

## Analysis of the Institutional Position of Military Judges Against the Independence of the Indonesian Military Courts

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### ABSTRACT

Application of a theory of power-sharing which is divided into executive, legislative, and judicial branches in Indonesia has been applied to achieve checks and balances between state institutions. The judiciary must stand upright in carrying out its primary duties and functions as a law enforcement agency. In the context of military justice, judges have an undeniably important role in the running of a judicial body. The position of military judges has ties between two institutions, namely the Indonesian National Armed Forces (executive) and the Supreme Court (judicial) which should be of different clumps. Judicial bodies that should be independent, uninterrupted, and intervening must be reviewed from the perspective of laws and regulations. This research uses the normative-empirical method (applied law research). The approach in question is in the form of a conceptual approach by examining the structure of the state administrative organization based on applying a theory and legislation and their implementation in the field. Military judges indirectly stand on two legs institutionally, because both the Supreme Court and the TNI have the same role in determining the career path of military judges. In that case, military judges still have great potential for intervention. Several factors affect the independence of military judges in carrying out their duties within the scope of military justice. Military judges indirectly stand on two legs institutionally, because both the Supreme Court and the TNI have the same role in determining the career path of military judges. In this regard, the military courts in Indonesia are not yet fully considered an independent judiciary. This is because several factors that have great potential in determining a judge can be intervened by another party (executive).

**Keywords:** *Institutional; Military Judges; Independence; Military Court*

## **ABSTRAK**

Penerapan teori pembagian kekuasaan yang terbagi dalam eksekutif, legislatif dan yudikatif di Indonesia sudah diterapkan guna tercapainya check and balances antar lembaga negara. Lembaga peradilan (yudikatif) haruslah berdiri tegak lurus dalam menjalankan tugas pokok dan fungsinya sebagai badan penegak hukum. Dalam konteks peradilan militer, hakim memiliki peranan penting yang tidak terbantahkan dalam jalannya suatu badan peradilan. Kedudukan hakim militer memiliki ikatan antar dua institusi yakni Tentara Nasional Indonesia (eksekutif) dan Mahkamah Agung (yudikatif) yang seharusnya berbeda rumpun. Badan peradilan yang seharusnya independen, tidak terintervensi dan mengintervensi perlu dikaji berdasarkan perspektif peraturan perundang-undangan. Penelitian ini menggunakan jenis metode normatif-empiris (*applied law research*). Pendekatan yang dimaksud berupa pendekatan konseptual dengan mengkaji struktur organisasai ketatanegaraan yang didasari atas penerapan suatu teori dan peraturan perundang-undangan serta implementasinya dilapangan. Hakim militer secara tidak langsung berdiri dalam dua kaki secara institusional, karena baik MA maupun TNI sama-sama berperan dalam menentukan jalannya karir hakim militer. Dalam hal itu hakim militer masih memiliki potensi besar untuk diintervensi. Terdapat beberapa faktor yang dapat mempengaruhi ketidakmandirian hakim militer dalam menjalankan tugasnya dalam lingkup peradilan militer. Hakim militer secara tidak langsung berdiri dalam dua kaki secara institusional, karena baik MA maupun TNI sama-sama berperan dalam menentukan jalannya karir hakim militer. Dalam hal itu maka peradilan militer di Indonesia belum secara utuh dikatakan sebagai peradilan yang independen. Ini disebabkan karena beberapa faktor yang berpotensi besar dalam menentukan seorang hakim dapat di intervensi oleh pihak lain (eksekutif).

**Kata Kunci:** *Institusional; Hakim Militer; Kemandirian; Peradilan Militer.*

## Introduction

The State of Indonesia is legal as mandated in the 1945 Constitution of the Republic of Indonesia as the highest basic law in the state. The explanation regarding this matter is contained in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states "The State of Indonesia is a state of law". In Dutch terms, the rule of law is referred to as *rechtstaats*, although in some European countries, it has a different designation, such as *etat de droit* which is the name of the French state and the legal state or the rule of law by the British state which has the same idea expression.<sup>1</sup> It has become a consequence of a state of lawmaking law as the highest reference in regulating state governance. There is nothing else that can be a reference other than compliance with the law itself.

The supremacy of the law from the constitution and the regulations under it is the most important thing in the reference to the state, thus in the concept of the Indonesian state there is no absolute power like a country that adheres to a royal system where the power of the king influences the law that is enforced. Power in the life of the state, especially in the Republic of Indonesia, has a nature that is not owned by a single ruler alone.

According to Montesquieu in his book *L'esprit des lois* (The Spirit of Laws), power in the state is divided into 3 (three) parts, namely the Legislative, Executive, and Judicial.<sup>2</sup> Normatively, the Indonesian state itself makes the law an important instrument in state administration and good governance. Law is placed on the highest caste as the main reference for the state. In addition,

the law also functions as a tool or means to achieve the ideals of the state.<sup>3</sup>

Based on this, when viewed from both a theoretical and practical point of view, the power that has the task of ensuring the law runs well in the administration of state life is judicial. Judicial power as bodyguard, supervisor, and law enforcement has a strategic position in the state system. Therefore, the Indonesian constitutional system mandates that judicial power is required to be independent or independent from interference from any party.

In the context of the Indonesian state itself, the independence of the judiciary has been guaranteed by the state constitution by confirming it in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which reads:

"Judicial power is an independent power to administer justice to uphold law and justice".

In more detail, the provisions that describe the independence of the judiciary in the constitutional mandate are Article 1 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power which states:

"Judicial power is the power of an independent state to administer the judiciary to enforce law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the State of Law of the Republic of Indonesia".

So the urgency of the independence of judicial power is a must and is absolute. However, if studied from the perspective of the old-order era to the new-order era, judicial power is not independent as in the reform era. At that time the executive power still had a dominant role in

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<sup>1</sup> La Ode Husein, *Negara Hukum, Demokrasi Dan Pemisahan Kekuasaan*, 1st ed. (Makasar: Social Politics Genius, 2019).

<sup>2</sup> A. Sakti Ramdhon Syah R, *Dasar-Dasar Hukum Tata Negara: Suatu Kajian Pengantar*

*Hukum Tata Negara Dalam Perspektif Teoritis-Filosofis* (Makasar: Social Politics Genius, 2019).

<sup>3</sup> Moh. Mahfud MD, *Politik Hukum Di Indonesia*, 8th ed. (Depok: Rajawali Pers, 2018).

regulating the administration of personnel, financial administration, and office administration of judges under the auspices of the Ministry of Justice.<sup>4</sup> This of course creates an opportunity for the authorities, especially the executive, to intervene in the law enforcement process within the judiciary, and is an entry point for the development of collusion and other negative practices.

The consequences of the reform era resulted in very significant changes to the judiciary in Indonesia. The Ministry of Justice in the pre-reform era still regulates administration, and finance has been transferred to one roof authority under the Supreme Court. This started when Law no. 35 of 1999 concerning the Basic Provisions of Judicial Power as an amendment to Law no. 14 of 1970 which tends to be obsolete and no longer relevant. Then the regulations regarding judicial power changed to Law no. 4 of 2004, after which changes to regulations were made again through the ratification of Law no. 48 of 2009 concerning Judicial Power which is then valid until now.

All arrangements regarding judicial structural organization are under the auspices of the Supreme Court which is a high-state institution in judicial affairs. In its role, the judicial environment under the Supreme Court has the main tasks, functions, and specificities as well as the characteristics of each privilege, including military courts.

The Military Court is a judicial institution that has characteristics because its authority in law enforcement is special and is not owned by other courts. The specialty of this judicial body lies in its authority which only specifically judges certain legal subjects, namely a soldier, or someone who is equated with a soldier as well as a subject of civil law in the case of

connectivity.<sup>5</sup> In addition, other privileges that are owned are the existence of a judicial and administrative institution that is not owned like other courts under the auspices of the Supreme Court.

Technically, until now, military justice is still attached to Law Number 31 of 1997 concerning Military Courts as the legal basis, which also includes the procedural law of military courts. The regulation is the basis for the most recent or most recently ratified regulations from other judicial circles, but the substance of the law lags behind other judicial regulations. This is because this regulation has not been amended following the constitutional amendments. It has been 24 (twenty-four) years that this regulation has not undergone any changes like other judicial environments whose legal basis has changed by adjusting the mandate of constitutional changes after the amendment to the 1945 Constitution of the Republic of Indonesia.

The statutory order regarding judicial power after the fourth amendment has undergone changes that are adapted to the conditions of the times regarding Law no. 48 of 2009. In the context of the military court, because it has not undergone any changes, the legal basis used in its considerations still refers to the law on judicial power before the amendment, namely Law no. 14 of 1970, so that the relevance of the current regulations regarding military justice needs to be questioned.

As a special judiciary, strategic positions in the organizational structure of the military justice system, from the military courts, high military courts, and the main military courts are also filled by a judge who is also a member of the military. This arrangement is contained in Article 18, Article 19, and Article 20 of Law no. 31 of 1997 concerning Military

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<sup>4</sup> Patrialis Akbar, *Lembaga-Lembaga Negara Menurut UUD Negara Republik Indonesia Tahun 1945* (Jakarta: Sinar Grafika, 2013).

<sup>5</sup> "Law of the Republic of Indonesia Number 31 of 1997 Concerning Military Courts" (1997).

Courts. The regulation stipulates that it is mandatory for military judges from various levels from the first level to the appeal level to be the military judge.

If a judge in the military court is a member of the military, then it is certain that a military judge is also subject to all the provisions regulated by the TNI institution as the parent institution of a military person. Considering that indeed a military judge is a pure military person who is then appointed by the competent authority to become a judge in the military court environment.

In Article 7 paragraph (1) of Law no. 31 of 1997 concerning Military Courts, the structure of the military courts in terms of organization, governance, budget, administration, and finance, used to be under the auspices and guidance of the TNI Commander. Then all aspects of its management were transferred under one roof under the auspices of the Supreme Court since the fourth amendment of the constitution.

This transition was marked by the Decree of the President of the Republic of Indonesia No. 56 of 2004 concerning the Transfer of Organizational, Administrative, and Financial Courts in Military Courts from the Indonesian National Armed Forces Headquarters to the Supreme Court. This transfer under one roof of the Supreme Court is an effort to ensure the independence of the judiciary as a body that has a strategic position in law enforcement.

The transfer between these two state institutions does not cover all aspects that support the independence of the judiciary. This is because the TNI institution is still authorized to train

soldiers in the military court environment. As a result, a military judge whose military status is very attached is still being fostered and supervised by the TNI institution.

In addition, the rank status attached to military judges is still valid today, so this reflects that the transfer between the two institutions to ensure the independence of the judiciary is something that needs to be questioned and reviewed. In addition, the assessment of the position of military judges as people who occupy strategic positions has a crucial role in the independence of judicial power as law enforcers, it is very necessary to study in depth.<sup>6</sup> So that the role of executive domination over the judiciary which should be independent is not created absolutely.

### **Methodology**

This research uses normative-empirical legal research methods. Normative-empirical research is research that is often referred to as applied law research.<sup>7</sup> This study examines the application of the law (laws and regulations) that are currently in force (*ius constitutum*) and its implementation in the field in factual cases in every legal event that exists within the community.<sup>8</sup> The type of approach used to find light on the topic or issue to be studied. In normative research, the type of approach used is the statutory approach.<sup>9</sup> In addition, the approach that can be taken is to use a historical approach.<sup>10</sup>

This study uses a statutory approach and a historical approach in the form of a study of a constitutional organizational structure based on the

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<sup>6</sup> Explanation Sheet of Article 3 of Law of the Republic of Indonesia Number 31 of 1997 concerning Military Courts.

<sup>7</sup> Muhaimin, *Metode Penelitian Hukum*, 1st ed. (Mataram: Mataram University Press, 2020).

<sup>8</sup> *Ibid*, Muhaimin.

<sup>9</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Grup, 2014).

<sup>10</sup> Jonaedi Efendi and Johnny Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris*, 1st ed. (Depok: Prenada Media Group, 2018).

application of a rule and theory into a state system, as well as interpretation from a historical perspective on the enactment of a regulation. The approach to the legislation is studied comprehensively and combined with studies in the form of realities in the field to find implications for the suitability of regulation to the object that is the focus of this research. In this type of normative-empirical legal research, data collection techniques can be carried out together or separately.<sup>11</sup> So the data collection in this study was carried out using a literature study of primary, secondary, and tertiary legal materials, as well as through the results of interviews.

## **Discussion**

### **1. Status of Military Judges in Institutional Dualism**

#### **A. History of the Implementation of Judicial Power in Indonesia**

The separation of the judicial and executive functions is important in maintaining the checks and balance's function. The position of the two clumps is institutionally important to separate and not interfere with each other or interfere. An independent and independent judiciary will certainly be realized if the supporting components contained in it are also guaranteed their rights and obligations as independent law enforcers without interference from other parties.

In reviewing a judge's position institutionally, it is necessary to study from the perspective of the history of the regulation of judicial power in Indonesia. Since the 1945 Constitution of the Republic of Indonesia was ratified on August 18, 1945, there has been a determination and enthusiasm to replace all legal provisions that were in effect during the colonial period with

regulations created by the minds of the nation's children. At that time the constitution had regulated the important role of judicial power. To fulfill the provisions of Articles 24 and 25 of the 1945 Constitution of the Republic of Indonesia, Law Number 19 of 1948 was established as a basic regulation regarding judicial power which previously applied regulations made during the colonialism period.

During the enactment of Law No. 19 of 1948, judicial power only consists of 3 (three) judicial bodies, namely: the General Court; Administrative Court, and Military Court. In addition, the technical implementation of judicial power only consists of General Courts; High Court, and Supreme Court. However, the implementation of Article 35 paragraph (2) encountered problems because the regulation states that all cases concerning the civil affairs of Muslims must be resolved according to their religious regulations. While at that time the religious court had not yet been formed so in its settlement at that time the judge in the case was a religious expert who was then appointed by the President at the suggestion of the Minister of Religion and the Minister of Justice.

Then the enforcement of judicial power regulations was changed by Law no. 19 of 1964. The change in regulation resulted in changes in the organizational structure of judicial power with the addition of a judicial body in the form of a religious court, as well as the addition of authority to each court and the Supreme Court as the highest court of all judicial bodies.

At that time the position of the judiciary was technically under the Supreme Court, but organizationally, administratively, and financially it was under the relevant Ministry. This has been stated in Article 7 of Law no. 19 of 1964, which reads:

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<sup>11</sup> Efendi and Ibrahim., pg. 125.

- 1) Judicial power which has the personality of Pancasila and which carries out the function of law as protection is exercised by the Court in the following circumstances:
  - a. General Court;
  - b. Religious Courts;
  - c. Military Courts;
  - d. State Administrative Court;
- 2) All courts culminate in the Supreme Court, which is the highest court of all jurisdictions;
- 3) The courts referred to in paragraph (1) above are technically under the leadership of the Supreme Court, but organizationally, administratively, and financially under the authority of the Ministry of Justice, Ministry of Religion, and Departments within the Armed Forces;
- 4) The provisions in paragraph (1) still opens the possibility for efforts to settle civil cases amicably outside the court;

However, at that time the implementation of this regulation was still thick with the existence of a power that was more dominated by the executive than other powers (executive heavy). In addition, the enforcement of judicial power regulations is only used as a revolutionary tool towards a socialist society based on the Political Manifesto of the 1945 Constitution of the Republic of Indonesia, Socialist, Democracy, Guided Economy, and Indonesian Personality (USDEK).<sup>12</sup>

The organizational, administrative, and financial placements which were controlled by the relevant departments at that time were met with strong opposition from the judges' professional organizations, but the government did not receive any response at that time. The courts that were

considered special courts at that time were military courts and religious courts. State administrative courts are not classified as special courts but are separate courts called administrative courts / civil service courts.<sup>13</sup>

The New Order government was determined to implement Pancasila and the 1945 Constitution of the Republic of Indonesia purely. So, the government at that time encouraged efforts to conduct a "Legislative Review" and created several laws. However, the enactment of the law created from the legislative review is considered contrary to the mandate of the 1945 Constitution of the Republic of Indonesia in terms of its content.<sup>14</sup>

But the regulation will still be enforced before a new law replaces it so Law no. 14 of 1970 concerning the Basic Provisions of Judicial Power. After this regulation was enacted, then another law was created that specifically regulates every judicial environment, be it general courts; state administrative courts; religious courts, or military courts. This law is used as the basis for touchstones or considerations for the specific regulations governing each of these courts.

This regulation also does not solve the problem of judicial power in Indonesia. The independence of the judiciary has become a hot topic of debate by legal scholars. The judiciary at that time was not considered fully independent because the judges in the four judicial circles still depended on the government and the Supreme Court. Then the regulation regarding judicial power was changed again with Law no. 35 of 1999 where the regulation is an implementation of the mandate MPR Decree Number X/MPR/1998 concerning the Principles of Development Reform in the Context of Saving and Normalizing National Life as

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<sup>12</sup> Johan Bahder, S H Nasution, and M Hum, "Sejarah Perkembangan Kekuasaan Kehakiman Di Indonesia," *INOVATIF | Jurnal Ilmu Hukum* 7, no. 3 (2014),

<https://online-journal.unja.ac.id/jimih/article/view/2171>.

<sup>13</sup> Bahder, Nasution, and Hum.

<sup>14</sup> Bahder, Nasution, and Hum.

State Policy by changing several articles in it.

Then enacted Law no. 4 of 2004 concerning Judicial Powers, one of which contains the unification of the organizational, administrative and financial roofs of judicial bodies into the Supreme Court. In the context of military justice, the transfer is regulated and determined by decree of the President of the Republic of Indonesia No. 56 of 2004 concerning the Transfer of Organizational, Administrative, and Financial Courts in Military Courts from the Indonesian National Armed Forces Headquarters to the Supreme Court.

After the end of the new order which was closely related to the military domination of important state institutions, including the judiciary, the policy of unifying the roof of the military courts under the auspices of the Supreme Court in 2004 did not solve the problem in terms of guaranteeing the independence of the judiciary. The position of a judge is one of the noble professions and has a crucial function in enforcing the law requires further study for the sake of justice and the enforcement of a law. A judge is required to be able to evaluate and examine cases to create an accurate legal decision. It is the demands of the task that require a judge to be free from tension, worry, and pressure.<sup>15</sup>

#### B. Military Judge Institutional Position

The status of military judges, which is normatively attached to their status as military officers, has consequences that need to be studied more deeply. Differences in functions that should not be in direct contact with each other, in the context of the position of military judges, are used as an exception formula for law enforcement. The status

of military judges is purely soldiers who are employed outside the institution, namely the Supreme Court of the Republic of Indonesia. This is allowed by laws and regulations, the regulation of which is contained in Article 47 paragraph (2) of Law no. 34 of 2004 concerning the Indonesian National Army which reads:

"Active soldiers can hold positions in the office in charge of the coordinator in the fields of Politics and State Security, State Defense, Presidential Military Secretary, State Intelligence, State Code, National Defense Institute, National Defense Council, National Search and Rescue (SAR), National Narcotics, and Supreme Court".

The Military Court is one of the judicial bodies under the auspices of the Supreme Court which consists of the Military Court, the High Military Court, and the Main Military Court, all of the judges in the court are active military who serve as judges. At each level of the court, the status of military rank is attached to the judges in each court. A military judge before becoming a judge is a pure military soldier who is then selected, educated, and fostered by the Supreme Court to later be appointed as a judge.<sup>16</sup>

A military person who wants to have a career as a military judge must meet the requirements written in the legislation, then be appointed by the President based on the recommendation of the Commander in Chief and the approval of the Chief Justice of the Supreme Court. It is described in Article 18, Article 19, and Article 20 of Law no. 31 of 1997 concerning Military Courts, the general requirements to be appointed as judges in military courts (first level) are soldiers who have at least the rank of captain and have a law degree. Meanwhile, to be appointed as judges in

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<sup>15</sup> Abdul Manan, *Etika Hakim Dalam Penyelenggaraan Peradilan*, 3rd ed. (Jakarta: Kencana, 2015).

<sup>16</sup> Result of Interview with Fredy Ferdian Isnartanto, Head of Military Court II-11 Yogyakarta. in Yogyakarta, 12 April 2022.



the high military courts and the main military courts, soldiers with the rank of lieutenant colonel and a law degree certificate are required to have experience in the field of law during their careers.

The profession of a judge in the military court environment is required one to be bound by the doctrine of both institutions at once. Status as a military officer, the judge is submissive and obedient to the Sapta Marga, 8 mandatory TNI and Soldier Oaths, and the TNI Officer Code of Ethics.<sup>17</sup> In addition, a military judge must also comply with the Code of Ethics and Code of Conduct for Judges (KEPPH) imposed by the Supreme Court.

The financial rights of military judges also differ from judges in other judicial circles under the Supreme Court. If judges in general courts, religious courts, and state administrations are fully regulated based on the regulations of the Supreme Court, a military judge in terms of basic salary rights still refers to regulations that are fully under the Indonesian National Armed Forces. The base salary of a military judge remains the same as the base salary of other TNI soldiers based on rank.<sup>18</sup> What makes the difference is that a military judge gets benefits like other judges in other courts. The financial rights in question have been regulated in Government Regulation Number 94 of 2012 concerning Financial Rights and Facilities for Judges Under the Supreme Court.

Furthermore, the study of the structure of the military judiciary needs to be questioned for its independence, this is

because its position is on two legs. Although this is normatively regulated in law, its application must also take into account the provisions of the constitution that require judicial clumps or independent judicial bodies.<sup>19</sup> This study requires a review from a point of view that is not only studied normatively. The independence of a judicial body must be studied vertically and horizontally from various perspectives. The enactment of regulations that facilitate the position of military judges currently vertically from a constitutional perspective does not fulfill the element of the phrase "freedom" as mandated.

The phrase "*Merdeka*" based on the definition of the Big Indonesian Dictionary means free, not bound, and not dependent on other people or parties.<sup>20</sup> So in the context of law enforcement regarding the position of military judges, the author argues that contextually it is contrary to the constitution. In addition, the judiciary clumps institutionally must be upright and no interference is allowed in any way, including in terms of the administrative staffing of judges because law enforcement requires complete independence.<sup>21</sup>

## **2. Factors that can affect the independence of military judges in the Indonesian military justice system**

The independence of the judiciary is a fixed price that must be guaranteed to achieve real justice efforts. The independence of the judiciary itself has

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<sup>17</sup> Parluhutan Sagala and Farid Iskandar, "Kedudukan Hakim Militer Dalam Kekuasaan Kehakiman Indonesia," *Jurnal Hukum Militer STHM* 5, no. 1 (2018): 105.

<sup>18</sup> Fredy Ferdian Isnartanto, *Op.Cit*, Interview Result.

<sup>19</sup> Results of Interview with Muhammad Zaki Mubarrak, Academician of Jenderal

Achmad Yani University Yogyakarta. in Yogyakarta, 10 June 2022.

<sup>20</sup> Independent. Definition Based on the Big Indonesian Dictionary (Online), Fifth Edition, Ministry of Education, Culture, Research and Technology of the Republic of Indonesia, 2016. Taken On 11 June 2022.

<sup>21</sup> Muhammad Zaki Mubarrak, *Op.Cit*, Interview Result.

also been guaranteed by the state constitution as an absolute thing. The intended independence is sought so that judges have freedom in carrying out their profession and also in enforcing the law. In the context of military justice, military judges have a crucial position in terms of law enforcement. However, the problem of independence is still a matter of debate. The author in this case will describe several factors that can cause military judges to be independent in exercising their authority. The factors in question are:

#### A. Structural Factor

The organizational structure in the context of the military justice system requires special attention. This is because the status of his position which is closely related to the executive element is a form of direct intervention that has the potential to affect the freedom of military judges in litigation and careers. This organizational factor is influential when the structure is not an independent autonomous institution but is subordinated to other structures.<sup>22</sup>

In this case, military judges in organizational structure currently still rely on all provisions of the TNI institution as the parent institution where a person with military status takes shelter. In addition, a military judge is currently also under another organization, which is essentially a different family. This is a consequence of his profession as a judge who demands his position to be under the auspices of the Supreme Court.

The factors mentioned above have implications for military judges in terms of promotion, which in turn affects a career as a military judge. If a military judge is judged by the Supreme Court to be able to occupy a higher position in the

military judicial structure, then a military promotion is also required as a condition that has been written in the legislation. For example, a military judge at the military court at the first level with the rank of a TNI Major, and then deemed worthy and able to occupy a higher position as a military judge in a high military court, or other structural positions within the judiciary, is required that the military judge be promoted to one level higher, namely Lieutenant colonel.

In the event of a promotion, if the Supreme Court wants a judge to be able to occupy a higher position, but the TNI institution does not increase his military rank, then a military judge cannot occupy the position determined by the Supreme Court. So that in the career of a military judge who will occupy a higher position than his previous position, both the Supreme Court and the Indonesian National Army must work together and have the same decision.<sup>23</sup>

In terms of the pattern of promotion of structural positions in military justice, a military judge who will be promoted or transferred to his position must obtain approval from the Chief Justice of the Supreme Court and the TNI Commander. This is regulated in the Decree of the Supreme Court of the Republic of Indonesia Number: 48/KMA/SK/II/2017 concerning the Pattern of Promotion and Mutation of Judges in Four Courts.

Based on this, military judges in their careers are still very dependent on other institutions outside the jurisdiction of the judiciary. The organizational structure that is still subordinated will cause the judiciary to be not free and independent and become an inseparable part of the executive.<sup>24</sup> From the

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<sup>22</sup> Ahmad Kamil, *Filsafat Kebebasan Hakim*, 3rd ed. (Jakarta: Kencana, 2017).

<sup>23</sup> Fredy Ferdian Isnartano, *Op.Cit.*, Interview Result.

<sup>24</sup> Kamil, *Filsafat Kebebasan Hakim. Op.Cit.*, p. 249.

perspective of theory and legal principles, the mechanism or pattern mentioned above is not permitted and does not describe an independent judicial system, and this is contrary to the constitution.<sup>25</sup> The author also argues that the current structural factors contradict the provisions of Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which mandates that the judiciary must be independent. In addition, the arrangement of this organizational structure is also contrary to the Decree of the MPR RI No. X of 1998 concerning the Principles of Development Reform in the Context of Saving and Normalizing National Life as State Policy, which mandates that there is a clear separation between the judicial and executive functions.

#### B. Understanding Factor

Judges as law enforcers have an important role as actors in enforcing laws and regulations and as representations for upholding justice. So it is the role of the judge that greatly influences a judicial body to have independence or not. Several indicators affect the independence and freedom of judges, namely: a culture of dependence, professional guarantees, thinking patterns, employment status, and integrity.<sup>26</sup> In addition, there is a paternalistic culture that is still attached to the lives of some judges with the feeling of *ewoh pakewoh* towards their superiors, making judges have a feeling if not have the courage to take their stand and make decisions.<sup>27</sup>

Such an attitude could have the potential for judges to be shaky in carrying out their profession. Moreover, in the context of military judges, judges often receive requests from superiors of

military defendants who have a higher military rank than the judges themselves to seek commutation of sentences for their subordinates who are accused.<sup>28</sup> Things like this illustrate that the understanding of a military judge is required to be extra, moreover, a military man has also been indoctrinated and required to obey the principle of unity of command. Military judges are needed who have high integrity and don't care about intervention efforts from other parties, including their superiors in their parent institution, the TNI. This sometimes becomes a dilemma considering that a military judge in examining and deciding cases must also consider the interests of the military and state security.

#### C. Power Factor

Throughout history, both from the old order, new order, and reformation, power has become a problem that continues to be debated in terms of discussing the independence of a judicial body. In the era of the old order and new order, law enforcement is always closely related to the intervention of the executive and legislative powers. At that time the law was not used as the main guardian of power, on the contrary, it was a power that controlled the law. So that judges are often trapped and do not have the freedom to block the intervention of a judicial process.

Interventions can occur not only outside the judiciary, vertical power at that time also often became an obstacle for a judge in deciding cases. So in this reform era, the power of the Supreme Court as supervisor of judges is also limited by the provisions of Article 39 paragraph (3) of Law no. 48 of 2009 concerning Judicial Power which states that internal supervision and authority

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<sup>25</sup> Muhammad Zaki Mubarrak, *Op.Cit*, Interview Result.

<sup>26</sup> Kamil, *Filsafat Kebebasan Hakim.*, *Op.Cit*, p. 251.

<sup>27</sup> Kamil. *Ibid*, p. 251.

<sup>28</sup> Fredy Ferdian Isnartanto, *Op.Cit*, Interview Result.

carried out by the Supreme Court must not reduce the freedom of judges in deciding cases.

However, in the context of military courts, the position of military judges as military officers is also attached to the TNI institution which is under the auspices of the executive family. The Indonesian National Armed Forces, which still has dominance that influences the course of military judges in their careers, has the potential to affect the freedom of judges.

In addition, the dominance of the TNI in the scope of military justice also lies in its authority in terms of investigation, investigation, and prosecution. In terms of investigation and investigation, the TNI institution oversees Anku and the Military Police; also in terms of prosecution, the Military Oditurat is under the auspices of the TNI, if in terms of the judiciary, the dominance of the TNI is also binding on a judge and affects the career of military judges, it is feared that the legal decisions produced by the military courts are based on the will of the influence of the executive power. It is undeniable that the political order often makes an independent judicial power powerless against political pressures and tendencies.<sup>29</sup>

This condition can occur because the construction of the judge's position regulation is still high in the potential for intervention from outside a judge such as pressure, intimidation, the direction of

opinion formation, and so on. Besides that, structural intervention against a judge from his superiors, leaders, or superiors is still common.<sup>30</sup> Judges in this case are required not to be complacent by the intervention of other powers by maintaining the integrity of the judiciary, even though the current regulations have a high potential for intervention.

At present, special attention is needed and efforts to change the legal regulations of military courts are needed so that the potential for intervention in the independence of the judiciary cannot be carried out by anyone. This is in line with the opinion expressed by Jimly Asshiddiqie, who said that the word independent and independent from the influence of government power has a functional meaning as well as an institutional meaning.<sup>31</sup>

Therefore, reform of military law in various fields, both in the legal structure (legal structure), legal substance (legal substance), and legal culture (legal culture) needs to be carried out.<sup>32</sup> This is because the legal regulations regarding military justice need to be understood as a systemic unit and there is a relationship that unites various special regulations, and the legal system for military courts also needs to be well understood so that the nature of the law can be understood correctly.<sup>33</sup>

The reform of military law in terms of the legal structure relating to institutions, implementation of the law,

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<sup>29</sup> Kamaruddin Kamaruddin, "Otokritik Terhadap Kemandirian Peradilan Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *Justicia Islamica* 11, no. 1 (June 1, 2014): 74, <https://doi.org/10.21154/justicia.v11i1.93>.

<sup>30</sup> Joko Sasmito, "Mewujudkan Kemandirian Hakim Untuk Menegakkan Hukum Dan Keadilan Dalam Lingkungan Peradilan Militer," *Perspektif* 20, no. 1 (January 29, 2015): 16, <https://doi.org/10.30742/perspektif.v20i1.138>.

<sup>31</sup> Andi Suherman, "Implementasi Independensi Hakim Dalam Pelaksanaan Kekuasaan Kehakiman," *SIGn Jurnal Hukum* 1, no. 1 (September 27, 2019): 42-51, <https://doi.org/10.37276/sjh.v1i1.29>.

<sup>32</sup> Agustinus PH and Yuliana Yuli, "Pembaharuan Hukum Pidana Militer Dalam Pembaharuan Hukum Pidana Nasional," *Jurnal Yuridis* 1, no. 2 (2014): 206.

<sup>33</sup> Dini Dewi Heniarti, *Sistem Peradilan Militer Di Indonesia*, 1st ed. (Bandung: Refika Aditama, 2017).

the authority of institutions, and personnel (law enforcement officers) requires changes. The legal structure is an element that has a strong influence on the legal culture that will be created (legal culture).<sup>34</sup> Legal culture itself can be interpreted as an attitude/mentality that will later determine how to use a law itself. Legal structures that are not able to move the legal system will create disobedience to the law so that the material/substance of the law determines the course of law.<sup>35</sup>

In the context of the military justice system, if law enforcement officers in this case a military judge are not fully independent as mandated by the constitution, then the legal culture that will be created is a legal culture that contains values that are contrary to the purpose of the law itself, namely the value of justice. A legal system that does not run progressively will create the wrong orientation because the legal objectives are not achieved (disorientation).

According to Mahfud MD, a country that is unfair or deviates from its intended purpose (disorientation), will cause a loss of public trust in its country (distrust), and loss of public trust will result in disobedience by the people to their country (disobedience), disobedience by the people will cause divisions within the country (disintegration).<sup>36</sup> In addition, the law does not only talk about what is currently happening, which may or may not be possible, but the law also needs to be seen as a preventive effort to dispel things that are contrary to the rules, norms, and rules of the law itself.<sup>37</sup>

## **Conclusions**

Military judges have an important role in law enforcement in the military justice environment. In carrying out his duties a military judge requires special attention considering the laws and regulations require a military judge to stand under the two major institutions which have different clumps, main functions, and authorities. Things that should not intersect with each other, in the context of the military justice system, are used as a formula for law enforcement. In terms of authority vertically and horizontally, which is related to its parent institution, namely, the TNI, military judges still have a direct relationship with matters of an administrative nature.

As a consequence of this, a military judge is still financially dependent on his parent institution. With the current position of military judges, the military judiciary has not yet found the point of pure independence expected by the constitution. This is because the financial position and matters related to personnel administration, which is still related to institutional positions, have a high potential for intervention. From the perspective of theory and the rule of law based on the constitutional mandate, the expected independence has not been fulfilled.

The enactment of legal regulations that are normatively valid at this time resulted in the position of judges being institutionally standing in both institutions. Therefore, several factors can affect the independence of military judges in the military justice system. The factors in question consist of: Structural factors, the current institutional position of

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<sup>34</sup> Lutfil Ansori, "Reformasi Penegakan Hukum Perspektif Hukum Progresif," *Jurnal Yuridis* 4, no. 2 (2017): 150.

<sup>35</sup> Ansori.

<sup>36</sup> Dian Erika Nugraheni, "Mahfud MD Ungkap Gejala Hancurnya Sebuah Negara,"

Kompas.com, 2020, <https://nasional.kompas.com/read/2020/02/17/12112401/mahfud-md-ungkap-gejala-hancurnya-sebuah-negara/>.

<sup>37</sup> Muhammad Zaki Mubarrak, *Op.Cit*, Interview Result.

military judges has an impact on the military judiciary, which institutionally seems to be a subordinate body of the TNI;

Factors in the understanding of military judges who carry various doctrines from two different institutions are required to be able to consider and distinguish legal interests for the sake of upholding justice, and political interests or power;

The power factor that currently exists is the dominance of the TNI over the career path of military judges in terms of promotion, position and some of its financial elements put pressure on the judge so that the legal decisions made are not following the judge's conscience. In addition, the dominance of the TNI in terms of the military justice system, which oversees the body that has the authority from investigation to correctional terms, makes the role of military judges in giving legal considerations very important.

If judges in carrying out their duties have the potential to intervene, the independence of the military court will not be created. makes the role of military judges in giving legal considerations very important. If judges in carrying out their duties have the potential to intervene, the independence of the military court will not be created. makes the role of military judges in giving legal considerations very important. If judges in carrying out their duties have the potential to intervene, the independence of the military court will not be created.

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