

The Ideal Position of Judicial Power in the Criminal Justice System



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ABSTRACT: The independence of the judicial power is one of the main pillars of the rule of law, and if this component does not exist, then we can no longer talk about the rule of law. This study aimed to examine the judicial power in the Indonesian criminal justice system as an independent judiciary to enforce law and justice based on Pancasila. This research used doctrinal law research. The sources of legal information were from primary legal materials (relevant regulations and documents) for further qualitative analysis. The approach used was legislation, conceptual, and analysis in helping to solve the problem formulation. The results of the study indicated that judicial power must be free and impartial, this can only be realized if it is subject to the applicable legal rules. If the judicial power does not obey the law, then it will lose its legitimacy and its presence in a country becomes meaningless.

KEYWORDS: Position; Independence; Judicial Powers; Criminal Justice System.

A. PRELIMINARY

The criminal justice institution (which in Catur Wangsa theory consists of components of the police as an investigative institution; the Prosecutor's Office as the institution authorized to carry out prosecutions; the Court which is tasked with examining and also adjudicating cases; and the Penitentiary Institution) as the organizer of judicial power is seen in the context of a democratic rule of law is an institution that is free and independent from the interference of other state powers.¹ This principle should provide solid support for the judiciary to administer a clean, honest and fair trial.

The practice of the legal and judicial mafia that has emerged today is contrary to the judicial power's principle of independence. Every legal issue that is resolved through the courts seems to be a traded commodity, which can be negotiated at market prices. Justice, which should be the superior product of the judiciary, instead comes out with a win-win decision that is determined by accessibility and finances.

The emergence of judicial mafia practices is related to many causal factors, but there are at least 3 (three) main factors,² the first concerns the recruitment system for judicial officers which still shows the practice of Collusion, Corruption, and Nepotism (KKN) which in the end gives birth to incompetent officers, both in terms of hard skills and soft skills; Second, it concerns the transparency of public services and the administration of justice. This issue is important for people seeking justice or justice, such as regarding the clarity of how long a case must take to process, how much it will cost, and what the mechanism is, and so on.

Various public complaints illustrate the face of a bureaucratic judiciary compared to services and legal certainty. For example, in the investigation stage of a criminal case, a suspect does not receive adequate service, when the case is processed and at trial, how long will he be detained. The dimensions of power or judicial bureaucracy are so strong, cases of arrest and detention of someone who did not commit a crime, but were forced by the apparatus as a suspect, and as a result, the court decided that innocent people were convicted. The two problems that have been stated above are further exacerbated by the third factor, namely the weakness of the monitoring and enforcement system.

The characteristics of such a fragile judiciary, if linked back to the independence of judicial power in an absolute sense, will trigger the misuse of the principle of independence for the benefit of the elements and the mafia. In this regard, to restore a fair and trusted criminal justice system to the public, it is deemed urgent to interpret or reinterpret the concept of judicial independence as referred to in the 1945 Constitution (hereinafter referred to as the 1945 Constitution) and the Law on Judicial Powers.

¹ Pujiyono, "Rekonstruksi Sistem Peradilan Pidana Indonesia Dalam Perspektif Kemandirian Kekuasaan Kehakiman" *Jurnal Masalah-Masalah Hukum*, Vol. 41, No. 1, 2012, hlm. 119.

² Sirajuddin, et.al., 2007, *Komisi Pengawas Penegak Hukum, Mampukah Membawa Perubahan*, Malang, Malang Corruption Watch (MCW)- YAPPIKA, hlm. 43.

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According to the 9th United Nations Congress in 1995 in Cairo³ that the Criminal Justice System contains the principle of Accountability, in the sense that: 1. The performance or administration of criminal justice is responsible for the efficient and humane implementation of criminal justice; 2. the management of criminal justice is part of the public administration that is responsible to the wider community; and 3. the administration of criminal justice is a part of a sustainable resource development policy.

Based on the results of the UN Congress, it is very clear that the judiciary as the organizer of judicial power which is independent has implications for public accountability. Thus the existence of the judiciary as one of the pillars of a democratic rule of law has consequences for the administration of judicial power which is not only independent but also has accountability so that it can carry out a clean judicial function, is trusted by the community and also makes it an authoritative judicial power.

Based on the direction and framework of developing judicial institutions as mandated by the United Nations (hereinafter referred to as UN), this paper attempts to reflect on the position of judicial power in Indonesia, and also to realize independent judicial power in the criminal justice system in Indonesia.

B. DISCUSSION

1. The Standing of Judicial Power in the Republic of Indonesia

Judicial power in the context of the Indonesian state is the power of an independent state to administer justice to emphasize law and justice based on Pancasila for the sake of the implementation of the Republic of Indonesia. One of the important agendas that need to be faced in the future of law enforcement in Indonesia, and the main thing in law enforcement is the issue of an independent judiciary. At the end of 2009, to be exact on September 29, 2009, the House of Representatives of the Republic of Indonesia ratified the Law on Judicial Powers, Law No. 48 of 2009 concerning Judicial Power (hereinafter referred to as the Law on Judicial Power).

At the same time, Law No. 49 of 2009 concerning the second amendment to Law No. 2 of 1986 concerning General Courts was passed, Law No. 50 of 2009 concerning the second amendment to Law no. 7 of 1989 concerning the Religious Courts, and Law No. 51 of 2009 concerning the second amendment to Law No. 5 of 1986 concerning the State Administrative Court The Law on Judicial Power needs to be critically studied and understood by the public regarding the future of an independent judiciary in 2010 and the future. This is because the community wants the perpetrators of judicial power to be free and independent so that justice and truth can be consistently enforced. The rich and the poor should be treated equally before the law.

Amendments to the 1945 Constitution brought changes in constitutional life, especially in the exercise of judicial power. Among other things, these changes confirm that:

- a. Judicial power is exercised by a Court and the Judicial Body under it in the General Court environment, the Religious Courts environment, the Military Court environment, the State Administrative Court environment, and by a Constitutional Court.
- b. The Supreme Court has the authority to adjudicate at the level of cassation, examine statutory regulations under the law against the law, and has other powers granted by the law;
- c. The Constitutional Court has the authority to examine laws against the 1945 Constitution of the Republic of Indonesia and decide on disputes over the authority of state institutions whose powers are granted by the 1945 Constitution;
- d. The Judicial Commission has the authority to propose the appointment of Supreme Court justices and has other powers to maintain and uphold the honor, dignity, and behavior of judges. Basically, Law Number 4 of 2004 concerning Judicial Power is following the amendments to the 1945 Constitution of the Republic of Indonesia above, but the substance of the law has not comprehensively regulated the implementation of judicial power, which is an independent power exercised by a Supreme Court and judicial bodies under it in the general court environment, religious court environment, military court environment, state administrative court environment, and by the constitutional court, to administer justice to uphold law and justice.⁴

In this regard, as an effort to strengthen the administration of judicial power and create an integrated judicial system, the government needs to ratify the Law on Judicial Power as a replacement for Law No. 4 of 2004 concerning Judicial Power.

In the context of this judicial power, several terms are commonly used, namely court, judiciary, and adjudicating. According to R. Subekti and R. Tjitrosoedibio,⁵

“The court (rechtbank) is a body that conducts justice, namely examining and deciding legal disputes and violations of law/laws. Judiciary (rechtspraak) is everything related to the duty of the state to enforce law and justice.”

³ Anwar, Yesmil, et.al., 2011, *Sistem Peradilan Pidana, Konsep, Komponen dan Pelaksanaannya dalam Penegakan Hukum di Indonesia*, Bandung, Widya Padjadjaran, hlm. 65.

⁴ M. Syahrul, “Independensi Kekuasaan Kehakiman Dari Pengaruh Kekuasaan Di Indonesia” *Jurnal Ilmu Hukum*, Vol. 1 No. 1, 2016, hlm. 88.

⁵ R. Subekti dan R. Tjitrosoedibio, 1971, *Kamus Hukum*, Jakarta, Pradnya Paramita, hlm. 82-83.

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Thus, it means that the court refers to the meaning of its organs, while the judiciary is its function. However, according to Soedikno Mertokusumo, the judiciary is always related to the court, and the court itself is not merely a body but is also related to an abstract understanding, namely providing justice.⁶

Another is Rochmat Soemitro who argues that courts and judiciary are also different from judicial bodies. The emphasis of the word judiciary is on the process, the court focuses on the method, while the judiciary is focused on the body, council, judge, or government agency.⁷ However, according to the results of the research on the use of the words court and judiciary in practice, it turns out that the word court does refer to the body, while the word judiciary is the process. On that basis, Sjachran Basan thinks that the use of the term court is intended for the agency or institution that provides justice, while the judiciary refers to the process of providing justice in the context of enforcing the law or *het rechtspreken*. Courts are always related to the judiciary, although the courts are not the only body administering justice.⁸

The judiciary itself as a process must consist of certain elements. In the opinion of Rochmat Soemitro, after examining the various opinions of Paul Scholten, Bellefroid, George Jellineck, and Kranenburg, the judicial elements consist of four elements, namely:

- a. The existence of an abstract legal rule that binds the general public that can be applied to a problem
- b. There is a concrete legal dispute
- c. There are at least two parties
- d. There is a judicial apparatus with the authority to decide disputes

Descriptions that use bullets or Arabic numerals must follow the sentence. Not allowed to be made in the form of points down. For example: so far, there are two systems for updating voter data, namely: a. updating of active voter data; and b. passive data updating.

However, according to Sjachran Basan, the more complete elements of the judiciary include the existence of formal law in the context of applying the law (*rechtstoepassing*) and finding the law (*rechtsvinding*) "*in concreto*" to ensure compliance with the material law referred to the element (a) mentioned above. On that basis, Sjachran Basan said that "The judiciary is everything related to the task of deciding cases by applying the law, finding the law in concreto in maintaining and guaranteeing the observance of material law by using the procedural methods established by formal law."

The judicial process without material law will be paralyzed, but on the other hand, without formal law, it will be wild and act arbitrarily, and can lead to what people usually fear as "judicial tyranny". Judicial power is the main feature of the rule of law (*Rechtstaat*) and the principle of the rule of law. Democracy prioritizes the will of the people, the rule of law prioritizes the rule of law. Many scholars have discussed the two concepts, namely democracy and the rule of law in an inseparable continuum. But both need to be distinguished and reflected in institutions that are separate from each other.⁹

In Indonesia, judicial power, from the very beginning of independence, was also intended as a branch of power separate from political institutions such as the MPR/DPR and the President. In the Elucidation of Articles 24 and 25 of the 1945 Constitution before the amendment, it is determined:

"Judicial power is an independent power, meaning that it is independent of the influence of government power. In this regard, there must be a guarantee in the law regarding the position of judges."

The meaning of "government" in the explanation can be understood in a broad sense, which includes the notion of the legislative and executive branches of power at the same time, considering that the 1945 Constitution before the amendment did not adhere to the notion of separation of powers, especially between the executive and legislative functions. However, although they do not adhere to the doctrine of separation of powers, the branch of judicial power is still declared free and independent from the influence of government power. Because of this, the judicial branch of power from the beginning was treated specifically as a separate and apart branch of power. This is one of the important characteristics of the principle of a rule of law to be built based on the 1945 Constitution of the Republic of Indonesia.

To further emphasize the principle of the rule of law, after the reform, the provisions regarding the rule of law were reaffirmed in the Third Amendment of the 1945 Constitution in 2001. In Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, it was emphasized that Indonesia is a state of law. In line with these provisions, one of the important principles of the rule of law is the guarantee of an independent judiciary, free from the influence of other powers to administer justice to uphold law and justice. To strengthen the principle of an independent judiciary, following the demands for reform in the field of law, amendments have been made to Law Number 14 of 1970 concerning Basic Provisions of Judicial Power with Law Number 35 of 1999 concerning Amendments to Law Number 14 of 1970 concerning Basic Provisions of Judicial Power.

⁶ Sudikno Mertokusumo, 1971, *Sejarah Peradilan dan Perundang-undangannya di Indonesia Sejak 1942 dan Apakah Kemanfaatan Bagi Kita Bangsa Indonesia*, Bandung, Kilat Maju, hlm. 2.

⁷ Sjachran Basah, 1997, *Eksistensi dan Tolok Ukur Badan Peradilan Administrasi di Indonesia*, Bandung, Alumni, hlm. 23.

⁸ *Ibid.*, hlm. 2.

⁹ Jose Maria Maravall and Adam Przeworski (eds.), *Democracy and the Rule of Law*, Cambridge University Press, 2003; baca misalnya tulisan John Ferejohn and Pasquale Pasquino, Rule of Democracy and Rule of Law dalam *Ibid.* hlm. 242-260

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Through the amendment to Law Number 14 of 1970, a policy has been put in place that all matters concerning the judiciary, both those relating to judicial technicalities as well as organizational, administrative, and financial matters are under one roof under the authority of the Supreme Court. This policy is popularly known as the “one roof policy”. This policy is determined to have been implemented no later than five years from the promulgation of Law Number 35 of 1999 concerning Amendments to Law Number 14 of 1970 concerning Basic Provisions of Judicial Power. With the enactment of this Law, the development of the general judiciary, the religious judiciary, the military judiciary, and the state administrative judiciary are under the authority of the Supreme Court. Because of the specific history of the development of religious courts in the national judicial system, the development of religious judicial bodies is carried out by taking into account the suggestions and opinions of the Minister of Religion and the Indonesian Ulema Council.

After Law Number 35 of 1999 was amended again by Law Number 4 of 2004, 15 transitional processes were reaffirmed in the Transitional Provisions of Article 42 of this Law that the transfer of organization, administration, and finance within the general courts and administrative courts State efforts are completed no later than March 31, 2004. The transfer of organization, administration, and finance within the religious courts is completed no later than June 30, 2004. The transfers of organization, administration, and finance within the military courts are completed no later than June 30, 2004. The organizational, administrative, and financial transfers as referred to above are stipulated by a Presidential Decree. The Presidential Decree is stipulated no later than (a) 30 days before the end of the period as referred to in paragraph (1); and (b) 60 days before the expiry of that period.

Furthermore, it is also stipulated in Articles 43 and 44 that since the transfer of the organization, administration, and finance, then: (a) all employees of the Directorate General of the General Courts and State Administrative Courts of the Ministry of Justice and Human Rights, district courts, high courts, courts State Administration, and the high court of State Administration, are employees of the Supreme Court; (b) all employees who occupy structural positions at the Directorate General of General Courts and State Administrative Courts of the Ministry of Justice and Human Rights, District Courts, High Courts, State Administrative Courts, and State Administrative High Courts, remain in their positions and remain in receive office allowances at the Supreme Court; (c) all assets belonging to/inventory within the District Court and High Court, as well as the State Administrative Court and the State Administrative High Court, shall be transferred to the Supreme Court.

Since the transfer of the organization, administration, and finances: (a) all employees of the Directorate of Religious Courts of the Ministry of Religion have become employees of the Directorate General of Religious Courts at the Supreme Court, and employees of the religious courts and high religious courts have become employees of the Supreme Court; (b) all employees occupying structural positions at the Directorate of Religious Courts of the Ministry of Religion hold positions at the Directorate General of Religious Courts at the Supreme Court, under statutory regulations; and (c) all assets belonging to/inventory items at the religious courts and high religious courts are turned into assets belonging to/inventory items for the Supreme Court. Also since the transfer of the organization, administration, and finances: (a) the development of military personnel within the military judiciary is carried out under the laws and regulations governing military personnel; (b) all Civil Servants in the military judiciary are turned into Civil Servants at the Supreme Court.

The changes made above were in line with the spirit of national reform which culminated in the amendment of the 1945 Constitution as the highest law in the administration of the Republic of Indonesia. The amendments to the 1945 Constitution of the Republic of Indonesia inevitably have brought changes in the life of the state administration, especially in the exercise of judicial power. Based on these changes, it was emphasized that judicial power is exercised by a Supreme Court and judicial bodies under it in the general court environment, the religious court environment, the military court environment, the State Administrative court environment, and by a Constitutional Court.¹⁰

The provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia stipulate that the Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine the law against the 1945 Constitution disputes over the authority of state institutions whose authority, granted by the 1945 Constitution of the Republic of Indonesia, decides on the dissolution of political parties, and decides on disputes regarding the results of general elections. In addition, the Constitutional Court has the obligation to give a decision on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President according to the 1945 Constitution of the Republic of Indonesia.

In addition to the changes related to the institutional administration of judicial power as stated above, the 1945 Constitution of the Republic of Indonesia has also introduced a new institution related to the exercise of judicial power, namely the Judicial Commission. The Judicial Commission is independent which has the authority to propose the appointment of Supreme Court justices and has other powers in the context of maintaining and upholding the honor, dignity, and behavior of judges. Thus, in the system and mechanism for administering the judicial power of the Republic of Indonesia, the Supreme Court as the highest judicial institution can be accompanied by the Judicial Commission as an auxiliary state commission that functions as a recruiter of supreme judges and supervisors of the code of ethics of judges.

¹⁰ Nawa Angkasa, “Analisis Kedudukan dan Fungsi Yudikatif Sebagai Pemegang Kekuasaan Kehakiman dalam Sistem Negara Hukum di Indonesia” *Jurnal Nizham*, Vol. 01 No. 01, 2013, hlm. 85

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Given the fundamental changes made in the formulation of the material for the 1945 Constitution of the Republic of Indonesia, especially concerning the administration of judicial power, then Law No. 14/1970 concerning the Basic Provisions of Judicial Power as amended by Law No. 35/1999 is necessarily need comprehensive changes. This law regulates the bodies administering judicial power, the principles of administering judicial power, guaranteeing equal status and treatment for everyone in law, and in seeking justice. In addition, this Law also regulates provisions that confirm the position of judges as officials exercising judicial power as well as clerks, substitute clerks, and bailiffs as judicial officials, implementation of court decisions, legal assistance, and other bodies whose functions are related to judiciary power. To provide certainty in the process of transferring the organization, administration, and finances of the judiciary under the Supreme Court, this Law also regulates transitional provisions.

In the law, judicial power itself is defined as the power of an independent state to administer justice to enforce law and justice based on Pancasila, for the sake of the implementation of the constitutional state of the Republic of Indonesia. The independent judicial power implies that the judicial power is free from any interference from the extra-judicial powers, except in matters as stated in the 1945 Constitution of the Republic of Indonesia. Freedom in exercising judicial authority is not absolute because the task of judges is to enforce law and justice based on Pancasila so that the decisions reflect the sense of justice of the Indonesian people.

The implementation of judicial power is carried out by a Supreme Court and judicial bodies under it in the general court environment, the religious court environment, the military court environment, the State Administrative court environment, and by a Constitutional Court. Thus, the apex of the judicial system in Indonesia now consists of a Supreme Court and a Constitutional Court. All courts throughout the territory of the Republic of Indonesia are state courts and are stipulated by law. This provision does not rule out the possibility of resolving cases outside the state court through reconciliation or arbitration. The state court applies and enforces law and justice based on Pancasila.¹¹

2. Independence of Judicial Power in the Criminal Justice System

To form an independent and integrated system of judicial power, the idea/soul/spirit of "free and independent judicial power" must be realized integrally in the overall legislative policy that regulates the entire process/system of law enforcement power (judicial power system/criminal justice system). Thus, as part of independent judicial power, the four subsystems in the criminal justice system must also be free and independent powers.¹²

One thing that needs to be emphasized is that the Indonesian state based on the 1945 Constitution does not adhere to the *trias politica* understanding. However, the institutionalization of various state powers clearly shows that the formulators of the 1945 Constitution were strongly influenced by the *trias politica* understanding. The principle of *trias politica* espoused in the 1945 Constitution is the existence of an independent and impartial judicial power as a feature and condition for the establishment of a rule of law. Adherence to this principle is contained in the provisions of Article 24 (1) along with an explanation of Articles 24 and 25 of the 1945 Constitution.¹³

The formulation of the 1945 Constitution concerning the adherence to the principle of independence of judicial power does not include the organization or organizational relationship between the judicial power organization and the executive power organization. What is mentioned is only the principle that judicial power must be free and independent and that can be interpreted only to apply to its judicial function.¹⁴ The situation changed when the government issued Law no. 19 of 1964 concerning the main provisions of the Judicial Power and Law no. 13 of 1965 concerning Courts within the General Courts. Article 19 explains:

"In the interests of the revolution, the honor of the state and nation or the urgent interests of the people, the president may step down or intervene in court matters."

Furthermore, Law Number 13 of 1965 concerning Courts in General Courts states that judges in carrying out their functions must comply with the political vision of the government. Article 6 paragraph (1) states that the politics that judges must follow and practice are government politics based on Pancasila, Manipol/Usdek, and guidelines for their implementation.¹⁵

The rule of the New Order with the motto of implementing Pancasila and the 1945 Constitution purely and consistently has taken several important steps to realize an independent judicial power under Articles 24 and 25 of the 1945 Constitution. One of the legal products that were born during the New Order era was Law No. 14 of 1970 on the Principles of Judicial Power. Article 1 of Law No. 14 of 1970 concerning the Principles of Judicial Power states:

"Judicial power is the power of an independent state to administer justice to uphold law and justice based on Pancasila for the sake of the implementation of the State of Law of the Republic of Indonesia."

¹¹ Ahmad Basuki, "Pengawasan Terhadap Penyelenggaraan Kekuasaan Kehakiman Sebagai Upaya Dalam Mewujudkan Akuntabilitas Peradilan Pidana", *Jurnal Perspektif* Vol. XVIII No. 1, 2013, hlm 76.

¹² Barda Nawawi Arief, 2008, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan*, Jakarta, kencana, hlm. 37.

¹³ Moh. Mahfud MD, 1999, *Pergulatan Politik dan Hukum Di Indonesia*, Jakarta, Gama Media, hlm. 275.

¹⁴ *Ibid*, hlm.276

¹⁵ Benny K.Harman, 1997, *Konfigurasi Politik dan Kekuasaan Kehakiman di Indonesia*, Jakarta, ELSAM, hlm. 13.

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However, the vision and political interests of the new order remained a reference for judicial power when carrying out its judicial functions. This is evidenced by:

- a. UU no. 14 of 1970 still confirms the dualism of judicial power of the guided democratic political regime.
- b. As employees of the department, the position or status of the judges as civil servants is of course subject to the regulations concerning Civil Servants.
- c. The emergence of an institution that was initially only a forum for dialogue between the Supreme Court, the Ministry of Health, the Attorney General's Office, and the Police.
- d. There is an affirmation in the law that the president is the head of state.
- e. It seems that the control of the judicial power by the government power.

One of the articles in Law no. 14 of 1970 concerning the Principles of Judicial Power which can interfere with the independence of judicial bodies, namely Article 11 which determines organizationally, administratively, and financially judicial bodies are under the relevant department (executive), while on the other hand Article 10 states that the highest judiciary is the Supreme Court, who supervises as well as cassation and review of the decisions of the judiciary.

This situation is commonly referred to as the existence of a two-roof system within the judiciary, which will soon end with the implementation of Law No. 35 of 1999. This Law is the implementation of the MPR Decree No. X of 1998 deals with a clear separation between the Judicial and Executive functions. Based on the provisions of Law No. 35 of 1999, the transfer of the Department's (executive) authority over the judicial bodies so that they become under one roof at the Supreme Court is carried out in stages within 5 years from the promulgation of the Law, which means between 1999 and 2004. Thus, there will no longer be a dualism in the development of judicial bodies but will become one form of guidance under the authority of the Supreme Court, covering both technical and administrative, organizational, and financial development.

Based on the historical analysis of the constitution in Indonesia, the guarantee and certainty of the nature of the freedom and independence of the judiciary are highly dependent on the implementation and implementation of the political system. Although the current constitution explicitly states the freedom of judicial power, there are still so many deviations, both in the context of the substantive and procedural dimensions that do not allow the freedom and independence of the judicial power to occur. Various laws and regulations that regulate judicial power, still do not provide a conducive space and atmosphere for the independence of judicial power. Many regulations are not in tune, not in harmony, and inconsistent with the constitution and with one another. Some of them contain various weaknesses because they contain multiple interpretations and cannot be enforced. Meanwhile, the mechanism of various laws and regulations distort the provisions in the constitution.

The intervention or influence of interference from government power is still very clearly visible and felt. The judiciary is subordinated to the executive power and co-opted by those who control economic and political resources. In this regime, the judiciary is part of the interests of the executive, because it must run the directives and safeguard the preferences of the interests of the ruler and power. So that its genuine function cannot be carried out optimally, instead it functions to implement, maintain and secure development programs and government interests, namely as an instrument of political stability and a driver of economic growth.

The judiciary does not have the freedom and independence to regulate matters relating to internal institutional and substantive issues. In personal matters, priority is also still a problem, where ethics, morality as well as the integrity and capability of judges in judicial power are not yet fully independent and free from the influence and interests of power. They should not be able to influence and/or be influenced by various decisions and legal consequences that they make themselves, both politically and economically. The various issues surrounding the judicial power as described above have become one of the important reform agendas so that in the Amendment to the 1945 Constitution, the articles governing judicial power underwent significant changes. The independence of judicial power is really at stake in the judicial process that touches the interests of power. In addition to the intervention of the executive power on the judicial power which has become an "actor" forcing judges to betray their profession, the judicial power in carrying out its judicial duties is still plagued by "acute disease" namely rampant judicial corruption.

Therefore, Judicial Power, which is said to be free or independent, is essentially bound and limited by certain signs, so at the International Commission of Jurists conference, it was said that: "Independence does not mean that the judge is entitled to act arbitrarily. "Although in principle judges are independent and free, the freedom of judges as described above is not absolute because in carrying out their duties judges are micro-limited by Pancasila, the 1945 Constitution, statutory regulations, the will of the parties, public order, and morality. judicial power is highly recommended to avoid matters related to political interests. Judicial power that is free and impartial will only be realized if it is subject to applicable legal regulations. So, limitations or signs that must be remembered and considered in the implementation of that freedom is primarily the rule of law is *sen self*. Legal provisions, both in terms of procedural and substantial/material, are themselves a limitation for the "Judicial Powers so that in exercising their independence they do not violate the law and act arbitrarily. Judges are "subordinated" to the Law and cannot act "*contra legem*".¹⁶

¹⁶ *Ibid.*, hlm. 55

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Likewise, with the power of the Supreme Court which is the perpetrator of judicial power, it must also be independent and separate from other state powers. That independence includes personal independence (personal judicial independence), substantial independence (substantive judicial independence), and internal independence and institutional independence (institutional judicial independence).

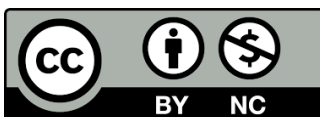
- a. Substantive independence is independence in examining and deciding a case solely to uphold truth and justice following legal principles.
- b. Institutional independence is the independence of the judiciary from the intervention of various other state and government institutions in deciding a case.
- c. Internal independence is the independence possessed by the judiciary to regulate the interests of the judicial personnel, including among others recruitment, transfer, promotion, salary, tenure, retirement.
- d. Personal independence is independence from the management of colleagues, leaders, and the judicial institution itself.¹⁷

C. CONCLUSION

Freedom of Judges based on the independence of Judicial Power in Indonesia is guaranteed in the Indonesian Constitution, namely the 1945 Constitution, which is then implemented in the Law on Judicial Power. Thus the judicial power must be free and impartial, this will only be realized if it is subject to the applicable legal rules. If the judicial power does not maintain a proper distance from the existing political institutions in a country, then it will lose its legitimacy and its presence in a country will be meaningless. The idea of independent judicial power can be realized, one of which is if the Human Resources of the Supreme Court justices have a personality that is not reprehensible, fair, professional, and experienced in the field of law. This means that the available recruitment system must ensure that the best individuals are recruited. Therefore, recruitment must be carried out through a system by neutral, competent, transparent parties, effective supervision of recruitment, and proper standards.

BIBLIOGRAPHY

- 1) Ahmad Basuki, "Supervision of the Implementation of Judicial Power as an Effort in Realizing Criminal Justice Accountability", *Perspektif Journal* Vol. XVIII No. 1, 2013.
- 2) Anwar, Yesmil, et.al., 2011, *Criminal Justice System, Concepts, Components and Implementation in Law Enforcement in Indonesia*, Bandung, Widya Padjadjaran.
- 3) Barda Nawawi Arief, 2008, *Problems of Law Enforcement and Criminal Law Policy in Combating Crime*, Jakarta, Kencana, p. 37.
- 4) Benny K. Harman, 1997, *Political Configuration and Judicial Power in Indonesia*, Jakarta, ELSAM.
- 5) Jose Maria Maravall and Adam Przeworski (eds.), *Democracy and the Rule of Law*, Cambridge University Press, 2003; read for example the writings of John Ferejohn and Pasquale Pasquino, *Rule of Democracy and Rule of Law*
- 6) M. Syahrul, "Independence of Judicial Power from the Influence of Power in Indonesia" *Journal of Legal Studies*, Vol. 1 No. 1, 2016.
- 7) Moh. Mahfud MD, 1999, *Political and Legal Struggle in Indonesia*, Jakarta, Gama Media.
- 8) Nawa Angkasa, "Analysis of the Position and Function of the Judiciary as the Holder of Judicial Power in the State Legal System in Indonesia" *Journal of Nizham*, Vol. 01 No. 01, 2013.
- 9) Pujiyono, "Reconstruction of the Indonesian Criminal Justice System in the Perspective of Independence of Judicial Power" *Journal of Legal Problems*, Vol. 41, No. 1, 2012.
- 10) R. Subekti and R. Tjitcosoedibio, 1971, *Legal Dictionary*, Jakarta, Pradnya Paramita.
- 11) Sirajuddin, et.al., 2007, *Law Enforcement Supervisory Commission, Can It Bring Change*, Malang, Malang Corruption Watch (MCW) - YAPPIKA.
- 12) Sjachran Basah, 1997, *Existence and Benchmarks of Administrative Courts in Indonesia*, Bandung, Alumni.
- 13) Sudikno Mertokusumo, 1971, *History of the Judiciary and its Legislation in Indonesia Since 1942 and What Are the Benefits for Us, the Indonesian Nation*, Bandung, Kilat Maju.



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¹⁷ *Ibid.*, hlm. 58.