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THE POLITICAL SHIFT IN LEGAL POWER OF THE JUDICIARY POST CONSTITUTIONAL AMENDMENT

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ABSTRACT

The purpose of this study examines the legal politics of the shift in judicial power after the constitutional amendment in Indonesia. This study was conducted using doctrinal legal research with a fundamental research approach, designed to gain a deeper understanding of law as a social phenomenon. The results of the study found that historically, the earliest shift in judicial power was related to the theory of shifting separation of powers and the imperative rule of law. The post-constitutional shift resulted from the amendment to the 1945 Constitution which expressly stated that the judiciary is independent. Judicial power is an independent power to organize justice in order to uphold the law and equality and judicial power is not only carried out by the Supreme Court, but also by the Constitutional Court, that the supreme court judge must have integrity and an impeccable personality, fair, professional, and experienced in the field of law, To guarantee the independence and integrity of judges, especially the amendment to the 1945 Constitution, a new institution was issued called the Indonesian Judicial Commission.

1. Introduction

The changes in the 1945 State Constitution have resulted in several crucial and fundamental changes in the state management system in Indonesia. The shifting that occurred is not only a shift of paradigm, the shifting is already in the state of a leap of paradigm according to Kuhn.[1] Through the series of shifts, democracy is restored to its genuine position, nomocracy is affirmed as the state normative framework, constitutional democracy is positioned as the base of the republic, and checks and balances are filled as the state power control framework.

Not only that, the strengthening of judicial power and its autonomy has received full guarantees as an independent power and free from interference from other powers. This branch of power also obtained additional power through the significant role of the Constitutional Court of Indonesia because

1 Liek Wilardjo., *Realita Dan Desiderata*, Yogyakarta, Duta Wacana University Press, 1990; Also see, Edgar F Borgatta and Marie L Borgatta, eds., *Encyclopedia of Sociology*, Vol.III, New York, Macmillan Publishing Company, 1992).

this institution is particularly charged with safeguarding the constitution as the superior law of the land. The power safeguarding and enforcing the constitution that was previously held by the political institution, now is handled by the judicial power which is run by the Supreme Court of the Republic of Indonesia and the Constitutional Court of Indonesia. These are a few of the constitutional-juridical leads from the shifting of the legal politic in judicial power.

Hence, understanding the shifting in legal politics in the law of judicial power from the authoritarianism idea to legal politic in the law of judicial power that guarantees democracy must be considered as a constitutional call to strengthen constitutional justice in the legal state of Indonesia.

Constitutional-juridical lead is not only providing the opportunity to restore what existed but also including the accent of reality, which is a novelty that sees the reality in a sense to add or subtract since the weight of reality differs according to how it occurred and the faced conditions[2] This means a shift in the legal politics of judicial power resulting from changes must be followed by a change of perspective based on the setting of the change itself.

The setting of a constitutional change is a cut-off will from the state-centric authoritarian regime. This regime is backed by the obsession to build a powerful government-state institution. As a result, the power design is mainly focused until there is no separation of power. The president holds the power as the leader of the state, head of the government, supreme commander of the armed forces, and the power to make laws. Therefore, the prerogative rights accumulated in the hands of the president are on the contrary, untouchable by the controlling institution from the outside.

The fact that authoritarian regimes affirmed themselves by hiding behind the constitutional articles, indicated that the pre-amendment of the 1945 State Constitution is open for manipulation for the sake of power preservation interests. The combination of subjective interests to preserve the power and the flexible formulation of the constitutional articles have caused the former regime to have unlimited access to accumulate powers. The final product of the particular obsession could be a primitive unification, which is a collective subjugation of non-governmental institutions to a monolithic authority: one subject (contrary to the ruler), one meaning (based on the ruler's concept), one action (chosen by the ruler), and one consequence (based on the ruler's target).[3]

Undoubtedly, this political direction that caused a double effect will eventually create a "victim pyramid". On one side, the former regime is involved in authoritarianism and tends to prevent any disruption of their "possession". The ruler could conduct an operation to take over the rights of citizens' possessions based on their personal or group interests, while the government's ownership cannot be disrupted. This fortifies the fact that the ruler with their power is the determinant of everything that occurs in the life of a republic, and no longer

2 Indah Sri Utari., TNI, Apanya Yang Berubah?, *Majalah Basis*, 1999.
3 Bernard L Tanya., *Hukum, Politik Dan KKN*, Surabaya, Srikandi, 2006.

works with a political morality based on values. On the other side, with the binary asymmetrical polarization opposition of the controller and the controlled, the public is confined in the cross-regional segmentation which causes suspicion, discomfort, and collective anxiety which leads to endemic social-politic disappointment. The explanations above are *raison d'etre* for a constitutional change. Constitutional change is a starting point of an institutional reformation which is regarded as the elementary requirement to attain a consolidated democracy.

This study aims to explain a few of the legal politics shifts regarding the judicial power post-amendment of the 1945 State Constitution in Indonesia. The legal politics in this study refer to the concept proposed by Bernard L. Tanya, which is a legal vision. According to the proposed vision, the forming of laws or legal ratification is formatted to achieve the stated vision or purposes.[4] As a vision, legal politics functions as an ideological function of two fundamental things: (i) giving the starting point and basic direction for a legal order in managing various matters in the different fields to achieve collective objectives, (ii) directing and unleashing the whole potentials of law to attain the said collective objectives.[5]

As the proposed problems, this study particularly aims to uncover the shifting of the legal politic in judicial power post-amendment of the 1945 State Constitution. The result of this study will contribute to the theoretical thinking in constitutional law and legal politics. Besides, this study will also contribute as a proposition for the restoration of constitutional law that regulates judicial power.

2. Research Methods

The discussion on this matter is conducted following the flow and the method of doctrinal legal research with a fundamental research approach. doctrinal legal research, namely legal research by examining library materials and secondary materials.[6] The qualitative study focuses[7] to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social, or political implications.[8]

3. Research And Discussion

3.1 The Shifting in Separation of Power Doctrine

4 Bernard L Tanya., *Politik Hukum, Agenda Kepentingan Bersama*, Yogyakarta, Genta Publishing, 2012.

5 *Ibid*

6 Andri Winjaya Laksana, Bobur Sobirov., Comparative Study of Criminal Law Enforcement Against Drug Addicts Through Religious Rehabilitation Between Indonesia and Uzbekistan, *Madania*, Vol.28 No.1, Juni 2024, page.159-166

7 Zainab Akmal, Sheikh Adnan Ahmed Usmani., Digital Rights and Women's Empowerment In Pakistan: An Analysis Of Contemporary Islamic Legal Perspectives In The Age Of Social Media, *MILRev: Metro Islamic Law Review*, Vol.3 No.1 Januari-Juni 2024, page. 95-118

8 Terry C M Hutchinson, *Researching and Writing in Law*, Toronto, Lawbook Company, 2002.

Historically, the earlier shifting of judicial power is related to the shift theory of separation of power. The first idea of the separation of power horizontally is proposed by John Locke. In his work "Two Treaties of Civil Government", Locke separated the power into three branches of power, namely legislative power, executive power, and federative power. Each power branch has its function. The legislative has the power to formulate the constitutions; the executive has the power to operate the constitution, and the federative has the power to carry international relations with other states.[9] According to Locke, the power to enforce justice is integrated into the executive branch.

The concept proposed by Locke was later partially corrected by Montesquieu in his work *L'Espirit de Lois*. Montesquieu agrees with Locke on the legislative and executive power but disagrees on the integration of judicial power into the power of the executive. According to Montesquieu, the judicial power is regarded as an autonomous status to prosecute the violations of law.[10] In his argumentation, Montesquieu stated that *"... there is no liberty if the judiciary power be not separated from the legislative and the executive. Was it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator? Were it joined to the executive power, the judge might behave with violence and oppression".*[11] This is the same case for legislative and executive, Montesquieu stated that *"when the legislative and the executive powers are united in the same person or the same body of magistrate, there can be no liberty".*[12]

According to Montesquieu, the power of legislative, and executive. Judicative must be separated from one and the other, either their respective tasks (function) or their organizing tools (institutions) [13]. The separation is known as *Trias Politica*. Montesquieu emphasized the freedom of the judicial body to give protection for the human rights of the citizens who at that time had fallen victim to Bourbon King despotism [14]. Meanwhile, Locke's argumentation is heavily influenced by the constitutional practice of England that put the highest judicial power in the legislative body known as the House of Lords.

After the 1945 Constitution was amended, there was a fundamental change that people's sovereignty was no longer fully implemented by the MPR, but was implemented by many state institutions according to the provisions stipulated in the constitution. This means that the duties and authorities of state institutions receive direct attribution from the 1945 Constitution as a manifestation of the will of the people.[15]

9 John Locke., *Two Treatises of Civil Government*, London, J.M Dent and Sons, 1960.
10 Benny K Harman., *Konfigurasi Politik Dan Kekuasaan Kehakiman*, Jakarta, ELSAM, 1997.
11 *Ibid*.
12 *Ibid*.
13 Roelof Kranenburg., *Ilmu Negara*, Jakarta, Viva Studi, 1997.
14 Miriam Budiardjo., *Dasar-Dasar Ilmu Politik*, Jakarta, Gramedia, 1989.
15 Sri Nur Hari Susanto., Pergeseran Kekuasaan Lembaga Negara Pasca Amandemen UUD 1945 Masalah-Masalah Hukum, Vol.43 No.2, April 2014, page. 279-288

The concepts proposed by Locke and Montesquieu further developed by van Vollenhoven by dividing the state's power into four functions, namely *regeling*; *bestuur*; *rechtspraak*; and *politie*. This separation of power into four functions is later known as "*Catur Praja*" in Indonesia.[16] In the four functions theory, *regeling* means the state's power to form a regulation. *Bestuur* is a power branch that performs the function of government. Meanwhile, *rechtspraak* is the branch of the state's power that runs the judicial function. The difference with the theories proposed by Locke and Montesquieu is that Vollenhoven introduced *politie* as a branch of power that functions to maintain the order of the public and the state.

3.2 The Shifting in Imperative Legal State

In connection with the shift in the theory of separation of powers, the shift in legal politics in judicial power cannot be separated from the idea that the rule of law is the basis for justice and power in determining the form of the system government. [17]

Historically, the idea of *rechstaat* has emerged among German thinkers since Immanuel Kant, Paul Laband, Julius Stahl, Fichte, and Otto Von Gierke. Julius Stahl, for example, stated that there are at least 4 elements of *rechstaat*, namely: (i) the protection of human rights, (ii) the division of power, (iii) Government based on law, and (iv) independent state administrative court.[18]

In correlation with the concept stated by Stahl, the experts further reflected in a different formulation with no major substantial difference. For example, [19] formulated the main characteristics of *rechstaat* as follows; (i) the presence of a state constitution or constitution that includes a written provision on the relationship between the ruler and the citizen; (ii) the presence of a state's power division covering the constitution maker in the parliament, a free judicial power that not only handle the legal actions between individuals and the society, but also handle the legal actions between the government and the society, and the government and their actions on the constitutions. (iii) the authorization and protection of the citizen's rights. Stated the characteristics of *rechstaat* are[20]: (i) the presence of the state's power limitation towards individuals, the limitation is performed by the laws; (ii) individual rights violation is only permitted through the fundamental law regulations (legality principles); (iii) the presence of human rights (absolute rights); (iv) the presence of

16 Jimly Asshiddiqie., *Pengantar Hukum Tata Negara Jilid II*, Jakarta, Sekretariat Jenderal dan Kepaniteraan MKRI, 2006.

17 Zahra, Sinaga & Firdausi., Problematika Independensi Hakim Sebagai Pelaksana Kekuasaan Kehakiman, *Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance*, Vol.3 No.2, 2023, page. 2009–2025.

18 Adi Sulistiyono., *Negara Hukum Kekuasaan, Konsep, Dan Paradigma Moral*, Surakarta, Lembaga Pengembengan Pendidikan (LPP) dan UPT Penerbitan dan percetakan UNS (UNS PRESS) Universitas Sebelas Maret, 2007.

19 Hadjon, Philipus M., *Pengantar Hukum Administrasi Indonesia*, Yogyakarta, Gadja Mada University Press, 2011

20 Gautama, Sudargo., *Pengertian Tentang Negara Hukum*, Bandung, Alumni, 1973

separation of power; (v) unbiased judicial bodies. Meanwhile, proposed four characteristics of *rechstaat*, namely[21]: (i) legality principle, every action of the government must be based on the fundamental constitution; (ii) separation of power, this requirement means that the state's power must not be held in one hand only; (iii) basic rights. Basic rights are legal protection targets for the citizens along with power limitation of the constitution maker; (iv) the availability of channels through courts that are free to examine the government's actions.[22] The main substance of the explained theories is the idea of protection for human rights with the law as the main facilitation. The elements of power division, legal-based government, and independent administrative court are the complementary elements for ensuring the protection of the citizen's rights. In other words, all the *rechstaat* elements are efforts of power limitation and control to protect the citizen's rights well.

It can be said that *rechstaat* does not only limit and divide the state's power to several branches but also ensures legal protection for the state's citizens. The legal assurance in this context is a guarantee of the state's citizens' rights in their lives. This assurance is important to ensure that the state is there to protect their rights.

In the few countries in Continental Europe, the citizen's complaints can be sent through petitions. Countries like the Netherlands put the right to deliver a petition on the government's action as the basic rights of their citizens. The complaints further developed and could be submitted through judicial institutions. This thing established the state administrative court where the government's legal actions in the form of *beschikking* can be questioned in the court. All these ideas of power limitation are based on the assumption that the sources of disaster caused by power are considered by an excessive degree of power concentration or the absence of rigid limitation towards the particular power.

It needs to be emphasized that since Montesquieu revised John Locke's concept, the judicial power held a central position as a pillar of a modern democratic state. The revision carried out by Montesquieu not only let go of the executive power hegemony on judicial power but also developed as an inspiration to end the superiority of the parliament legacy of Ancient Greece.

In the concept of 4th BCE Ancient Greece, the parliament is the axis of the Republic. Parliament is the only main institution of the state. In Jean Bodin's reflection on the particular Greek Concept, he stated "Where there is no legislative power, there are no *republica*, no official government, and therefore,

21 Suseno, Franz Magnis., *Etika Politik: Prinsip-Prinsip Moral Dasar Kenegaraan Modern*, Jakarta, Gramedia, 1991

22 Abdul Kadir Jaelani, Ahmad Dwi Nuryanto, Rakotoarisoa Maminirina Fenitra, M. Misbahul Mujib, Resti Dian Luthviati., Legal Protection of Employee Wage Rights in Bankrupt Companies: Evidence from China, *Legality: Jurnal Ilmiah Hukum*, Vol.31 No.2, September-2023, page. 202-223

there is no state".[23] Hence, the power and products resulting from the parliament cannot be disturbed. As a result, the principle of 'constitution cannot be disturbed' becomes sacred, and the judge obeyed the principle by acting as a funnel of the constitution, hence the judge's task is to obey the constitution in the literal sense.

The concept that stayed for quite a long time in Continental Europe was eventually abandoned around the 18th century due to the idea proposed by Montesquieu through *Trias Politica*. From there on, the idea of judicial review of legislation entrusted to the judicial power appeared. Post-18th century Continental European countries finally put judicial institutions in the same position as legislative institutions and executive institutions. Even in particular matters, the judicial power is superior to the other institutions.

In the practice of modern states nowadays, the judicial power becomes the facilitator for controlling other institutions. The power includes; (i) judicial review of the constitutionality of legislation; (ii) supervising and control of the relevance of the government's action performed by the executives according to the applicable legal basis; (iii) in several countries, judicial power acts as on arbitration when a juridical conflict occurred between the state's institutions on each functional authority.

This explained that judicial power became the power branch with the authority to guard the law supremacy on all the branches of power. Judicial power has become one of the essential elements of the modern legal state. Hence, anytime a person discusses a legal state, they inclusively discuss the independent judicial power. All the theories on legal state, whether from Stahl, Sheltema, Van Wijk, Konijnenbelt, or Zippelius put judicial power as a vital power in the modern legal state.[24]

In conclusion, the shifting condition of imperative law, particularly in the context of modern legal states,[25] reflects the evolution of judicial power as a central element in ensuring the supremacy of law. Montesquieu's Trias Politica paved the way for judicial review, which allowed courts to become arbiters of not only the constitutionality of legislation but also the actions of other state institutions. As legal theories from Stahl, Sheltema, Van Wijk, Konijnenbelt, and Zippelius emphasize, the judiciary plays an essential role in balancing the branches of government, safeguarding the rule of law, and acting as a check on both legislative and executive powers. This shift underscores the growing importance of an independent judiciary as a cornerstone of legal order in contemporary state systems.

3.1.1 The Shifting in Legal Policy

23 Carl Joachim Friedrich., *The Philosophy of Law in Historical Perspective*, Chicago, Chicago University Press, 1969.

24 G J Wiarda., *Drie Typen Van Rechtsvinding*, Zwolle, Tjeenk Willink, 1980.

25 Jürgen Habermas., *Contributions to a Discourse Theory of Law and Democracy*, The New Social Theory Reader, Routledge, 2008, page. 9

Legislation regarding the judicial system in Indonesia, which also includes the amended 1945 Constitution,[26] has been on a new path. Previously, the judicial power's autonomy is barely sufficient. However, after the constitutional amendment, full autonomy has been given for judicial power. Judicial power is not only autonomous in the term of adjudication, but also autonomous in the term of management in their institution whether it is organizational, administrative, or monetary. Even, the leadership appointment of The Supreme Court which was previously done by the legislative, now is fully carried out by The Supreme Court.

The greatest move resulted from the 1945 State Constitution amendment does not only explicitly mention the independent judicial power. Article 24, Paragraph (1) of the 1945 State Constitution stated that judicial power is an independent power to administer justice to enforce the law and justice. Not only that, Article 24 Paragraph (2) of the 1945 State Constitution mandated that judicial power is not only carried out by The Supreme Court, but also by the Constitutional Court. For a judge, Article 24A Paragraph 2 of the 1945 State Constitution explicitly determined that the Supreme Judge must have integrity and flawless personality, fair, professional, and experience in the legal field. To guard the judge's independence and integrity particularly, the 1945 State Constitution Amendment issued a new institution called "the Judicial Commission"

To amplify the great change in the judicial power post-amendment of the 1945 State Constitution, a series of adjustments has been implemented through 2003-2004 (read: the changes and establishment of several laws); (1) Law No. 24 of 2003 concerning the Constitutional Court (UU No. 24/2004), (2) Law No. 4 of 2004 concerning Judicial Power (UU No. 4/2004), (3) Law No. 5 of 2005 concerning the Supreme Court (UU No. 5/2004), (4) Law No. 8 of 2004 concerning General Courts (UU No. 8/2004), (5) Law No. 9 of 2004 concerning State Administrative Courts (UU No. 9/2004), and (6) Law No. 22 of 2004 concerning the Judicial Commission (UU No. 22/2004). The development of an independent judiciary in Indonesia, particularly after the amendments to the 1945 State Constitution, marks a significant turning point in strengthening the rule of law and the balance of power among the branches of government. The explicit mention of judicial independence in Article 24, Paragraph (1) of the Constitution establishes the judiciary as a distinct, autonomous branch tasked with enforcing law and justice free from external interference. This is a fundamental step toward ensuring that judicial power operates without influence from the legislative or executive branches, safeguarding the impartiality and fairness necessary for a functioning legal system.

This shift has caused a non-repressive legal politic. However, the power within the state is managed through the check and balances mechanism according to the genuine principles of *trias politica*. As emphasized by Montesquieu, the separation of powers means that each branch of power must be held by

26 Leli Tibaka, Rosdian., The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of the Republic of Indonesia*, Fiat Justicia*, Vol.11 No.3, July-September 2017, page. 266-288

different officials and should not concurrently hold positions in other branches of power.[27] The meaning behind the concept states that the authority owned by the government is always potentially misused. To prevent that, the state's power should not be centralized and monopolized by a certain ruler or group. The state's power must be divided. This idea of power division is carried out equally to obtain certainty that the citizens' political freedom is not broken.

Congruent to the *Aufklärung* concept, the question of freedom is indeed an important thing in Montesquieu's thought. The idea of the necessity of guaranteeing freedom encouraged Montesquieu to fight for the need for power limitation through checks and balances mechanisms between existing powers. According to Montesquieu, *Trias Politica* is a mechanism that can guarantee the realization of the will of the people in a society that has a government.[28] Montesquieu argued that if the powers in the state were strictly separated each power being performed by an independent body it would eliminate the possibility of arbitrary actions from a ruler.[29] In short, *Trias Politica* narrows the possibility of the birth of an absolutistic government. Montesquieu considered a strict separation of powers between the three powers in the *trias politica*, which is a prerequisite for political freedom for citizens.

Directly or indirectly, Montesquieu led us to constitutionalism. Friedrich formulated constitutionalism as "an institutionalized system of effective, regularized restraints upon governmental action".[30] Likewise, Hamilton interpreted constitutionalism as, "...the name given to the trust which men repose in the power of words engrossed in parchment to keep a government in order".[31] In order to achieve the goal "to keep a government in order", such arrangements are needed, consequently, the power dynamics in the government process can be limited and controlled to avoid oppressing the people's basic rights. The idea of regulating and limiting power naturally arises because of the need to avoid abuse of power by the rulers. This idea is related to the historical experience in 16th and 17th century Europe. When nation-states took on a very strong, centralized, and very powerful form during those centuries, there was an atrocious practice of authoritarianism. This occurrence sparked resistance to end the cruelty. This was the beginning of the emergence of the idea of protecting the people's basic rights which later crystallized in the Constitution and constitutionalism which is a guarantee of legal protection for the people.[32]

27 Montesquieu., *The Spirit of Law*, New York, Hafner Press, 1949.
28 *Ibid*.
29 *Ibid*.
30 Carl Joachim Friedrich., *Man and His Government; an Empirical Theory of Politics*, New York, McGraw Hill, 1963.
31 Dossy Iskandar Prasetyo., *Ide Normatif Mahkamah Konstitusi Dalam Konteks Cita Hukum Dan Negara Hukum*, Malang, Brawijaya University, 2006.
32 Daria Bulgakova and Deruma, Sintija., The Liability of Online intermediaries Under European Union Law, *Kyiv-Mohyla Law & Politics Journal,* Vol.8 No.9, 2023

Therefore, constitutionalism nowadays is considered a necessary concept for every modern country that is rooted in human rights,[33] democracy, and the rule of law. The basic material was the people's victory spearheaded by the bourgeoisie to overthrow the *standestaat*[34] system that prevailed at that time. In this way, general agreement and agreement between the majority of the people becomes the basis for the format of an ideal state, a democratic legal state. State organization is needed by the people to protect and promote their common interests through the establishment and use of a mechanism called a constitution in the spirit of constitutionalism.[35]

The philosophy of constitutionalism was formulated by Francois Hotman as: "A people can exist without a king... whereas a king without a people cannot even be imagined".[36] People can live without a king, but not vice versa. Constitutionalism is not primarily constitutional rules, but the final principle on citizens' rights. That is why the understanding of constitutionalism has become synonymous with the principle of legal state because this pair of principles operate for the same purpose, namely the protection of citizens and the supremacy of the law. Therefore, a universal creed regarding the inevitability of the relationship between democracy, legal state, and constitutionalism is accepted, with mutual reliance and mutual need.[37]

According to Andrew, generally, the consent to guarantee constitutionalism enforcement in the modern day is known through three elements of consent.[38] First, the consensus concerning collective purpose and goals. This consensus greatly decides the constitution and constitutionalism enforcement in a country because a collective goal most likely reflects the same interests among the citizens with their plurality and heterogeneity.

Secondly, the consensus on the rule of law as the base of the governance or state administration. This consensus is crucial to fulfilling the need for the collective belief that whatever is intended to be done in the context of state administration has to be based on the supremacy of law, not on the needs of individuals in power. In the United States of America, this doctrine is developed as a monumental and seminal motto, "the rule of law, and not of Man". This motto demonstrates that the law is governing a state, not the human will, which per idea teaches that ruling has laws.[39]

33 Yusna Zaidah, Raihanah Abdullah., The Relevance of Ihdad Regulations as a Sign of Mourning and Human Rights Restriction, *Journal of Human Rights, Culture and Legal System* Vol.4 No.2, July 2024, page. 422-448

34 *Ibid*.

35 William G Andrews., *Constitutions and Constitutionalism*, Princeton, Van Nostrand Company, 1968.

36 Rocky Gerung., Etika Dan Tugas Politik Oposisi, in *Panduan Parlemen Indonesia* (Jakarta: Yayasan API, 2001, page.18.

37 *Ibid*.

38 Andrews William G Andrews., *Constitutions and Constitutionalism*, Princeton, Van Nostrand Company, 1968.

39 Deky Rosdiana., Spyware in Intelligence Espionage Operations as a Threat to the State, *Kyiv-Mohyla law & Politics Journal*, Vol.8 No.9, 2023.

Thirdly, the consensus regarding the form of institutions and the constitutional procedures. This consensus is related to (a) the structure of the state's organs and the procedures managing the power, (b) the relations of these state organs with one another, (c) the relationships between the state's organs with the nation's citizens.

The point of all the explanations is that limited government is a core conception of constitutionalism. Therefore, Andrews stated that "under constitutionalism, two types of limitations impinge on government: power proscribe and procedures prescribed", power is prohibited and procedure is determined.[40]

Hence, the function of constitutionalism includes at least three things as stated by Andrews: (1) determining the limitation of powers, (2) giving legitimation on the government's power based on the rule of law, (3) as an instrument to transfer the authority from the constituent power to the state organs power.

In conclusion, the shifts in legal policy, particularly following the amendments to the 1945 State Constitution, reflect Indonesia's deliberate efforts to fortify the independence and integrity of its judiciary. By explicitly recognizing judicial power as autonomous and free from external interference, the amendments have paved the way for a more balanced system of governance, where judicial oversight is crucial in maintaining the rule of law. These changes ensure that the judiciary can function impartially, without being subordinated to the legislative or executive branches. The development of laws such as those establishing the Constitutional Court and Judicial Commission further consolidates the judiciary's role as a guardian of constitutional values and justice. These shifts are a vital step toward promoting good governance, legal certainty, and public trust in the legal system.

3.1.2 The Shifting in the Presence of the Constitutional Court of Indonesia

The legal politics shifting of judicial power post-amendment of the 1945 State Constitution is a shift related to the presence of the Constitutional Court. The presence of this institution has a great juridical constitutional significance for the existence of the democratic and modern legal state in Indonesia.

Firstly, the presence of the Constitutional Court as the guardian of the constitution simultaneously ends the political power (parliaments or People's Consultative Assembly) as the interpreter of the Constitution. This means the supremacy and autonomy of laws are achieved. According to Roman Herzog, a country that does not have a constitutional court will result in gaps in ideas within the constitutional texts with the political beliefs embraced by the politicians.[41]

Secondly, with the authority to perform a judicial review on constitutions, The Constitutional Court could straighten out the content of the laws (Constitutions)

40 *Ibid*.
41 Satya Arinanto., *Ditunggu Peran MA Sebagai Constitutional Court*, *Kompas*, Jakarta, 1999.

following the constitution norm as the highest law.[42] Consequently, the smuggling of political interests that are always synonymous with Constitutions as products of politics can be evaluated in a juridical-constitutional way. The Constitutional Court's authority of judicial review on Constitutions is very strategic as a media for determining legal politics since it is a legal product located in the middle. On the above, the relevance of the Constitution will be examined according to the legal requirements and goals within the constitution. Meanwhile, downwards, the examined Constitution becomes a touchstone for the regulations below. Consequently, the decision of the Constitutional Court's decision on the judicial review has the potential as a guiding principle, critic norms (evaluation principle), and motivating factor for law enforcement (establishment, discovery, law application, and legal behavior) in this country.

Thirdly, through the authority to handle disputes between state institutions, dissolution of political parties, decisions on disputes over general election results, and examine the violations conducted by the president or vice president. The Constitutional Courts have the opportunity to perform judicialization of politics. This demonstrates that politics or power is limited by legal norms. In other words, politics and power are below the control of the law, and therefore it is always possible to conduct a legal justice.

Fourth, in the position of the guard of constitution, The Constitutional Court has the opportunity to guide the legal political direction to be in line with the legal goals within the constitution. This whole time, deciding the legal political direction is mostly carried out by political institutions and not by legal institutions. The absence of institutions that have the authority stated above will cause uncertainty in the national legal political line.

In legal-formal, there is no particular authority given to the Constitutional Court to handle legal politics matters. However, it does not mean that The Constitutional Court has no opportunity to direct the legal politic. The Constitutional Court has to present itself as the spearhead in setting the direction of legal politics because of two things; First, The Constitutional Court is the guard of the basic law (the highest law which is the basil of all positive law). Second, this guarded basic law includes the main ideas of directions of the legal politics that have to be realized in the positive law. Therefore, logically, the duty to direct the legal politic is inherent within The Constitutional Court as the guard of constitution.

To perform this duty, The Constitutional Court has to be bold enough to creatively interpret the constitution as a whole. This is because the legal politics matter (in the main ideas of the 1945 State Constitution Opening) is not possible to be found directly through the requirements of constitution paragraphs. The aim of legal politics in the constitution cannot be obtained by text-literal interpretation of constitution paragraphs. It must be dug to explore

42 Dossy Iskandar Prasetyo., *Ide Normatif Mahkamah Konstitusi Dalam Konteks Cita Hukum Dan Negara Hukum*, Malang, Brawijaya University, 2006

the principles within the opening since the opening contained the goals of the constitution.

Therefore, The Constitutional Court Judges have to be more comprehensively oriented in philosophy. As stated by Bernard L. Tanya in his law theory book, "It is not enough for us to just have the skill to read the rules in *rechtsdogmatiek*". Furthermore, the judges must have the ability to read while considering the teleology and context as proposed by the theory of natural law, *interessenjurisprudenz*, *freirechtslehre*, sociological jurisprudence, realistic jurisprudence, critical legal theory, human jurisprudence, psychoanalytic jurisprudence, feminist legal theory, responsive law or progressive law.[43] In summary, to interpret the constitution that is true, good, and appropriate, a judge with various perspectives is needed. The explanation of legal political spirit through judicial review must depend on the wisdom of the constitutional judges to interpret the main ideas in the constitution. They have to act as a creative lawyer who is expected to make decisions with "guiding principles" quality to guide the legal politics in Indonesia.

In conclusion, the shifting existence of the Indonesian Constitutional Court represents a pivotal transformation in the country's legal and political framework. Established through the amendments to the 1945 State Constitution, the Constitutional Court was created to ensure constitutional oversight, offering a specialized judicial body to review the constitutionality of laws and resolve disputes between state institutions. Its existence marks a profound shift in Indonesia's commitment to upholding the supremacy of the Constitution, reinforcing the separation of powers, and protecting fundamental rights. By serving as a check on legislative and executive actions, the Constitutional Court has become a cornerstone in safeguarding democracy, legal certainty, and the principles of justice in Indonesia. This shift reflects a broader evolution towards a more robust and accountable legal system, promoting the rule of law and protecting constitutional governance.

4. Conclusion

Historically, the earliest shift in judicial power is related to the theory of separation of power which was proposed by John Locke and further improved by Montesquieu with the theory of *Trias Politica*. According to Montesquieu, "…there is no liberty if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislato. Were it joined to the executive power, the judge might behave with violence and oppression". On the matter of legislative and executive, Montesquieu also stated, "When the legislative and the executive powers are united in the same person, or in the same body of magistrate, there can be no liberty". Locke's and Montesquieu's concept are further developed by van Vollenhoven that separates the state power into four functions namely *regeling*,

43 Bernard L Tanya, Yoan N Simanjuntak, and Markus Y Hage., *Teori Hukum : Teori Tertib Manusia Lintas Ruang Dan Generasi*, Yogyakarta, Genta Publishing, 2013.

bestuur, *rechstpraak*, and *politie*. The four separations of the state power are known as "*Catur Praja*" in Indonesia. Besides the shifting in the separation of powers theory, the shifting in legal politics in judicial power cannot be separated by the idea of a legal state. Historically, the idea of rechstaat has already been raised among German thinkers since Immanuel Kant, Paul Laband, Julius Stahl, Fichte, and Otto Von Gierke.

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