Does the Judiciary Support Legal Certainty? An Indonesian Perspective

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Abstract: Many legal thinkers have tried to interpret what and how the principle of legal certainty enforced. In both civil and common law traditions, legal certainty is considered a value and the basis for the legality of public authorities' legislative and administrative actions. The meaning of these two views, both Civil law and Common law, is that legal certainty is the embodiment of the principle of legal legality or in other words, legal certainty related to law enforcement itself. Interestingly, legal certainty begins with the legal uncertainty created by the institutions that form it. The judge's role in interpreting, translating and finding the law is crucial so that there is no legal vacuum due to the malfunction of the rule of law. This paper will discuss how the Indonesian judiciary supports legal certainty. The research method used is juridical normative with conceptual, and case approaches. The results of this study indicate that the Indonesian judiciary supports legal certainty through legal interpretation and legal findings made by judges. This legal interpretation and legal findings' primary purpose is to fill the legal gap left by laws that are multiple interpretations and ambiguous.

Keywords: Judicial Institution, justice, Legal Certainty, Judge.

INTRODUCTION

Anthony D'amato, in his paper entitled *Legal Uncertainty* which published in the California Law Review, once stated that current law is increasingly leading to legal uncertainty [1, 2]. It is because the legislators did not fully answer all legal issues in the community. Ironically, the legislature laws that should be that for society's benefit, notable by society due the norms are ambiguous, contradictory and multiple interpretations. Besides, laws do not clearly and completely regulate the possibilities because laws are only limited to textualities made by legislators. Though when viewing the purpose of establishing the ideal of law as the legal doctrine (*idee 'des recht*) Gustav Radbuch is for legal certainty (*rechtssicherkeit*), justice (*gerechtigkeit*) and benefits (*zweckmasigkeit*).

If the above objectives not achieved, it can ascertain that the law is uncertain due to ambiguous norms and interpretations earlier. If this happens, there will be two options for law enforcement officers to carry out the law, namely whether to run under the laws made by the legislators or make the legal interpretation of the law to understand and be sure.

In a country that adheres to a Civil Law system that does not recognize jurisprudence such as in Indonesia, the principle of legal certainty is one of the essential principles to maintain law enforcement institutions' morale, especially judicial institutions that they still gain the public trust. In the Civil Law tradition, one of the duties of the judge is to interpret the law. Because it will be a problem when the passed decisions are different even in similar cases with similar laws, the public will assume that there has been *inconsistency* and *legal uncertainty*. In legal language, such a decision is called an overruling decision. *Overruling* is considered a practice whereby the court provides a new judicial opinion, replacing the previous judicial opinion [3, 4].

For example, the Constitutional Court is seen as inconsistent in several decisions because it decides differently on cases that have the same substance. Constitutional Court decisions that are substantially overruling are the Constitutional Court Decision Number 36/PUU-XV/2017 and Constitutional Court Decision Number 40/PUU-XV/2017 related to the Corruption status Eradication Commission (KPK) in the constitutional structure in Indonesia. The Constitutional Court Decision Number 36/PUU-XV/2017 and MK Decision Number 36/PUU-XV/2017 have interpreted the KPK as part of the executive branch. In contrast, in the previous 4 (four) decisions, namely the Constitutional Court Decision Number 016-017-019/PUU-IV/2007, MK Decision Number 19/PUU-V/2007, MK Decision Number 37-39/PUU-VIII/2010, and MK Decision Number 5/PUU-IX/2011, the Constitutional Court stated that the KPK as an independent institution not included in the executive, judicial and legislative power systems.[1] The practice of overruling by the Constitutional Court was evident in the dissenting opinion submitted by Constitutional Justice I Dewa Gede Palguna, Judge Suhartoyo and

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[1]Ibid.

Judge Saldi Isra in the Constitutional Court decision Number 36/PUU-XV/2017.[2]

This paper discusses the importance of the principle of legal certainty in judicial institutions, especially in Indonesia. The first part of this article will discuss the notion of legal certainty both in the Common law tradition and Civil law tradition. The second part of this paper will discuss the concept of justice, the application of legal certainty in the judiciary and what the judiciary gets in supporting legal certainty. In the third part, we will discuss legal certainty in Indonesia and its application in the Indonesian judiciary.

This paper results from legal research conducted to produce new arguments, theories or concepts as a prescription in solving the problems at hand. This research uses a conceptual approach and a case approach. The conceptual approach departs from the views and doctrines developed in the science of law [5]. This research will use legal certainty concepts both formal and material, the natural idea of justice in both civil law and common law countries, the concept of legal interpretation, and the concept of legal findings (*rechtsvinding*). Meanwhile, the conceptual approach is carried out by analyzing cases related to the issues faced, which have become court decisions with permanent legal force.[3] Study of a staple in this case approach is the *ratio decidendi* or reasoning, that reasoning the court to come to a decision.

THE IMPORTANCE OF CERTAINTY IN A LAW

The debate about the importance of legal certainty against legal justice is a classic debate that has lasted a very long time, even as old as the law itself [6]. Since the beginning of the law, the legal certainty and legal justice are always contested and debated through dialogue and debate imaginary of the philosophers and legal scholars since that time. In the past, the debates that took place related to *ius scrictum* and *ius aequum*. Still, now the most frequent debates, especially in continental countries like Germany, are related to certainty and justice.[4] Although they have different terminology, basically they refer to two various aspects of the law. Meanwhile, in Indonesia, legal certainty is one of the principles that must be implemented by a judicial institution in the form of decisions with permanent legal force.

In simple terms, legal certainty can be interpreted when someone will get something expected in certain circumstances. Certainty is defined as clarity of norms so that it can be used as a guideline for people who are subject to that regulation. This understanding can also be interpreted as clarity and firmness in applying the law in society so that it does not cause many misinterpretations. In the book Introduction to Law, Van Apeldoorn defines legal certainty as a matter determined by the law in concrete issues [7]. Legal certainty guarantees that the law explained that those who have the right to sue the law could get their rights and implement decisions. In another sense, legal certainty is Justiciable protection against arbitrary actions, meaning that someone will get something expected in certain circumstances.

For decades, legal scholars have argued that legal certainty is the incarnation of good law. There is no clear distinction between legal certainty and legal rules, and even some experts argue that legal certainty is the law itself. Whereas from a functional point of view, these two ideas are identical enough that can analyze them. Before the concept's emergence, the questions allow it to be reinterpreted from previous debates by placing them in this context [8].

The characteristics of legal certainty are relatively consistent with the characteristics identified by Lon Fuller in his masterpiece entitled *The Morality of Law* [9] namely: (a) the existence of a legal system consisting of regulations, not based on momentary decisions for some issues; (b) the law is made public; (c) the law is not retroactive (non-retroactive principle); (d) is made in a formula that is easily understood by the public; (e) there must be no conflicting regulations; (f) must not demand an action beyond what is to be done; (g) must not be changed frequently; (h) there must be a match between the regulations and the day-to-day implementation.[5]

Meanwhile in the book *Between Facts and Norms*, Habermas discusses legal certainty in more detail [10, 11]. It seeks to answer how can simultaneously achieve legal certainty and legal legitimacy in adjudication.[6] He argues that the legal system's social integration function requires that adjudication simultaneously satisfy conditions consistent with

[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*

[5] Lon Fuller's opinion has entered the realm of behaviour, and It means that as one of the objectives of the law, the law must have certainty between the rule of law and its implementation. *Ibid.*
[6] *Ibid.*

rational decision making [12]. Therefore, on the one hand, legal certainty requires that decisions be consistent with the existing legal framework. On the other hand, claims of legitimacy demand decisions that are consistent concerning the surrounding legal system and must also be rationally justified so that everyone can accept their rational decisions.[7]

Habermas also introduced the concept of law-dependent procedural certainty to resolve the paradoxical relationship between certainty and acceptance. However, the legal procedural paradigm supported by Habermas only creates the conditions for those who participate in the procedure to actualize their rights. It does not guarantee specific and predetermined results. Instead, it ensures the necessary procedural arrangements that can balance different values on a case-by-case basis.[8]

Although Habermas advocates a procedural understanding of the law and legal certainty, it became clear that the procedure is not sufficient to ensure legal certainty. He also believes that the procedural rights create legal certainty form because people know that they have a chance to get their cases heard by specific procedural rules. He recognizes that this in itself is not sufficient to meet the requirements of legal certainty. Importantly, because it is impossible to make a proper law at the outset, legal certainty is guaranteed on the one hand through procedural (creates procedural predictability) and on the other through argumentation (rational acceptance).[9] It leads to questions about how the community can agree on a particular legal paradigm to resolve the problem of legal uncertainty in decision making. Habermas proposes a reflexive form of communicative action to fix this problem. In other words, an agreement among the legal community concerning the interpretation of the text of the law in a particular case requires that the rights of all participants recognized the legal arguments.[10]

Legal certainty in the formal sense implies that law and adjudication must be predictable. The law must meet imperative clarity, stability, clarity, and acceptance so that those who care can calculate with relative accuracy the legal consequences of their actions and the results of legal proceedings. Meanwhile, substantive legal certainty is related to rational acceptance by decision-makers in court. In this view, it is not sufficient that laws are predictable, so they must also be accepted by the legal community [13]. So, the legal certainty, both formal and substantive, forms essential principles in the current legal system.

The law also stabilizes expectations of behaviour in society to create legal certainty that allows legal subjects to calculate the legal consequences of their behaviour and that of others. Consequently, legal norms must assume a form that is easy to understand, consistent and precise, and generally accepted. It is known to whom it intended, does not apply retroactively and must regulate general factual conditions and relate concrete situations to legal consequences. It is possible to use the norm for everyone and all comparable cases in the same way.[11]

Legal certainty is closely related to standard and unambiguous rules, or in other words, legal certainty is related to the implementation of legal rules under these rules. It goes back to the earlier explanation that legal certainty is the rule of law itself. Therefore, legal certainty could be measure by a lack of legal process. Effective law is a fundamental law that can renegotiate, which has similarities with the case approach (jurisprudence). However, legal certainty is not a legal requirement because it not used to define law as a right.

Legal certainty also depends on the relationship between facts and law, and three dimensions may emerge. First, there is certainty regarding the content of the law itself, namely certainty in legal material. Second, there is certainty regarding the transition from facts to law or in other words, namely procedural legal certainty. Third, there is certainty in forming a circle, connecting law with facts and forms of efficacy rather than legal certainty.[12] From the three dimensions above, it can say that legal certainty occurs in conditions where the rule of law is following the reality of law enforcement itself.

Ironically, as mentioned above, the current law does not lead to certainty but leads to uncertainty. Legal

[7]The problem of rationality discussed by Habermas is as follows: how can we continue to develop and develop laws to be applied in a way that guarantees both? Certainty and correctness or, more specifically: how can the selective conformity of decisions be justified so that all participants perceive them as accepted? the answer to this question is related to the idea of a legal paradigm that guides adjudication. *Ibid.*

[8]*Ibid*, p. 1474.

[9]*Ibid*, p. 1475.

[10]*Ibid.*

[11]*Ibid*, p. 55.

[12]Regis Lanneau, *Op.Cit.*, p. 8-9.

uncertainty means that the law cannot answer every legal question. In Anthony D'Amato's view, the law tends to be increasingly uncertain, or in other words, the law creates legal uncertainty.[13] The rules and principles of law are becoming more and more uncertain in their content and implementation because the biased legal system does not support expressing the law's rules and principles.

Uncertainty in law occurs due to two factors. *First*, the law is uncertain because of the written law. In the sense that the same law is interpreted differently by different courts, even in the same case.[14] Written law can also become increasingly erratic because of the legislative process itself. People who are disadvantaged by the rules may exist which lobbied to get new provisions to enacted that create exclusion, exemption, or privilege or obtain a particular law of another kind. *Second*, the rules can be more uncertain is in their implementation. People who are less fortunate by existing rules can change their activities to fall in the gaps between current rules or come up more ambiguous in any given rule.[15] So, even though the written rules remain unchanged, if people change their behaviour so that the clear rules apply less to what they do, we can say that the general law has become less certain.[16]

Moreover, Anthony also argued that the law built to be more uncertain by the people who created it (the legislator). This uncertainty obtained in one of two ways. Namely, it may change any given rule by law may be altered to approach 0.5, a degree of uncertainty about whether it will apply it to every factual situation.[17] Second, the legal system's strength can operate to push every rule given to the zero points of total extinction. Although legislators make more definite laws by removing some rules, legal uncertainty increases because the general rule only approaches extinction without reaching it. As any given rule approaches extinction, other rules appear to take its place.

Indeed, most American scholars like Anthony do not know the term legal certainty and reject the teaching of legal certainty. Many American legal scholars who call themselves realists have popularized the term legal uncertainty because laws made increasingly leading to more significant uncertainty. It is why the understanding of legal certainty as one of the law goals disappeared in America in the early 1960s. Coupled with the emergence of legal academics of critical legal studies in America in the 1980s who revived Jerome Frank's radical thinking in books *Law and the Modern Mind* who think that legal decisions are always uncertain [14].

The court's role in realizing legal certainty, legal justice, and legal benefits can be seen from the passed decisions. An excellent judicial process can be seen from how a judge can properly carry out his duties and functions. Judges have a very noble task to uphold truth and justice and to uphold the law. According to Henry Merryman, judges seen as cultural heroes or figures of a father because of its strategic role. Judges have a contribution to developing the legal tradition through analyzes and decisions [15].

THE ROLE OF THE JUDGE AND THE NATURE OF THE JUDICIARY

When discussing the concept of justice, it will never separate from the legal system used, namely the Civil law legal system and the common law legal system. Both the legal system has precise differences and comprehensively deals with the concept of proceedings. In the common law system, it identified with a case-based system. Still, even though cases play a dominant role, especially in England, the English law sources do not only include case law, which are principles taken from decisions governed by the doctrine of precedent (*stare decisis*). But also laws that contain legal regulations through enforcement by the legislative body. Although legislation in the Common law system, especially the UK, has recently become not only a source of authoritative law. Sometimes, it had also become a primary law source when there are no cases relevant to the problem at hand, or even when such a case decided [16].

This case-law system set by precedent, so higher courts' decisions is usually binding against lower courts' decisions. The part that is considered binding in the decision afterwards is the fundamental part of decision-making (*ratio decidendi*), mostly a principle formed through cases. Any other review that the judge gives at initial consideration (*prima facie*) classified as an incidentally non-binding review of the court (*obiter*

[13]Anthony D'Amato, Legal Uncertainty..., *Op.Cit*.
[14]Ibid, p. 2.
[15]*Ibid*.
[16]The biggest problem with legal uncertainty according to D'Amanto is where the rule approaches the 0.5 level. See, *Ibid*, p. 7.
[17]Equivalently, factual situations can be manipulated so that they are not clear under the existing rules. The aim is that the current regulations cover the definite position with only 0.5 probability that it affects the parties' legal rights. *Ibid*, hlm. 9.

dicta).[18] But for some regions of law, the highest status of a judicial statement depends on what a higher court has to say about it.

The style that characterizes Common law is pragmatic and improvisatory, particularly demonstrated by judges' decisions and disputes.[19] It means that the judge does not become the law's mouthpiece but the judge who interprets the law. Another reason is that English law did not codify.[20] Thus the Act only consolidates or clarifies existing law and intends to establish the current case law, which can use legitimacy to interpret any ambiguities or meanings that are not sure of a law.[21] Whereas in the Civil legal system, the courts based on laws. It means that the judge is the enforcer of laws, and as the mouthpiece of the law, the judge may not carry out the function of forming laws. It is based on the doctrine of separation of powers, where lawmakers and commentators legislation is at the legislature.

In its development, courts and judges' position in the Civil law system has several distinct characteristics. Namely: (a) the role and functions of judges are limited, judges only function to applicable laws and may not make new laws; (b) the judge's position as part of the judiciary is equal to that of the legislative and executive bodies. So that the branches of power must respect each other, judges may not cancel decisions or legal products from different branches; (c) judges are only legal technicians so that all they can do is analyze the facts in the case handled and then look for laws that match those facts; (d) judges in the civil law legal system are only one link in the government bureaucracy who carry out their assigned tasks regularly.[22]

Based on the above characteristics, it can see that judges not bound by the precedent doctrine of previous decisions as known in the Common law legal system. So the decisions produced by judges who adhere to the Civil legal system are only juridical editorial in nature. Civil law judges think in terms of solutions to problems drawn from a systemic and authoritative exposition of law and seek solutions using general clauses and principles.[23]

However, there has been a shift in the function of Civil law judges, where judges have begun to make legal discoveries and legal interpretations. Due to the existing written rules do not provide answers to all questions in the case at hand. Even though making legal discoveries, legal interpretation, and legal interpretation have violated the basic concept of justice in the Civil law state. According to Satjipto Raharjo, one of the inherent nature of the law or written law is the authoritative nature of the rules' formulation [17]. Explanation in writing or *litera scripta* is only an effort to convey an idea or thought.[24] The attempt to explore this spirit is automatically part of the imperative attached specifically to written statutory laws. The court will carry out such measures in the form of interpretation and construction.

As an illustration, when a civil law judge faces a case where the defendant is a state official who violated the law, he murdered on the grounds of public interest. The judge must then interpret what is meant by the norm of *public interest*, what conditions are categorized as public interest, what are their characteristics, how many are the penalties, and so on. If the judge still has a deadlock, he can reopen similar decisions and see their legal considerations.

In Indonesia, the concept of justice is not much different from that of civil law countries because Indonesia was ruled for several hundred years by the Dutch. Dutch law (Civil law System) has been embedded in Indonesia and made as national law. In general, the concept of Indonesian justice is regulated constitutionally in Chapter IX of the section of Judicial powers in the 1945 Constitution. Article 24 paragraph (1) stated; *judicial power is an independent power to organize judicial administration to uphold the law and justice*. The word *independent* here means the judiciary is free from interference from other institutions (legislative and executive), which means that the judicial system in Indonesia influenced by the rule of law doctrine and the doctrine of separation of powers [18].

LEGAL CERTAINTY IN INDONESIAN JUDICIARY

The biggest challenge for the judicial system in Indonesia today is how to place judges' role in realizing legal objectives, namely legal justice, legal certainty, and legal benefits simultaneously. The judge, as one of

[18] *Ibid.*
[19] In the British Common law system, British judges see their primary function as arbitrating disputes and that their job is to resolve conflicts. See, *Ibid*., p. 148
[20] *Ibid*
[21] *Ibid*
[22] *Ibid.*
[23] Compare with the British judge who served as arbitrator in *Ibid*., p. 148.
[24] *Ibid.*

God's representatives entrusted as the court in the world, has to determine a case decision from the disputing parties [19].[25] Judge's decision handed down reflects the judges themselves' ability to check, hear, and decide the case under the law. Moreover, the judge also has the task of finding the right law in the courts. It means the judge not merely expressed in legislation [20].

There is a possibility that the law does not clearly and completely regulate because the law is only limited to textuality. So, the judge must explore the legal values that live in the community. The judge served as a digger and formulated it in a decision. The decision as the judge's crown is part of the law enforcement process which aims to achieve one of the legal truths or for the realization of legal certainty. Judges' decisions are a law enforcement product based on legally relevant matters (juridical) from the results of the process legally at trial. Judges' legal considerations as the basis for issuing verdicts are determinants in seeing the quality of decisions.

Legacy of Dutch colonialism, it caused many judges to experience difficulties in achieving these legal objectives. It is due to the remnants of behaviour as a colonized people were still visible among the judges. These behaviours include [21]; (1) judges do not have the confidence to cite the jurisprudence of the Indonesian Supreme Court; (2) possible absence of the judge's decision can be considered qualified for that case; (3) consider foreign jurisprudence always valid and quality. On the other hand, this attitude appears because of the assumption that judges are free person unfettered in law alone. At one time, the judge will restrain himself, and at a certain period, the judge will do more judicial activities.

The principle of restraint in judicial restraint urges judges not to decide legal issues unless the decision is necessary to settle factual disputes between opposing parties [22]. As something substantive, the notion of judicial restraint urges judges who consider constitutional questions to pay significant respect to the elected branches' views and cancel their actions only when constitutional boundaries have breached. Rebecca Zietlow believes this as a form of recognition and respect for judges to the branch of political power as the branch of power that has the authority to form law within the framework of democracy [23]. Whereas in the activism context, judges must position themselves as judges who have the right and authority to give considerations to political, social and economic policies.

The Judicial restraint as a form of restriction on judges have some restriction, especially for court judge constitutional judge actions, Among others [24]:

1. Constitutional Limitation. The Limitation based on the constitution's provisions or the granting of limited authority to the court in the constitution.

2. Doctrine Limitation. This restriction is one of the principles of prudence by judges in hearing and deciding cases.

3. Policy Limitation. This Limitation emphasizes that the court should find the original meaning of a norm in the law being tested before determining its constitutionality. This policy intended to find out the original intent of legislators about the norm in question. Original intent is not always clearly reflected in the minutes of debate by members of the legislature.

Legal certainty in Indonesia always linked to the principle of legality, which is a normalized principle in Article 1 of the Criminal Code which contains the principle of *Asseln von Feuerbach atau nullum delictum nulla poena sine praevia lege poenali*. This principle actualized in the formulation: *No act can be punished except on the criminal rules' strength in the existing laws and regulations before the act committed*. It means that legal certainty requires a certain criminal norm, that norm must be based on statutory regulations and be non-retroactive.

The debate regarding legal certainty principle, including legality and non-retroactivity, has always been dominated by adherents of positivism and progressive doctrines. For adherents of the Indonesian positivism doctrine, legal certainty seen from the standpoint of legislation. It means that legal certainty indicated by explicit legal provisions that do not have multiple interpretations. What the law says must be implemented. Meanwhile, the progressive school views certainty from the point of view of justice, meaning that when enforcing the law, it does not have to be what the law says, but must explore values outside the law.

[25]The judges, when judging and deciding cases must incarnate themselves and act as representatives of God on earth. The moral burden is weighty because the responsibility is horizontal to our fellow human beings and vertically commitment to God. Then this is the other side to be at stake as a judge. Judicative power is indeed the last hope for justice seekers.

In countries that adhere to the common law system, judges have a strategic position to form laws. It is different from that in Civil law System countries that prioritize laws and regulations resulting from the legislative process. The law found by the judge is more emphasized, therefore in common law countries, legislation is seen as merely an additional function. One of the reasons for the law in judges' hands is the proximity from case to case and to establish a legal entity that binds the judges under it (Stare decisis doctrine). For example, in the United States, judges perform an extensive legal interpretation function, even where administrative measures found to be legally valid [25].

It is essential that judges make legal interpretations in legal discovery, both in the Common law and Civil law systems.[26] The doctrine of separation of powers considers that the court is not allowed to interpret. Still, it must refer to the legal interpretation problem determined by the legislature itself as a solution. But what if the law made by the parliament turns out to be ambiguous and multi-interpretative? to solve this problem, the legislature will provide authoritative interpretations to guide judges. It aims to avoid the legal flaw, preventing the court from the threat of judicial tyranny.[27] If the judge experiences doubts about the uncertainty of the law, then the judge will submit the doubts to the particular statutory commission created for that purpose.

Apart from the doctrine of separation of powers, the duty of lawmakers is to form laws that are needed by society, while the task of judges is to interpret the law. However, in its development, law apparently cannot answer all problems because the development of people's behavior is so fast compared to the development of law. Thus, legal interpretation is needed so that the law can catch up with the development of community behavior, and this should be the duty of the judge.

In the modern legal system, judges see the law as written rules, because it should realize that there are also unwritten rules that exist and live in a society in addition to written rules. Law finding by the judge is significant. Even in the modern system, the judge's discovery is an extraordinary thing. The judge does not see the legal discovery as routine but must see as an essential task of his job [26, 27]. Also, judges are professionals who have been trained to decide cases including to know the law. If the law has uncertainty because of its ambiguity, the judge can interpret it on his own. Although judges often think that legislation as a form of service, it serves as an additional function which is often inaccurate.[28] Therefore, the judge in conducting the interpretation must fill the gaps and solve the legislative scheme's problems. The judge must change the law in response to changing conditions and realities. The legislation is not something particular in its use, especially for wise judges.[29]

In general, the Continental Europe judges (Civil law System) do not strictly separate the interpretation method from the construction method. In contrast, in the Anglo Saxon country (common law system), there is a strict separation between the interpretation method and the legal construction method. The difference in principle between interpretation and construction is that the interpretation or legal interpretation of the legal text still adheres to the text's sound. Meanwhile, in construction, the judge uses logical reasoning to develop a legal text further. It means that the judge is very likely to no longer adhere to the text's sound or even ignore the law as a system.

There are two different views, whether judges always make legal discoveries or not. First, in view of Sens Clair's doctrine. Second is the view that judges must always make legal findings regardless of the conditions. In this first view (sens claire), legal discovery can make if; (1) the regulations do not yet exist for concrete cases; (2) the laws already exist but are not clear. Furthermore, in this view, apart from the above two circumstances, legal discovery by the judge cannot be made. According to Michel ban Kertkhov, the Sens Clair doctrine includes five things [28, 29]:[30]

1. There is a law text that has its own meaning and is based on any previous explanation, and is unlikely to raise doubts.

2. Because the language of law is based on everyday spoken language, it can be assumed that all terms that are not determined by the legislators are still the same in meaning as they have in everyday spoken language.

[26] John Henry Merryman, *Op.Cit.,* p.40-47.
[27] Martitah, *Op.Cit*, hlm. 55

[28] John Henry Merryman, *Op.Cit*, p. 34
[29] Martitah, *Op.Cit*, p. 39.
[30] See Also, Zaka Firma Aditya, *Asas Retroaktif*….., *Op.Cit.,* h. 84.

3. The obscurity of a statutory text is only possible because it contains an ambiguous meaning or because of the inaccuracy of the usual meaning of the term.

4. Ideally, usually what is used as a guideline for legislators is that they must formulate the text of the law as clearly as possible. Text blurring should be avoided.

5. In order to find out if the text is blurred or not, it is not necessary to interpret it. On the other hand, the recognition of the clearness or obscurity of the text produces criteria that allow it to judge whether an interpretation or legal discovery is or is not necessary.

Besides, to be able to perform legal discovery, judges can also form the law. The results of this legal discovery can use as jurisprudence that is followed by judges, and for community guidance, namely legal decisions in concrete events and generally accepted. More than that, judges must have creative abilities to resolve and decide cases by searching and finding in cases where there is no legal regulation. Judges must make legal discoveries to decide cases to realise justice and certainty in society. In other words, judges are freer and more flexible because they convey the textuality of laws and carry out legal discoveries extracted from various legal sources or can also carry out legal creation.

The importance of judges being able to make legal discoveries and make laws is that judges cannot say that the law is unclear and therefore ignore actions. Interpretation problems like this become one of the justifications for judges' decisions when the legislative direction is unclear. Both make judges solve cases act as legislators, and show parties who are not responsible for the law. It can be even worse, where the legislature fails to make any rules.

When a complete and coherent regulation fails to hold, the court should fill the legislative scheme's gap and reconciling legislation seem contradictory. Although the law's text does not change, its meaning and application often change in response to social facts. The ideal of legal certainty becomes unreachable in the face of uncertainty in reality, where the determination of the rights of various parties must wait for the results of legislation. In practice, judges are not acquitted in a clear, complete, coherent manner, predicting from having to interpret and implement laws. Like a judge in a Common law country involved in a meaningful, complex and challenging process. Judges have to enforce laws that are rarely used and fill gaps and resolve conflicts in legislative schemes. And of course, judges have to adapt to changing and uncertain legal conditions.

CONCLUSION

Legal certainty is the law itself, law without certainty is not a law. Legal certainty will encourage the creation of legal justice, and legal justice leads to legal certainty. Whatever the legal system, both Civil law with its doctrine of judicial independence and Common law with its Stare decisis doctrine, legal certainty is the primary goal. Because legal certainty leads people to believe in court decisions, legal certainty guides someone to get something expected in certain circumstances. Legal certainty legalizes the clarity of norms used as guidelines for people who are subject to these regulations and guide clarity and firmness on applying the law in society not to cause many misinterpretations.

The principle of legal certainty has become a common principle in countries in the world, both countries that adhere to the common law tradition and civil law countries. As a general principle of the European legal system, legal certainty requires that all laws be sufficiently precise to permit the person, with the correct advice to estimate, to the degree that is reasonable in the circumstances and consequences of the actions given. That means: (1) laws and decrees must be made public; (2) laws and decrees must be definite and clear; (3) court decisions must be binding; (4) legal retroactive restrictions and decisions must be enforced, and (5) legitimate expectations must be protected. The principle of legal certainty above is the same as the principle of legal certainty described by Fuller in his book *The Morality of law*. It means that the principle of legal certainty in any country is the same.

It can see the court's role in realizing legal certainty, legal justice, and legal benefits from past decisions. An excellent judicial process can be seen from how a judge can properly carry out his duties and functions. Judges have a very noble duty to uphold truth and justice and uphold the law. Even because of their strategic role, Judges must see as cultural heroes or figures of a father. Judges have a contribution to developing the legal tradition through analyzes and decisions.

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