

## **The Essence of Judicial Independence of Judicial Institutions in the Indonesian Legal System**

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**Abstract:** The type of research conducted in this study is normative legal research (legal research) and empirical legal research. The normative legal approach is carried out through an inventory of positive law, the discovery of the principles and basis of positive legal philosophy, as well as theories relating to judicial independence in the Indonesian rule of law system. The purpose of the research in writing this dissertation is to find out and analyze the position of the Judicial Power in the Concept of the Doctrine of Separation of powers as one of the principles of the Indonesian rule of law, analyze the embodiment of judicial independence in the judiciary concept of Indonesia and analyze the role of the Supreme Court in realizing the independence of the judiciary in Indonesia.

**Keywords:** Independence, Judicial, Indonesian Law State

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### **I. INTRODUCTION**

Indonesia is one of the states declaring itself as a rule of law as enshrined in the 1945 Constitution, which was last amended in 2002 (Amendment IV), states the form and sovereignty of the State of Indonesia. is the rule of law. In the development of world civilization, there are known concepts of a liberal rule of law, a formal concept of the rule of law, a substantive/material concept of the rule of law.<sup>1</sup>

In general, the concept of the rule of law requires 4 (four) main elements in the administration of the state, namely 1) Recognition of human rights, 2) There is a separation of powers, 3) Government is governed by laws (written law), 4) There is an Administrative Court.<sup>2</sup> The International Commission of Jurist has formulated the principles of the rule of law by adding the principle of "independence and impartiality of judiciary".<sup>3</sup>

The court as the main pillar in law enforcement and justice and the process of building legal civilization, and the judge as the main actor in the judicial process are required to hone conscience, maintain integrity, moral intelligence and increase professionalism. Thus the Judge as the main executor of the Judiciary function must gain the trust of the community and justice seekers. However, the position of judges in the government system is unclear, on the one hand the law states that judges are state officials, and when viewed from the selection and appointment system, judges are civil servants. Under these circumstances, the judge as a state official who receives treatment, salaries and benefits as a civil servant in general. So it is not surprising that the demands of an ever-growing era can be said to be the income of judges not in accordance with the burdens or tasks they carry. Judges as a noble and sacred position in carrying out their duties as law enforcers are full of limitations and on the other hand judges must maintain their independence, while on the other hand judges are inseparable from their position as ordinary people who need to fulfill their needs, the violation of ethical codes such as accepting bribes or gratuities make it a form of temptation that is so large, because the income of judges and the facilities that they should receive as State Officials do not show anything worth it. The executive and legislative institutions are required to provide guarantees for the implementation of Judicial independence (judicial institutions) by increasing the welfare of the judicial apparatus.

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<sup>1</sup>Riyanto, Astim. (2009). *Teori Konstitusi*. Bandung: Yapemdo, p. 249.

<sup>2</sup>*Ibid.*, p. 250.

<sup>3</sup>Anis, Muhammad. (2015). Kemandirian Peradilan dalam Perspektif Anggaran: Kritik Kebijakan Penganggaran Lembaga Mahkamah Agung RI. *Varia Peradilan, Ikatan Hakim Indonesia*, 30(353), p. 57.

## II. STATEMENT OF THE PROBLEM

1. What is the position of Judicial Power in the Doctrine of the Separation of powers as one of the principles of the Indonesian rule of law?
2. What is the embodiment of judicial independence of the judiciary in the concept of the Indonesian rule of law?
3. What is the role of the Supreme Court in realizing the independence of the judiciary in Indonesia?

## III. THEORETICAL FRAMEWORK

### A. The Concept of the Rule of Law

The theory of the state based on law essentially means that the law is “Supreme” and the obligation for every state or government official to comply with the law (subject to the law). There is no power above the law (above the law), everything is under the law (under the rule of law). With this position there can be no arbitrary power (misuse of power) or misuse of power (misuse of power).<sup>4</sup>

#### 1. Rechtsstaat

In Indonesian literature, the term rule of law is a direct translation of the term *rechstaat*.<sup>5</sup> The concept of a rechtsstaat state according to Immanuel Kant is the function of the state as a guardian of both preventive and repressive security (liberale state rechtsstaat), which is forbidding the state from interfering in the people’s prosperity efforts, because the people must be free in working for their prosperity, while Friedrich Julius Stahl refuses the absolute monarchy to state that the concept of rechtsstaat has four elements, namely:<sup>6</sup>

- a. Recognize and protect human rights;
- b. To protect human rights, the administration of the state must be based on trias politica;
- c. In carrying out their duties, the government is based on laws;
- d. If in carrying out their duties under the law the government still violates human rights (government interference in one’s personal life), then there is an administrative court that will resolve it.

#### 2. The Rule of Law

The concept of the rule of law state law in the nineteenth century, Albert Venn Dicey with his work entitled *Introduction to the Study of the Law of the Constitution* in 1985 revealed 3 (three) main elements of rule of law namely, supremacy of law, equality before the law, constitution based individual rights.<sup>7</sup>

The formulation of the characteristics of the rule of law from the concept of rechtsstaat and rule of law as proposed by A.V Dicey and F.J Stahl was then integrated into new details that would better enable the government to be active in carrying out its duties. The conference produced by the International Commission of Jurist in Bangkok in 1965 created the concept of a dynamic state or the concept of a material state law (welfare state) as follows:<sup>8</sup>

- a. Constitutional protection, meaning in addition to guaranteeing individual rights;
- b. The constitution must also specify procedural ways to obtain protection for guaranteed rights;
- c. The existence of a judicial body that is free and impartial;
- d. Free elections;
- e. Freedom of expression;
- f. Freedom of association or organization and opposition; and
- g. The existence of citizenship education.

### B. Teachings on the Separation of State Power

From an institutional standpoint, the principle of popular sovereignty is usually organized in two ways, namely through a system of separation of power or distribution or division of power. The separation of powers is horizontal in the sense that power is divided into functions that are reflected in equal and mutually equitable state institutions (checks and balances). Whereas the distribution of power is vertical in the sense that the

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<sup>4</sup>Sumali, Sumali. (2002). *Reduksi Kekuasaan Eksekutif di Bidang Peraturan Pengganti Undang-Undang (PERPU)*. Malang: UMM Press, p. 11.

<sup>5</sup>Azhary, Muhammad Tahir. (1995). *Negara Hukum Indonesia: Analisis Yuridis Normatif tentang Unsur-Unsurnya*. Jakarta: UI Press, p. 30.

<sup>6</sup>*Ibid.*, p. 46.

<sup>7</sup>*Ibid.*, p. 39.

<sup>8</sup>D., Moh. Mahfud M. (1993). *Demokrasi dan Konstitusi di Indonesia: Studi tentang Interaksi Politik dan Kehidupan Ketatanegaraan*. Jakarta: PT. Rineka Cipta, p. 44.

manifestation of power is distributed vertically down to the high state institutions under the institution of people's sovereignty.<sup>9</sup>

The system of separation of powers began when John Locke in his book *Two Treatises on Civil Government* (1690) separated power from each country in 3 powers, namely:<sup>10</sup>

1. Legislative power, power to make laws;
2. Executive power, power to implement the Act;
3. Federative power, power to enter into unions and alliances and all actions with all people and agencies abroad.

Miriam Budiardjo said in her book, *trias politica* is the assumption that state power consists of three types of power: first, legislative power or the power of making laws (in the new term it is often called the rule making function); second, executive power or the power of implementing laws (in new terms often called the rule application function); third, judicial or judicial power for violating the law (in the new term is often called the rule adjudication function) *Trias politica* is a normative principle that these powers should not be left to the same person to prevent abuse of power by the ruling party.<sup>11</sup>

The recognition of powers granted to various state bodies by the makers of the constitution or laws is seen as balances. Obligations of power recipients to be accountable to power givers are seen as checks. Therefore, there is a relationship between the giver of power and the recipient of power, namely the relationship between the authority of the authority of the giver and the authority receiving body.<sup>12</sup>

### **C. Principles of Independent Judicial Power**

An independent judicial power does not mean that judicial power can be exercised as freely as possible without oversight, because in the aspect of court proceedings known there are general principles for proper litigation (general principles of proper justice), and rules that are procedural or procedural law that opens up the possibility of filing various Legal efforts.

The function of the judiciary is basically the whole set of activities to adjudicate a concrete individual dispute. In relation to the concept of an independent judicial power, which in the legal context includes authority, authority, rights and obligations, judicial power can be interpreted as the power, right and obligation to determine what and how the legal norms for cases of conflict-individual-concrete filed to him, then the power of the judiciary is bound by rules that are procedural called the Procedural Law. Independent judicial power that is manifested in the freedom of judges in the judicial process, and the freedom of the judges in exercising their authority, there are signs of formal legal rules and material laws, as well as unwritten norms called the general principles of good judicial administration (general principles of proper justice). In other words, judicial power is bound to the rules of material law and procedural rules, namely procedural law. Thus the material legal rules and procedural rules, can be said as a normative limit to the freedom of judicial power or the freedom of judges in the judicial process.

To support the establishment of an independent judicial power, a change has been made to Law No. 14 of 1970 concerning the main points of judicial power and Law No. 35 of 1999 concerning amendment to Law No. 14 of 1970 which was replaced by Law No. 4 of 2004 concerning Judicial Power. And finally, Law No. 4 of 2004 was changed to Law No. 48 of 2009 concerning Judicial Power.

One of the core of Law No. 4 of 2004 is the implementation of the one-roof principle (one roof system) for judicial institutions both related to the institutional and technical administration and administration of justice as stipulated in article 13 paragraph (1) of Law no. 4 of 2004. The reasons that require changes to Law No. 4 of 2004 becomes Law No. 48 of 2009 concerning Judicial Power is due to Law no. 4 of 2004 does not yet comprehensively regulate the implementation of judicial power and the amendment is to strengthen the implementation of judicial power and realize an integrated justice system.

The legislative component in Indonesia has made many changes, both in the 1945 Constitution which is the basic constitution of the country as well as the Law on judicial power and the Law on judicial bodies. While the component of law enforcement is the implementation of law enforcement. If they are good, then the law will certainly be upright, and vice versa.

### **D. Judicial Power in Indonesia**

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<sup>9</sup>Asshiddiqie, Jimly. (2004). *Format Kelembagaan Negara dan Pergeseran Kekuasaan dalam UUD 1945*. Yogyakarta: UII Press, p. 35.

<sup>10</sup>Kansil, C. S. T. (1985). *Sistem Pemerintahan Indonesia*. Jakarta: Aksara Baru, p. 10.

<sup>11</sup>Budiardjo, Miriam. (2002). *Dasar-Dasar Ilmu Politik* (Revisi ed.). Jakarta: PT. Gramedia Pustaka Utama, p. 151.

<sup>12</sup>Mulyosudarmo, Suwoto. (1997). *Peralihan Kekuasaan: Kajian Teoritis dan Yuridis terhadap Pidato Nawaksara*. Jakarta: PT. Gramedia Pustaka Utama, p. 30.

Independent judicial power is one of the important principles for the Indonesian people who call themselves a rule of law. This principle requires judicial power that is free from interference from any party and in any form, so that in carrying out its duties and obligations there is a guarantee of impartiality of the judicial power except for law and justice.<sup>13</sup>

In Law Number 4 of 2004, it also regulates judicial bodies that administer judicial powers, the principles of administering judicial powers, guarantees of position and equal treatment for everyone in law and in seeking justice. In addition, this Law also regulates provisions that affirm the position of judges as officials who exercise judicial authority and clerks, substitute clerks, and bailiffs as judicial officials, implementation of court decisions, legal assistance, and other bodies whose functions are related to power the judiciary. To provide certainty in the process of transferring the organization, administration and financial services of the judiciary under the Supreme Court.

Furthermore, in 2009, the Law on Judicial Power again underwent a fundamental change, with the formation of Law Number 48 of 2009, which also uses the same name nomenclature, namely about "Judicial Power". In the explanation of Law No. 48/2009, it is explained that basically Law No. 4/2004 concerning Judicial Power has been in accordance with the amendment to the 1945 Constitution of the Republic of Indonesia above, but the substance of the Law has not been regulated comprehensive implementation of judicial power, which is an independent power carried out by a Supreme Court and the judiciary bodies under it in the general court, religious court, military court, state administrative court, and by a Constitutional Court, for conducts justice to uphold law and justice. In addition to comprehensive regulation, this Law is also to fulfill the decision of the Constitutional Court Number 005/PUU/2006, one of which has canceled Article 34 of Law Number 4 of 2004 concerning Judicial Power. The Constitutional Court's ruling has also canceled the provisions relating to the supervision of judges in Law Number 22 of 2004 concerning the Judicial Commission. In connection with this, as an effort to strengthen the implementation of judicial power and realize an integrated justice system, Law Number 4 of 2004 concerning Judicial Power as the basis for the implementation of judicial power needs to be replaced. Thus at this time, which is the legal basis for the implementation of judicial power in Indonesia after experiencing several changes is Law Number 48 of 2009 concerning Judicial Power.

## **E. Perpetrators of Judicial Power in Indonesia**

### **1. Supreme Court**

As described above, that the Supreme Court is one of the executors of judicial power in Indonesia as referred to in the 1945 Constitution Article 24 paragraph (2) and Article 24A paragraph (1) and Law Number 48 of 2009 concerning Judicial Power and Law Number 14 of 1985 concerning the Supreme Court as amended by Act Number 5 of 2004 concerning Amendment to Law Number 14 of 1985 concerning the Supreme Court and Act Number 3 of 2009 concerning the Second Amendment to Law Number 14 of 1985 about the Supreme Court (MA Law).

In exercising judicial power, the Supreme Court is the highest court of all judicial environments. All organizational, administrative and financial matters of the Supreme Court and the judiciary under it are under the authority of the Supreme Court.

### **2. Constitutional Court**

The existence of the Constitutional Court is a new phenomenon in the world of state administration. Most established democracies do not recognize the Constitutional Court institution which is independent. Its functions are usually included in the functions of the Supreme Court in each country. One example is the United States. The functions of the Constitutional Court such as judicial review in order to examine the constitutionality of a law are related to the authority of the Supreme Court.<sup>14</sup>

## **F. Judicial Commission**

The Judicial Commission was formed with the hope to uphold the honor and behavior of the judges. In this case the Judicial Commission functions as a supervisor. The position of the Judicial Commission is very strategic or fundamental. The Judicial Commission became an institution that was given the role of overseeing the performance of judges.<sup>15</sup> In connection with the function of the Judicial Commission, it is necessary to carry out reform steps that are oriented towards the creation of a truly clean and authoritative judicial institution to ensure that people and justice seekers receive justice and are treated fairly in accordance with applicable laws

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<sup>13</sup>Tutik, Titik Triwulan. (2010). *Konstruksi Hukum Tata Negara Indonesia Pasca Amandemen UUD 1945*. Jakarta: Kencana Prenada Media Group, p. 210.

<sup>14</sup>Asshiddiqie, Jimly. (2005). *Model-Model Pengujian Konstitusional di Berbagai Negara*. Jakarta: Konstitusi Press, pp. 28 – 29.

<sup>15</sup>Wahid, Abdul, & Muhibbin, Moh. (2009). *Etika Profesi Hukum: Rekonstruksi Citra Peradilan di Indonesia*. Malang: Bayumedia Publishing, p. 285.

and regulations. The authority of the Judicial Commission in the selection of justices has been regulated in Article 24B of the 1945 Constitution and Article 14 paragraph (1) of Law Number 22 Year 2004 concerning the Judicial Commission. However, the selection in question is a selection to propose a prospective Chief Justice, not to make a selection about whether or not someone who has become a Supreme Court justice. The Judicial Commission is an independent institution. In line with that, the Judicial Commission does have an important role in the effort to realize an independent judicial power through the nomination of Supreme Court Justices and oversight of transparent and participatory judges in order to uphold the dignity and dignity and conduct of judges. Supervision by the Judicial Commission in principle aims that the Chief Justice and Judges in carrying out their authority and duties are truly based and in accordance with applicable laws and regulations, the truth, and a sense of justice for the community and uphold the ethical code of the profession of judges. Along with the amendment to the 1945 Constitution as a genealogical emergence of the Judicial Commission which is a state institution that was born from reforms in Indonesia, the Judicial Commission is a state institution that has the same position as other state institutions. As a state institution, the Judicial Commission gets its duties and authority in the 1945 Constitution and is further outlined in Law Number 22 of 2004 concerning the Judicial Commission.

## **G. Scope of Judges Role in Court**

### **1. Definition of Judge**

The term judge has 2 (two) meanings, namely the first is the person who hears the case in court, and the second understanding is a wise person.<sup>16</sup> Basically, the Judge's job is to give decisions in cases or conflicts that are confronted with him, determine matters such as the legal relationship, the legal value of behavior, and the legal position of the parties involved in a case, so as to be able to resolve disputes or conflicts based on the law applies, the Judge must always be independent and free from the influence of any party, especially in making a decision.

Referring to Article 1 point 8 of the Criminal Procedure Code, it is stated that a Judge is a state court official who is authorized by law to adjudicate. Meanwhile, when referring to Article 24 of the 1945 Constitution jo. Article 1 Law Number 48 of 2009 concerning Judicial Power, the term judge means a person who hears a case in a court or court; Hakim also means a court, if someone says "the case has been submitted to the Judge". 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 rule of law of the Republic of Indonesia.

### **2. Judges' Code of Ethic**

The Judge's Code of Ethics was first coined through the 1966 IKAHI Extraordinary Congress in Semarang in Semarang, in the form of the Indonesian Judge's Code of Ethics and refined in the 2000 IKAHI National Conference in Bandung. Subsequently followed up at the 2002 RI Supreme Court Work Meeting in Surabaya which formulated 10 (ten) Judicial Conduct Guidelines principles, which were also preceded by an in-depth study which included a comparison process with international principles, as well as similar regulations established in various countries, between others The Bangalore Principles of Judicial Conduct. The Supreme Court issued guidelines for Judges' Behavior through the Decree of the Chairperson of the Supreme Court of the Republic of Indonesia Number: KMA/104A/SK/XII/2006 dated December 22, 2006, concerning the Code of Conduct for Judges and Decree of the Chairperson of the Supreme Court of the Republic of Indonesia Number: 215/KMA/SK/XII/2007 dated 19 December 2007 concerning Guidelines for Implementing Judges' Conduct Guidelines. Likewise the Indonesian Judicial Commission has conducted an in-depth study by taking into account input from various parties through Public Consultation activities held in 8 (eight) cities whose participants consisted of judges, legal practitioners, legal academics, as well as community elements including non-governmental organizations.

The basic principles of the Code of Ethics and the Code of Conduct for Judges are implemented in 10 (ten) rules of conduct as follows: (1) Behaving Fairly, (2) Being Honest, (3) Behaving Arif and Wise, (4) Being Independent, (5) High Integrity, (6) Responsible, (7) Uphold Self-Esteem, (8) High Discipline, (9) Be Humble, (10) Be Professional.

### **3. The Role of Judges in Courts**

Judges in carrying out their duties must be based on applicable law, the term law must be interpreted broadly not only to the extent of the law, but also includes the law and values that live in society. Judges in carrying out their positions have obligations, that is, judges may not refuse to examine cases (adjudicate), adjudicate is a series of judges' actions, to accept examining and deciding criminal cases based on the principles

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<sup>16</sup>Machmudin, Dudu Duswara. (2006). Peranan Keyakinan Hakim dalam Memutus Suatu Perkara di Pengadilan. *Varia Peradilan, Ikatan Hakim Indonesia*, 21(251), p.52.

of freedom, honesty and impartiality in court in terms of and in a manner that suits stipulated in this law (Article 1 paragraph (9) of the Criminal Procedure Code), a judge may not reject a case on the grounds that there is no legal rule or the law is unclear. Because the judge was considered to know the law *CurialusNovit*. If the rule of law does not exist, he must dig it with legal knowledge, if the rule of law is less clear, then he must interpret it. Judges as state officials and law enforcers are required to explore, follow and understand the legal values and a sense of justice that lives in the community.

## **H. Supervision Theory**

### **1. Definition of Supervision**

Supervision can be defined as a process to ensure that organizational and management objectives can be achieved. This relates to ways of making activities as planned. This understanding shows that there is a very close relationship between planning and supervision.<sup>17</sup>

Furthermore, according to Stephen Robein, Supervision is the process of following the development of activities to ensure the course of the work can thus be completed perfectly (accomplished) as planned previously by correcting several interconnected thoughts.<sup>18</sup>

### **2. Types of Supervision**

In several literatures, various theories are found that discuss the types of supervision.

- a. Supervision from within the organization (Internal Control)
- b. Supervision from outside the organization (external control)
- c. Preventive supervision
- d. Repressive supervision

### **3. Supervision Method**

#### **a. Direct Supervision**

Direct Supervision is if the supervisory apparatus/leadership of the organization conducts a direct inspection at the place of work implementation, both with the inspection, verification, and investigative systems. This method is intended so that immediate remedial and refinement measures can be taken in carrying out the work. While the direct supervision system by his superiors is called the built in control.<sup>19</sup>

#### **b. Indirect Supervision**

Indirect supervision is if the supervisory apparatus/leadership of the organization carries out the inspection of the work only through reports that come to it. These reports can be in the form of words in a row of numbers or statistics that contain an overview of the results of progress that have been achieved in accordance with planned expenditure/budget. The weakness of this indirect supervision cannot immediately find out the mistakes in its implementation, so that it can cause more losses.

#### **c. Formal Oversight**

Formal Oversight is supervision that is formally carried out by the supervising unit/apparatus acting on behalf of the leadership of the organization or the supervisor of the leadership of the organization. In this supervision procedures, relationships, and work procedures are usually determined.

#### **d. Informal Supervision**

Informal supervision is supervision that does not go through formal channels or established procedures. This informal supervision is usually carried out by the leadership official through informal (personal) visits, or incognito. This is intended to avoid stiffness in the relationship between superiors and subordinates. In this way the leader wants openness in obtaining information and at the same time proposals/suggestions for improvement and improvement from his subordinates.

#### **e. Administrative Supervision**

Administrative Supervision is supervision that covers the fields of finance, staffing, and material. Financial oversight concerns budget items (ceiling), budget planning, budget execution which includes administrative and treasury management. This concerns the procedures for receiving and dispensing procedures.

## **I. Role Theory**

Role theory defines "role" or "role" as "the boundaries and sets of expectations applied to role incumbents of a particular position, which are determined by the role incumbent and the role senders within and beyond the organization's boundaries".<sup>20</sup> Other than that, Robbins<sup>21</sup> define the role as "a set of expected behavior patterns attributed to someone occupying a given position in a social unit"

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<sup>17</sup>Yahya, Yohannes. (2006). *Pengantar Manajemen*. Yogyakarta: Graha Ilmu, p. 133.

<sup>18</sup>Robbins, Stephen P. (2001). *Organizational Behavior*. New Jersey: Prentice Hall, p. 30.

<sup>19</sup>Simbolon, MaringanMasry. (2004). *Dasar-Dasar Administrasi dan Manajemen*. Jakarta: Ghalia Indonesia, p. 65.

<sup>20</sup>Bauer, Jeffrey C. (2003). "Role Ambiguity and Role Clarity: A Comparison of Attitudes in Germany and the United States". *Disertasi*, University of Cincinnati, Ohio, p. 54.

In terms of Organizational Behavior, this role is one component of an organization's social system, in addition to the norms and culture of the organization. Here in general the 'role' can be defined as "expectations about appropriate behavior in a job position (leader, subordinate)". There are two types of behavior that are expected in a job,<sup>22</sup> (1) role perception: i.e. one's perception of the way that person is expected to behave; or in other words, is an understanding or awareness of the pattern of behavior or function expected of that person, and (2) role expectation: the way other people accept someone's behavior in a particular situation. With the role a person plays in the organization, an important component will be formed in terms of the person's identity and ability to work. In this case, an organization must ensure that these roles are clearly defined.

## **J. Theory of State Institutions**

### **1. Definition of State Institutions**

In the Big Indonesian Dictionary (KBBI), the word "institution" is interpreted among others as (1) 'origin (which will be something); ovaries (animals, humans and plants); (2) 'original form (form, form)'; (3) 'references; ties (about eye rings etc.)'; (4) 'a body (organization) whose purpose is to conduct a scientific inquiry or conduct a scientific inquiry or conduct an enterprise'; and (5) 'established patterns of human behavior, consisting of structured social interaction within a relevant value framework'. The dictionary also provides examples of phrases that use the word institution, which is a government agency which is defined as 'government bodies in an executive environment'. If the word government is replaced by the word state, it means 'state bodies in all spheres of state government (especially in the executive, judicial and legislative spheres)'.<sup>23</sup>

### **2. Checks and Balances in the Arrangement of State Institutions**

The amendment to the 1945 Constitution which is fundamental certainly results in changes in state institutions. This is not only due to changes in the provisions of the provisions governing state institutions, but also because of changes in the paradigm of law and state administration. One of the fundamental changes to the 1945 Constitution is the amendment to Article 1 paragraph (2) which reads "Sovereignty is in the hands of the people and implemented according to the Basic Law". This provision has the implication that people's sovereignty is no longer fully carried out by the MPR, but is carried out according to the provisions of the Constitution. The People's Consultative Assembly (MPR) is no longer the highest state institution above the high state institutions. Based on the provisions of Article 1 paragraph (2) of the 1945 Constitution, the 1945 Constitution becomes the highest legal basis for the implementation of people's sovereignty. This means that the sovereignty of the people is exercised by all constitutional organs with their respective functions and authorities based on the 1945 Law. based on the changes in Article 1 paragraph (2) of the 1945 Constitution, sovereignty remains in the hands of the people and its implementation is directly distributed functionally to constitutional organs.

### **3. State Auxiliary Organs**

There are several terms relating to "state auxiliary organs", some refer to them as state commissions "state auxiliary agencies" and "state auxiliary bodies" and others refer to as independent state institutions. The understanding of "state auxiliary organs" from several experts is as follows: In Asimow's opinion, state that state commission is "Units of Government Created by Statute to Carry Out Specific Tax in Implementing The Statute". "Most Administrative Agencies Fall in the Executive Branch But Some Important Agencies are Independent".<sup>24</sup>

Another opinion expressed by Jimly Asshiddiqie, Jimly argues that an independent state commission is a state organ (stateorgans) which is ideally independent because it is outside the executive, legislative and judicial branches of power but instead has a mixed function of the three. On another occasion Jimly Asshiddiqie named "state auxiliary organs" as "self regulatory agencies" or "independent supervisory bodies", namely institutions that carry out mixed functions between regulative, administrative and punitive functions which are usually separated but are actually carried out simultaneously by these new institutions.

## **IV.DISCUSSION**

### **A. Embodiment of Judicial Independence of the Judiciary in the Indonesian Legal System**

#### **1. The Concept of the Indonesian Rule of Law**

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<sup>21</sup>Robbins, Stephen P. (2001). *Op. Cit.*, p. 227.

<sup>22</sup>Bauer, Jeffrey C. (2003). *Op. Cit.*, p. 55.

<sup>23</sup>Nadira, Faradita Ayu. (2005). *Lembaga Negara dan Sengketa Kewenangan Antar Lembaga Negara*. Jakarta: Konsorium Reformasi Hukum Nasional Bekerja sama dengan Mahkamah Konstitusi, p. 29.

<sup>24</sup>Indrayana, Denny. (2008). *Negara Antara Ada dan Tiada: Reformasi Hukum Ketatanegaraan*. Jakarta: Kompas, pp.264 – 265.

The concept of the Indonesian legal state is different from the concept of *rechtsstaat* and rule of law because it has a different background. The concept of the Indonesian law state is as mentioned in Article 1 paragraph (3) of the third Amendment to the 1945 Constitution which reads: "The State of Indonesia is a state of law". The term "rule of law" in Indonesian literature is almost always paired with foreign terms including *rechtsstaat*, *at de droit*, the state according to law, legal state, and rule of law. Notohamidjojo matched the term rule of law in the Indonesian constitution with the concept of *rechtsstaat* as in his writing "... rule of law or *rechtsstaat*".<sup>25</sup> In addition, Muhammad Yamin in his writings stated that "... the Republic of Indonesia is a state of law (*rechtsstaat*, government of law)".<sup>26</sup>

The urgency of affirming a country as a state of law (government by law) is nothing but to avoid arbitrariness committed by the government towards its citizens. Therefore, in a rule of law, the limitation of the function of state power must be clearly carried out in the highest law of the country itself, which in this case is known as the constitution. The provisions in this constitution are intended to prevent anyone from denying the validity of the rule of law concept itself.

In the concept of the Indonesian rule of law, the urgency of affirming a country as a state is nothing but to avoid the arbitrariness of the government towards its citizens while ensuring the implementation of the constitutional rights of citizens. Therefore, limiting the function of state power must be emphasized in the highest law, namely the Constitution. In the 1945 Constitution of the Republic of Indonesia, the Provisions on Judicial Power are regulated in Chapter IX, Article 24 paragraph (1) which states that "Judicial Power is an independent power to administer justice in order to enforce law and justice" subsequently in paragraph (2) it is stressed that "Power the judiciary is carried out by a Supreme Court and a judicial body which is underneath it within the general court, religious court, military court, state administrative court, and by a Constitutional Court". Thus, the authors conclude that the judicial authority in the rule of law in Indonesia, including independence which is interpreted as judicial independence and independence which includes the freedom of judges in deciding cases before them.

## **2. Judicial Power in the Doctrine of the Separation of Powers as One of the Principles of the Law of Indonesia**

In Indonesia, judicial power is exercised by a Supreme Court, and also judicial institutions that are under it in the sphere of general court, religious court, military court, and state administrative court, and also by a Constitutional Court as affirmed in Article 24 paragraph (2) 1945 Constitution CHAPTER IX concerning judicial authority. Furthermore, the provisions of Article 25 of the 1945 Constitution stipulate that the requirements to become and to be dismissed as judges are determined by law. According to Philipus M. Hadjon, both articles contain 3 (three) legal norms, namely: judicial power exercised by judicial bodies (judicial) which culminates in a Supreme Court; the composition and power of the judiciary will be further regulated; the conditions for becoming a judge, as well as dismissal will also be arranged further.<sup>27</sup>

The existence of the above provisions according to Sri Soemantri can be used as an indication that the influence of the *trias politica* has been adopted in the 1945 Constitution as a constitutional foundation for the state. In general, the separation of powers in the material sense does not exist or has never been fully implemented in Indonesia, as it is known that the condition of separation is not always perfect, because sometimes each other is not really separate even influencing each other.<sup>28</sup>

In general, it can be stated that there are two principles which are usually considered very basic in the judicial system, namely: a) the principle of judicial independence; and b) the principle of judicial impartiality. Both of these principles are recognized as the basic prerequisites of the system in all countries called modern law or "modern constitutional state". The principle of independence itself must be manifested, among others, in the attitude of the judges in examining and deciding cases they face. In addition, independence is also reflected in various arrangements regarding matters relating to the appointment, tenure, career development, payroll system, and dismissal of judges.

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<sup>25</sup>Notohamidjojo, O. (1970). *Makna Negara Hukum bagi Pembaharuan Negara dan Wibawa Hukum bagi Pembaharuan Masyarakat di Indonesia*. Jakarta: BPK Gunung Mulia, p. 27.

<sup>26</sup>Yamin, Muhammad. (1982). *Proklamasi dan Konstitusi Republik Indonesia*. Jakarta: Ghalia Indonesia, p. 72.

<sup>27</sup>Hadjon, Philipus M., et al. (Eds.). (2011). *Pengantar Hukum Administrasi Indonesia*. Yogyakarta: UGM Press, p.293.

<sup>28</sup>Soemantri, Sri. (2009, 26 – 29 Juni). Lembaga Negara dan State Auxiliary Bodies dalam Sistem Ketatanegaraan Menurut UUD 1945. Paper presented in *Dialog Hukum dan Non Hukum "Penataan State Auxiliary Bodies dalam Sistem Ketatanegaraan"*, organized by Departemen Hukum dan HAM RI, Badan Pembinaan Hukum Nasional bekerjasama dengan Fakultas Hukum Universitas Airlangga, at Surabaya.



According to Prof. Bagir Manan that judicial power is an independent power apart from the influence of other powers to administer law and justice.<sup>29</sup> Independence, here in after referred to as the independence of judicial power, is a complex idea, not merely as a value, but also as a useful instrument to pursue higher values, namely the rule of law.<sup>30</sup>

One of the absolute requirements or condition *sine qua non* in a state of law that adheres to the separation of powers is an independent, neutral (competent and authoritative) court capable of upholding the authority of the law, the protection of the law, legal certainty and justice. Only the court has all these criteria that can guarantee the fulfillment of human rights. As the main actor of the judiciary, the position and role of judges is very important, especially with all the authority it has. Through its verdict, a judge can transfer someone's ownership rights, revoke the freedom of citizens, declare illegitimate acts of government arbitrage against the community, up to order to revoke one's right to life. Therefore, all the authorities possessed by judges must be exercised in order to uphold the law, truth and justice indiscriminately by not discriminating against people as regulated in a judge's oath, in which everyone is equal before the law and the judge. The enormous authority of the judge demands high responsibility, so that the court's decision pronounced in the "For the sake of justice based on the Almighty God" implies that the obligation to uphold the law, truth and justice must be accounted horizontally to all humans, and vertically accountable to God Almighty.

As a country that affirms its position as a rule of law, Indonesia has an obligation to organize the institutional concept based on the teachings of *trias politica*. One of the functions of state power in the teaching of *trias politica* is judicial power which has the role of examining and deciding cases in a country. The Supreme Court as one manifestation of judicial power is always required to work well in conducting justice to enforce law and justice based on the Pancasila and the 1945 Constitution of the Republic of Indonesia. Therefore, in order to support the implementation of this function, the Supreme Court must be separated from all other forms of influence of state power.

## **B. Embodiment of Judicial Independence of Judicial Institutions in the Indonesian Legal System**

### **1. Authority of Filling the Position of Chief Justice**

During the enactment of Law Number 14 of 1985 concerning the Supreme Court, the process of recruiting supreme court justices is a joint power between the president and the DPR, as stated in Article 8 paragraph (1) of Law Number 14 of 1985. Furthermore, Article 8 paragraph (2) The Supreme Court Law regulates, the DPR has the authority to propose a list of names of prospective judges after hearing the opinion of the Supreme Court and the government, to then be elected and appointed by the president as head of state.

As regulated in the Supreme Court Law and the Judicial Commission Law related to the mechanism for appointing judges and the authority of the House of Representatives regulated in the two Laws, they have been formulated differently, and are not in accordance with Article 24A paragraph (3) of the 1945 Constitution. This creates legal uncertainty. Article 8 paragraph (2) of the Supreme Court Law stipulates that: "Prospective justices as referred to in paragraph (1) are selected by the House of Representatives from the names of candidates proposed by the Judicial Commission".

From the aforementioned provisions, it can be seen that the authority of the House of Representatives in appointing judges is basically regulated in the 1945 Constitution. However, the involvement of the House of Representatives is limited to the authority to give "approval" to prospective justices proposed by the Judicial Commission before established by the President as Chief Justice and there is no authority to "elect" prospective justices as stipulated further in the Supreme Court Law and the Judicial Commission Law.

With the enactment of the House of Representatives' authority to "elect" prospective judges in as stipulated in the Supreme Court Law and the Judicial Commission Act, it can be seen as a serious violation of the constitution because the mechanism for appointing judges involving the House of Representatives has been deviated. If related to the power of the House of Representatives which includes the formation of laws, then this arrangement can be said as a form of abuse of power or abuse of power.

The recruitment of judges (judicial appointment) is indeed one of the important topics in the effort to realize the independence of judicial power. Like filling a position in general, placing people in a position, at least they must see the qualifications of nominated people in accordance with the principles of skills, competencies, and integrity (merit based principle) and ensure the selection process that occurs must be designed comprehensively and transparently. In the context of judge selection, a comprehensive and transparent

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<sup>29</sup>Manan, Bagir. (2005). *Suatu Tinjauan Terhadap Kekuasaan Kehakiman Indonesia dalam Undang-Undang Nomor 4 Tahun 2004*. Jakarta: Mahkamah Agung RI, p. 23.

<sup>30</sup>Djohansjah, J. (2008). *Reformasi Mahkamah Agung Menuju Independensi Kekuasaan Kehakiman*. Bekasi: PT. Kesaint Blanc Indah, p. 130.

selection process is not only intended to guarantee the best individuals, but also to increase public confidence in judicial power.<sup>31</sup>

Furthermore, in the selection of prospective justices in 2015, the Judicial Commission submitted 6 (six) candidates for justices to the DPR to be approved as justices, and all received approval, where one of the approved names was a candidate who was rejected in 2013. Furthermore, in 2017, the House of Representatives is still conducting the Feasibility and Compliance Test of 5 Supreme Judge Candidates and likewise in 2019, where the House of Representatives through Commission III is still conducting a fit and proper test or fit and proper test for prospective justices. The result was that all four candidates who took part in the fit and proper test were all rejected by the DPR. This condition is certainly very unfortunate, considering that after being passed the selection at the level of screening by the Judicial Commission, the DPR actually still uses its authority to assess the eligibility aspects of candidates proposed by the judicial Commission. The mechanism for appointing judges must be returned to the constitutional order for the realization of judicial power and the protection of judicial independence in the Indonesian rule of law.

## **2. The Relationship Pattern of the Judicial Commission's Authority to the Supreme Court**

The relationship of power between the Supreme Court institution and the Judicial Commission according to the author occurs in 2 patterns/models, namely the formal authority relationship (*de formele gezagsverhouding*).<sup>32</sup> and partnership relations. The Judicial Commission is a state institution formed in the judicial power group established by the 1945 Constitution which has been amended, namely in the chapter on judicial power, namely article 24B of the 1945 Constitution. Starting from 1968 the idea of forming the Judicial Research Advisory Council (MPPH) emerged. But the idea was not successfully included in the law on Judicial Power. It was only in 1998 that it reappeared and became a stronger and more solid discourse since the insistence on unifying the roof for judges, which certainly requires external supervision from an independent institution so that the ideals of realizing an honest, clean, transparent and professional justice system can be achieved. For this reason, in the third amendment to the 1945 Constitution, an article which explained the judicial commission in the chapter of judicial power appeared.

Even though it is within a group of judicial powers, the judicial commission is not an institution holding judicial power but only as an institution that supports the implementation of the tasks of judicial power or can be called a supporting institution. The formal authority relationship is the institutional relationship between the Supreme Court and the Judicial Commission in carrying out the mandate of Article 24A Paragraph (3) of the 1945 Constitution (the Third Amendment Result), namely the appointment of the appointment of justices in the Supreme Court by the Judicial Commission. Article 24A Paragraph (3) of the 1945 Constitution (the Third Amendment Result) reads: "Prospective Supreme Court Judges are proposed by the Judicial Commission to the House of Representatives to obtain approval and subsequently be appointed as Supreme Court Justices by the President". The mechanism for proposing and appointing Supreme Court Justices to the DPR is one of the authorities possessed by the Judicial Commission (Article 13 letter a of the Judicial Commission Law). For this reason, the Judicial Commission has the task of registering candidates, selecting, determining and submitting candidates for Supreme Court Justices to the House of Representatives. In Article 15 Paragraph (2) of the Law the Judicial Commission clearly stipulates that those who can submit candidates for Supreme Judge to the Judicial Commission include: the Supreme Court, the government and the community.

## **3. Public Intervention of Judicial Independence**

In principle, the constitution expressly states that Indonesia is a state of law, on the other hand although it does not explicitly Indonesia also declare itself as a democratic state based on Pancasila. This is a manifestation of the provisions of Article 1 paragraph (3) which determines that "Sovereignty is in the hands of the people and is carried out based on the provisions of the Basic Law". However, between the two concepts, their use is often interchangeable. Even though the essence is that when talking about the rule of law, it means talking about the concept of a state based on law, whereas if we talk about a democratic state, it means that we are talking about a concept of a state based on the will of the people.

Related to the above, the authors suggest that the context as stated above, according to the author is a picture that almost resembles the condition of the legal system that occurs in Indonesia today. Interventions against the Supreme Court in relation to the judicial process, especially court decisions, often get pressure from the public. The community freely provides comments on court decisions, even on the ongoing judicial process. Although in the concept of the rule of law of Indonesia, the existence of a free and impartial judiciary, by arguing and sheltering behind the "concept of democracy" in relation to freedom of expression, this becomes

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<sup>31</sup>Taufik, Giri Ahmad. (2014). Pembatasan dan Penguatan Kekuasaan Kehakiman dalam Pemilihan Hakim Agung. *Jurnal Yudisial, Komisi Yudisial Republik Indonesia*, 7(3), p. 297.

<sup>32</sup>Bhakti, Teguh Satya. (2004). "Pola Hubungan Presiden dan DPR Pasca Amendemen UUD 1945". *Tesis*, Universitas Indonesia, Jakarta, p. 249.

something normal and it becomes a necessity for the community to participate in giving his views on law enforcement efforts.

Thus, the authors conclude that to be able to better guarantee the creation of the best atmosphere for the administration of justice in order to uphold law and justice based on Pancasila, then the actions, behavior, attitudes/and or speech that can demean and undermine the authority, dignity, and honor. the judicial body or known as the Contempt of Court must immediately be regulated in the form of regulations accompanied by strict sanctions in the context of realizing the constitutional mandate of realizing the state of Indonesia as a state of law.

## **C. The role of the Supreme Court in Realizing the Independence of the Judiciary in Indonesia**

### **1. The Role of Guidance and Supervision**

Bagir Manan said that judicial power is indeed very weak compared to legislative and executive power, the judiciary is always powerless in the face of political pressure to keep an independent judicial power intact and weak in the administrative system, such as the budget. As long as the budget system for judicial power expenditure depends on the “kindness” of the government as the holder of the state treasury, efforts to strengthen judicial power will experience various obstacles.<sup>33</sup>

In the Supreme Court’s blueprint update, it was emphasized that the Supreme Court oversight profile of 2010-2035 to be achieved was: “The function of judicial oversight is carried out by credible and authoritative organizational units, which are respected and respected by all levels of the court because of the competence and integrity of its personnel, as well as the role and its position in the organization of the Supreme Court”.

The basic key to achieving this is strengthening oversight organizations. This is a logical consequence of the implementation of the one-stop system so that the burden of the supervisory function carried out by the Supreme Court jumped dramatically. In addition, with the high public scrutiny of the performance and integrity of Judges and the Judiciary, the Supervisory Agency is required to carry out its functions independently to a certain extent, so that its performance is able to increase public confidence in the judiciary. The supervisory organizational structure still contains several deficiencies that need to be corrected and improved, for example the position of the Oversight Body which is still not at the level of the Inspectorate General, the unclear line of command and coordination of the Oversight Body, there is a need to guarantee the independence of the Oversight Body in terms of structural, authority, duties and Regional Inspectorate positions that need to be reviewed and strengthened to be able to support the optimal functioning of supervision throughout Indonesia as well as challenges to the resources and capacity of the Regulatory Body to oversee the Supreme Court and its lower judicial bodies throughout Indonesia. Strengthening the oversight organization is focused on five aspects, namely:

- a. Restructuring the Oversight Organizing Organization
- b. Strengthening Human Resources Implementing the Supervision Function
- c. Use of Objective Parameters in Implementation
- d. Improvement of Accountability & Quality of Complaints Services for the Community
- e. Redefinition of Relationship between the Supreme Court and the Judicial Commission as Partners in the Implementation of the Oversight Function

### **2. Openness of Court Information**

Effective & efficient information disclosure is part of the Supreme Court’s commitment in the framework of bureaucratic reform, as stated in the Decree of the Chief Justice of the Republic of Indonesia Number 144/KMA/SK/VIII/2007 concerning Transparency of Information in the Court. After SK 144 was enacted, the issuance of laws and regulations governing the implementation of information disclosure, namely Law Number 14 of 2008 concerning Openness of Public Information and Regulation of Information Commission Number 1 of 2010 concerning Public Information Service Standards, which serve as guidelines for information services by all agencies Public, including court. To realize the efficient and effective implementation of the task of information services, and in accordance with the provisions in the legislation, information service guidelines are needed in accordance with the duties, functions & organization of the Court.

In principle, the transparency policy through providing access to court information is directed at achieving two things, namely: meeting the needs of the justice seeker community; and realizing the accountability of the judiciary in order to increase public trust. The steps that will be taken by the Supreme Court to achieve the above objectives are as follows:

- a. Building a Culture of Openness in Courts;
- b. Developing a Simple, Fast, Timely and Low Cost Information Access Mechanism;
- c. Building Organizational Structure and Developing Support Policies;

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<sup>33</sup>*Ibid.*

- d. Develop a Supervision, Complaint and Complaint Resolution Mechanism, as well as Incentives and Disincentives;
- e. Increasing public understanding of the usefulness and information needs of the court.

### **3. Increased Accountability through the Accreditation and Quality Assurance System of the Court**

One of the efforts made by the Supreme Court in order to increase public confidence in the judiciary's power in addition to renewing the system of supervision and disclosure of public information is to establish an accreditation and quality assurance system. This is based on the needs, demands and expectations of the community regarding the existence of the Supreme Court as the highest forum for solving problems that arise in the community.

ISO 9001: 2008 Quality Management Certification shows that the judiciary under the Supreme Court has been able to move quickly in responding to changes in community demands. Through the organs of the Directorate General of the Judiciary, the Supreme Court has increased the standard of public services in the effort to achieve the mission, namely maintaining the independence of the judiciary, providing justice for justice seekers, improving the quality of judicial leadership and increasing the credibility and transparency of the judiciary.

## **V. CONCLUSION**

1. Judicial power in the doctrine of separation of powers is a function of state power that guarantees the realization of the protection of the constitutional rights of citizens as the main principle of a rule of law. Thus, judicial power must be free from other functions of state power in administering justice in order to uphold law and justice based on the Pancasila and Law The 1945 Constitution of the Republic of Indonesia. As one of the rule of law, Indonesia is obliged to guarantee the independence of the judiciary power to be free from the pressures of legislative and executive power. The pressure in this case covers all forms of intervention that have the potential to weaken the independence of the judicial power in the administration of justice.

2. The exercise of judicial power in Indonesia does not guarantee the realization of the independence of the judiciary according to the rule of law which requires a free and impartial judiciary. The factors that influence the efforts to realize the independence of the judiciary are firstly related to the authority to fill the position of supreme judge who still relies heavily on the decision of the House of Representatives as the holder of the Legislative Power which incidentally is an element of people's representation from political parties. Second, the position of the Judicial Commission as an auxiliary state organ, in carrying out its functions is no longer in line with the mandate of the 1945 Constitution of the Republic of Indonesia. Third, the independence of the judicial power is confronted with public opinion which in the writer's opinion is a form of intervention that can interfere with the independence of judges in deciding cases. This is caused by the bias of the concept of democracy that is understood by the community and weak law enforcement efforts against the contempt of court.

3. The Supreme Court as one of the executors of judicial power in Indonesia has sought to realize the independence of the judiciary in Indonesia, through improving the pattern of internal guidance and supervision, easy access to court information and increasing accountability through the accreditation system and quality assurance of the judiciary.

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