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JUDICIAL POWER AS A MATERIAL CONTENT OF THE 1945 CONSTITUTION IN THE PERSPECTIVE OF ITS DEVELOPMENT AND OBJECTIVES

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Abstract: The power of the judiciary as one of the content materials in the written constitution of a legal state is inseparable from the conception of the trias politica. It is intended to ensure the independence of judges in shaping the law through their rulings as well as to prevent abuse of power. In this case, it is important to prove that the intention is in accordance with the substance of the judicial power in the content of the 1945 Constitution. On this basis, this study is limited to two subjects, namely about the extent to which the background of judicial power is the content material in the 1945 Constitution and the position of judicial power as content material in the 1945 Constitution. Both of these things will be analyzed normatively using a statutory approach and a historical approach. The final results of this study show that despite the change of government regime, the form of the state until the amendment of the 1945 Constitution, judicial power remained an important and fundamental content in the 1945 Constitution. One of the processes of legal formation can occur in the judiciary through judges' decisions, therefore the substance of the changes in the 1945 Constitution aims to strengthen the independence of judicial power as well as strengthen the principle of separation of powers mainly in the judicial power section as a form of checks and balances.

Keywords: Judicial Power; Content Materials; 1945 Constitution.

1. Introduction

Almost all countries in the world have constitutions as life guidelines in carrying out each of their constitutional lives. So important is the constitution as the ideology of a country, then it should be the whole agreement and noble values that are born and developed in every walk of life, so that the constitution is able to reflect the entire life of the country. According to Cheiryl Saunders the constitution is not only interpreted as a social contract, but more than that, the constitution is a radiance of the history, views, and soul of a nation.

> "*A constitution is more than a social contrac, it is rather an expression of the general will of a nation. It is areflection of its history, fears, concerns, aspirations, and indeed, the soul of the nation*"[1]

[1] Bagir Manan and Susi Dwi Harjanti, *Memahami Konstitusi: Makna Dan Aktualisasi* (Jakarta: Raja Grafindo Persada, 2015). Pg. iv.

"The Constitution is the result of the agreement (consensus) of the nation in order to realize the goals of the state, oleh therefore the result of the collective agreement must be understood by the people."[2] In Indonesia, the 1945 Law of the Republic of Indonesia (UUD 1945) was established as the basic norm underlying state life which in its development "has undergone four amendments that took place in the middle of 1999 to 2002, which certainly affected the legal and political landscape in Indonesia."[3] Theoretically, the 1945 Constitution is often consecrated as a form of agreement between the entire Indonesian people. Consequently, the 1945 Constitution became "the highest law in the national legal system."[4]

One of the provisions that are regulated after the establishment and ratification of the 1945 Constitution as a written constitution and become the highest law in Indonesia is about judicial power. "The judicial power in the 1945 NRI Constitution before the amendment was only regulated in two articles and only placed the Supreme Court (MA) as the only institution that exercised judicial power in Indonesia."[5] This shows that the drafters of the 1945 NRI Constitution have recognized the importance of judicial power being regulated in formal constitutional documents. Although initially the implementation of judicial power was only carried out by one institution, this can be understood by the argument that the newly independent Indonesia has not been able to accommodate all issues related to judicial power.

"Judicial power is one of the branches of state power that has an important role in the conception of *the theory of trias politica* initiated by Montesquieu."[6] It is based that judicial power is a branch of state power whose duties and functions are to carry out legal principles through judicial decisions that reflect the principles of certainty, justice and expediency. Therefore, judicial power must be independent from all forms of influence of other branches of power.

The exercise of judicial power is generally exercised by judicial bodies, both general judicial bodies and constitutional judicial bodies. However, the judicial power is specifically exercised by one subject of law, namely a judge. Judges are judicial officials who are authorized by the state to adjudicate. Therefore, a judge can be called the heart of judicial power with all the responsibilities he carries.

When performing tasks and their functions, "The central role of judges in the administration of the state in establishing and developing laws is embodied in various forms of very extensive interpretation, although the various existing laws and regulations, are valid according to the law."[7] Referring to the role of judges who can interpret a law, both the constitution (a supreme legislation) to the legislation

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[2] Ahmad Fadlil Sumadi, *Politik Hukum Konstitusi Dan Mahkamah Kosntitusi* (Malang: Setara Press, 2013). Pg. 3

[3] Sulardi and Hilaire Tegnan, "Analysis of the Indonesian Presidential System Based on the 1945 Constitution of the Republic of Indonesia," *Journal of Legal, Ethical and Regulatory Issues* 21, no. 3 (2018): 2018.

[4] Janedri M. Gaffar, *Demokrasi Konstitusional: Praktik Ketatanegraaan Indonesia Setelah Perubahan UUD 1945* (Jakarta: Konstitusi Press, 2012). Pg. 89

[5] Lihat Pasal 24 dan Pasal 25 UUD 1945 Sebelum Perubahan

[6] Ruhenda Ruhenda et al., "Tinjauan Trias Politika Terhadap Terbentuknya Sistem Politik Dan Pemerintahan Di Indonesia," *Journal of Governance and Social Policy* 1, no. 2 (2020): 58–69.

[7] Susi Dwi Harijanti, "Pengisian Jabatan Hakim: Kebutuhan Reformasi Dan Pengekangan Diri," *Jurnal Hukum IUS QUIA IUSTUM* 21, no. 4 (2014). Pg. 536-537

under the constitution, it is on this basis that the judicial power must be regulated and stated in the content of the 1945 NRI Constitution, in addition to of course to maintain the independence of judicial power in the conception of *trias politica*.

In addition to these two things, the initial construction of arguments that can explain the purpose and purpose of the imposition of judicial power in the content of the 1945 NRI Constitution according to the author is to prevent the abuse of power by the executive granted from the sovereignty of the people. As a country that adheres to the understanding of constitutional democracy, the handover of people's sovereignty to the legitimate government through the *election* process proves that all Indonesians hand over the regulation of Indonesian constitutional life to one branch of power, namely the executive as the only policy maker.

The position of the executive as a branch of state power is absolutely stipulated in the constitution in order to provide guidelines and constitutional limits on what things the executive should do. And to prevent abuse of power by the executive or to assess the presence or absence of executive abuse must be done by another branch of power that is independent in nature. Therefore, the other branch of power (judicial power) must also be regulated in the constitution in order to create an equal position in the constitution.

The three hypotheses outlined by the author seem to need to be comprehensively examined in the next discussion. In this paper, it not only proves the truth of these three hypotheses, but also confirms the position of judicial power as a material content that must exist in the 1945 Constitution, even though the 1945 Constitution is changed repeatedly. For this reason, the problems raised in this study are: First, To what extent is the background of judicial power the content of the 1945 Constitution? Secondly, What is the position of judicial power as a content material in the 1945 Constitution?

2. Method

The author will analyze both formulations of the problem normatively. Therefore, this research is categorized as normative research. "This type of normative research is also known as doctrinal legal research because it is often conceived as what is written in legislation."[8] Normative legal research is legal research carried out by examining library materials or secondary data. In analyzing the problems raised by the author, in addition to explaining the meaning contained in the 1945 Constitution, especially regarding judicial power, the author also uses a statutory approach and a historical approach in formulating the results of this study.

3. Discussion

3.1. A Brief Portrait of Judicial Power in Indonesia

The historical sequence of judicial power in the Indonesian constitutional system can be divided into several phases, namely judicial power during the Dutch and Japanese colonial periods, judicial power after the independence of the Republic

[8] Joanedi Effendi and Johny Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris* (Jakarta: Prenada Media, 2018). Pg. 124

of Indonesia or before the amendment of the NRI Constitution in 1945, and the last is the judicial power phase after the amendment of the 1945 NRI Constitution.

During the Dutch East Indies era, three forms of justice were known, namely the gubernatorial court (*gouvernements rechtspraak*), the bumiputera court, and the swapraja court. Criminal justice is listed in "Article 130 of the *Indische Staatsregeling* (IS); bumiputera courts are listed in Ordinance S. 1932-80; and the swapraja judiciary is provided for in the Swapraja Regulations of 1938. According[9] to Soepomo, there were five legal orders at that time, namely:

1. "Gubernemen judicial order, which covers the entire area of the Dutch East Indies;
2. In the parts of the Dutch East Indies where the people were allowed to administer their own judiciary, in addition to the gubernatorial judges there were also native judges who tried according to the indigenous judicial order;
3. Within most swapraja areas in addition to the gubernemen judicial order there is also the swapraja judicial order itself (*zelfbestuursrechspraak*);
4. There is a religious judiciary. Religious courts existed both in parts of the Dutch East Indies where there were solely gubernatorial courts and in areas where religious courts were part of the indigenous judiciary or within swapraja areas as part of the swapraja judiciary;
5. There is a village judiciary within the village community."[10]

The power to adjudicate various kinds of courts is not limited by region, but each judicial group has its own environment of power according to the case and the environment of power according to the person. Departing from this, there was no uniformity of legal regulations and justice systems during the reign of the Dutch East Indies, judicial bodies were also discriminatory because of the distinction between indigenous and non-indigenous.

In its development, the Japanese colonization in the next phase abolished judicial dualism and unified the various types of justice that existed during the Dutch colonial period so that the judicial mechanism at that time could apply to all classes of the Indonesian population. During the Japanese colonial period, there were three levels of courts, namely "*Tihoo hooin* (court of first instance), *Koota hooin* (Court of Appeals), dan *Saikoo hooin* (Supreme Court)."[11]

One of the pillars of an independent Indonesian state conveyed concerns "One judicial body for the whole population and free from the influence of governing bodies."[12] After a long process of discussion and formulation article by article in the 1945 Constitution, finally the judicial power is regulated in Chapter IX of the 1945 Constitution, which consists of Article 24 and Article 25. The formulation of article 24 and Article 25 of the 1945 Constitution was then clarified again in the

[9]Drafting Team, *Comprehensive Manuscript of amendments to the 1945 Constitution*, *Book VI*, *Judicial Power* (Jakarta: Secretariat General and Clerkship of the Constitutional Court, 2010). Pg. 9

[10] Ibid.

[11] King Faisal Sulaiman, *Politik Hukum Kekuasaan Kehakiman Di Indonesia* (Yogyakarta: UII Press, 2017). Pg. 39 Lihat juga Tim Penyusun, *Naskah Komprehensif Perubahan UUDNRI Tahun 1945, Buku VI, Kekuasaan Kehakiman*. *Op.cit.*, Pg. 12

[12] Tim Penyusun, *Naskah Komprehensif Perubahan UUDNRI Tahun 1945, Buku VI, Kekuasaan Kehakiman*. *Op.cit.*, Pg. 16

Explanation section of the 1945 Constitution “Judicial power is an independent power, meaning independent of the influence of government power". According to Sri Soemantri, the phrase 'detached from government power' means "regardless of the power that exists or arises from the government that contributes to shaping the disposition, belief or deed of judicial power.”[13]

After the ratification of the 1945 Constitution, Indonesia had an absolute judicial system and was not bound to judicial bodies left over from the colonial era after the promulgation of Law No. 7 of 1947 which was later amended by Law No. 19 of 1948 concerning the composition of the power of the Supreme Court. However, the change of Indonesia's written constitution from the 1945 Constitution to the Constitution of the United States of Indonesia (RIS) resulted in a change in the position of the Supreme Court.

The discussion of the authority of the judicial body is specifically regulated in Part III, starting from articles 144-163. There is one article in the RIS Constitution that is interesting in terms of the independence of judicial power. Article 145 subsection (1) states: "any interference, however, by equipment which is not a judicial fixture, is prohibited, unless permitted by law. It implies that despite the change in the form of the state into a union state, the issue of guaranteeing the power of an independent judiciary remains one of the important content materials in the constitution so that its substance is still maintained.

The next period was the enactment of the Provisional Constitution of 1950 (1950 Constitution). In this phase, an addition is made to the authority of the Supreme Court. The addition of the authority of the Supreme Court in this period still maintains the guarantee of independent judicial power. This can be seen in the mandate of Article 103 which states: “Any interference in court affairs by equipment that is not a court fixture, is prohibited, except where permitted by law”. The formulation of article 103 shows that no matter how in the basic conditions of the state which is only temporary and adheres to the parliamentary cabinet system, guarantees against the judicial body are still maintained by the drafters of the constitution. there is no visible form of institutional egocentricity shown by Parliament to intervene against judicial bodies and processes.

The birth of the Presidential Decree on July 5, 1959, one of which stated the re-enactment of the 145th Constitution, then became a new period for judicial power in Indonesia. In this period there was a renewal in judicial power, including the birth of Law Number 19 of 1964 which was later amended again by Law No. 14 of 1970 and finally changed to Law No. 35 of 1999 concerning the Basic Provisions of Judicial Power.

The birth of these three laws on the subject of judicial power also gave birth to new judicial authorities and bodies, namely the birth of the State Administrative Court, the Religious Court becoming one of the judicial environments under the Supreme Court, as well as the addition of the authority of the Supreme Court to test the laws and regulations under it. However, in this period the principle of independent judicial power was disturbed by the birth of Law Number 19 of 1964 and Law Number 13 of 1965. These two bills give the President room to intervene in the courts. In fact, the proceedings can be halted when the President intervenes.

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[13] Sri Soemantri, *Hukum Tata Negara Indonesia Pemikiran Dan Pandangan* (Bandung: Remaja Rosdakarya, 2014). Pg. 254

"Executive intervention to the judiciary was inversely proportional to what was embraced in the constitution at the time, where in the 1945 Constitution guaranteed space for independence from the judiciary."[14]

The 'dark' period of guaranteeing independent judicial power then ended with the repeal of Law Number 19 of 1964 and Law Number 13 of 1965. In the spirit of restoring the guarantee of independent judicial power, the government at that time then gave birth to Law Number 14 of 1970 concerning the Basic Provisions of Judicial Power, Law Number 14 of 1985 concerning the Supreme Court, until the last Law Number 35 of 1999 concerning Amendments to Law Number 14 of 1985 concerning the Supreme Court.

As is known that the Amendment to the 1945 Constitution occurred in several phases, namely:

> "The first amendment occurred in the 1999 MPR General Assembly on October 14-21, 1999, the second change occurred in the 2000 MPR Annual Session on August 7-18, 2000, the third change occurred in the 2001 MPR Annual Session on November 1-9, 2001, and the fourth change occurred in the 2002 MPR Annual Session on August 1-11, 2002."[15]

The period of change to the Constitution does not make the changes that occur as one separate part from one another. However, these changes are a series of changes that are a single entity.

After going through a long process of discussion to the determination at the plenary session that occurred in the change I to the change to IV, finally the final formulation of the content material on judicial power was born. Furthermore, the final formulation can be described in the table below:

Table 1. Changes to the Material Formulation of Content About Judicial Power

Before Changes	After Changes
CHAPTER IX JUDICIAL POWER	CHAPTER IX JUDICIAL POWER
Article 24 1. Judicial power is exercised by an MA and other statutory judicial bodies. (1) The composition and powers of the judicial bodies are regulated by law	Pasal 24 1. Judicial power is an independent power to administer the judiciary to uphold law and justice. 2. Judicial power is exercised by a Supreme Court and the judicial bodies subordinate to it in the general judicial environment, the religious judicial environment, the military judicial environment, the administrative court environment, and by a Constitutional Court. (1) Other bodies whose functions relate to judicial power are provided for in the legislation

[14] See Article 19 of Law 19/1964 and Article 23 of Law 13/1965

[15] Majelis Permusyawaratan Rakyat Republik Indonesia, *Bahan Tayang Materi Sosialisasi Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Jakarta: Sekretariat Jenderal MPR RI, 2006). Pg. 1

Article 25 The conditions for becoming and for being dismissed as a judge are determined by law.	Article 25 The conditions for becoming and for being dismissed as a judge are determined by law.

Source: Minutes of Amendment to the Constitution of the Republic of Indonesia 1945 1999-2002 Session Year 2000 Book One

Referring to the final formulation of the Chapter on judicial power, there is a new state institution as the exercise of judicial power, namely the Constitutional Court. there are at least three thoughts that put the position of the Constitutional Court, namely: "The Constitutional Court is part of the MPR, the Constitutional Court is attached or part of the Supreme Court, as well as its position independently as an independent state institution."[16] The establishment of this institution, is one of the tangible manifestations of the need for balance and control among state institutions.

In addition to the Constitutional Court, another institution born under the amendments to the 1945 Constitution is the Judicial Commission (KY). Judicial Commission as "state institutions were reformed and authorized by the 1945 Constitution to uphold and uphold the honor, nobility of dignity and conduct of judges."[17] However, it is only a state institution outside the exercise of judicial power that has functions and duties closely related to the body that specifically exercises judicial power. The original intention of the establishment of KY was to maintain and uphold the honor of dignity and any deviant behavior of judges. This was carried out from the beginning of the proposal for the appointment of the chief justice to supervise all indications of deviant actions from the judge. This is intended so that each judge can implement a form of independence and independence of judicial power in examining, deciding, and adjudicating every case he handles. Without doubting the independence of each judge, it is not uncommon for this form of judicial power independence to become a shield for judges until deviant behavior appears. The implementation of judicial. i. e. one of the defining ones is "Components of substance (material) that are used as starting points or signs of operational in carrying out their own judicial practice."[18]

Therefore, KY positions itself as an institution that can create a mechanism of *checks and balances* within the judicial power itself. This mechanism becomes important because "supervisory functions cannot be performed if they do not form another organ separate from the organ under which it is supervised."[19]

In sequence, the portrait of the development of judicial power in Indonesia is something important in state life. This can be seen from the colonial period to the era after the reform of the presence "Judicial power becomes a vital element in realizing the principle of *checks and balances* within the framework of a democratic

[16] Sulaiman, *Politik Hukum Kekuasaan Kehakiman Di Indonesia*. *Op.cit*. Pg. 199

[17] Omar Rolihlahla Hakeem, "Sistem Pengawasan Hakim Konstitusi Ditinjau Dari Kekuasaan Kehakiman Menurut Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *LEX ADMINISTRATUM* 9, no. 2 (2021).

[18] Fence M Wantu, J. Puluhulawa, A. H. Bajrektarevic, M. Towadi, & V. Swarianata. "Renewal of the Criminal Justice System Through the Constante Justitie Principle That Guarantees Justitiabelen's Satisfaction," *Jurnal IUS Kajian Hukum Dan Keadilan* 10, no. 3 (2022).

[19] Widodo Ekatjahjana, "Eksistensi Dan Peran Komisi Yudisial Dalam Praktik Ketatanegaraan Indonesia," in *Optimalisasi Wewenang Komisi Yudisial Dalam Mewujudkan Hakim Berintegritas*, ed. Komisi Yudisial (Jakarta: Sekretariat Komisi Yudisial Republik Indonesia, 2016). Pg. 232

legal state."[20] The thing that must be considered is that the judicial power has turned out to be the subject matter in the Indonesian constitution in several government regimes until the change in the form of the state. The judicial power as a content material in the constitution is then supported by the principle of independence for every judge in carrying out his duties and functions as an important 'actor' in exercising judicial power in Indonesia.

3.2. Judicial Power as Material Content of the Constitution of the Republic of Indonesia of 1945

With regard to the content of the Constitution in the framework of laws and regulations, literally Law Number 12 of 2011 as amended through Law Number 15 of 2019 concerning the Establishment of Laws and Regulations, Article 1 number 13 states "Content Material of Laws and Regulations is material contained in laws and regulations in accordance with the type, function, and hierarchy of laws and regulations." Implicitly it illustrates that a law that is born must be in accordance with what material is made for the purpose of enactment and the type of legislation.

Existence as the highest legislation, "The 1945 NRI Constitution never mentions a problem must be regulated by law while other issues are sufficiently regulated by other laws and regulations."[21] In addition, the 1945 Constitution does not stipulate what matters should be the subject matter of a statute, including what should be contained in the 1945 Constitution itself.

In particular Hamid S. Atamimi argues that

> "The content of Indonesian law is an important thing to study, because the formation of a country's laws depends on the ideals of the state and the state theory it adheres to, on sovereignty and division of power within its country, on the state government system it organizes."[22]

The establishment of a law in Indonesia which is carried out through collaboration between the President (executive) and the House of Representatives (DPR) always considers the specificity of the legislation. Maria Afrida Indrati put forward 3 guidelines that can be used to find a charge material. The three guidelines are:

1. "From the provisions in the torso of the 1945 Constitution;
2. Based on the insight of the state based on the law (*rechtsstaat*);
3. Based on the insights of government based on the constitution."[23]

Referring to the subject matter, if studied in depth, it can be found that the judicial power as a material content of the 1945 Constitution meets these three tracking guidelines. This can be seen from Article 24 to Article 25 of the 1945 Constitution which contains material on judicial power. Meanwhile, article 1 paragraph (3) of the 1945 Constitution absolutely confirms that "The State of Indonesia is a country of law". Furthermore, all forms of governmental actions are

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[20] Sunarto Sunarto, "Prinsip Checks and Balances Dalam Sistem Ketatanegaraan Indonesia," *Masalah-Masalah Hukum* 45, no. 2 (2016): 157–63.

[21] Maria Farida Indrati Soeprapto, *Ilmu Perundang-Undangan 1: Jenis, Fungsi, Dan Materi Muatan* (Yogyakarta: Kanisius, 2007). Pg. 235

[22] *Ibid*

[23] *Ibid*. Pg. 237

limited and bound by the 1945 Constitution as the basic constitution of the Indonesian state. Therefore, it is important to have arrangements about judicial power in the constitution so that both power and government and judicial power are bound by state law.

If 'the *basis of the national legal order'* then the provisions in the Constitution will be "sources of reference for the establishment of state laws and regulations whose position is lower than that of the Constitution."[24] Departing from this, according to Sri Soemantri who quoted the opinion of J.G Steenbeek, in general, the Constitution or constitution contains three main things, namely: "First, there is a guarantee of human rights and citizens; Second, the establishment of a fundamental constitutional structure of a country; Third, there is a division and limitation of constitutional duties which is also fundamental."[25] Not dissenting from this opinion, Hans Kelsen stated that the content of the constitution consists of:

1. *"The Preumble;*
2. *Determination of the contents of future statutes*; In this case, the Constitution, in addition to containing the determination of state bodies whose procedures for determining laws, also contains matters related to the content of the Constitution that will be formed next. The next form of change also includes material on judicial power that can develop if there is a need or legal vacuum needed by the judiciary;
3. *Determination of the administrative and judicial function*; In the Constitution, the duties of administrative and judicial bodies are also established. Therefore, the Constitution can be spelled out directly by administrative decisions and through the decisions of judicial bodies. The existence of this task can be seen in the formulation of the chapter on judicial power in the 1945 NRI Constitution, where it explains the duties of each judicial body (MA and MK) to the duties of other bodies that have a close relationship with judicial power;
4. *The constitutional law;*
5. *Constitutional prohibitions*; The constitution contains a ban on state fittings. This means that the actions of any state fittings must be based on established laws, since in this case the Constitution has established the duties of state fittings. Departing from this, the position of the judicial body becomes important to annul any act of state fittings that commit legal deviations from the constitution. Therefore, the judicial power is absolutely provided for in the constitution so that all acts of the judicial body have constitutional power in any judgment that annulles such irregularities;
6. *Bill of rights;*
7. *Guatantee of the constitutions*; The Constitution contains things that can be used as a testing stone for the material of the laws and regulations under it. Judges in carrying out their duties to examine, adjudicate, and decide a case will certainly be based on existing laws and regulations and guided by the

[24] Rosjidi Ranggawidjaja, *Wewenang Menafsirkan Undang-Undang Dasar* (Bandung: Cita Bhakti Akademika, 1996). Pg. 8

[25] Sri Soemantri, *Prosedur Dan Sistem Perubahan Konstitusi* (Bandung: Alumni, 2006). Pg. 60

hierarchy of legislation. This is intended so that the laws and regulations do not conflict with each other."[26]

Based on the description above, the existence of judicial power is absolutely regulated in the constitution of the 1945 Constitution. The existence of the constitution as the highest document and guideline in the state, the constitution is also a tool that can shape the legal system and formulate the purpose of the law. The process of forming the law certainly requires an independent judicial body and free from all interference from other parties. This further confirms the view that the presence of a state of law will not be realized plenary without the existence of judicial power provided for in the constitution.

3.3. Maintaining the Independence of Judicial Power as a Form of *Checks and Balances* in the 1945 Constitution of the Republic of Indonesia

The existence of judicial power is inseparable from the classical theory of the separation of powers, in which state power is exercised by three different organs, namely the legislative, executive, and judicial. The purpose of holding this separation of powers is to "prevent lest the power of the government (executive) be exercised arbitrarily and not respect the rights governed."[27] In practice, the three powers must be exercised and held by different institutions or not mixed between one power and another. Therefore, it is very important to guarantee the independence of judicial power so that there are no deviations between branches of state power.

The independence of the judicial body is necessary solely because of its function in administering the judiciary to uphold law and justice. Independence is interpreted as "a circumstance when a person should not be controlled or influenced by another party (especially by the litigants). Whether it is influence or interference (intervention) it is political (power) or money (economy)."[28] Therefore, Independence serves as "protection against the possibility of intervention or influence from interested parties so that the judiciary can exercise its power properly and correctly."[29]

Independence or independence has become an inherent thing and even one of the properties of judicial power, as mentioned by Bagir Manan about judicial power, that: "First, judicial power is a body that is independent from the interference of other powers. Second, the relationship of judicial power to other tools of the state, reflects more on the principle of separation of powers, than the division of powers."[30] Indeed, at the beginning of its establishment, Indonesia did not adhere to the principle of separation of powers. After the constitutional reform in 1999-2002, this principle began to become a guideline for the implementation of the power of

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[26] Hans Kelsen, *General Theory of Law and State*, dalam Ranggawidjaja, *Wewenang Menafsirkan Undang-Undang Dasar*. Pg. 12-19

[27] Soemantri, *Prosedur Dan Sistem Perubahan Konstitusi*. *Op.cit*., Pg. 239

[28] Farid Wajdi, "Independensi Dan Akuntabilitas Peradilan," in *Meluruskan Arah Manajemen Kekuasaan Kehakiman*, ed. Komisi Yudisial (Jakarta: Sekretariat Komisi Yudisial Republik Indonesia, 2018). Pg. 80

[29] Suparman Marzuki, *Kewenangan Komisi Yudisial Dalam Konteks Politik Hukum Kekuasaan Kehakiman Dalam Hitam Putih Pengadilan Khusus* (Jakarta: Komisi Yudisial, 2013). Pg. 101

[30] Bagir Manan, *Menegakkan Hukum Suatu Pencarian* (Jakarta: Asosiasi Advokat Indonesia, 2009). Pg. 82

state institutions in Indonesia. The existence of changes to the 1945 Constitution (including the material content of judicial power in the constitution) at intervals of 1999-2002 had implications for the application of the principle of separation of powers accompanied by the principle of *checks and balances*. Therefore, the guarantee of independence of judicial power in the 1945 Constitution (especially after the amendment) which is carried out within the framework of the separation of powers between the legislature, executive, and judiciary is carried out as a form of *checks and balances* between the holders of the country's branch of power.

It can be described that during the discussion of the amendment to the 1945 Constitution there was a link point about the implementing body and other bodies that directly concerned with judicial power (MA, MK, and KY). The link point is about the position of MA, MK and KY which includes institutional authority, institutional nature, recruitment and composition of members of each institution. These three things received special attention during the discussion of changes to the 1945 Constitution on judicial power. The discussion of judicial powers that supervise and compensate each other in the amendment of the 1945 Constitution is intended so that the regulation of judicial power in the Constitution is more comprehensive than before the implementation of changes to the 1945 Constitution.

Regarding institutional authority, one of the things that was intensely discussed was about *judicial review* conducted by the judiciary. *Judicial review* may include material and formal examinations of statutory legal products (laws and regulations under the law). One of the opinions stating the authority of judicial review by the judiciary is the implementation of the principle of *checks and balances* presented by Hamdan Zoelva.

> "the composition and position of the Supreme Court is expressly provided for in the Constitution including the authority granted to it regarding the right of material and formal examination of the legal products of the law and below. This regulation of authority is considered indispensable to foster *checks and balances* between various state higher institutions."[31]

After a fairly long discussion, it was finally formulated "The Supreme Court has the authority to test laws and regulations under the law against laws."[32] Meanwhile, the Constitutional Court has the authority to "test the law against the constitution whose decision is final and binding."[33] Meanwhile, the institutional nature in question is an autonomous judicial institution without any intervention from other parties/institutions. The autonomy of the judiciary, for example, "can be seen from the process of selecting the leaders of the judicial bodies (MA and MK) which are chosen respectively by the judges of the Supreme Court and the Constitutional Court."[34] In addition to MA and MK, the institutional nature of KY is also independent. As for the recruitment process and the composition of the members of

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[31] Sekretariat Jenderal MPR RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 1999-2002 Tahun Sidang 2000 Buku Satu* (Jakarta: Sekretariat Jenderal MPR RI, 2008). Pg. 103

[32] Pasal 24A ayat (1) UUD NRI 1945

[33] Pasal 24C ayat (1) UUD NRI 1945

[34] Pasal 24A ayat (4): "Ketua dan Wakil Ketua Mahkamah Agung dipilih dari dan oleh hakim agung". Pasal 24C ayat (4): "Ketua dan Wakil Ketua Mahkamah Konstitusi dipilih dari dan oleh hakim konstitusi"

each judicial body and the body that concerns judicial power (KY), it is also based on the spirit of *checks and balances*. This can be seen from the following opinions: First, regarding the recruitment process and the composition of supreme court justice candidates, I Ketut Astawa from the F-TNI/Polri statedthat "Regarding Article 24B in the context of the appointment of Chief Justices, the concept of Article 24B is appointed and dismissed by the Tribunal if we suggest that we consider that the one who submitted the proposal is KY then the approval of the House who appoints or dismisses is the President."[35] After going through a long process of debate between each member of the drafting team to discuss changes to the Constitution, finally the substance of the opinion became the formulation of article 24A paragraph (3).

The participation of KY in the recruitment process for supreme court justice candidates is intended in the context of competence, in the context of professionalism, and in order to be independent of the influence of political interests. In addition, the authority of the DPR and the President is exercised on the basis of how the power of the Judiciary still adheres to the principle of *checks and balances* in other branches of state power, with the executive and legislative.

Second, regarding the recruitment process and composition of candidates for constitutional judges, Member of PAH I BP MPR 2001, Harjono from F-PDI Perjuangan stated that

> "Therefore, the number must be odd, not even, put nine. Nine we just divide the House three, the Supreme Court three, the President three. We don't have to talk about whose proposal it is, it's up to the House to want to find out where it came from, please. He opened *up* how, *President, Supreme* Court, we leave exclusively him who has".[36]

The formulation of the substance of the opinion then became an agreed upon matter and became the formulation of Article 24C paragraph (3) of the 1945 NRI Constitution. It is intended that the Constitutional Court judges represent all the aspirations of the holders of state power, namely the DPR, the President, and from the Supreme Court.

The involvement of the DPR and the President is a tangible form of people's representation in the process of placing judges in the implementing body of judicial power. The representation in question is because the DPR and the President are directly elected by the people. Meanwhile, the role of the Supreme Court is intended as a form of juridical majority consideration, because the process in the Constitutional Court focuses more on every juridical consideration.

Third, regarding the recruitment process and composition of KY members, I Dewa Gede Palguna expressed his views as follows:

> "In electing members of this KY there should be a mirroring of *checks and balances*, therefore, we would like to propose that there are two candidates proposed by the one appointed by the President drawn from active lawyers proposed by the profession of lawyers. Then the second is two people from among the active prosecutors, which may be proposed by the association of

[35] Sekretariat Jenderal MPR RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 1999-2002 Tahun Sidang 2000 Buku Satu*. *Op.cit.*, Pg. 317

[36] Sekretariat Jenderal MPR RI., Pg. 538

prosecutors so. Ketiga, I see from academics or for example professors in the field of law proposed by the Association of Legal Sciences. And the fourth is the one proposed by the House of Representatives itself."[37]

Broadly speaking, the substance of the opinion is reflected in article 24B paragraph (2). Just as the recruitment process for supreme court justice candidates avoids all forms of political elements that can interfere with the independence of the Supreme Court, at the beginning of the recruitment of KY members (whose job it is to propose candidates for supreme court justices) has also been formulated so that there is no strong political element in the process. Therefore, academics and legal practitioners have equal space to occupy KY membership positions.

Referring to the relationship between the process of discussion and changes to the 1945 NRI Constitution, the substance of the change reflects the strengthening of the principle of separation of powers mainly in the judicial power section which is intended as a form of *checks and balances* between the three branches of state power. In addition, the discussion of changes to the Judicial Power in the 1945 Constitution was also based on the spirit of guaranteeing the independence of the judicial institution. The existence of a constitutional mandate that regulates the composition, position, membership, and procedural law of the judicial bodies (MA and MK) and bodies related to judicial power (KY) is further regulated in the Law that has previously been discussed and reviewed by the DPR and passed by the President does not mean the intervention of the legislature and the executive, but is intended as a process in creating an order of *checks and balances*. in a democratic legal state.

4. Conclusion

The position of judicial power as a content material in the 1945 NRI Constitution is one of the fundamental and important things in realizing the principle of the state of law. This is reflected in the discussion of judicial power in the content of the constitution of the 1945 Constitution in several government regimes until the change in the form of the state. In fact, discussions about the form and exercise of judicial power have existed since the colonial period, although the process and mechanism are different from what was then regulated after Indonesian independence.

The Constitution as the highest document and guideline in the state, aims at forming a system and formulating legal objectives. The process of forming such laws requires an independent judicial body and free from interference from other parties whose position must be regulated in the constitution. In particular, the substance of the changes in the 1945 Constitution aims to affirm the independence of judicial power as well as strengthen the principle of separation of powers primarily in the judicial power section as a form of *checks and balances*.

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[37] Sekretariat Jenderal MPR RI., Pg. 325

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