

Reformulation of Supervision of The Constitutional Court in Carrying Out Its Functions as Judicial Power

Nurus Zaman

Faculty of Law, Trunojoyo University of Madura
zamany_02@yahoo.co.id

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Abstract

In this research, two issues will be discussed. First, the institutional position of the Constitutional Court and the Supreme Court, which are both regulated in the 1945 Constitution. Second, is it conceptually justified for the Constitutional Court to refuse external supervision like the Supreme Court. This research uses doctrinal normative legal research in collaboration with reform-oriented research methods. The results obtained in this research are as follows. First, the Constitutional Court and the Supreme Court institutionally have the same level; both have the same judicial authority to uphold law and justice. The Constitutional Court and the Supreme Court have the same basis for constitutionality, which is regulated in Article 24, paragraph (1) and paragraph (2) of the 1945 Constitution. The difference between the Constitutional Court and the Supreme Court lies in the scope of their powers. Second, the 1945 Constitution does not regulate the supervision of the Constitutional Court. However, the Constitutional Court and the Supreme Court are both regulated in the 1945 Constitution and have the same orientation, that is, to law and justice enforcement, so conceptually, there is no reason for the Constitutional Court to refuse external supervision like the Supreme Court.

Keywords: Reformulation; Supervision; Constitutional Court; Judicial Power.

Abstrak

Dalam penelitian ini ada dua permasalahan yang akan dibahas, yaitu: *Pertama*, bagaimana kedudukan Mahkamah Konstitusi dan Mahkamah Agung secara institusional yang sama-sama diatur dalam UUD 1945. *Kedua*, apakah dibenarkan secara konseptual Mahkamah Konstitusi menolak dilakukan pengawasan secara eksternal sebagaimana Mahkamah Agung. Penelitian ini menggunakan penelitian hukum normatif doktrinal yang dikolaborasikan dengan metode *reform oriented research*. Hasil yang di dapat dalam penelitian ini adalah. *Pertama*, Mahkamah Konstitusi dan Mahkamah Agung secara institusional memiliki derajat yang sama, keduanya sama-sama sebagai kekuasaan kehakiman guna menegakkan hukum dan keadilan. Antara Mahkamah Konstitusi dan Mahkamah Agung memiliki dasar konstitusionalitas yang sama yaitu diatur dalam Pasal 24 ayat (1) dan ayat (2) UUD 1945. Perbedaan antara Mahkamah Konstitusi dan Mahkamah Agung terletak pada

ruang lingkup kekuasaan yang dimiliki. *Kedua*, UUD 1945 tidak mengatur terkait pengawasan bagi Mahkamah Konstitusi. Namun demikian, Mahkamah Konstitusi dan Mahkamah Agung yang sama-sama diatur dalam UUD 1945 dan memiliki orientasi yang sama yaitu guna menegakan hukum dan keadilan, maka secara konseptual tidak ada alasan bagi Mahkamah Konstitusi menolak dilakukan pengawasan secara eksternal sebagaimana Mahkamah Agung.

Kata kunci: *Reformulasi; Pengawasan; Mahkamah Konstitusi; Kekuasaan Kehakiman.*

Introduction

Judicial power as an instrument in the context of providing legal protection for every citizen. The exercise of judicial power is handed over to the judicial bodies and stipulated by law.¹ The legal politics of judicial power emphasizes that judicial power is an independent judicial power to uphold law and justice. The legal politics of judicial power must be able to provide answers to various problems faced by society for the sake of law enforcement and justice. The court institution is not only friendly to the community but also fair, transparent and accountable so that it automatically increases public trust in the court institution.² The court institution is not only friendly to the community but also fair, transparent and accountable so that it automatically increases public trust in the court institution. This requires that the judicial power must not only exist and be consistent at the present time, but the legal politics of the judicial power must also exist and be consistent in accordance with its existence and function in the future.

Initially, judicial power was exercised by the Supreme Court (abbreviated as the Supreme Court), in its development it underwent changes according to the situation at that time. The change is a positive response from the state so that the

¹ Rinsofat Naibaho1 and Indra Jaya M. Hasibuan, *The Role of the Supreme Court in Law Enforcement and Justice through Judicial Power*, Journal of Master of Law, Postgraduate Program, HKBP Nommensen University, Volume 02, Number 02, July 2, 2021, p. 205.
ORDER: <http://ejournal.uhn.ac.id/index.php/opinion>

² Hani Adhani, *Indonesian Constitutional Court in the Digital Era: Efforts to Enforce the Constitution, Substantive Justice and Constitutionally Conscious Culture*, Journal of Law Enforcement and Justice, Vol. 2 No. 2, September 2021, p. 145.
DOI: 10.18196/jphk.v2i2.11763

solution of existing problems is not only solved by one institution, in this case the Supreme Court. Judicial power that is only exercised by one state institution, even though the existing and complex and diverse problems occur, has the potential to solve these problems cannot be maximized and even protracted in its solution. So that it can lower the dignity of the existing judicial power. The formation of the Constitutional Court (abbreviated as the Constitutional Court) as part of the judicial power is expected to really carry out its functions in accordance with the forerunner of its formation. So that the formation of the Constitutional Court is part of the judicial power that is able to solve various state problems in accordance with the scope of its authority.

So between the Constitutional Court and the Supreme Court, both are judicial powers whose positions are equal. Even if you look at its historical history, the Supreme Court has existed before the Constitutional Court. As an institutionally equal judicial power and the norms that govern it, the Constitutional Court and the Supreme Court both have the right and obligation to submit to the political line of state law that has been agreed. The formulation of *legal policy* in the judicial power must be *equal*, so that the Constitutional Court and the Supreme Court are truly equal as equal judicial powers. One of the most important things in commonality is that both must be monitored and supervised. The supervision does not intend to intervene but as a form of equality between the Constitutional Court and the Supreme Court, in addition to the creation of *checks and balances* in the field of judicial power. Bagir Manan's opinion in the practice of the doctrine of the division of power cannot be carried out consequentially, in addition to being impractical, *the absolute* separation between the existing branches of power without accompanying or negating the system of supervision and balance between the branches of power one and the other can cause arbitrariness according to the environment of each of these branches of power.³

The judicial power that carries out judicial functions still requires a supervision model related to the performance carried out so that the level of success and the

³ Bagir Manan, *Presidential Institution*, Yogyakarta: Third Printing Revision, FH UII Press, 2006, pp. 7-8.

level of obstacles faced can be measured. Measurement of the exercise of the functions of the judicial power is in order to see the extent to which these functions are carried out when the work to carry out the functions uses supervision. The implementation of the function of judicial power as a judicial function must be more supervised along with this function directly related to the needs of the community for justice and the interests of the state in terms of law enforcement. Mutual supervision of the existing state administration functions is a necessity in the state so that the achievement of goals in the field of these functions is faster in accordance with what is outlined by the state and the expectations of the community. Conceptually, only with the mechanism *of checks and balances* can each related branch of power be prevented from abusing its power or acting arbitrarily. Without *checks and balances* from other branches of power, the executive can exercise arbitrary power, as well as legislative and judicial.

The judicial power in both the Constitutional Court and the Supreme Court both has a subject who carries out the functions of the institution called officials. Officials are servants of the state, they are appointed by the state to provide services to the community. This service is in order to improve the welfare of the community in accordance with the scope of its function. In terms of judicial power, good service for the community is when the community's hope to get justice is felt. The state gives authority to state officials to do or not do something on the basis of the interests of the community. As part of the state, state officials must be professional, credible and responsible to the state. When there are officials who commit acts that are contrary to their duties and responsibilities by using the means of their positions, they should be subject to heavier sanctions with perpetrators who are not officials.⁴

The characteristics of judicial power are different from the characteristics of other state powers, making judicial power an important instrument in the progress of the state. The protection of the constitutional rights of citizens whose fate lies in the institution of judicial power, as well as almost all lines of national and state life, including economic affairs, are also determined by the judicial power in the context

⁴ Warih Anjari, *Crimes in Office in the Perspective of the State of Pancasila Law*, Widya Yustisia Scientific Journal, Volume 1 Number 2, December, 2017, p. 2.

of law enforcement. The political line of the independent judiciary is to uphold law and justice as the dignity and parameters of Indonesia as a state of law. The realization of the common needs and interests of a society (over the independent judicial power) is the main stimulus in reflecting on the aspects of the implementation of democracy.⁵ The freedom of judges in assessing cases handled by both the Constitutional Court and the Supreme Court as the next instrument is related to the ethics possessed by each judge who fills the position of judicial power. The independence and freedom of judges as ordinary human beings will certainly not be separated from mistakes that arise either through their intentions or unintentionally beforehand. The potential to make mistakes requires the importance of supervision of judicial power. Supervision is carried out equally for the Constitutional Court and the Supreme Court. This is because both are judicial powers as stipulated in the provisions of Article 24 of the 1945 Constitution.

Supervision of judicial power is a form of equal responsibility between the Constitutional Court and the Supreme Court. Accountability in the judicial power of the Constitutional Court and the Supreme Court is important, especially since the judicial power itself is directly related to the rights of every citizen, so it is necessary to make constitutional arrangements so that the position in the judicial power is not abused and can be held accountable. The accountability is not only related to the verdict issued, but also related to the ethics of each judge. If the Supreme Court has become the object of KY supervision while the Constitutional Court has not had any external supervision until now. In fact, since the establishment of the Constitutional Court, there have been several cases of legal, ethical, and moral that have been lightly surfaced by judges, several cases of violations of the Constitution's code of ethics.⁶ The implementation of the function of judicial power cannot be separated from the principle of no power without accountability. This is

⁵ Artha Debora Silalahi, *Reconstruction of Supervision of the House of Representatives of the Republic of Indonesia in the Formation of Laws and Regulations through the Framework of Constitutional Democracy*, Journal of Constitution and Democracy, Vol. 3 No. 2 (December 2023): 100-116 DOI: 10.7454/JKD.v3i2.1306

⁶ Tanto Lailam, *Building Constitutional Morality of Constitutional Judges in Indonesia*, De Jure Journal of Legal Research, Volume 20, Number 4, December 2020, p. 512. DOI: <http://dx.doi.org/10.30641/dejure.2020.V20.511-530>

certainly in accordance with the jargon of the state of law, where the value of legal certainty always exists both in terms of the basis of acting for power, but legal certainty can also be seen from the accountability of carrying out its functions. The independence of judicial power that is recognized both conceptually and constitutionally does not mean that the judicial power in carrying out its functions is simply loose without checks *and balances* from other parties. The most important thing is that external supervision, especially for the Constitutional Court, is not in the context of intervening and influencing it in the context of upholding law and justice. Moreover, Constitutional Court judges are selected figures who are considered to have the ability to be independent in the field of law and statehood.

The previous research that the researcher can propose is as follows: Rahayu Prasetyaningsih's writing, titled *Accountability of Judicial Power*, published in the journal *Constitution* Volume 8 No. 5 of 2011, generally states that the separation of powers is a functional separation of state power and is horizontal in nature consisting of three state powers, namely, legislative, judicial and executive power. In its implementation, the relationship between the three is not strictly separated. However, it is a relationship that balances and supervises each other known as *checks and balances*. This is intended to ensure that each power will not exceed the limits of its power.⁷

In addition to the above, the research written by Sri Devy Gabrielah Budiman with the title: *AJudicial Institution Independence According to Law Number 48 of 2009 concerning Judicial Power of the Republic of Indonesia* which in essence the research discusses aJudicial Institution Credibility with the accountability of the Judicial Institution to the community and how indicators of quality and responsible court decisions towards the judicial system who are independent. Accountability to the current judicial power in Indonesia has become an urgent need to be realized immediately in order to rebuild public trust in the law and law enforcement agencies. One of the objectives of the establishment of the Republic of Indonesia as mandated in the Preamble to the 1945 Constitution, is to realize justice, order,

⁷ Rahayu Prasetyaningsih, *Accountability of Judicial Power*, *Constitutional Journal* Volume 8 No. 5 of 2011, p. 833. DOI:<https://jurnalkonstitusi.mkri.id/index.php>

social balance and to enforce the law itself.⁸ Enforcing law and justice is carried out by the Supreme Court and the Constitutional Court, both of which are regulated in the 1945 Constitution. However, whether the position between the Supreme Court and the Constitutional Court is the same, and whether the Constitutional Court as one of the judicial powers in terms of its supervision can be carried out externally like the Supreme Court. The fact that the Constitutional Court is now a kind of "*supreme body*" certainly hurts the idealism of realizing a democratic-constitutional system of government that operates in a *check and balance mechanism*.⁹

Research Method

This study uses normative legal research combined with *reform oriented research* methods. Normative legal research includes research on laws and regulations, legal principles, legal systematics, legal synchronization, both vertical and horizontal, legal comparison, including looking at the history of existing laws.¹⁰ Doctrinal research is conducted to examine policies regarding external supervision in the judicial system. This research begins by looking at existing laws (doctrinal), then followed by consideration of issues that affect the law, as well as the underlying legal politics. This research also combines *the reform oriented research* method. As this method is carried out to evaluate the feasibility of existing rules and which recommends changes to rules that are deemed necessary. This model is based on a legal reform research methodology to provide advice on changes to existing laws. At its peak, this model leads researchers to propose changes to the law.¹¹

⁸ Sri Devy Gabrielah Budiman, *Accountability of Independent Judicial Institutions According to Law Number 48 of 2009 concerning Judicial Power of the Republic of Indonesia*, Journal: Lex Administratum, Vol. VI/No. 4/Sept-Des/2018. p. 190. DOI: <https://ejournal.unsrat.ac.id/v3/index.php/administratum/article/view/24539>

⁹ Zain Badjeber (2017), *Judicial Power and Other Bodies whose Functions Are Related to Judicial Power*, *Journal of Constitutional Affairs-Volume* 004 September 2017. p. 127.

¹⁰ Moch. Marsa Taufiqurrahman, et al, *Integration of the General Election Judicial System through the Establishment of the General Election Court*, *Constitutional Journal*, Volume 18, Number 3, September, 2021, p. 567. DOI: <https://doi.org/10.31078/jk1834>

¹¹ *Ibid.*

Result and Discussion

The characteristics of independent judicial power provide comfort and free choice to every judge in the judicial environment to uphold the law and justice that is being handled. However, even though these independent characteristics must be accompanied by the personal ability of each judge so that his personal analysis and conclusions on a case are not wrong, let alone misleading. The main task of judges is to examine, adjudicate, and decide the case being handled. The judge's decision is the final action of the judge in the trial, determining whether the perpetrator is convicted or not, so the judge's decision is a statement from a judge in deciding a case in the trial and has permanent legal force.¹² However, factually, the frequent differences of opinion between one judge and another judge are not a form of violation. The inconsistency of judges' decisions can be caused by several factors, including sociological factors where there is fear and concern from judges in the community, then juridical factors that arise due to the influence of a *dissenting opinion* (difference of opinion of judges).¹³

However, the principle of independent judicial power does not mean that judicial power can be exercised as freely as possible without signs of supervision, because in the procedural aspect of court proceedings there are known general *principles of proper justice* and procedural or procedural laws that open up the possibility of filing various legal remedies.¹⁴ Regarding supervision in the implementation of judicial power functions, the Constitutional Court, as part of the judicial power, should have given a model to existing state institutions so that one state institution and another state institution in carrying out their respective functions is balanced.

¹² Mulyadi in Imran, *Violation of the Code of Ethics and Code of Conduct of Judges Review Decision Number 63/Pid.B/2012/PN. TBL and Number 64/Pid.B/2012/PN. TBL*, Judicial Journal, 2019, Vol. 12 No. 1 April: 1 - 15. <http://dx.doi.org/10.29123/jy.v12i1.379>.

¹³ Rufaidah & Yeni Widowaty. *Inconsistency of Judge's Decision in the Case of Narcotics Crimes with Child Offenders*, Study of Decision Number 28/Pid.Sus-Anak/2020/Pn.Mre. Judicial Journal Vol. 15 No. 2 August: 207 – 226. DOI: 10.29123/jy.v15i2.516.

¹⁴ Antoni Putra, *The Final and Binding Nature of the Constitutional Court's Decision in Testing the Law*, Review of the Constitutional Court's Decision Number 34/PUU-XI/2013, Judicial Journal Vol. 14 No. December 3, 2021: 291-311 DOI: 10.29123/jy.v14i3.425.

The 1945 Constitution does not distinguish between judicial power within the scope of the Supreme Court and the Constitutional Court. The difference between the two is in the scope of authority and the nature of the decision, including the composition of each judge. However, related to its position between the Constitutional Court and the Supreme Court, it is an independent judicial power to uphold law and justice. The legal formulation of judicial power in the 1945 Constitution expressly states that judicial power is an independent power to enforce the law and order. The label of independence that exists in the judicial power means that the judicial power in exercising its authority is free and free from the influence of any party and cannot be intervened by anyone, including by existing state institutions and cannot be intervened from within the judicial power itself.

Independent judicial power means that the existing judges when handling a case have the freedom to give an assessment of the case handled. This means that the more often the judge has experience and has extensive legal knowledge, it means that he will be able to outperform his legal thinking from judges who have low legal knowledge. The independent judicial power itself, among other things, must be manifested in the independence of judges in examining and deciding the cases that are being prosecuted. Therefore, the judge's decision is an important reference in determining the community's compliance with the law.¹⁵ The independence of judicial power is not only aimed at the institutional structure of the judiciary, but also at judicial judges in carrying out their functions in adjudicating and deciding a case before them.¹⁶

1. Independent judicial power

Independent judicial power should be accompanied by the responsibility of each judge for the implementation of duties as *public servants in* the judicial field. A social responsibility (*social accountability*) is a counterweight to the

¹⁵ CrhertoWilliam and Timothy Daniel Wijaya. *Independent Judicial Power*, Journal of Legal Dynamics & Society, tt, Vol. 6 No. 1. p. 81. DOI: <https://doi.org/10.30737/dhm.v6i1.4665>.

¹⁶ Andi Suherman. *Implementation of Judges' Independence in the Implementation of Judicial Power*, Journal, SIGn Legal Journal Vol. 1, No. 1, September 2019, p. 46. DOI: [10.37276/sjh.v1i1.29](https://doi.org/10.37276/sjh.v1i1.29).

independence and independence of the judiciary. Efforts to be able to balance judicial power that is free and have both social and political accountability are through the formation of the Honorary Council of Judges.¹⁷ The historical journey of the existence of the Constitutional Court and constitutional judges from every periodic tendency is always dynamic and there are various bad perceptions about the Constitutional Court and its constitutional judges. The negative perception of the independence of the Constitutional Court and constitutional judges is quite reasonable, considering that the situation of the past constitutional judges and the current constitutional judges is increasingly concerning. In fact, when compared between positive assessments and negative assessments on constitutional judges, they tend to be more dominant positive. Because the work as a profession of constitutional judges is not a job and profession of ordinary value, no matter how small the negative actions taken by the constitutional judges will close the positive assessment that has been built. This will reduce the dignity and dignity of the constitutional judges themselves.

Various events that occurred within the Constitutional Court are inseparable from the Constitutional Court's sense of trust as an institution that cannot be supervised by existing state institutions such as the Supreme Court. Even though the Constitutional Court and the Supreme Court are institutions with equal positions, even the Supreme Court was in existence earlier than the Constitutional Court does not question the supervision of its judges being carried out externally. Therefore, any institution should feel happy when the state legal politics regulates its institution to be supervised externally so that the supervision carried out is a medium of encouragement to carry out its functions in a maximum, good and correct manner. Not only stopping at external supervision of state institutions, including the Constitutional Court, there is no clear mechanism related to accountability as a consequence of carrying out state functions.

¹⁷ Withyant Easter Hero. *The Legal Politics of Judicial Power in Indonesia*, Journal of Social Sciences and Education, Vol. 4. No. 2 March, 2020, p. 120.
<http://ejournal.mandalanursa.org/index.php/JISIP/index>

2. Urgency of responsibility to carry out judicial functions

Accountability starts from the word responsibility, which means that the state is obliged to bear everything, there are two terms that indicate responsibility, namely *liability* and *responsibility*. The term *liability* indicates legal liability, while *responsibility* indicates political liability. Legal accountability means that there are actions or deeds carried out by a position in a state institution that are not in accordance with the regulations that govern it. A position where an official carries out his activities in order to achieve goals in accordance with his position.¹⁸ Because the position contains functions and officials who perform these functions, each official who performs the function of the position is given authority in accordance with the nature of the function of the position. Because the official performs an act or deed, every action and deed carried out by the official must be accounted for.

In principle, no position held by an official is free from accountability, because when the position held by the official does not require accountability, it is possible that one day abuse of authority will occur and everything violates the principle of equality before the law and government. Therefore, even though the 1945 Constitution does not regulate the accountability of state institutions in carrying out their functions in this case in the field of judicial power, because the functions carried out are related to who carries them out, then if those who carry out these functions have a mindset and set a mandate, and the depth of spirituality and emotional maturity, without being regulated they will carry out the functions of judicial power with trust and accountability with an appropriate accountability model.¹⁹ According to Bagir Manan and Kuntana Magnar,²⁰ any position that has power should be equipped with accountability, so that it is easier to evaluate the

¹⁸ Hendry Campbell Black. *Black's Law Dictionary, Fifth Edition*, USA: St Paul Minn West Publishing: Co, 1979.p. 823.

¹⁹ Nurus Zaman, *The Constitution in the Perspective of Legal Politics*, Surabaya, Scopindo Media Pustaka, 2021, p. 211.

²⁰ Bagir Manan and Kuntana Magnar, *Some Problems of Constitutional Law*, Bandung: Revised Edition, Alumni 1997, p. 30.

executors of the positions carried out by the party who is given the position. So that it will be the motivation of the person concerned to perform as well as possible.

The Constitutional Court as a judicial power whose authority is different from the Supreme Court and even the authority of the Constitutional Court is special, it is said to be special because the authority of the Constitutional Court can cancel laws formed by two state institutions, namely the House of Representatives and the President, the Constitutional Court can also dissolve political parties and resolve disputes over authority between state institutions formed through the 1945 Constitution and even the Constitutional Court can decide whether the President and Vice President are guilty or not and so on. The authority possessed by the Constitutional Court is very special, even though it must go through the existing normative mechanism. The principle of no authority without accountability should also apply to all lines of power in the state. This principle cannot only be applied to one form of existing power, but the principle applies to all state powers. Accountability for the performance of state institutions is carried out institutionally, as long as the accountability is not related to personal violations of the law. In essence, the holders of judicial power are obliged and even required to be responsible for all consequences in the termination of the law, without any other intention and motivation, except for the sake of upholding justice.²¹

3. Model of supervision in judicial power

The legal political line related to judicial power is regulated in the 1945 Constitution, especially Article 24. In essence, the provisions of Article 24 of the 1945 Constitution stipulate that judicial power is an independent power to uphold law and justice carried out by the Supreme Court and the judicial bodies under it and by the Constitutional Court. There is no difference in position between the Supreme Court and the Constitutional Court, because both have the same status as an independent judicial power. The most crucial difference between the Supreme

²¹ M. Asro, *The Authority of the Constitutional Court in the Constitution of the Republic of Indonesia in 1945*, Journal, 'Adliya Vol. 11, No. 2, June 2017. p. 154.
[https://journal.uinsgd.ac.id/index.php/adliya/...](https://journal.uinsgd.ac.id/index.php/adliya/)

Court and the Constitutional Court lies in the scope of authority and the characteristics of its decisions. The judicial system within the Supreme Court is known for its legal remedies, both ordinary legal remedies and extraordinary legal remedies. The legal remedy model is basically in order to provide opportunities for parties who still object to the decision that has been decided by the judiciary in the Supreme Court and the courts below. Meanwhile, the characteristics of the decision in the Constitutional Court are final and binding so that the judicial system in the Constitutional Court does not affect legal remedies. Like it or not, the Constitutional Court's decision immediately has permanent legal force and must be obeyed by all parties.

When constitutionally the position of the Supreme Court and the Constitutional Court is equal, namely an independent judicial power to uphold law and justice, then there should be no reason for the Constitutional Court to refuse external supervision from the Constitutional Court. The difference in the scope of authority and the characteristics of the different decisions between the Supreme Court and the Constitutional Court cannot be used as a justification that the Supreme Court and the Constitutional Court are different in terms of their supervision. A balanced position because they are both formed through UUD1945 do not have to have the same authority. According to Maruarar Siahaan, the word *balance* that we understand as balance, does not always mean that state power must be divided equally or evenly among the three state powers.²² When viewed from the placement of legal norms that govern the Supreme Court and the Constitutional Court, it is not directly tiered but is limited by the existence of the Judicial Commission as a supervisory institution in the judicial system. If the Supreme Court is regulated in the provisions of Article 24A of the 1945 Constitution while the Constitutional Court is regulated in Article 24C of the 1945 Constitution and the Judicial

²² Maruarar Siahaan, is an *independent and accountable judicial power according to the 1945 Constitution of the Republic of Indonesia*. Journal of Governance, Volume 003 June 2017, p. 7. Doi: https://www.mpr.go.id/pengkajian/Jurnal_KK.pdf

Commission is regulated in the provisions of Article 24B of the 1945 Constitution. In this case, the Judicial Commission regulates after the Supreme Court and the Constitutional Court is regulated after the KY. The placement of legal norms is interpreted by some opinions that with such a placement of legal norms, the KY does not have the authority to supervise the Constitutional Court, but the KY only has the authority of the Supreme Court. The following researcher presents the provisions of the articles regarding judicial power in the 1945 Constitution.

Article 24

- (1) The 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 judiciary under it in the general judicial environment, the religious judicial environment, the military judicial environment, the state administrative judicial environment, and by a Constitutional Court.
- (3) Other bodies whose functions are related to judicial power are regulated in law.

Article 24A

- (1) The Supreme Court has the authority to adjudicate at the cassation level, examine the laws and regulations under the law against the law, and has other powers granted by law.
- (2) Supreme Court justices must have integrity and personality that is impeccable, fair, professional, and experienced in the field of law.
- (3) The candidate for the supreme court judge is proposed by the Judicial Commission to the House of Representatives for approval and subsequently designated as the supreme judge by the President.
- (4) The Chairman and Vice President of the Supreme Court are elected from and by the Supreme Court justices.
- (5) The structure, position, membership, and procedural law of the Supreme Court and the judicial bodies under it are regulated by law.

Article 24B

- (1) The Judicial Commission is independent and has the authority to propose the appointment of the supreme court judge and has other authorities in order to maintain and uphold the honor, dignity, and behavior of judges.
- (2) Members of the Judicial Commission must have knowledge and experience in the field of law and have integrity and an irreproachable personality.
- (3) Members of the Judicial Commission are appointed and dismissed by the President with the approval of the House of Representatives.
- (4) The composition, position, and membership of the Judicial Commission are regulated by law.

Article 24C

- (1) The Constitutional Court has the authority to adjudicate at the first and last level whose decision is final in order to test the law against the Constitution,

- decide disputes over the authority of state institutions whose authority is granted by the Constitution, decide the dissolution of political parties, and decide disputes about the results of general elections.
- (2) The Constitutional Court is obliged 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.
 - (3) The Constitutional Court has nine members of constitutional judges appointed by the President, three of whom are proposed by the Supreme Court, three by the House of Representatives, and three by the President.
 - (4) The Chairman and Deputy Chief Justice of the Constitutional Court are elected from and by constitutional judges.
 - (5) Constitutional judges must have integrity and personality that is irreproachable, fair, statesman who controls the constitution and constitution, and does not concurrently serve as a state official.
 - (6) The appointment and dismissal of constitutional judges, procedural law and other provisions of the Constitutional Court are regulated by law.

Based on the systematics of norms between the Supreme Court, the Supreme Court and the Constitutional Court, it is not an exaggeration when there is an opinion that the Supreme Court does not have the authority to supervise the Constitutional Court. Moreover, the proposal of a constitutional judge does not involve the intervention of the KY. In contrast to the proposal of the supreme judge, where based on Article 24A paragraph (3) of the 1945 Constitution it is stated: The candidate for the supreme court judge is proposed by the Judicial Commission to the House of Representatives to obtain approval and then be appointed as the supreme judge by the President. Furthermore, the above provisions are reinvigorated by the provisions of Article 24B paragraph (1) of the 1945 Constitution which in essence the KY has an independent nature that has the authority to propose the supreme court justice. Based on the provisions mentioned above, the rationality of the legal logic built can be justified on the opinion that the Supreme Court is not authorized to supervise the Constitutional Court, because the Supreme Court is the party that proposes the Supreme Court justice, so it is reasonable for the Supreme Court to supervise the behavior of the nominated Supreme Court Justice.

But this rationality cannot always be used as a reason for exercising supervision in the context of judicial power, if the supreme judge is proposed by the Supreme Court, it is different from the Constitutional Court judge. Based on the provisions

of Article 24C paragraph (3) of the 1945 Constitution: The Constitutional Court has nine members of constitutional judges appointed by the President, which are proposed by the Supreme Court three each, three by the House of Representatives, and three by the President. Based on these provisions, the composition of constitutional judges comes from the proposal of the three state institutions, which were initially considered as the ideal composition and the composition of the constitutional judges is seen as a composition that will work neutrally in handling cases. However, in the context of supervision of constitutional judges, the 1945 Constitution does not give authority to both the House of Representatives, the President and the Supreme Court to supervise constitutional judges. In consideration of Law No. 7 of 2020 concerning the Third Amendment to Law No. 24 of 2003 concerning the Constitutional Court, it is stipulated that the Constitutional Court is an independent actor of judicial power and has an important role in upholding the constitution and the principles of the rule of law in accordance with its authority and obligations according to the constitution.

The provisions of the above consideration in the sentence are important to uphold the constitution and principles in the state of law, so that what is held by a constitutional judge is not an easy job to carry out. Basically, even though the constitutional judges only consist of 9 (nine) constitutional judges, as long as all of them are really elected and proposed without any reason other than science and personal integrity is not a problem. But it will be a problem when he chooses and proposes that each of the three state institutions is carried out unprofessionally so that on the way when the proposer has an interest in the Constitutional Court will become a boomerang for the dignity of the Constitutional Court. As a more neutral alternative way is to restore the Constitutional Court as the same judicial power as the Supreme Court. In such a construction, the existence of external supervision for the Constitutional Court is important to be carried out as has happened to the Supreme Court. Moreover, the historical journey of constitutional judges since the establishment of the Constitutional Court in 2003 constitutional judges have always been faced with

legal problems that cause constitutional judges to be convicted both in criminal law and ethically guilty of constitutional judges.

The provisions of the rule on the transition of roman numerals III (three) of the 1945 Constitution stipulate: The Constitutional Court was established no later than August 17, 2003 and before it was formed, all its powers were exercised by the Supreme Court. Based on these provisions, it further gives legitimacy that the Supreme Court once had the authority to exercise the authority of the Constitutional Court which had not yet been formed. This shows that the delegation of authority shows that the Supreme Court and the Constitutional Court are in equal position. On the other hand, the basis of the constitutionality of the KY's authority to supervise the Supreme Court does not explicitly use the redaction of legal norms, the word supervise. However, the provisions of Article 24B paragraph (1) of the 1945 Constitution use the word that the KY has other authorities in order to maintain and enforce the honor, dignity and behavior of judges. The word judge's behavior in the provisions of the article can also give rise to different interpretations, because it is possible that the judge's behavior is not only the behavior of judges in the Supreme Court, but also the behavior of judges in the Constitutional Court judges. However, based on the provisions of Article 44 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power, it is stipulated that: Supervision of constitutional judges is carried out by the Honorary Assembly of Constitutional Judges. Based on the Judicial Power Law, supervision of the Constitutional Court is not carried out like supervision of the Supreme Court, but supervision of constitutional judges is carried out by the panel of constitutional judges. Based on the provisions of Article 27A of Law No. 7 of 2020, the third amendment to Law No. 7 of 2020 concerning the Third Amendment to Law No. 24 of 2003 concerning the Constitutional Court states: (1) The Constitutional Court is obliged to compile a Code of Ethics and Code of Conduct for Constitutional Judges which contains norms that must be complied with by every constitutional judge in carrying out their duties to maintain integrity and an irreproachable personality, fair, and statesman. (2) In order to

enforce the Code of Ethics and Code of Conduct for Constitutional Judges as intended in paragraph (1), the Honorary Assembly of the Constitutional Court is established whose members consist of: (a) 1 (one) constitutional judge; (b) 1 (one) member of the Judicial Commission; and (c) 1 (one) academic with a background in the field of law.

Constitutional judges who are undergoing a code of ethics hearing where one of the ethics committees is a colleague and comrade in the Constitutional Court, then a conflict of interest can occur due to several things: (1) a conflict of interest in wanting to maintain the dignity and good name of the institution. (2) conflict of interest in repaying services or the like during their time as a partner as a constitutional judge. (3) conflict of interest to plant merit before the interests for themselves are needed. (4) conflict of interest for the third party. To avoid conflicts of interest, it is better that in every formation of the ethics council it is not necessary to involve constitutional judges, let the members of the ethics assembly be filled by selected external parties. If constitutional judges still want to be involved in the ethics assembly, because constitutional judges are proposed by three state institutions, then the formulation of the members of the Constitutional Court ethics assembly is also proposed by three state institutions (DPR, President and Constitutional Court) and added from the Supreme Court and academics.

However, from the options offered above, if referring to the principle that the Supreme Court and the Constitutional Court are both independent judicial powers to uphold law and legitimacy, then the Constitutional Court also needs an external supervisor and should be able to supervise the behavior of constitutional judges is the KY, as an institution whose position is equal, namely established through the 1945 Constitution. The ambiguity in the sentence "other authority" possessed by the Supreme Court as stipulated in the provisions of Article 24 paragraph (1) which reads: The Judicial Commission is independent which has the authority to propose the appointment of the supreme court judge and has other authorities in order to maintain and uphold the honor, dignity, and behavior of judges. It can be interpreted narrowly and broadly by anyone,

especially those who have interests. It is possible that what is masked with other authorities in the article has a relationship with the Supreme Court judge only, but other sentences of authority can also be related to constitutional judges. Because constitutional judges must have integrity and personality that is irreproachable, fair, statesman who controls the constitution and state administration, and does not concurrently serve as a state official.

In principle, between judges in the Supreme Court and within the Constitutional Court, they must be figures who have a trusting, honest and courageous nature to take a stance for the sake of the dignity of the Constitutional Court and carry out especially the functions of the Constitutional Court in accordance with the forerunner of the reason for the formation of the Constitutional Court. According to Moh. Mahfud MD, in the future, constitutional judges must be supervised for the benefit of the Constitutional Court in the long term. Supervision of constitutional judges is not based on suspicion of constitutional judges, but to maintain the dignity and honor of the Constitutional Court.²³ The choice of state law politics in maintaining and upholding the honor, dignity, and behavior of judges requires supervision not only of supervisors formed by the internal Constitutional Court, but also of external supervision which is really an instrument in upholding the ethics of Constitutional Court judges. Furthermore, Mahfud MD argued that Constitutional Court judges are seen as often taking their own perspectives, even though there are other perspectives that are also argumentative. In this case, the Constitutional Court's decision then cannot be seen as a truth that is substantively in line with the content or legal politics of the 1945 Constitution but only in line with its own perspective. Even though each perspective has its own logics that are also true.²⁴

²³ Moh. Mahfud MD. *Building a Supervision System and Strengthening the Independence of Constitutional Judges*, Seminar Paper on Cooperation between FH UII and Hans Seidel Foundation HSF. Yogyakarta. 2011, th.

²⁴ Mahfud MD. *Constitutional Law Debate After Constitutional Amendment*, Jakarta: Third Edition. Rajawali Press 2013, p. 100.

The choice of state legal politics related to the composition of constitutional judges was initially considered an ideal legal political choice. Because the composition of the Constitutional Court judges was proposed by three state institutions, both from the House of Representatives, Supreme Court and President. The composition is expected to be carried out fairly by each Constitutional Court decision. Moreover, the Constitutional Court stands on the basis of the assumption of the supremacy of the constitution that underlies state activities and as a parameter to prevent the state from acting unconstitutionally.²⁵ But in terms of supervision of the current Constitutional Court, which only consists of three people, namely with a combination of one person from the Constitutional Court itself, one person from the Constitutional Court and one person from academics with a legal background, it is not a guarantee to be fair and neutral when there is an ethical judge over constitutional judges. The element of the Constitutional Court is the main reason why the fair and neutral attitude is doubtful. In the future, it is hoped that the Constitutional Court, as part of the judicial power that runs the judiciary like the Supreme Court, will be wiser when responding positively to the wishes and views of the public who want the Constitutional Court to also be supervised by external institutions such as the Supreme Court. Supervision of the Supreme Court and the Constitutional Court, both of which are judicial institutions to enforce law and justice, is not intended to intervene and interfere in the affairs of the Supreme Court and the Constitutional Court as an independent state power. The supervision is intended so that all have an *equal* position and are expected to be more careful in behaving and deciding the cases handled, as well as maintaining a negative assessment of the judiciary.

4. Discourse on external supervision of constitutional judges

²⁵ Abu Nawas, The Position and Authority of the Constitutional Court as an Actor of Judicial Power, Iblam Law Review Iblam College of Law Vol 1 No 2 2021, p. 162. Team: <https://ejournal.iblam.ac.id/IRL/index.php/ILR/>.

Ideally, a definite law should also be fair, and a fair law should also provide certainty.²⁶ The 1945 Constitution does not regulate external supervision for constitutional judges, causing debate among state law experts. The debate is legitimate when it is carried out by a party that does not have a conflict of interest, but what raises speculation because the defense that constitutional judges do not need to be supervised by external supervisors is the opinion of the constitutional judges themselves. Therefore, whatever is done by the public to demand that the Constitutional Court as part of the judicial power also needs to be supervised externally as the Supreme Court will experience futile. Because the judicial review of the Constitutional Court Law related to this matter must be rejected by the constitutional judges. This requires a breakthrough from the lawmakers, if indeed the Constitutional Court is part of the judicial power, then external supervision of the Constitutional Court should be carried out through changes in its regulations. Discourse and tug-of-war between the public who want external supervision for the Constitutional Court and those who do not need the Constitutional Court to be supervised by external parties will be prolonged if the lawmakers are only silent. The legislative review and executive review steps are the best way to make changes to the laws and regulations related to the system of supervision of judicial power, in this case the Constitutional Court.

The courage and seriousness of the House of Representatives and the President to build an equal judicial system between the Supreme Court and the Constitutional Court, of course, is evidenced by conducting a legislative review or executive review related to the external supervision of the Constitutional Court. Good faith and commitment from the two state institutions are urgently needed because the Supreme Court and the Constitutional Court are both free judicial powers and cannot be intervened by any party. Legal breakthroughs made by the House of Representatives or the President as an instrument for legal reform in the judicial system. The legal reform of the judicial system is the most important part

²⁶ Purwanto, *The Embodiment of Justice and Social Justice in the Indonesian Legal State: A Struggle That Is Not Easy to Operationalize*, Journal of Media Bhakti Law, Faculty of Law, Panca Bhakti University, th, 2017. ORDER: <https://doi.org/10.32501/jhmb.v1i1.2>

of a democratic legal state. The House of Representatives and the President must have a strong will in the context of the Constitutional Court's external supervision. Moreover, the external supervision is not in the capacity to intervene in the nature of the independence of constitutional judges, but the existence of external supervisors of the Constitutional Court in order to maintain and monitor the judicial process at the Constitutional Court, so that constitutional judges are more careful and not easily negligent, let alone to the point of mistakes in exercising their authority.

Past experience, as evidenced by the existence of legal proceedings for criminal violations that befell constitutional judges at that time, the impact of legal violations committed by constitutional judges is sufficient as proof that without external supervision of the Constitutional Court, the spaces and potential for violations committed by constitutional judges are very open. Moreover, the model of the Constitutional Court's accountability to whom is not clear, Accountability is related to the idea of general thinking about accountability and the administration of power to achieve the public interest.²⁷ In August 2023, the incident of ethical violations committed by constitutional judges together with the chairman of the Constitutional Court further convinced and strengthened the reason for the Constitutional Court's decision to carry out external supervision. Various incidents of violations of the law, both legally proven and violations that are still suspected against constitutional judges, are actually part of the sunnatullah that can befall every constitutional judge and other state administrators. But preventive measures can be taken in this context through external supervision. So far, the Constitutional Court has always refused when there is a test related to supervision of him and dismissed the view that the importance of the Constitutional Court being supervised by the outside. The Constitutional Court has always considered the

²⁷ Rahayu Prasetyaningsih, *Accountability of Judicial Power*, Journal of Constitution, Volume 8, Number 5, October 2011, p. 832.

https://www.google.com/search?q=Akuntabilitas+Kekuasaan+Kehakiman&oq=Akuntabilitas+Kekuasaan+Kehakiman&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIHCAEQIRigATIHCAIQIRigATIHCAEQIRigAdIBCjMwOTk5NGowajeoAgCwAgA&sourceid=chrome&ie=UTF-8

institution as a state institution that guards the constitution which will never be mistaken.

Table. Discourse on External Supervision of the Constitutional Court

Aspects	News Narrative	Source
Opt Out of External Supervision	<p>Eman Suparman admitted that he was surprised by the attitude of the Constitutional Court judge Harjono, who refused to be supervised by external parties and instead chose to form his own ethics team. Furthermore, the Constitutional Court said that it seemed to refuse to be supervised. Judge Harjono did not seem to want to be supervised. What is the matter with the Constitutional Court judge? I am even suspicious, while now he wants to form an ethics team, from his own internal which he said are the content experts," said Eman at the Bandung Corruption Court, Jl LRE Martadinata, Thursday (10/10/2013).</p> <p>Constitutionally, the right to supervise judges is the KY. "We are a constitutional judicial supervisory institution for judges, note that. So Constitutional Court judges do not have to resist KY's supervision," he said.</p>	<p>https://news.detik.com/News/D-2383824.hakim-MK-rejected-supervised-party-external-ky</p>
Refusal to be Supervised	<p>Although there have been two Constitutional Court judges arrested by the Corruption Eradication Commission, Chairman of the Constitutional Court Arief Hidayat does not agree that his institution must receive external supervision such as from the Judicial</p>	<p>https://nasional.tempo.co/read/849769/Chairman-MK-refuse-External-supervised-party</p>

Commission (KY). The judiciary, the judges, should not be supervised. The principle must be maintained, not supervised. Moreover, in the construction of the Constitution, we (MK) have nothing to do with KY," said Arief when met after attending the inauguration of Aidul Fitriada Azhari as a Professor of Law at the University of Muhammadiyah Surakarta (UMS) on Thursday, February 23, 2017.

The Judicial Commission is ready to supervise the institution of the Constitutional Court (MK) in accordance with the agreement of President SBY and other state institutions to save the Constitutional Court. Supervision is carried out so that the authority of the Constitutional Court can run better.

For example, the Perppu will mandate the KY to re-supervise the ethics and behavior of Constitutional Court judges, so as a state institution, the KY is certainly ready to implement it, said KY Spokesperson Asep Rahmat Fajar to Liputan6.com. Monday (7/10/2013).

<https://www.liputan6.com/news/read/713248/ky-hakim-MK-must-be-supervised-externally>

The table above shows that the Constitutional Court seems to want to make it a state institution without outside supervision. This is contrary to the political line of state law that between the Constitutional Court and the Supreme Court are both judicial powers. However, the Constitutional Court's desire is not in harmony with the situation within the Constitutional Court itself, where the event tarnishes its existence as a judicial power that is free from intervention from any party for fair law enforcement. Various events that undermine the dignity and authority of the Constitutional Court as a state institution that

specifically guards the constitution to uphold the constitutional rights of citizens have not been consistently proven. Moreover, the table above shows the rejection of the supervision of the Constitutional Court sourced from the constitutional judges themselves. Thus, it seems that there is a defense from within the Constitutional Court itself which will actually harm the Constitutional Court itself. The Constitutional Court is expected to be able to restore the image of the judiciary in Indonesia as an independent judicial power that can be trusted in upholding law and justice.²⁸

Conclusion

The position of the Constitutional Court and the Supreme Court institutionally has the same degree, thus it should be accompanied by the same supervision model, that is, both have internal supervision and also have executive supervision. So far, external supervision only applies to the Supreme Court, while in the Constitutional Court there is none. External supervision for the Constitutional Court is urgently needed, especially in connection with various negative events (violations of the law and code of ethics) that befall constitutional judges. In addition to this, external supervision for the Constitutional Court is not prohibited either politically and conceptually. Therefore, external supervision for the Constitutional Court is a means for the judicial system, especially for constitutional judges, to be more careful in issuing decisions on the cases handled. External supervision for the Constitutional Court is a form of straightening out the concept that the Supreme Court and the Constitutional Court are both equal judicial powers. External supervision for the Constitutional Court does not intend to intervene with each other, but in the context *of checks and balances* in the world of justice under the legal political line of the 1945 Constitution.

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