

CHAPTER IV

RESULTS AND DISCUSSION

A. IMPLEMENTATION OF JUDICIAL INDEPENDENCE IN THE CONSTITUTIONAL COURT RELATING TO DISPUTES BETWEEN STATE INSTITUTIONS.

The Constitution of the Republic of Indonesia of 1945 confirms that Indonesia is a legal state. In line with such provision, the most important principle of the law is the guarantee operation of the judicial authorities is independent, free from the influence of other powers to carry out justice to uphold the law and justice. According to the 1945 Constitution, judicial power as an organizer of the state is one of the organizers of the state agency, in addition to the MPR, DPR, President and BPK. As the state administration bodies, the structure of judicial authority is different from the composition of other state agency providers. The judicial power consists of the highest judicial authority and judicial authority levels are lower. Meanwhile, organizers of other state agencies consist of only one composition. There is no body composition of the MPR, DPR, President and BPK, the lower levels.

Judicial authority is an independent authority to hold the judiciary to uphold the law and justice, regardless of the influence of government power, such as the desired article 24 of the 1945 Constitution. This means that an independent judicial authority or independence of judicial authority constitutionally set in the 1945 Constitution. From the concept of the law as outlined by the Constitution, then in order to implement Article 24 of the

1945 Constitution must strictly prohibit the power of state government (executive) to limit or reduce the authority of an independent judicial authority that has been guaranteed by the constitution. Thus, an independent judicial authority influence of government power, in an effort to guarantee and protect freedom of the people of the possibility of arbitrary action of government.

The principle of independent judicial power as one of the joint operation of the Unitary Republic of Indonesia, is inseparable from the principle that the state of Indonesia are state based on the constitution and state the law. 1945 Constitution confirms that Indonesia is a legal state. In line with such provision, one important principle of the law are the guarantee operation of the judicial authorities are independent, free from the influence of other powers, to hold the judiciary to uphold the law and justice.

To understand the principle of an independent judicial power, is inseparable from the doctrine of Montesquieu on the objectives and the need for 'separation' of power, namely to ensure the existence and implementation of community members state of political freedom. Montesquieu gave the meaning of political freedom as "a Tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be as constituted as one man need not be Afraid of another ".³³ Political freedom characterized by a sense of security, because everyone was guaranteed the security or safety. To realize this political

freedom, the government agency must be arranged in such a way so that people do not feel afraid of him, just as every person does not feel afraid towards other people around him.

Structuring of state or government agency that will guarantee the freedom, according to Montesquieu was done by separation of government agencies into three branches of power. Without separation, then there will be no freedom. Put forward by Montesquieu in 'The Spirit of the Laws' in justification of the doctrine of separation of powers (separation of power), that: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise; lest the same monarch or senate should enact tyrannical laws, to execute than in a tyrannical manner."³⁴ Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the live and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to executive power, the judge might behave with violence and oppression. There would be an end of everything, were to some man, or somebody, weather of the nobles or of the people, to the exercise those three powers, that of enacting laws, that of executing the public resolution and of trying the causes of individuals." 2004,

If the judicial authority coupled with legislative powers, then the person's life and liberty would be in a control carried out arbitrarily. On the

³⁴ Montesquieu, 1995. *Montesquieu, Pengantar Tiga Politik*. Jakarta: Pustaka Utama Grafiti

other hand, if the power of the judiciary together with the executive power, then the judge probably will always act in the arbitrary and oppressive. Therefore, viewed from the doctrine of separation of powers, an independent judicial authority is part of efforts to secure freedom and prevent abuse.

In the Indonesian state administration system is not adopted for the separation of powers doctrine (separation of power) '*Trias Politica*' as proposed by Montesquieu. But with the 1945 Amendment to say that Indonesia is building the law doctrine of separation of powers and the authority of each possible existence of supervisory authority towards authority of other powers so as to offset each other in equality and equality, in order to create harmony rule are in balances, or 'checks and balances Among of powers', to prevent arbitrariness or abuse of power.

The existence of restrictions on state power and state organs by way of applying the principle of power sharing in a vertical or horizontal separation of powers. In accordance with the iron the law of power, every authority must have a tendency to develop into arbitrary, as proposed by *Lord Acton*: "Power tends to corrupt, and absolute power corrupts absolutely." Therefore, power should always be restricted by dividing power into branches that are 'checks and balances' on equal footing and balance each other and control each other. Limitation of power is also done by dividing the power into the several organs arranged vertically. That way, power is not

centralized and concentrated in one organ or one hand a possibility of abuse

Independent and impartial judiciary is an absolute must have in every State of Law. An independent judicial authority may be regarded as a reflection of the 'Universal Declaration of Human Rights', and 'International Covenant on Civil and Political Rights', in which the set of "independent and impartial Judiciary." In the Universal Declaration of Human Rights, stated in Article 10, "Every one is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him ". Everyone is entitled in full equality heard his voice in public and fairly by the courts of an independent and impartial, in terms of setting the rights and obligations and of any criminal charge against him. In the International Covenant on Civil and Political Rights, in Article 14 stated,³⁵ "... in the determination of any criminal charge against uterus, or of his rights and obligations in a suit at law, everyone Marshall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ".

In connection with an independent judicial authority, said by Russell in 'Toward a General Theory of Judicial Independence': "A theory of judicial independence that is realistic and cannot be analytically useful Concerned with every inside and outside influences on Judges". In things that the free judges in the judicial process, according to Kelsen: "The Judges are, for instance, ordinarily 'independent' that is, they are subject only to the laws and not to the orders (instructions) of the superior judicial or administrative

organs". The trial judge is only subject to the law and not subject to orders or instructions from the judicial or administrative organ of the higher. How important the judicial authority, Harold J. Laski in the "Elements of Politics" argues, "Certainly no man can over estimate the importance of the mechanisms of justice".³⁶ In relation to an independent judicial authority, Scheltema in 'De rechtsstaat', argued: *"Beslissing van rechtsgeschillen door en onafhankelijkerechter is de basis voor een goed functionerend rechtssystem. Wil men ook garanderen dat de overheid zich houdt aan het geldende recht, dan zal onafhankelijke rechter over klachten van burgers dienaangaande moeten oordelen. Aan deze eis wordt in ons voldaan."*³⁷

Alexander Hamilton in The Federalist explaining judicial independence is to illustrate the comparison between the powers possessed by the three branches of power: in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither

FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.³⁸

So, according to Hamilton judicial independence is necessary because of the three branches of power, the judiciary is "the least dangerous to the political rights of the Constitution".

The judiciary has no influence both power (sword) and financial (purse) when compared with the executive and legislative powers. Judicial authority only has power in the form of 'decision' alone (judgments).

Lubet said that judicial independence contains basic values: fairness, impartiality, and good faith. Independent judges who will give equal opportunity and open to each party to be heard without linking it to the identity or social position these parties. An independent judge will be impartial, free from the influence of unrelated and immune from outside pressure. An independent judge to decide based on honesty (good faith), under the law as he knows, regardless of the consequences that are personal, political or financial.

John Ferejohn (1998) mentions, that in principle the goal of judicial independence are to facilitate the three certain value. Such as:³⁹

1. Judicial independence is a necessary condition for maintaining a state of law.

³⁸ Christopher M.Larkins, *judicial independence and democraton*, the american journal of komparatif law, vol 44. No 4, hlm 669-610

³⁹ *judicial independence and democraton*, the american journal of komparatif law, vol 44. No 4, hlm 669-610

2. In a constitutional government, constitutional law only to have the legitimacy that must be upheld and the court must have the ability to perform the task in deciding the law.
3. There is a need for the court to have the freedom to cancel the legal state which violates those values. Third, in a democratic state, the court must have strong autonomy in resisting the temptation to give too much respect for the holders of economic or political power.

The Universal Declaration of Human Rights 1948 states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal" (Art. 10). Similarly, in The International Covenant on Civil and Political Rights (ICCPR), 1966 stated that: "everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" (Art. 14 (1).)

Meanwhile, in the Basic Principles on the Independence of the Judiciary which is produced in the Seventh United Nations Congress on the Prevention and the Treatment of offenders in 1985 stated, that:⁴⁰

1. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason;

⁴⁰*Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 12 December 1985. [journal.htm_4](#)

2. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law;
3. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law. (Basic Principle, article 2-4)

The provisions in the Basic Principles stipulates several areas of judicial independence, including the main elements of the decision of the judge or court decision, impartiality, freedom from outside influence. Only with the existence of an independent judiciary, judges can decide cases in an impartial and fair, because "state the law" requires a judge who is not afraid or worried about the consequences or reprisals from outside parties.

Meanwhile, in The International Bar Association Code of Minimum Standards of Judicial Independence, 1987 mentions the limitations of judicial independence that includes personal freedom, independence substantive, the internal independence, and independence of the collective. Personal independence requires that judges that filling the vacancy, including appointment, transfer, and payroll is not established by and under the executive decision. Independence substantive restrictions to a judge must give his own verdict on the basis of reasoning or argumentation the law itself, not on the basis of interpretation others. Internal independence means a judge

should be able to take decisions without interference from colleagues or superiors. Collective independence refers to the fact that a court is an agency or institution that does not depend on the power of government to another.

Harold See mentions the existence of two perspectives of looking at judicial independence.⁴¹

1. First, the perspective of separation of powers in the form of institutional independence (institutional independence) power of the judiciary from other branches of government. Its aspects including organizational, administrative, personnel, and financial.
2. Second, the perspective of democracy in the form of independence in making decisions (decisional independence). This relates to the special obligation of the courts towards state the law.

Justice is not just one branch of government in the judicial authorities, but carries out the functions to ensure the realization of state the law. Inside is the protection of the independence of judges in deciding the effect of different interests.

The same is proposed by John Ferejohn (1988) which states, that emphasizes the traditional conception of judicial independence as freedom from interference by government officials. In addition there is a broader conception that views the judicial independence of social and economic interests are very strong.⁴² However, judicial independence is not an end

proposed state the law and protects freedom and human rights. When judges speak of judicial independence as an end in itself, it will result in the public and other branches of power who think that justice as superior towards other branches of power. Therefore, judicial independence does not mean absolute independence. Justice is not free from all influences and he only is free from undue influence. For example, the power of the judiciary is not free from criticism, but he is free from unjust criticism, intimidation, or retaliation.

In this regard, judicial independence is not in a vacuum chamber. Judicial independence does not mean isolation judicial or judicial separation. Independence remains in a relationship of interdependence with other branches of power. This is as said by one of the U.S. Supreme Court: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a work-able government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

In this case the Constitutional Court is expected to become one of the important institutions that are able to show that realize the State of Law is not something that cannot be achieved. To arrive at the will of that, the Constitutional Court must be maintained and built the independence and integrity.

In the explanation of Article 24 of the Constitution of 1945 before the amendment of the text states that "power is the power of an independent judiciary." This will be that it also noted an independent power means "free

from the influence of government power" and to do that "must be guaranteed in the law on the status of judges".

If the script above is compared with the post-1945 constitution, amendments mentioned in the constitution "judicial power is the power of the free ..." This means that the text in the constitution there is nothing different with article constitution before the amendment. However, in the script before the amendment is an explanation which defines the purpose of an independent authority.

The judicial power in the constitution of post-amendment must be interpreted not only covers the Supreme Court and judicial institutions that are below it but also including the Constitutional Court. Within post-amendment to the constitution there is another sentence that describes an independent judicial authority by stating "... the power of the free ..." was intended to "... uphold the law and justice ..." When done free then the whole sentence interpretation concerning the constitution of an independent judicial authority must be addressed to guarantee and ensure that is used to enforce law and justice.⁴³ This is what distinguishes articles with the constitution after the previous amendment.

A guarantee for independent or judicial authority that has the independence is a precondition that cannot be negotiable. Various international legal instruments also mention explicitly the importance of judicial independence. Several documents which raised in the Universal

Declaration on the independence of justice, Montreal 1983. Within one of Alinea on the preamble declaration that stated "... independence must be guaranteed to international Judges, National Judges ..." As well as in the Beijing Statement of Principles of the Independence of the Judiciary Law in the Asia Region are put forward at the point 2 "... An independent Judiciary is Indispensable to the implementation of these rights".⁴⁴

Within other international documents independence also raised a limitedly as well as those in the International Bar Association Code of Minimum Standards of Judicial Independence, New Delhi 1982; Viena Declaration and Programme for Action 1993, Declaration of Human Rights article 10); and International Covenant on Civil and Political Rights (article 14).

Within Universal Declaration on the Independence of Justice, in one part, specifically addressed issues related to independence. There are at least 10 (ten), an important point raised in that part, some of which are among other states:⁴⁵

- a. first, "Judges promote the principle of due process of law as being an integral part of the independence of justice";
- b. second, "no reservations be made or admitted to treaty provisions relating to the fundamental principles of independence of Judiciary "and
- c. Third, the ethical standards required of National Judges in the exercise of their judicial functions apply to some judges.

⁴⁴Clauspeter Hill, 2009, *Constitutional Review and Separation of Powers Sixth Conference of*
Asian Constitutional Court Judges Singapore, Konrad Adenauer Stiftung journal, 2009, blm 94

Alexander Hamilton in The Federalist explaining judicial independence is to illustrate the comparison between the powers possessed by the three branches of power: in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.

The Constitutional Court is the executive power of the judiciary in addition to the Supreme Court, thus subject to the principle which an independent judicial authority and responsibility. In Law No. 24 of 2003 regarding the Constitutional Court stated that: The Constitutional Court is one of the state institutions which conduct an independent judicial authority to carry out justice to uphold the law and justice. In the event that the authority of the Constitutional Court the authority to hear at the first and last which shall be final, to:

1. Judicial review the law against the 1945 constitution
2. Decide disputes between institutions whose authority is the authority

3. Decide disputes election results, and
4. Decide on the dissolution of political parties.

In addition, the Constitutional Court shall make a decision on the opinion of the House, that the President and / or Vice President is alleged to have violated the law,

When the other government institutions responsible to the people, the judiciary and only the courts that are responsible for the highest moral values and the "judicial rectitude." The concept of judicial independence and accountability are mutually reinforcing each other. Judicial independence with respect to institutional independence of the judiciary is not designed to benefit the individual judge or the judiciary as a body. Judicial independence is designed to protect the people. While judicial accountability cannot work in a vacuum. Judges must work within the rules and based on the oath of office.

In general, judicial accountability related to the concept of good governance. *Bintoro Tjokroamidjojo* accountability translates as "the accountability of the management / administration". Meanwhile, Institute of Public Administration (LAN) defines accountability as: "The obligation to give account or to answer and explain the performance and actions of a person / head of an organizational unit to the party who has the right or the authority to hold accountable".⁴⁶

⁴⁶ Simon batt 's, 2009, *The Constitutional Court's Decision in the Dispute between the Supreme Court and the Judicial Commission: Resolving Judicial Accountability?* Legal Studies Research

Accountability is different from responsibility. Responsibility depends entirely on who is responsible for the holding of a duty or authority. He can perform their responsibilities properly, but can also occur irregularities committed in the name of their responsibilities. While accountability, implementation of responsibility is accountability, could be asked which party has the right to ask to account and can be sued.

Stefan Voigt mentions judicial accountability involves two aspects, namely the procedural aspects relating to judicial conduct, and substantial aspects relating to the judge's decision.⁴⁷ With regard to behavior aspects, to distinguish between behavior in office (e.g., bribery) and behavior outside the office (e.g. the beating of wife / husband). In this verdict, the judge must decide based on the law and evidence presented before the court. In addition, the trial must be conducted in an open court, under the supervision of the public and the press. Similarly consideration in court decisions and behavior in the hearing must be open to criticism from a higher court, legal experts, academic environment, and public and the press.

In that meaning, accountability cannot be enforced without transparency, participation, responsible, and predictability of law (rule of law). Thus, although institutionally independent, but independence or freedom which is owned by a judicial authority is not absolute but must be accountable to the public or the people as well as to law and justice - in accordance with the principle of popular sovereignty and rule of law. In that

regard, if judicial independence is a means to an end, the judicial accountability is the goal itself. Accountability of all government powers, including judicial authorities, in essence is to the people as the goal of democratic governance.

In carrying out its authority, the Constitutional Court has judicial independence. Institutionally, the Constitutional Court is independent from interference by other institutions in upholding the rule of law and justice. This is indicated by a rule that determines, that the organizational, administrative, and financial Constitutional Court under the authority and the authority of the Constitutional Court (Article 13 paragraphs (2) of Law No. 4 of 2004). Provisions were firmer again in Law no. 24 of 2003 which states, that the Constitutional Court is responsible for regulating the organization, personnel, administration, and finance in accordance with the principles of good governance and clean. In his explanation, the provisions of Article 12 is intended to guarantee the independence and credibility of the Constitutional Court in regulating the organization, personnel, administration and finance in accordance with the principles of transparency and accountability.

The provisions in Law no. 24 of 2003 showed, that the judicial independence of the Constitutional Court has not held separately from judicial accountability. Institutional independence of the Constitutional Court is not only to goal of independence itself, but becomes an instrument to ensure the credibility of the Constitutional Court in public. This is reinforced

1. The provisions of the Constitutional Court must publish regular reports to

the public openly with respect to request listed, examined, and decided upon, and financial management and other administrative duties (Article 13 of Law no. 24 in 2003). That way, the independence of the judiciary is accountable to the public. However, it does not mean that the liability is reduced liabilities for financial reporting in accordance with laws and regulations.

The characteristic of a proper governmental system is the existence of a check and balances mechanism in the implementation of authority. The existence of this checks and balances mechanism will enable the mutual control between the existing branches of authority while endeavoring to prevent hegemonic, tyrannical actions, and the centralization of authority. The implementation of the checks and balances principle is required to ensure that there is no overlap among the existing authorities. By referring to the principle of a legal state, then the relevant control system is judicial control. The position of the Constitutional Court as a part of the judicial authority (judicative authority), will encourage the development of the checks and balances mechanism in state administration.

One of authorities of the Constitutional Court is to settle the disputes relating to the authority among state institutions, which are stipulated in the Constitution. There are two requirements that must be satisfied before the Constitutional Court can exercise its authority; there is a state institution and the authority of this institution is stated in the Constitution. The conception of a state institution, the authority of which is specified by the Constitution, may

invite various interpretations⁴⁸. This is because the amended Constitution has no clear conception regarding state institutions, particularly when one considers the emergence of many new institutions, either the ones specified in the Constitution or those not expressly stated in the Constitution. At last count there were at least nine state institutions the authority of which is specified in the Constitution; namely, the People's Consultative Assembly; House of Representatives; Local House of Representatives; President; Supreme Court; Constitutional Court; Finance Audit Agency; and Judicial Commission. Meanwhile, there are many state institutions the authority of which is not directly stated in the Constitution, examples of which include the National Commission of Human Rights, the National Ombudsman Commission (KON), KPKPN, and others.

The meaning regarding state institutions the authority of which is stated in the Constitution may certainly lead to various interpretations as to which institution will fall under the jurisdiction of the Constitutional Court. For instance; whether the Constitutional Court also has the authority to settle disputes arising between Local Governments and the Central Government, and also disputes among Local Governments themselves. The authority is indeed present and generally referred to in the Constitution. However, it is important to clarify whether or not the Local Government and Municipality/City belong to the category of state institution or not. In some

countries such as South Africa, South Korea, Germany, the Russian

Federation, the Czech Republic, and Yugoslavia, the authority of the Constitutional Court also includes disputes between Central Government and Local Government and among the Local Governments

B. LEGAL IMPLICATIONS THAT ARISE IN THE IMPLEMENTATION OF JUDICIAL INDEPENDENCE IN JUDICIAL POWER.

The Constitution of the Republic of Indonesia of 1945 confirms that Indonesia is a state of law. In line with such provision, one important principle of law is the guarantee operation of the judicial authorities are independent, free from the influence of other powers to carry out justice to uphold the law and justice. According to the 1945 Constitution, judicial power as an organizer of the nation is a state agency providers, in addition to the MPR, DPR, President and BPK. As the state administration bodies, the structure of judicial authority is different from the composition of other state agency providers. The judicial power consists of the highest judicial authority and judicial authority levels are lower. Meanwhile, an organizer of other state agencies consists of only one composition. There is no body composition of the MPR, DPR, President and BPK, the lower levels.

The highest judicial authority is run by the Supreme Court together with judicial bodies underneath it, and by a Constitutional Court. According to the 1945 system, the function of the power of the Supreme Court is:⁴⁹

1. Conduct judicial authorities, to conduct an independent judiciary to uphold the law and justice. However, the House serves to control the power of the Supreme Court through the determination of the appointment and dismissal of justices, which was proposed by the Judicial Commission.
2. By considering the recommendations of the Supreme Court, the President was given the right to grant clemency and rehabilitation.

⁴⁹ Montesquie, loc.cit, hlm 180

Constitution of the Republic of Indonesia Year 1945 has introduced a new institution which relates to the conduct of judicial authority that the Judicial Commission. Judicial Commission provided for in Article 24B of the 1945 Constitution, as follows:

1. Is independent Judicial Commission which proposed the appointment of justice's authorities and others having authority in order to maintain and uphold the honor, grandeur of dignity, and the behavior of judges.
2. Members of the Judicial Commission must have knowledge and experience in the legal field and have the integrity and personality.
3. Members of the Judicial Commission shall be appointed and dismissed by the President with the approval of the DPR.
4. The structure, composition and membership of the Judicial Commission shall be regulated by law.

The implementation of Article 24B of the 1945 Constitution, which is the enactment of Law No. 22 of 2004 of the Judicial Commission. The Judicial Commission has an important role in realizing the power of an independent judiciary through the nomination of Supreme Court justices, as well as oversight of judges is transparent and participatory in order to uphold the honor and nobleness dignity, and maintain the behavior of judges. The Judicial Commission is a state institution that is independent and in the implementation of its authority free from interference or influence of other powers. The Judicial Commission has the authority to propose the appointment of Supreme Court Justice to parliament and uphold the honor

and nobleness dignity, and maintain the behavior of judges. From the details of the functions of each institution mentioned above can be seen that the relationship between President, Parliament and Supreme Court, was developed in a balanced manner through the mechanism of 'checks and balances'. Through the mechanism of 'checks and balances', the three branches of the legislative, executive and judicial, as reflected in the three institutions are able to control and balance each other, so there is no arbitrariness in between each other.

Judicial authority is an independent authority to hold the judiciary to uphold the law and justice, regardless of the influence of government power, such as the desired article 24 of the 1945 Constitution. This means that an independent judicial authority or independence of judicial authority constitutionally set in the 1945 Constitution. The other concepts of judicial independence which related to the 1945 constitution are:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the state. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

From the concept of law as outlined by the Constitution, then in order to implement Article 24 of the 1945 Constitution must strictly prohibit the power of state government (executive) to limit or reduce the authority of an independent judicial authority that has been guaranteed by the constitution. Thus, an independent judicial authority can influence of government power

in an effort to guarantee and protect freedom of the people of the possibility of arbitrary action of government.

The principle of independent judicial power as one of the joint operation of the Unitary Republic of Indonesia is inseparable from the principle that the state of Indonesia is a state based on the constitution and legal state. 1945 Constitution emphasized that Indonesia is a state of law. In line with such provision, one important principle of law is the guarantee operation of the judicial authorities are independent, free from the influence of other powers, to hold the judiciary to uphold the law and justice.

To understand the principle of an independent judicial power is inseparable from the doctrine of Montesquieu on the objectives and the need for 'separation' of power, which is to ensure the existence and implementation of community members state of political freedom. Montesquieu gave the meaning of political freedom as "a Tranquility of mind arising from the opinion each person has of his safety."⁵⁰ In order to have this liberty, it is requisite the government be as constituted as one man need not be Afraid of another ". Political freedom characterized by a sense of security, because everyone was guaranteed the security or safety. To realize this political freedom, the government agency must be arranged in such a way so that

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Structuring of state or government agency that will ensuring the freedom, according to Montesquieu was done by separation of government agencies into three branches of power. Without separation, then there will be no freedom. Proposed by Montesquieu in 'The Spirit of the Laws' in justification of the doctrine of separation of powers, that: "When the legislative and executive powers are united in the Same Person, or in the Same body of magistrates, there cans be no liberty; Because apprehensions May Arise, lest the Same Monarch or Senate Should tyrannical enact laws, to execute Than in a tyrannical manner. Again, there is no liberty, if the Judiciary power be not separated from the legislative and executive. Were it joined with the legislature, the lives and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to executive power, the judge Might behave with violence and oppression. There would be an end of everything, were the resource persons to some man, or the somebody, weather of the nobles' or of the people, to the exercise of those three powers, that of enacting laws, that of executing the public resolution and of the causes of Trying individuals. "

If the judicial authority coupled with legislative powers, then the person's life and liberty would be in a control carried out arbitrarily. On the other hand, if the power of the judiciary together with the executive power, then the judge probably will always act in the arbitrary and oppressive. Thus, viewed from the doctrine of separation of powers an independent judicial authority is part of efforts to secure freedom and prevent abuse

In the Indonesian state administration system is not adopted for the separation of powers doctrine (separation of power) '*Trias Politica*' as proposed by Montesquieu. But with the 1945 Amendment to say that Indonesia is building the legal doctrine of separation of powers (separation of powers) and the authority of each possible existence of supervisory authority (check) against the authority of other powers so as to offset each other in equality and equality, in order to create harmonization rule (Harmonization of powers) are in balance, or 'checks and balances Among of powers', to prevent arbitrariness or abuse of power.

With the concept of checks and balances made possible the control of one power against the other powers among the branches of executive power, legislative and judicial, so that they can offset each other in equality and equality for the achievement of harmonization powers are in balance to prevent arbitrariness or abuse of power. Legal doctrines in the overall reform then bring up the idea using the concept of checks and balances, regarding the authority of supervision of judicial authorities.

Although the 1945 Constitution did not adopt the doctrine of separation of powers (separation of power) '*Trias Politica*' as proposed by Montesquieu, the independent judicial authority shall remain enforceable both as a principle in rule of law, or to allow judicial authorities to ensure that government is not done arbitrarily executions. Judging from the doctrine of separation of powers (separation of powers), an independent judicial

authority is part of efforts to secure freedom and prevent abuse. In other

words, an independent judicial authority independent of the influence of government power, in an effort to ensuring and protect freedom of the people of the possibility of arbitrary action of government. Thus, the presence of an independent judicial authority is no longer determined by *stelsel* separation of powers (separation of power) or power-sharing *stelsel* (distribution of power), but as a '*conditio sine quanon*' for the realization of rule of law, guaranteeing the freedom and control over the running of the government countries.⁵¹ The elements that can be drawn that require:

1. the existence of a court (tribunal) established by the legislation;
2. that justice must be independent, unbiased (impartial) and competent; and
3. Conducted in a fair trial (fair trial) and openly examination (public hearing).

From the concept of law as outlined in the Constitution Article 1, paragraph (3) of the 1945 Constitution, in order to implement Article 24 of the 1945 Constitution, must strictly prohibit the state government or executive power to restrict and reduce the authority of an independent judicial authority or the judge is free in the process justice that has been guaranteed by the constitution. In connection with an independent judicial authority, said by Russell in 'Toward a General Theory of Judicial Independence': "A theory of judicial independence that is realistic and cannot be analytically useful Concerned with every inside and outside influences on Judges". In things that the free judges in the judicial process, according to

⁵¹ Barbara aeronstein black, *judicial independence in perspektif, law and history review*, vol 3, no.1, hlm 101-106

Kelsen: "The Judges are, for instance, ordinarily 'independent' that is, they are subject only to the laws and not to the orders (instructions) of the superior judicial or administrative organs". The trial judge is only subject to the law and not subject to orders or instructions from the judicial or administrative organ of the higher. How important the judicial authorities, Harold J. Laski in the "Elements of Politics" argue, "Certainly no man can over estimate the importance of the mechanisms of justice".

In the settlement of legal disputes by an independent judicial authority (judges are free), is the basis for well-functioning legal system. With the power of an independent judiciary, everyone will get a guarantee that the government will act in accordance with applicable law, and with just under applicable law that an independent judicial authority to decide a case freely.

An independent judicial authority does not mean that judicial authority can be exercised freely without supervision signs, because the aspect of proceedings in the court recognized the existence of general principles for litigants who either (general principles of proper justice), and the regulations that are procedural or procedural law that opened the possibility of filing various legal efforts. Thus in the case of the judicial function is to adjudicate a whole series of activities in the form of a concrete individual cases and disputes in relation to the concept of an independent judicial authority, which in the context of the law includes powers, authorities, rights and obligations, then the power of the judiciary can be interpreted as the power, rights and obligation to determine what and how the legal norms to individual cases of

conflict-concrete-posed to him, then the judicial authorities bound by the rules that are procedural so-called Law of Procedure. An independent judicial authority that is embodied in the freedom of judges in the judicial process, and freedom of the judge in carrying out this authority, there are signs of formal legal rules and legal materials, as well as unwritten norms of the so-called general principle of good administration of justice (general principles of proper justice). In other words, judicial powers are bound to the material laws and regulations that are procedural namely procedural law. Thus the rules of material law and regulations that are procedural can be regarded as normative limits on freedom of judicial power or the freedom of judges in the judicial process.

Article 24 paragraph (1) of the 1945 Constitution specifically and expressly has provided a very strong constitutional basis for judicial authority to perform judicial functions. The judicial power is stressed as an independent power with specific purpose and enforce law and justice major. This setting has an important implication that there should be no other state power to intervene in the affairs of the judiciary and in understanding others, not allowed to have one of any institution that performs the function of the judiciary. Recognition of a single judicial authority is in line with the formulation of the State of Indonesia as the Legal state (Article 1 paragraph (3) of the 1945 Constitution). Meanwhile, as the executor of the judicial power, judicial power to hold its authority under the constitution so that its existence could not be shifted to another authority (in this case the Executive

and Legislative Powers) in accordance with Article 1 paragraph (2) of the 1945 Constitution. The judicial power is then set specifically in Law No. 4 of 2004 which was later replaced by Act No. 48 of 2009. If the two laws is done in-depth study will be obtained by a single concept that is very different judicial authority sharp and highly significant impact.

1. The concept of judicial power according to Law no. 4 of 2004 on judicial power

At the start of defining the judicial power which is very different from both the law. Law no. 4 of 2004 through Article 1 mentions the "power of the Judiciary is an independent State authority to provide justice to uphold the law and justice based on Pancasila, for the implementation of the Legal state of the Republic of Indonesia." Need thing matters more is the basic judicial authority in Article 1 of Law no. 4 of 2004 is Pancasila and it's just not the 1945 Constitution. It is the position of Pancasila as the Source of all Sources of Law or any ideals of the Indonesian state but only if the judicial authorities of Pancasila as the basis for his power base would have enormous power. Scholar said to have enormous power because of the basic execution or existence of Pancasila and the judicial authority is not included in this case in the 1945 Constitution. Indeed the 1945 Constitution has provided the settings in article 24 paragraphs (1), only Article 1 of Act NO. 4 of 2004 to formulate a differences judicial power in base. Thus article 1 of Law no. 4

of 2004 can be said unconstitutional because it does not fit with the intent of the 1945 Constitution.

Especially when considering the background of the establishment of Law No. 4 of 2004 at which time the 1945 amendment was in the third stage (August 18, 2002) while the formation of Act NO. 4 of 2004 on January 15, 2004 then this arrangement are unconstitutional. In addition, judicial authority that such arrangement will create legal certainty to be vague and subjective justice. Legal certainty to be very difficult to measure when the judge in making decisions are not given the obligation to refer to the rules or it could be possible to take a rule with an arbitrary interpretation, this is very detrimental to the parties. On the other hand, fairness is very subjective because the judge who will judge what is right and wrong.

2. The concept of judicial power according to Law no. 48 of 2009 on judicial power

The impact of judicial power settings according to Article 1 of Act NO. 4 of 2004 is the power of the judiciary becomes a very absolute power was no longer autonomous or independent but able to perform the judicial authority on all matters on the basis of Pancasila. Seeing this deficiency, a matter that can be understood if the legislators then make Law number 48 of 2009 and at the same time revoke Law number 4 of 2004. Different settings are shown in Article 1 number 1 of Act NO. 4 of 2004 which states "judicial power is independent of state power to

organize the judiciary to uphold the law and justice based on Pancasila and the Constitution of the Republic of Indonesia Year 1945, for the implementation of the Legal state of the Republic of Indonesia."

As mentioned in this provision, the judicial authorities are one of the powers of an independent state in the sense of power that is free from interference by another power to perform judicial functions. Just do not mean a higher judicial authority or stronger than other state power. But between state powers with one another should work together because in essence the separation of state power can never be done. Harjono describes this as a form of execution in the sovereignty of the people who-for according to the function of every tool state equipment (functional distributive powers).

These include regulation of the function of the judiciary to carry out judicial functions. Independent judicial authority also has the understanding that this power should not interfere in another state authority in carrying out its functions. For example, when the Legislature set a power of law then allowed no judicial power to overturn legislation is in the process of its formation. Another case if the product of law was made and suitable to the Material Test against the 1945 Constitution, in accordance with the authority of the Constitutional Court to adjudicate.

Similarly, the executive power, judges should not affect the powers of government work programs conducted executive. Essentially judicial authority is an institution that is passive in handling cases. Basic implementation of the judicial power is the Pancasila and the 1945

Constitution provides the legal consequences of the limits and direction of the power of the judiciary in Indonesia. When the judge hears the case filed, he assumed the noble duty to uphold law and justice within the limits of Pancasila and the 1945 Constitution. This is very important to understand given so much confusion in the community when defining the extent of the judge's decision was fair and legal certainty. The answer is when the decision reflects the values of Pancasila and the 1945 Constitution. Limits or standards of fairness and legal certainty decision does not lie on the aspirations or opinions of a group of people or not lies in the subjective sense of a judge but should reflect on the Pancasila and 1945 Constitution. If further elaborated embodiment of the values of Pancasila in the Civil Court can be realized such as: The use of the word "for the sake of justice under belief in one God" in accordance with the value of the First Five Principles of precepts that provide basic life and judicial accountability to the Creator (article 2, paragraph (1) Law no. 48 of 2009). A lofty base must be thoroughly understood by the judge in looking at the role of the court which is not arbitrary but is a mandate from God. Human values that the verdict should really humanize human beings both in the consideration or implementation of its decision. Judge in giving the verdict should provide a clear basis for consideration in accordance with article 53 paragraph (2) of Law No. 48 of 2009. The value of unity from the 3rd Pancasila precepts embodied in the implementation of judicial authority when the judge is obliged to explore the values and sense of justice of the society, in this sense of pride and appreciation for the values the

nation was accommodated in the judge's decision. As a result, every decision the judge will be accepted and understood as the recognition of legal values and sense of justice that has been living in the community. While the value of deliberation to reach a consensus on the outline in Article 14 of Law No. 48 of 2009 requires that a consultative decision-making process and is done with mutual agreement among the judges. This is very consistent with the purpose of justice to avoid the subjectivity of judges in deciding cases.

The value of social justice in the Law No. 48 of 2009 is evident in provisions concerning the obligations of the inclusion of a clear legal basis in the hearing and decide the case (article 50 paragraph (1), the permissions from the public (article 52), the court should not discriminating between people (Article 4), the judge should explore the legal values and sense of justice that exist in society (Article 5 paragraph (1), the application of the principle presumption of innocence (article 8, paragraph (1) and clarity of any other court procedures.

While the embodiment of the arrangement of the 1945 Constitution appears in the implementation of judicial power made by a Supreme Court and judicial bodies underneath it, in general courts, the Religious, the military court, state administrative courts as well as by a Constitutional Court (article 24 paragraph (2) 1945 Constitution and Article 18 of Law 48, Year 2009), and the authority of the Supreme Court (article 20 of Law no. 48 of 2009), the Judicial Commission (article 40) and the Constitutional Court (Article 29-