

# The Impact of Non-Judicial Guidance on the Impartiality of Tax Court Judges in Exercising Judicial Power

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## ABSTRACT

This study aims to analyze the impact of non-judicial coaching on the impartiality of tax court judges in exercising judicial power. This study uses normative legal methods, using a qualitative approach to determine the application of law to the development of tax courts and tax court institutions in Indonesia. The results of this study are (1) Based on the principle of judicial power and the freedom of judges, it implies that judges who serve in the Tax Court must be free from the influence of other powers, but in reality the judges who serve are under the ministry of finance, this is considered to weaken the function supervision and independence of judges in the tax court as a representation of judicial power. (2) The dualism of coaching which shows inconsistency with the existing justice system, causes the tax court not to fully comply with the applicable justice system. In other words, in this condition tax revenue is not completely independent or free from extra judicial influences. So that a political law is needed related to the full statutory tax court under the Supreme Court with the affirmation that the tax court judge must be free from the influence of the power of the ministry of finance.

## ABSTRAK

Penelitian ini bertujuan untuk menganalisis dampak pembinaan non yudisial terhadap imparisialitas hakim pengadilan pajak dalam menjalankan kekuasaan kehakiman. Penelitian ini menggunakan metode hukum normatif, dengan menggunakan pendekatan kualitatif untuk menentukan penerapan hukum terhadap pembinaan pengadilan pajak dan kelembagaan pengadilan pajak di Indonesia. Adapun hasil dari penelitian ini ialah (1) Berdasarkan prinsip kekuasaan kehakiman dan kebebasan hakim mengisyaratkan agar para hakim yang bertugas di Pengadilan Pajak harus bebas dari pengaruh kekuasaan lain, namun dalam kenyataannya para hakim yang bertugas berada di bawah kementerian keuangan, hal tersebut dianggap melemahkan fungsi pengawasan dan independensi hakim dalam pengadilan pajak sebagai representasi kekuasaan kehakiman. (2) Dualisme pembinaan yang menunjukkan inkonsistensi terhadap sistem peradilan yang ada, menyebabkan pengadilan pajak tidak sepenuhnya tunduk pada sistem peradilan yang berlaku. Dengan kata lain, pada kondisi ini pengasilan pajak belum sepenuhnya mandiri atau bebas dari pengaruh extra yudisial. Sehingga dibutuhkan suatu politik hukum terkait penyatuatapan pengadilan pajak di bawah Mahkamah Agung secara penuh dengan penegasan bahwa hakim pengadilan pajak harus terbebas dari pengaruh kekuasaan kementerian keuangan.

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## I. INTRODUCTION

Judicial power in the Indonesian constitutional system is an independent power exercised by a Supreme Court and judicial bodies under it, and by a Constitutional Court as the organizer of the judiciary to uphold law and justice (Butarbutar, Februari 2010). In Article 1, paragraph 1 of Law Number 48 of 2009 concerning Judicial Power, it is explained that the judicial power is an independent state power to administer justice to uphold law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the Law of the Republic Indonesia. This article is an embodiment of the principle of guaranteeing the administration of an independent judicial power.

In general, in the theory of rule of law, there are two kinds of conceptions of the rule of law, consisting of the concept of a rule of law in the sense of *rechtsstaat*, and a rule of law in the sense of the rule of law. The term *rechtsstaat* is known in Continental European countries, this understanding was developed by, among others, Immanuel Kant, Paul Laband, Julius Stahl, and Fichte. Meanwhile, the rule of law, developed in Anglo Saxon countries, adherents of common law, which was pioneered by A.V. Dicey in England. However, basically the two conceptions have a similar purpose, namely the protection of human rights and respect for human dignity (Djafar, Oktober 2010). The main condition for the upholding and strengthening of a rule of law is an independent judiciary. This means that if there is no independence of judicial power, especially due to the influence of government or executive power, it will open up opportunities for abuse of power and neglect of human rights by the authorities (Suseno, 2003).

Furthermore based on Article 27 of Law no. 48 concerning Judicial Power provides an explanation that in each judicial environment a special court can be established which is regulated by law. These special courts include juvenile courts, commercial courts, human rights courts, corruption courts, industrial relations courts, and fisheries courts which are within the general court environment. In addition, there is also a tax court that is within the state administrative court.

In Article 1 paragraph 8 of Law no. 48 of 2009 concerning Judicial Power, it is explained that a special court is a court that has the authority to examine, adjudicate and decide on certain cases which can only be formed within one of the judicial bodies under the Supreme Court which is regulated by law. One of them is the tax court which organizes judicial power to uphold law and justice, as well as provide legal protection for taxpayers in the settlement of tax disputes (Saidi, 2007).

when examined more deeply, the reason for the emergence of a tax dispute can be drawn a conclusion that the dispute arose, due to the issuance of a decision that has met the requirements that an appeal or lawsuit can be filed in the Tax Court based on tax legislation, and besides that due to the implementation of billing based on the tax billing law with a forced letter giving rise to a lawsuit from the taxpayer (Anggreini, Juli 2021). The position of the tax court which is a special court within the state administrative court environment has been emphasized in the elucidation of Article 9A of Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning State Administrative Court. The tax court in the implementation of justice in Indonesia is very different when compared to other special courts, especially in terms of guidance by the Supreme Court.

The Supreme Court has adhered to the one-roof judiciary concept in which judicial technical development and non-judicial technical development covering the administration, organization and finances of the judiciary under the Supreme Court are carried out by the Supreme Court. These provisions have been emphasized in the Judicial Powers Act so that

the one-roof judiciary concept is expected to materialize to guarantee the independence of the judicial powers.

Judicial technical development of the judicial power with the Supreme Court as the highest state court having independence and freedom in carrying out the judicial process and intervention from outsiders of the judicial power is prohibited. Then technically non-judicial guidance has a functional coordinating relationship between the Supreme Court and related departments, namely the Ministry of Justice, the Ministry of Religion, and the Ministry of Defense and Security. Functional coordination and division of tasks between the Supreme Court and related departments for the benefit of administering judicial power, both in theory and practice, have been distorted. So that in the process of resolving certain cases where the government or government officials have an interest, it seems that the judiciary is lacking or not independent, giving rise to public disappointment and concern. In this case, the power of the relevant departments in the field of organization, administration and finance of the judiciary, which is seen by some as the cause (Mujahidin, 2007). So that it creates an impact or effect on the independence of the judiciary where the legal effect is an effect caused by law, on an act committed by a legal subject (Ali, 2008).

Article 39 paragraph (1) of the Judicial Powers Law confirms that the highest supervision over the administration of justice in all judicial bodies under the Supreme Court in exercising judicial power is carried out by the Supreme Court and Article 39 paragraph (2) confirms that in addition to the supervision referred to in paragraph (1), the Supreme Court carries out the highest supervision of the implementation of administrative and financial tasks. So with the provisions in the Tax Court Law, by giving non-judicial coaching affairs related to organization, administration and finance at the Ministry of Finance, it has resulted in a not properly constructed guidance and coordination system that is aligned in handling tax dispute resolution and has resulted in an accumulation of the burden of settling cases decided by the Panel of Supreme Judges (Mardatillah, 2020). Based on the description above, the problem of fostering a tax court that is not in line with the institutional system of judicial power in the Indonesian state administration as stipulated in the Constitution and related laws and regulations.

## II. RESEARCH METHODS

The type of research used in this legal research is normative legal research whose research target is the legal principles of statutory regulations which form the legal basis both in the synchronization aspect and from the horizontal aspect including from legal norms which are multi-interpreted or inconsistent with other rules. This legal research was carried out using a statutory approach, a conceptual approach and a historical approach. The statute approach is carried out by examining all laws or regulations that are related to the legal issues under study.

## III. DISCUSSION RESULT

### 1. Development Authority of the Minister of Finance and the Supreme Court

Judicial power after the amendment of the 1945 Constitution became a very fundamental power and as part of the axis of power which has the function of upholding justice. Judicial power in the composition of state power according to the 1945 Constitution after the amendment is still placed in the power that is independent and free from the interference of other powers (Subiyanto, Desember 2012). As part of a judicial institution, the Tax Court must also be independent or

independent from the powers of other state institutions. however, arrangements regarding the Tax Court regulated in Law no. 14 of 2002 concerning the Tax Court has not shown the independence of a judicial body. The fact that the Tax Court is not yet independent can be seen from the guidance that uses a two-roof system, namely the Supreme Court and the Ministry of Finance.

The consequence is that Indonesia is a constitutional state, the highest authority in the state is law (Hamzani, September 2014). So that's why this dualistic coaching is eliminated as much as possible in the justice system, even though it has been emphasized in the Tax Court Law that coaching for the Ministry of Finance does not reduce the independence of judges in examining and deciding tax disputes.

However, according to M. Yahya Harahap, this provision contains a mistake on the grounds that placing the judiciary under the executive, in this case the department or ministry that is placed under it, is only organizational, administrative and financial aspects, this system, either directly or indirectly, is a symbol of juridical recognition that the judiciary is under the department concerned, furthermore the symbol, gives a warning signal to judges about the limits of their autonomous freedom, that is, in carrying out the functions and authorities of the judiciary, they are under the department. Therefore, even though theoretically what the department is fostering and overseeing is only administrative, personal, and financial, the power of symbols contained therein creates a very broad political and psychological effect on the independence of judges' autonomy, and also has a broad impact on the value of "loyalty" of the judges themselves, in the form of indecision, whether they must be loyal to the functions and authorities of the judiciary or must be loyal to the policies of the ministry concerned. The current system of dualism creates difficulties and obstacles in providing comprehensive and integral supervision and development concepts and programs (Harahap, 1997).

In line with this provision, the institutions authorized to exercise judicial power have been mentioned in a limited way. In other words, there are no judicial institutions other than those explicitly stated in the constitution (Afdol & Setjoatmadja, 2015). Furthermore, the independence of the Tax Court according to the Tax Court Law can also be seen from the many powers of the Ministry of Finance related to the Tax Court.

During the reform period, the provisions stipulated in Article 11 of Law No. 14 of 1970 were amended based on MPR Decree No. X/MPR/1998 Concerning the Principles of Development Reform in the framework of saving and normalizing national life as the direction of the state, which among other things, places an agenda for a strict separation between judicial and executive functions (Hambali, April 2021). Trias politica is a normative principle that these powers should not be handed over to the same person to prevent abuse of power by those in power so that citizens' human rights are guaranteed (Efi Yulistyowati, Desember 2016). This means that the concept of trias politica offers an order regarding the life of the state by carrying out a separation of powers which are expected to separate each other in an equal position, so that they can mutually control and balance one another (check and balances) (Sunarto, April 2016). The term trias politica in Indonesian as a translation is the separation of powers. However, if we look at the implementation of the trias politica as envisioned by Montesquieu in England, it turns out that each power cannot be separated. It would be more appropriate if this concept is referred to as the distribution of power. Because there is no power that stands alone. Executive power also has legislative and judicial powers (Marline, Maret 2018).

All courts throughout the territory of Indonesia are state courts and are determined by law, while the supreme court in our judicial system is the Supreme Court as the highest state court. The Supreme Court has several functions, namely the Supreme Court has a judicial (judicial) function, the Supreme Court has a judicial (judicial) function, the Supreme Court as the highest court has a second function, namely to lead the judiciary in fostering and developing law and at the same time developing Indonesian law through its decisions to direction of legal and judicial units, the Supreme Court has a regulatory function, the Supreme Court has an advisory function, the

Supreme Court has a supervisory function over the actions of other courts, the Supreme Court has an administrative function which has its own administration (Mertokusumo, Sistem Peradilan di Indonesia, 1997).

The authority of the Ministry of Finance in aspects of organizational development, administration and finance has the potential to influence judicial power through financial regulation and the freedom of judges through aspects of the employment of a judge. Placing the judiciary under the executive, in this case the ministry, even though those who are placed under it are only organizational, administrative and financial, a system like this is not good directly or indirectly because it is a symbol of juridical recognition that the judiciary is under the ministry concerned. The independence of the judicial power or the freedom of the judge is that in carrying out the trial, the judge is basically free, namely free to examine and try cases and free from interference by extra-judicial powers (Zulaeha, Juni 2011).

## **2. Independence of Judges and Independence of the Tax Court**

Independent means non-partisan, namely free, independent, and not under influence and not in favor of a person, certain group, political party or government (BN, 2005). The freedom of judges can be understood as the attitude of a free judge which is manifested in the absence of partiality in making decisions, that is, each party must be treated equally and the judge must provide equal opportunities to each party.

Paulus Lotulung stated that independence is defined as being free from executive influence or any other power and freedom from coercion, directives or recommendations coming from extra-judicial parties, except in matters permitted by law. This also includes freedom from internal judicial influences in making decisions (Lotulung, 14-18 Juli 2003). Furthermore, it must be realized that freedom and independence are also bound by responsibility or accountability, both of which, independence and accountability are basically the two sides of a coin that are attached to each other. There is no absolute freedom without responsibility. In other words, it can be understood that in the context of the independence of the judiciary, it must be balanced with its counterpart, namely judicial accountability.

The definition of self determination and independent or freedom is different. Self determination means to be under its own roof or not under the roof of another department, but independent or freedom means in deciding cases free from the influence of the executive and all other state powers and freedom from coercion, recommendations coming from parties outside the power of the judiciary (Hamzah, Kemandirian dan Kemerdekaan Kekuasaan Kehakiman, 14-18 Juli 2003).

An independent judge will take a role to make this situation more balanced. Judges at the Tax Court are required to require special Judge staff who have special expertise in the field of taxation and hold a law degree or other degree. In practice, most of the judges at the Tax Court are former officials at the Ministry of Finance, especially the Directorate General of Taxes and are not career judges who come from the career development system in general. In addition, coaching for Tax Court judges is not under the Supreme Court but under the Ministry of Finance. Many people are worried that this situation will affect the independence of judges in examining and deciding cases.

The recruitment of Tax Court Judges is not like the recruitment of career judges who come from the career judge coaching system in general, that is because Tax Court Judges must have special expertise in the field of taxation so that currently most of the judges at the Tax Court are former officials at the Ministry of Finance, especially the Directorate General Tax.

This is as stated by Supandi, Head of the TUN Chamber of the Supreme Court that, "Judges at the Tax Court come from human resources recruited by the Ministry of Finance. His basic education was STAN, then he was accepted as an ASN at the Ministry of Finance. They then equipped themselves with lectures in law. The recruitment of judges is carried out by the Ministry of Finance. The prospective judges have not yet joined the Pusdiklat Supreme Court. They were

trained at the Ministry of Finance, then proposed to become judges at the Tax Court. That is, they are not yet fully under the guidance of the Supreme Court.”

Then Ali Hakim, as Head of the Tax Court, emphasized that, "The Tax Court has never been intervened by the Ministry of Finance, because the Tax Court Judge obeys the law. It must be admitted that the employees of the Tax Court are employees of the Ministry of Finance. They are tasked with providing administrative services at the Tax Court. Unlike the case with the judges. The judges, although they come from units of the Ministry of Finance, have been separated from their main units. There is absolutely nothing about their activities related to the units of origin. The Ministry of Finance is only present when recruiting.” Recruitment of tax court judges as well as judges at other courts must be improved, but this is not a problem with their structural independence but with their technical skills and abilities. Recruitment by the Ministry of Finance because it is considered to have better understanding of technical capabilities in the taxation sector.

Recruitment and development of prospective tax court judges by the Ministry of Finance is a consequence of the two-roof system being enforced at the Tax Court. The Minister of Finance is responsible for coaching in the areas of organization, administration, and finance at the tax court agency as described in the Tax Court Law. It is different from the one-roof system policy under the authority of the Supreme Court which is a manifestation of the independence of the judiciary in Indonesia in law enforcement efforts. The function of the powers of the judiciary is not only responsible for purely judicial functions, but also responsible for administrative functions such as recruitment, appointment, termination, transfer of employees, officials and judges under the auspices of the Supreme Court as well as managing finances and so on. Whereas at the Tax Court itself, the recruitment, appointment, dismissal, transfer of judges, officials and employees of the tax court as well as financial management and so on are the responsibility of the ministry of finance. So that on that matter, the tax court as the perpetrator of judicial power was questioned by several parties about its independence.

The independence of the judiciary is one of the prerequisites for the establishment and upholding of a democratic rule of law. This is because the independence of the judiciary can guarantee individual freedom and human rights. Therefore, according to Montesquieu, who explained that the danger of judicial power is not independent or independent. He stated that if the power of the judiciary is united with the power of the legislature, then the power over the lives and liberties of citizens will be exercised arbitrarily because the judges will be the legislators. If judicial power is united with executive power, then judges can become oppressors (Asrun, 2004).

For some experts, judicial power is not only power that is free from all the influence of other institutional powers or institutional independence. Harold See explained that judicial power which is free from all influences from other institutional powers is only one perspective in viewing the independence of judicial power, namely a form of institutional independence. Another view of the independence of the judiciary is the perspective of democracy in the form of independence in making decisions (decisional independence). Independence in making decisions related to the obligations of judicial power which is carried out through the courts against the rule of law. The judicial power carries out the function of guaranteeing the establishment of a state in which there is protection for the independence of judges from the influence of various interests in deciding a legal issue (See, 1998).

Based on the above conception, the Tax Court does not yet have independence in exercising independent judicial power because some of the tax court institutions namely administration, organization and finance are still under the guidance of the Ministry of Finance which in fact is an executive institution. With regard to financial independence, before the birth of the law that transferred organizational, administrative and financial development under the Supreme Court, the source of the judiciary institution's budget was sourced and simultaneously managed by the executive, but currently from the same source to then be managed by the judiciary itself through

the Supreme Court. Unlike the case with financial management at the Tax Court, the implication of the Minister of Finance still fostering the financial sector is that the source of the budget is managed solely by the executive, in this case the Secretariat General of the Ministry of Finance, which oversees the Tax Court in non-judicial aspects.

In the regulation of the Minister of Finance Number 206.1/PMK.01/2014 Concerning the Organization and Work Procedure of the Tax Court Secretariat states that the Tax Court secretariat is led by a secretary who is administratively under and responsible to the Secretariat General of the Ministry of Finance and operationally under and responsible answer to the Chairman of the Tax Court. This is what is meant by the dualism of coaching at the Tax Court because it is under the responsibility of the Supreme Court and the Ministry of Finance. Based on the description above, the independence of judges is not always related to attitudes and behavior at work, but must also be reflected in various regulations related to matters that can improve their performance. Such as recruitment, tenure, training, promotion and transfer systems, payroll systems, finances and dismissal of judges. Until now, the tax court, which in practice is not yet independent because the system of recruitment, appointment and dismissal of judges, and the payroll system still has the involvement of the Ministry of Finance as an executive agency.

The dependence of the Tax Court as a judicial body on executive power, in this case the Minister of Finance, does not meet the indicators of the independence of a judicial body as described above. This occurs as a result of non-judicial guidance which is not under the responsibility of the Supreme Court at the Tax Court. If freedom is not owned by the judicial power, it can act non-neutral, especially when there is a dispute between the authorities and the people (Rumadan, November 2014). There is a concern whether the Supreme Court is capable of handling 2 (two) areas of coaching tasks at once, that is judicial technical and non-judicial technical development. Meanwhile, when the Supreme Court only handled judicial technical matters, there were an average of more than 20,000 (twenty thousand) cases in arrears. Thus a legal structure that abuses the law will create a twisting culture and abusing the law. The functioning of the legal structure is highly dependent on its implementers, that is law enforcement officials (Ansori, 2017).

Looking at the performance of the Supreme Court and the four judicial institutions (General Courts, Religious Courts, Military Courts and State Administrative Courts) which have succeeded in resolving cases with a fairly high ratio, it shows that the Supreme Court, which handles two trainings at the same time, that is judicial technical guidance and non-judicial technical development, actually showed significant results. Whereas in the Tax Court, where there is a dualism of coaching, the case settlement ratio is only around 51.45% or much lower than other judicial bodies. Even though in the Law on Judicial Powers the basic principles have been laid down in order to achieve the principle of fast, simple and low-cost justice in Indonesia, the court is obliged to help justice seekers to be able to overcome problems that arise that can hinder the achievement of the principle of a simple, fast and low-cost trial. . The word "simple" means that the legal principles governing the procedures for examining cases must be simple, easily understood by justice seekers and not convoluted and not too formalistic (Aburaera, 2012).

This quantitatively illustrates that the efficiency of handling cases with a one-roof system shows significant results compared to the dualism of guidance practiced in the Tax Court. The dualism of fostering the tax court must be corrected immediately, as an effort to realize independence or judicial power that is independent and capable of guaranteeing the upholding of the role and function of the judiciary and the courage to control government activities, the tax court should indeed be under the Supreme Court. This is because such dualism of guidance shows an inconsistency with the existing judicial system, so that the tax court is not fully subject to the applicable judicial system. In other words, in this condition the Tax Court is not fully independent in the sense that it is free from extra judicial influence.

#### IV. CONCLUSION

Tax court judges in examining and adjudicating tax disputes always base it on the principle of impartiality through decisions that are not influenced by any party, even though structurally the tax court is also under the guidance of the Ministry of Finance at a non-judicial level. The ratio of case handling by the Supreme Court and the four judicial bodies under it compared to the tax court is better so that it shows the efficiency of case handling with a one roof system showing significant results.

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