

INDEPENDENCE OF JUDGES IN THE IMPLEMENTATION POWERS OF JUSTICE

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Abstract

This article aims to explore the independence of the judiciary as an important pillar of a rule of law. Independence of the judiciary is a necessary condition for maintaining the rule of law, only constitutional law has legitimacy that must be upheld and the court should have the ability to perform a task in deciding the law. The independence of judges to examine, prosecute and deciding have guaranteed in the Constitution of the Republic of Indonesia Year 1945 and Act No. 48 of 2009 on Judicial Power, with the purpose judge in his judicial function can actually examine, prosecute and deciding on cases based on the law and justice.

Keywords : judge, judicial independence, judiciary power.

Abstrak

Tulisan ini bertujuan mengeksplorasi independensi peradilan sebagai pilar penting sebuah negara hukum. Independensi peradilan merupakan kondisi yang diperlukan untuk memelihara negara hukum, hanya hukum yang secara konstitusional memiliki legitimasi yang harus ditegakkan dan pengadilan harus memiliki kemampuan untuk melakukan tugas dalam memutuskan hukum tersebut. Penormaan independensi hakim dalam melaksanakan fungsi kekuasaan kehakiman melalui peradilan-peradilan negara diatur dalam Pasal 24 ayat (1), ayat (2) dan ayat (3) UUD NRI Tahun 1945. Juga Pasal 1 Butir 1 dan Pasal 3 ayat (1) dan ayat (2) UU No. 48 Tahun 2009 tentang Kekuasaan Kehakiman.

Kata kunci: hakim, kemandirian peradilan, kekuasaan kehakiman.

Preface

The independence of the judge as the executor of the judicial power has been a long debate in the constitutional history since the birth of the idea or notion of state law. Pros and cons of the need for freedom is given to the judge as the executor of the judicial power is born of pragmatism dealing with progressive ideology.

Judiciary independent and impartial is one of the important principles to support building a modern law state. As a consequence of this principle, the judge in his judicial duties should not be influenced by anyone, including by various interests, including the interests of positions (political) or the interests of money (economic).

The judge is not merely the application of the law through the method of syllogism (trumpet/funnel law), unless the judge is the implementer, the inventor (law judge finding) and forming law (judge-made law) fair and wise. Therefore, the judge should not be bond only to the

law within the meaning of the legislation is loaded with the dominant interests of a powerful minority (the ruler).

There should be a legal guarantee to create the independence of judges, so that the judge can be free from all forms of intervention of state power and administration, free from any form of intimidation of other coercive powers, and free from threats that can affect the load psychological and physic while being judge and after the verdict.

Facts on the ground show that many judges have not been able to maintain its independence. In accordance Reports Semester I (January-June) 2014 Judicial Commission, there were eight judges imposed severe sanctions (dishonorable dismissal, non hammer for two years, dismissal remains with pension rights), thirteen judges imposed moderate sanctions (non hammer for one year, the longest non-hammer six months, a delay salary for one year, the longest non-

hammer three months); forty-four judges imposed mild sanctions (written reprimand, verbal reprimand).¹

The above facts have reflected that an independent judiciary is still far from complete, even though the constitution has been asserted that "Judicial power is an independent power to organize judicial administration to uphold the law and justice". The principle of judicial independence is one of the key principles of democracy. This principle requires that the judiciary free from interference, pressure, or coercion, either directly or indirectly, of the power of other institutions, colleagues or superiors, as well as other parties outside the court. Based on the explanation above, the formulation of the problem addressed in this paper is how far the existence of an independent judiciary as pillars of state law and how the norms of independence of judges as the executor of judicial power in Indonesia.

Discussion

Independence of the Judiciary Power as a Pillar of State Law

Judicial independence is a dynamic concept that can be defined in different ways, generally simplify the meaning as judicial independence from the executive and legislative branches of government.² Judicial independence is recognized as an "indispensable condition" for a free society under the rule of law. The independence implies freedom from interference by the executive or legislative in performing judicial functions.³

Michael D. Gilbert gives a different definition of the independence of the judiciary, namely the situation of a judge can not be penalized, and knows that he can not be punished by the other actors as a result of his decision. The judge

can not accept punishment as a reduction in salary, loss of office of judges, prison, or other hazards. "Other actors" including parties who get involved, legislators, bureaucrats, voters, interest groups, other judges, and so on. The official decision means a decision in one's professional capacity as a judge.⁴

Regarding the independence of the judiciary, there are two perspectives. *First*, the perspective of the separation of powers in the form of independence from other branches of power. Its aspects including organizational, administrative, personnel, and financial; *Second*, the perspective of democratic form of independence in making decisions. This relates to the special obligation of the courts of the state of law. Justice is only one branch of government in the judicial power, but carry out the functions to ensure the establishment of a state of law, in which there is the protection of the independence of judges in deciding the case that is free from the influence of various interests.⁵

The independence of the judiciary in the state law can be tested in two ways, namely impartiality and rupture relations with political actors (political insularity). Impartiality of the judge looks at the idea that the judges will base decisions on the law and facts at trial, not on the basis of association with one of the litigants. Impartiality of the judge is not something that is easily detected, in which case it can be tracked only as long as a judge of behavior vis-a-vis its association with the litigants in the context of social relations or political relations.⁶

John Locke in the context of the separation of power teaches that power in a state distributed or divided into several organs of different state agencies, John Locke wrote: "It may be too great a temptation to human frailty, apt

¹ Anonim, Laporan Semester I, <http://www.komisiyudisial.go.id/statis-25-informasi-pengawasan-hakim.html>, accessed on 28th January 2015.

² Frank B. Cross, "Thoughts on Goldilocks and Judicial Independence", *Ohio State Law Journal*, Vol. 64 No. 195, 2003, Ohio St. L.J., page 209.

³ Moosa Akefi Ghazi, "Iranian Judiciary Facing Human Rights Norms or Islamic Criteria", *Journal of Middle Eastern and Islamic Studies (in Asia)*, Vol. 5, No. 3, 2011, page 40.

⁴ Michael D. Gilbert, "Judicial Independence and Social Welfare", *Michigan Law Review*, Vol. 112, Issue 4, 2014, page 582.

⁵ Harlord See, "Comment Yudicial Selection and Decrisional Independence", *Law and Contentemporary Problems*, Vol. 61, No 3, Summer 1998, page 141-142.

⁶ Agung Prastyo Wibowo, "Lembaga Eksaminasi Dalam Perspektif Peradilan Pidana Indonesia Upaya Pengujian Terhadap Putusan Hakim yang Tidak Memenuhi Rasa Keadilan Masyarakat", *Jurnal Ilmu Hukum*, Vol. 15, No. 1, March 2012, page 91.

to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage".⁷

According to John Locke, to protect the accumulation of power only in certain organs of the state, it is necessary to distribute power to the several organs of state, to avoid the abuse of power if only focused on one organ. John Locke's theory further developed by Montesquieu, that is very dangerous if there is an overlap between the functions of the legislative, executive and judicial branches of government, therefore, need to be separated, Montesquieu wrote: when the legislative and executive powers are united in the same person or in the same body of Magistrates, there can be no liberty. Again, there is no liberty if the judiciary power be not separated from the legislative and executive.⁸

According to Montesquieu, for the establishment of democratic legal state should be a separation of state power into three axis powers, namely the legislative, executive, and judicial powers. Legislative power, wherein the power in the formation of legislation. Executive power, covering power in the field of law enforcement. Judicial power (judicial), including the authority in the field of justice and the judiciary in order to enforce the legislation/enforcement (law enforcement).

Trias Politica doctrine also supports the doctrine of state law. Both doctrines that (trias politica and state laws) are intertwined and inseparable, like the two sides of the same coin. In the separation or division of powers, the emphasis is placed the independence of the judiciary power.⁹

Aniagolu has explained the working of the principle of separation of powers, as written Sunday E. Edeko as follows: the principle of separation of powers is fundamental to our presidential Constitution. The Constitution both at the Federal and the State levels makes provision for three great departments of state the Legislative, Executive and Judiciary. Provisions have been made in the Constitution as to the powers and functions of each department.¹⁰ Thus, separation of power is the most basic thing for a country whose constitution adopts a constitution organize presidential and legislative, executive and judicial branches of the functions and authority of each of each field.

Independence of the judiciary is generally seen as a fundamental value for a state law.¹¹ In a political system, the independence of the judiciary as a requirement for the state of law.¹² Several international documents and agreements such as the Basic Justice Principles of of the United Nations and the European Charter on the Status of Judges, stressed the importance of judicial independence and tried to explain the key elements of the judicial independence.¹³

The main purpose of the independence of the judiciary is to facilitate three specific value. *First*, judicial independence is a necessary condition for maintaining a state of law. *Second*, in a constitutional government, only law that is constitutionally legitimate to be enforced and the court should have the ability to perform a task in deciding the law. Therefore, there is a need for the court to have the freedom to cancel a law that violates these values. *Third*, in a democracy, the court must have a strong autonomy within resist the temptation to give too much respect to the economic or political power holders.

⁷ Marina Kunnecke, 2007, *Tradition and Change in Administrative Law: An Anglo-German Comparison*, Berlin: Springer, page 15.

⁸ Sunday E. Edeko, "The Relevance of Separation of Powers in A Democratic System of Government: A Comparative Approach", *African Journal of Law and Criminology*, Vol. 1, No. 2, 2011, page 3.

⁹ Sufiarina & Efa Laela Fakhria, "One Roof Judicial System in Indonesia", *Indonesia Law Review*, Year 2 Vol. 3, September - December 2012, page 326.

¹⁰ Sunday E. Edeko, *op.cit.*, page 11.

¹¹ R. De Lange & P.A.M. Mevis, "Constitutional Guarantees for the Independence of the Judiciary" *Electronic Journal of Comparative Law*, Vol. 11 No. 1, May 2007.

¹² Thomas E. Plank, "The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia", *William & Mary Bill Of Rights Journal*, Vol. 5, Issue 1, 1996. page 3

¹³ Arjana Llano, "Independence of the Judiciary", *Juridical Tribune*, Vol. 3, Issue 2, December 2013, page 109.

For a democratic constitutional state such as Indonesia, independent of the judicial power is needed and it is a primary requirement to be applied. Judicial power, in the context of Indonesia is an independent state authority to conduct judiciary to uphold law and justice based on Pancasila, for the implementation of the State Law of the Republic of Indonesia.

The Norms of Independence of Judges as the Executor of Judicial Power in Indonesia

Judicial independence is generally used to represent the judiciary, including the individual judge, as an independent agency of the intervention of other parties. United Nations (UN) confirmed the seven principles of judicial independence as a reference judges in performing judicial power which was adopted from the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Judicial power in the state system of Indonesia is an independent power perpetrated by a Supreme Court and judicial bodies underneath, and by a Constitutional Court, to organize judiciary to enforce the law and justice. Independent judiciary is independent in the sense, has been affirmed in Article 24 paragraph (1), (2) and (3) NRI Constitution of 1945, as follows:

- (1) Independent judiciary is an independent power to organize judicial administration to uphold the law and justice.
- (2) Independent judiciary shall be carried out by a Supreme Court and judicial bodies that are below it in the general courts, religious courts, military courts, administrative courts, and by a Constitutional Court.
- (3) Other agencies whose functions related to the judicial authorities stipulated in law.

Constitutionally Article 24 of the Constitution NRI 1945 demanding and requires power really was impartial and that is free and independent of the influence of the litigants, and not partial to either party in accordance with the principle of equal opportunity for each party (au-

di alteran partem or must give the same opportunity to call now party). Give equal treatment to the parties or also called equal dealing. In addition also have to completely free and independent of the influence and executive grip or ruler (independence from the executive power)

Independent judicial power when studied further in an independent, free from the influence of other powers of intervention, then the assertion of the basic law of the country, further developed in Law No. 48 of 2009 on Judicial Power, as well as in Law No. 14 of 1985 on Supreme Court, as amended by Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 in conjunction with Law No. 3 of 2009 on the Second Amendment Law No. 14 of 1985 on Supreme Court. In Article 1 point 1 of Law No. 48 of 2009 on Judicial Power affirmed: Judicial power is independent of state power to conduct judiciary to uphold law and justice based on Pancasila and the Constitution of the Republic of Indonesia Year 1945, for the implementation of State laws of the Republic of Indonesia.

On Official Explanation point I Law No. 48 of 2009 contains a more emphatic clarification about the existence of the independence of judicial authorities in the administration of justice. This, explained that: NRI Constitution of 1945 affirms Indonesia is a state of law. In line with the provisions of the one of the important principles of state law is a guarantee of the implementation of an independent judiciary, free from the influence of other powers to organize judiciary to enforce the law and justice.

Furthermore, emphasized in Article 3 paragraph (1) and paragraph (2) of Law No. 48 of 2009, as follows:

- (1) In carrying out its duties and functions, judges and constitutional judges must maintain the independence of the judiciary.
- (2) Any interference in judicial affairs by other parties outside the judicial authority is prohibited, except in cases referred to in the Constitution of the Republic of Indonesia Year 1945.

The assertion of independence of judicial power above, the vertical structure and culminating in the Supreme Court. It was stipulated in

Article 2 of Law No. 14 of 1985 (amendment to Law No. 5 of 2004 Junto Law No. 3 of 2009), that: The Supreme Court is the Highest Court of the State of all courts, which in carrying out their duties free from the influence of government and other influences.

Maintenance of an independent and accountable judiciary is the basis of constitutionalism and human rights protection. The emergency constitution Bill of Human Rights has revived awareness and concern about the role of the judiciary as a forum that is used to search the individual and collective justice and sustainability of democratic culture.¹⁴

The independence of the judicial power is not only directed towards the institutional structure of the judiciary, but also against the judges of the courts in carrying out its functions in hearing and deciding a case that confronted him. Implementation of judicial power handed over to the judicial authorities stipulated by law with the main task to receive, examine and resolve each case submitted to it.

The independence of judges is generally determined by two factors as set forth Arjana Llano that: *first*, with regard to how the judge maintained securely from improper influence of third parties (individuals or organizations); *second*, the extent to which judges think, act and make decisions independently of the specific factors actually and properly according to law.¹⁵ Judicial independence is determined by a good legal framework, or the application in practice and perception of the judge against its independence.¹⁶

In line with these basic tasks, then the court can not refuse to investigate and prosecute a case filed by yustisiabel on the pretext that the law does not exist or is less clear. This means that the court is obliged to examine, hear and decide a case filed by litigants. Article 10 paragraph (1) of Law No. 48 of 2009, asserted that: Court prohibited refuse to examine, hear and decide a case filed under the pretext that the

law does not exist or is less clear, but obliged to examine and judge.

Implementation of the duties and functions of the judicial power which is run by the judges of the courts, is expected to uphold the law and justice are independent, independently, without any interference from the environment of other powers and influence of other elements beyond the interests of justice. On that basis, the judge is required to always perform excavation, follow social dynamics, and understanding the legal values and sense of justice in society. The requirement that the judge, affirmed in Article 5 of Law No. 48 of 2009, that:

- (1) Judges and constitutional judge must have excavate, follow, and understand the legal value and sense of justice in society.
- (2) Judges and constitutional judge must have integrity and personality irreproachable, honest, fair, professional, and experienced in the field of law.
- (3) Judges and constitutional judges must comply with the Code of Ethics and Code of Conduct of judges.

Demands for the judge is a legal consequence and professionalism of judges in performing independent judiciary function to enforce the law and justice through judicial bodies. The independence of judges in performing judicial power through the state justice agencies, meant that judges can truly independent, free and independent from all interference that can affect its function in check, adjudicate and decide a case that confronted him.

The justice system must be reformed to achieve justice in favor of the citizens, which is more transparent and efficient. The way is: *first*, strengthening the court of first instance (strengthening handling litigation, strengthen wise thinking, mediate disputes rather than taking decisions that lead to quarrels, internal court assistance system). *Second*, extending the principle of the single judge, reorganize the law (the opportunity to appeal to the court of appeal, rearrange

¹⁴ Muna Ndulo, "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System", *Zambia Social Science Journal*, Vol. 2, No. 1, May 2011, page 4.

¹⁵ Arjana Llano, *op.cit.*, page 109-110.

¹⁶ *Ibid.*, page 110

the instrument to control the error, the centralization of power in the highest court in the state; reconsideration), and the complaints system.¹⁷

Closing

Conclusion

1. Judicial independence is an important pillar of a state law for judicial independence is a necessary condition for maintaining a state of law; in a constitutional government, only law that is constitutionally legitimate to be enforced and the court should have the ability to perform tasks in the judicial decisions; in a democracy, the court must have a strong autonomy within resist the temptation to give too much respect to the economic or political power holders.
2. The norms of independence of judges in performing judicial functions of the judicial power through state-court set out in Article 24 paragraph (1), paragraph (2) and paragraph (3) the Constitution of 1945. Also Article 1 Clause 1 and Article 3 paragraph (1) and paragraph (2) of Law No. 48 Year 2009 on Judicial Power.

Suggestion

It needs an independent judiciary to achieve a good state of law. To realize an independent judiciary, it is necessary to judge the professional, transparent and accountable in deciding the case in the court and the required optimal control of the judges in order not to violate the law and professional ethics of judges.

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¹⁷ Nur Agus Susanto, "Independensi Kekuasaan Kehakiman dan Efektivitas Sanksi untuk Kasus Hakim Penerima

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