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The Position of The Constitutional Court in The Sphere of Judicial Power

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Abstract

This study aims to find and analyze the Herarki or the position of the Constitutional Court in the Scope of Judicial power. Where the decisions issued by the constitutional court are binding for all legal subjects and final, which means that the first and last decisions cannot be appealed. So this research is important to be researched from the history of the idea of the emergence of the constitutional court and its position in the scope of judicial power. In this study, the author will examine the position of the constitutional court based on the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia) and positive norms that are still in force today

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(ius contitutum). Based on this description, this study focuses on two problem formulations, namely first, how historically the constitutional court was formed as an institution within the scope of judicial power. Second, what is the position of the constitutional court within the scope of judicial power? This research is a normative research with the main research methods used are the statute approach, historical approach and conceptual approach. In this study, it is drawn from the history of the emergence of the Constitutional Court Institution and entered as one of the spheres of judicial power. Where in the judicial power there are 3 institutions including the Supreme Court Institution, the Judicial Commission Institution and the Constitutional Court Institution. The position in the institution is aligned with no higher or highest institution. Institutions within the scope of judicial power have the principle of check and balance and are independent.

Keywords: *Constitutional Court, Judiciary, and Board Position*

A. Introduction

The characteristic of being a state of law in carrying out the administration of the nation and state that is based on, on the basic law, and the highest law in the constitutional system, namely the Constitution or the Constitution of the Republic of Indonesia in 1945 (Constitution of the Republic of Indonesia in 1945). The position of the constitution in a state of law is *the supreme law of the land*[1] where its character binds every people and the state must obey the constitution. The absolute condition of a democratic legal state is the existence of a constitutional system in the Constitution that limits the power of the state and enforces the constitutional provisions of the state.[2] The Constitution contains constitutional rights and human rights, regulates the relationship between the state as a trustee and the people as the holder of the highest power in a democratic country, as well as limiting the authorities between institutions and branches of state power according to the principles of constitutionality.[3]

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[1] Lihat Pasal 6 Konstitusi Amerika Serikat.

[2] Abd ul Mukhtie Fadjar, *Sejarah, Elemen, dan Tipe Negara Hukum* (Malang: Setara Press, 2016), hlm. 62.

[3] Philip Bobbitt, *Constitutional Interpretation* (Massachusetts: Basil Blackwell, Inc., 1991), hlm. 4.

Judicial powers include the Supreme Court, the Judicial Commission and the Constitutional Court. The Constitutional Court of the Republic of Indonesia is one of the holders of judicial power in Indonesia which contributes to the development of the constitution, legal system and legislation through its final and binding decisions. The character and binding nature of the decision and its binding enforceability as attributes of *judicial supremacy*, linearly restrict, restrict, and even prevent the branches of political power in the national government from achieving their own interpretation of a constitutional matter.[4] The institution of judicial power with the authority to review and examine the constitutionality of legal rules is an interdependent element in the constitutional supremacy paradigm.[5]

The basic idea of Trias Politica is the concept of separation of powers to prevent the occurrence of absolute state power.[6] The figure who introduced the concept of Trias Politica was John Lock, which was later developed by Montesquieu, was written in his book entitled "*L'Esprit des Lois*" .[7] The concept of Trias Politica is the concept of separation or division of power between the Legislative, Executive, and Judiciary. Indonesia adheres to the concept of division of power, not separation of powers. Indonesia is a country that adheres to a democratic system so that it is one of those that adopts the concept of Trias politica in the aspect of power sharing.

Legislative power includes the People's Consultative Assembly, the House of Representatives and the Regional Representative Council which has the function of forming laws, Executive Power is held by the President as implementing laws that have been formed together with the House of Representatives and running the wheel of government assisted by its Ministers, while the judicial power is the power that supervises the president in implementing laws and wheels government and as a judicial power, which is carried out by the supreme court and the constitutional court.[8]

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[4] Greg Weiner, *The Political Constitution: The Cases Against Judicial Supremacy* (Kansas: The University Press of Kansas, 2019), hlm. 76.

[5] Jutta Limbach, "The Concept of The Supremacy of The Constitution," *The Modern Law Review* 64, no. 1 (2001), p. 3.

[6] Rosadi Ontong, *Hukum Tata Negara Indonesia: Teori dan Praktek*, Padang, Tanpa Penerbit, 2004.h. 7.

[7] Nugroho. W.E. " Implementasi Trias Politica dalam Sistem Pemerintahan di Indonesia", *Gema Keadilan,* vol.1, no.1, 2014. h.66.

[8] Efi Yulistiowati, "Penerapan Konsep Trias Politica dalam pemerintahan Republik Indonesia: Studi Komparatif Atas Undang-Undang Dasar Tahun

The scope of judicial power Where it has been regulated by the Constitution of the Republic of Indonesia in 1945 (UUDNRI of 1945) in Chapter IX is the Supreme Court, the Constitutional Court and the Judicial Commission. The meaning of judicial power is regulated in Article 24 paragraph (1) of the 1945 Constitution which reads as follows:

"The Judicial Power is an Independent Power to administer the judiciary to uphold law and justice"

In Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, it is emphasized that the institution of judicial power reads as follows:

"Judicial power is exercised by a Supreme Court and the judiciary under it within the scope of the general judiciary, the religious judicial environment, the military judiciary, the state administrative judiciary and by a Constitutional Court".

The 1945 Constitution in Chapter IX regulates the Judicial Power, Article 24A regulates the Supreme Court Institution, Article 24B the Judicial Commission Institution and Article 24C regulates the Constitutional Court Institution. In this case, the Judicial Power Institutions of the constitutional court, the Judicial Commission and the Supreme Court whose position after the 4th Amendment is how herarki is within the scope of judicial power.

Based on the background mentioned above, the researcher is interested in conducting a study with the title "The Position of the Constitutional Court in the Scope of Judicial Power".

B. The History of The Formation of The Constitutional Court in Indonesia

Before the independence of Indonesia, in the Dutch East Indies era, the judiciary was pluralistic or more than two types of courts were known as three forms of justice, namely the *Governor's Court* (*gouvernements rechtspraa*), the Bumiputra Court as stated in the 1932-1980 Ordinance and the Swapraja Court regulated in the 1938 Swapraja regulation. The power to adjudicate various types of courts above is not limited by region, but each judicial class has its own power environment

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1945 sebelum dan Sesudah Amandemmen," *Jurnal Dinamika Sosial Budaya,* vol. 18, no. 2, p. 336, 2016.

according to the case and the power environment according to the person. The difference in the class of the people is regulated in Article 163 *of the Indische Staatsregeling* (IS) where the group is *the First* Group of Europeans, the *Second* Group of Bumi Putra and *the Third* Group of Foreigners Orientals.[9]

During the Japanese rule, changes were made in the field of judicial power, namely removing the nature of pluralism and unifying the types of justice in the Dutch East Indies period that were applied to all groups of the population. Japan does not distinguish between population classes for each court, but divides it into three levels of courts as follows:

a. Court of First Instance (*tihoo hooin*);
b. Court of Appeal (*koota hooin*);
c. Department of Agong (*Psycho Happened*).

After the 1945 NRI Constitution was ratified by the Indonesian Independence Preparatory Committee (PPKI) on August 18, 1945, it abolished the intellectual property institutions established by Japan. Therefore, the provisions of judicial power are regulated in Chapter IX of judicial power in Articles 24 and 25 of the 1945 Constitution of the Republic of Indonesia which reads as follows:

"Article 24"

1) Judicial power is exercised by a Supreme Court and other judicial bodies according to the law.
2) The composition and powers of the judiciary are regulated by law.

"Article 25"
The conditions for becoming and to be dismissed as a judge are set by law".

The formulation of the two articles above, then in the Explanation of the 1945 Constitution of the Republic of Indonesia states that:

[9] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Buku VI Kekuasaan Kehakiman* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), h. 10. Lihat Prof.Dr. R. Supomo,"Sistim Hukum di Indonesia Sebelum Perang Dunia II",Penerbit Noor Komala, cet.keempat,1960.

The formulation of the two articles above, then in the Explanation of the 1945 Constitution of the Republic of Indonesia states that:

> *"Judicial power is an independent power, meaning regardless of the influence of government power".*

Article II of the Transitional Rules also provides:

> *"All existing state bodies and regulations are still in effect as long as no new ones have been held according to this Constitution".*

Thus, the Indonesian state expects an independent judiciary without being influenced by government institutions and powers and there is no legal vacuum, as long as there is no new regulation, the old regulation will remain in force.

Prof. Jimli Asshidiqy delivered a lecture at the University of Mataram on September 27, 2005 arguing that the Constitutional Court had emerged before independence at the time of the drafting of the Constitution at the Indonesian Independence Preparatory Efforts Investigation Agency (BPUPKI) proposed by Moh Yamin but rejected by Soepomo for two reasons, namely the Constitution does not adhere to the Trias Politika system and the number of law scholars in Indonesia is not large and have experience in nailing this.[10]

During the discussion of the first amendment to the 1945 Constitution in 1999, it was still in Article 24 and Article 25 that the concept had not yet arrived. On November 9, 2001, the amendment to the third session of the 1945 Constitution related to judicial power has been ratified into five new articles, namely Article 24 concerning the Supreme Court, Article 24B concerning the Judicial Commission, Article 24C concerning the Constitutional Court and Article 25.[11] The idea of establishing the Constitutional Court Institution is a evelopment of constitutional law in the 20th century. After the third amendment to

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[10] Johansyah, Kedudukan Mahkamah Konstitusi sebagai Lembaga Negara Berdasarkan Undang-Undang Dasar 1945. Vol.17 no.2. 2019. h. 97-98 lihat juga Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Buku VI Kekuasaan Kehakiman* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010). h.16-17.

[11] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Buku VI Kekuasaan Kehakiman* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), h. 36

the 1945 Constitution was ratified, the People's Consultative Assembly (MPR) stipulated that the Supreme Court temporarily carried out the functions of the Constitutional Court pending the establishment of the Constitutional Court as stipulated in Article III of the transitional rules of the 1945 Constitution.

The legislative and executive formed a Constitutional Court Bill. On August 13, 2003, the Legislative and Executive agreed on Law No. 24 of 2003 concerning the Constitutional Court. On October 15, 2003, the case was transferred from the Supreme Court to the Constitutional Court, as one of the branches of judicial power based on the 1945 Constitution.[12]

The Constitutional Court has 4 (four) authorities and 1 (one) obligation as described in Article 24C paragraph (1) of the 1945 Constitution, which are as follows*: First,* Testing the Law on the 1945 Constitution. *Second,* to decide disputes over the authority of State Institutions whose authority is given directly by the 1945 Constitution. *Third,* decide on the dissolution of political parties. and *fourth,* decide disputes about the results of the general election. One obligation of the Constitutional Court is to give a ruling on the opinion of the House of Representatives regarding alleged violations by the president and/or vice president according to the Constitution.[13]

C. The Position of The Constitutional Court in the Sphere of Judicial Power

The meaning of judicial power in the process of reading the 1945 Constitution of the Unitary State of the Republic of Indonesia in 1945 from the ideas and ideas of several factions that represented it, including Gregorius Seto from F-PDKB stated that "The judicial power of the

[12] https://www.mkri.id/index.php?page=web.Berita&id=11766 diakses Selasa, Tanggal 06 Agustus 2024.
[13] Undang-Undang Dasar Republik Indonesia Tahun 1945, Sekertariat Jendral dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2009. h. 41-42.

judicial power, which is independent of the influence of the government power, because originally the position of the judicial power was still influenced by the executive power, must now be upgraded to a body that independent, regardless of the influence of judicial power".[14] Meanwhile, Zoelva from F-PBB is "judicial power is an independent power, independent of the influence of other state bodies".[15] Asnawi Latief from F-PDU said "Judicial power is an independent power, independent of the influence of other state bodies or the government from any party that will influence it...", in the representatives of the Faction agreed that the judicial power must be an independent body that must be independent from the influence of executive power and other institutions. The Constitution of the Republic of Indonesia explains the meaning of judicial power in the Chapter of Judicial Power Article 24 paragraph (1), namely "judicial power is an independent power to hold the judiciary to uphold law and justice".

Indonesia's constitutional system After the Amendment of the Constitution of the Republic of Indonesia in 1945 (UUDNRI of 1945) underwent many changes, including in the judicial power, initially the Supreme Court as the only Judicial Institution that carried the judiciary. The Supreme Court before the Third Amendment was the highest court institution and the governing body under it in the general judicial environment, the religious judicial environment, the military judicial environment, and the state administrative judicial environment. After the 3rd Amendment in 2001, the 1945 Constitution added new judicial powers, namely the Constitutional Court and the Judicial Commission.

The judicial power is a fundamental power, having a function as an independent justice enforcer that is independent and free from the interference of other parties' power. The Supreme Court as the guardian of the rule of law that must not contradict the law, the Constitutional Court as the guardian of the 1945 Constitution and the Judicial

[14] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Buku VI Kekuasaan Kehakiman* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), h.48.
[15] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Buku VI Kekuasaan Kehakiman* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), h.49.

Commission to propose the appointment of a Supreme Court Justice who is professional and has integrity and maintains the dignity and honor of the Supreme Court.[16]

State institutions that fall within the scope of judicial power are regulated in the 1945 Constitution of the Republic of Indonesia in Chapter IX are the Supreme Court, the Constitutional Court and the Judicial Commission. In Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia reads as follows:

"Judicial power is exercised by a Supreme Court and the judiciary under it within the scope of the general judiciary, the religious judicial environment, the military judiciary, the state administrative judiciary and by a Constitutional Court".

The Supreme Court and its judicial bodies as well as the Constitutional Court stated in Article 24 paragraph (2) of the 1945 Constitution as the organizer of judicial power, while the Judicial Commission is an external supervision to maintain the dignity and honor of Judges. This is in line with his opinion that Edi Subiyanto stated that the Judicial Commission does not have judicial power, so this body is referred to as an Extra-Judicial institution.[17] Moh Imam Gusthomi argued that the Judicial Commission is an independent, independent, independent and accountable State Institution, which has the authority to propose the appointment of the Supreme Court Justice to the House of Representatives to obtain approval and be determined by the President. Its position is equal to the Supreme Court and the Constitutional Court.[18] The existence of the Judicial Commission is as a new paradigm in the state institution of the branch of judicial power in the implementation of independence and the principle of c*Hek and Balnce* in judicial power.

The establishment of the Constitutional Court is a form of transplantation of a similar institution in Germany, namely *the*

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[16] Pasal 24B ayat (1) UUD NRI Tahun 1945 menyatakan, "*Komisi Yudisial bersifat mandiri yang berwenang mengusulkan pengangkatan Hakim Agung dan mempunyai wewenang lain dalam rangka menjaga dan menegakkan kehormatan, keluhuran martabat serta perilaku hakim.*

[17] Achmad edi Subiyanto, "Mendesain Kewenangan Kekuasaan kehakiman setelah perubahan UUD 1945" Jurnal Konstitusi,Volume 9, Nomor 4, desember 2012, h. 666.

[18] Moh. Imam Gusthomi, "Kedudukan dan Kewenangan komisi Yudisial dalam UUDNRI Tahun 1945, Jurnal Majelis MPR-RI, Tema Hubungan Antara Lembaga Negara Edisi 05, Desember 2022.h.91-108. https://mail.mpr.go.id/jurnal/507/Jurnal-Majelis-Ed-5-2022:-Hubungan-Antar-Lembaga-Negara diakses pada tanggal 22 Agustus 2024.

Bundesverfassungsgericht which has the authority to adjudicate at the first and last level whose decision is final to test the law against the 1945 Constitution, decide disputes over the authority of state institutions, decide the dissolution of political parties, and decide disputes about the results of general elections.[19] In addition, the Constitutional Court also has the obligation to give a ruling on the opinion of the House of Representatives regarding alleged violations committed by the President and/or Vice President according to the 1945 Constitution (Article 24C paragraphs (1) and (2) of the 1945 Constitution). The Constitutional Court is a judicial institution (*Court)* that is the only holder of judicial power for constitutional jurisdiction. The position of the Constitutional Court is at the same level or equivalent to the Supreme Court as an independent judicial power in the Indonesian constitutional system.[20]

D. Conclusion

The history of the establishment of the Constitutional Court Institution was carried out by the People's Consultative Assembly in the 3rd amendment on September 9, 2001. The House of Representatives and the Government drafted the Constitutional Court Law and jointly approved Law Number 24 of 2003 concerning the Constitutional Court on August 13, 2003, by having 4 (four) authorities and 1 (one) obligation as explained in Article 24C paragraph (1) of the 1945 Constitution, which are as follows*: First,* Testing the Law on the 1945 Constitution. *Second,* to decide disputes over the authority of State Institutions whose authority is given directly by the 1945 Constitution. *Third,* decide on the dissolution of political parties. and *fourth,* decide disputes about the results of the general election. One obligation of the Constitutional Court is to give a ruling on the opinion of the House of Representatives

[19] Danang Wijayanto, dkk, *Meluruskan arah manajemen kekuasaan kehakiman.* (Jakarta Pusat: Sekertarial Jendral Yudisial Republik Indonesia, 2018). h.48-49. Lihat juga di Werner Heun, *The Constitution of Germany A Contextual Analysis*, (Portland: Hart Publishing, 2011). h. 86

[20] Miftakhul Huda, "Ultra Petita dalam pengujian Undang-Undang", Jurnal Konstitusi Volume 4 Nomor 3, September 2007.h.144. Lihat Juga Nanang Sri Darmadi. "Kedudukan Dan Wewenang Mahkamah Konstitusi Dalam System Hukum Ketatanegaraan Indonesia" Jurnal Hukum Volume XXVI nomor 02 Agustus 2011.h.667-690

regarding alleged violations by the president and/or vice president according to the Constitution.

The Supreme Court and its judicial bodies as well as the Constitutional Court stated in Article 24 paragraph (2) of the 1945 Constitution as the organizer of judicial power, while the Judicial Commission is an external supervision to maintain the dignity and honor of Judges. The position of the Constitutional Court within the scope of Judicial Power is parallel to the Supreme Court and the Judicial Commission, according to the 1945 Constitution of the Republic of Indonesia.

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