHAP*)

About the judge's independence and impartiality in adjudicating the criminal case, explicitly, it is formulated in the elaboration of Indonesia Basic Law Number 8 Year 1981 about Criminal Session Law, the common explanation, verse 3, and alphabet e, with the formulation "Judicature which should be done soon, simple, economic, free, honest and impartial must be implemented consequently in all judicature levels.

The realization of judge's independence and impartiality principle which accommodates the supreme mandate is formulated implicitly in the sections of Law book which are included in the norms of criminal session law. This is about the sections of the process stage to prove the criminal case.

In the sections of law book, the law norms implicitly accommodate the judge's independence and impartiality principle in adjudicating the criminal case. It can be found in the Section 183 of Law Book, chapter 4 about the verification of verdict in a general session with the formulation "Judge cannot give the verdict to someone without at least two valid evidence instruments that proved the action done by the accused person.

The admitted evidence as the valid proof in the criminal case, which is formulated in Section 184 verse 1 of Law Book;

The valid evidences are:

- a. The information from the witnesses
- b. The information from the experts
- c. A letter
- d. A guidance
- e. The information from accused person

Besides the juridical requirements, that should be completed by two valid evidence instruments. The formal-juridical rules in the Section 183 of Law Book also require the elements of belief of the judge towards the instruments showed in the court.

The criminal session law about the process of proving the criminal case, as stated in the Section 183 of Law Book which requires the validity of the evidence is completing the formal-juridical criminal session, which contains, at least, two valid instruments and the belief of the judge. This is known as negative proving system (*negatief wettelijk theorie*).

The negative proving system is:

"A blend proving system between *conviction raisonee* with the positive proving system. The formulation of the system is, whether the person wrong or not, it is determined by the judge's belief based on the way and the valid instruments."¹

The negative proving system is the same as the rules in the Section 183 of Law book in which emphasizes the instruments of proving the evidence and the belief of judge.

The thing about the judge's belief should be put in the context of proving the criminal case. The judge can get the belief from the instruments. This way can prove that the criminal case has been done so that it influences the judge's belief.

If the valid instruments which are brought into the court can make the judge believes that the criminal case has been done, then, the intended person will be punished.

On the other hand, if the consideration of the instruments which are brought into the court then the judges does not believe that the accused person has done criminal case, then, the accused person is free from the punishment (*vrijspraak*).

If it is based on the consideration of the valid instruments, then, the judge believes the case done by the accused person is true but the case does not belong to the criminal case, then, the accused person is free as well (*ontslag van alle rechtsvervolging*).

Talking about the belief, the judge shows the independence. The researcher says that the definition of judge's belief is the belief that is got from the juridical facts found in the court and finally raises the belief of the judge. That is pure from the deepest heart.

¹ M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi dan Peninjauan Kembali*, (Jakarta: Sinar Grafika, 2008), hlm. 279.

CONCLUSIONS

Based on the explanation above, the conclusions are:

1. The nature of judge's independence and impartiality principle in adjudicating the criminal case, namely, the independence and impartiality principle is implemented by the judge in (receiving, examining and deciding the verdict) the criminal case. It is a judiciary process which accommodates the values realizing in the norms of criminal session law. Especially, in the Section of Law Book which organizes the proving process such as the truth values (tangible truth) and the justice values.
2. The implementation of judge independence and impartiality principle in criminal judiciary can be seen from the result of the evidence which has been done by the judge mentioned in the verdict whether or not there is a belief of the judge towards the case done by the accused person. The belief of judge is from the deepest heart getting from the valid evidence instruments which are brought to the court.

REFERENCE

BOOKS

- Boy Nurdin. *Kedudukan Dan Fungsi Hakim Dalam Penegakan Hukum Di Indonesia*. Bandung: PT. Alumni, 2012.
- Darji Darmodiharjo & Shidarta. *Pokok-Pokok Filsafat Hukum: Apa Dan Bagaimana Filsafat Hukum Indonesia*. Jakarta: PT. Gramedia Pustaka Utama, 1999.
- Darmoko Yuti witanto dan Arya Putra Negara Kutawaringin. *Diskresi Hakim Sebuah Instrumen Menegakkan Keadilan Substantif Dalam Perkara Pidana*. Bandung: Alfabeta, 2013.
- Munir Fuady. *Aliran Hukum Kritis Paradigma Ketidakberdayaan Hukum*. Bandung: Citra Aditya Bakti, 2006.
- Rifai Ahmad. *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif*. Jakarta: Sinar Grafika, 2011.
- Shidarta. *Moralitas Profesi Hukum Suatu Tawaran Kerangka Berfikir*. Bandung: Refika Aditama, 2009.
- Shimon Shetreet. *Judicial Independence New Conceptual Dimension and Contemporary Challenges* dalam *Cetak Biru Pembaharuan Mahkamah Agung Tahun 2003*.
- Soerjono Soekanto. *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*. Jakarta: Rajawali. 1983.
- Tolib Effendi. *Dasar-Dasar Hukum Acara Pidana Perkembangan Dan Pembaharuannya Di Indonesia*. Malang: Setara Press, 2014.
- Wildan Suyuthi Mustofa, H., *Kode Etik Hakim*. Jakarta: Kencana Prenada Media Group, 2013.
- Yahya Harahap, M., *Pembaharuan Permasalahan Dan Penerapan KUHAP, Pemeriksaan Sidang Pengadilan, Banding, Kasasi dan Peninjauan Kembali*. Jakarta: Sinar Grafika, 2008.

LAW AND REGULATION

- Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
- Undang-Undang Republik Indonesia Nomor 48 Tahun 2009, Lembaran Negara Republik Indonesia Tahun 2009 Nomor 157, Tambahan Lembaran Negara Republik Indonesia Nomor 5076, Tentang Kekuasaan Kehakiman.
- Undang-Undang Republik Indonesia Nomor 3 Tahun 2009, Lembaran Negara Republik Indonesia Tahun 2009 Nomor 3 Tambahan Lembaran Negara Republik Indonesia Nomor 4958, Tentang Perubahan Kedua Atas Undang-Undang Nomor 14 Tahun 1985 Tentang Mahkamah Agung.
- Undang-Undang Republik Indonesia Nomor 8 Tahun 1981, Lembaran Negara Republik Indonesia Tahun 1981 Nomor 76, Tambahan Lembaran Negara Republik Indonesia Nomor 3209 Tentang Hukum Acara Pidana.

INTERNATIONAL JOURNAL:

- Edgar Bodenheimer. *Seventy Five Years of Evolution In Legal Philosophy*, *American Journal of Jurisprudence*, 1978, volume 23.