



The Obscurity of Judicial Independence towards Regulations with Legal Certainty in Indonesia

Ibnu Subarkah¹; I Nyoman Nurjaya²; Bambang Sugiri²; Mascruchin Ruba'i²

¹ Doctorate Candidate in Doctor of Law Science Programme, Faculty of Law, Brawijaya University of Malang, Indonesia

² Doctor of Law Science Programme, Faculty of Law, Brawijaya University of Malang, Indonesia

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Abstract

The background of this present research is that the application of the Article 3 verse (1) of the Law No. 48 year of 2009 On Judicial Power causes some obscurity in interpreting judicial independence. Therefore, a library research method through primary, secondary, and tertiary legal materials was adopted. The research results and its analysis show that the Article 3 verse (1) of the Law No.48 year of 2009 On Judicial Power does not possess juridical, sociological and philosophical applicability. Since in its application, it often happens that the actors of judicial power abuse of power where according to Paul Scholten's thought, a law state should guarantee legal certainty and its results. An equality principle is required to realize justice in decision. Honor of justice is the main goal either in the context of state administration or justice. Therefore, it can be concluded practically restrictions of the freedom of each party has been regulated, but in its application the actors of the power itself still abuses it. It is recommended that the Parliament together with the Government revise the important principle in the context of state administration and justice namely the principle of judicial independence as stated in the Article 3 verse (1) of the Law No. 48 year of 2009 regarding Judicial Power and it be scheduled in the National Legislation Program.

Keywords: *Judicial Independence; Legal Certainty; Certainty in Law*

Introduction

The development of law in Indonesia is in line with the growth of the legal values living in the society. Regulations develops if they are measured from their various types and forms and objects causing disputes or problems. A legal purpose in terms of its certainty is estimated to be reached if the importance of the legality in its various forms or the principle of legality is in accordance with the characteristics of a law state developed in Indonesia.

It is also the case in the field of judicial power. The teaching of the separation of powers conceptualized as a relationship between executive, legislature and judiciary powers is guided by the Constitution of the state of Indonesia namely the 1945 Constitution of the Republic of Indonesia

(henceforth the 1945 CRI), where each power is bound with the implementation of the check and balancing relationship. The legislative and judiciary powers have a relationship with the executive power.

The judiciary power connoted with the judicial power by some experts in the constitutional law in the Indonesian country has regulated it through the Article 24 verse (1) of the 1945 CRI that the “Judicial Power is an independent power to administer justice in order to enforce law and justice.”

The independent judicial power is in the frame of the Legal State related to the realization of the power division/separation, which basically requires adjustments that are harmonious and balanced with the efforts to protect human rights, namely equal rights between powers either in or out of the judicial power itself. It is because in the concept of the power division in Indonesia, besides judiciary power, there are also executive and legislature powers as determined in the 1945 CRI.” (Joko Sasmito, 2018)

The nature of the judicial power as an independent power is intended to administer justice to enforce law and justice. Its description as determined in the Explanation of the Article 3 verse (1) of the Law No. 48 Year of 2008 regarding Judicial Power (Jimly Asshiddiqie, 2014), confirms that judicial independence means being “free from any outsiders’ intervention and free from any forms of pressures either physically or psychologically.” It is the effort to realize the “sense of justice, which is considered to be greatly necessary to have clean and prestigious justice.”

The importance of giving attention to the matter has been explained in the Articles 8 and 10 of The General Assembly in The Universal Declaration of Human Rights), where in the former it is mentioned that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”, (Hadi Setia Tunggal, 2000), and in the latter it is stated that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” (Ibid)

The term judicial independence has normatively been confirmed in the Article 3 verse (1) of the Law No. 48 Year of 2009 on Judicial Power as stated in Verse (1) “In Carrying out their tasks and functions, judges and constitutional judges are obliged to keep justice independence”; in Verse (2) “All interventions in justice matters made by other parties outside judicial powers are forbidden, except in matters as stated in the 1945 CRI.” In Verse (3) it is stated that “Every person who intentionally breaks stipulations as stated in Verse (2) shall be sentenced in line with the stipulations in the regulations.”

Considering the legal norms above, in terms of the substance, no significant change occurs in the Law No. 4 year of 2004 On Judicial Power, as stated in the Verse 1 as the legal norm backgrounded by the condition that there has happened an act of intervention made by the judicial commission to the process of the nomination of Supreme Court Judges in certain justice. The matter of justice independence is normatively confirmed. It means that the issue of legal certainty has been juridically applied in accordance with legal certainty.

The sociological and philosophical applicability becomes an important factor as one unity with the juridical applicability. It needs acceptance and recognition from the people and gets binding and coercing power in the future.

The concept of justice independence is derived from the explanation of the Article 3 verse (1) of the Law No. 48 Year of 2009 on Judicial Power stating that it is free from any outsiders’ intervention and free from any forms of pressures either physically or psychologically.”

The nature of the concept has sociological and philosophical implications. This is because the protection guarantee is one-sided in nature which is contradictory with the equality principle before the law namely equal rights in the legal or governmental rights or theoretically it is called an equality principle. However, in the juridical applicability Bagir Manan (Bagir Manan, 1992) stated that a legal principle should fulfill a necessity condition namely it should follow certain procedures, possess null and void implications, or it does not have/has not yet owned binding legal power. Moreover, he stated that the applicability of legal principles should meet 3 (three) requirements namely “There shall be a requirement of an authority from the regulators, possess null and void implications, and be a conformity of forms and types or regulations with higher or equal regulations, or not be binding legal power, not be contradictory with higher levels of regulations. Besides juridical applicability, a legal principle should also fulfill empirical applicability.”

What should be attended in the sociological applicability of a legal principle according to Soerjono Soekanto and Purnadi Purbacaraka (1993) is that there are 2 (two) theoretical bases as the sociological foundation of the applicability of legal principle. The first is the “Power Theory, where sociologically a legal principle is applied due to the ruler’s coercion whether it is accepted or not accepted by the society, and the second is the Recognition Theory, where a legal principle is applied on the basis of the acceptance in which the law is prevailed.” (Soerjono Soekanto, Purnadi Purbacaraka, 1993). In the foundation of a legal system, “there are fundamental appraisal principles called legal principles, besides the rule of law that appears the most, namely code of conduct and legal principles.” (JJH Bruggink, 2011)

Dealing with the philosophical applicability, Bagir Manan stated that “each society has *Rechtsidee*, namely what is expected by the society from the law such as the one expected to guarantee justice, expediency, and order or welfare” (Bagir Manan, Op.cit.).

It is the perspective of philosophical applicability of the Article 3 verses (1), (2) and (3) of the Law. No. 48 Year of 2009 on Judicial Power dealing with the above concept underlying the values of the norms that requires assurances of justice, expediency and welfare. Justice, expediency and welfare is greatly relevant with certainty. It is not only a thought of legal certainty, but also that of certainty in law. It means that justice in a norm needs certainty in order to have expediency for the welfare, something that results in happiness.

Concerning with judges’ personal freedom, some international instruments have expected such freedom as stated in the “Universal Declaration on the Independence of Justice (1983) that “Judges should be individually free”, in the “International Bar Association Code of Minimum Standards of Judicial Independence” (1982) it is also mentioned that “Individual judges should enjoy personal independence and substantive independence”. In The Bangalore Principles of Judicial Conduct (2002), especially in a section of *judicial independence*, there is also a similar provision that “A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects”. (Tim Peneliti Komisi Yudisial, 2017)

However, it is not enough. Judges and court institutions as the implementers of judicial power are granted freedom from any outsiders’ interventions or any forms of physical or psychological pressures. The one-sidedness is created by the legal norms themselves. It means that legal norms have made a condition where substantial discrimination have occurred. Its relevance is that criminal aspects committed by judges and justice institution have increased. The following is illustrated a case of a one-sidedness in interpreting judicial independence resulting in an abuse of law as the one occurred in the District Court of Balikpapan, where the head of the Court I Ketut Tirta was removed from his position by the Supreme Court and he was also moved to the District Court of Surabaya as an ordinary judge. The removal is related to the action made by his subordinate, namely Judge Kayat who was arrested in an

arrest operation made by the Corruption Eradication Commission (KPK) on May 2019 where he was suspected to accept bribes..(<https://sumutkota.com/news/berita/d-4673431/ketua-pn-balipapan-dicopot-buntut-ott-kpk-ke-anak-buahnya.html>, August 21, 2019, at 04.06 AM) “The Supreme Judge Andi Samsan Nganro, previously said to give sanctions to his superior as stipulated in the Regulation of the Supreme Court No. 8 Year of 2016 On Supervision and Guidance from the Direct Superiors in the Supreme Court Environment and its lower courts. (*Ibid*) Besides imposing a sanction to I Ketut Tirta, the Supreme Court also gave sanctions to 16 other judges since they broke disciplines in the whole month of July 2019. There were 3 clerks of courts, 2 junior clerks of courts and 4 substitute clerks of courts and 1 bailiff who were sentenced to disciplinary, (*Ibid*) The sanctions were also given to the judges and the Supreme Court also reassigned three judges who acquitted HI, the accused of rape to two siblings, Joni (14 years old) and Jeni (7 years old) HR, in the District Court of Cibinong, Bogor regency.” (<https://www.voaindonesia.com/a/ma-pindahkan-tiga-hakim-yang-tangani-kasus-pemeriksaan-dua-anak/4897644.html>, May 3, 2019, at 10 PM)

On the basis of the reasoning above, integrated legal certainty has not yet been reached in its context. Justice independence should be addressed as independence to the actors of judicial powers to enable an equality principle to be realized towards certainty in law. Therefore, the authors were interested in examining the Obscurity of Judicial Independence towards Regulations with Legal Certainty in Indonesia The issue of the positive legal applicability to study the concept of judicial independence regulated in the Article 3 verse (1) of the Law no. 48 Year of 2009 on Judicial Power should be soon carried out, remembering that judicial independence should be able to realize certainty in law.

Research Method

It is a legal research since it is a research which does not recognize field research because what is examined is legal materials” (Johny Ibrahim, 2007) and normatively it is conducted as efforts to make a library research where the legal materials are primary and secondary ones in nature. The primary legal material studied are justice independence as stated in the Article 3 verse (1) of the Law No. 48 Year of 2009 on Judicial Power.

Results and Discussion

The Obscurity in the State Administration and Justice Contexts

In the New Order era, the intention of the government to protect the judge profession was regulated in the Law No. 14 year of 1970 on Basic Provisions of Judicial Power (Government Gazette of the Republic of Indonesia, Year of 1970 No.14, Additional Government Gazette No. 2951) and through the Law No. 14 Year of 1985 on Supreme Court (the Law No. 14 Year of 1985 on Supreme Court (Government Gazette No. 3316) where the General Explanation in item 4 of the Law has mentioned the term Contempt of Court. This law in its consideration is to implement the law in the field of judicial power as stated above.

Since the regulation was enacted, an obscure situation in the arrangement in the judicial power has occurred. This implies on the state administration order including the judicial life in Indonesia. The situation encouraged a desire to make a bill on Contempt of Court and it was stipulated in the draft of the new Criminal Code.

The stipulations stated in the Criminal Code are still effective. It can be stated that juridically, *ius constituendum* and *ius constitutum* of any acts of intervention have been regulated in the regulations of the Criminal Code namely the norms dealing with judicial contempt arrangement in the form of obstruction of justice that have possessed binding powers to any citizens who break the norms including

acts of offending other courts. It is the cause that results in the intention of making the government regulation in lieu of law (Perppu). The substance of each verse as stipulated in the Article 3 of the Law No. 49 Year of 2009 on Judicial Power according to the statutory theory is an interrelated or inseparable norm. Article 3 verse (3) of the Law on Judicial Power is related to the verses (2) and (1) of the article. This shows that the article has had some strengths, where substantially, the content of the article is broad and encompassing, meaning that it “does not know its legal subject.” Practically, it seems that “it is expected that the President would intervene when a dispute between institutions in the scope of justice occurred, for example between the “Corruption Eradication Commission (KPK) and the Police of the Republic of Indonesia known as Cicak Vs Buaya (Lizard VS Crocodile)” (<https://www.merdeka.com/peristiwa/yusril-bila-berwibawa-sby-bisa-selesaikan-cicak-vs-buaya.html>, January 24, 2019, at 05. 38 PM.)

During the President Jokowi’s administration, “it seems that there has been an intervention in the field of law in the case of Audrey-Justice’s for Audrey, regardless of the political interest. In this case, he directly ordered to the Head of Police of the Republic of Indonesia to solve the case legally”. (<https://www.merdeka.com/peristiwa/yusril-bila-berwibawa-sby-bisa-selesaikan-cicak-vs-buaya.html>, January, 24 2019, at 05: 38 PM). The President’s action did not cause any reactions at all in the form of legal polemic among the people. However, at the best knowledge of the authors, the policy taken by the President should be conducted although constitutionally his prerogative rights has been institutionalized in the Constitution, juridically due to the view of equal before the law, the intervention may result in injustice, where each member of a society encountering a legal problem may always make efforts to solve his/her problem through the President.

On the one hand, to implement the fact that Indonesia is a state based on the law, various types of legalities have been created by ensuring legal certainty in the justice protection where the legislation prevailed at present is not separated from the previous one. However, on the other hand, some obscurity occurred as contained in the substance of the Law No. 48 Year of 2009 on Judicial Power, especially the one regarding the protection of the justice given by the academicians by including it in the Chapter of Criminal Acts to the Administration of Justice and changing the Criminal Code (<https://news.detik.com/kolom/3086762/ikhwal-ruu-contempt-of-court> January 23, 2019, at 06: 59 PM); then by the Indonesian Advocates Association (PERADI) by including the substance to change the Criminal Code, then from the Indonesian Judges Association by proposing a Bill on Contempt of Court. Then from the government as the holder of the executive power when drafting the law on Judicial Power, it merely saw the imperfection of the Law. 4 Year of 2004 on Judicial Power (the Law No. 4 Year of 2004 on **Judicial Power** (Indonesian state Gazette of the Republic of Indonesia Year of 2004 No. 8), where anything dealing with the effort to follow the direction of the change of the 1945 Constitution, it should contain the principles of the administration of judicial power caused by the Decision of the Constitutional Court regarding the Judicial Commission’s intervention and it does not attend the importance of regulating intervention in the context of “examination at the judicial (court) level”, although at each court there have been stipulations of court order, including the ones that have been regulated in the Regulation of the Supreme Court No. 5 Year of 2020 on Trial and Security Protocol in the court environment. (The Regulation of the Supreme Court No. 5 Year of 2020 on Trial Protocol and Security in the Court Environment (Official gazette of the Republic of Indonesia Year of 2020 No. 1441).

Protection of the proceedings is need to avoid any acts of intervention. Since 1964, some changes have been made to the Law of the Republic of Indonesia No. 19 Year of 1964 on the Basics of Judicial Power. (the Law of the Republic of Indonesia No. 19 Year of 1964 on the Basics of Judicial Power (Government Gazette Year of 1964 No. 107).

It is not prevailed since it is contradictory with Pancasila and the 1946 Constitution as stated in the Law of the Republic of Indonesia No. 6 Year of 1969 regarding the statement that various laws and

government regulations in lieu of law (the Law of the Republic of Indonesia No. 6 Year of 1969 regarding the Statement that Various Laws and Government Regulations in lieu of Law (government gazette no. 27 Year of 1969); then it was arranged the Law of the Republic of Indonesia No. 14 Year of 1970 on the Basics of Judicial Power, where in “Article 4, verse (3) stating that any interventions in judicial affairs outside the Judicial Power is forbidden, except as stated in the Constitution”; (loc.cit) then the regulation was changed through the Law of the Republic of Indonesia No. 35 Year of 1999 on Change of the Law No. 14 Year of 1970 on the Basics of Judicial Power, where in the consideration in letter (a) it is stated that “Judicial Power is an independent power and therefore to realize the judicial power which is autonomous and is separated from the Government’s power it is considered to be necessary to make a strict division between judicial and executive functions” (the Law of the Republic of Indonesia No. 35 Year of 1999 on Change of the Law No. 14 Year of 1970 on the Basics of Judicial Power (Government gazette of the Republic of Indonesia No. 147 Year of 1999). The law was then repealed through the Law of the Republic of Indonesia No. 4 year of 2004 on Judicial Power where the Article 4 verse (3) states that “Any interventions in justice affairs by other parties outside the judicial power is forbidden, except in matters as stated in the 1945 Constitution, while verse (4) states that Each person who intentionally breaks the stipulations as stated in the verse (3) shall be convicted.” (Loc.cit) Then in the explanation, the Article 4 verse (4), what is meant by “be convicted” is that any element of criminal acts and its punishment is specified in the Law. The same case is also stated in the results of the change due to the existence of Article 3 verse (3) of the Law of the Republic of Indonesia No. 48 Year of 2009 on Judicial Power as a political product which is effective now.

Since the enactment of the Law No. 4 Year of 2004 on Judicial Power, this legislation does not have any power as the main regulation and in terms of intervention of judicial affairs, it is firmly stated the phrase “being convicted”.

Regulating norms in the Article 3 of the Law of the Republic of Indonesia No. 48 Year of 2009 on Judicial Power underwent various phases, and each regulation has its own legal spirit, and it is also mentioned the norm as stated in the general explanation in the item 4, of the Law No. 14 Year of 1985 on Supreme Court (Loc.cit) that in order to have Supreme Judges who are independent, who dare to make decisions and who are free from either external or internal influences, requirements as described in this law are needed. Then to be able to more ensure the best condition for the administration of justice to enforce the law and justice based on Pancasila (Five Basic Principles), it is necessary to “make a law regulating action of deeds, behaviors, attitude and/or remarks that may humiliate and undermine authority, dignity and respect of the courts known as *Contempt of Court*,” (Ibid) but then this matter was not further regulated by the Law of the Republic of Indonesia No. 5 Year of 2004 on the Change of the Law No. 14 Year of 1985 on Supreme Court. (The Law of the Republic of Indonesia Year of 2004 on the Change of the Law No. 14 Year of 1985 on Supreme Court. (Government Gazette of the Republic of Indonesia No. 2004, Additional Gazette of the Republic of Indonesia No. 4359).

On the contrary, in the general explanation of the Law No. 5 Year of 2004 on Supreme Court, the matter, namely the issue of intervention, is greatly important, therefore it is stated that Independent Judicial Power is one of the important principles for Indonesia as a state of law. This principle requires judicial power which is free from any party and any form of interventions, so that in doing its tasks and obligations, impartiality of the judicial court except for law and justice is ensured. To strengthen the direction of change of the administration of the judicial power that has been stated in the 1945 Constitution of the Republic of Indonesia, some adjustments to various laws regulating judicial power should be made. Then according to the Law No. 3 Year of 2009 on the Second Change of the Law No. 14 Year of 1985 on Supreme Court (the Law of the Republic of Indonesia No. 3 Year of 2009 on the Second Change of the Law No. 14 Year of 1985 on Supreme Court (Government Gazette of the Republic of Indonesia Year of 2009 No. 3), in the general explanation of the Law it is stated that Supreme Court is one of the actors of the judicial power supervising the judiciary in the general court, religious court,

military court and state administrative court environments. It does not mention any confirmation about the necessity of regulating contempt of court. Such a confirmation is even stated in the Regulation of the Supreme Court No. 5 Year of 2020 in its considerations, remembering that the Law No. 14 Year of 1984 on Supreme Court has been changed (instead of being repealed). Judicially it serves as an *ius constituendum* (the law idealized) through changes instead of repeal, therefore the applicability of the legal principle on the basis of the recognition and power theories is still effectively enforced. Some cases occurred where legal advisors were threatened with criminal law since they obstructed examinations.

The main problem, namely the Article 3 of the Law No. 48 Year of 2009 on Judicial Power, is not as the main basis in enforcing the protection to the court, whether it is the application of *lex superiori derogat legi inferiori* principle or as the main legislation, whereas historically in accordance with the existing approaches and interpretations, the regulations in the field of judicial power have legal spirits to attend the judicial power as a power that is independent, free from any interpretation of any party.

The law enforcement policy in the field of judicial power, because of the arrangement of its legal product in 2009, is a legal implication of various changes in the judicial power arrangement emphasizing the importance of powers division. Division of Judiciary Power and Executive Power Through the Article 3 verse (1) of the Law on Judicial Power, it is stated that "In carrying out their tasks and functions, judges and constitutional judges are obliged to keep judicial independence." It seems that there has been some clarity in the setting the principle of administrating judicial power namely the judicial independence principle (Chapter II, Principle of Administrating Judicial Power) where before that no firm arrangement existed before. It means that any talks about judges' freedom, and their independent power, in positivistic legality, has juridical power at present. However, from the meaning of "justice" (<https://www.hukumonline.com/klinik/bacagrafis/lt57e20b90bdb53/perbedaan-peradilan-dengan-pengadilan/>, 25 February 25, at 0.08 AM), itself, it not only means regulation in the field of judicial power, but it is wider namely it is the law enforcement from the police, prosecution, to the judicial levels existing in the courts and institutions implementing the results of the executions made by the prosecutors namely the correctional institutions which are identical with the criminal justice system.

Historically, in the civil law system, judges are the representatives of the people instead of the King, as a result, in a trial, an equality principle as a universal legal principle needs a thought to be considered that anyone in a trial possesses equality and respects human rights with the method of the application of the equality principle which is balanced with the principle of fellowship. Sudikno Mertokusumo explained that ^(*)"In the four principles proposed by Paul Scholten, namely personality, fellowship, equality and dignity principles, there tend to highlight and insist others, and it is possible to separate what is good and what is bad." (Sudikno Mertokusumo, 1991)

In the common law system, King's honor including in it is Judges' honor. When a judge is insulted, the King is also humiliated. "In Anglo Saxon countries, King's power is identical with court power". (Ida Keumala Jeumpa, 2014). Therefore in the mainland European, known as civil law system as adhered in Indonesia, it is not King's honor, but Judges are the people's honor as shown ^(*)"The judges are considered as the representatives of the king but as the representatives of the people and their courts are called people's courts, instead of king's courts. However, each unreasonable behavior to the justice systems is also considered by some of the countries as criminal acts." (*Ibid*)

Satochid Kartanegara stated that "although someone has despicable temper and has not possessed any feelings to his own honor, but he has a right that his honor is not broken." (Erdianto Effendi, citing Satochid Kertanegara, no year). This indicates that court honor lies in all elements in a litigation as the realization of equality in the field of law. Therefore, in terms of legal certainty, in the future the honor of

justice is given more priorities over primary needs than honor of each element in the litigation. Each party requires limitations in the corridor of freedom one applies.

Paul Scholten's Thought of Freedom Limitation

A power needs control and supervision. It is a source of conflicts. One given power will tend to misuse of the power. Judges and courts according to the existing regulation are granted powers in terms of independence or freedom which are the same concepts according to the Indonesian Dictionary. As a result, the authors assumed that the freedom in judges are given by judicial power, or the freedom is possessed due to the judicial power or the freedom of the judicial power. In this matter, as a judicial system, freedom is directed to and developed in line with the prevailed system either internally or externally by referring to opinions of legal experts to discuss the issue of judicial independence. The tendency may be abuse of independence judiciary. (Ibnu Subarkah, 2017) Freedom is a "part of personality legal principles universally prevailed. This principle exists in each legal system. The personality principle reflects individual freedom, which is always contradicted with social or fellowship principle." (Shidarta, 2009) Besides according to Paul Scholten, there are still some "other principles which are universally applied namely principles of equality, authority, separation of good and bad, and principles of respect to human dignity." (*Ibid*) The principles, especially the personality principle containing individual freedom, and the equality contradicted with the authority principle are related to the abuse of independence which is not only focused on the judges' freedom. As a result, the balance to obtain intended justice does not have a meeting point as long as the justice is not well enforced. The Trial Leader in the Court is Judge. A judge possesses an authority and is considered to the representative of God. Those interested in a lawsuit should obey the judge. Judges are active. The authors have the same opinion with what is stated by Luhut Pangaribuan, "where the judge's power in Indonesia is greatly absolute, it is the judge that determines the facts, the law and he does not share with anyone." (<https://nasional.kompas.com/read/2019/09/03/19353481/peradi-mengawasi-kuasa-hakim-lebih-penting-dibanding-contempt-of-court>, accessed on September 3, at 08.08 PM)

Luhut Pangaribuan stated that @¹"The legal system in Indonesia at present more needs regulations to regulate supervision of judge power (contempt of power) than the regulations arranging the sentencing for those insulting justice institution (*contempt of court*). It is because the judge power in Indonesia is very absolute, either substantially or formally and its procedural laws. It is the judge who determines facts. Law and he does not share with others." (*Ibid*)

Certainty in Law to Enforce Legal Certainty

Some countries have arranged their regulations. This shows that a clear regulatory issue may be used as the main guide. The Law No. 48 Year of 2009 on Judicial Power is the main regulation although it does not strictly state the name of the regulation. As a consequence, it will be influential that the norms existing in the Article 3 do not have power anymore juridically. The legality principle implying that the law should in the written form is expected to have some benefits in the implementation. A Law is for the society, therefore certainty in law needs clarity and firmness in terms of its formulation. According to Fence M. Wantu, "law without a value of legal certainty will lose its meaning because it cannot be used as a code of conduct for all people". (R.Tony Prayogo, 2016). Legal certainty means as the clarity of norms so that it may be used as a guidance for the people because of this regulation. (*Ibid*) The concept of certainty may mean that there is clarity and firmness of the law applied in the society. This results in a lot of interpretations. According to Van Apeldoorn, (*Ibid*) "legal certainty may be determined by laws in terms of concrete things. Legal certainty is a guarantee that the law should be enforced, that those having rights according to the law may get their rights and a decision may be implemented. Law certainty is

justifiable protection to any arbitrary acts. It means that one may get something that is expected in a certain condition.”

The firmness of the law prevailing in the society, the law for the society at present, and the issue of the arrangement of good legislation in fact are extremely important. The people’s distrust to judges and courts are caused by the fact that the judges who are given mandates in the substance of the legislation need efforts to make interpretations. The people do not realize indirect victims from a legislation since its application is given less attention, but actually the regulation is problematic. Bagir Manan stated that applying the law carelessly for the sake of legal certainty may confront the feelings of justice for those looking for justice or for the people.” (Bagir Manan, 2007). Moreover, he said that “by making interpretations, certainty (decisions based on laws) and social interest may be met by giving new meanings to the existing law.” (*Ibid*)

The legislation that may result in the interpretation is the regulation which is contradictory with the people’s feelings of justice. The people should take part in law enforcement. This participation is important if no participation is made, it will cause victims. The people in the position serve as non-participating victims, namely “they refuse/deny crimes and they are criminals but they do not take part in coping with crimes.” (Lilik Mulyadi, 2007)

Therefore, the people have freedom to say to realize their participation. This freedom needs restriction. According to AM Mujahidin, people’s participation here does not “mean that the people are free to intervene or even force their will to influence court decisions. But their participation in the process of law enforcement in the court is the form of supervising the process of handling cases in the court from any elements that may injure the feeling of justice.” (Ahmad Mujahidin, 2010)

Then he stated that there are some important reasons of enforcing laws by the court and the people. “Ignorance of law enforcement made by the court to the people’s control and escort and the elimination of the people’s adverse impacts on the people’s justice at last are intended to administrate the legal enforcement which is pro justice and free from any intimidation made by any parties, especially political pressures.” (*Ibid*)

Law enforcement for humans means “a law as a human civilization process network among others requires how far the law enforcement may realize orderliness, regularity, certainty and just that protect all people.” (*Ibid*) The issue of arranging legal products in this present political situation is considered so that the law is for the people and it may be accepted by the people and it may fulfill their feelings of justice. It is correct for what is presented by Antony Duff, Lindsay Farmer, Sandra Marshall, Massimo Renzo, Victor Tadros that *overcriminalization* in making legal products which are a part of political structure, external matters are considered before criminal law is realized. They stated that “External constraints are more tradition ally constitutional, and Husak argues for changes in the political structure of law-making to require that certain conditions be met before penal laws can be enacted.” (Antony Duff, Lindsay Farmer, Sandra Marshall, Massimo Renzo, Victor Tadros, 2013). Political configuration and power also determine the development of the society and its legal system. In accordance with the history of justice power in Indonesia, the colonialists gave great impacts on political situation up to the independence era as a milestone of freedom and independence where Indonesian people determined their own destiny. This means that the desire to enforce the rule of law has a place that would be uphold as highly as possible.

According to Bahder Johan Nasution (1019), viewed from its history, judicial power has developed for a long time in line with the developing political situation and condition according to the state administration eras accompanying it. The “unification” emerged in the justice power which is free and independent and it is basically embodied in four justice environments: General Court, Military Court,

Religious Courts and State Administrative Court where each of this court environment culminates in the Supreme Court, as the highest institution holding free and independent judicial power.

Besides, he also said that according to its history, there was legislation after the independence regulating judicial power namely the “Law No. 19 Year of 1948, the Law No. 19 Year of 1964 and the Law No. 14 Year of 1970 as changed with the Law No. 35 Year of 1999. The three laws were made to fulfill the instruction of the Articles 24 and 25 of the 1945 Constitution. Before the Law No. 19 Year of 1948 was applied, anything dealing with regulations and institutions concerning with the judicial power, the regulations and bodies before the independence are (Japanese and Dutch era) had been enforced. Such enforcement was based on the stipulation of the Article II on Transition Rules of the 1945 Constitution which principally stated that all state bodies and existing regulations will still prevail as a long as no new regulations exist according to the Constitution.” (*Ibid*)

The Article 28 D, verse (1) Chapter X on Human Rights of the 1945 Constitution of the Republic of Indonesia confirms that “each person has a right to recognition, assurance, protection and legal certainty which is just and the equal treatment before the law.” (*Op.cit* UUD 1945). Each citizen needs legal certainty. The law which is uncertain, which philosophically and juridically is spread, according to the rule of law and also anything dealing with the form of type of its crime containing the guarantee and protection of human rights is violation to human rights. If it is related to the norm in the Article 3 of the Law No. 48 Year of 2009 on Judicial Power, it will bear a concept that it is possible to have law enforcement with certainty and this will cause chances to court decisions which do not satisfy those looking for justice and the people. This thought, as presented by Bagir Manan when discussing the case between Marbury Vs Madison (1803) in the US, is that “Marbuy applied to the Supreme Court to issue a decision (stipulation) instructing the President (Thomas Jefferson) to implement the President’s decision made by the previous President (John Adams) that had appointed Marbury as a judge. It turns out that the decision made by the Supreme Court did not give attention to the request applied by Marbury. what was decided was to declare the law on judicial power (Judiciary Act, 1787) giving authorities to the Supreme Court to decide (stipulate) an instruction to do something which is in contradiction with the Constitution.” (*Loc.cit*, Bagir Manan)

At the best knowledge of the authors, the concept above is that “certainty in law is required, although the legal certainty is necessary.” The higher the enforcement of the legal certainty, the lower the certainty in law will be. To have certainty in law, at the level of the arrangement of legislation, carefulness is needed. Certainty in law is a reflection of the fact that Indonesia is a state of law, a state which is based on law, which has certainty in law and which attends the results of the rule of law itself.

In fact, it has caused some results due to ignorance of the nature of judicial power. Indonesian Judges Association (IKAHI) presented a number of events of the contempt of legal proceedings in Indonesia, such as:

“The attack to infrastructure on November 15, 2003; the building of the District Court Larantuka, East Nusa Tenggara was burned, in 2006, the District Court in Maumere East Nusa Tenggara was burned. This also happened to the District Court Temanggung, Central Jawa in 20011, District Court Depok West Java in 2013, and District Court Bantul DI Yogyakarta in 2018.” The attack to judges also occurred. In 2013, a judge in Gorontalo was attacked when he was driving, Supreme Jude Syaifuddin Kartasasmia was fired until death when he was driving is car to his office. A judge in Religious Court in Sidoarjo died since he was stubbed in the court room, while in the District Court, Central Jakarta, an advocate tortured with his belt to the judge who was reading his decision”(https://nasional.kompas.com/read/2019/08/01/12271201/banyak-hakim-diserang-dpr-didesak-bahas-uu-contempt-of-court, September 3, 2019, at 00.20 AM)

Conclusion

On the basis of the analysis of the research results above, it can be concluded that to have certainty in law, at the level of the establishment of legislation, carefulness is greatly needed. Certainty in law is a reflection of the fact that Indonesia is a state of law, a state which is based on law, which has certainty in law and which attends the results of the rule of law itself. Although practically the restriction of the freedom of each party has been regulated in each regulation, but in the application, abuse of power still occurred made by the actors of the power itself. As a result, the certainty in law of the arrangement of the justice independence in its concept needs reviewing.

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