

# The Study of Legal Norms in Criminal Law Procedures Code (KUHAP) That is the Concretization of the Judge's Independence and Impartiality Principle

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## Abstract

The judge's independence and impartiality principle is one of the principle or the fundamental that adopted by the criminal procedural law. This research tried to answer what is the meaning of the concretization of independence principle and judge impartiality in Criminal Law Procedures Code (KUHAP) norms of law; How the existence of norms of law that accommodates the principle independency and the judge impartiality in Criminal Law Procedures Code (KUHAP) currently and How the realization of the judge's independence and the impartiality principle in Criminal Law Procedures Code (KUHAP) norms of law to the future. It seen from the kind of research, this is conducted as research normative law and analyzed qualitatively normative. The research, in answer to the problems served, namely: the meaning of the concretization of the judge's independence and impartiality principle in the norms of law of Criminal Law Procedures Code (KUHAP), the norms of law that accommodate the principle of independency and the judge impartiality are a guideline or foundation for judge in thinking, being and acting i criminal justice by the realization of truth and justice values over a criminal case. Then, the norms law existence that accommodate the judge's independence and impartiality principle in Criminal Law Procedures Code (KUHAP) currently, is there juridical problematic of vague of norms and vacuum of norms. The last, regarding the concretization of the judge's independence and impartiality principle in the norms of law of Criminal Law Procedures Code (KUHAP) for the future, is the need for conducted the actions of the policy of the criminal law, by doing the revision toward the formulation of KUHAP articles that accepted today to avoid the vague and vacuum norms again that accommodates it's judge's independence and impartiality principle.

**Keywords:** Norm, Legal Norm, The Judge's independence Principle, The Judge's Impartiality Principle; Criminal Procedures

## INTRODUCTION

The focus of the study is to review it deeply toward the independence and impartiality principle that is concretized into the legal norm in Constitution of the Republic of Indonesia Number 8 Year 1981 concerning the Criminal Procedures that known as Criminal Law Procedures Code that must be applied by the judge of criminal justice.

Based on the Law Dictionary, *Dictionary of Law Complete Edition*, the definition of "principle" is "A vision that is formulated widely and underlying the existence of the legal norm."<sup>1</sup>

The definition of "principle" based on the other law dictionaries, namely, principle, means: 1. The fundamental law; 2. Fundamental (a foundation in thinking and arguing; 3. The basic association (community or organization)."<sup>2</sup>

According to Tolib Effendi, "...the principles or principle in any law is a strong basis in the establishment of the articles in the law itself."<sup>3</sup>

Furthermore, Muhammad Erwin, states that :

"legal principle of basically formed the general principles, so it has not directly launched. For the concretized to society, the fundamental law (the process) should be manifested into a norm that known as the rule of law. From this, we can see that it becomes a foundation for the existence of the norm as a regulation. We can consider of this view that the concretization of the regulations basically start from the very beginning process through to the end can be returned to the fundamentals of the law."<sup>4</sup>

It can be understood that legal principle is a abstract principle, it is concretized into regulation (legal

<sup>1</sup> M. Marwan & Jimmy P, *Kamus Hukum. Dictionary of Law Complete Edition*, (Surabaya: Reality Publisher, 2009), hlm. 56.

<sup>2</sup> Sudarsono, *Kamus Hukum*, (Jakarta: Rineka Cipta, 2009), hlm. 37.

<sup>3</sup> Tolib Effendi, *Dasar-Dasar Hukum Acara Pidana Perkembangan Dan Pembaharuannya Di Indonesia*, (Malang: Setara Press, 2014), hlm. 16.

<sup>4</sup> Muhamad Erwin, *Filsafat Hukum Refleksi Kritis Terhadap Hukum*, (Jakarta: PT Raja Grafindo Persada, 2011), hlm. 49.

norm) so it is a foundation of the establishment of the regulation.

According to N.E. Algra *et al*, translated from J. C.T. Simorangkir, cited by Donald Albert Rumokoy and Frans Maramis, norm is:

“The term of norm (Dutch: norm; English: norm) itself derived from Latin, it means right-angled. The function is: (1) to make an angle of 90 degree; and for testing whether an angle of 90 degree made was accurate. Similarly as the function of norm, namely: (1) to determine how the social life must go on; and (2) to assess whether the social life has appropriate with the regulation made.”<sup>1</sup>

Austin Chinhengo as cited by A’an Efendi, Freddy Poernomo and IG.NG Indra S. Ranuh, state, “Norm is *standard of social behavior*. Norm is a standard or criteria of social behavior.”<sup>2</sup>

Furthermore, it explains the definition of norm stated by Ian P. Farrel in *On the Value of Jurisprudence* cited by A’an Effendi, Freddy Poernomo and IG. NG Indra S. Ranuh, “Norm interpreted as well as the guide conduct. It is the guide to behave.”<sup>3</sup>

Furthermore, here is the definition of legal norm, according to experts.

JJ. H. Bruggink, that translated by B. Arief Sidharta, described the legal norm with the rule of law, that is, “Rule of law is the content of the rule of law itself.”<sup>4</sup>

Donald Albert Rumokoy and Frans Maramis, argue, “Legal norm, namely: norm that can be forced with the help of country supplies instruments of being determined to task concerned.”<sup>5</sup>

The next topic, namely the definition of the “independency” principle in the trial context., based on *Black’s Law Dictionary*, *independent*, defined as bellow:

1. “Not subject to the control or influence of another (*independent investigation*).
2. Not associated with another (often larger) entity (*an independent subsidiary*).
3. Not dependent or contingent on something else (*an independent person*).”<sup>6</sup>

Then based on *Judicial Dictionary*, explained:

“The independence of judiciary is not limited only to the independence from the executive pressure or influence; it is a wider concept with takes within its sweep independence from any other pressure and prejudices. It has many dimensions, viz: fearlessness of other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong.”<sup>7</sup>

Based on the etymological meaning presented in *Black’s Law Dictionary* and *Judicial Dictionary* it can be emphasized that independency means limitless. Independency in the judiciary, which termed with independence of judiciary, means, the freedom owed by the matter the trial judge, which is freedom from distress the executive pressures as well as other parties.

Further definition of the “impartial” principle in the judicial context, based on *Black’s Law Dictionary*, explained “Impartial” meant as disinterested.”<sup>8</sup>

When it translated freely, the definition of impartial based on the *Black’s Law Dictionary*, means: who is independent, who is neutral.

Damoko Yuti Witanto and Arya Putra Negara Kuntawaringin argue, “Impartial is a neutral position in treating of parties in the trial. Judge must ensure that all the right of the parties’ dispute can be accommodated well under the term of the criminal procedure that is prevailed.”<sup>9</sup>

Andi Hamzah, stated that, “Impartial shall not be defined literally, it is because in giving a decision the judge must be partial to the right. In this case, the judge impartial are defined not bias in consideration and their assessment.”<sup>10</sup>

Talk about legal principle of related on the topic of this writing, namely: the study of norms law of Criminal Code Procedure that is concretized the principle of independency and judge impartiality, implicitly is accommodated in the independent principle, honest and impartial. This principle can be found in the explanation of Constitution of the Republic of Indonesia Number 8 Year 1981 about Criminal Procedure, which is affirmed in a General Explanation, no. 3, letter e, with the formulation, “Judicial has to be done immediately, simple and low cost and free, honest and impartial to be applied in entire extent judicial consequently.

<sup>1</sup> Donald Albert Rumokoy dan Frans Maramis, *Pengantar Ilmu Hukum*, (Jakarta: PT Raja Grafindo Persada, 2013), hlm. 51.

<sup>2</sup> A’an Efendi, Freddy Poernomo dan IG. NG Indra S. Ranuh, *Teori Hukum*, (Jakarta: Sinar Grafika, 2016), hlm. 155.

<sup>3</sup> *Ibid*.

<sup>4</sup> JJ. H. Bruggink, dengan Alih Bahasa: B. Arief Sidharta, *Refleksi Hukum Pengertian-Pengertian Dasar Dalam Teori Hukum*, (Bandung: PT Citra Aditya Bakti, 2011), hlm. 92.

<sup>5</sup> Donald Albert Rumokoy dan Frans Maramis, *Op. Cit.* hlm. 52.

<sup>6</sup> Bryan A. Garner, *Black’s Law Dictionary, Seventh Edition*, (S.T Paul, Minn: West Group, 1999), p. 774.

<sup>7</sup> Justice, L.P., Singh, *Judicial Dictionary*, (New Delhi Allahabad: Law Orient Publihing Company, 2005), p. 765.

<sup>8</sup> Bryan A. Garner, *Op. Cit.*, p. 755.

<sup>9</sup> Darmoko Yuti Witanto dan Arya Putra Negara Kutawaringin, *Diskresi Hakim Sebuah Instrumen Menegakkan Keadilan Substantif Dalam Perkara-Pidana*, (Bandung: Alfabeta, 2013), hlm. 20.

<sup>10</sup> Andi Hamzah, *Hukum Acara Pidana Indonesia*, (Jakarta: Sinar Grafika, 2008), hlm. 106.

## METHODOLOGY

Methodology has an essential meaning in the preparation of the paper. By following the procedures set in a method of writing it is expected creating a paper with scientific value and can be responsible scientifically as well.

Concerning to the methodology, this paper is the type of law research with qualifying normative research. The approach of the problem includes: the regulations approach, the analysis legal concept approach, and philosophical approach. A kind of law, namely: the primary, secondary and tertiary law. The collecting technique of the material is conducted through the study of literature and systematic method that analyzed normative qualitatively.

## RESULT AND DISCUSSION

### 1. The Interpretation of Concretization of Independency Principle and Judge Impartiality in the Norm of Law of Criminal Law Procedures Code (KUHAP)

The purpose in handling the criminal case done by a judge in criminal justice by applying the provision of the criminal procedures that formulated in Criminal Law Procedures Code is to uphold the truth and justice.

Justice is something that spatially abstract, which is in the form of value.

“Value” is the basis for people whether to behave, to do or do nothing. An attitude or a human deed which is predicated by the “value” will reflect the integrity of the human being themselves.

The definition of “moral”, according to Shidarta, that is “something that concerns about the good and the bad of human being as human.”<sup>1</sup>

The next opinion about “moral”, namely, “The doctrine, advises, preaches, standards, rules, and the statutes either spoken or written, about how human should live and take action to make them become a good human.”<sup>2</sup>

So “moral” is something abstract as well as “value”, that gives the identity to human because “moral” reflected the attitudes and what is done by human.

Relating to the justice as a value, Rescue Pound explained the opinion of Plato, cited by Munir Fuady that stated, “Justice is the supreme virtue which harmonizes all other virtues.”<sup>3</sup> (Justice is the highest good value).

The similar opinion, i.e:

“Justice is one of the aims of any legal system; moreover it was the most important goal. There are some legal purposes that also used to have become a pillar of law, namely the legal certainly, benefit or discipline.”

Besides legal purposes, justice can also be seen as value. For a good life of human, there are four values of the importance foundation, namely:

1. Justice
2. Rightness
3. Law
4. Moral<sup>4</sup>

Based on the opinion of the expert of law that explained can be understood, that is justice as value is considered as the most essential of the basic of human life.

Then “justice” in the relevance to the “moral” in this context that impartiality or unfair shows the moral integrity of a person. In general, the word “fair” means giving to someone in accordance with their right, treat others equally, balanced, not favoritism.

Thus, “justice” is one of the value accommodated in a principle, in this included in the independence and impartiality principle that must be applied by the judge in adjudicating (received, check and judgment) the criminal cases. In this case justice often becomes the moral dilemmas for the judges. This moral dilemmas will only insurmountable when the judge as implementing officials judicial able to face the judicial problems rationally and objective, so it is appropriate to apply a method of reasoning called as non-analytical reasoning in judgment the criminal cases that emphasized by the researcher from the Edgar Bodenheimer, with free translation by researcher, namely:

- a. There is an expansion or extension of the rationality meaning.
- b. Rationality in law analytical reasoning extends up on each effort to persuade the people about value and the righteousness of a normative proposition.<sup>5</sup>

<sup>1</sup> Shidarta, *Moralitas Profesi Hukum Suatu Kerangka Tawaran Berpikir*, (Bandung: Refika Aditama, 2009), hlm. 43.

<sup>2</sup> Franz Magnis Suseno, *Etika Dasar: Masalah-Masalah Pokok Filsafat Moral*, (Yogyakarta: Kanisius, 1987), hlm. 14.

<sup>3</sup> Munir Fuady, *Aliran Hukum Kritis Paradigma Ketidakterdayaan Hukum*, (Bandung: Citra Aditya Bakti, 2006), hlm. 52.

<sup>4</sup> Wildan Suyuthi Mustofa, H., *Kode Etik Hakim*, (Jakarta: Kencana Prenadamedia Group, 2013), hlm. 101.

<sup>5</sup> Edgar Bodenheimer, *Seventy Five Years of Evolution In Legal Philosophy*, (*American Journal of Jurisprudence*, 1978), Volume 23.

## **2. The Existence of Norms of Law Accommodates Judge's Independence And Impartiality Principle in Criminal Law Procedures Code ( KUHAP) Now (*Ius Constitutum*)**

Concerning the substance formulated in criminal law procedures code as a basis juridical formal criminal procedure relating to the judge's independence and impartiality principle in adjudicating the criminal cases. According to the researcher, there are judicial problems in the vague of norm and vacuum of norm.

### **2.1. Vague or Norm on the Judge's Independence Principle of the in Criminal Law Procedures Code (KUHAP)**

As understood that principle is something abstract, which accommodates some underlying value of regulations. The principle is listed into a norm, in this context is a norms of law. Those will be more concretized again in the article, paragraph and chapters of a regulation.

Thus, also happen to the principles in criminal justice, the principles listed into norms of law of Criminal Law Procedures Code which later is concretized again, namely formulated in the articles, paragraphs and chapters in it as the formal basis juridical the practice of criminal justice.

According to JJ. H. Bruggink who translated by B. Arief Sidharta, termed with the vague definition, that is, "the definition that cannot be indeterminable clearly, so the limitation is not clear."<sup>1</sup>

In existing of the vague of norm related to accommodate the independency norm of judge, that in the articles of Criminal Law Procedures Code has no formulation who clearly give restrictions to the judge's independence principles in criminal justice.

Through normative study that researcher did to the essence of the articles of Criminal Law Procedures Code, researcher interpret that the judge's independence principle to adjudicate in criminal case is in it but only by implication, that in Article 183 and 188 paragraph (3).

Article 183 Criminal Law Procedures Code, with the formulation, "Judge must not give a decree to people unless there are at least two valid evidences and they get belief that a crime is really happened and a defendant did it.

Article 188 paragraph 3, the Criminal Law Procedures Code with the formulation, "an assessment of the strength of verifiable of an indicator in any certain circumstances carried out by the judge with humble and wise after they took the inspection for full of great precision and accuracy based on his conscience.

Researcher though that in the article 183 of Criminal Law Procedures Code in implied accommodate the independence principle, because the articles is that to base process of criminal case on a negative proof. It is that the judge can only give decree if there is at least two valid evidences with the judge conscience. Based on the essence of the article the researcher concluded that the condition "confidence" of the judge shows the implication of the independence principle, that is in check and give a decree, judge must rested on relying of their conscience, it is not influenced of the authority and other parties.

Next on the article 188 paragraph 3, the Criminal Law Procedures Code, according to researcher, that article by implication accommodate the judge's independence principle in criminal justice, but only by implication, that can be interpreted by the researcher of a sentence based on "judge's conscience".

A sentence " judge's conscience" in relevance with the essence of the article 188 paragraph (3), the Criminal Law Procedure Code, that is referring to conscience judge, namely conscience of the judge in the independent condition, not under pressure from any party.

### **2.2. Vague of Norm in connection with the Judge's Impartiality Principle in the Criminal Law Procedures Code (KUHAP)**

The Existence of the judge's impartiality principle in criminal justice stated in legal norm and more concretized again in the form of Criminal Law Procedures Code in this context the researcher found some of the articles that is implied load on the impartiality principle, and the provision of article 157, paragraph (1), 157, paragraph (2), 157 paragraph (3), who its essence the point, the obligation to resign from handling matter for chief justice of the trial, judge members, prosecutor general and the scribe in terms of the family relationship with the defendant or legal counsel.

The research argue that article 157 paragraph (1), (2), (3) Criminal Law Procedures Code is a vague norm relating to the impartiality principle of the Judge that is because in the article about the judge impartiality are not formulated with the clear words, so as to understand that the provisions of the article accommodate the principle of judge impartiality or not, that is obtained through the result of interpretation or exegesis to mean contained in words or the article sentences.

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<sup>1</sup> JJ. H. Bruggink, Alih Bahasa B. Arief Sidharta, *Op. Cit*, hlm. 61.

### **2.3. Vacuum of Norm of the Independence Principle and Judge Impartiality in Criminal Law Procedures Code (KUHAP)**

A vacuum of norm interpreted, “..... when the rule of the law is incomplete or do not exist then used the method of argument (*argumentum per analogian*, *argumentum a contrario*, *rechtverwijning*, fiction of law and exposition method) (construction of law) to form the new law concepts.”<sup>1</sup>

According to researcher, on existing of the vacuum of norm associated with the judge independency and impartiality in Criminal Law Procedures Code, the points which are the researcher describes in the following:

#### **a. Vacuum of Norm of the Judge’s Independence Principle related to expansion instrument evidence especially in a criminal act who has instrument evidence unconventional or digital forensic.**

The criminal act “unconventional”, namely a criminal act out of the Criminal Code (KUHP) or which is called also with the commission of a special crimes into proof these crimes in the practice of criminal justice use of evidence which is called by “unconventional evidence” or “expanded evidence”, as digital forensic evidence.

Unconventional evidence formulated in the Constitution of the Republic of Indonesia Number 11 Year 2008 about Information and Electronic Transaction, in Article 1, 2, 3 and 4, in the form of: electronic information, electronic transaction, information technology, and electronic document.

In the cases are happened in the practice of criminal justice implicated in crimes using the term “unconventional evidence” in the process of proving because there were no formulated in Criminal Law Procedures Code (vacuum of norm), for the evidence is classified as a “guidance” evidence.

#### **b. Vacuum of norm about the impartiality principle of the judge related to the society developed proposed demand to trial broadcast directly (live) in media audio visual (television). The developments in current public, is the requests of the community the trial aired directly (live) through media audio visual, i.e. Television.**

The developments the broadcast of the trial, that is, the trial broadcast, namely through media audio visual as reflection of the application of the principle of impartiality the best accommodate transparency in criminal justice associated with the principle of concretization into norms of law that elaborated in the article of Criminal Law Procedures Code, in this case, there are juridical problematic about the vacuum of norm because there has been no article formulation in it who formulated about the broadcast of the trial directly through the media audio visual.

#### **c. Vacuum of norm about the judge’s independence principle of the associated with the presence of dissenting opinion or a difference of opinion in a meeting a judge to decide a case that is must be attached in judicial decisions.**

Dissenting opinion between the judges in order to decide a criminal case, in the practice of criminal justice at this event a development, that dissent the judge was attached together with judicial decisions.

Formulation exists in the Criminal Law Procedures Code, related to the difference of opinion in a judge to decide ....., it is only about the things bellow:

Article 182, paragraph (6), Criminal Law Procedures Code, with the formulation “on the principle decision is the result of the discussion round unless it planted heartily cannot be achieved, so apply provisions, as follows:

a. The decision taken with the most.....

b. If these regulations is a, it could also be obtained decisions chosen is the judgement of the judge most favorable for the defendant.

Article 182, paragraph (7), Criminal Law Procedures Code, with the formulation, “the implementation of the decisions as referred to in paragraph (6) are recorded in the set of decisions are provided special for the purpose and the secretly contents of the book.

Observing the provision of the articles of Criminal Law Procedures Code, the law clearly shows that there has been no provision of article, which accommodates about necessity attached dissent of judge together with the verdict.

### **3. Penal Policy / Criminal Law Policy / Strafrechtspolitik in Relation to the Independence Principle and Judge Impartiality in the Norms of Law in Criminal Law Procedures Code (KUHAP) that Will be Coming (Ius Constituendum)**

Associated with the criminal law, Branda Nawawi Arief Explain, “the term of criminal law policy can also called with the term “political criminal law”. In foreign term literature “political criminal law” is known with various term, among others ”penal policy”, ”criminal law policy” or “strafrechtspolitik”<sup>2</sup>

<sup>1</sup> Lukman Santoso, Az dan Yahyanto, *Pengantar Ilmu Hukum, Sejarah, Pengertian, Konsep Hukum, Aliran Hukum, dan Penafsiran Hukum*, (Malang: Setara Press, 2016), hlm. 186-187.

<sup>2</sup> Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana, (Perkembangan Penyusunan Rencana Konsep KUHP Baru)*, (Jakarta: Kencana Prenada Media Group, 2008), hlm. 22.

Marc Ancel provides understanding of policy or political criminal law by using the term penal policy. That may be understood of a statement, “*Both a science and art, of which the practical purposes ultimately are to enable the positive rules better formulated and to guide not only the legislator who has to draft criminal statutes, but the court by which they are applied and the prison administration which gives practical effect to the court decision.*”<sup>1</sup>

Then Sudarto, place restrictions that, “law political” is, “the effort to realize the good regulations that appropriate to the state and the situation at some point”<sup>2</sup>

In other sources, Sudarto said his opinion to the meaning of political law, namely, “the policy of countries through agencies authorized to set regulations is intended who is expected can be used to express what is in society and reaching what is want.”<sup>3</sup>

Further, Sudarto said that “implement” political criminal law “means hold election to achieve their best criminal legislation in the sense of qualified a justice and the resources.”<sup>4</sup>

Sudarto also believes that for judge, “implement” political criminal law “means” effort to the criminal regulations appropriate to the state and situation at the time and for time to come.”<sup>5</sup>

The essence of policy or political criminal law according to Sudarto if researchers relate to the judge’s independence and impartiality principle in criminal case essentially through policy or political criminal law policy or political criminal law is expected the better contain the regulation criminal (formal or criminal procedure), who gives clarity particularly on what can be used the independency of the application of the principle and the judge impartiality in criminal justice.

For judges required the clarity of the rules of principle independency and impartiality that in carrying out their duties judge criminal cases, judge really apply the independence principle of the accordance with restrictions juridical is there who cannot be separated the restrictions philosophical and sociological so independency of the judges are not lead to freedom.

To justice seekers or public in desperate need of clarity about the formulation about the norms of law that accommodate the principle independency and judge impartiality, namely by the legal certainty.

Next juridical about problems in a vacuum of norm with accommodates the judge’s independence and impartiality principle associated development in society and expansion science and technology, very necessary the formulation the articles of the regulations in the law of the criminal which will come as *ius constituendum*.

## CONCLUSION

Based on analysis that explained previously then associated with the existing problems, can formulated conclusion, as follows:

1. The meaning of concretization of the judge’s independence and impartiality principle in legal norms more elaborated again in the articles of Criminal Law Procedures Code, is guidelines for judge in thinking, behave and act in check and the judgement so it is really done judicial honest, transparent and impartial and finally created judicial decision that accommodates uphold truth and justice value as reflection moral integrity sublime judge.
2. Existence norms law that accommodates the principle independency and the judge impartiality of Criminal Law Procedures Code, namely there are juridical problematic of vague of norm, that judge’s independence and impartiality have not been formulated clearly in Criminal Law Procedures Code, and the emptiness of legal norm, regarding the judge’s independence and impartiality related to the development that happen in the society and technology and science development.
3. Realization of judge’s independence and impartiality in the next Criminal Law Procedures Code, that legislator should establish the authority of criminal law immediately, which formulate the better regulation of criminal law (formal) and meet the need of law in accordance with the development in society especially regarding the legal norms that accommodate judge’s independence and impartiality in criminal justice.

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<sup>1</sup> Marc Ancel, *Social Defence, A Modern Approach to Criminal Problems*, (London: Routledge & Kegan Paul, 1965), hlm. 209.

<sup>2</sup> Sudarto (I), *Hukum dan Hukum Pidana*, (Bandung: Alumni, 1981), hlm. 159.

<sup>3</sup> Sudarto (II), *Hukum Pidana Dan Perkembangan Masyarakat*, (Bandung: Sinar Baru, 1983), hlm. 20.

<sup>4</sup> Sudarto (I), *Op. Cit*, hlm. 161.

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