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Constitutional Review

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TEH CONSTITUTIONAL COURT OF
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THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

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Note From Editors

We enthusiastically welcome our readers to the may-edition 2017 of *Constitutional Review.* Six articles will be presented to our reader in this edition. Issues covered range from the idea of constitutional complaint, judicial preview on the bill of international treaty, judicial supervision, the independence of Indonesian Constitutional Courts, non-retroactive doctrine in the constitutional court decision and human rigths protection for refugees. We expect that our readers will find interesting insgihts and ideas in the articles which might provoke further research and readership.

In the first article of this edition, Justice Palguna of the Indonesian Constitutional Court presents an interesting discussion on the idea of granting the Constitutional Court with the authority to decide on constitutional complaint cases. Constitutionally, Indonesian Constitutional Court does not have this authority. Its authority has been limited by the Constitution and the Constitutional Court Law. Considering it as a most significant authority Palguna suggests that this authority should be granted to the Constitutional Court as it might ensures the protection of citizens' constitutional rights more comprehensively. Therefore, an amendment to the Indonesian Constitution of 1945 for this purpose should be brought into consideration. However, this process might take a long time. Palguna offers another way, a legal construction, which is a limited constitutional

complaint granted by way of amending the Constitutional Court Law. Drawing comparison with the Constitutional Court of Germany, readers will find rich perspectives on the nature of constitutional complaint, which is *pengaduan konstitusional* in Indonesian, in this article.

Indonesian Constitutional Court is not granted with the authority to conduct judicial preview to challange the constitutionality of a bill before being enacted into law. The same thing applies to international treaty. An international treaty can only be challenged after it is enacted into law which tranforms the treaty to become national law. However, there is a problem here as Noor Sidharta, the author of this second article reveales, regarding the status of the treaty itself when it is challenged before the Constitutional Court. Complexity may arises concerning the idea of obeying the Constitution and declaring the treaty to be in violation of the Constitution and maintaining the treaty and disobey the Constitution. Both are problematic. The author, thus, suggests the importance of granting the Constitutional Court with the authority to conduct judicial preview concerning the bill on international treaty. Granting the Court with this authority will strengthen the principle of checks and balances among branches of government since the process of ratification of international treaty will not involve only the president and the parlement but the Constitutional Court as well. In order to grant this authority, the 1945 Constitution should be amended. The writer realizes that constitutional amendment is a complicated and lenghty process. However, this still can be done by amending Constitutional Court Law. Benchmarking with countries that follow monism and dualism doctrine contribute to the rich discussion which is put forward interestingly by the writer in this article.

The third article is written by Wiryanto, Moch Bakri, Masruchin Ruba'i, and Prija Djatmika. The author describes the importance of strengthening ethics supervision system especially for Constitutional Court Justices. This system is needed to uphold the honor, dignity and the conduct of constitutional justices. However, there is still weaknesses in the current system. Therefore, reconstruction is needed. The writer offers three ways to reconstruct the current system which,

among others, is normative reconstruction of the 1945 Constitution. Readers will find the significance of the ideas discussed this article in relevance to the current development of ethics supervision at the Constitutional Court of the Republic of Indonesia.

Independence is the hallmark of judicial power. Luthfi Widagdo Eddyono, in the fourth article of this edition, put some endeavours in assessing the independence of the Constitutional Court both the justices and the Court itself.The author, in this article, tries to describe challenges faced by the Constitutional Court both internally and externally. The ups and downs of the Court which resulted in the loss of public trust due to some corruption cases committed by certain justices and an alleged political intervention which tries to limit the authority of the Court colour the struggle of the Court in maintaining its independence and gaining public trust. The author interestingly covers three aspects that contribute to the success of the Court in maintaining its indepenndence which are the justices, the Court itself, and the role of the Ethics Council.

The fifth article is written by Iskandar Muda. The author discusses the logic and reasoning behind some decisions of the Constitutional Court which denies non-retroactive principle. The author notes that the Court uses the so-called the logic of "implication relationship" and further questions whether this logic meets the limits of constitutionalism.

The sixth article covers the protection of refugees from constitutional and human rights perspectives. Oly Viana Agustine, the author, analyses some provisions of the 1945 Constitution concerning human rights which uses the word 'everyone' to denote the coverage of the protection. Not only the provisions, the author also analyses the Preface of the Constitution which contains the substance of human rights protection. The author relates the analyses in this article to the problems of refugees especially cross border refugees in Indonesia in which, in the opinion of the auhtor, has not received serious attention. International perspectives on the matter is also discussed by the auhtor in this article.

Editors

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I Dewa Gede Palguna

Constitutional Complaint and the Protection of Citizens the Constitutional Rights

Constitutional Review Vol. 3 No. 1 pp. 001-023

Constitutional complaint is one of important issues to be dealt with by severral countries issues adopting constitutional court in their national legal system and the Federal Constitutional Court Germany (Bundesverfassungsgericht) is considered by expert as one of the most advance mechanism among countries in dealing with the issue. Generally speaking, constitutional complaint can be described as a complaint or lawsuit filed by an individual citizen who deems his or her constitutional right (s) has been violates by act or omission of public institution or public official. Mostly, such a complaint can only be filed it theere is no other legal remedy available or all legal remedies available have been exhausted. The Constitutional Court of The Republic of Indonesia however is not entrusted with authority to hear constitutional complaint case not withstanding the fact that statistical data on judicial review cases filed by many petitioners before the Court were substantially constitutional complaint issues. It means that, empirically giving the Court to hear constitutional complaint case is necessarily pivotal and theoritically, the Court has the very foundation to be entrusted withq such authority. Considering the complex mechanism to amend the Constitution of 1945, which exhaustively deserible the court's authorities, this article offers the lawmaker a theoretical insight tio give the Court a limited authority to hear constitutional complaint case by the way of amending the law on Constitutional Court.

Keywords: Constitutional Complaint, Constitutional Court and Constitutional Rights

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Noor Sidharta, Sudarsono, I Nyoman Nurjaya and Bambang Sugiri

Judicial Preview on the Bill on International Treaty Ratification

Constitutional Review Vol. 3 No. 1 pp. 024-042

This research is aimed to find and introduce a new idea on the state administration, which has implications on the international treaty ratification procedure followed by Indonesia and additional authorizations of the Constitutional Court of the Republic of Indonesia. The judicial preview in this research is an international treaty examination procedure by the Constitutional Court before an international treaty is transformed into a law, i.e. such international treaty is a Bill. The judicial preview shall have different terms in each country, such as Review *ex ante*, abstract review, judicial review. This procedure is applied when an international treaty has not been validated as a country's national law. The benefits of a judicial preview shall be a solution to connect an ambiguity between the state administrative law and international law. The judicial preview is also the inter-state institutions real check and balance on the international treaty. Out of benchmarking results of four countries following the monism doctrine, i.e. Russia, Germany, France, and Italty and two countries following the dualism doctrine, i.e. Hungary and Ecuador, several additional authorizations of the Constitutional Court shall be summarized, i.e. via the Amendment of 1945 Constitution of the Republic of Indonesia and/or regulations via laws. If both manners are not possible, the Constitutional Court may apply the judicial preview as a state administrative practice. An international treaty draft, which has passed through the judicial preview, may not be submitted to the Constitutional Court to be performed a judicial review, unless 5 (five) year-period has passed since the bill is enacted as a law.

Keywords: Judicial Preview, Constitutional Court, International Treaty, *Pacta Sunt Servanda*, Ratification

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Wiryanto, Moch Bakri, Masruchin Ruba'i and Prija Djatmika

Reconstruction of ethics Supervision System towards Constitutional Court Justice

Constitutional Review Vol. 3 No. 1 pp. 043-070

Ethics supervision of constitutional justices is an important issue for the development of ethics supervision system in the Constitutional Court, because the supervision of constitutional justices is a means of maintaining the independence and impartiality of constitutional justices, which is in fact the main pillar of an independent judiciary. In its development, there has always been a debate about the ethics supervision of the constitutional justices, whether the justices should be overseen externally or internally. This is because, juridically, the law does not regulate it clearly. Based on the above background, the research issues drawn are: (1) What is the significance of ethics supervision toward constitutional justices ?, (2) What is the system of ethics supervision of constitutional justices according to Indonesia's current positive law?, (3) How to reconstruct the system of ethics supervision of constitutional justices more optimally in the future. Based on the result of the research entitled "Reconstruction of Ethics Supervision System toward Constitutional Justice", the following conclusions are obtained: (1) Based on philosophical, juridical and empirical perspective, ethics supervision of constitutional justices has important meaning in order to maintain and uphold the honor, dignity, and the behavior of constitutional justices, (2) Based on the analysis of the evolution of the ethics supervision system, the result shows that the ethics supervision system toward constitutional justices which is always changing indicates that there is still no standard system as a guideline for the enforcement of alleged violation of ethics against the constitutional justices. Therefore, there is a need for normative reconstruction of the ethics supervision system toward constitutional justices through legislation. (3) The reconstruction of the ethics supervision system toward constitutional justices can be done through: a. Amendment to the 1945 Constitution by adding a new norm governing the provision on ethics supervision system toward constitutional justices, b. Amendment to the Constitutional Court Law.

Keywords: Constitutional Justice, Ethics Supervision System, code of conduct

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Luthfi Widagdo Eddyono

Independence of the Indonesian Constitutional Court in Norms and Practices

Constitutional Review Vol. 3 No. 1 pp. 071-097

Article 24 (1) of the 1945 Constitution States after the third amendment, "the judicial power shall be independent in administering justice so as to uphold the law and equality." The Indonesian Constitutional Court is one of the performers of the independent judicial power who plays a significant role in the enforcement of the constitution and the principle of the state based on the law by its authority and obligations as determined by the 1945 Constitution. This paper intends to study the Indonesian Constitutional Court to find out whether the Constitutional Court in exercising its constitutional authority can be independent. Also, this article will examine not just institutional independence but also judges independence to understand current issues related to the role of ethics and conduct of judges. The independence of the Indonesian Constitutional Court supported by the 1945 Constitution after the amendments from 1999 until 2002, and further stipulated in Law. However, it can be said that this institution has ups and downs of public trust due to corruption cases conducted by constitutional justices. Also, in several political instances showed efforts of political institutions to limit the authority of the Constitutional Court. In its experiences, the Constitutional Court succeeded in convincing the parties through its decisions and strengthening institutional independence against the influence that tried to destabilize its institutions. The Council of Ethics of Constitutional Judges that maintains the values and behavior of judges also continuously works and efficient enough in overseeing the ethics and conduct of judges. The decision of the Ethics Council may also be accepted as a proportional decision.

Keywords: Constitutional Court, Independence, Council of Ethics

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Iskandar Muda

The Legal Logic of the Collapse on Non-Retroactive Doctrine in the Constitutional Court Decision

Constitutional Review Vol. 3 No. 1 pp. 098-118

The non-retroactive doctrine as a legal principle did not apply retroactively. In legal system of Indonesian; Article 28I paragraph (1) of 1945 Constitution determines that a human right can not be prosecuted based on retroactive law as well as rights that can not be reduced under any circumstances. Similarly Article 58 of Law No. 24 Year 2003 concerning Constitutional Court determines that a Law is being reviewed by the Constitutional Court is still applied, before there is decision stated that the law is contrary to the 1945 Constitution. However, with the use of "legal logic of implication relationships" in Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009, the decision was made retroactive and it become the jurisprudence for the Constitutional Court Decision No. 5/PUU-IX/2011 and Decision No. 13/PUU-XI/2013.

Keywords: The Collapse of the of Non-Retroactive Doctrine, Constitutional Court Decision

Keywords are derived from the article
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Oly Viana Agustine

The Constitutional Will in Human Rights Protection for Refugees

Constitutional Review Vol. 3 No. 1 pp. 119-140

Human rights protection granted to refugees in Indonesia has not received serious attention, in particular for those who are included in the cross-border refugees. This issue is a question of how the Constitution mandates a protection to them, whether it is an obligation of the government of Indonesia or it is volunteerism alone. The provisians are addressed in Article 28A, Article 28B paragraph (2), Article 28D paragraph (4), Article 28E paragraph (1), Article 28G paragraph (2), and Article 28H paragraph (1), and Article 28J paragraph (1), Broadly speaking, the Indonesian constitution calls for better protection of refugees to internally displaced persons and refugees across borders. This is reflected in several articles in the 1945 Constitution that mention the word "everyone" in the subject which meant regardless of citizenship status or population. This is certainly in line with the values of human rights that have been recognized along with the universality of human rights that are applicable. Therefors the will of the constitution on refugees needs to be implemented in legislation in Indonesia, which describes in details the human rights protection to internally displaced persons and refugees state that the will of the constitution in the protection of human rights to refugees be implemented correctly.

Keywords: Constitutional, Human Rights, Refugees.

Constitutional Complaint and the Protection of Citizens the Constitutional Rights

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Abstract

Constitutional complaint is one of important issues to be dealt with by severral countries issues adopting constitutional court in their national legal system and the Federal Constitutional Court Germany (*Bundesverfassungsgericht*) is considered by expert as one of the most advance mechanism among countries in dealing with the issue. Generally speaking, constitutional complaint can be described as a complaint or lawsuit filed by an individual citizen who deems his or her constitutional right (s) has been violates by act or omission of public institution or public official. Mostly, such a complaint can only be filed it theere is no other legal remedy available or all legal remedies available have been exhausted. The Constitutional Court of The Republic of Indonesia however is not entrusted with authority to hear constitutional complaint case not withstanding the fact that statistical data on judicial review cases filed by many petitioners before the Court were substantially constitutional complaint issues. It means that, empirically giving the Court to hear constitutional complaint case is necessarily pivotal and theoritically, the Court has the very foundation to be entrusted withq such authority. Considering the complex mechanism to amend the Constitution of 1945, which exhaustively deserible the court's authorities, this article offers the lawmaker a theoretical insight tio give the Court a limited authority to hear constitutional complaint case by the way of amending the law on Constitutional Court.

Keywords: Constitutional Complaint, Constitutional Court and Constitutional Rights

I. INTRODUCTION

A. Background

The term of "constitutional complaint" applied in this paper refers to a legal remedy which takes the form of a complaint or lawsuit filed by an individual citizen who deems his or her constitutional right (s) has been violated by act an omission of public institution or public official. Generally such complaint may only be filed if all available legal remedies have been exhausted. It means that there is no legal remedies for the issue.[1] In many countries the authority to deal eith the issue is in the hand of a constitutional court.

Meanwhile, constitutional rights are rights derived from human right concepts which are stated into and become part of the constitution.[2] Once such human rights have been adopted into and become a part of a constitution, the rights bind all branches state power divisions.[3] Therefore, a breach to constitutional rights means a breach to the constitution and the rights holder must be given have legal remedies to maintain his or her rights, which are guaranteed by the constitution. Constitutional complaints are one of such legal remedies.

The history of constitutional complaints begins and is directly related to and even a logical consequence of, "negara hukum" (here in after referred to as "constitutional state") perspective.[4] In brief, the theoretical construction is

[1] See The Federal Constitutional Court, "Constitutional Complaint" in http://www. bundesverfassungsgericht.de/en/organization/verfassungsbeschwerde. html, 4/24/2006, p. 2. See also Raymond Youngs, *English, French & German Comparative Law*, Second Edition, Routledge-Cavendish, London-New York, 2007,p. 48-49; Raymond Youngs, *Sourcebook on German Law*, Second Edition, Cavendish Publishing Ltd., London-Sydney-Porland, 2002,p. 91; Victor Ferreres Comella, "Is The European Model of Constitutional Review In Crisis?", paper presented for *the 12th Annual Conference on 'the Individual Vs. the State*, Central European University, Budapest, June 18-19, 2004, p.3. David P. Currie, *The Constitution of the Federal Republic of Germany*, the University of Chicago Press, Chicago and London, 1994, p. 27.

[2] According to Baker, the history of the constitution is the history of initiatives to human rights acknowledgment and respect. Thus, such human rights are not solely related to constitutions but also incorporated into the constitutions. See Ernest Baker, *Reflection on Government*, Oxford University Press: Oxford, 1958,p. 30-31.

[3] See further Durga Das Basu, *Human Rights in Constitutional Law*, Wadhwa and Company: New Delhi-Nagpur-Agra, specifically,2003,p. 48-78 and p. 107-135.

[4] There are three terminologies translated into "negara hukum" (in Indonesian) or "constitutional state" , i.e. *Rechtsstaat, Etat de droit, Rule of Law.* Even though such three terms are generally accepted as having an identical meaning, theoretically they have differences. According to Michel Rosenfeld, the term of*Etat de droit* (French) is a literal translation of the term of *Rechtsstaat* (German), which is more appropriately translated into*Etat légal*. In other words, the term of *Rechtsstaat* (German) will be more appropriate if it is translated into state rule through law (English) or*Etat légal* (France). Meanwhile, the term of*Etat légal*is more appropriately translated into state rule through democratically enacted law in English. Even though the terms of*Rechtsstaat* and *Etat légal*collectively refer to "a system of laws made by legislator", only the term of *Etat légal*requires that legislators making such laws are elected democratically.In the meantime, the term of Rule of Law lies between *Rechtsstaat*and*Etat de droit*, i.e. covering laws made by legislators. However, such laws do not necessarily always take a form of a series of constitutional requirements which have legal force. Therefore, the Rule of Law does not depend on laws (as reflected in the term of *Rechtsstaat*) or written constitutions having legal force (as reflected in the term of *Etat de droit*). See Michel Rosenfeld, "Constitutional Adjudication in Europe and the United States: paradoxes and contrasts" in Georg Nolte (Ed.), *European dan US Constitutionalism*, Cambridge University Press, Cambridge-New York-Melbourne-Madrid-Cape Town-Singapore-São Paolo, 2005,pp. 204, 208, and 209.

explained as follows. The first characteristic of a modern constitutional state is constitutionalism,[5]which means that state administration is based on and (therefore) may not contradict with constitutions. Therefore, constitution must be actually applied or complied with in practice, instead of merely playing an aspirational role it is. In order to secure strict compliance and performance of constitution in practice, the idea to establish a constitutional court emerges.

The main constitutional court's function is constitutional review, which includes both the constitutionality of legal norms as well as the constitutionality of actions or deeds. The constitutional review has two main tasks. First, maintaining the proper democratic process in a mutually intervening relationship between the legislative, executive, and judicial body. In other words, it means to prevent the seizure of power by one branch of state power at the expense of the others st. Second, protecting citizens' personal rights or lives against offenses committed by any branch of state powers.[6]

Therefore, it is understandable why Brown and Wise state that the idea to establish a Constitutional Court is an attempt to uphold the principles of rule of law and to provide maximum protection for democracy and human rights of citizens.[7] Derived from this perspective, the constitutional court is granted an authority to decide a constitutional complaint case, as a part of the implementation of Constitutional Court's functions, i.e. to carry out a constitutional review. The objective is to provide maximum protection not only for the citizens' constitutional rights, but also for the democracy.

B. Questions

1. How the constitutional complaint mechanism applied at the Constitutional Court of Germany?
2. How the constitutional complaint mechanism should be applied in Indonesian legal system?

[5] For further details on the characteristics of a constitutional state see, among others, Barry M. Hager, *The Rule of Law. A Lexicon for Policy Makers,* the Mansfield Center for Pacific Affairs, 2000.

[6] H. Hausmaninger, *The Austrian Legal System*, Manzsche Verlags- und Universitätsbuchhandlung: Wien, 2003, p. 139. About the development of idea on this constitutional review, see, among others, Jimly Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara*, Second Edition, Jakarta:Konpres, 2005,p.1-47.

[7] Trevor L. Brown & Charles R. Wise, "Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine", *Political Science Quarterly*, Vol. 119, No. 1, 1994, p. 155.

II. DISCUSSION

A. Constitutional Complaints in Germany

This paper attempts to offer a possibility of applying the constitutional complaint mechanism in Indonesian legal system by granting an authority to decide constitutional complaint case to the Constitutional Court. However, there is problem as the 1945 Constitution has set out the Constitutional Court's authority in a limited manner in Article 24C paragraph (1) and (2). Thus, the available constitutional procedure to grant an authority to the Constitutional Court to decide constitutional complaint cases should be by amendment to the 1945 Constitution, particularly Article 24C. The final chapter of this paper tries to offer an alternative, i.e.a legal theoritical construction which may be used as the basis to grant such authority to the Constitutional Court without amending, and even remaining to rely on, Article 24C paragraph (1) of the 1945 Constitution.

Hence, it becomes important to review other countries' practices as references. However, this paper will only emphasize on the constitutional complaint practice in the Federal Republic of Germany, which is in this case, the Constitutional Court of the Federal Republic of Germany(*Bundesverfassungsgericht,*hereinafter referred to as the Constitutional Court of Germany), as a comparative reference. There are several reasons to choose Germany as the comparison.

First, a constitutional complaint is a part of a constitutional review, in which Indonesia and Germany adopt the same model.[8]Even though these two countries apply the same model, the Constitutional Court does not have an authority to adjudicate constitutional complaint cases. Second, in the context at legal tradition, Indonesia and Germany are in the same legal tradition,

[8] In general, there are two models constitutional review, i.e. the American model (American Model of Constitutional Review) and the European model (European Model of Constitutional Review). In the meantime, this European Model is divided into several variations, i.e. the Austrian or Continental Model, Kelsenian Model, German Model, dan France Model. A further explanation on the difference between those two constitutional review models can be seen in Mauro Cappelletti, 1989, *The Judicial Process in Comparative Perspective*, Clarendon Press: Oxford; Vicki Jackson & Mark Tushnet, 2006, *Comparative Constitutional Law*, Second Edition, Foundation Press: New York; Herman Schwartz, 2000, *The Struggle for Constitutional Justice in Post-Communist Europe*, the University of Chicago Press: Chicago and London; Jimly Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara*, Second Edition, Konpres: Jakarta. According toAutheman and Henderson, Indonesia and Germany adopt the same model, see Violaine Autheman & Keith Henderson, "Constitutional Courts: The Contribution of Constitutional Review to Judicial Independence and Democratic Processes from a Global and Regional Comparative Perspective", *Rule of Law White Paper Series*, IFES, White Paper #4, Constitutional Courts, 2005,p. 8.

i.e. civil law.[9] In the civil law tradition, codifications play a significant role as legal sources[10] and the highest codification is constitution.[11]Therefore, the legal tradition means an in-depth attitude on (among others) how to ideally apply laws[12]. Therefore, it shall be relevant to know why two countries sharing the same legal tradition and who have the same institution in enforcing the constitution, i.e.the constitutional court; but, the authority granted to such institution in order to enforce the constitution is significantly different. Moreover, the difference lies on the fundamental factor, i.e. a part of legal initiatives to protect citizens' constitutional rights. The protection of such rights are rights is a significant substance of every constitution.[13]

Third, Germany is one of the countries referred to when the idea to establish constitutional court was discussed in the meetings of the Ad Hoc I Committee of the Working Body of the People's Consultative Assembly. One of the reasons to choose Germany as a reference was due to the fact that Germany is one of countries who has the most advanced and established constitutional court system than other countries, even though it is not the oldest.[14]Therefore, a real exchange of ideas or at least experiences among Germany's constitutional court judges and the 1945 Constitution amendment legislators, i.e. members of the Ad Hoc I Committee of the Working Body of the People's Consultative Assembly, may

[9] Here, the term of "legal tradition" is distinguished to the term "legal system".The "legal system" term refers to the understanding of the legal system working as a set of institutions, procedures, and rules of law. Meanwhile, the "legal tradition" term refers to the definition of a set of deeply embedded attitudes, which are historically about the nature of law, role of law in the society and government, how should the organization and operation of a legal system, as well as how the law is established or should be established, applied, studied, and taught. Thus, the "legal tradition" term is broader than the "legal system" term. In the same legal tradition, it is very likely that there are different legal systems. For further discussion, see John Henry Merryman, *The Civil Law Tradition*, Stanford University Press, Stanford-California, 1985,p. 1-5. Also see Linda Picard Wood (Ed.), *Merriam-Webster's Dictionary of Law*, Merriam-Webster Inc., Springfield-Massachusetts, 1996,p. 543.

[10] Linda Picard Wood, *ibid*. Mauro Cappelletti refers to it asthe supremacy of statutory law, as an adversary of the stare dicisis doctrine in the common law tradition. See further Mauro Cappelletti, *op.cit.*, pp. 137-141.

[11] Even though if it is observed from its function, the term of "constitution" has the same meaning with the term of "canon", i.e. equally playing a role as a fundamental law of a country, but they actually have a difference.The constitution is not always written in a codification (so, it may not be referred to as a canon). The constitution is written in documentation, such as in England. Therefore, the grouping of constitutions into a "written constitution" and "unwritten constitution" shall be understood within the meaning that the "written constitution" refers to the codified fundamental constitution, while the "unwrittenconstitution" refers to the (solely) document fundamental constitution. Therefore, the argument of K.C. Wheare is appropriate in terms of the England constitution, i.e. "The truth about Britain can be stated not by saying that she has an unwritten Constitution but by saying rather that she has not written Constitution". See K.C.Wheare, *Modern Constitutions*, Oxford University Press, Oxford-London-New York, 1966,p. 14.

[12] John Henry Merryman,*loc.cit.*

[13] One of the constitution meanings is *"...the body of rules which directly or indirectly affect the distribution of the sovereign power in the State. It is ... the collection of principles according to which the powers of the Government, the rights of the governed and the relations between the two are adjusted"*. See A. Appadorai, *The Substance of Politics*, Fifth Impression, Oxford Indian Paperback, Manzar Khan-Oxford University Press: New Delhi, 2005, p. 247.

[14] Together with constitutional judges of South Korea and Thailand) to a hearing on articles draft regarding the Constitutional Court of the RI. See the Minutes of Session of the Ad Hoc I Committee of the Working Body of the People's Consultative Assembly, especially from May to July 2000.

take place. However, when a final draft of the Constitutional Court's authorities is agreed upon by the Plenary Session of the People's Consultative Assembly, such authority to try constitutional complaint cases is not included into the Constitutional Court's authority, as observed in Article 24C paragraph (1) of the recent 1945 Constitution.

The authority of the German Constitutional Court to try constitutional complaint cases (in German, such cases are referred to as *Verfassungsbeschwerde*) is a part of its most widest authorities,[15]either directly granted by the Federal Constitution (*Grundgesetz*, generally abbreviated as*GG*) or Law on the Constitutional Court of the Federal Republic of Germany (*Bundesverfassungsgerichtsgesetz*, commonly abbreviated as *BVerfGG* in German).[16] It ensures that all parties, specifically state administrators, expressly comply with the constitution and implement it in the practice. In other words, a characteristic of Germany as a democratic constitutional state is explainednot only theoretically but also in practice – in this case, theconstitutionalism characteristic.[17]

The German Constitutional Court consists of two panels and each panel has eight judges [Article 2 paragraph (1) and (2) of the *BVerfGG*]. Each panel has its own authority or competence. The First Panel is authorized to examine laws constitutional reviews and constitutional complaint cases, other than constitutional complaints regulated in Article 91[18] and complaints within the domain of general election laws. Meanwhile, the Second Panel is authorized to

[15] It is said as wide as it includes all problems on the GG implementation and interpretation. Thus, it is stated that the Constitutional Court of Germany has an exclusive authority to all proceedings, which are directly included to the compliance issue with the Federal Constitution (GG). See David P. Currie, *op.cit.* p. 27. See also Dieter Blumenwitz, "The Federal Constitutional Court of Germany and Foreign Affairs. An Introduction for the American Reader to the Court Decision of July 31, 1973" in Frederick W. Hess (Ed.), *German Unity, Documentation and Commentaries on the Basic Treaty*, East Europe Monograph 4, Park College, Govermental Research Bureau: Kansas City-Missouri, p. 11.

[16] As the authority of the Constitutional Court of Germany is significantly wide and diverse, the procedural law to implement each authority is highly diverse. Up to recently, there have been 15 (fifteen) procedural laws in the Constituonal Court of Germany, see Helmut Steinberger, "Constitutional Jurisdiction in the Federal Republic of Germany", in the*Journal of Constitutional and Parliamentary Studies*, Vol. XVII Nos. 1-2 (January-June, 1983), p. 5.

[17] Therefore, many experts in Germany currently assess that, following the acceptance of *GG* (German Constitution) after the World War II,Germany is no longer suitable to be referred to as *Rechtsstaat*, which is a 19th century legacy term. It will be more appropriate if Germany is referred to as the follower ofthe *Verfassungsstaat* ("a country regulated under the constitutions") principle. Karpen provides the following meaning:"*a state which means to organize politics and evaluate goals by applying, executing the constitution"*, see Ulrich Karpen, (Ed.), 1988, *The Constitution of the Federal Republic of Germany*, Nomos Verlagsgesellschaft: Baden-Baden, p. 169 and p. 173. Therefore, the classic *Rechtsstaat* principle (from the 19th century) rejects the judicial review idea in a modern form, i.e. including basic rights into the scope, see ChristianBoulanger, "Europeanization Europeanisation through Judicial Activism? CEE Constitutional Courts' Legitimacy and the Return to Europe", *paper presented for a workshop in the European University Institute in Florence* on 28-29 November 2003, p. 22. Also see Georg Nolte (Ed.), *op.cit.*, p. 204-205.

[18] Article 91of the *BVerfGG* regulates constitutional complaints submitted by the commune or association of commune (will be further described in the next description).

examine cases of human rights eliminations,political party's inconstitutionality, complaints on judgments of the *Bundestag* related to the legality of a general election or filling or vacancy of a deputy title at the *Bundestag,* impeachment of a Federal President by *Bundestag* or *Bundesrat*, GG interpretation in case of a dispute on a scope of rights and obligations of the highest Federal organization or other relevant parties, whose rights are granted by GG or rules of procedure of the highest Federal organization, disagreement on rights and obligations of the Federation and States (*Länder*) – particularly the implementation of a Federal law by States and Federal supervision as regulated in Article 93 paragraph (1) (3) and Article paragraph (4) second sentence of the GG, other disputes involving public laws – between the Federation and States, inter-States or in a State (unless there is a remedy regarding other court's authority implementation), impeachment of a Federal and State judge (in case there is a doubt whether a public international law is an integral part of the Federal law and such provision directly causes indvidual rights and obligations – if a verdict on such issue is filed to a court), cases on an application of a law as a Federal law, and constitutional complaint regulated in Article 91 of the *BVerfGG*, and complaints within the domain of a law on general election [Article 14 paragraph (1) and (2) of the *BVerfGG*].[19] Those two Panels will appoint several chambers, which consist of three justices and such justices have a one-year tenure. This chamber's composition may only be maintained for three years in a maximum [Article 15a paragraph (1) of the *BVerfGG*].

At first, GG does not explicitly set out the German Constitutional Court's authority to decide constitutional complaints cases. The authority is just expressly granted later, as stated in Article 93 paragraph (1) of the recent GG. Article 93 paragraph (1) of the GG states in a complete text, as follows:[20]

> The Federal Constitutional Court decides:
> 1. *on the interpretation of this Constitution in the event of disputes concerning the extent of the rights and duties of a highest federal body or other*

[19] As each Panel has its own authority, and the justices selected for a Panel may not be transferred to another Panel, Born refers the Constitutional Court of Germany as a "twin court". However, the verdict taken by each Panel shall be effective as a verdict of the Constitutional Court of Germany, instead of the Panel's decision. See Sigrid Born (ed.), *Law on the Federal Constitutional Court* (translated by Martin Fry), Inter Nationes: Bonn, 1996,p. 26.

[20] Quoted from Axel Tschentscher, *The Basic Law (Grundgesetz)*, Jurisprudentia Verlag, Würzburg, 2002, p. 72.

parties concerned who have been vested with rights of their own by this Constitution or by rules of procedure of a highest federal body;

2. *in case of differences of opinion or doubts on the formal and material compatibility of federal law or State law with this Constitution, or on the compatibility of State law with other federal law, at the request of the Government, of a State government, or of one third of the House of Representatives [**Bundestag**] members;*
   *2a. in case of differences of oninion on the compatibility of federal law with Article 72 II, at the request of the Senate [**Bundesrat**], of a State government, or of a State parliament;*[21]
3. *in case of differences differences of opinion on the rights and duties of the Federation and the States [**Länder**], particularly in the execution of federal law by the States [**Länder**] and in the exercise of federal supervision;*
4. *on other disputes involving public law, between the Federation and the States [**Länder**], between different States [**Länder**] or within a State [**Land**], unless recourse to another court exists;*
   4a. on complaints of unconstitutionality, being filed by any person claiming that one of his basic rights or one of his rights under Article 20 IV or under Article 33, 38, 101, 103 or 104 has been violated by public authority;[22]
   4b. on complaints of unconstitutionality filed by communes or associations of communes on the ground that their right to self-government under Article 28 has been violated by a statute other than a State statute open to complaint to the respective State constitutional court;[23]
5. *in other cases provided for in this Constitution.*

The authority of the German Constitutional Court to decide constitutional complaint cases is described in Article 93 paragraph (1) number 4a and 4b of the GG above.[24] From these provisions, it seems that the subjects who can file a complaint to the German Constitutional Court are:

1) *individuals if the rights violated by a public authority is human rights or rights set out in Article 20IV or Article 33, 38, 101, 103, or 104 of the GG;*
2) *commune or commune associations if their right to self-government under Article 28 of the GG is violated by a law other than the laws of the state, which is open to a complaint be submitted to the state's constitutional court.*[25]

[21] Provisions in this Paragraph (1) 2.a are included into the 42nd Amendment (27th October 1994).
[22] This paragraph is included into the 19th Amendment (29thJanuary 1969).
[23] This paragraph is included into the 19th Amendment (29thJanuary 1969).
[24] This provision is reconfirmed in Article 13 number 8a of the Law on Federal Constitutional Court (*BVerfGG*).
[25] In Germany, each State (*Länder*) also has a constitutional court, except the State of Schleswig-Holstein and Mecklenburg-Vorpommern. In the latter states, issues related to the constitution are submitted to the Constitutional Court of Germany; see Raymond Youngs, *English, French... op.cit.*, p. 46. Even, according to the history, the state constitutional court was first established (c.q. the constitutional court of Bavaria) than

Further provision, which is also a part of the procedural law on constitutional complaints, is regulated in the *BVerfGG*, Article 90 to Article 95.[26]Article 90 of the *BVerfGG* states that:

(1) Any person who claims that one of his basic rights or one of his rights under Articles 20 (4), 33, 38, 101, 103 and 104 of the Basic Law has been violated by public authority may lodge a constitutional complaint with the Federal Constitutional Court.

(2) If a legal action against the violation is admissible, the constitutional complaint may not be lodged untill all remedies have been exhausted. However, the Federal Constitutional Court may decide immediately on a constitutional complaint lodged before all remedies have been exhausted if it is of general relevance or if recourse to other courts first would entails a serious and unavoidable disadvantage for the complainant.

(3) The right to lodge a constitutional complaint with the constitutional courtof the Land in accordance with the provision of the Land constitution shall remain unaffected.

Under the provisions of Article 90 of the *BVerfGG*, it can be concluded that a new constitutional complaint may be basically filed if there is no other remedy or all existing legal remedies have been exhausted. However, such provision can be ruled out. It means that the Constitutional Court of Germany can immediately rule on a constitutional complaint case despite all available remedies have not been taken, provided that the complaint "contains general relevance"[27], or if an early settlement via other courtwill cause a serious and inevitable loss to the complainant. Constitutional complaints submitted to the Constitutional Court of Germany do not affect the complainant's right to file a constitutional complaint to the State constitutional court in accordance with the constitution of the relevant State.

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the Federal Constitutional Court or the Constitutional Court of Germany (*Bundesverfassungsgericht*). The Constitutional Court of Germany was only established following the acceptance of Herrenchiemsee Proposals, which contain suggestions on the draft of the Federal Constitution of Germany as the result of a conference held at the Chiemsee lake (August 1948, and therefore referred to as the Herrenchiemsee Conference), and considering suggestions from Prof. Hans Nawiasky who cooperated with Prof. Hans Kelsen. Such conference was joined by states under the Allies and initiated by the Governor of Bavaria State, Minister-President Hans Ehard; see further in Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press: Durham and London,1989, p. 7-8.

[26] All quotes of the *BVerfGG* articles in this paper are taken from Sigrid Born (ed.), 1996,*Law on the Federal Constitutional Court* (translated by Martin Fry), Inter Nationes: Bonn.

[27] *BVerfGG*does not further explain on the meaning of this "*of general relevance*". Nevertheless, in a conversation between the Author and Prof. Sigrid Broβ, a constitutional judge of the Second Panel, at Karlsruhe on 10th April 2008, it is said that one of the indications is such complaint does not only relate to the complainant's individual interests, but also many people's interests.

The reason submitted in the constitutional complaint must explain the alleged breached rights or act or omission of an institution or official alleged to commit such breach. Such provision is regulated in Article 92 of *BVerfGG* which states that:

> The reason for the complaint shall specify the right which is claimed to have been violated and the act or omission of the organ or authority by which the complainant claims to have been harmed.

Furthermore, Article 93 of the *BVerfGG* regulates in detailed on the constitutional complaint filing deadline against a decree and a law or an act committed by an authorized official and legal consequences related to such deadline. Article 93 of the *BVerfGG* shall state in complete as follows:

(1) A constitutional complaint shall be lodged and substantiated within one month. This time-limit shall commence with the service or informal notification of the complete decision, if this is to be effected ex officio in accordance with the relevant procedural provisions. In other instances, the time-limit shall commence when the decision is proclaimed or, if it is not to be proclaimed, when it is otherwise communicated to the complainant; if the complainant does not reveive a copy of the complete decision, the time-limit pursuant to the first sentence above shall be suspended by the complainant requesting, either in writing or by making a statement recorded at the court office, a copy of the complete decision. The suspension shall continue until the complete decision is served on the complainant by the court or ex officio or by a party to the proceedings.

(2) If a complainant was unable to comply with this time-limit through no fault of his own, he shall on request be granted ***restitutio in integrum***.[28] *This request shall be made within two weeks of thre hindrance's disappearance. The reasons for the request shall be substantiated when making the request or during the request proceedings. The omitted legal action must be carried out within the time-limit for the request; if this is done the complainant may be granted a reversal without need for a formal request. The request shall be invalid if made later than one year after the expiry of the time-limit. The fault of the complainant's attorney shall be seen as equal to that of the complainant himself.*

[28] Recovery to the initial condition (Yan Pramudya Puspa, Kamus Hukum Bahasa Belanda, Indonesia, Inggris, Complete Edition, Aneka Ilmu: Semarang, 1977, p. 733).

(3) If the complaint is directed against a law or some sovereign act against which legal action is not admissible, the complaint may be lodged only within one year of the law entering into force or the sovereign act being announced.
(4) If a law has entered into force before 1 April 1951, a constitutional complaint may be lodged until 1 April 1952.

There are some important things to note from the provisions of Article 93 of the *BVerfGG* above. First, there is a different constitutional complaint filing deadline between a complaint against a decree and a complaint against a law or an act of a competent official, in which a legal action does not apply to or cannot be acceptable to such official.

Regarding a constitutional complaint against a decree, the deadline is one month since a complete informal notice on such decree is issued, provided that the decree is applicable ex officio in accordance with the applicable procedures. If the decreeis announced, the period starts since the announcement of the decree. Meanwhile, if the decree is not announced, the period commences when it is notified to the complainant. If the complainant does not receive a full copy of the decree, the one-month period is suspended at the request of the complainantfor a complete copy of the decree. Such request may be made in written form or making a statement recorded at the court registry. The suspension will remain effective until the complete copy of such decree is handed over to the complainant by the court or ex officio by a party to the proceedings.

Regarding a constitutional complaint against a law or an act of an authorized official, in which a legal remedy does not apply or cannot be acceptable, a period for filing a complaint is one year since the law comes into force, or the act of the official is announced.

Second, in the case of a constitutional complaint against a decision, if the complainant is unable to comply with the prescribed period due to his non-fault, he, at his request, should be given "the restoration to his original state" *(restitutio in integrum)*. A demand of recovery to the original state must be made within two weeks since the completion of the nuisance and the reason for filing the request must be presented at the time of making the request or

during the examination of the request. The request is not valid if it is made more than one year after the expiration of the period. Meanwhile, in order to organize a constitutional complaint filed by the city government (municipalities) or association of municipalities,[29] Article 91 of the *BVerfGG* states:

> *Municipalities and association of municipalities may lodge a constitutional complaint on the ground that a Federal or Land law infringes the provisions of Article 28 of the Basic Law.*[30] *A constitutional complaint may not be lodged with the Federal Constitutional Court if a complaint against violation of the right to self-government may be lodged with the constitutional court of the Land in accordance with Land law.*

If it is observed carefully, the provisions of Article 91 of the *BVerfGG* above imply that the constitutional complaint on a commune right to govern independently is not to be made to the Constitutional Court of Germany. Instead, it can be submitted to the State constitutional court where it is possible according to the laws of the State. In this case, it means that the State constitutional court should take precedence. In other words, only if, according to State laws, such issue is not an authority of the State constitutional court, it will be submitted to the Constitutional Court of Germany.

Furthermore, the *BVerfGG* stipulates that each constitutional complaint application requires an acceptance (by the German Constitutional Court). It means the application must be declared first as admissible to be examined by the German Constitutional Court. The consent will be given if the Constitutional Court of Germany argues that the application may contain "a fundamental constitutional significance" or if the application contains an indicated enforcement of human rights and other rights set forth in the GG or the complainant will suffer grave disadvantage if the application is rejected for an examination [Article 93a paragraph (1) and (2) of the *BVerfGG*].[31] Then, Article 93B of the *BVerfGG* confirms that the chamber may refuse to accept a constitutional complaint or accept it preceding a verdict in the cases described in Article 93c. Otherwise, the consent is decided by a Panel.

[29] GG uses the term of communes or association of communes; see *supra*, Article 93 paragraph (1) number 4b above.
[30] Article 28 of the GG as referred to in Article 91 of the *BVerfGG* is a provision regulating the commune's rights to govern its management.
[31] However, the *BVerfGG* does not provide further explanation on what meant by the "fundamental constitutional meaning".

Article 93c of the BVerfGG designated by Article 93B contains provisions on next steps to be taken by the chamber if the requirements as referred to in Article 93a and 93B above are met. In complete, Article 93c of the *BVerfGG* states:

(1) *If the conditions of Article 93a (2) (b) above are fulfilled and the constitutional issue determining the judgment of the complaint has already been decided upon by the Federal Constitutional Court, the chamber may allow the complaint if it is clearly justified. This decision is equal to a decision by the panel. A decision stating, with the effect of Article 31 (2)*[32]*above, that a law is incompatible with the Basic Law or with other Federal law shall be reserved for the panel.*

(2) Articles 94 (2)-(3) and 95 (1)-(2) below shall apply to the above procedure.

Thus, according to the provisions of Article 93c of the *BVerfGG* above, if a constitutional complaint application has met the consent requirements set out in Article 93a paragraph (2) of the *BVerfGG* and constitutional issues which decide a decision on the complaint has been established by the Constitutional Court of Germany, the chamber may grant such complaint if it is totally reasonable. A decision taken by the chamber in this case shall be equated with the panel's decision. Thechamber's decision which states that a law is incompatible with the GG or other Federal laws, in which the legal effects are stipulated in Article 31 paragraph (2) of the*BVerfGG,* will be submitted to the panel to decide.

Each chamber's decision always has to be taken unanimously (Article 93d paragraph (3) of the *BVerfGG*). Decisions taken under the provisions of Article 93B and Article 93c of the *BVerfGG* without going through any oral proceedings may not be filed for an objection. If a constitutional complaint application is not granted, such rejection does not require any reasons (Article 93d paragraph (1) of the *BVerfGG).*Provided that the panel has not decided, the chamber may take any decisions relevant to the examination of the constitutional complaint.

[32] Article 31 paragraph (2) of the *BVerfGG* explains that the **verdict of the Constitutional Court of Germany has a power as a law** for cases of: misunderstanding or doubt on the formal and material compatibility between the Federal or State law and GG, or the compatibility of the State law and Federal law, in which the application is submitted by the Federal Government, or State Government, or one third of the *Bundestag* members (as regulated in Article 13 number (6) of the *BVerfGG*), compatibility between a Federal law and GG or compatibility of a State law and Federal law in which the application is submitted by a court (as regulated in Article 13 number (11) of the *BVerfGG*), doubt on whether a public international law is a part of the Federal law and whether it causes a right and obligation to an individual in which the application is submitted by a court (as regulated in Article 13 number (12) of the *BVerfGG*), disagreement on the continuity of a law as a Federal law (as regulated in Article 13 number (14) of the *BVerfGG*), constitutional complaints related to compatibility or incompatibility of a law and GG or a law stated as null and void.

Atemporary injunction which delays the implementation of a law can be imposed, but it can only be done by the panel (Article 93d paragraph (2) of the *BVerfGG). BVerfGG* also decides that the state institution or element of government, whose act or omission is filed for a constitutional complaint, is given an opportunity to submit a statement within the prescribed period. It is stipulated in Article 94 which reads:

(1) The Federal Constitutional Court shall give the Federal or Land constitutional organ whose act or omission is complained of in the constitutional complaint an opportunity to make a statement within a specified period.
(2) If the act or omission was committed by a minister or a Federal or Land authority, the competent minister shall be given an opportunity to make a statement.
(3) If the constitutional complaint is directed against a court decision, the Federal Constitutional Court shall also give the party in whose favour the decision was taken an opportunity to make a statement.
(4) If a complaint is lodged directly or indirectly against a law, Article 77[33] *above shall apply mutatis mutandis.*
(5) The constitutional organs named in paragraph 1, 2 and 4 above may join the proceedings. The Federal Constitutional Court may dispense with oral pleadings if they are not expected to advance the proceedings any further and if the constitutional organs which are entitled to make a statement and have joined the proceedings waive oral proceedings.

Lastly, the consequence of a constitutional court granting under the type and object of such complaint, is regulated in Article 950f the *BVerfGG*, which states in complete as follows:

(1) If a constitutional complaint is upheld the decision shall state which provision of the Basic Law has been infringed by which act or omission. The Federal Constitutional Cour may at the same time declare that any repetition of the act or omission against which the complaint was directed will infringe the Basic Law.[34]
(2) If a complaint against a decision is upheld, the Federal Constitutional Court shall quash the decision and in cases pursuant to the first sentence

[33] Article 77of the *BVerfGG* states that *"The Federal Constitutional Court shall give the Bundestag, the Bundesrat, the Federal Government, and – in case of differences of opinion on the validity of Federal law – the Land governments, and – in case of differences of opinion on the validity of a rule of Land law – the Parliament and Government of the Land in which the rule was announced, an opportunity to make a statement within a specified period".*

[34] This provision is quite similar to the *stare decisis* principle in common law tradition.

of Article 90 (2) above it shall refer the matter back to a competent court

(3) If a complaint against law is upheld, the law shall be declared null and void. The same shall apply if a complaint pursuant to paragraph 2 above is upheld because the decision is based on an unconstitutional law. The provision of Article 79 above shall apply mutatis mutandis.

According to all descriptions on constitutional complaints in Germany, the followings are several significant matters to be emphasized:

1. Constitutional complaint is a part of the constitutional review.
2. Constitutional complaint principally may only be filed if all available legal remedies have been exhausted.Certain cases may have been exempted for all legal remedies, i.e. if the German Constitutional Court finds that the complaint contains general relevance or if a requirement to take all legal remedies first will bring serious and inevitable losses to the complainant.
3. An individual may apply for a constitutional complaint related to a violation of human rights or rights specifically granted in the GG. Communes or associations of communes may also apply for such complaint related to violations of the communes' rights to govern themselves.
4. The object of complaints may be addressed to any act or omission committed by public officials (either at the Federal or State level), court verdicts, as well as constitutions.
5. If a constitutional complaint is granted, legal consequences will vary depending on the object of complaints:
   - if the complaint is submitted against act or omission of a public official, the German Constitutional Court will declare that the provisions of the GG are violated by such act or omission, and at the same time, it can also state that the repetition of similar acts or omissions constitutes a violation of the GG;
   - if a complaint is submitted against a court verdict, the German Constitutional Court will annul the verdict. Meanwhile, if the complaint is granted before all available legal remedies have been taken, the German Constitutional Court will hand over the issue to the court which is competent to hear it;
   - if the complaint is submitted against a law, the German Constitutional Court will declare the law as null and void. This applied also applies to constitutional complaints submitted against a court ruling, in which such ruling is taken based on the laws which are contrary to the GG.

B. Application of Constitutional Complaints in Indonesia

The discussion on a possibility to adopt or implement a constitutional complaint mechanism in the Indonesian legal system is relevant to be given serious attention for several reasons. First, under Article 1 (2) and (3) of the 1945 Constitution, it can be concluded that the fundamental idea, which underlies the 1945 Constitution and will be manifested in practice, is the idea that Indonesia is a constitutional democratic state. Therefore, it means that the 1945 Constitution will provide maximum protection to democracy and constitutional rights of citizens. Thus, the Constitutional Court was established. Meanwhile, constitutional complaints are part of legal initiative to provide maximum protection for the citizens' constitutional rights. However, it turns out that the Constitutional Court has no authority to decide constitutional complaints cases. Therefore, the aspiration to provide maximum protection has not been fully achieved.

Second, the lack of authority of Constitutional Court to adjudicate constitutional complaints will lead to the unavailability of judicial remedy through constitutional adjudication mechanism for violations of the citizens' human rights, in which such violations are not committed due to the unconstitutionality of the law norms but, they tends to occurdue to actions or omissions of state institutions or public officials. Meanwhile, all legal remedies provided by the current system have been pursued by the complainant. One of its consequences is many applications submitted to the Constitutional Court, which are substantially constitutional complaints, are declared "inadmissible" (*niet ontvankelijk verklaard*) due the Constitutional Court is not competent to try them.[35]

Third, according to the provisions of the constitution and applicable laws, namely Article 24C paragraph (1) of the 1945 Constitution in conjunction with

[35] According to the data of the Clerk of the Constitutional Court up to November 2009, there was at least 26 applications, which were substantially constitutional complaints. Thus, such applications were rejected or ruled"inadmissible" (*niet ontvankelijk verklaard*). Several applications which gained a wide coverage: Case Number 016/PUU-I/2003 (application on the revocation of the Judicial Review of the Supreme Court), Case Number 061/PUU-II/2004 (application on the revocation of two contradictory Judicial Review Verdicts of the Supreme Court), Case Number 004/PUU-III/2005 (an allegation of bribery in the verdict of the Supreme Court), Case Number 013/PUU-III/2005 (a violation of constitutional norms application), Case Number 018/PUU-III/2005 (wrong interpretation in the application of laws), Case Number 025/PUU-III/2006 (two contradictory Verdicts of the Supreme Court), Case Number 007/PUU-IV/2006 (uncertainty of the case proceeding at the common court and alleged bribery), Case Number 030/PUU-IV/2006 (an authority to issue a broadcasting permit), Case Number 20/PUU-V/2007 (a mining cooperation contract which does not include the approval from the People's House of Representative), Case Number 026/PUU-V/2007 (dispute on the winning party at the regional government head election), CaseNumber 1/SKLN-VI/2008 (a report on the findings of the regional government head election violation, which are not followed-up).

Article 10 of Law Number 24 of 2003 on the Constitutional Court (hereinafter referred to as the Constitutional Court Law), available legal remedies for citizens to defend their constitutional rights via the constitutional judicial proceedings in the Constitutional Court are solely through the judicial review mechanism. In other words, the current applicable system is assumed as if the violation of the citizens' constitutional rights can only take place if the legislatures (House of Representatives and the President) make a law, which apparently violates the citizens' constitutional rights. In fact, a violation of the citizens' constitutional rights does not only occur due to "erroneous" laws, but also because of acts or omissions of public officials. Such circumstances, based on empirical experience, is triggered by a symptom where people who consider that their constitutional rights have been violated apply for a judicial review. However, the norm tested does not contain any unconstitutional material, or they try other procedure, namely making a legal construction as if there has been a dispute on the authority of state institutions. They hope that this procedure will be able to restore the constitutional rights and/or authorities losses they have experienced.[36]

Fourth, the lack of authority of the Constitutional Court of the Republic of Indonesia to adjudicate a constitutional complaint case and it is also contradictary the history of the constitutional court establishment. The Constitutional Court was established to uphold principles of a constitutional state (rule of law), as mentioned earlier, and also to provide maximum protection for the democracy and human rights of citizens.[37] The authority to try such constitutional complaint cases granted to a specific judicial body, i.e. the constitutional court, will contribute to the increased respect for the human rights and fundamental freedoms, intensified protection of these rights and reinforced constitutional degree. The protection of human rights will only have an appropriate priority if the specific judicial body, namely the constitutional court, carries out its constitutional review authority against real cases.[38]

[36] Two examples of cases gaining a significantly close attention from the people were dispute on the Depok Mayor election (Verdict Number 002/SKLN-IV/2006) and dispute on the termination of the Bekasi Mayor (Verdict Number 004/SKLN-IV/2006).

[37] Trevor L. Brown & Charles R. Wise, *op.cit.*, p. 155. See also John Ferejohn & Pasquale Pasquino, "Rule of Democracy and Rule of Law" in Josė María Maravall & Adam Przeworski, *Democracy and Rule of Law*, Cambridge University Prees, 2003, p. 251.

[38] Jan Klucka, "Suitable Rights for Constitutional Complaint", paper presented for *Workshop on the Functioning of the Constitutional Court of the Republic of Latvia*, Riga, Latvia, 3-4 July, 1997.

However, since Article 24C paragraph (1) and (2) of the 1945 Constitution has limitedly prescribed the authority of the Constitutional Court, an additional authority will only be possible by amending the provisions of the 1945 Constitution. In fact, an amendment to the 1945 Constitution is not easy, as the proposed amendment should be submitted by at least 1/3 of the members of the People's Consultative Assembly in order to put into the People's Consultative Assembly's Session agenda. It must also be accompanied by a detailed.[39]

In theory as well as in practice, as explained in the previous description, and as observed in Germany, the constitutional complaint is a part of the constitutional review material, especially the constitutionality of acts (or omissions) which may violate or damage citizens' constitutional rights. If it is related to the Article 24C paragraph (1) of the 1945 Constitution, the constitutional complaint, on a limited basis, can be incorporated into the constitutional review material. In fact, the current applicable constitutional review in Indonesia, based on the Law on Constitutional Court, is a part of the constitutional complaint procedure in Germany, i.e. the constitutional complaint against the constitutionality of laws.[40] It is said as limited because the complaint is limited to the acts or omissions of public officials (to the detriment of the citizens' constitutional rights) which derived from an erroneous interpretation the legal norms.

Concretely, the constitutional complaint application is still construed as a judicial review petition. However, in the substance, such petition does not question the constitutionality of norms, but it questions the constitutionality of public officials' acts (or omissions) due to a misinterpretationof the legal norms. As a consequence, the citizens' constitutional rights are violated. Therefore, a demand for relief by the applicant should be a demand for statement from the Constitutional Court that the acts or omissions of public officials are contrary to the constitution.

If the above legal construction is acceptable, the amendment is necessarily conducted on several articles of the Law on Constitutional Court, i.e.:

[39] Article 37 paragraph (1) and (2) of the 1945 Constitution

[40] See again Article 92 and Article 93 paragraph (3) of the *BVerfGG* quoted in the previous page.

1. Article 51 paragraph (1) which previously reads, *"Complainants are parties who consider their constitutional rights and/or authorities have been violated by the enactment of a law, namely ... etc."* shall be modified/added, so it reads *"Complainants are parties who consider their constitutional rights and/or authorities have been violated by the enactment of a law* ***and/or acts or omissions of public officials due to an erroneous interprating meaning of law****, namely ... etc.".* Then, the Elaboration of this article may add an explanation on public officials, who are included court verdicts.
2. Article 51 paragraph (3), which previously reads, *"In the application as referred to in paragraph (2), the complainant must describe clearly that:*
   a. *the drafting of the law does not comply with the requirements under the 1945 Constitution of the Republic of Indonesia; or*
   b. *the substantial material in a paragraph, article, and/or part of the law is considered to be contrary to the 1945 Constitution of the Republic of Indonesia",*

   shall add letter c which reads, *"c. the substantial material of a paragraph, article, and/or part of the law has mistakenly interpreted in such a way so as to cause, the complainant's constitutional rights and/or authorities are damaged which are contradictory to the 1945 Constitution of the Republic of Indonesia."*
3. Article 56 paragraph (3) shall be amended/added, i.e. previously read, *"(3) In the event the application is granted as referred to in paragraph (2), the Constitutional Court shall expressly state that the substantial material of the paragraph, article, and/or part of laws which is contrary to the 1945 Constitution of the Republic of Indonesia"* to becomes *"(3) In the event the application is granted as referred to in paragraph (2), the Constitutional Court shall expressly state that the substantial material of the paragraph, article, and/or part of laws which is contrary to the 1945 Constitution of the Republic of Indonesia or expressly declare that public officials have mistakenly interpreted the substance of the paragraph, article, and/or part of the law, which resulted in the damage of the complainant's constitutional rights and/or authorities."*
4. Article 57, which originally consists of three paragraphs, shall add one paragraph which reads, *"The verdict of the Constitutional Court shall state that public officials have mistakenly interpreted the substance of the paragraph, article, and/or part of the law, which the damage of the complainant's constitutional rights and/or authorities. Thus, the act or omission of such public official, shall be contrary to the 1945 Constitution of the Republic of Indonesia".*

III. CONCLUSION

In the future, considering the increasing constitutional awareness of citizens, there is no reasonable doubt to say that the need to adopt a constitutional complaint mechanism is no longer solely born to meet the theoretical demands, but it is born to fulfill the real demands of citizens. Hence, in long term, the People's Consultative Assembly as an institution which has the authority to amend the Constitution has to be seriously consider the need. Or, at least in the short term, there is a pressing demand for (House of Representative together with the President) to amend the Law on Constitutional Court in order to adopt a limited constitutional complaint mechanism as described above.

Taking into account the statistics data of constitutional review petitions submitted to the Constitutional Court until recently, the number of applications, which are substantially constitutional complaints, is significant. The data can be construed if the constitutional complaint mechanism may be adopted by the amendment on the Constitutional Court law, it will significantly reduce the number of judicial review petitions.

Politically speaking, these circumstances have a positive symbolic-political meaning. Therefore, it will further reduce the laws - which have been painstakingly drafted – stated to be contrary to the 1945 Constitution, even though there was not many petitions for judicial review were granted. Up to recently, the percentage of laws which are declared to be contrary to the 1945 Constitution by the Constitutional Court is relatively small.

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Judicial Preview on the Bill on International Treaty Ratification

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Abstract

This research is aimed to find and introduce a new idea on the state administration, which has implications on the international treaty ratification procedure followed by Indonesia and additional authorizations of the Constitutional Court of the Republic of Indonesia. The judicial preview in this research is an international treaty examination procedure by the Constitutional Court before an international treaty is transformed into a law, i.e. such international treaty is a Bill. The judicial preview shall have different terms in each country, such as Review *ex ante*, abstract review, judicial review. This procedure is applied when an international treaty has not been validated as a country's national law. The benefits of a judicial preview shall be a solution to connect an ambiguity between the state administrative law and international law. The judicial preview is also the inter-state institutions real check and balance on the international treaty. Out of benchmarking results of four countries following the monism doctrine, i.e. Russia, Germany, France, and Italty and two countries following the dualism doctrine, i.e. Hungary and Ecuador, several additional authorizations of the Constitutional Court shall be summarized, i.e. via the Amendment of 1945 Constitution of the Republic of Indonesia and/or regulations via laws. If both manners are not possible, the Constitutional Court may apply the judicial preview as a state administrative practice. An international treaty draft, which has passed through the judicial preview, may not be submitted to the Constitutional Court to be performed a judicial review, unless 5 (five) year-period has passed since the bill is enacted as a law.

Keywords: Judicial Preview, Constitutional Court, International Treaty, *Pacta Sunt Servanda*, Ratification

I. INTRODUCTION

A. Background

The subject which underlies this research is the Constitutional Court accepts the review application on Law Number 38 of 2008 on ASEAN Charter ratification (Asean Charter) submitted by the Institute for Global Justice in 2011[1] One of the reasons to submit the Judicial Review of the Law on ASEAN Charter Validation is economics treaties binding member countries via the ASEAN Charter shall be performed a free trade agreement between member countries and other countries other than ASEAN members. Such treaties significantly deduct the sovereignty of Indonesia as a country and liberalize the economic and labour, in which the liberalization may threaten the life sustainability of citizens of the Republic of Indonesia.[2] Related to the Judicial Review, Former Director of International Treaties at the Ministry of Foreign Affairs of the Republic of Indonesia, Damos Dumoli Agusman states his opinion as follows:

> However, it shall be noted if the Constitutional Court decides that the ASEAN Charter contradicts with the 1945 Constitution, a legal dilemma will emerge for Indonesia (as a country), i.e. how to comply with the 1945 Constitution by breaching international laws or obey international laws by breaching the 1945 Constitution. According to international laws, Indonesia cannot reject the performance of treaties it consented to under a reason that they contradicts with the national laws.[3]

Regarding the rationale of Damos Dumoli Agusman aforesaid, there is a dilemma between the national and international laws which has not been settled until now. The 1945 Constitution often encounters a problem with international treaties in terms of state sovereignty, individual rights, etc. There is also a worry on the future of international treaties threatened to be aborted due to various contradictions between national and international laws. This concern is reasonable

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[1] See Khaerudin,"MK Diminta Batalkan Ratifikasi Piagam Asean", *Kompas,* 23 September 2012, [...link...] http://internasional.kompas.com/read/2012/11/23/2139259/MK.Diminta.Batalkan.Ratifikasi.Piagam.Asean

[2] See also Simon Tumanggor, *Judicial Review Undang-Undang Pengesahan Piagam Perhimpunan Bangsa-Bangsa Asia Tenggara Jendela Informasi Bidang Hukum Bidang Perdagangan* (Judicial Review on the Law on Association of Southeast Asian Nations' Charter as the Window for Commercial Legal Sector Information). (Ministry of Home Affairs of the Republic of Indonesia, 2011, (*see http://jdih.kemendag.go.id/files/pdf/2014/02/14/3-1392378065.pdf)*), Page 3

[3] Damos Dumoli, Judicial Review of ASEAN Charter. See http://www.sinarharapan.co.id/content/read/judicial-review-piagam-asean/, See also *Majalah Opino Juris*, Vol. 4 (2012), Ministry of Foreign Affairs of the Republic of Indonesia.

considering several issues in the Indonesian state administrative and national laws which have not been settled with international treaties, among others:

1. Law No. 24 of 2000 on International Treaties does not expressly explain the position of international treaties in laws. It solely states that an international treaty is validated with a law/Presidential Decree without further explaining the meaning and consequence for Indonesian laws.
2. Other problem lies in the hierarcy of the laws as referred to in article 7 paragraph (1) of the Law No. 12 of 2011 on Laws Drafting. The provision does not explain the position of International Treaties in the national laws. If the ratification of international treaties is embodied via laws, it means the law on international treaties may be performed a Judicial Review under the most severe consequence of such law being stated as null and void and breaching the constitution or the 1945 Constitution of the Republic of Indonesia. The consequence of such international treaties cancellation may present a bad implication to the international politics and weaken the position of the Ministry of Foreign Affairs, which is the front line of the state diplomacy.
3. It is not clear whether Indonesia applies a Dualism or Monism in its international legal system. Until recently, Indonesia still applies a mixed doctrine, in which the monism doctrine is applied for international treaties related to the state's bound as an external international legal subject and the dualism doctrine along with a transformed action is applied for international treaties related to rights and obligations for all Indonesian citizens.

B. Research Questions

What is the mechanism and possibility of a Judicial Preview of the Bill on the Ratification of International Treaty?

C. Research Methodology

In this research, the main data are primary and secondary data. Primary data are interview results combined with normative data, such as treaty texts and laws, which are analysed by the Law and Change Theory, Pacta Sunt Servanda and Check and Balance and utilizing findings on several countries' international treaties norms to be compared one to another. In addition to primary data, this research is also supported by secondary data from legal literatures, such as dissertations and scientific journals. Approaches applied in this research shall be statute approach, conceptual approach and treaty approach and comparative

approach which are applied to compare the Judicial Preview on International Treaties by Russia, Germany, Hungary, France, Italy, and Ecuador.

II. RESULT AND DISCUSSION

Before we further discuss this research outcome, it is important to take note about decisions on the ASEAN Charter Judicial Review at the Constitutional Court, which are taken in February 2013. Even though such Judicial Review application is not granted by the Constitutional Court, it is only a temporary relief. Other international treaties are threatened to be cancelled before the Constitutional Court because International Treaties validated by law automatically become a test object at the Constitutional Court. However, it is important for us to carefully study several judges' opinions on the ASEAN Charter review case, among others:[4]

1. Judge Harjono shall think that even though Indonesia has bound itself in international treaties, as a sovereign country Indonesia remains have an independent right to terminate such agreement, if Indonesia thinks it is harmful or does not provide any benefits. ASEAN Charter is an agreement among ASEAN member countries. From the national point of view, it is a macro policy in the commercial sector. Such macro policies may be changed if it does not provide any benefits or causes harms. Therefore, the government and People's House of Representative need to review such agreement, in this case ASEAN Charter.

   In addition, due the ASEAN Charter implementation relies on each ASEAN member country under Article 5 paragraph (2) of the ASEAN Charter, the Indonesian government shall make an implementing regulation which complies with the national interests under the 1945 Constitution. According to Harjono, a country's obligation does not occur because an international treaty has been ratified by a law. However, such obligation occurs because the parties (countries) as the legal subjects have collectively agreed to an agreement. It complies with the principle of Pacta Sunt Servanda.
2. Instead, having a different opinion with Judge Harjono and other Constitutional Judges, Judge Hamdan Zoelva and Judge Maria Farida think that the Law

[4] See the Verdict of MK Number 33/PUU-IX/2011 on the review of ASEAN Charter

No. 38 of 2008, as the legal form of the People's House of Representative's approval for the ASEAN Charter, may not become a judicial review object against the 1945 Constitution, which is the authorization of the Court. Thus, this application should not be acceptable *(niet otvankelijk verklaard).* (See point 2 of the difference between the common law and UUPI)

Two different opinions in the legal consideration of the Constitutional Court Judges are also consequences of no express norm in the Indonesian national laws and regulations, which principally differentiate between common laws and international treaties laws. These differences are reasons why the Judicial Preview is urgent for Indonesia. The difference between both of them is described as follows:

1. Common laws, which are mostly belonging to the national legislation programme, are internal in nature for either its provisions or legal substance. Internal nature means that underlying legal sources and the procedure to draft this law include in the national scope. Meanwhile, an international treaty law is a law which prevails internally because it is "covered by" a law. However, the source and procedure to draft such international treaties to become a law come from international organizations, bilateral agreements, multilateral conventions, etc.
2. In terms of the laws format, laws shall principally have a fundamental difference with the international treaties ratification law, and it is stated by the Constitutional Judge Maria Indrati as follows:

> *Law Number 38 of 2008 on Ratification of the Charter of the Association of Southeast Asian Nations is the Law on ratification which serves as a ratification tool of a treaty performed by the Government and other countries or international institution. By law, either by Law No. 10 of 2004 and Law No. 12 of 2011 on the Enactment of Laws and Regulations, the provisions of the international treaty ratification Law are placed in a different sector with common laws and other laws and regulations. A different provisionsal placement between common laws (including other laws and regulations) and the Law on international treaties ratification of the treaty is reasonable. Therefore, the format or surface form (kenvorm) of both laws has a significantly fundamental difference, specifically the*

> *elaboration and wirting of both laws' body. In Law Number 12 of 2011 on the Drafting of Regulations*[5]

Furthermore, Maria Farida Indrati argued that the Law generally formulates the substance of various norms and such norms may be directly addressed to each person. Thus, the enactment of such Law will bind everyone. [6] This is different to the Law on International Treaties Ratification, because the ratification is a state administrative institution on the ratification by the legislature for the Government's legal actions (which has signed a treaty) in accordance with the Law on International Treaties. Therefore, Indonesia is formally bound to the treaty. Thus, the promulgation of the Law on International Treaties Ratification is not binding to each person/people. However, it solely binds the parties who enter into the treaty. This complies with the principle that a treaty binds the parties entering into it (*pacta sunt servanda*) as referred to in Article 26 of the Vienna Convention[7]

3. The third issue which distinguishes common laws and the law on international treaties is the "law making" or making of norms or rules of law in both laws. Common laws are laws coming from the legislative and judicial agencies and they are discussed in the commission and plenary meetings before they are ratified and binding. Meanwhile, laws derived from international treaties are not discussed in a meeting, either the People's House of Representative's commission meeting or plenary meeting, which is aimed to make norms in the international treaties Bill. The meetings conducted by the People's House of Representative are held to solely ratify the Bill into the Law, totally without changing the content. The absence of a substantial discussion on international treaties by the People's House of Representative is stated by Prof. Dr. Maria Indrati in the Verdict No. 33/PUU-IX/2011 on ASEAN Charter review:

> *Regarding the substance in the body of the common laws, the laws drafters, both the People's House of Representative and the President will address the overall design of the Law, whether it is the considerations, legal*

[5] Verdict Number 33/PUU-IX/2011 on the ASEAN Charter review, pp. 202-203.
[6] Maria Farida Indrati S. 2007, *Ilmu Perundang-undangan (1). (Jenis, Fungsi, Materi Muatan)*, Yogyakarta, Kanisius. page 53.
[7] Harry Purwanto, "Keberadaan Asas Pacta Sunt Servanda Dalam Perjanjian Internasional", *Mimbar Hukum UGM,* Volume 21 No. 1, February 2009, Yogyakarta. pp. 155-170.

> *basis, and also Article 1 to last article. Therefore, if there is an opinion or improvement, they can change or even delete it. Once the entire bill is discussed and its corrections and formulations are performed, the bill will be collectively agreed upon by the People's House of Representative and the President. Then, the President ratifies such Law. This is different from the discussion on the Bill on the International Treaties Ratification, because the People's House of Representative and the President only focus on the ratification issue and they cannot change the intenational treaty substance made by the Government and other state (country) or international organization.*

4. The fourth difference between common laws and laws derived from international treaties, is the law nullification status. If the laws are generally canceled through a Judicial Review by the Constitutional Court, such Law is automatically no longer binding. It is different if the Constitutional Court cancels a Law derived from an international treaty. The binding content of such international treaty is not automatically cancelled. This is explained by Damos Dumoli Agusman:[8]

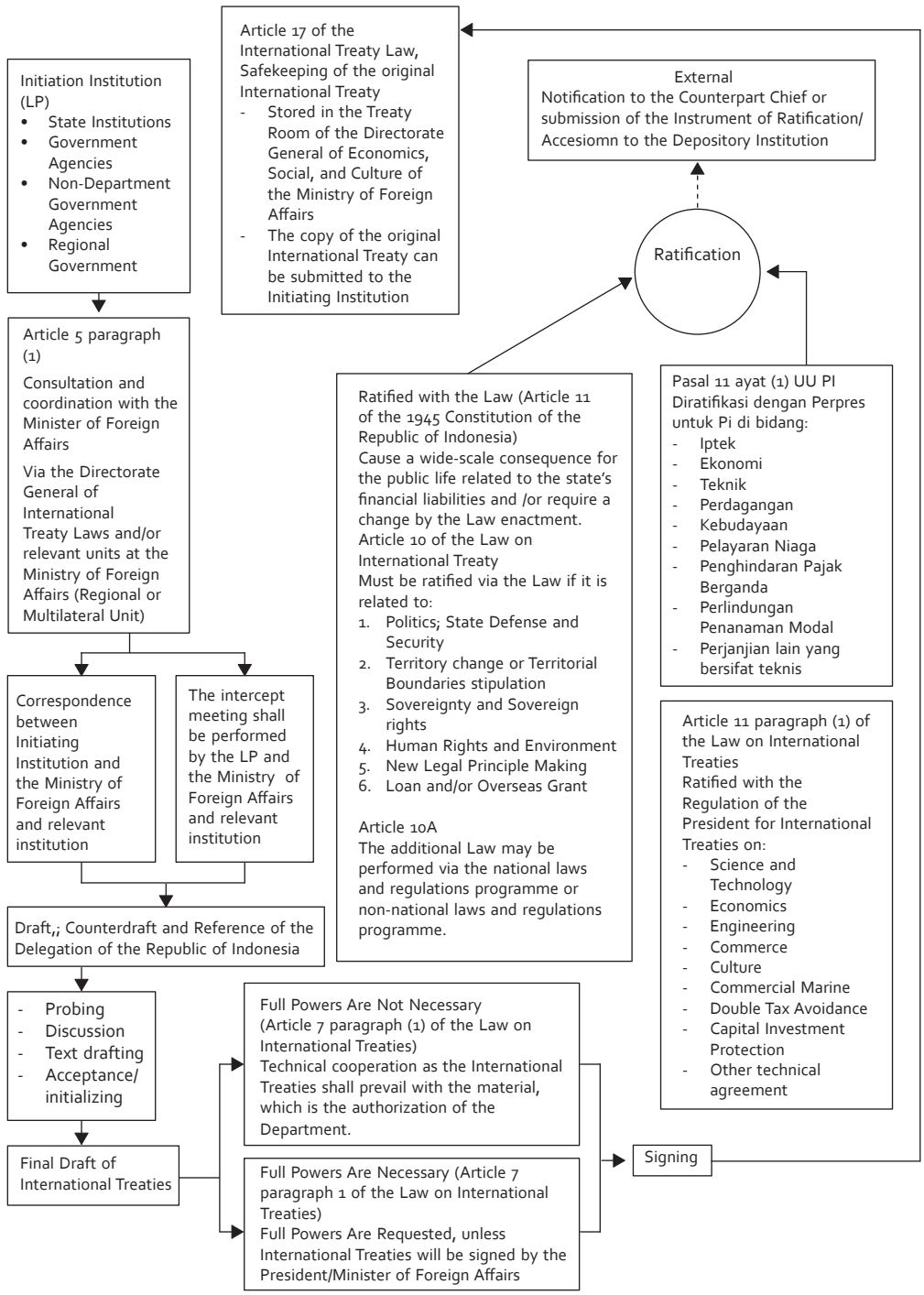
> *If it is observed from the legal source, the Dutch doctrine shall become the guideline for Indonesia. It means the Constitutional Court can only review Law No. 38 of 2008. It cannot review the ASEAN Charter, because the Law No. 38 of 2008 is only an approval by the People's House of Representative and is not intended to make the ASEAN Charter as a national law.*

5. The last reason is the Constitutional Court of the Republic of Indonesia does not have any abstract review as European countries, among others Austria, Hungary, Germany and Italy. However, the need to settle the constitution issue between international treaties and national laws must be fulfilled. Indeed, the idea of a Judicial Preview of an international treaty bill is the same with the abstract review or ex ante review in the countries aforesaid. The use of the Judicial Preview term is a speciality applied to differentiate the abstract review of an international treaty bill and the abstract review of common laws and regulations, which are conducted by some European countries.

Then, let's we see the mechanism of an International Treaty and Judicial Review of Laws threatening the performance of an international treaty:

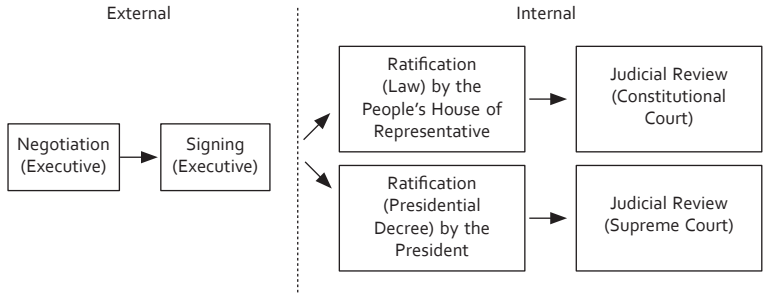
[8] Opinio Juris Magazine, op.cit.

(1) The Scheme of the International Treaty Drafting[9]



[9] Eddy Pratomo, *Hukum Perjanjian Internasional, Pengertian Status Hukum dan Ratifikasi*. Penerbit Alumni, Bandung 2011.

(2) The Scheme of the International Treaty Judicial Review



Along this time, in terms of international treaties making, the authority remains on both state's controlling institutions, i.e. executive in terms of making international treaties; the People's House of Representative of the Republic of Indonesia has an authority to ratify international treaties which has contents including in the law classifcations; and other technical international treaties ratification other than laws ratification are the authority of the president (Presidential Decree).

The international treaties scheme aforesaid according to the Law on International Treaties has been significantly outdated, because the Law on International Treaties does not have norms regulating the possible Judicial Review against the Law on International Treaties. Even though the content of the Law on International Treaties is different to common laws, the status remains a Law, which may be subject to a judicial review before a Court.

The constitution and laws and regulations (Law of the Republic of Indonesia Number 12 of 2011 on the Enactment of Laws and Regulations (UUP3) and Law No. 24 of 2000 on International Treaties) have indeed guaranteed the ratification of international treaties to become a part of national legal provisions via ratification. The most important unresolved issue in the constitution and laws and regulations in Indonesia is no classification of laws which can be cancelled by the Constitutional Court, even though the laws content can vary.

The second scheme aforesaid shows even though international treaties have been approved and have a binding effect, they may be filed in the Constitutional Court or the Supreme Court for a judicial review. If an international treaty is

declared unconstitutional by the Constitutional Court or the Supreme Court, the treaty cannot be implemented. In this case, a Judicial Preview is necessary. The Judicial Preview is basically an abstract norm test, which is, in principle, a preventive mechanism for the future of laws and regulations predicted to be unconstitutional.[10] In other words, the Judicial Preview is a control on a bill prior to its enactment as a legally binding law. This means that there are preventive aspects of the Judicial Preview if it is enacted on the international treaty bill. This preventive aspect is a form of prudence if the international treaty bill is indeed contrary to the national interests and the 1945 Constitution.

The Judicial Preview on the ratification bill will be important to be studied for the effectiveness of the international treaties ratification and enactment process. If the bill has been legally enacted as a law and the ratification law can be tested, there is no legal certainty in the enactment of such bill. The test of the ASEAN Charter is an experience that the enacted international treaties law has a cancellation consequence. Once the agreement is made, it should be implemented as the *pacta sunt* servanda and good faith (the provisions of the Vienna Convention in Article 26). Furthermore, the results of this study can be a solution-based recommendation which can be applied as problem solving regarding the international treaties for other countries.

The researcher chose to compare the judicial preview of the countries embracing the Austria model or continental model,[11] because the Constitutional Court of the Republic of Indonesia is synonymous with the Constitutional Court of the countries adopting the Austrian model in some respects. First, Indonesia is a country which inherits the law of the European continent. Thus, it will be more consistent if a comparative study is carried out between the member countries which follow the Austria model or continental model, The second reason is Indonesia has a Constitutional Court, in which it is a characteristic of a country which adopts the Austria or Continental model. Therefore, the comparative study compares the state administration practice and judicial preview norms between countries adopting the Continental model. Some countries used

[10] Jimly Ashshiddie, Peradilan Konstitusi di Sepuluh Negara. Jakarta, Konstitusi Press page 50.
[11] This model is also known as kelsenian model.

as the comparisons are Russia, Germany, Hungary, United States of America, Italy and Ecuador as an input in the design of judicial preview to become the authority of the Constitutional Court of the Republic of Indonesia. Some matters compared are later broken down in the following table:

Country	Doctrine	Ratification Authority	International Treaties Form following a Ratification	Name of the Institution	Terminology	Legal Basis of the Authority	Possible Judicial Review of the Law on International Treaties
Russia	Monist	President, Parliament only some elements	Without transformation	Constitution Court	Abstract Review	Constitution, Laws	None
Germany	Monist	President	Without transformation	Constitution Court	-	Practice	Practice
Hungary	Dualist	President at the approval of the Parliament	Menjadi UU atau Keppres	Constitution Court	Review ex ante/ A priori review	Constitution, Laws	Yes
France	Monist	President	Without transformation	Constitution Council	A priori review	Constitution	None
Italy	Monist	President, Parliament only some elements	Without transformation, sometimes become a Law	Constitution Court	Abstract review	Constitution	Yes (ratified into a Law)
Ecuador	Dualist	President at the approval of the Parliament	Without transformation	Constitution Court	Judicial Review	Law	None
Indonesia	Dualist	Parliament and President	Become a Law or Presidential Decree	Constitution Court/ Council	Not Yet	Not Yet	Yes

From the above comparative table, there are several matters which can be summarized from each country:

1. From the comparison table above, it can be seen that some countries adopt the Monism such as Russia, Germany, France and Italy. Agreed international

treaties no longer require a ratification instrument of Constitution. The agreed international treaties automatically become a part of the national law. However, for Russia and France, before the international treaties are ratified/signed, the treaties must pass the examination or review of the Constitutional Court and Constitutional Council. Unlike Germany, when the treaty is ratified by the President, the international treaty is self-executing[12].

2. The German Constitutional Court does not have any jurisdiction over a treaty review. However, Germany puts a state administrative action into practice, when the Constitutional Court reviews the international treaty on ECtHR prior to the entry into force (judicial preview) of the International Treaty on Double Tax Avoidance (judicial review). For Italy and Russia, the two countries are slightly inconsist in the monism doctrine. Not all international treaties can be ratified by the President. Sometimes there are some specific treaties to be ratified by the Parliament and transformed into a Law.
3. For a country which adopts the dualism doctrine in international treaties such as Hungary, Ecuador and Indonesia, a law can be binding in domestic laws when it is approved by the parliament. The Hungarian and Italian Constitutional Court can review a bill on international treaties when the president or the government appeals to the constitutional court of each country. Nevertheless, this is different from Indonesia because the Constitutional Court does not have any authority to a priori review. Therefore, a law on international treaties can be cancelled by the Constitutional Court's verdict. In contrast to Ecuador, when Ecuador will implement an international treaty, the Ecuadorian Constitutional Court is automatically authorized to review the international treaty before it is passed by the parliament. Thus, the Constitutional Court of Ecuador is one of the authorities in the international treaties process. However, Ecuador does not transform an international treaties which have been to a law. Therefore, the ratified International Treaty is not included in the petition object to the Constitutional Court of Ecuador.

[12] Eddy Pratomo, op.cit, pp 200-201.

4. For a country which adopts the monism doctrine, such as France, an international treaty cannot be petitioned for a judicial review by a Constitutional Court/Council since the treaty is adopted not in the form of a law. However, the state administrative practice of Germany, i.e. an abstract review, does not adopt any international treaty. Nevertheless, prevailing international treaties once exist in the state administrative practice, even though such treaty is not a review object of the German Constitutional Court. However, the Court remains performing the judicial review because the common legal principles shall have a priority below the German constitution. Thus, the constitutional review of international treaties remains valid to be tested against the German constitution.
5. In terms of countries adopting the dualism doctrine, such as Hungary, their Constitutional Court has an ex ante and abstract review which is one step more advanced than the Indonesian Constitutional Court. However, it may still be argued by the possible law on international treaties ratification agreed by Hungary, which is cancelled by the Constitutional Court. The solution taken is to eliminate the judicial review for this type of law, or the law on international treaties ratification may be materially reviewed. However, a period of time should be given for the review application of this law.
6. Related to the Indonesian Constitutional Court, as to be described next, Indonesia may performa judicial preview for the international treaties ratification bill by several methods. First, amend the 1945 Constitution of the Republic of Indonesia and add the judicial preview authority for the Constitutional Court. Second, include an authority in a law on Constitutional Court. Therefore, it is not necessary to amend the constitution (take example from Ecuador). Third, perform the state administrative practice as Germany.

Then, in general, following matters can be drawn from the judicial preview of above countries:

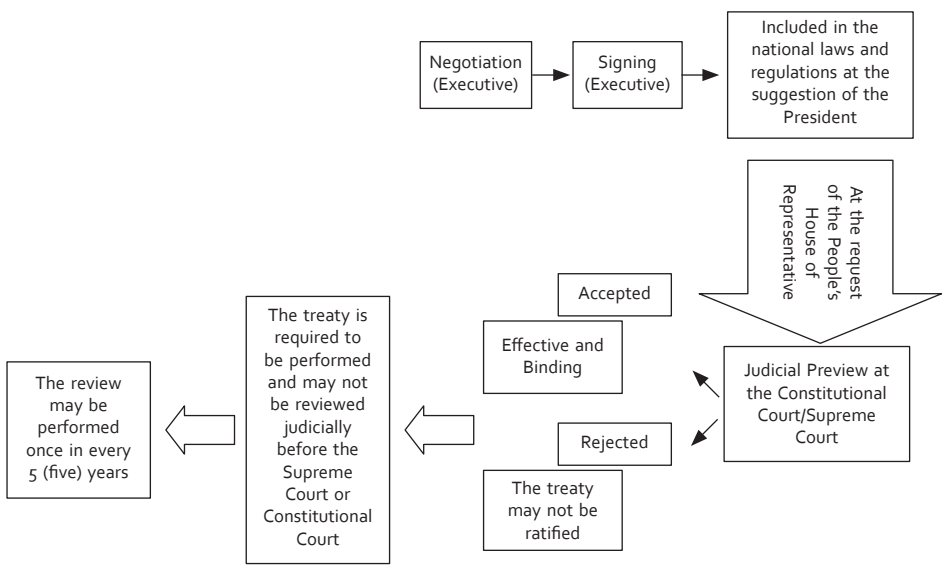
1. Even though there are countries which claims as monists, the dualism practice also occurs when there are countries transforming the international treaty into a law.

2. The countries' ratification authority model also varies. Some countries' parliament ratifies the law and some countries' President performs the ratification. Then, there is also some countries' Parliament and President who ratify the law, either individually by the Parliament (Law) and Presidential Decree (President) (the example of these countries is Indonesia) or collectively (the President at the approval of the parliament).
3. The naming of a constitutional institution mostly applies the term of "court" and it is classified into the judicial power. The exception applies for France which takes a Council form. Therefore, the members are not judges.
4. The term of International Treaties review prior to its binding effect is not uniform. Some countries name it as abstract review, *a priori* review, review *ex ante*, or judicial review. The naming of judicial review in this research is aimed to specifically point to the International Treaties Bill. Thus, the definition will not be mixed with the abstract review, *a priori* review, or review *ex ante*, which prevails in some countries for common laws.
5. The Legal Basis of each country's Constitutional Court's authorization is directly transferred via the Constitution and Laws. Then, some countries adopt a principle where the authority does not derive from the Constitution. It is solely derived from Laws. However, some countries do not have such authority in their constitution or laws. But, it is carried out as a legal practice (Germany).
6. Then, in terms of the judicial review, a treaty covered by the laws (laws/act) may remain able to be reviewed by the Constitutional Court. However, it is different when it is not transformed as a monist practice. When it has been entered into and prevailed, an international treaty is no longer a case object of the Constitutional Court, unless there is a practice as Germany. It is related to the possible cancellation via a judicial review (for Dualist countries). A norm to govern every 5 (five) year may be added and the Law on International Treaties may be submitted for a judicial review before the Constitutional Court. It is aimed to guarantee individual rights concurrently as an evaluation moment on the progress of such Law on International

Treaties; whether the content of such agreement remains relevant or has been performed, etc.

The Judicial Preview is a real action in mediating the national state administrative issue and international laws (treaties). It may provide a new authority for the Constitutional Court of the Republic of Indonesia to perform the judicial preview on international treaties signed by the delegations, when such international treaties remain as a bill. In order to provide such new authority to the Constitutional Court, several procedures may be taken, i.e. Amendment of the 1945 Constitution (by including a new authority in Article 23 of the 1945 Constitution), Amend the Law on Constitutional Court, or stipulate a judicial preview as a state administrative practice. Such three solutions are taken by an exemption, in which the international treaties bill to be reviewed judicially by the Constitutional Court does no longer have any chances to be reviewed judicially when the international treaties bill has been ratified or taken a form of a law because it has undergone the judicial preview process.

Out of this benchmarking result, the scheme of the international treaties judicial preview is formulated in this research:



As a follow-up, there are several actions which may be taken, so the Constitutional Court may have an authority regarding the judicial preview on the international treaty ratification bill, among others:

1. **Add the Authority of the Constitutional Court in the 1945 Constitution**
   An idea to include the Constitutional Court in the international treaties process in Indonesia is relatively new. If the Constitutional Court is to be included in an international treaties process, the Judicial Preview authority by the Constitutional Court may be added by amending the 1945 Constitution. The authority granting to the Constitutional Court by amending the 1945 Constitution will be considered as an over-the-top action by some people, because the 1945 Constitution is highly sacred. However, it does not mean that this amendment cannot be performed. The amendment of the 1945 Constitution is a token that our constitution is not entirely reserved and cannot be amended. In the name of national interests and public order, the amendment can be taken. One point to be noted is the amendment of the 1945 Constitution is not the only means. There are other means to provide a new authority to the Constitutional Court. However, the amendment of the 1945 Constitutional is the most realistic means if we consider a positive law, which requires all norms and provisions to be in a written form.

2. **The authority granting to the Constitutional Court via Laws**
   The second option is to grant authorities to the Constitutional Court via Laws. If it is considered too difficult and impossible to amend the 1945 Constitutional, it is a choice. In order to grant a new authority to the Constitutional Court is not a prohibited or bad matter if the purpose is aimed for the Indonesian national interests. We can see the example from Ecuador whose constitution does not explain about any review authorities on international treaties prior to the ratification. This authority is only mentioned in the organic law of the Ecuadorian Constitutional Court. Likewise, the Thailand Constitutional Court grants the authority expansion to approve the recommendation of the Corruption Eradication Commission, in which the Thailand Constitutional Court may suggest to the Prime Minister not to

appoint any public officials, who do not submit a true asset report. Observing the examples of the Constitutional Court's authority expansion from the above countries, which materialize a legal certainty on the international treaties performance, this authority expansion may be carried out by amending the Law on Constitutional Court for the third time.

3. Judicial Preview via the State Administrative Practice at the Constitutional Court

The forms of state administration system which are not set out in the laws and regulations, are nothing new in the world. We can see how Germany, as a developed country, does not always have laws and regulations in its state administrative practice. The judges of the Constitutional Court of the Federal Republic of Germany are very progressive in terms of the constitutional practice, but they still consider the state's constitution and national laws.

Indonesia, as the country with a Constitutional Court, has also significantly been performing state administrative practices which have not been regulated by laws and regulations. For example, when the Constitutional Court issues a verdict, which is *ultra petita* in nature and considered to go beyond the authority of the Constitutional Court, it is intended that the law is not left behind to changes in society and the national and international political constellation. Although the Law on International Treaties is no longer be petitioned for a judicial review, each five (5) year-period[13] is given as an opportunity for parties, who wish to file an application for a Judicial Review. It aims to maintain the relevance of laws and regulations and times, and provide an opportunity for the public to review the treaty by submitting a Judicial Review.

[13] Discussion outcome with Prof. Jimly Ashsiddiqie, Jakarta 2016

III. CONCLUSION

- Being aware of the outdated Law on International Treaties against the Law on Constitutional Court and norms of the judicial review, the People's House of Representative should immediately revise the Law on International Treaties in order to conform to the Law on Constitutional Court and other legal norms.
- The judicial preview has a different naming in each country, such as review *ex ante*, abstract review, judicial review.
- The judicial preview is useful to balance the division of authority between state institutions in making international treaties. If the Constitutional Court of the Republic of Indonesia is given an authority to review the bill of international treaties, the authority to make international treaties is not limited to the executive body (negotiation stage) and legislative (ratification stage). Therefore, the check and balance principle can be realized.
- The judicial preview may become the authority of the Constitutional Court of the Republic of Indonesia by amending the 1945 Constitution of the Republic of Indonesia and/or the Constitutional Court's authority is added via the Law on Constitutional Court (such as, the authority of the Russian judicial preview is only regulated in the Organic Law). However, if both are not possible, the Court can review the constitutionality of an international treaty bill as a form of constitutional practice (e.g. *Bundesverfassungsgericht* Germany which does not have the authority (in written) on the judicial preview and judicial review of international treaties, but it takes the initiative to review the treaty before such treaties are binding).
- This judicial preview concept obviously can become a bid to other countries, which also have a Constitutional Court and a cooperation tool of the Constitutional Courts among countries, specifically considering that the Constitutional Court of the Republic of Indonesia has many useful collaborations to advance the interstate constitutional system and the

Judicial Preview is an important breakthrough to ensure the implementation of international treaties and of course carry out the functions of the Constitutional Court of any country in the world as a Guardian of Constitution.

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Reconstruction of Ethics Supervision System Towards Constitutional Court Justice

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Abstract

Ethics supervision of constitutional justices is an important issue for the development of ethics supervision system in the Constitutional Court, because the supervision of constitutional justices is a means of maintaining the independence and impartiality of constitutional justices, which is in fact the main pillar of an independent judiciary. In its development, there has always been a debate about the ethics supervision of the constitutional justices, whether the justices should be overseen externally or internally. This is because, juridically, the law does not regulate it clearly. Based on the above background, the research issues drawn are: (1) What is the significance of ethics supervision toward constitutional justices ?; (2) What is the system of ethics supervision of constitutional justices according to Indonesia's current positive law, (3) How to reconstruct the system of ethics supervision of constitutional justices more optimally in the future? Based on the result of the research entitled "Reconstruction of Ethics Supervision System toward Constitutional Justice", the following conclusions are obtained: (1) Based on philosophical, juridical and empirical perspective, ethics supervision of constitutional justices has important meaning in order to maintain and uphold the honor, dignity, and the behavior of constitutional justices. (2) Based on the analysis of the evolution of the ethics supervision system, the result shows that the ethics supervision system toward constitutional justices which is always changing indicates that there is still no standard system as a guideline for the enforcement of alleged violation of ethics against the constitutional justices. Therefore, there is a need for normative reconstruction of the ethics supervision system toward constitutional justices through legislation. (3) The reconstruction of the ethics supervision system toward constitutional justices can be done through: a. Amendment to the 1945 Constitution by adding a new norm governing the provision on ethics supervision system toward constitutional justices, b. Amendment to the Constitutional Court Law.

Keywords: Constitutional Justice, Ethics Supervision System, Code of contact.

I. INTRODUCTION

A. Background

Article 1 (3) of the 1945 Constitution states "the state of Indonesia is a state based on law". The important principle of rule of law state is a guarantee of the implementation of independent judicial power, free from the influence of other powers, (independence), and non-partisan (impartiality). Independence has three (3) dimensions, namely the functional dimension, structure or institutional, and personal. First, the functional dimension implies a prohibition against other institutions and all parties to influence or intervention; Second, the structure or institutional dimension, implies institutional justice must also be independent and impartial; Third, the personal dimension implies judges have the freedom on the basis of capabilities (expertise), accountability, and adherence to the code of ethics and code of conduct.[1]

Personal dimension in the sense that a judge is the representative of Allah (khalifah) on earth who holds respectable position (*nobile officium*) and noble. One task of a judge is to uphold law and justice, which is reflected in their decision in the name of the One and Only God, who will not only be accountable to the public, to the parties litigant, but also to God in the Hereafter.[2]The authority possessed by a judge in its implementation should be carried out in order to enforce the law and justice as mandated by Allah. In addition, a judge, either personally or institutionally, must be held accountable. It is such demand for accountability which requires that a judge should have moral and ethical integrity.[3] Therefore, to maintain moral integrity and ethics of judges, there needs to be supervision arrangement set forth in the guidelines of ethics and conduct of judges as the minimum standard that must be followed by a judge.[4]

A judge is an honorable office (*nobile officium*).[5] Therefore, the judge, as a man of noble-sounding title, is obliged to preserve the honor and dignity and

[1] Sekretariat Jenderal MK-RI, *Hukum Acara Mahkamah Konstitusi,*Jakarta: Sekretariat Jenderal Mahkamah Konstitusi, 2010, p. 19.
[2] Wildan Suyuti Mustofa, *Kode Etik Hakim,*Jakarta: Kencana Prenadamedia Group, Cetakan Kedua, 2013, p. 267.1
[3] Jurdi, *Komisi Yudisial*, Yogyakarta: Kreasi Wacana, 2007, p. 75.
[4] *Ibid.*
[5] Ahmad Fadil Sumadi, *Pengadilan,Fungsi Manajemen Mahkamah Agung Terhadap Pengadilan di Bawahnya Setelah Perubahan UUD 1945,*Malang: Setara Press, Cetakan Pertama, 2013, p. 217.

the nobility of good behavior in order to maintain the glory of office he bears. In this perspective the supervision of judges gains its importance.[6] Thus, the nature of the supervision of the judge is to maintain the glory of the judge and control the judges in performing their duties and authorities to prevent them from violation of moral and ethical integrity.Supervision or control in the judiciary can be distinguished between the supervision of the judicial institution and supervision of judges as the main actors of judicial power. As a judicial institution it should also be independent and impartial in running the judiciary, so it is not justified that other institutions influence the course of justice. As to the judges who have freedom, it is not in the sense of freedom without limits. Judicial independence is associated with the implementation of its constitutional duties, while the conduct of judges is not free from scrutiny. Therefore, monitoring is not intended to supervise judges in carrying out their duties and authorities, but to supervise the judges in their behavior (ethics)[7] in order to preserve and uphold the honor, dignity and behavior of judges.

Based on the above legal construction, according to the author, following Constitutional Court Decision Number 005 / PUU-IV / 2006, Constitutional Court Decision No. 49 / PUU-IX / 2011, and Constitutional Court Decision No. 1-2 / PUU-XII / 2014, control system of ethics against constitutional judges is unclear as the legal basis for the formation, position, composition and authority and procedures or oversight mechanism is not clear and does not have a strong juridical basis. Therefore, in this dissertation, the author will conduct an in-depth study related to the monitoring system of ethics to the constitutional justice, both the system that has been applied and that which is currently in force, so that comprehensive understanding concerning issues related to the supervision system of ethics at the Constitutional Court would be obtained.

Based on the above description, the objective of this study is to examine and analyze the supervision system of ethics of the constitutional judges and recommend the importance of reconstructing the supervision system of ethics to

[6] *Ibid*, p. 216-217.

[7] In the conceptual part, because supervision in the judiciary is intended to supervise the conduct of judges (the Constitutional Court Justices), thus, in this study, supervision would mean supervision of ethics.

optimize the monitoring system of ethics against constitutional judges in order to preserve and uphold the honor, dignity, and the behaviour of constitutional justices in the future so that the constitutional judges will be protected from abuse of authority, their dignity preserved and the independent judicial power can be realized to enforce law and justice.

B. Research Question

Referring to the above background, this study proposes three questions, namely:

1. What is the significance of ethics supervision against constitutional justices within the framework of independent judicial power?
2. How does the system of ethics supervision toward Constitutional Justices work in maintaining and upholding the honor, dignity and conducts of the Constitutional Justices according to the Indonesian positive law today?
3. How to optimize the reconstruction of supervision system of ethics toward Constitutional Justice in order to maintain and uphold the honor, dignity and conducts of the Constitutional Justice in the future?

C. Research Method

This research is a normative legal research, which uses doctrinal method in analyzin principles and norms of legislation relating to the ethics supervision system toward constitutional justices. Normative legal research conceptualize the principles and doctrines as well as a set of norms in the legislation, in this case the norms related to ethics supervision system of constitutional justices in order to preserve and uphold the honor and dignity, as well as the behavior of the constitutional justices. There are 6 (six) approaches used in this study, namely: statute approach, comparative approach, historical approach, philosophical approach, case approach and legal interpretation approach.

In line with the research method, the researcher in this research will use primary, secondary, and tertiary legal materials, obtained in the Constitutional Court library as and other libraries otuside the Court. Primary legal materials, including: (1) the 1945 Constitution of the Republic of Indonesia; (2) of Law

Number 48 Year 2009 regarding Judicial Power; (3) of Law Number 14 Year 1985 regarding the Supreme Court, as amended by Law No. 5 of 2004 on the Amendment to Law Number 14 Year 1985 regarding the Supreme Court, as amended by Law Number 3 of 2009 concerning Second Amendment to Law Number 14 Year 1985 regarding the Supreme Court; (4) Law Number 24 Year 2003 regarding the Constitutional Court, as amended by Law Number 8 of 2011 on the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court, as amended by Law Number 4 of 2014 regarding the Stipulation of Government Regulation in Lieu of Law Number 1 Year 2013 on the Second Amendment to Law Number 24 Year 2003 regarding the Constitutional Court to Become Law, and Government Regulation in Lieu of Law No. 1 Year 2013 on the Second Amendment to Law Number 24 Year 2003 regarding the Constitutional Court; (5) Law Number 22 Year 2004 concerning Judicial Commission as amended by Law Number 18 of 2011 on the Amendment to Law Number 22 Year 2004 concerning Judicial Commission; and Constitutional Court Regulations which are related the object of the research.

Secondary legal materials which include: Minutes of Discussion of the Amendment of the 1945 Constitution, Bill on the Constitutional Court and the its Minutes of Discussion, Bill on the Judicial Commission and its Minutes of Discussion, the decisions of the Constitutional Court and the decisions of other courts, research papers, law journals, other scholarly works. While tertiary legal materials, namely, among others are dictionaries and encyclopedias.

II. RESULT AND DISCUSSION

The Importance of Ethics Supervision towards Constitutional Justice in the Framework of Independent Judiciary

The Researcher will describe briefly the arguments underlying the importance of the ethic supervision of the constitutional judges, from a philosophical perspective, juridical, and empirical. Philosophical perspectives are based on philosophical approaches carried out by tracking the basic concepts, such as a human concept, the concept of ethics and the concept of freedom. Juridical

perspective will be presented by using a normative approach. While empirical perspective will be presented by using a case approach.

1. Philosophical Perspective

First, from the aspect of human philosophy, the concept of supervision towards constitutional justices is based on the concept of honorable judges, namely keeping the human soul with soul, become patron of the parties to the dispute, be an impartial mediator, have the authority to establish justice, has the authority to determine a person's guilt and the authority to punish someone who is found guilty.Second, from the aspect of ethics, supervision of constitutional justices departed from ethics as a code of ethics, in this case the Code of Ethics and Conduct of Constitutional Justice. The values contained in the Code of Ethics and Conduct of Constitutional Justice originated from Moral Philosophy, but the Code itself functions as a working guideline or moral teachings of the constitutional justices. Thus, the Code is the legalization of moral values in order to be enforced by the workings of the legal norms. The working of the law is to provide the institution that has the legitimate authority; there is penalty and punishment for violators. To determine the morality of the constitutional justices, the Code of Ethics of Constitutional Court Justice adheres to deontological and consequentialist ethics. Deontological ethics means judging a moral or immoral action by seeing whether the conduct violates or does not violate the Code of Ethics. Whereas consequentialist ethics means judging that an action called immoral because it is bad for public interest.

2. Juridical/Legal Perspective

Legal perspective can be traced from legal norms that are in the legislation. According Satjipto Rahardjo, states that the law is not only a statutory document that consists of thousands of articles, but rather a moral document, which saves a moral message to social life. Supervision of constitutional justices are the commands of laws and egulations, starting from the 1945 Constitution, the Act to the more technical rules which is Constitutional Court Regulation (PMK).

3. Empirical Perspective

Empirically, it can be traced from several events concerning enforcement of alleged ethics violations committed by constitutional justices. Enforcement of alleged violations of ethics is not only done by the Honorary Council of the Constitutional Court, but has also been conducted by an Investigative Team and Ethics Panel of the Constitutional Court. However, empirically, the system of ethics supervisionrunning today is carried out by a permanent Board of Ethics of the Constitutional Court and Assembly of Honor of the Constitutional Court which is *ad hoc* in nature.

Therefore, either from philosophical, juridical and empirical perspective, ethics supervision of the constitutional justices has significant importance in order to preserve and uphold the honor, dignity, and the conduct of the constitutional justices and the nobility of the Constitutional Court.

4. Ethics Supervision in the Framework of Judicial Power

According to the theory of supervision of judges, supervision is the activity to locate, assess and correct irregularities that may occur or have occurred based on the prevailing laws and regulations.[8] While theory of rule of law state says that "*the important principle of rule of law state is the guarantee for the implementation of independent judicial power*." Independence of the judiciary is reflected in the independence of the constitutional justices which is a key element within the judiciary itself. The independence of the judges should not be understood in absolute terms that an effective external institution in the field of judicial ethics is required as a balancing mechanism for independence and impartiality. The independence of judges, in some cases, has become a way for judges to act in tyrannical way by behaving in a distorted,corrupt and collusive manner. Thus, the judicial authority without adequate controls would likely give birth to absolutism in judicial institutions or judicial tyranny.[9]

[8] Imam Anshori, *Konsep Pengawasan Hakim, Op.Cit.* p. 26.
[9] A. Ahsin Thohari, *Desain Konstitusional Komisi Yudisial dalam Sistem Ketatanegaraan Indonesia*, Jurnal Legislasi Indonesia, Vol. 7 No. 1, Maret, Jakarta: Direktorat Kenderal Peraturan Perundang-undangan Kementerian Hukum dan HAM, 2010, p. 71.

Freedom of constitutional justice would not mean freedom without limit, but limited by laws and ethical codes that are implemented in the form of ethics supervision, and also freedom is an integral part of accountability. Therefore, the supervision of the constitutional justices do not conflict with the principle of independence of the judges as long as it is not in the realm of execution of their duties and functions.

The System of Ethics Supervision towards Constitutional Justices Based on Positive Law in Indonesia Today.

This section consists of two sub-topics. First, exposure to the evolution and dynamics of the practices and regulation of ethics supervision towards constitutional justices which will be divided into five periods. Second, analysis on the dynamics of this supervision.

1. Evolution of the System of Ethics Supervision towards Constitutional Justice

Supervision of constitutional justice has been regulated and practiced since the Constitutional Justices were inaugurated on August 16, 2003, with the issuance of PMK No. 02 of 2003, on 24 September 2003 on the Code of Ethics and Code of Conduct of the Constitutional Justices. In fact, the discussion on the Code of Ethics and Code of Conduct of the Constitutional Justice was done prior to the discussion concerning rules of order of the court hearing, law of procedures, etc. This shows that the constitutional justices in the first period put integrity more important before performing their duties and authorities.In the process, the Court made several changes to the rules relating to the supervision of the justices. This suggests that the process of constitutional justice supervision regulation did not come out of the blue, but was influenced by the situation and empirical conditions that are also constantly changing.

In the opinion of M. Ali Safa'at, the monitoring would not be done to the verdict and the authority of the constitutional justices in carrying out justice, but towards the behavior of the justices so that their dignity, honor,

and statesmanship well-preserved.Based on the theory and the opinion of legal experts as explained above, as well as considering the development and the dynamics of the ethics supervision towards constitutional justices as mentioned earlier, the supervision system of constitutional justice can be divided into (5) five periodicities, namely:

1. *The first period*, started since the establishment of the Constitutional Court until the birth of the Constitutional Court Decision No. 005 / PUU-IV / 2006, dated August 23, 2006;

   Development of this period can be traced through normative perspective and the implementation of ethics supervision towards constitutional justices. Normative perspective is derived by analyzing the provisions of Law No. 24 of 2003, and the Regulations of the Constitutional Court, as well as the decisions of the Constitutional Court, and in Law No. 22 of 2004 and its implementing rules. Meanwhile, implementation perspective is built by analyzing the application of a system of ethics supervision towards constitutional justices, both the system run by the Constitutional Court and the one practiced by the Judicial Commission.

   This period ended with the cancellation of the entire rules on the supervision of the judge which is the authority of the Judicial Commission through Constitutional Court Decision No. 005 / PUU-IV / 2006 on Judicial Review of Law Number 22 Year 2004 concerning Judicial Commission and the Law Number 4 of 2004 on Judicial Power against the 1945 Constitution. This is the most important stage in the dynamics of the ethics supervision system of the constitutional justices.

   In the first period, based on the theory of supervision of judges as described in paragraph 2.1.3, the application of the supervision system of ethics against constitutional justices is supposed to be an ideal system, because in addition to the internal control system through the Honorary Assembly of the Constitutional Court, external monitoring system which is the authority of the Judicial Commission is also applied.

2. *The second period*, beginning after the birth of the Constitutional Court Decision No. 005 / PUU-IV / 2006 until the enactment of Law No. 8 of 2011;

Analyzing the basis of the legal argument constructed by the Constitutional Court in the judgment of the Court Decision Number 005 / PUU-IV / 2006, the main reason why later the Constitutional Court annulled the authority of the Judicial Commission to oversee the Constitutional Court Justices is related to the freedom /independence of the judiciary. In its consideration, the Constitutional Court has always stressed that the independence of the judiciary is a bastion (safeguards) of the rule of law which is mandated by the constitution.[10] Moving on from these thoughts the Constitutional Court argues that judicial independence must be protected against all pressures, influence and interference from anyone. Judicial independence is a fundamental prerequisite for the realization of the idea of the rule of law state and a guarantee for the enforcement of law and justice.[11] Oversight by other state institutions, according to the Constitutional Court, is a form of interference in judicial independence.

The Constitutional Court also dismissed the notion that the Constitutional Court can be monitored by other state institutions on the basis of the principle of checks and balances. For according to the Constitutional Court, the principle of checks and balances applies only to the executive branch and the legislative. But interestingly it turns out that the Constitutional Court also actually realizes that the monitoring of the behavior of the constitutional justices can be actualized.

Due to the decision concerning the Judicial Commission and the Law on Judicial Power through the Constitutional Court Decision Number 005 / PUU-IV / 2006, the supervision system of the constitutional justices is no longer under the authority of the Judicial Commission. As

[10] Ni'matul Huda, *Dinamika Ketatanegaraan Indonesia Dalam Putusan Mahkamah Konstitusi*, FH UII Press, Yogyakarta, 2011, p. 170.
[11] *Ibid.*, p. 171.

a consequence, the system of ethics supervision is internal only through the Honorary Assembly of the Constitutional Court as provided for in Article 23 paragraph (5) of the Constitutional Court Law and shall be further regulated by the Regulation of the Constitutional Court.

Related to the opinion of the Constitutional Court in the aforementioned decision, the author agrees with the opinion of M. Ali Safa'at[12] that regardless of the nature of a Constitutional Court ruling which is final and binding, permanent supervision is needed to prevent abuse of power. Oversight is not done to the verdict and authority of constitutional justices in carrying out justice, but towards the behavior of the justices so that their dignity, honor, and statesmanship are well-preserved.

The existence of institutions that conduct oversight would not in itself be regarded as disturbing the independence and impartiality of the Constitutional Court. Also, it would not be appropriate if there is a view that the supervisory agency has a higher position than those supervised. Just like the position of the Constitutional Court, which annuls the law made by the House of Representatives and the President, that is not higher than the two institutions. The Constitutional institution which is most appropriate to perform supervision would be the Judicial Commission. Further opinions are as follows:

First, the argument (judgment a quo) is less compelling and convincing. Concerning the argument about interpretation, what was used was systematic interpretation. But if broader interpretation was used[13] with the purpose to bring about a strong judiciary, supervision towards the conduct of the constitutional court justices is surely required

[12] M. Ali Safa'at, *Mahkamah Konstitusi dalam Sistem Checks and Balances,* dalam Mukthie Fadjar, *Konstitusionalisme Konstitusi*, *Op.Cit*. p. 33.

[13] Sekretariat Jenderal Mahkamah Konstitusi, Hukum Acara Mahkamah Konstitusi, *Op.Cit.*p. 63-80 (Satjipto Rahardjo, citing the opinion of Fitzgerald argued that in general, interpretation can be divided into two (2) types, namely (1) a literal interpretation, and (2) functional interpretation. Based on the findings of law, it can be divided into (1) a method of restrictive interpretation; and extensive interpretation. Meanwhile, according to Sudikno Mertokusumo and A. Pitlo, interpretation can be divided into (1) grammatical interpretation or interpretation based on language; (2) The teleological or sociological interpretation; (3) systematic or logical interpretation; (4) historical interpretation; (5) comparative interpretation; and (6) futuristic interpretation.)

so that their statesmanship can be well-preserved. From the perspective of original intent, testimony from the government and the House was also heard which stated that supervision by the Judicial Commission was also intended to be applied to the constitutional justices.

Second, the status of constitutional justices as judges due to their position which is elected for a period of five years would not be sufficient reason to remove it from the definition of "judges" who will be supervised by the Constitutional Court. The Judicial Commission can even conduct supervision to Supreme Court justices recruited from a non-career ladder. Recruitment system for the positions of judges is certainly less significant to serve as a basis for the distinction in supervision.

Third, when KY has the authority to supervise the conduct of the Constitutional Justices, it does not put KY in a higher position than the Constitutional Court. The subject matter of supervision is also outside the case and the judicial authority run by the Constitutional Court. Therefore, when the Judicial Commission carries the authority to supervise the conduct of the constitutional justices, the Constitutional Court does not need independence and impartiality in hearing and deciding cases concerning disputes on authority involving the Constitutional Court as one of the parties. In line with the above opinion, Titik Triwulan Tutik in her research states that if examined there are inconsistencies and weakness in the opinion in the opinion of the Court because the Constitution explicitly says that the judicial power is performed by the Supreme Court and the Constitutional Court.

Thus, as a consequence of judicial power, constitutional justices cannot be excluded from the definition of a judge under Article 24B paragraph (1) of the 1945 Constitution. Because judicial power is implemented by judges in all courts, then the consequence is that constitutional justice is included in the definition of judge. In addition, in the records of discussion of the amendment of the 1945 Constitution,

it was never mentioned that the constitutional justice is excluded from the definition of judge, and statutory provisions does not separate the definition of judges based on the scope, then all the judges in the realm of judicial power, including constitutional justices should be intended as a judge.

3. *The third period*, starting from the enactment of Law No. 8 of 2011, which was followed by Constitutional Court Decision No. 49/PUU-IX/2011 to the enactment of Government Regulation in Lieu of Law No. 1 of 2013 (Perppu No. 1 of 2013); *Periode ketiga,* dimulai sejak diundangkannya UU Nomor 8 Tahun 2011 yang diikuti dengan lahirnya Putusan Mahkamah Konstitusi Nomor 49/PUU-IX/2011 sampai dengan diundangkannya Peraturan Pemerintah Pengganti Undang-Undang Nomor 1 Tahun 2013 (Perppu Nomor 1 Tahun 2013);

A fairly fundamental change regarding mechanisms for enforcement of Code of Ethics of Constitutional Justice in Law No. 8 of 2011 is the normative construction which orders the Constitutional Court to develop a Code of Ethics and Code of Conduct of the Constitutional Justice and to establish Honorary Assembly of the Constitutional Court. Referring to the provisions of Article 27A paragraph (1) and (2) of Law No. 8 of 2011 which states that:

> The Constitutional Court shall draw up the Code of Ethics and Code of Conduct for Constitutional Court Justices containing norms to be complied with by every constitutional court justice in the performance of their duties in order to safeguard integrity and impeccable personality, being just and statesmanship.

Furthermore paragraph (2) stipulates that:

> In order to uphold the Code of Ethics and Code of Conduct for Constitutional Court Justices as referred to in paragraph (1), Honorary Assembly of the Constitutional Court shall be established with a membership consisting of:
> a. 1 (one) constitutional court justice;
> b. 1 (one) member of the Judicial CVommission;

c. 1 (one) person from the DPR;
d. 1 (one) person from the government who organizes government affairs in the field of law; and
e. 1 (one) supreme court justice.

Then Article 27A paragraph (7) of Law No. 8 of 2011, assets that further provisions regarding the composition, organization and order fo procedure for sessions of Honorary Assembly of the Constitutional Court shall be regulated by a Regulation of the Constitutional Court. But interestingly a number of the provisions were submitted for a review to the Constitutional Court, and through the Constitutional Court Decision No. 49/PUU-IX/2011, the articles filed, namely Article 27A paragraph (2) point c, point d, and point e, paragraph (3), paragraph (4), paragraph (5) and paragraph (6) of Law No. 8 of 2011 were declared contrary to the 1945 Constitution.

However, empirically that the Constitutional Court is aware of the legal consequences that arise with such decision handed down, particularly with regard to the formulation of the code of ethics and code of conduct of constitutional justices, as well as membership of the Honorary Assembly of the Constitutional Court. Therefore, the Constitutional Court will further regulate it through PMK.

4. *The fourth period*, starting from the promulgation of Government Regulation in Lieu of Law No. 1 of 2013 to the birth of Constitutional Court Decision No. 1-2 / PUU-XII / 2014;

The regulation of ethics supervision system in this period can be regarded as a new phase of ethics supervision system against the constitutional justices. Because there are many changes to the system of ethics supervision adopted by Perppu No. 1 of 2013. A number of significant changes regarding the system of ethics supervision certainly cannot be separated from the background underlying the issuance of the Perppu.

In Perppu No. 1 of 2013 there were interesting and different regulations related to the ethics supervision system of constitutional justices compared with previous regulation. One fundamental difference in this regulation is to reinstate external supervision that the Judicial Commission to be involved in the ethics supervision of constitutional justices, though not the totality of the supervisory authority of constitutional justice under the authority of the Judicial Commission. Thus, the Government Regulation in Lieu of Law No. 1 of 2013 can be said to revive the norms that have been annulled by the Constitutional Court, although it is not entirely the authority of the Judicial Commission.

Article 1 paragraph 4 of Government Regulation in Lieu of Law No. 1 of 2013 states, "*Honorary Assembly of the Constitutional Court is an organ established by the Constitutional Court and the Judicial Commission to safeguard the honor and the behavior of constitutional justice*".[14] The provision of this article clearly revives the authority of the Judicial Commission to be involved in overseeing the constitutional justices albeit with different scale and degree.

Government Regulation in Lieu of Law No. 1 of 2013 authorizes the enforcement of the Code of Ethics of Constitutional Justices to an institution named "Honorary Assembly of Constitutional Justice". Nomenclature Honorary Assembly of the Constitutional Justice is a new one because in the previous period the nomenclature used was "Honorary Assembly of the Constitutional Court." The establishment of the Honorary Assembly of Constitutional Justice was carried out jointly by the Constitutional Court and the Judicial Commission as provided for in Article 27A paragraph (4) which states, "*In order to enforce the Code of Ethics and Code of Conduct of the Constitutional Court referred to in paragraph (1), the Constitutional Court together with the Judicial Commission formed a permanent Honorary Assembly of the Constitutional*

[14] Republik Indonesia, *Peraturan Pemerintah Pengganti Undang-Undang Republik Indonesia Nomor 1 Tahun 2013 tentang Perubahan Kedua atas Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi*, LN Tahun 2013 Nomor 167, TLN Nomor 5456, Pasal 1 angka 4.

Justice."[15] This article also reconfirms the involvement of the Judicial Commission in the system of ethics supervision of constitutional justices. Based on this article, it is found out that the existence of the Honorary Assembly of the Constitutional Justice is permanent in nature, not an ad hoc institution. The permanent nature of the Honorary Assembly of the Constitutional Justice is also undoubtedly different from the Honorary Assembly which is temporary or ad hoc.

The composition of the Honorary Assembly of the Constitutional Justice is regulated under Article 27A paragraph (5) Government Regulation in Lieu of Law No. 1/2013 which governs that the membership of the Assembly is 5 (five) people consisting of:

a. 1 (one) former constitutional justice;
b. 1 (one) legal practitioner;
c. 2 (two) academics in which one or both have backgrounds in law; and
d. 1 (one) community leader.

Based on these compositions, all members of the Honorary Assembly of the Constitutional Justice are from outside the institution of the Constitutional Court. The term of office of the Honorary Assembly of the Constitutional Justice is 5 (five) years and can not be reelected.[16] Thus, the members of the Honorary Assembly of Constitutional Justice can only assume the post for one period only.

Based on the above consideration, it is understood that, in this period, there are two systems of ethics supervision towards constitutional justices, namely: *first*, the system of ethics supervision which is regulated in Government Regulation in Lieu of Law No. 1 of 2013 as has been passed into law No. 4 of 2014 on January 15, 2014 with the Honorary Assembly of the Constitutional Justice as an enforcing institution. *Secondly*, the system of ethics supervision as set forth in PMK No. 2 of 2013 that the

[15] *Ibid.*, Pasal 27A ayat (4).
[16] *Ibid.*, Pasal 27A ayat (7).

idea of its formation comes from the Constitutional Court itself, and the implementing organ is the Ethics Council of Constitutional Justice.

Interestingly, the system of ethics supervision set out in the Government Regulation in Lieu of Law has No. 1 of 2013 as has been passed into law No. 4 of 2014 is not applicable for long. Along with the birth of the Constitutional Court Decision No. 1-2 / PUU-XII / 2014 on Judicial Review of Law No. 4 of 2014 on the Stipulation of Government Regulation in Lieu of Law No. 1 Year 2013 on the Second Amendment to Law Number 24 Year 2003 regarding Constitutional Court to Become Law, dated February 13, 2014 of which the verdict states that the Law No. 4 of 2014 is contrary to the 1945 Constitution and does not have binding legal force, the system of ethics supervision as regulated in the Law No. 4 of 2014, since then, comes to an end.

Based on the analysis of the Writer concerning the substance of the Constitutional Court Decision No. 1-2 / PUU-XII / 2014, there are at least three (3) main reasons related to ethics supervision system found which are as follows:

First, the principle of checks and balances does not apply to the branch of judiciary, but only for the legislative and executive branches of power. Complete judgment can be found in the legal considerations of the Constitutional Court paragraph 3.22 subparagraph one of decision a quo.

Second, independent power is the spirit of the judiciary, so that it can not be restricted let alone intervened. Complete judgment can be found in the legal considerations of the Constitutional Court decision paragraph 3.22 subparagraph two of decision a quo.

Thirdly, the involvement of the Judicial Commission in the supervision of constitutional justices constitutes smuggling of law that is conflicting with decisions of the Constitutional Court earlier. More reasoning can be found in the legal considerations of the Constitutional Court paragraph 3.22 subparagraph eleven of the decision a quo.

Those three reasons that convince the Constitutional Court to declare Law No. 4 of 2014, including ethics supervision systems of constitutional justices which revive the role of the Judicial Commission contrasts with the 1945 Constitution.

5. *The fifth period* began after the birth of the Constitutional Court Decision No. 1-2 / PUU-XII / 2014 until now.

As a legal consequence of the Constitutional Court Decision No. 1-2 / PUU-XII / 2014 in which one of the verdicts state:

> Law No. 4 of 2014 on the Stipulation of Government Regulation in Lieu of Law No. 1 Year 2013 on the Second Amendment to Law Number 24 Year 2003 regarding the Constitutional Court to Become Law and its attachments (State Gazette of the Republic of Indonesia Year 2014 Number 5, Supplement to the State Gazette of the Republic of Indonesia Number 5493) contradictory to the 1945 Constitution of the Republic of Indonesia

then the Law No. 4 of 2014 is no longer valid because it has no binding legal force and Law No. 24 of 2003 as amended by Law No. 8 of 2011 on the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court applies back as before the change.

Furthermore, the Constitutional Court stipulates PMK No. 2 of 2014 on the Honorary Assembly of the Constitutional Court (PMK No. 2 of 2014), which revoked PMK No. 1 of 2013 and PMK No. 2 of 2013. Substantially there are not many changes regulated in PMK No. 2 of 2014. In fact, it can be said PMK No. 2 of 2014 substantially only incorporate the provisions contained in the PMK No. 1 of 2013 and PMK No. 2 of 2013.

Article 1 point 3 in connection with (*juncto*) Article 14 Paragraph (1) of PMK No. 2 of 2014 state as follows:

> Board of Ethics of Constitutional Justice, hereinafter the Board of Ethics, is an organ formed by the Constitutional Court for maintaining the honor, nobility, dignity, and the Code of Ethics of Constitutional Justice in response to the report and information filed by the society on the alleged violation committed by a Reported Judge or an Alleged Judge.

While Article 14 Paragraph (2) of PMK No. 2 of 2014 states that the position of the Board of Ethics is permanent in nature.

Based on such legal construction, if observed, the presence of the Board of Ethics of the Constitutional Court is considered as a part of the Honorary Assembly of the Constitutional Court is not visible and can even be said that there is overlapping in its regulation. Since the two organs in question, both maintain and enforce the Code of Ethics and Code of Conduct of the Constitutional Justice. The difference is that there might be sanctions imposed on the reported judge or the alleged judge. In fact, it can be said that the Board of Ethics has a strategic role in the enforcement of the code of ethics of the constitutional justice. The Board of Ethics plays a role to perform a "day to day" supervision against the conduct of the constitutional justices and is permanent in nature. While the presence of the Honorary Assembly of the Constitutional Court is based on the recommendation of the Board of Ethics, and is ad hoc in nature.

On the one hand, the presence of the Board of Ethics provides fresh air to the prospect of enforcement of the code of ethics of the constitutional justices. But on the other hand, the presence of the Board of Ethics raises a number of questions among law observers. Some things that are considered problematic in relation to the existence of the Board of Ethics are as follows: *first*, the legal basis for the establishment of the Board of Ethics. As mentioned earlier, the establishment of the Board of Ethics is not based on the command of the law but only based on the PMK. In constitutional terms, it is certainly very problematic and potentially raises the issue of lack of legal certainty.

Second, related to the budget to finance the Board of Ethics. As the implications of the absence of a law which serves as the legal basis for the formation of the Board of Ethics, there appears a debate about whether the Board of Ethics can be financed using the State Budget (APBN). This issue is certainly crucial to answer, given the absence of the budget

allocated specifically, an institution would not be able to run well.*Third*, related to the qualifications Board of Ethics Council, whether it is an internal supervisory organ or an external oversight body. Considering the composition of the Board of Ethics, it is difficult to say that this institution is an internal watchdog, for the entire composition of the membership comes from outside the Constitutional Court (external). It is stipulated in Article 15 of PMK No. 2 of 2014 that the Board of Ethics has a fixed members of 3 (three) people for a period of 3 (three) years consisting of (1) one former constitutional justice, (1) one law professor, and (1) one community leader.[17] However, since the Board of Ethics is established by the Constitutional Court, it is also difficult to say that this institution is an external agency.

Ambivalence regarding the qualifications of the Board of Ethics is certainly very problematic, given the Constitutional Court in its decision No. 005 / PUU-IV / 2006 and strengthened in decision No. 1-2 / PUU-XII / 2014 has stated that the Constitutional Court as the executor of independent judicial power can not be intervened in any form. Oversight of other state institutions to the Constitutional Court would interfere with the independence of constitutional justices in exercising its authority. Based on the above explanation, if the Board of Ethics is qualified as an external supervisor, then it certainly shows inconsistencies of the Constitutional Court in addressing the design for the supervision system of the constitutional justices. Besides, the PMK No. 2 of 2014 also regulates the allocation of the duties and authorities between the Board of Ethics and the Honorary Assembly of the Constitutional Court. Nevertheless, the Board of Ethics and the Honorary Assembly of the Constitutional Court are both the organs established by the Constitutional Court to maintain and uphold the honor, dignity and the codes of ethics of the constitutional justices. Honorary Assembly is established based on the recommendation of the Board of Ethics, but there is an allocation of

[17] See Article 15 Constitutional Court Regulation Number 2 of 2014 on the Honorary Assembly of the Constitutional Court .

roles and responsibilities between the two. Referring to the division of tasks and responsibilities between the Board of Ethics and the Honorary Assembly of the Constitutional Court, it can be concluded that Board of Ethics is authorized to oversee minor violations of the code of ethics of the constitutional justices, while the Honorary Assembly's authority is to enforce the code of ethics against major violations.

With the establishment of the Board of Ethics in this period, it can be concluded that the Constitutional Court still actually needs a supervisory agency in order to preserve and uphold the honor, dignity and the conduct constitutional justices, regardless of whether the agency is internal or external. The qualification of the Board of Ethics itself remains a debate as to whether the Board of Ethics that can be qualified as an internal supervisory agency or an external watchdog.

According to Mukthie Fajar,[18] in essence, based on its composition that comes from outside the Constitutional Court, the Board of Ethics can be categorized as an external oversight organ. However, institutionally, it was formed and is within the organizational structure of the Constitutional Court so that it can be classified as an internal supervisory body as well. It is this condition that makes it difficult to remove the position of the Board of Ethics from qualifying as an internal or external oversight institutions. Also, the establishment of the Council of Ethics does not have a firm legal basis, since the order of legislation is to establish the Honorary Assembly of the Constitutional Court, and not to create the Board of Ethics of Constitutional Justice.

In line with the opinion of Mukthie Fajar, according to the author, internal control is not effective and optimal enough for maintaining the honor, dignity, and code of ethics of the constitutional justices. In order to optimize and effectuate the ethics supervision of constitutional justices, the supervision should be conducted by internal and external

[18] Interview with the Chairman of the Board of Ethics (Mukthie Fadjar), in the office of the Board of Ethics, Constitutional Court Building, Tuesday, 27 December 2016.

supervisory watchdog. However, it has been widely understood that external supervisors juridically can not be done prior to their rearrangement through normative reconstruction in the 1945 Constitution and/or through an organic law. This is because in the Constitutional Court Decision Number 005/PUU-IV/2006, as explained above, among others, the Constitutional Court argued that constitutional justice does not include in the definition of "judges" as referred to in Article 24B paragraph (1) of the 1945 Constitution, whose ethical behavior overseen by the Judicial Commission. So the supervision of the implementation of the Code of Ethics of the Constitutional Justice is performed by a separate Honorary Assembly independently in accordance with Law No. 24 of 2003 as amended by Law No. 8 of 2011 on the Constitutional Court.

According to Muhammad Nuh,[19] the ineffective and the non-optimal function of internal oversight of judicial institutions can be caused by several factors as follows: first, the quality and integrity of the supervisors are inadequate. Second, submitting complaints, monitoring the process and outcome (no access). Third, the spirit of defending fellow corps (esprit de corps), which resulted in sentencing is not proportional with violations. Any effort to improve a poor condition would definitely get a reaction from those who benefit from these bad conditions. Fourth, there is a strong will from the leadership of law enforcement agencies to follow up on the results of the monitoring.

Therefore, in the future, it is necessary to design a more optimal system of ethics supervision toward constitutional justices that is through an internal and external control system. This is done to optimize and make more effective the system of ethics supervision for constitutional justices, so that the dignity and honor of the constitutional justices are always well-preserved. Moreover, with such great authority granted by the 1945 Constitution, abuse of power practices are very likely to occur in the Constitutional Court, so that the Constitutional Court should have

[19] Muhammad Nuh, *Etika Profesi Hukum*, Bandung: Pustaka Setia, 2011, pp. 233-234.

an effective monitoring system of ethics to protect the constitutional justices from violations of the code of ethics and abuse of power.

Reconstruction of Ethics Supervision System towards Constitutional Justice

Based on the normative construction as has been described in the previous Chapter, and in accordance with the objective of this study, which is the reconstruction of monitoring system of ethics against constitutional judges, in order to preserve and uphold the honor, dignity, and the conduct of constitutional justices, the main issues that may be proposed to be reconstructed have been identified namely some relevant norms concerning ethics supervision system of the constitutional justice through the amendment of Law No. 24 of 2003 as amended by Law No. 8 of 2011.

The researcher proposes three concepts to reconstruct ethics supervision system of the constitutional justices. *First*, at the level of argument about the judges in the constitution, the researcher agree with the opinion of the Constitutional Court, as contained in the Constitutional Court Decision No. 005/PUU-IV/2006, Decision No. 49/PUU-IX/2011 and Decision No. 1-2/PUU-XI/2016. These three decisions essentially affirm that constitutional justices are not included in the definition of judges whose ethical conduct is supervised by the Judicial Commission. For the sake of maintaining the honor, dignity, and the Code of Ethics and Code of Conduct of the Constitutional Justice, the supervision is performed by an internal supervisory body which is based on Law No. 8 of 2011. But regarding the notion of judges in general, the author argues that constitutional justice is a judge, and therefore in the normative reconstruction of the 1945 constitution, this norm should be formulated clearly and unequivocally.

Second, at the level of legal basis, internal supervision of the constitutional justices should be regulated through normative reconstruction in Law No. 8 of 2011. *Third*, at the level of supervisory organ, in my opinion, the regulation of the Board of Ethics of Constitutional Justice overlaps with the Honorary Assembly of the Constitutional Court, so it is necessary to simplify it by establishing one

ethics supervisory organ which is Honorary Assembly of the Constitutional Justice (MKHK).

Based on the whole description in this study, the author is of the opinion that to provide a firm juridical foundation, it is necessary to incorporate the norms into the 1945 Constitution. Therefore, there needs to be a reconstruction of norms concerning supervision system of the constitutional justices through the amendment of the 1945 Constitution. However, the amendment of the 1945 Constitution is not an easy mechanism, then to establish a monitoring system of ethics, what can be done in a not very long time is the amendments to the Constitutional Court Law. Therefore, the author proposes the normative reconstruction in the formulation of the Draft Amendment to Law Number 24 of 2003 as amended by Law No. 8 of 2011, especially regarding the strengthening of the ethics supervisory agency of the constitutional justices, namely:

1. Regulation concerning the drafting of the Code of Ethics and Code of Conduct of the Constitutional Justice;
2. Regulation regarding the Honorary Assembly of the Constitutional Justice which contains, membership composition, requirements for candidate members, the nature of the organ, and recruitment mechanism through Panel of Experts;
3. Provisions concerning the Panel of Experts as an organ established by the Court to conduct fit and proper test for MKHK prospective members;
4. Further provisions regarding the structure, organization, rules of procedure for the proceedings in the Honorary Assembly of Constitutional Justice;
5. Further provisions on the Panel of Experts.

III. CONCLUSION

The Importance of ethics supervision towards Constitutional Justice in the Framework of independent Judicial Power, namely:

(1) Philosophical Perspective

The constitutional Justices are the main executors of the duties and authorities of the Constitutional Court in upholding the law and justice that

has respectable positions (noble officium). They have fulfilled the requirement of a Constitutional Justice and have been qualified as a judge, but it does not mean that the justices in carrying out their duties and responsibilities will be spared from mistake or wrongdoing. Therefore, to maintain that respectable office (noble officium) they shall keep the honor and dignity and good behavior in order to maintain the glory of the office they bear.

(2) Juridical Perspective.

Supervision of constitutional justice is a command of laws and regulations, namely the 1945 Constitution which contains basic norms of supervision of justices (Article 24B, Paragraph 1 of the 1945 Constitution) and Law No. 8 of 2011. Therefore, the Constitutional Justice must abide by and adhere to the normative provisions regarding supervision system regulated in the legislation.

(3) Empirical Perspective.

Empirically, the Constitutional Court through the organs it established (Investigation Team, Ethics Panel, and the Honorary Assembly of the Constitutional Court) has made several legal enforcement on alleged ethics violation committed by constitutional justices. This indicates that there is no guarantee that a constitutional justice, before being inaugurated by the President, although already passed the fit and proper test by the Panel of Experts, in carrying out his/her duties and authorities will be prevented from abuse of authority.

Thus, ethics supervision towards justices is a necessity that must be present, in order to preserve and uphold the honor, dignity, and the conduct of constitutional justices. Supervision is absolutely necessary because according to Lord Acton, *"the power tends to corrupt, absolute power corrupt absolutely"*.

Ethics Supervision System towards Constitutional Justice with the purpose to maintain and uphold the honor, dignity, and the behavior of the Constitutional Justice according to the Positive Law in Indonesia, namely:

(1) In the context of supervision of the constitutional justices, in the beginning of the establishment of the Constitutional Court, after the election of the Chief Justice and Deputy Chief Justice of the Constitutional Court, constitutional justices discussed the Code of Ethics and Code of Conduct of Constitutional Justice, which is then passed through the PMK No. 02 of 2003, on September 24, 2003. This shows that the constitutional justices in the first period put integrity first before carrying out their tasks and authorities.

(2) From the evolution of ethics supervision of constitutional justice, it is understood that the Constitutional Court made a number of changes to the rules relating to the ethics supervision of constitutional justices. This indicates that:

First, the constant change of the regulation on ethics supervision of constitutional justice shows that the process of regulating the ethics supervision is influenced by the situation and empirical conditions that are also constantly changing.

Second, in addition, these changes indicate that the Constitutional Court is open to changes.

Third, at first, there are two systems of supervision in the regulation concerning ethics supervision of the constitutional justice, namely internal control system performed by the Honorary Assembly of the Constitutional Court and external systems conducted by the Judicial Commission, but the external supervision is declared not to have binding legal force since the imposition of Constitutional Court Decision No. 005/PUU-IV/2006.

Fourth, in its development, the current systems of ethics supervision against constitutional justices is conducted internally by two organs namely the Honorary Assembly of the Constitutional Court and the Board of Ethics of Constitutional Justice.

Reconstruction of Ethics Supervision System of the Constitutional Justice for the Purpose of Maintaining and Upholding the Honor, Dignity, and Behavior of Future Constitutional Justice, namely:

(1) Some most important aspects which underlie the need to do a normative reconstruction of ethics supervision of constitutional justices are as follows. *First*, at the level of legal basis, internal oversight of constitutional justice is clearly and firmly regulated in Law Number 8 of 2011, so there needs to be normative reconstruction on the provisions related to the supervision of constitutional justices.

Second, regulation of the Board of Ethics of Constitutional Justice is ineffective and inefficient and overlaps with the Honorary Assembly of the Constitutional Court, so it is necessary to restructure it by only establishing one permanent supervisory organ.

Third, the Constitutional Court does not have the authority to create a new norm which replaces the norms of the Law through the Regulation of the Constitutional Court but must be through the revision of the Law.

(2) Furthermore, the researcher will propose the reconstruction in the formulation of norms in the Draft Amendment to Law Number 24 of 2003 as amended by Law No. 8 of 2011, as described above.

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Independence of the Indonesian Constitutional Court in Norms and Practices

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Abstract

Article 24 (1) of the 1945 Constitution States after the third amendment, "the judicial power shall be independent in administering justice so as to uphold the law and equality." The Indonesian Constitutional Court is one of the performers of the independent judicial power who plays a significant role in the enforcement of the constitution and the principle of the state based on the law by its authority and obligations as determined by the 1945 Constitution. This paper intends to study the Indonesian Constitutional Court to find out whether the Constitutional Court in exercising its constitutional authority can be independent. Also, this article will examine not just institutional independence but also judges independence to understand current issues related to the role of ethics and conduct of judges. The independence of the Indonesian Constitutional Court supported by the 1945 Constitution after the amendments from 1999 until 2002, and further stipulated in Law. However, it can be said that this institution has ups and downs of public trust due to corruption cases conducted by constitutional justices. Also, in several political instances showed efforts of political institutions to limit the authority of the Constitutional Court. In its experiences, the Constitutional Court succeeded in convincing the parties through its decisions and strengthening institutional independence against the influence that tried to destabilize its institutions. The Council of Ethics of Constitutional Judges that maintains the values and behavior of judges also continuously works and efficient enough in overseeing the ethics and conduct of judges. The decision of the Ethics Council may also be accepted as a proportional decision.

Keywords: Constitutional Court, Independence, Council of Ethics

I. INTRODUCTION

A. Background

Based on the provision of Article 24C of the 1945 Constitution, the Constitutional Court of Indonesia has the authority to try cases at the first and final level, the decisions of which shall be final, to conduct judicial review of laws against the Constitution, to settle disputes on authorities between state institutions whose powers are bestowed by the Constitution, to decide upon the dissolution of political parties, and to decide upon electoral disputes. The Constitutional Court shall render a judgment on the opinion of the DPR alleging that the President and/or the Vice President have/has committed a violation of law in the form of treason against the state, corruption, bribery, other felonies, or disgraceful acts, and/or no longer meets the qualification as President and/or Vice-President as referred to in the Constitution of the State of the Republic of Indonesia of the Year 1945.The provision is restated in Article 10 Constitutional Court Law[1] and Article 12 paragraph (1) of Law of the Republic of Indonesia Number 4 The year 2004 concerning Judicial Authority.

According to Decision 005/PUU-IV/2006, the presence of the Constitutional Court, as the state institution authorized by the 1945 Constitution to try and pass final decisions at the first and last level on state administration issues, is a logical consequence of the new state government system to be established by the 1945 Constitution following a series of amendments. Such new state government system is a system which basic ideas are intended to make Indonesia into a democratic constitutional state (*democratische rechtsstaat*), namely a democratic state based on constitution (constitutional democracy), as reflected in the provisions of Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution, which constitute the elaboration of the Preamble of the 1945 Constitution, especially the fourth paragraph. Therefore, the entire provisions of the 1945 Constitution, as an integrated system, constitute the further elaboration of the basic ideas and accordingly, they can be explained based on such basic ideas.[2]

[1] Constitutional Court Law is the Law of the Republic of Indonesia Number 24 of the year 2003 regarding the Constitutional Court as amended by the Law Number 8 of the Year 2011 regarding the Amendment to the Law Number 24 of the year 2003 regarding the Constitutional Court.

[2] Indonesian Constitutional Court Decision Number 005/PUU-IV/2006, August 23, 2006.

> Whereas the first requirement for every country applying the principles of rule of law and constitutional democracy is constitutionalism principle, namely the principle placing the constitution as the highest law, the substance of which is contained in the Fourth Paragraph of the Preamble of the 1945 Constitution, as the realization of the statement of the country's independence, which is reflected among others in the sentence, "*.... Indonesia's national independence shall be formulated in a Constitution of the State of Indonesia*". Accordingly, the constitution is *the fundamental statement of what a group of people gathered together as citizens of a particular nation view as the basic rules and values which they share and to which they agree to bind themselves* (please refer to Barry M. Hager, *Rule of Law, A Lexicon for Policy Makers*, 2000). Based on this reason, for countries applying the principles of *rule of law* and *constitutional democracy, "constitutions should serve as the highest form of law to which all other laws and governmental actions must conform. As such, constitutions should embody the fundamental precepts of a democratic society rather than serving to incorporate ever-changing laws more appropriately dealt with by statute. Similarly, governmental structures and actions should seriously conform with constitutional norms, and constitutions should not mere ceremonial or aspirational documents*" (please refer to John Norton More, 1990).[3]

Therefore, according to Constitutional Court on Decision 005/PUU-IV/2006, there must be a mechanism ensuring that the provisions of the Constitution are implemented in the daily life of the state. To ensure the enforcement and implementation of the constitution, the presence of the Constitutional Court is a sure thing, namely as an institution functioning as the guardian of the constitution, and because of such function, the Constitutional Court is the sole judicial interpreter of the constitution. Based on such thought, all the authorities granted by the constitution to the Constitutional Court, as outlined in Article 24C paragraph (1) of the 1945 Constitution, are from a constitutional source and constitutionally founded.[4]

According to Wasis Susetio, the presence of the Constitutional Court of Indonesia (Mahkamah Konstitusi—MK) in a new democracy, as an institution needed to strengthen and protect the human right in a transitional period, requires a careful and intelligent approach to avoid confrontations which are highly detrimental to the strengthening of its existence. [5]

[3] *Ibid*.
[4] *Ibid*.
[5] Wasis Susetio, "Guarding Constitution of Indonesia through the Court", [http://www.ialsnet.org/meetings/constit/papers/

> MK must consider the opposition voiced by politicians and other state administrators who do not accept MK' s decisions so as not to relapse to the condition similar to the one prior to the reform era. Institutional strengthening by applying natural methods requires strategic approaches to certain cases, which are not only based on populist opinions. The progress made by the Indonesian Constitutional Court in the last three years has been remarkable, yet also caused a concern for many people and politicians. Such condition must be addressed prudently by the judge of the Constitutional Court. Prudence is needed to avoid being trapped in compliments and to carry out the action plan to gain public opinion that is favorable for the achievement of a consolidated democracy through the existence of MK, which serves as the checks and balances mechanism in a sound state administration system.[6]

With the role held by the Constitutional Court, it is important to understand the extent to which independence it has. As mentioned by Decision 005/PUU-IV/2006[7], in a democratic rule-of-law state, as outlined in Article 1 paragraph (3) of the 1945 Constitution that reads, "*Indonesia shall be a rule-of-law state*," the independence of courts and judges is an essential element of a rule-of-law state or *rechtsstaat*. Due to the importance of such principle, the conception of the division of power among the executive, legislative, and judicative institutions and the conception of judicial independence are perceived as fundamental notions and determined as one of the main elements of the constitution and serve as the spirit of the law itself.[8]

Even before the amendment to the 1945 Constitution, in which the principle of division of power was not adopted, the principle of the division and independence of judicial authorities had already confirmed, and it was reflected in Article 24 and its Elucidation. Now, after the first to fourth amendments to the 1945 Constitution, in which the branches of power of the state are divided based on the principle of *checks and balances*, mainly in the relation between the legislative and executive institutions, the division of judicative power from the influence of other branches of authority is more emphasized.[9]

SusetioWasis%28Indonesia%29.pdf].

[6] *Ibid*.

[7] Decision 005/PUU-IV/2006 was read out in a Plennary Session of the Constitutional Court open for public on this day Wednesday, August 23, 2006, by Prof. Dr. Jimly Asshiddiqie, S.H., as the Chairperson acting also as a Member, H. Achmad Roestandi, S.H., Prof. H. A. Mukthie Fadjar, S.H. M.S., I Dewa Gede Palguna, S.H., M.H., Prof. H. A. S. Natabaya, S.H., LL.M., Dr. Harjono, S.H., M.C.L., Maruarar Siahaan, S.H., and Soedarsono, S.H. This decision is very crucial to explain about Independence of Courts and Judges issues in general.

[8] *Ibid*.

[9] *Ibid*.

Related to that, Yustina Trihoni Nalesti Dewi, et.al. wrote, constitutional reform becomes a driving force strengthening the independence of judicial power. The amendment to Article 24 of the 1945 Constitution surely has made Indonesian Judicial Authority gains legal legitimacy to run the full freedom that focuses on the independence of judges who are not influenced by other powers out of the structure of judicial power.[10]

B. Research Method

This paper intends to study the Constitutional Court of Indonesia as one of the state institutions conducting the independent judicial power to perform the judiciary to enforce law and justice to find out whether the Constitutional Court in exercising its constitutional authority can be independent. Also, this paper will examine not just institutional but also judges to understand current issues related to the role of ethics and conduct of judges.

II. DISCUSSION

A. Independence of Constitutional Court

In the reform era, Indonesia has taken comprehensive reform measures by bringing the sovereignty back to the hand of the people. The peak of such efforts was the amendments to the 1945 Constitution which were made within four consecutive years, namely the First Amendment in 1999, the Second Amendment in 2000, the Third Amendment in 2001, and the Fourth Amendment in 2002. The objectives of the Amendments were to complement the core rules of living as a state, which caused the abuse of power in the past.[11] These changes, according to Jimly Asshiddiqie, resulted in a blueprint of state administration system which is different from the previous one. Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution are: (i) the principle of constitutional democracy, and (ii) the principle of the democratic rule of law or "*democratische rechtsstaat*."[12]

[10] Yustina Trihoni Nalesti Dewi, W. Riawan Tjandra, and Grant R. Niemann, "Independence of Judicial Power as a Foundation of Human Rights Judicial Function in Indonesia", *International Journal of Social Science and Humanity*, Vol. 6, No. 3, March 2016, p. 242.
[11] Moh. Mahfud MD, "The Role of the Constitutional Court in the Development of Democracy in Indonesia", paper is presented in the World Conference on Constitutional Justice, Cape Town, January 23-4, 2009, p. 1.
[12] Jimly Asshiddiqie, "Creating a Constitutional Court In a New Democracy", paper presented in Australia, March 2009, p. 1.

The objective of the First Amendment to the 1945 Constitution is to restrict the authority of the President and to strengthen the position of the House of People's Representatives as a legislative institution. The Second Amendment covers issues regarding state territory and regional governance, perfecting the first amendment in the matters about the strengthening of the position of the House of People's Representative, and detailed provisions regarding Human Rights. The Third Amendment to the 1945 Constitution covers the rules regarding the Principles for the foundation of state affairs, public institutions, relations among state institutions, and provisions relating to the General Election. The Fourth Amendment covers the provisions regarding state agencies and relationships among state institutions, the elimination of the Supreme Consultative Board, provisions regarding education and culture, provisions regarding economics and social welfare, and transitional rules as well as additional rules.[13]

Before the enactment of the third amendment to the 1945 Constitution in 2001, the judicial power was dealt under two articles. Article 24(1) of the 1945 Constitution states that: "The judiciary in Indonesia shall be exercised by the Supreme Court and such other judicial bodies as may be established by law." Section (2) of then states that the composition and powers of the judicial bodies shall be, as provided for by law. Whereas, Article 25 of the 1945 Constitution states, "the requirements for the appointment and removal of judges shall be as provided for by law." In the Elucidation of Article 24 and Article 25, it is explicitly averred that the judicial power shall be independent, that is to say, free from the influence of the executive. As a result of the third amendment to the 1945 Constitution, Article 24 (1) now reads as follows: "The judicial power shall be independent in administering justice so as to uphold the law and equality."[14]

In the opinion of Bagir Manan, the concept of independence of the judiciary is one of the cardinal principles of democracy.[15] Almost all literature or the views of legal scholars state that the independent power of the court is a strengthening tool for the implementation of democracy, and upholding the rule of law. The

[13] *Ibid*.
[14] Bagir Manan, "Independence of the Judiciary, Indonesian Experience", [http://www.supremecourt.gov.pk/ijc/Articles/2/10.pdf], p. 3.
[15] *Ibid*.

independent powers of the judiciary are undoubtedly the strongest pillar of democracy. However, that has not guaranteed the independence of judicial powers in any sense of the word.[16]

According to the 1945 Constitution after amendment, judicial independence itself serves as a safeguard from the rule of law. Article 24 Constitutional Court Law states the judiciary shall be an independent authority to perform the bench to enforcing law and justice. Moreover, the Constitutional Court is one of the performers of the independent judicial power who plays a significant role in the enforcement of the constitution and the principle of the state based on the law by its authority and obligations as determined by the Constitution.[17]

Decision 005/PUU-IV/2006 states, such principle is also universally adopted as reflected in the 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, in Milan, on August 26 up to September 6, 1985, and ratified with the Resolutions of the General Assembly of the UN Number 40/32 dated November 29, 1985 and Number 40/146 dated December 13, 1985, the articles 1, 4, 7, 14, and 15.[18]

Therefore, judicial independence must be protected against all pressures, influences, and intervention of any party whosoever. Judicial independence is an essential prerequisite for the realization of the purpose of a rule-of-law state and serves as the guarantee for the enforcement of law and justice. This principle is inherent in and must be reflected in the examination and decision-making process in every case and is closely related to the independence of courts as honorable, dignified, trustable legal institution.[19]

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[16] *Ibid*., p. 4.

[17] Consideration of the Law Number 8 of the Year 2011 regarding the Amendment to the Law Number 24 of the Year 2003 regarding the Constitutional Court.

[18] Which read among other things as follows: 1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary; 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; 7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions; 14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. 15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters. Read Indonesian Constitutional Court Decision Number 005/PUU-IV/2006, August 23, 2006.

[19] *Ibid*.

Related to that, Bagir Manan argues, the government system and organs, are not the only factors that would influence the independence of the judiciary, it is very much influenced by the social and cultural factors also. The culture of permissiveness or tolerance on the breach of law and social system are very significant in effect on the independence of judicial powers. Therefore, in the efforts to uphold the independent powers of the judiciary, besides managing a democratic government, as based on law, it is also crucial to maintain a social life and promote a culture of law obedience, and the respect for judges and judicial powers.[20]

The Constitutional Court shall be domiciled in the Capital City of the State of the Republic of Indonesia. According to Article 7 Constitutional Court Law, an Office of the Registrar and Secretariat General shall be established by the Constitutional Court to assist in the execution of the tasks and authorities of the Constitutional Court.

The Office of the Registrar is a functional office which exercises judiciary technical, administrative functions of the Constitutional Court. The judiciary technical, administrative tasks comprise the coordination of judiciary technical implementation at the Constitutional Court; development and implementation of case administration; development of professional services for bench activities at the Constitutional Court; and the execution of other tasks assigned by the Chief Justice of the Constitutional Court by its field of works.

The Secretariat General shall exercise technical, administrative tasks of the Constitutional Court. The technical administrative tasks comprise: the coordination of administrative executions in the environment of the Secretariat General and the Office of the Registrar; the formulation of professional administrative support plan and program; the conduct of cooperation with the society and inter-institutional relations; the rendering of facility support for court hearing activities; and the execution of other tasks assigned by the Chief Justice of the Constitutional Court in accordance with its field of jobs.[21]

[20] Bagir Manan, *Op.Cit.*, p. 4.

[21] Further provisions regarding the structure of organization, function, duties, and authorities of the Office of the Registrar and of the Secretariat General of the Constitutional Court shall be regulated by a Regulation of the President at the proposal of the Constitutional Court.

According to Constitutional Court Law, the Constitutional Court shall have the responsibility to regulate its organization, its personnel, its administration, and its finances by the principle of good and clean governance. The budget of the Constitutional Court charged to a separate budget in the State Budget of Income and Expenditure. However, the Constitutional Court shall announce periodical reports to the society transparently regarding petitions registered, examined, and judged on and management of the finances and other administrative tasks. The society also shall have access for acquiring judgments of the Constitutional Court.[22]

The Constitutional Court has the authority to adjudicate at the first and final instance, whose decision shall be final. According to Elucidation of Article 10 Constitutional Court Law, a decision of the Constitutional Court shall be final, namely that a ruling of the Constitutional Court shall immediately obtain permanent legal force as of its pronouncement and no legal efforts can be made. The final character of a decision of the Constitutional Court also comprises legal binding force (final and compulsory).

A ruling of the Constitutional Court shall be signed by the judge who examined, adjudicated, and decided the case, and the Registrar. A decision of the Constitutional Court shall obtain permanent legal force as of its complete pronouncement in a plenary session open to the public. The legal consideration of the judgment shall contain the legal basis constituting the basis of the decision. In the interest of the execution of authorities, the Constitutional Court has the power to summon a state official, government official, or a member of the society to provide information.

Up to the end of 2016, the Court has registered 2.319 cases. From all the cases, 1.993 cases have decided with results: 352 cases granted (*kabul*), 1.052 cases rejected (*ditolak*), 667 cases dismissed (*tidak diterima*), 135 cases withdrawn (*tarik kembali*), and 16 cases failed (*gugur*).[23]

[22] Luthfi Widagdo Eddyono, "Kemerdekaan Kekuasaan Kehakiman", [https://www.academia.edu/3412699/Kemerdekaan_Kekuasaan_Kehakiman].

[23] Mahkamah Konstitusi Republik Indonesia, *Harmoni Sosial dan Budaya Demokrasi yang Berkeadilan", Laporan Tahunan mahkamah Konstitusi 2016*, Kepaniteraan dan Sekretariat Jenderal MKRI, Jakarta, 2017, p. 9.

Source: Annual Report Indonesian Constitutional Court 2016.

According to Fritz Edward Siregar, Indonesia's Constitutional Court has functioned well as a protector of constitutional rights and defender of the 1945 Constitution. However, the National Representative Council (*Dewan Perwakilan Rakyat*) and the Executive (President) are showing signs of wanting to restrain the influence of the Court. In 2011, the government amended the Indonesian Constitutional Court Act to reduce the authority of the Court.[24]

As Bagir Manan stated that the constitutional guarantee, legal rules or law, in general, do not guarantee the reality of independence of judicial authorities. The independence of judicial powers mostly depends on external factors.[25] Article 45A prohibited the Court from issuing decisions was not sought by applicants (*ultra petita*). Article 57(2a) prevented the Court's from making decisions that override legislated provisions that comply with the 1945 Constitution. By citing Article 45 of the South Korean Constitutional Court and the ruling of the U.S. Supreme Court in Marbury vs. Madison, the Court struck back by declaring

[24] Fritz Siregar, "Indonesian Constitutional Politics", *Int'l J. Const. L. Blog*, Oct. 20, 2013, available at: [http://www.iconnectblog.com/2013/10/indonesian-constitutional-politics]. Read more Decision Number 48/PUU-IX/2011 and Number 49/PUU-IX/2011.
[25] Bagir Manan, *Op.Cit*, p. 4.

most of the articles in the 2011 amendment, including Article 45A and Article 57(2a), constitutionally invalid.[26]

Article 45A states, "a judgment of the Constitutional Court shall not contain a verdict not petitioned by the petitioner or exceeding the petition of the petitioner, save to certain matters related to the subject matter of the petition." Article 57 (2a) states, "a judgment of the Constitutional Court shall not contain a. A verdict other than as referred to in section (1) and section (2); b. A ruling to the lawmakers; and c. A norm formulation instead of the rule of law declared to be contrary to the Constitution of the State of the Republic of Indonesia of the Year 1945." As of Tuesday, dated 18 October 2011, these articles has no longer legal binding force by a judgment of the Constitutional Court Number 48/ PUU-IX/2011.

Since then, the Court have received many cases related to its authority and institution. Many articles of Constitutional Court Law have declared to have no legal binding force by Decision Number 48/PUU-IX/2011, Decision Number 49/PUU-IX/2011 dated 18 October 2011, Decision Number 34/PUU-X/2012 dated 25 September 2012, and Decision Number 7/PUU-XI/2013 dated 28 March 2013.

No.	Constitutional Court Law	Note
1.	Article 4 (4f): "*The election of the Chief Justice and the Deputy Chief Justice of the Constitutional Court shall be conducted in 1 (one) meeting for election*."	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
2.	Article 4 (4g): "A *candidate having obtained the majority vote in the election as referred to in section (4f) shall be designated as the Chief Justice of the Constitutional Court*."	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.

[26] Fritz Siregar, "Indonesian Constitutional Politics", *Op.Cit.*

3.	Article 4 (4h): "*A candidate having obtained the second majority vote in the election as referred to in section (4f) shall be designated as the Deputy Chief Justice of the Constitutional Court*."	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
4.	Article 7A (1): "*The Office of the Registrar as referred to in Article 7 is a functional office which exercises judiciary technical administrative tasks of the Constitutional Court*."	As of Tuesday, 25 September 2012, this section has the legal binding force to the extent it is accompanied by the phrase "with the retirement age of 62 (sixty-two) years for a Registrar, a Junior Registrar, and a Substitute Registrar" by a Judgment of the Constitutional Court Number 34/PUU-X/2012.
5.	Explanation Article 10 (1): "*A judgment of the Constitutional Court shall be final, namely that a judgment of the Constitutional Court shall immediately obtain permanent legal force as of its pronouncement and no legal efforts can be made. The final character of a judgment of the Constitutional Court in this Law also comprises legal binding force (final and binding)*."	As of Tuesday, dated 18 October 2011, this explanation of article has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
6.	Explanation Article 10 (2): "*Referred to as "opinion of the DPR" is an opinion of the DPR regarding an allegation of violation by the President and/or the Vice President resolved in a General Resolution in accordance with the laws regarding the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council and the Regional People's Representative Council, and the Regulation of the People's Representative Council regarding the Code of Conduct*."	As of Tuesday, dated 18 October 2011, this explanation of article has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.

7.	Article 15 (2) d: "*In order to be eligible for appointment as a constitutional court justice, besides having to comply with the conditions as referred to in section (1), a candidate constitutional court justice shall comply with the conditions:* *d. he/she shall be of the age of at least 47 (forty* *-seven) years and at the highest of 65 (sixty-five) years when appointed*."	As of Thursday, dated 28 March 2013, this provision (letter d) has no longer legal binding force to the extent it does not mean "having the age of at least 47 (forty-seven) years and at the highest of 65 (sixty-five) years at the first appointment" by virtue of a Judgment of the Constitutional Court Number 7/PUU-XI/2013.
8.	Article 15 (2) h: "*In order to be eligible for appointment as a constitutional court justice, besides having to comply with the conditions as referred to in section (1), a candidate constitutional court justice shall comply with the conditions:* *h. He/she shall have work experience in the field* *of law of at least 15 (fifteen) years and/or have* *been a state official*."	As of Tuesday, dated 18 October 2011, this provision (letter h.) to the the extent of the phrase "and/or has been a state official," has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
9.	Article 26 (5): "*A replacing constitutional court justice as referred to in section (2) shall continue the remaining term of office of the constitutional court justice he/she replaces*."	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
10.	Article 27A (2) c: "*In order to uphold the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices as referred to in section (1), the Assembly of Honor of the Constitutional Court shall be established with a* *membership consisting of:* *c. 1 (one) person from the DPR*."	As of Tuesday, dated 18 October 2011, this provision (letter c.) has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.

11.	Article 27A (2) d: "*In order to uphold the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices as referred to in section (1), the Assembly of Honor of the Constitutional Court shall be established with a membership consisting of: d. 1 (one) person from the government who organizes government affairs in the field of law*."	As of Tuesday, dated 18 October 2011, this provision (letter d.) has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
12.	Article 27A (2) e: "*In order to uphold the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices as referred to in section (1), the Assembly of Honor of the Constitutional Court shall be established with a membership consisting of: e. 1 (one) supreme court justice*."	As of Tuesday, dated 18 October 2011, this provision (letter e.) has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
13.	Article 27A (3): "*In the execution of its tasks, the Assembly of Honor of the Constitutional Court shall be guided by a. the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices; b. the order of procedure for sessions of the Assembly of Honor the Constitutional Court; and c. the norms and the statutory rules and regulations*."	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
14.	Article 27A (4): "*The order of procedure of sessions of the Assembly of Honor the Constitutional Court as referred to in section (3) letter b contains the mechanism for the enforcement of the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices and type of sanctions*."	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.

15.	Article 27A (5): "*The sanctions as referred to in section (4) may be in the form of a. a written reprimand; b. a temporary suspension; or c. discharge*."	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
16.	Article 27A (6): "*The membership of the Assembly of Honor the Constitutional Court stemming from the constitutional court justices as referred to in section (2) letter a shall be stipulated by the Constitutional Court*."	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
17.	Article 45A: "*A judgment of the Constitutional Court shall not contain a verdict not petitioned by the petitioner or exceeding the petition of the petitioner, save to certain matters related to the subject matter of the petition*."	As of Tuesday, dated 18 October 2011, this article has no longer legal binding force by a judgment of the Constitutional Court Number 48/PUU-IX/2011.
18.	Article 50A: "*The Constitutional Court in its review of a law against the Constitution of the State of the Republic of Indonesia of the Year 1945 shall not utilize other laws for its legal consideration*."	As of Tuesday, dated 18 October 2011, this article has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
19.	Article 57 (2a): "*A judgment of the Constitutional Court shall not contain: a. a verdict other than as referred to in section (1) and section (2); b. A ruling to the lawmakers; and c. a norm formulation in lieu of a norm of the law declared to be contrary to the Constitution of the State of the Republic of Indonesia of the Year 1945*."	As of Tuesday, dated 18 October 2011, this article has no longer legal binding force by a judgment of the Constitutional Court Number 48/PUU-IX/2011.
20.	Article 59 (2): "*If an amendment is required to a law which has been reviewed, the DPR or the President shall forthwith follow-up the judgment of the Constitutional Court as referred to in section (1) in accordance with the statutory rules and regulations*."	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a decision of the Constitutional Court Number 49/PUU-IX/2011.

21.	Article 87: "*By the time this Law enters into force: a. the constitutional court justice serving to date as Chief Justice or Deputy Chief Justice of the Constitutional Court shall remain serving as Chief Justice or Deputy Chief Justice of the Constitutional Court up to the expiry of his/her term of office by virtue of the provisions of the Law Number 24 of the Year 2003 regarding the Constitutional Court; and b. The constitutional court justices serving to date shall remain serving up to his/her discharge by the provisions of the Law Number 24 of the Year 2003 regarding the Constitutional Court*."	As of Tuesday, dated 18 October 2011, this article has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
22.	Law Number 4 of the Year 2014 regarding Government Regulations in Lieu Number 1 of the Year 2013 regarding Second Amendment of Law Number 24 of the Year 2003 regarding the Constitutional Court to Become Law.	As of Thursday, dated 13 February 2014, this Law has no longer legal binding force by a judgment of the Constitutional Court Number 1-2/PUU-XII/2014.

At the climax, on Thursday, 13 February 2014, Law Number 4 of the Year 2014 regarding Government Regulations in Lieu Number 1 of the Year 2013 regarding Second Amendment of Law Number 24 of the Year 2003 regarding the Constitutional Court to Become Law has no longer legal binding force by a judgment of the Constitutional Court Number 1-2/PUU-XII/2014. The Court has been strengthening independence by using its decision.

B. Independence of Constitutional Judges

There are a number or international legal instruments that enshrine the importance of judicial independence. These include: Article 10 the Universal Declaration of Human Rights, Article 14 the International Covenant on Civil And Political Rights (ICCPR), paragraph 27 the Vienna Declaration and Program of Action 1993, the International Bar Association Code of Minimum Standards of

Judicial Independence, New Delhi 1982, and the Universal Declaration of the Independence of Justice, Montreal 1983.[27]

According to Preamble of the Bangalore Principles of Judicial Conduct (2002), the Universal Declaration of Human Rights recognizes as fundamental principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and any criminal charge. The International Covenant on Civil and Political Rights also guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by statute.[28]

The other fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in constitutional conventions and traditions. The importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice. The competent, independent and impartial judiciary is likewise essential if the courts are to fulfill their role in upholding constitutionalism and the rule of law.[29]

Value 1, Independence Principle the Bangalore Principles of Judicial Conduct (2002), states, "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects."[30] Decision 005/PUU-IV/2006 also states that the independence of judges and courts is materialized in the independence of judiciary, whether individually or as an institution, from various influences outside themselves in the form of persuasion, pressure, coercion, threat, or retribution due to particular political or economic interests of the government of the ruling political power or groups,

[27] *Ibid*., p. 3.
[28] The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002. [http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf].
[29] *Ibid*.
[30] *Ibid*.

with compensation or reward in the form of position, economic benefits, or other forms.[31]

> Considering whereas the independence of judges is closely related to the impartiality of judges both in examination and decision-making process. A dependent judge cannot be expected to act neutral or impartially in performing his/her duties. Likewise, a judicial institution dependent to other organs in certain fields and unable to independently manage itself could also result in non-neutral attitude in performing its duties. Such independence also has different aspects. Functional Independence contains a prohibition for other branches of power to intervene with judges in performing their judicial duties. However, such independence must not be interpreted as absolute, because it is limited by law and justice. The aforementioned independence is also to be interpreted that judges are free to pass their verdicts in accordance with their beliefs based on legal interpretation, although verdicts based on such interpretation and belief may be contradictory to those having political and administrative powers. If the verdicts are not in line with the wish of the ruling party, it cannot be used as an excuse to affect retribution against judges, whether personally or against the authority of judicial institutions ["*.... when a decision adverse to the beliefs or desires of those with political power, can not affect retribution on the judges personally or on the power of the court*" (Theodore L. Becker in Herman Schwartz, *Struggle for Constitutional Justice*, 2003 page 261)];[32]

Such independence relates to the examination and decision-making process in cases faced by judges, to obtain verdicts that are free from pressure, influence, whether physical or psychical in nature, and corruption due to Corruption, Collusion, Nepotism, therefore, actually, such independence is not the *privilege* of judges, but an *indispensable right* or *inherent right* of justices in the context of ensuring the fulfillment of the human right of citizens to obtain fair trial. Therefore, mutually, judges are required to act independently and impartially to meet the human rights of justice seekers (*justitiabelen).* It automatically includes the right of magistrates to be free from pressures, influences, and threats.[33]

Decision 005/PUU-IV/2006 in the argument that independence must be interpreted within limits determined by law and in the context of fair enforcement of the law, as mentioned above. Independence is also in line with accountability

[31] Indonesian Constitutional Court Decision Number 005/PUU-IV/2006, August 23, 2006.
[32] *Ibid.*
[33] *Ibid.*

realized through supervision. However, the sensitivity level of judges is extremely high because two opposite parties are defending the interests of the conflicting parties. Therefore, the independence of judiciary also serves as, in addition to inherent right, a prerequisite for the impartial act of magistrates in performing judicial duties.[34]

The form of accountability demanded from judges requiring a format that can accommodate such sensitivity. Carelessness both in the formulation of responsibility mechanism in the kind of supervision and the implementation thereof may result in negative impacts to the existing judicial process. The necessary trust to require compliance with and acceptance to the verdicts made by judges is currently in a critical condition. However, the remaining low level of trust must be maintained to prevent it from complete lost. Therefore, the intention to keep the honor, dignity, and attitude of judges is, in fact, counterproductive and will eventually result in *legal chaos*.[35]

According to Article 21 Constitutional Court Law, before taking office, the Constitutional Court Justices shall swear an oath or a promise by their respective religions. The sworn oath and promise are conducted in front of the President. The pledge or promise shall be as follows:

> *The Oath of a Constitutional Court Justice*
>
> "In the name of Allah I swear that I will do my best in fulfilling all obligations as a Constitutional Court Justice, and I will be as good and fair as possible, abide by the 1945 Constitution of the Republic of Indonesia, and apply all legislations and laws as strict as possible in accordance with the 1945 Constitution of the Republic of Indonesia, and serve the country and the nation."
>
> *The Promise of a Constitutional Court Justice*
>
> "I solemnly promise that I will do my best in fulfilling my obligations as a Constitutional Court Justice, and I will be, and I will be as good and fair as possible, abide by the 1945 Constitution of the Republic of Indonesia, and apply all legislations and laws as strict as possible in accordance with the 1945 Constitution of the Republic of Indonesia, and serve the country and the nation." [36]

[34] *Ibid.*
[35] *Ibid.*
[36] [http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilMK&id=7&menu=2].

The Constitutional Court has nine constitutional court justice members who shall be designated by a Decree of the President. The issuance of a Decree of the President in this provision is of an administrative character. The structure of the Constitutional Court consists of one chief justice being concurrently a member, one deputy chief justice being concurrently a member, and 7 (seven) constitutional court justice members. A constitutional court judge is a state official.

The constitutional court judges shall be proposed respectively 3 (three) people by the Supreme Court, 3 (three) people by the DPR, and 3 (three) people by the President. The candidacy of the constitutional court justices shall be executed transparently and participatory. A candidate constitutional court justice shall be published in print as well as electronic mass media so that the society can give input regarding the respective candidate justice.

The provisions relating to the procedures for the selection, election, and submission of the constitutional court judges shall be regulated by the individual authorized institutions. The election of the Constitutional Court judges shall be executed objectively and accountable. The term of office of a constitutional court justice is five years, and he/she can be re-elected only for one subsequent term of office.

Constitutional Court judge shall comply with the following conditions: a. He/she shall have integrity and impeccable personality; b. He/she shall be just; and c. He/she shall be a statesman/stateswoman having command over the constitution and constitutionalism. To be eligible for appointment as a constitutional court justice, besides having to comply with that conditions, a candidate constitutional court judge shall comply with the conditions:

a. he/she shall be an Indonesian citizen;
b. he/she shall hold a doctor's and a master's degree with a basis of an undergraduate's background of higher education in law;
c. he/she shall have faith in God the One Only and be of noble character;
d. he/she shall be of the age of at least 47 (forty-seven) years and at the highest of 65 (sixty-five) years at the first appointment;
e. he/she shall be physically and mentally capable of performing his/her duties and obligations;

f. he/she shall have never been sentenced to criminal imprisonment by a court judgment which has obtained permanent legal force;
g. he/she is not being declared bankrupt by virtue of a court judgment; and
h. he/she shall have work experience in the field of law of at least 15 (fifteen) years.[37]

Constitutional Court justice will be discharged honorably due to a. His/her demise; b. His/her resignation on own accord submitted to the Chief Justice of the Constitutional Court; c. He/she reaches the age of 70 (seventy) years; d. Expiry of his/her term of office; e. Physical or mental disease for 3 (three) consecutive months so that he/she cannot perform his/her tasks as substantiated by a medical statement of a physician.

Constitutional Court justice is discharged dishonorably if a. He/she is convicted to criminal imprisonment by a court judgment having obtained permanent legal force due to committing a criminal act threatened with criminal imprisonment; b. He/she commits disgraceful acts; c. He/she has been absent from sessions being his/her duties and obligations for 5 (five) consecutive times without valid reasons; d. He/she has violated his/her oath or pledge of office; e. he/she deliberately obstructs the Constitutional Court to render a judgment within a period as referred to in Article 7B Section (4) of the 1945 Constitution; f. he/she has violated the prohibition to hold concurrent offices as referred to in Article 17; g. He/she no longer meets the qualifications as a constitutional court justice; and h. He/she has violated the Ethical Code and the Guidelines for Conduct of a Constitutional Justice.

The protocol status and the financial entitlements of the Chief Justice, the Deputy Chief Justice, and the members of the Constitutional Court shall be subject to the provisions of the statutory rules and regulations for state officials. The state shall grant security guaranty for constitutional court justices in the exercise of their duties and responsibilities as executors of the judicial power. A constitutional court judge is prohibited from holding office as a concurrently

[37] These requirement according to Constitutional Court Law, Decision of the Constitutional Court Number 7/PUU-XI/2013 and Decision of the Constitutional Court Number 49/PUU-IX/2011.

a. Another state official; b. A member of a political party; c. A businessperson; d. An advocate; e. A civil servant.

A constitutional court justice can only be subjected to police acts by order of the Attorney General after having obtained the approval in writing of the President, save in matters of a. Being caught red-handed while committing a criminal act; or b. by the adequate initial evidence he/she is alleged to have committed a criminal offense which is subject to capital punishment, a criminal offense against the security of the state, or a particular criminal act.

Unfortunately, on Wednesday, October 2, 2013, the Corruption Eradication Commission arrested Akil Mochtar, the Chief Justice of the Indonesian Constitutional Court, for alleged bribery.[38] On Thursday, January 27, 2017, Justice Patrialis allegedly accepted gratification related to the Judicial Review of Law (UU) No. 41/2014 on Animal Health and Husbandry also by the Corruption Eradication Commission.[39]

C. The Ethical Code and the Guidelines for Conduct of a Constitutional Justice

Article 27A Constitutional Law states the Constitutional Court shall draw up the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices containing norms to be complied with by every constitutional court judge in the performance of their duties to safeguard the integrity and impeccable personality, being just, and statesmanship.[40]

The Constitutional Court already have a Code of Constitutional Judicial Ethics and Conduct, which is mainly based on The Bangalore Principles of Conduct of 2002 and added with the Indonesian cultural values. The code of Constitutional Judicial ethics and conduct has been declared with the name of *Sapta Karsa Hutama* on October 17, 2005, and revised on December 1, 2006.

According to Decision 005/PUU-IV/2006, the aforementioned guidelines on judicial conduct are intended to regulate the allowed, restricted, mandatory,

[38] Stefanus Hendrianto, The Indonesian Constitutional Court at a Tipping Point, Int'l J. Const. L. Blog, October 3, 2013, available at: http://www.iconnectblog.com/2013/10/the-indonesian-constitutional-court-at-a-tipping-point

[39] [https://en.tempo.co/read/news/2017/01/27/055840547/Patrialis-Akbar-Corruption-Case-Brings-Disaster-for-Public].

[40] This norms states on the Law Number 8 of the Year 2011 regarding the Amendment to the Law Number 24 of the year 2003 regarding the Constitutional Court.

and suggested or non-suggested judicial conduct, both inside or outside the office, in order to form justice as judicial authorities officials (*ambtsdrager van rechtelijkemacht*) having ideal and fair integrity and personality so as to become the final fort in law and fairness enforcement efforts. The aforementioned guidelines of conduct are the elaboration of provisions of the code of ethics that are universally and generally applicable and accepted as the moral values and norms followed by people or a group of individuals in regulating their conduct, with the purpose of identifying what are good and what are bad in their behaviour among their fellows in their group.[41]

> The professional code of ethics, as seen in the Code of Constitutional Judicial Ethics and Conduct as well as Guidelines for Indonesian Judicial Conduct applicable in the Supreme Court, contains a series of basic principles and the morality values that must be upheld by justice, inside and outside their office. The aforementioned principles and values are further detailed in the form of judicial conduct that is deemed in accordance with the aforementioned principles or values. For example, the value of fair conduct is translated as a principle in the form of description of what are deemed as fair, and it is subsequently detailed how the foregoing is described in Judicial conduct while performing judicial duties. Similarly, when integrity value or principle is adopted as part of the professional code of ethics, the aforementioned integrity principle has been given a limit, that "*constitutes mental attitude reflecting the integrity and balance of personality of any judge as a person and as a state official in performing his respective duties. The integrity of personality includes honesty, loyalty, and sincerity in performing his professional duties, equipped with the mental strength to set aside and reject all persuasions and temptation on position, asset, popularity or other inducements. Personality balance includes mental and physical balance, and spiritual intellectual, emotional intellectual, and intellectual balance in his performance of duties*." From the implementation of the aforementioned principle, it can be known for example that the judge guarantees that his conduct is not disgraceful from the appropriate observation perspective or his attitude and conduct must strengthen people's trust on judicial image and authority. Fairness is not only performed but must also be seen as performed.[42]

In order to safeguard and uphold integrity and impeccable personality, justice, and statesmanship, a constitutional court judge shall comply with statutory rules

[41] Indonesian Constitutional Court Decision Number 005/PUU-IV/2006, August 23, 2006.
[42] *Ibid*.

and regulations, attend sessions, implement the procedural law as it should be, follow the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices, treat litigants justly, indiscriminative, and impartially; and render judgments in an objective manner by virtue of facts and law which can be accounted for. A constitutional court justice is prohibited: to violate his/her oath/pledge of office, to receive a gift or promise from the litigants, either directly or indirectly; and to give out court opinions or statements on cases being handled by him/her before judgment.

As wrote by Stefanus Hendrianto, In 2009, the Court's Council of Ethics found that Justice Arsyad's family had held meetings with Arsyad's law clerk to discuss the cases. The Council concluded that Arsyad violated the judiciary code of ethics because he failed to stop his family members from making a deal with parties involved in cases being handled by the Court. Arsyad maintained that he did not commit any crime and he denied that his daughter had introduced the candidate to him. Nevertheless, Arsyad tendered his resignation.[43]

On March 2016, the Council of Ethics recommended that Chief Justice Arief Hidayat is given a special warning. The Ethics Council ruled that the Chief Justice acted with a lack of prudence in issuing the letter of recommendation because it could create negative perceptions. Nevertheless, it did not find any gross violations of ethics and broadly accepted Chief Justice Hidayat's version of events.[44]

III. CONCLUSION

The independence of the Indonesian Constitutional Court supported by the 1945 Constitution after the amendments from 1999 until 2002, and further stipulated in Law. However, it can be said that this institution has ups and downs of public trust due to corruption cases conducted by constitutional justices. Also, in several political instances showed efforts of political institutions to limit the

[43] Stefanus Hendrianto, The Indonesian Constitutional Court at a Tipping Point, Int'l J. Const. L. Blog, October 3, 2013, available at: [http://www.iconnectblog.com/2013/10/the-indonesian-constitutional-court-at-a-tipping-point].

[44] Read more Stefanus Hendrianto, The "Ethics" of the Indonesian Constitutional Court: How Low Can It Go?, Int'l J. Const. L. Blog, May 25, 2016, at: [http://www.iconnectblog.com/2016/05/the-ethics-of-the-indonesian-constitutional-court-how-low-can-it-go/].

authority of the Constitutional Court. In its experiences, the Constitutional Court succeeded in convincing the parties through its decisions and strengthening institutional independence against the influence that tried to destabilize its institutions.

The Council of Ethics of Constitutional Judges to maintain the values and behavior of judges is also continuously work and efficient enough in overseeing the ethics and conduct of judges. The decision of the Ethics Council may also be accepted as a proportional decision. However, there are other issues that need to be studied more deeply, such as the political links between the tenure of the judge and the appointment of judges by the institution authorized by it, and the extent to which the independence of the Constitutional Court can be influenced by institutional leadership factors.

I agree with Fritz Edward Siregar that wrote, the Constitutional Court of Indonesia used the limited window that it had to drive political change and retain its legitimacy.[45] "Even though the Court was attacked, it continued to live with no consequences and gained even more public support. The Court has been bold enough to take this momentum and become one of the most respected and trustworthy institutions in Indonesia".[46]

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Indonesian Constitutional Court Decision

Decision Number 005/PUU-IV/2006

Decision Number 48/PUU-IX/2011

Decision Number 49/PUU-IX/2011

Decision Number 34/PUU-X/2012

Decision Number 7/PUU-XI/2013

Decision Number 1-2/PUU-XII/2014

The Legal Logic of the Collapse on Non-Retroactive Doctrine in the Constitutional Court Decision

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Abstract

The non-retroactive doctrine as a legal principle did not apply retroactively. In legal system of Indonesian; Article 28I paragraph (1) of 1945 Constitution determines that a human right can not be prosecuted based on retroactive law as well as rights that can not be reduced under any circumstances. Similarly Article 58 of Law No. 24 Year 2003 concerning Constitutional Court determines that a Law is being reviewed by the Constitutional Court is still applied, before there is decision stated that the law is contrary to the 1945 Constitution. However, with the use of "legal logic of implication relationships" in Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009, the decision was made retroactive and it become the jurisprudence for the Constitutional Court Decision No. 5/PUU-IX/2011 and Decision No. 13/PUU-XI/2013.

Keywords: The Collapse of the of Non-Retroactive Doctrine, Constitutional Court Decision

I. INTRODUCTION

A. Background

John Marshall, the Chief Justice of the United States Supreme Court (1801-1835) had said that: "Law is said to be unconstitutional means that it isn't contrary to the constitution, but because it is contrary to the doctrine which is made by a judge to interpret the constitution."[1] Talking to the doctrine,[2] in Indonesia at

[1] Craig R. Ducat, *Constitutional Interpretation*, Ninth Edition, Boston: Wadsworth Cengage Learning, 2009, p. 81.
[2] The doctrine which is intepreted in this paper can be understood in two meanings, those are: (i) the establishment of a class of

least there are three Constitutional Court Decisions regarding Constitutional Review[3] of law that make collapse of the non-retroactive doctrine. Those three decisions are Constitutional Court Decision No. 110-111-112-113/ PUU-VII/2009, Decision No. 5/ PUU-IX/2011,[4] and Decision No. 13/PUU-X/2013.[5]

Principal petition of the applicant in the Case No. 110-111-112-113/PUU-VII/ 2009 is the provision Article 205 paragraph (4), Article 211 paragraph (3) and Article 212 paragraph (3) of Law No. 10 Year 2008 concerning General Elections The People's Representative Council, The Regional Representative Council, and The Regional People's Representative Council[6] (Law No. 10 Year 2008). More details of the substance of the petitions described as follows: [7]

1. Whereas the Petitioner I argued that Article 205 paragraph (4) and Elucidation Article 205 paragraph (4) of Law No. 10 Year 2008 opens the potential for double counting and lead to uncertainty in the law. While the Article 212 paragraph (3) and Article 211 paragraph (3) of Law No. 10 Year 2008, Petitioner I argued that it's contrary to the open Proportional electoral system.
2. Whereas the Petitioner II argued that if the phrase "vote" in Article 205 paragraph (4) of Law No. 10 Year 2008 interpreted as the only remaining vote of Political Parties that meet the Splitter Voter Numbers (BPP, *Bilangan Pembagi Pemilih*), thus it makes disproportionality of the acquisition vote is to the seats a political party, and there will be double counting.
3. Whereas the Petitioner III argued that if the phrase "vote" in Article 205 paragraph (4) of Law No. 10 Year 2008 interpreted as the only remaining vote of Political Parties which meet the BPP, there will be double counting. While the Article 211 paragraph (3) and Article 212 paragraph (3) of Law No. 10 Year 2008 *mutatis-mutandis* to the argument of the Pettioner I.

expert statecraft, consistently, particularly in the country's policy and (ii) as a principle, such a legal principle in many cases. In this case the Constitutional Court's Decision could be interpreted as the founding class of the expert of matters pertaining to the form of constitution studies, consistently, particularly in the country's policy, while the doctrine of non-retroactive is defined as a legal principle. For clearer understanding look at to the Discussion with part of theme about The Doctrine and the Non-Retroactive Doctrine.

[3] Why does this paper use a term of "Constitutional Review."? In legal system of Indonesian, based on Article 24 paragraph (2) of 1945 Constitution stated that the doer or judicial power is done by Supreme Court and Constitutional Court. One of the authority of Supreme Court is to review statutory rules and regulations below the laws against the laws, while Constitutional Court has authority to review laws against the Constitution. In this case, thus; "Judicial Review" is as the authority of The Supreme Court and it is not discussed in this paper. While "Constitutional Review" is as the authority of The Constitutional Court.

[4] Constitutional Court Decision No. 5/PUU-IX/2011 regarding Constitusional Review of Article 34 of Law No. 30 Year 2002 concerning Commission of Corruption Eradication, stated on the Plenary Constitutional Court was open for public on Monday, 20th of June 2011.

[5] Constitutional Court Decision No. 13/PUU-XI/2013 regarding Constitusional Review of Article 22 paragraph (1) and paragraph (4) of Law No. 15 Year 2006 cocerning The Financial Audit Board, stated on the Plenary Constitutional Court was open for public on Tuesday, 10th of September 2013.

[6] The meaning of The Regional People's Representative Council in this case there are three region thise are: (i) provinces, (ii) regencies and (iii) municipalities.

[7] Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009, p. 81-82.

4. Whereas the Petitioner IV argued that Article 205 paragraph (4) of Law No. 10 Year 2008 in the implementation lead to multiple interpretations, especially in defining the phrase "vote" when it is interpreted as the rest of the vote from the political parties only which meet the BPP, thus it will be an injustice, because the major parties will be over representation, and to the smaller parties will be under representation conversely.

On Friday, 7th of August 2009, the Court finally decided the Case No. 110-111-112-113/PUU-VII/2009, which was stated in the Plenary session of the Constitutional Court are open to the public by stating "To grant the petition for some applicant," which describes as follows: [8]

- Stating that Article 205 paragraph (4) of Law No. 10 Year 2008 is conditionally constitutional. It means the constitutional has mening as long as be understood that the calculations for establishing the second phase of The People's Representative Council (DPR, *Dewan Perwakilan Rakyat*) seats acquisition for political parties members which is conducted in the following methods:
  1. Determining the equivalence of 50% (fifty percent) of the number of valid votes BPP, that is 50% (fifty percent) of the BPP numbers in every constituency of DPR Member;
  2. Distribute the remaining seats in each constituency of Parliament Member to Political Party of general election participant of DPR Member, with the following provisions:
     a. If the valid votes or remaining votes of political parties participating in General Election of DPR reaches at least 50% (fifty percent) of the BPP, thus the Political Parties acquire one (1) seat.
     b. If the valid votes or remaining votes of political parties participating in General Election of DPR does not reach at least 50% (fifty percent) of the BPP and there are remaining seats, therefore :
        1) The valid vote of political party is categorized as the remaining vote which consider in the calculating of seat in the third phase; and
        2) The remaining votes of the political party are taken in the calculation of seats in the third phase.
- Stating that Article 211 paragraph (3) of Law No. 10 Year 2008 is conditionally constitutional. That is, the constitutional is as far as implemented in the following methods:

[8] Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009, p. 109-111.

1. Determine the number of remaining seats which is not divided yet, that is by reducing the amount of seats allocation in the constituency of The Provinces Regional People's Representative Council (DPRD, *Dewan Perwakilan Rakyat Daerah*) Member with the number of seats that have been divided by the calculation of the first phase.
2. Determine the number of remaining valid votes of political parties participating in the general election of the Provinces DPRD Members, by the methods:
    a. For political parties gaining seats in the first phase of the calculation, the number of valid votes of the political party is minus with the result of multiplying the number of seats obtained by political parties in the first phase with a number of BPP.
    b. For those political parties do not gain seats in the calculation of the first phase, the valid votes obtained by the Political Parties categorized as the remaining votes.
3. Establish seat acquisition of political parties participating in geneal election of The Regencies/Municipalities DPRD Members, by distributing the remaining seats to Political Party participating in the general election of The Regencies/Municipalities DPRD Members that is one by one as ordinary system all remaining seats are divided by depleted based on the largest remaining votes of Political Parties.

- Ordering to the Election Commission to implement the calculation of the DPR seats, Provinces DPRD, and Regencies/Municipalities DPRD in the seconf phase of general election results in 2009 based on this Court's Decision;
- Ordering to the publication of this decision in the Official Gazette of the Republic of Indonesia;
- Rejecting to the petition for besides and beyond.

Regardless of the articles declared conditionally constitutional by the Court in Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 as mentioned above, there are interesting things in the Constitutional Court in the Command of Constitutional Court Decision to be discussed in further discussion. That is there is a clause "Ordering to Election Commission carry out the calculation of the DPR seats, Provinces DPRD, and Regencies/Municipalities DPRD in the second phase of general election results in 2009 based on this Court's decision." It means that the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 has retroactive. And finally, the decision is also made by the jurisprudence of the two Constitutional Court Decisions.

First, the Constitutional Court Decision No. 5/PUU-IX/2011 regarding Constitusional Review of Article 34 of Law No. 30 Year 2002 concerning Commission of Corruption Eradication (Law No. 30 Year 2002), in the terms of jurisprudence (examine the bold sentence) can be seen on the *ratio decidendi* on the page 76 that is:

> "Considering that despite according to Article 47 of Law No. 24 Year 2003 concerning Constitutional Court, the Constitutional Court Decision in effect since established (prospective), but for the sake of expediency principle which is the universal principles and purposes of the law to specific cases the Court may enforce its decision retroactively (retroactive). It has become jurisprudence indicated in the Decision of the Court Number 110-111-112-113/ PUU-VII/2009 ..... Therefore, in order to avoid legal uncertainty in transition as a result of this decision, relating to the post of Chairman Commission of Corruption Eradication (KPK*, Komisi Pemberantasan Korupsi*) replacement (newly elected), then this decision applies to the KPK that have been selected and occupied the KPK is now elected for four years since he was elected. "

The second, as well as the Constitutional Court Decison No. 13/PUU-XI/2013[9] regarding Constitusional Review of Article 22 paragraph (1) and paragraph (4) of Law No. 15 Year 2006 cocerning The Financial Audit Board (Law No. 15 Year 2006), in terms of jurisprudence (examine the bold sentence) can be seen also on the *ratio decidendi* on pages 78-79, described as follows:

> "Considering that despite according to Article 47 of Law No. 24 Year 2003 concerning Constitutional Court, the Court's decision in effect since established (prospective), but for the sake of the principle of expediency which is the principle of the universal destiny of law, for certain cases the Court's decision may be applied retroactively (retroactive) as set forth in the Decision of the Court No. 110-111-112-113 / PUU-VII / 2009 ..... Therefore, to avoid legal uncertainty as a result of this decision, relating to the replacement of The Financial Audit Board *(*BPK*, Badan Pemeriksa Keuangan*) Member position, thus this decision applies to the replacement of *BPK* Member position has been appointed and has current positions as BPK Member, so has the right to occupy the full term which is 5 (five) years since it was his appointment as a BPK Member with the President's decision."

Constitutional Court Decision No. 110-111-112-113/ PUU-VII/2009, Decision No. 5/ PUU-IX/2011, and Decision No. 13/PUU-X/2013 as mentioned above

[9] Even The Constitutionsl Court Decision No. 13/PUU-XI/2013 eliminate the article which is not asked to be reviewd by Petitioner too, that is Article 22 paragraph (5) of Law No. 15 Year 2006 cocerning The Financial Audit Board.

has had retroactive. While textually, it doesn't matter by implementing a law retroactively (retroactive) is the thing that is not according to the constitution, as Article 28I paragraph (1) of 1945 Constitution: "..... and the right not to be prosecuted under a retroactive law are human rights that cannot be reduced under any circumstance whatever." Similarly, under Article 58 of Law No. 24 Year 2003 concerning Constitutional Court (Law No. 24 Year 2003) which determined that a law was constitutional reviewed by the Constitutional Court was still applied, before there was decision states that the law was contrary to the 1945 Constitution. Based on this understanding accurately, it can be interpreted, both based on Article 28I paragraph (1) of 1945 Constitution and Article 58 of Law No. 24 Year 2003 that the Constitutional Court Decision applies in non-retroactive. It means that it can be understood accurately that the three Constitutional Court Decisions are contrary to the Article 28I paragraph (1) of 1945 Constitution and also Article 58 of Law No. 24 Year 2003.

B. Questions

Based on the background as described above, the principal issues raised in this paper is what the legal logic used by the Court when the Court Decision No. 110-111-112-113/PUU-VII/2009 make the collapse of non-retroactive doctrine.[10]

II. DISCUSSION

A. The Doctrine and the Non-Retroactive Doctrine

The doctrine (*doktrin*), according to Indonesian Dictionary[11] there are at least two meanings, those are: (i) the doctrine (on the principle of political main stream, religious), and (ii) the establishment of a class of religious sciences expert, constitutional, consistently, particularly in the country's policy. While according to Black's Law Dictionary,[12] doctrine is as a principle, such a legal principle, that is widely adhered to.

[10] In this paper is focused to discuss about *ratio decidendi* specifically is used by Court in Constitutional Court Decision No. 110-111-112-113/ PUU-VII/2009, because this decision is the beginning of the collapse of non-retroactive doctrine.
[11] Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, edisi keempat, Jakarta: PT. Gramedia Pustaka Utama, 2008, p. 338.
[12] Bryan A. Garner (editor in chief), *Black's Law Dictionary,* Eigth Edition, Boston: West Publishing Company, 2004, p. 1457.

Furthermore, in the Alphabetical Thesaurus (*tesaurus*)[13] of Indonesian Language Center, which is defined as the doctrine is dogma, creed, stream, principles, dogma, ideology, canon, understanding, and theories.[14] Meanwhile, according to the Oxford Paperback Dictionary & Thesaurus,[15] is a doctrine is a set of beliefs or principles held by relligious or political group.

Based on the meaning of the doctrine referred (based on dictionary or thesaurus), thus it is a doctrine in this article can be understood in two meanings those are: (i) the establishment of a class of expert statecraft, consistently, particularly in the country's policy and (ii) as a principle, such a legal principle in many cases. In this case the Constitutional Court's Decision could be interpreted as the founding class of the expert of matters pertaining to the form of constitution studies,[16] consistently, particularly in the country's policy, while the doctrine of non-retroactive is defined as a legal principle.

Finally, it can be concluded wisely, that the Constitutional Court Decision and the principle of non-retroactive equally be called a "doctrine." Therefore, for more details, it can be understood that the word "doctrine" in the beginning of paragraph of this paper is: "Law is said to be unconstitutional means that it isn't contrary to the constitution, but because it is contrary to the doctrine which is made by a judge to interpret the constitution."

The non-retroactive doctrine as a legal principle which states that the law is not retroactive. In the American legal system, retroactive legal principles known as: *ex post facto law*, that Congress is forbidden to enact retroactive legislation. In America at least *ex post facto law* includes three kinds of restrictions. First, it bars government from punishing as a crime an act which was innocent at the time it was committed. Second, it prohibits government from retroactively increasing the seriousness of the punishment for an act already defined as a crime. Finally,

[13] Thesaurus *(tesaurus)* is different from dictionary. In the dictionary can be found out about the information of word meaning, while in the thesaurus can be found out the words are used to express the ideas of the author. Therefore, thesaurus can help the author to depict or express about the ideas based on the author means. See Departemen Pendidikan Nasional, *Tesaurus Alfabetis Bahasa Indonesia Pusat Bahasa*, Cet. I, Jakarta: PT Mizan Pustaka, 2009, p. Xi.

[14] *Ibid.*, p. 161.

[15] Maurice Waite & Sara Hawker (Edited), *Oxford Paperback Dictionary & Thesaurus*, Third Edition, New York: Oxford University Press, 2009, p. 274.

[16] Based on Article 24C paragraph (5) of 1945 Constitution states that : "A constitutional court justice shall have integrity and impeccable personality, be just, be a statesman/stateswoman mastering the constitution and constitutionalism, and does not concurrently hold a public office."

it restrains federal and state governments from eliminating criminal defenses that existed at the time the allegedly criminal act was performed.[17]

The legal system in Indonesia related to the non-retroactive doctrine/*ex post facto law* stipulated in Article 28I paragraph (1) of 1945 Constitution which determines that it is a human right not to be prosecuted based on retroactive law as rights that can not be reduced under any circumstances. There are two opinion groups with regard to the provisions of this Article. The first group believes that the rights contained in Article 28I paragraph (1) of 1945 Constitution should be follow to restrictions under the provisions of Article 28J paragraph (2) of 1945 Constitution.[18] The second group believes that the rights contained a human rights non-deregable rights, can not be reduced under any circumstances without exception.[19]

B. Legal Logic and It's Various Relationship

Irving M. Copi stated; "Logic is the study of methods and laws used to distinguish correct reasoning from the incorrect ones."[19] In short term it can be said that logic is a science and an ability to think straight (accurate).[20]

Furthermore, when it comes to the relationship between law and logic; Hans Kelsen stated that:[21]

> "That a view which has a lot of adherents among jurists is that there is a quite special relationship between law and logic (in the traditional meaning, from two values, true or false), that "logical character" has the nature of law specifically, it means that in their reciprocities relationships, the norms of law in accordance with the principles of logic."

The resolution of the issues is necessary to know all kinds of relations and its laws. If there are two statements displayed simultaneously will cause

[17] Timothy L. Hall (Edited), The U.S. Legal System: Volume 1, First Printing,, California: Salem Press, 2004, p. 286-287.
[18] Based on Article 28J paragraph (2) of 1945 Constitution states that: "In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society."
[19] Jimly Asshiddiqie, *Komentar Atas Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Cet. Pertama, Jakarta: Sinar Grafika, 2009, p. 124.
[20] Alex Lanur OFM, *Logika Selayang Pandang*, Cetakan ke-27, Yokyakarta: Kanisius, 1983, p. 7.
[21] Hans Kelsesn, "Essay in Legal and Moral Philosophy," alih bahasa, B. Arif Sidharta, *Hukum Dan Logika*, Cetakan ke-4, Bandung: Alumni, 2011, p. 27.

what the logic calls "logical relationship." There are at least six kinds of logical relationships:[22]

1. Independent relationship (non interlocked) that is: two statements have an independent relationship when both feature entirely separate issues, it's similar to the following statement:
   Sumbawa horse is vigorous.
   Tamarind tree is rooted riding.
   All rabbits are weak.
   All rabbits eat leaves.
   Arabic is difficult.
   The logic is difficult.
   Independent relationship has character: truth or falsity of the first statement can not be used to find the truth or falsity to the other statements. The truth of the statement "Sumbawa horses are vigorous" can not be used to determine the truth or falsity of the statement whereas "The Tamarin tree is rooted riding,"
2. Equivalent relationship that is: two statements have the equivalent relationship when the both have the same meaning such as:
   All materials are metal.
   Most of the metal are iron.
   Some scholars become minister.
   Most scholars don't become a minister.
   Equivalent relationship has the nature of truth or falsity of another statement which determine the truth or falsity of the statements of the others. With the other words, if the one statement is true so another statement is true too, if the one statement is false so another statement is false too.
3. Contradictory relationship is that two contradictory statements have a relationship when both composed of subject and predicate terms are similar but different in quality and quantity. There are contradictory relationship between A and B statements or on the pairs of E and I, suc as:
   A: All the successfull ones are diligent.
   B: Some successfull ones are not diligent.
   E: All the righteous ones are not spiteful.
   I: Some righteous ones are spiteful.
   A pair of contradictory problems have character when the another is false so the another one must be true, and if the one is true so the another must be true, it is impossible the both are true or false.

[22] H. Mundiri, *Logika*, Cetakan ke-14, Jakarta: RajaGrafindo Persada, 2011, p. 73-79.

4. Contrary relationship is that the two statements have contrary relationship when the term of subject and predicate both of them are equal in quantity universally but they are different in quality. On these statements of A and E have contrary relations, such as:
   A: All politicians are unfair.
   B: All politicians are not unfair.
      E: All tigers are not grumpy.
      A: All the grumpy tiger.
   Contrary relationship has character: one statement must be false and could be wrong and the the both could be false too. And now is investigated the nature of contrary relationship by taking a pair of propositions A and E on a few examples. When in the fact: all politicians are unfair, thus A statement is true and E statement is false. When in the facty: all politicians are not unfair ones so A is false and E is true. When in the fact: there are unfair ones and the others are fair, so both A and E are wrong.
5. Sub-contrary relationship (a half contrary): two statements have sub-contrary relationship when the term of subject and predicate of the statements are equal, has equally quantity and the particular is different in quality. There are sub-contrary relationships in these statements I and O, such as described bellow:
      I: Some traders are stingy.
      O: Some traders are not stingy.
   .....
      O: Some students are not lazy.
      I: Some students are lazy .
   The sub-contrary relationship has a nature that: one of the statements must be true and the both can be true. Let's test the nature of sub-contrary relationship by taking a pair I and O above as an example. When in the fact: all traders are stingy, thus I is true (remember about a half meaning) and O is false. When all the traders are not stingy, thus O is true and I is false. When in fact some traders are stingy and the the others are are not so I and O are true.
6. Implication relationship that is: two statements have implication relationship when the term of subject and predicate of the statements are equal in quality but both are different in quantity. On the statement of A and I and a pair E and O there are implication relationships, such as:
   A: All students from block C are diligent.
   I: Some students from block C are diligent.
      E: All patriots are not lazy.
      O: Some patriots are not lazy.

The implications relationship has the nature: the both can be true, the both can be false, or the one can be true and another can be false. And now, the nature of implication relationship is tested by taking a pair of A and I above as an example. When in the fact: if all student from block C are diligent, so A is true, and I is too. Therefore the both are true. When in fact: all students from block C are diligent, so A and I are false. In this case there is a possibility for the both are false. When in the fact: students from block C are diligent and last students so I is true and A is false. In this case there is a possibility the one is true and another is false. That condition can appear on the statement of E and O if they are tested.

Then, singular statement is investigated. A and E statement with the same subject and predicate as known the both have a contrary relationship. But the A and E statement are singular with the same subject and predicate which have a contrary relationship, such as:
A (singular): Hasan dresses in black.
E (singular): Hasan does not dress in black.

A pair of A problems (singular) with the same subject but different predicates is able to have a contrary relationship too, such as:
A (singular): Nurdin goes to Yogyakarta.
A (singular): Nurdin goes to Solo.

A pair of A problems (singular) with the same subject but different predicate is able to have an independent relationship such as:
A (singular): Nurdin goes to Yogyakarta.
A (singular): Nurdin is smart kids.

By many kinds of logical relationships like on the statements above thus in this research will be found out the understanding to what legal logic used by the Court in Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 that make the collapse of non-retroactive doctrine. Finally, the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 which make collapse of non-retroactive doctrine is applied as jurisprudence by the other two decisions, they are Constitutional Court Decision No. 5/PUU-IX/2011 and Decision No. 13/PUU-X/2013.

C. The Legal Logic of the Collapse on Non-Retroactive Doctrine in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009

What the legal logic used on Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 thus make collapse the non-retroactive doctrine

is able to be started by looking at the part of *ratio decidendi* specifically revealed by the Court to include five things (especially; look at to the bold one), that is: [23]

1. The setting to the power to legal binding of the Court decision explicitly is not found in either the 1945 Constitution or the Constitutional Court Law, but on the Article 24C paragraph (1) of 1945 Constitution, Article 10 paragraph (1), Article 47, and Article 58 of Law No. 24 Year 2003 specifies that the decision of the Court is a the court decision at the first and final level, which shaould be final and has permanent legal power since completed pronounced in the open plenary session to the public. If the decision of the Court declared the Act is contrary to the 1945 Constitution, the law is still applicable to the declaration that the Act is contrary to the 1945 Constitution and does not have legally binding since the announcement of the decision on open court to the public. From the three arrangements above can be concluded that the Court's decision doesn't have binding legal force on non-retroactive. As a result, that decision, thus the article or the Constitution which is stated not have binding legal force applied since the day of announcement of the judgment in a open plenary session to the public (*ex nunc*). It means that the statement does not have the legal binding force of an Act, it does not significantly affect to the legal relations have occurred prior to the announcement of the Court's decision.
2. The non-retroactive doctrine is ruled in Law No. 24 Year 2003 generally as principle that apply without mentions the possibility of an exception and does not set on the discretion of judges to determine the behavior that actually receded in certain circumstances be required to be able to achieve the goals decided by an Act of a quo. The principle of non-retroactive in the enforcement of a law at first regarding the application of the rules of criminal law retroactively is a principle accepted universally. The ban has correlation with protection of human rights, to prevent victims of injustice as a result of the arbitrariness of the authorities to create a law to prohibit and penalize an act which was not a criminal act, known as the principle of *nullum delictum nulla poena sine praevia lege poenali.* In particular, the setting of the American Constitution specifies that Congress is forbidden to enact legislation that retroactively (*ex post facto law*) meanwhile the Article 28I paragraph (1) of 1945 Constitution, determines that it is a human right not to be prosecuted on the basis of the law retroactive as rights that can not be reduced under any circumstances. Although a ban on the application of the Act in retroactive, that in the field of criminal law is a universal

[23] Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009, p. 105-108.

principle and becomes a human right that can not be reduced under any circumstances, these principles recognize the exceptions as set out in Article 1 paragraph (2) Criminal Code (KUHP, *Kitab Undang-Undang Hukum Pidana*) that applies universally, where if there is a change of legislation, the defendant treated is the most favorable to the accused.

3. The prohibition for the Court's decision to apply retroactively is not clearly regulated and found as common in ordinary court decision. In the State Administrative Court, Criminal, and Civil widely known decision of the court which has the power behavior retroactive (*ex tunc*) because in general sentencing or acquittal of the defendant, the granting of a lawsuit in unlawful acts, or defaults, the decision relating to the status or position of a civil servant, debts and legal violation, has retroactive since a default or a criminal offense committed, and it si not after the date of the announcement in the open plenary court to the public. A decision is not applied retroactive, in some circumstances could cause the purposes of protection provided by the legal mechanism is not reached.
4. The objective is given to the Constitution enforcement through constitutional review as the authority of the Court is not to allow an Act is contrary to the 1945 Constitution, so that if the decision applies only prospectively and there is not possible discretion for judges enforce them retroactive, be issues that must always be answered whether the constitutional protection objectives can be achieved or not. In the constitutional law, by the content and the various of law, it can be sure there is any particular legal interest protected by the 1945 Constitution, related to the status or position which apply through the electoral process, both decided by the Court through testing of Law which has correlation with the election of candidates through the method of the counting and determination of the seat, or through dispute or dispute about the results of elections. The consequences of tha legal decision should be binding retroactively on the desirability and the vote, either by a decision that confirms or cancels the determination of votes and number of seats determined by the Election Commission. Without the enforceability retroactive, thus the purpose of constitutional protections put on dispute resolution related to results of the general election law and the testing of laws that impact on a person's status or legal position will not be reached, as become the purpose of the constitution and law.
5. Article 58 of Law No. 24 Year 2003 determines that the principle of the presumption of constitutionality in the validity of the Law is applied on the decision declaring that the Law is contrary to the 1945 Constitution therefore it does not have legally binding, it is implied the prohibition

to retroactively enforce the decision of the Court. The practice of the Court in several decisions have stated that a law applied constitutionally with certain requirements (conditionally constitutional), either by a particular interpretation, fulfillment of certain minimum funding allocations, and after passing a certain period or the decision declaring the law is unconstitutional but it still applied until in a certain time limit. The practice is not regulated in the Law No. 24 Year 2003, both on the discretion of judges as well as special arrangements in the Law No. 24 Year 2003 determining the legal consequences of a decision on a limited basis or to declare that the decision has a legal effect in the future. Therefore, the principle of non-retroactive of the law as a result of the Court's decision is not an absolute thing, as applied on Constitutional Court Law expressly like in the several countries which have Constitutional Court. In a certain field of law, the exceptions and discretion recognized universally is required because there is an objective of specific legal protection to be achieved which has public order characters. Moreover, in a decision which give a certain interpretation as a condition of the constitutionality of the norm (interpretative decisions), the decision should be applied retroactive naturally since the creation of legislation which is interpreted, because it is for the meaning given and attached to the norm interpreted. Therefore, although the Law No. 24 Year 2003 determines that the Court's decision is prospective but for the case of *a quo*, because it is special, thus the decision of *a quo* should be implemented retroactive to the distribution of The People's Representative Council (DPR*, Dewan Perwakilan Rakyat*) seat, Provinces The Regional People's Representative Council (DPRD *Provinsi, Dewan Perwakilan Rakyat Daerah Provinsi*) seat and Regencies/Municipalities The Regional People's Representative Council (DPRD *Kabupaten/Kota, Dewan Perwakilan Rakyat Daerah Kabupaten/Kota*) seat of the result in legislative elections in 2009 without any compensation or indemnity for the consequences which already exist on the rules that existed before.

Furthermore, based on the special *ratio decidendi* by the Court as explained above, thus the legal logic used by the Court in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 thus make the collapse of non-retroactive doctrine is the implication relationship, that is: two statements have implication relationship when the term of subject and predicate of the statements are equal, the both are equal in quality but different in quantity. Legal logic of implication

relationship is as defined on the statement of pair A[24] and I[25] and to the pair of E[26] and O[27] as described follows:

A: Article 24C paragraph (1) of 1945 Constitution, Article 10 paragraph (1), Article 47, and Article 58 of Law No. 24 Year 2003 specifies that the decision of the Court is a the court decision at the first and final level, which shaould be final and has permanent legal power since completed pronounced in the open plenary session to the public

I: The objective is given to the Constitution enforcement through constitutional review as the authority of the Court is not to allow an Act is contrary to the 1945 Constitution, so that if the decision applies only prospectively and there is not possible discretion for judges enforce them retroactive, be issues that must always be answered whether the constitutional protection objectives can be achieved or not.

E: Article 28I paragraph (1) of 1945 Constitution, determines that it is a human right not to be prosecuted on the basis of the law retroactive as rights that can not be reduced under any circumstances.

O: Therefore, the principle of non-retroactive of the law as a result of the Court's decision is not an absolute thing, as applied on Constitutional Court Law expressly like in the several countries which have Constitutional Court.

The implication relationship has characteristics such as: both can be true, the both can be false, or the one can be true and another can be false. Let's test the nature of the implication relationship by taking the statements of pair of A and I above can have three possibilities, those are: (i) if in fact: All the Constitutional Court Decisions are non-retroactive, thus A[28] is true, so does I.[29] Therefore, both are true, (ii) if in fact: All the Constitutional Court Decisions are retroactive, thus A and I[30] are false. In this case, it has the both are possibility false, and (iii) if in fact: All the Constitutional Court Decisions are "non-retroactive" and there are "retroactive" too, thus I is true but A[31] is false. In this case there is possibility the one is true and another is false. The fact also occurs when the

[24] The statement of A is taken from special *ratio decidendi* by Court as described on point No. 1 above which is bold.
[25] The statement of I is taken from special *ratio decidendi* by Court as described on point No. 4 above which is bold.
[26] The statement of E is taken from special *ratio decidendi* by Court as described on point No. 2 above which is bold.
[27] The statement of O is taken from special *ratio decidendi* by Court as described on point No. 5 above which is bold.
[28] See the statement of A which is bold; the Constitutional Court Decision about non-retroactive.
[29] See the statement of I which is bold Constitutional Court Decision above is non-retroactive but in certain/special condition could be retroactive too.
[30] Could be remember that the statement of I which is bold that perhaps the Constitutional Court Decision is retroactive (in certain/special condition) by less quantity than the other Constitutional Court Decisions which are non-retroactive (generally).
[31] Could be remember that the statement of A which is bold it must be understood that Constitutional Court Decision is non-retroactive.

statements of E and O are tested. Of course, in this case, "if in the fact" referred to those of the three implication relationships [(i), (ii), and (iii)] are based on what statements are written in the "special *ratio decidendi*" in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009.

Finally, it can be concluded that, based on the fact in the "specifically *ratio decidendi"* revealed in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 which make the collapse of the non-retroactive doctrine using legal logic of implication relationship with the 3rd possibility (iii) above, that is, in fact: all the Constitutional Court Decisions there are "non-retroactive and some of them are "retroactive". Obviously, "retroactive" is rare happen as the decision, if in retroactive should be in under specific circumstances.

Next there is a question, whether the legal logic of implication relationship which is used by the Court in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 which make the collapse of non-retroactive doctrine as described above meets with the limits of constitutionalism too.

Constitutionalism is as a doctrine puts the constitution in the supreme position, or as the highest law applied in a country (the supreme law of the land). Therefore, the constitution does not have a positivistic legal significance only, but it has a philosophical meaning too and values which become the source of inspirations for all the policies in the life of the state.[32] The Constitution also is not like recipes which make a definite taste if it follows properly. However, the constitution is the words of the law are written on sheets of paper. Its application in practice is in another case. The Constitution is an important document and perhaps it is the most important, but there are seven main reasons why the constitution does not need to be understood correctly, those are:[33]

1. The Constitution may not be very important if it is not obeyed. Dictatorial regime has a democratic constitution generally, and politicians in the countries which have advanced democracies are known attempt to violate or avoid it.

[32] Hamdan Zoelva, *Mengawal Konstitusionalisme*, Cetakan Pertama, Jakarta: Konstitusi Press, 2016, p. 304.
[33] Kenneth Newton & Jan W. Van Deth, "Foundation of Comparatif Politics," diterjemahkan Imam Muttaqin, *Perbandingan Sistem Politik: Teori dan Fakta*, Cetakan I, Bandung: Nusamedia, 2016, p. 101-102.

2. The Constitution may be incomplete. It is a public document which may not explain to some of the aspects of the constitution which is more important; *eg*: electoral rules, political parties, or even the prime minister's tenure.
3. To understand the constitution fully sometimes needs the references to another document-consideration of the Supreme Court, historical documents, or the United Nation Declaration on Human Rights.
4. The written Constitution is supported by the convention rapidly.
5. The Constitution may evolve and change, even the document is not changed. The American Constitution in 1787 did not give the United States Supreme Court review of constitutional rights. The Supreme Courts took this authority by themselves in 1803 when deciding the case Marbury vs. Madison.
6. The Constitution may be unclear or does not address to the specific circumstances.
7. The Constitution can be fail. History is full of constitutional democracy were fails and took place by the revolution, autocrats and military dictatorial regime. The lesson can be learnt is that a successful democracy can't be dictated by the law of the constitution, however the constitution was drafted well; that political democracy must be accepted and practiced by the political elite and the citizens too. The constitution is like a fortress it must have solid structures and strict protection of the armed forces.

Based on the seven main reasons why that the constitution is not necessary to be understood accurately as stated above and this is the limitatition of the constitutionalism. In this case, at least by the use of legal logic of implication relationship which is used by the Court in Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 thus make collapse the non-retroactive doctrine certainly, and it is also in accordance with the two of the seven main reasons as limit of constitutionalism above. They are, the first, as stated on the point 2 above, that is the Constitution may be incomplete. It is a public document which may not explain to some of the aspects of the constitution which is more important; *eg*: electoral rules, political parties, or even the prime minister's tenure. In this case its relevant that it is proven that the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 related to the case about the unclear of the legislative elections rules and the Constitutional Court Decision No. 5/PUU-IX/2011 and Decision No. 13/PUU-XI/2013 related to the case about the unclear of the tenure state official rules.

Second, as stated on the point 6 above, that is the Constitution may be unclear or does not address to the specific circumstances. In this case, its relevant can be reviewed from historical aspect. Historically, when look at on the book of *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (The Comprehensive Text of Amendment of 1945 Constitution) published by *Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi* (The Secretariat General and the Office of the Registrar of the Constitutional Court of the Republic of Indonesia), if it is investigated the use of "retroactive" phrase at least there was thirteen (13) pages, those are page 22, 63, 66, 169, 227, 242, 243, 281, 293, 299, 336, 361, and 601.

The use of the "retroactive" phrase on the thirteenth page, there are two things should be understood, those are on the pages 22 and 242. On the page 22 described about the enforcement of the "retroactive" rule of law that is in the Indonesian Constitution in 1950 period (UUDS 1950, *Undang-Undang Dasar Sementara 1950*) it was made Law No. 62 Year 1958 concerning Citizenship of the Republic of Indonesia on 1st of August, 1958. On the Article VIII Closing Regulation of this Law mentioned that "This Law attend into force on the day ruled by the considerations stating that the article 1 letters b to j, Article 2, Article 17 letter a , c, and h are retroactive to 27th of December, 1949". It is known that on 27th of December, 1949 the recognition of sovereignty by the Netherlands with the founding of the Republic of Indonesia States as the result of the Round Table Conference (KMB, *Konferensi Meja Bundar*).[34]

While on page 242 the use of "retroactive" phrase as Muhammad Ali's opinion who expressed that he disagreed related to the court which could be retroactive. According to him it is not compatible with the principle of legality which is already known throughout around the world that was *nullum delictum nulla poena sine praevia lege poenali*.[35]

The "retroactive" phrase as stated on pages 22 and 242 in the book of The Comprehensive text of Amendment of 1945 Constitution stated that on the page

[34] Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002 (Buku VIII, Warga Negara dan Peunduduk, Hak Asasi Manusia dan Agama)*, Edisi Revisi, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010, p. 22.
[35] *Ibid*., p. 241-242.

22 related to the implementation of a law that applied retroactive, while on the pages 242 relate to the disagreement of the application of laws that could be applied retroactive.

III. CONCLUSION

Solving problem of the issue of constitutionality is also necessary to know the various relationships with their logical relationship and their laws. If the two statements are applied simultaneously will cause what the logic stated "legal logic of implication relationships." The legal logic used in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 thus make collapse the non-retroactive doctrine is the implication relationships, those are: two statements have implication relationships when the term of subject and predicate of the statements are same, both are in quality but they are different in quantity. The quality deal with the Constitutional Court Decision is final and binding, while the quantity has many implications related to the Constitutional Court Decision, whether the non-retroactive or retroactive. Finally, legal logic used based on the fact "specifically *ratio decidendi"* revealed on the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 concluded that all The Constitutional Court Decision applied "non-retroactive" and some of them are "retroactive." Obviously, "retroactive" is rare happen as the decision, if in retroactive should be in under specific circumstances.

The conclusions from the use of legal logic has complied at least with the limits of constitutionalism, it means there are two main reasons why the non-retroactive doctrine as set in Article 28I paragraph (1) of 1945 Constitution does not need to be understood correctly, those are: (i) the Constitution may be incomplete. It is a public document which may not explain to some of the aspects of the constitution which is more important; *eg*: electoral rules, political parties, or even the prime minister's tenure. and (ii) the Constitution may be unclear or does not address to the specific circumstances. Furthermore, in this case, there are also two things become relevant: (i) it is proven that the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 related to the case about the unclear

of the legislative elections rules and the Constitutional Court Decision No. 5/PUU-IX/2011 and Decision No. 13/PUU-XI/2013 related to the case about the unclear of the tenure state official rules and (ii) historically is not known about the restrictions related to the application of the non-retroactive doctrine certainly.

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The Constitutional Will In Human Rights Protection For Refugees

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Abstract

Human rights protection granted to refugees in Indonesia has not received serious attention, in particular for those who are included in the cross-border refugees. This issue is a question of how the Constitution mandates a protection to them, whether it is an obligation of the government of Indonesia or it is volunteerism alone. The provisians are addressed in Article 28A, Article 28B paragraph (2), Article 28D paragraph (4), Article 28E paragraph (1), Article 28G paragraph (2), and Article 28H paragraph (1), and Article 28J paragraph (1), Broadly speaking, the Indonesian constitution calls for better protection of refugees to internally displaced persons and refugees across borders. This is reflected in several articles in the 1945 Constitution that mention the word "everyone" in the subject which meant regardless of citizenship status or population. This is certainly in line with the values of human rights that have been recognized along with the universality of human rights that are applicable. Therefors the will of the constitution on refugees needs to be implemented in legislation in Indonesia, which describes in details the human rights protection to internally displaced persons and refugees state that the will of the constitution in the protection of human rights to refugees be implemented correctly.

Keywords: Constitutional, Human Rights, Refugees.

I. INTRODUCTION

A. Background of Study

Issue on refugees is not yet resolved fairly up to now, whether internally displaced persons (IDPs) or cross-border refugees. The obscure regulations on

refugees are merely extinguishing fire, instead of preventing the fire. This can be seen from how tangled to refugees who are spontaneous and not systematic. Cross-border refugees in Indonesia is also problematic due to the uncertainty of status and protection given by the government of Indonesia, whether it is an obligation or only a matter of hospitality to provide human rights protection. At that time, when a refugee came to Indonesia, the Indonesian government did not seem to give orders and regulations because it does not have a national policy. In the Law on Foreign Relations No. 37 of 1999, the mandate of the refugee camp in the health center. Moreover, all countries including those who have not ratified the Refugees Convention shall uphold the standard of refugee volumes that have become part of general international law. Looking at it in general, it certainly becomes an interesting study looking at how the constitution provides the will in human rights law against refugees.

B. Problem of Study

Based on the background above, in this paper the author reviews how constitutional will human rights protection for refugees is.

II. DISCUSSION

1. Internally Displaced Persons in Indonesian Legal Framework

Jesuit Refugee Service (JRS) applies the expression 'de facto refugee' to all persons persecuted because of race, religion, membership of social or political groups and the victims of armed conflicts, erroneous economic policy or natural disasters and for humanitarian reasons. It also includes internally displaced persons, that is civilians who are forcibly uprooted from their homes by the same type of violence as refugees but who do not cross national frontiers.[1]

Internally displaced persons are those obliged to relocate from their homes due to conflict, natural disasters or other causes but are within their own country. Indonesia is one of countries susceptible for various natural and social disasters.[2]

[1] *Jesuit Refugee Service* Indonesia, 2013, *Pengungsi dan Pencari Suaka di Indonesia*, Jakarta: Jesuit Refugee Service Indonesia, p. 3. in http://jrs.or.id/wp-content/uploads/downloads/2013/07/20130703_ido_adv_Booklet-Public-Awareness-CS4_by-indro.pdf downloaded on 15 April 2016.

[2] *Ibid.*, p. 6.

National protection is provided to internally displaced persons. Such protection is usually manifested in the enactment of law or particular policy pursuant to internationally acknowledged norms (guiding principles on internal displacement). Government of Indonesia provides protection for internally displaced persons through Law No. 24 of 2007 on Disaster Relief, Article 54 which reads as follows: the management of society and refugees hit by disaster shall be made through activities of collecting data, relocating to safe area, and fulfilling basic needs.[3]

Therefore, issue on internally displaced persons is not a big deal, since the state is present in terms of legislation and implementation. Data collection is conducted for all refugees receiving logistic aid and proper healthcare, as well as relocation to safe area equally without any disregard.

The frequently appeared issue is the basic needs set out by Government provided for the refugees. Basic needs should not only be intended as clothing, shelter, and foods, but also mental (psychological) needs. It cannot be denied that the refugees relocated due to unpleasantly heavy state (involuntary), resulted from conflict or disaster. Therefore, psychological needs are certain.

Such psychological needs may be provided through psychologists' service and guaranteed aid in forms of self-building and self-development, i.e. employment training and coaching. Psychologists' treatment and debriefing are expected to bring better hope for the refugees.

2. Cross-Border Refugees according to International Law

The term 'refugee' first appeared during the World War I, considered as a culmination point of development process of a nation.[4] Refugees who were victims of war were people trapped in poverty and could not earn any living and improve their life standard without nation's helping hand. The left involuntarily and consequently, they could not deal with the documents (certificates) of travel required in passing other countries' border to seek for refuge. This complicated, alarming state inspired the definition of refugees.[5]

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[3] *Ibid.*, p. 10.

[4] Peter J.Taylor, *Political Geography World Economy, Nation State and Locality, Es Sex: Longman*, 1993 ed. in Achmad Romsan, *Pengantar Hukum Pengungsi Internasional: Hukum Internasional dan Prinsip-prinsip Perlindungan Internasional*, Jakarta : UNHCR, 2003, p. 28.

[5] Daniele Joly, Haven or Hell: *Asylum Policies and Refugee in Europe*, London : Mac Millan Press, 1966, p. 11.

Webster Dictionary defines 'refugee' as 'an individual seeking refuge or asylum; *especially*: an individual who has left his or her native country and is unwilling or unable to return to it because of persecution or fear of persecution (as because of race, religion, membership in a particular social group, or political opinion)'.[6] Meanwhile, the Great Dictionary of the Indonesian Language (KBBI) mentions the etymology of *pengungsi* (refugee) is *ungsi* (evacuate) with verb *mengungsi* (to evacuate), as in evacuating (dismissing) oneself from danger or saving oneself (to a secured area), *pengungsi* is a noun which means a person who refuges, a civilian of a country who moved out to other political refugee's country due to political view opposite to the political view of one's native ruler.[7] Based on the opinion above, it is clear that refugees are the consequence of dangers such as natural disasters (flood, earthquake, eruption, drought) and manmade disasters (armed conflicts, political regime change, fundamental immunity oppression, human rights abuse, etc). Refuge may be undertaken within any country or cross-border due to political view difference.[8]

United Nation High Commisioner for Refugees (UNHCR) formed on January 1951 classifies refugees in two terms: mandatory refugees and statutory refugees. The former is all people recognized as refugees by UNHCR pursuant to function, authority, or mandate as set out by UNHCR statutes, whereas the latter is those within countries of 1951 Convention (upon the effectuation of this Convention since 22 April 1954) and/or 1967 Protocol (upon the effectuation of this Protocol since 4 October 1967. The two terms are used to differentiate the refugees before 1951 Convention and pursuant to 1951 Convention, both categorized as refugees protected by UNHCR in international instruments.

Article 1A (2) of 1951 Convention relating to the status of refugees, those considered as refugees are:

1. Refugees according to 12 May 1926 Agreement and 30 June Agreement, or 10 February 1938 Protocol, 14 September 1939 Protocol or International Refugee Organization Constitution.

[6] http://www.merriam-webster.com/dictionary/refugee#legalDictionary downloaded on 22 November 2016.
[7] The Great Dictionary of Indonesian Laguange, Department of Education and Culture, 1995, p. 675.
[8] Achmad Romsan, et. al. *Pengantar Hukum Pengungsi Internasional*, Bandung: Sanic Offset, 2003, p. 35.

2. "…. any person who: "As a result of events occuring before 1 January 1951 and owing to welfounded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it."
3. In the event that someone having more than one nationality, the term 'country of his nationality' means any country, where he is the citizen, and he shall not be entitled for protection from the country of its nationality without any unacceptable reason, owing to well-founded fear is unwilling to avail himself of the protection of one country of his nationality.

Definition of refugee in 1951 Convention then extended in Article 1 (2) on Protocol relating to the status of 1967 refugees as follows:

> "For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occuring before 1 January 1951 and …" and the words "… a result of such events", in article 1 A (2) were omitted".

Pietro Verri defines refugee by quoting Article 1 of 1951 UN Convention on the status of refugee as follows:

> "Applies to any person who fled the country of his nationality to avoid persecution or threat of persecution".

This definition indicates that refugees are all people who left their country to avoid persecution or threat of persecution. For such a case, those fleeing within his country cannot be called as refugees as in 1951 Convention.

Refugees as defined in Geneva Convention are all people, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion outside the country of his

nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of his native country.[9]

3. Human Rights Protection for Refugee accordance to International Law

International protection is available to cross-border refugees and asylum seekers. Such protection is usually made available by UNHCR (United Nations High Commissioner for Refugees) or international society. The international society who provide protection are those ratifying 1951 Geneva Convention and 1967 Protocol on cross-border refugees. 1951 Geneva Convention was built upon situation in Europe post-World War (WW) II. Since the cross-border refugees is an international issue – not only protecting refugees in time of World War II – additional Protocol then established in 1967. Until recently, 145 countries have ratified this convention. Meanwhile, government of Indonesia and most Southeast Asian countries have not ratified this convention.[10]

Arrangement on refugees pursuant to international law are contained in several conventions, they are:

(1) The Fourth Geneva Convention Relative to the Protection of Civillian Persons in Time of War

This Convention made in Geneva on 12 August 1949 regulates the protection for casualties of war and regulates the refugees categorized as protected people. The refugees not protected by any Country shall not be treated as enemy. Such arrangement is contained in Article 44 of this convention as follows:

> "in applying the measures of control mentioned in the present convention, the detaining power shall not treats the as the enemy aliens exclusively on the basic of their nationality de jure of an enemy state, refugees who do not, in fact, enjoy the protection of any government."

[9] *Ibid.*, p. 4.

[10] Jesuit Refugee Service Indonesia, *Pengungsi dan Pencari Suaka di Indonesia*, Jakarta: Jesuit Refugee Service Indonesia, p. 8-9. in http://jrs.or.id/wp-content/uploads/downloads/2013/07/20130703_ido_adv_Booklet-Public-Awareness-CS4_by-indro.pdf , 2013, downloaded on 15 April 2016

This Convention incorporates additional protocol to the Geneva Convention of 12 August 1949.[11] In this protocol on refugees is contained in Article 73 as follows:

> Persons who, before the beginning of the hostilities, were considered as stateless persons or refugees under the relevant international instrument accepted by the parties concerned or under the national legislation of the state of refugees or state of residence shall be protected persons within the meaning of parts I and III of the Fourth Convention, in all circumstance and without any adverse distinction.

(2) Convention Relating to the status of Refugees

This Convention was ratified on 28 July 1951 by United Nations Conference of Plenipotentiaries On the Status of Refugees and Stateless Persons enforced by resolution of United Nations General Assembly No. 429 (V) on 14 December 1950. This Convention applied since 22 April 1954 and defines refugees in very general meaning in Article 1A (2) of 1951 Convention Relating to the Status of Refugees.

1951 convention regulates the protection for refugees and helps the refugees, as follows:[12]

a) No discrimination

   Countries ratifying Convention shall not treat refugees based on discriminative politic related to race, religion or country of origin as well as skin complexion and they are free to practice their religious activities (Articles 3 and 4).

b) Private status of refugees regulated pursuant to the law of their domicile. Should they not have domicile, their private status shall be regulated by the law of their place of residence. Rights related to marriage shall also be recognized by countries ratifying Convention and Protocol (Article 12).

c) A refugee shall be equally entitled to have or own movable or immovable assets and retain them as other people and to transfer such assets to the country of their settlement (Articles 13, 14 and 30).

[11] This Protocol is referred to as the 1977 Additional Protocol

[12] Sri Setianingsih Suwardi, *"Aspek Hukum Masalah Pengungsi Internasional"*, IR Journal, Vol .2 No.1 of 2004, Jakarta: LPHI FH UI, p. 35

d) Rights of association

Countries ratifying Convention shall recognize the freedom of association and alliance for the refugees by establishing non-profit, non-political trade association (Article 15).

e) Refugee shall be entitled on freedom of litigation before the court (Article 16).

f) Entitled to secure jobs and establish a trade company and other independent businesses wherein pursuant to applicable provision, such as certificate, to ascertain the expertise and to facilitate the job placement (Articles 17, 18 and 19).

g) Every refugee shall be equally treated with other citizens for the right to acquire basic education (Article 22).

h) Right on social welfare.

Every refugee shall be allowed to enjoy the rights on social welfare, such as right on works, settlement, remuneration from the jobs they performed (Articles 20 and 22).

i) Every refugee shall be entitled on identity cards and documents for travelling beyond their country of their settlement unless for security reason and common interest. The travel document issued on international treaty shall be recognized by countries ratifying the Convention (Articles 27 and 28).

Other than rights of refugees mentioned above, Convention has also underlined obligations of refugees as contained in Article 2 thereof: Every refugee has duties to the country in which he finds himself, wihch require in particular that he conform to its laws and regulations as well as to measures taken for maintenance of public order. Based on Article 2 above, every refugee is obliged to comply with all laws, regulations and provisions to create public order in the country in which he finds himself.

(3) 1967 Protocol Relating to the Status of Refugees

This Protocol was approved by Economic and Social Council through resolution 1186 (XLI) on 18 November 1966 by UN General Assembly through

resolution 2198 (XXI). This Protocol is effective as of 4 October 1947. The countries are entitled to participate in thus 1967 Protocol without participating in 1951 Convention. Article 1 (2) of this Protocol has extended the definition of refugees in 1951 Convention as the words "As a result of events occuring before 1 January 1951 and ..." and the words "... a result of such events", were omitted". Article 1(2) of 1967 Protocol states as follows:

> For the purpose of the present protocol, the term "refugees" shall, except as regard the application of paragraph 3 of this article, mean any person within the definition of article 1 of the convention as if the words "As a results of events occurring before 1 January 1951 and..." and the word "... a results of such event". In Article 1(2) were omitted.

Such extended definition of refugees and protocol relating to the status of refugees are aimed to overcome issue on refugees after the World War II, primarily refugees resulted from political conflict in Africa during 1950s and 1960s.

(4) The Convention Relating to the Status of Stateless Persons (1954)

This Convention regulating the status of stateless persons was ratified through convention attended by sovereign countries on 28 September 1954 through Resolution of Social and Economic Council number 526 (XVII) on 26 April 1954 and effective as of 6 June 1960, pursuant to provision of Article 39 of Convention. The complete name of 1954 Convention is Convention Relating to the Status of Stateless Persons.

1954 Convention consists of 42 Articles and contained in 6 Chapters. One article worth to know is Article 1 that formulates 'stateless person', general obligation to be obeyed by them, human rights attached to them, such as right to practice their religious activities and religious education to their children, right on perpetual settlement, right to possess movable and immovable assets, including the right on works of art and industrial property, right on association, right on employment and decent life, rights on welfare, such as housing, general education, freedom of movement. Countries ratifying 1954 Convention shall also be required to issue identity card to

stateless persons in their country, as well as travel documents. Furthermore, this convention regulates the stateless seamen.

(5) The Convention on the Reduction of Statlessness (1961)

This Convention was ratified on 30 August 1961 through Resolution of UN General Assembly No. 896 (IX) on 4 December 1954. 1961 Convention contains 21 Articles. It outlines the diminution of stateless persons in a country by giving nationality status for their children born in such country. The nationality given that way is as obliged by 1961 Convention by paying attention to provisions applicable to the concerned country.

For the information, children born from stateless parents on boat or aircraft are considered to be born in the Country whose flag in country where such boat or aircraft is registered. This Convention also regulates the loss of nationality of stateless persons by marriage, broken marriage or obtaining other nationality.[13]

(6) African Territory

There is an instrument applicable to this territory on refugees within African territory, i.e. Convention Governing the Specific Aspects of Refugees Problems in Africa.

This Convention was ratified at the sixth extraordinary session of Heads of State and Heads of Government on 10 September 1969 in Addis Ababa. The reason behind this was the huge amount of refugees occurred in African Countries.

This Convention extends the definition of refugee as contained in 1951 Convention and 1967 Protocol. In Article 1 paragraph 2 of Convention Governing the Specific Aspects of Refugees Problems in Africa, refugees defined as those displaced owing to aggression, invasion, foreign domination or events causing public order intervention, in part or the whole area of a Country. Article 1 paragraph 2 states as follows:

[13] Document Series Symbol: ST/HR/, Secretariat Center for Human Rights

> For the purposes of this convention, the term "refugees" shall also apply to every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residences as a results of such event in unable or, owing to such fear, is unwilling.

This Convention regulates the residence of the refugees;[14] obligation of refugees to the Countries where he placed;[15] non-discriminative principle to the refugees;[16] voluntarily repatriation of refugees;[17] and travel documents of refugees.[18]

(7) Latin America Territory

Likewise African territory on mass relocation owing to war, civil conflict, violence, and political chaos, Cartagena Declaration of Refugees was ratified at Colloquium entitled "Protection to Refugees from Central America, Mexico and Panama: Judicial Humanitarian Problem" held in Cartagena, Colombia on 19-22 November 1984. Refugees in definition therein have been extended as contained in section III (3) as follows:

> In addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstance which have seriously disturbed public order.

Although the Declaration above adds other reason for people to be considered as refugees, but the status of refugee must be given by paying attention to basic criteria of 1951 Convention and 1967 Protocol. Moreover, this Declaration also recommends the participation to 1951 Convention and 1967 Protocol.[19]

[14] Convention Governing the Specific Aspect of Refugees Problems in Africa, Article 2 paragraph 5
[15] *Ibid*., Article 3 paragraph 1
[16] *Ibid*., Article 4
[17] *Ibid*., Article 5 paragraph 1
[18] *Ibid*., Article 6 paragraph 1
[19] Cartagena Declaration of Refugees, section II letter (a)

(8) European Territory

Instruments related to refugees in this territory are, among others, Agreement of the Abolition of Visas for Refugees, regulating the facilities given to the refugees to hold travel documents[20] for travelling within Countries ratifying European Agreement on Transfer of Responsibility for Refugeess that regulates the assignment of responsibility to the refugees living more than two years in one ratifying Country to other ratifying Country and Reccomendation on the Protection of Persons not Formally Recognized as Refugees Under 1951 Convention, regulates the recommendation not to reject application in a country's frontier, or repatriate a person to the place where he is threatened for persecution.

4. Constitutional Will in Providing Human Rights Protection for the Refugees

Although the government of Indonesia has not yet ratified 1951 Geneva Convention and 1967 Protocol on cross-border refugees and regulations of laws applicable in Indonesia has not specifically discussed the issue on refugees, it does not release government of Indonesia to the refugees within Indonesian territory.

Indonesia is a constitutional country where government is limited by constitution, thus 1945 Constitution is the guiding fundamental law.[21] The first paragraph of Preface of 1945 Constitution recognizes the freedom to be free, as follows: Whereas independence is the truest right of all nations, and therefore, colonization on the world shall be abolished for it is not in accordance with humanity and justice. The recognition to humanity is the essence of human rights and to justice is the essence of legal state principle that is one of our country systems.[22] The second paragraph states that Indonesia is a fair country. The adjective 'fair' indicates a legal state, the purpose of law is to seek fairness. The third paragraph underlines that Indonesian society declares that a manifestation

[20] These travel documents must be pursuant to the provision of 1951 Convention or agreement on the issue of travel documents for refugees dated 25 October 1946.
[21] Ismail Suny, *Hak Asasi Manusia*, Jakarta: Yarsif Watampone, 2003, p. 1.
[22] Ismail Suny, *Mekanisme Demokrasi Pancasila*, Jakarta: Aksara Baru, 6th ed, 1987, p. 10-30.

of an independent statehood is human rights recognition and protection, such as political equality.

The fourth and last paragraph contains the purpose and objective of the "Government of the Republic of Indonesia, protecting the whole Indonesian people and the whole blood-spilled land of Indonesia and to promote social welfare, educate the nation life, and participate in world order by virtue of independence, perpetual peace and social justice, it establishes the independence of Indonesia into a Constitution in a structure of the Republic of Indonesia with sovereignty of its people based upon: the Almighty God, just and civilized humanity, unity of Indonesia, and democracy led by the wisdom of deliberations among representatives, and by manifesting the social justice for the whole people of Indonesia." This completely quoted last paragraph contains the outline of human rights recognition and protection in aspects of politic, legal, social, economic, cultural, and education.[23]

In addition to Preface, several articles of 1945 Constitution, i.e. Article 28A, Article 28B paragraph (2), Article 28(D) paragraph 4, Article 28E paragraph (1), Article 28G paragraph (2), and Article 28H paragraph (1) as well as Article 28J paragraph (1) guide the human rights protection for the refugees. The Constitution wishes the philosophy of human rights is not individualistic freedom, rather putting humans in their relation to the state (social being) so that human rights could not be separated from human obligations.

Constitution contains the will that "everyone" is deserved to live, is deserved to survive, and maintain his life, is deserved to perpetually live, grow, develop and is deserved to be protected from any violence or discrimination, is deserved for citizenship status, is deserved to embrace religion and pray pursuant to his religion, choose education and study, choose occupation, choose nationality, choose residence within the territory of country and left them and is deserved to come back, and is deserved for political asylum from other country, is deserved to live physically and mentally prosperous, reside and acquire proper and healthy

[23] Ismail Suny, *Hak Asasi Manusia*, Jakarta: Yarsif Watampone, 2003, p. 2-3.

environment and is deserved to get healthcare service, and is required to respect each other's human rights in social, societal, and national life. This is as contained in Article 28A, Article 28B paragraph (2), Article 28D paragraph (4), Article 28E paragraph (1), Article 28G paragraph (2), and Article 28H paragraph (1), as well as Article 28J paragraph (1).

In addition to Constitution's call to protect refugees, Indonesia is also one of countries approving Universal Declaration of Human Rights. Its consideration states that the recognition on natural dignity and equal, absolute rights of all members of family are fundamental to independence, justness, and world peace. Furthermore, Article 2 explains that:[24] Any person shall be entitled to all rights and freedoms contained herein without any exclusion, such as distinguishing race, skin color, gender, language, religion, political or other view, origin of nationality or society, proprietorship, birth or other position. Moreover, it shall not recognize any distinction on political, legal pr international position from the country or area of origin, whether an independent country, trust territory, colonized land, or under other's sovereignty limitation.

Government of Indonesia states its view on Human Rights that:[25] Indonesian people, in its history has suffered misery and sorrows owing to colonization. Therefore, Preface of 1945 Constitution mandates that independence is the right for every nation and colonization shall be banished from the world since it is not in accordance with humanity and justice. Indonesian people is determined to participate in the world orderliness by virtue of independence, perpetual peace and social justice which essentially are obligation of every nation. Thereby, Indonesia views human rights are inseparable to human obligations. It is based on two things as follows:[26]

1. Indonesia has view and attitude on human rights originated from religious teachings, universal moral value, and national cultural noble value, and based on Pancasila and 1945 Constitution.

[24] Secretary General and Registrar Office of Constitutional Court, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan 1999-2002*, Jakarta: Secretary General and Registrar Office of Constitutional Court, 2010, p. 43.
[25] *Ibid.*, p. 52-53.
[26] *Ibid.*, h. 84.

2. Indonesia as a member of United Nations has responsibility to respect the Universal Declaration of Human Rights and other international instruments on human rights.

Human rights are substantially formulated through normative, empirical, descriptive, analytic approach as follows:[27]

1. Human rights are fundamental rights naturally, universally attached to human being as a gift from the Almighty God and serves as assurance of perpetual life, independence, development of mankind and society, should not be disregarded, snatched, or contested by anyone.
2. Indonesian society that is developed from simplicity to modernity basically is a kinship society. This society has recognized social institution regarding societal rights and obligations consisting of religious institution acknowledging that humans are created by the Almighty God with all of their rights and obligations; family institution as a vessel for life in communion to develop offspring to maintain existence; economic institution constituting human's efforts to increase prosperity; educational and teaching institution to develop intellectuality and personality of human; information and communication institution to expand insight and openness; legal and justice institution to ensure life order and harmony; security institution to ensure security of every human. Thus, the substantial human rights consist of: right to live; right to raise family and procreate; right of self development; right of justice; right for independence; right to communicate; right for security; and right for prosperity.
3. Indonesian people acknowledge and recognize that every individual is a part of society and thereby, society consists of individuals with human rights who live in environment that is resource for their life. Therefore, in addition to human rights, every individual is required to assume obligation and responsibility to respect other individual human rights, public order and continuity of function improved system and improvement of environmental standards.

[27] *Ibid.*, h. 55-57

The understanding of human rights for Indonesian people is as contained in comprehensive text below:[28]

1. Human rights are fundamental rights of mankind without any difference. Since fundamental rights are given by the Almighty God, definition of human rights is the rights given by the Almighty God attached to human rights, naturally existing, universal and perpetual, in respect to human dignity and prestige.
2. Every human has equal human rights believed and respected without distinguishing gender, skin color, nationality, religion, age, political view, social status, and language as well as other status. The ignorance and snatch to human rights lead to the loss of dignity and prestige as human, resulting in the lack of self-development and role as a whole.
3. Indonesia realizes that human rights are historical and dynamic, the implementation is developed social, societal, and national life.

Based on the explanation above, it clearly indicates that the Constitution will of Indonesia confirms that the principle of humanity must be highly respected. Article 28G of 1945 Constitution states, every person is entitled to be liberated from persecution or treatment humiliating dignity and is entitled to seek for political asylum from other country. Furthermore, Articles 25, 26, and 27 of Law Number 37 of 1999 on International Relations sets policy that asylum seekers and refugees to be regulated in a Presidential Decree. In fact, Indonesia has scheduled two accessions of 1951 Convention and 1967 Constitution in Proposed Action of Human Rights in 2009 and 2014. However, until recently, both the Presidential Decree and scheduled accessions of Refugees Convention have not seen the light. Consequently, issues on asylum seekers and refugees have not yet overcome properly.

It belongs to the category of illegal immigrants or under the provisions of Law No. 6 of 2011 on Immigration, as they have not been designated as Refugees by the United Nations High Commissioner for Refugees (UNHCR). The status of refugees is important to obtain because with refugee status then international

[28] *Ibid.*, p.57

law will work with all its systems and structures. With no ratification of the 1951 International Convention and 1967 Protocol on the Status of Refugees, the Government of Indonesia can not directly establish the status of immigrants as refugees.

5. Issues on Implementation of Human Rights Protection for Cross-Border Refugees in Indonesia

There are some problem in the implementation of human rights protection, they are: First, the lack fulfillment of basic needs such as shelter, health, and education. Second, the little amount of immigration detention house (*rudenim*) and Third, the long waiting process for permanent placement to the third country. Fourth, there is possibility for repatriation.

In addition to the above problems, Government of Indonesia has not yet signed 1951 Convention on Refugees. It means that government of Indonesia allows two international institutions to deal with the Asylum Seekers, they are:[29]

- Office of United Nations High Commissioner for Refugees (UNHCR) who supervises the process of determining status as Refugees, placement to the third country, and repatriation.
- International Organisation for Migration (IOM) who is responsible to provide daily assistance, covering foods, accommodation, and healthcare service; Asylum Seekers and Refugees are the responsibility of IOM until their placement to the third country or voluntarily return to their home country.

  Both UNHCR Indonesia and IOM Indonesia are extremely lack of resource but full of workload.

UNHCR is operated in Indonesia with the approval of the Government of the Republic of Indonesia. Director General of Immigration of Indonesia issued instruction in 2010 (No: IMI-1489.UM.08.05) stating that asylum seekers or refugees shall be referred to UNHCR to follow the process of refugee status determination and the status and presence of foreigners holding attestation letter or identity card issued by UNHCR as asylum seekers, refugees or people served by

[29] http://suaka.or.id/public-awareness/id-masalah-perlindungan/ downloaded on 15 April 2016

UNHCR shall be respected. Those without documents in question are threatened to be put into immigration detention house, sanctioned, and/or deported. The registered asylum seekers can apply for refugee status recognition as refugees assessed by UNHCR through process called refugee status determination (RSD). They are interviewed by RSD officer assisted by interpreter in respect of their application for protection. Should the application be rejected, RSD procedure gives one more chance to appeal such negation. Generally, legal aid and advise are not provided, therefore many negative determinations are the consequences of the non-understanding by asylum seekers of processes to be complied with, because of language barrier, fear of speaking to authority, and because of their non-understanding on their rights and obligations for persons applying for refugees. In practice, right to have legal advisor for asylum seekers and refugees is not completely recognized by UNHCR and the government. It jeopardizes RSD process integrity since the asylum seekers do not completely understand their rights and responsibilities, as well processes involving them. A research held by Australian scholars indicates that there are several legal aspects of protection needs for asylum seekers in Indonesia worth considering. One proposed solution is providing independent legal aid since "most of interviewed asylum seekers and refugees apparently have slight understanding on legal substance of their case or on refugee determination status procedure held by UNHCR in Indonesia.[30]

For those evidently requiring international protection, UNHCR offers one of these three durable solutions:

1. Placement to third country
2. Voluntarily deportation (if the conflict in his home country is ceased) and
3. Fusion to local society

Fusion to local society is really not an option in Indonesia since it does not permit UNHCR-recognized refugees to stay in this country. In 2013, 898 people have left Indonesia for placement to the third party. This is the highest number of placement from Indonesia in a decade. Until 31 December 2013, 88 refugees

[30] Savitri Taylor and Brynna Rafferty-Brown, Difficult Journeys: Accessing Refugee Protection in Indonesia, Monash University Law Review, Vol. 36, No. 3, 2010, in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1717242

accepted for placement to the third party are waiting for departure, while other 966 cases are applied by UNHCR for considered placement pending the decision from the concerned country. However, other 2,152 refugees are waiting for application or re-application of their cases by UNHCR to the third parties.

The Asia Pacific Refugee Rights Network (APRRN) has confirmed concern on Immigration Detention in this territory as follows:

- Arbitrary, non-necessary use of detention not meeting international standards
- Abandonment of fundamental rights
- Limitation to asylum procedure and legal aid; and
- Detention for vulnerable group, such as children, non-guarded children, pregnant women, elders, and physically and mentally disabled people.

Immigration detention houses in Indonesia are run by government of Indonesia, but the system does not have sufficient supervisory mechanism, does not transparent or does not have complaint procedure. This leads to common violations on human rights. Several cases on human rights abuse and violations in Indonesian immigration detention houses have been documented. Such documented violations are reports on asylum seekers detained for months not allowed to go to common room or outside the room, asylum seekers detained in prison rather than immigration detention house, blackmailing and physical abuse. Unfortunately, Indonesia does not have any independent supervisory system or sufficient complaint procedure. Treatment is given arbitrarily and discrepantly from one immigration detention house to another, and corruption and bribery practices are found ubiquitously.

Laws of Indonesia regulate that other nationalities may be detained if they entered and stayed in this country paperless. There are no criteria on who shall (or shall not) be detained, and for how long. Some regulations exempt certain groups from immigration detention house, such as children, for treatment by international organizations (like International Organization for Migration or partner institution of UNHCR). UNHCR has reported that until 31 December 2013, there 1,733 people who are detained, 1,173 of them are Asylum Seekers and

636 Refugees. Of those detained, 274 were women and 297 children (87 of the children are not guarded).

The non-ratification of Geneva Convention leads to the following effects:

1. Detention: placing asylum seekers including women and children in Immigration Detention House, supervised by Directorate General of Immigration. Those detained are lack of freedom and threatened to loss their human rights.
2. Deportation or forcible repatriation of asylum seekers to their native country.
3. Loss of right to improve the life standard (having a job or obtaining education).
4. Limited access to basic needs (shelter, foods, and healthcare).
5. Process of Refugee Status Determination is the responsibility of UNHCR.

III. CONCLUSION

Constitution provides guidelines and will in order for the Government of Indonesia to protect internally displaced persons or cross-border refugees. This is as contained in preface as well as Article 28A, Article 28B paragraph (2), Article 28D paragraph (4), Article 28E paragraph (1), Article 28G paragraph (2), Article 28H paragraph (1), and Article 28J paragraph (1). In broad outline, Indonesian Constitution is willing to provide protection for internally displaced persons and cross-border refugees. This is as reflected in the pronouncing of "every person" in several articles of 1945 Constitution in the said subject without differentiating status of nationality or civilian. It is relevant to human right values mutually recognized, i.e. universality of human rights. Therefore, it is necessary to ratify 1951 Convention on Refugees and 1967 Protocol on protection for cross-border refugees as well as establishing legal framework to deal with the issues of refugees and asylum seekers, in order to properly implement the constitution will.

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