



Constitutional Review

- Relation between the Constitutional Court of the Republic of Indonesia and the Legislators according to the 1945 Constitution of the Republic of Indonesia
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**CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

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CONTENTS

Relation between the Constitutional Court of the Republic of Indonesia and the Legislators according to the 1945 Constitution of the Republic of Indonesia

Fajar Laksono, Sudarsono, Arief Hidayat, and Muchammad Ali Safaat

The Laws of Ratification of an International Treaty in Indonesian Laws Hierarchy

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Bayu Mahendra

An Analysis of Subjectum Litis and Objectum Litis on Dispute about the Authority of State Institution from the Verdicts of the Constitutional Court

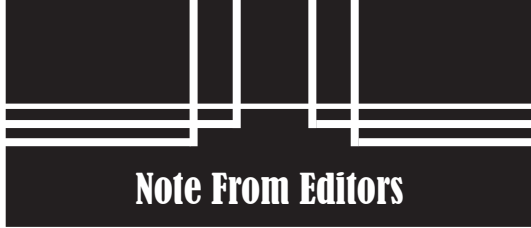
Anna Triningsih and Nuzul Qur'aini Mardiya

The Criticism on the Meaning of "Open Legal Policy" in Verdicts of Judicial Review at the Constitutional Court

Mardian Wibowo, I Nyoman Nurjaya, Muchammad Ali Safaat, and Jazim Hamidi

Biography

Author Guidelines



Note From Editors



This publication is the last edition of Year 2017 of Constitutional Review (CONSREV). It presents six articles which discuss various topics such as the relation between the Indonesian Constitutional Court and the legislators, the international treaty, democratic institutions in judicial review, the commentary of non-Indonesian citizen in judicial review, the analysis of subjectum and objectum litis on authority dispute, and the criticism on open legal policy in verdicts of judicial review. It is expected the six articles would be interesting and provoke further discussion among our readers.

The first article is provided by Fajar Laksono and others. They provides the analysis of the relationship between the Indonesian Constitutional Court and the legislators according to the 1945 Constitution of the Republic of Indonesia. The authors found that the relationships tend to be cooperative in the implementation of the constitutional mandate of the decision, but not a priority of legislation.

The second article is written by Noor Sidharta. He provides the explanation about laws of ratification of an international treaty in Indonesian law hierarchy. In relation to the cancellation of law of an international treaty at the Constitutional Court, he argues that there are several efforts on state administration by classifying the laws which differ the general laws from the laws whose contents are related to the international treaty.

The next article is an article by Andy Omara. This article focuses on the relationship between the Indonesian Constitutional Court, the legislature, and the executive in judicial review. The article argues that Katharine G. Young's typology of judicial review is quite helpful as an interpretive tool to understand the Court approaches when it decided cases related the right to work. The use of various approaches by the Court affected the relationship between the Court, the executive, and the legislature. This is because the executive and the legislature are the implementing agencies of the Court rulings.

The fourth one is written by Bayu Mahendra. The article discusses the inadmissibility of non-Indonesian citizens in judicial review before the Indonesian Constitutional Court. This paper concludes that the Court's reasoning has abandoned the constitutional loss as the very substance of legal standing and to which amounted to the immunity of legal standing provision from a judicial review. Consequently, non-Indonesian citizens will never be recognized in judicial review mechanism before the Indonesian Constitutional Court.

The next article is written by Anna Triningsih and Nuzul Qur'aini Mardiya. They provide the elaboration of analysis of *subjectum litis* and *objectum litis* on dispute about the authority of state institution from the verdicts of the Constitutional Court. The article also provides some elaboration of *subjectum* and *objectum* litis from various verdicts.

Finally, this journal gives an article written by Mardian Wibowo and others. It explains the criticism on the meaning of open legal policy in verdicts of judicial review at the Constitutional Court. The finding shows different meaning of open legal policy between various verdicts of the Constitutional Court.

Editors

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Fajar Laksono, Sudarsono, Arief Hidayat, and Muchammad Ali Safaat

Relation between the Constitutional Court of the Republic of Indonesia and the Legislators according to the 1945 Constitution of the Republic of Indonesia

Constitutional Review Vol. 3 No. 2 pp. 141-170

This research aims to analyze and to describe the relation between the Constitutional Court of the Republic of Indonesia (CC) with the People Representatives' Council and the President of the Republic of Indonesia as legislators by looking on implementation of CC's decision through the legislation in the period 2004-2015. Using doctrinal research, it can be seen how the constitutional mandate in the CC's decision are implemented by the legislator through the legislation. The results are: (a) legal opinions of the CC's decision have a binding power; (b) a constitutional mandate in the legal opinion is intended as guidance for the legislators regarding what the 1945 Constitution requires; (c) directives to the legislator in the legal opinions should be implemented because it is the implementation of the principle of checks and balances according to the 1945 Constitution, (d) implementation of the CC's decisions through legislation does not have standard mechanism and does not become the priority of legislation, and (e) relation between the CC with the legislators can not be categorized in black and white in cooperative or confrontative, but shows ups and downs between cooperative and confrontative relations. Cooperative relations are realized when the constitutional mandate is formulated strongly so it is implemented by the legislator as the formula. Relationships tend to be cooperative in the implementation of the constitutional mandate of the decision, but not a priority of legislation. Meanwhile, the confrontative relations is seen from the constitutional mandate of the CC decisions which are not implemented.

Keywords: Relation, Constitutional Court, Legislator, Cooperative, Confrontative

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Noor Sidharta

Laws of Ratification of an International Treaty in Indonesian Laws Hierarchy

Constitutional Review Vol. 3 No. 2 pp. 171-188

This journal article discusses the laws of ratification of an international treaty in Indonesian laws hierarchy. This journal uses a normative research approach where a draft agreement and laws are used as primary data apart from the laws and international treaties. There are some issues that still unsettled related to the legal status of the laws of ratification of an international treaty that have impacts in the implementation of the treaty. The laws of ratification of an international treaty now is still classified as general laws whose the content of the norm has been discussed by the People's Representatives Council, therefore the laws of ratification of an international treaty automatically become the object of Judicial Review at the Constitutional Court of the Republic of Indonesia. The cancellation of the laws of ratification of an international treaty impacts the cancellation of the deal on the treaty and it has failed the *pacta sunt servanda* principle, which becomes the basis of a treaty. To solve problems related to the cancellation of laws of ratification of an international treaty at the Constitutional Court, there are several efforts on state administration by classifying the laws which differ the general laws from the laws whose contents are related to the international treaty. Furthermore, a progressive new method on the state administration is needed by giving a Judicial Preview right to the Constitutional Court to conduct a review on the bill of the ratification of an international treaty based on its suitability to the constitution.

Keywords : Judicial Preview, Hierachy, Laws, Dualism, Treaties

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Andy Omara

**The Indonesian Constitutional Court and the Democratic Institutions in
Judicial Review**

Constitutional Review Vol. 3 No. 2 pp. 189-207

This paper focuses on the relationship between the Indonesian Constitutional Court, the legislature, and the executive in judicial review. It aims to explain the Court strategies in deciding judicial review cases related to the right to work in relation with the executive and the legislature. It appears that while constitutionally the Court is granted with a strong form of judicial review (as reflected in the finality of its decisions), it also employed other approaches in deciding cases related to the right to work. These approaches include the declaration of incompatibility, conditional decision, and the invalidation of a statute in its entirety. This paper argues that Katharine G. Young's typology of judicial review is quite helpful as an interpretive tool to understand the Court approaches when it decided cases related the right to work. The use of various approaches by the Court affected the relationship between the Court, the executive, and the legislature. This is because the executive and the legislature are the implementing agencies of the Court rulings.

Keywords: Constitutional Court, Democratic Institutions, Judicial Review

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Bayu Mahendra

A Commentary: the Inadmissibility of Non-Indonesian Citizens in Judicial Review before the Indonesian Constitutional Court

Constitutional Review Vol. 3 No. 2 pp. 208-231

The Constitutional Court of Indonesia, in its judgment No 2-3/PUU—V/2007, ruled that non-Indonesian citizens have no legal standing to file judicial review before the Court. In determining the legal standing, the Court rejected applicants' constitutional loss which should actually serve as the substantial examination in judicial review but rather addressed this question on the basis of applicant's citizenship. This inadmissibility ruling, however, raises question on what legal standing actually mean in the context of judicial review. This paper reviews the Court's consideration in determining legal standing status and examines future legal consequences of such reasoning. By revisiting the substance of legal standing and judicial review derived from the 1945 Constitution, relevant Statutes, Court's practices and case law, as well as the dissenting opinion of the judges in this case, it is found that the Court overruled the substance to procedural examination on the basis of citizenship and therefore failed to address the actual question of legal standing. This paper concludes that the Court's reasoning has abandoned the constitutional loss as the very substance of legal standing and to which amounts to immunity of legal standing provision from a judicial review. Consequently, non-Indonesian citizens will never be recognized in judicial review mechanism before the Indonesian Constitutional Court.

Keywords: Non-Indonesian Citizens, Judicial Review, Immunity

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Anna Triningsih and Nuzul Qur'aini Mardiya

**An Analysis of Subjectum Litis and Objectum Litis on Dispute about the
Authority of State Institution from the Verdicts of the Constitutional Court**

Constitutional Review Vol. 3 No. 2 pp. 232-261

The relationship of mutual control and balance between state institutions gives an opportunity for the emergence of the dispute about the authority of state institutions, especially the dispute about the constitutional authority. In relation to a dispute about authority of state institutions given by the 1945 constitution, a judicial institution is used to resolve the dispute. That judicial institution is the Constitutional Court. The court can evaluate the *subjectum litis* and *objectum litis* from the dispute about the authority of state institutions. Therefore that matter will be resolved definitively by the verdict of the Constitutional Court where the verdict is permanent and binding, then later it will become a jurisprudence, and it will be used as a reference. There are eight verdicts of the Constitutional Court related to disputes about the authority of state institutions which are related to the *subjectum litis* and *objectum litis*, such as: The verdict of The Constitutional Court No.004/SKLN-IV/2006; the verdict of the Constitutional Court No.030/SKLN-IV/2006; the verdict of the Constitutional Court No. 26/SKLN-V/2007; the verdict of the Constitutional Court No. 27/SKLN-VI/2008; the verdict of the Constitutional Court No. 1/SKLN-VIII/2010; the verdict of the Constitutional Court No. 2/SKLN-IX/2011; the verdict of the Constitutional Court No. 5/SKLN-IX/2011; and the verdict of the Constitutional Court No. 2/SKLN-X/2012.

Keywords: *Subjectum Litis, Objectum Litis, Authority Dispute*

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Mardian Wibowo, I Nyoman Nurjaya, Muchammad Ali Safaat, and Jazim Hamidi

The Criticism on the Meaning of “Open Legal Policy” in Verdicts of Judicial Review at the Constitutional Court

Constitutional Review Vol. 3 No. 2 pp. 262-286

In several verdicts of judicial review, the Constitutional Court formulates a concept of Open Legal Policy. The concept begins from a condition when a norm of law submitted to judicial review by the 1945 Constitution does not have reference in the 1945 Constitution. In other words, the open legal policy is a condition when the Constitutional Court cannot find any reference for the norm submitted to the judicial review. By using a construction method, this present research tries to find the meaning of a concept of open legal policy arranged by the Constitutional Court, then assessing whether the concept is in line with the spirit of judicial review. If the formulation of the concept done by the Constitutional Court has not been ideal, the deconstruction will be conducted toward the meaning that already exists until the open legal policy ideal with the perspective of the constitution is found. In this research, the finding shows different meaning of open legal policy between various verdicts of the Constitutional Court. Moreover, a new meaning is proposed including improvement of criteria of the open legal policy based on the difference between the object of regulation (*what*) and the content of the regulation (*how*).

Keywords: Open Legal Policy, Construction, Deconstruction



RELATION BETWEEN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA AND THE LEGISLATORS ACCORDING TO THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA

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Abstract

This research aims to analyze and to describe the relation between the Constitutional Court of the Republic of Indonesia (CC) with the People Representatives' Council and the President of the Republic of Indonesia as legislators by looking on implementation of CC's decision through the legislation in the period 2004-2015. Using doctrinal research, it can be seen how the constitutional mandate in the CC's decision are implemented by the legislator through the legislation. The results are: (a) legal opinions of the CC's decision have a binding power; (b) a constitutional mandate in the legal opinion is intended as guidance for the legislators regarding what the 1945 Constitution requires; (c) directives to the legislator in the legal opinions should be implemented because it is the implementation of the principle of checks and balances according to the 1945 Constitution, (d) implementation of the CC's decisions through legislation does not have standard mechanism and does not become the priority of legislation, and (e) relation between the CC with the legislators can not be categorized in black and white in cooperative or confrontative, but shows ups and downs between cooperative and confrontative relations. Cooperative relations are realized when the constitutional mandate is formulated strongly so it is implemented by the legislator as the formula. Relationships tend to be cooperative in the implementation of the constitutional mandate of the decision, but not a priority of legislation. Meanwhile, the confrontative relations is seen from the constitutional mandate of the CC decisions which are not implemented.

Keywords: Relation, Constitutional Court, Legislator, Cooperative, Confrontative

I. INTRODUCTION

1.1 Background

Legislation is a potential area of tension among key institutions that interact within it. Tensions arise especially after the Constitution 1945 of the State of the Republic of Indonesia (hereinafter referred to the Constitution 1945) adopts the idea of judicial review.¹ According to the 1945 Constitution, legislation is the domain of the People Representatives' Council and the President², while judicial review is the authority of the Constitutional Court of the Republic of Indonesia (CC). Judicial review is power to control legislation.³ That is, between legislation with judicial review intersect. In fact, judicial review is an important factor affecting legislation.⁴ Influence can be direct or indirect.⁵ On it tangency, tension can occur in the relationship of interacting institutions, namely the CC as an actor to judicial review with the People Representatives' Council and the President, as legislators.

Tensions are increasingly sharpening, because in a practice, the CC often gives constitutional orders to the legislator for legislative drafting. By Peter Paczolay, the constitutional order called a kind of 'mandamus'⁶, which is 'a constitutional mandate to legislate'.⁷ Allan R. Brewer-Carias calls it "binding orders and directives to Legislator" or "instruction directives sent by CC to Legislator".⁸ Meanwhile, Georg S. Vanberg uses the term instructions on the drafting of laws.⁹ Referring to these terms, in this study, Peter Paczolay's said, we uses the term "constitutional mandate for the legislator".

¹ "The 1945 Constitution of the Republic of Indonesia" (1945). Article 24C (1).

² *Ibid.* Article 20.

³ John Ferejohn in *Constitutional Review in the Global Context* as quoted by Saldi Isra, "Purifikasi Proses Legislasi Melalui Pengujian Undang-Undang," *Jurnal Legislasi Indonesia* 7, no. 1 (2010): 214.

⁴ Saldi Isra, *Pergeseran Fungsi Legislasi, Menguatnya Model Legislasi Parlemen Dalam Sistem Presidensial Indonesia* (Jakarta: Rajawali Press, 2010), 10.

⁵ Volkanksek, M.L. (2001), "Constitutional Court as Veto Players: Divorce and Decrees in Italy", *European Journal of Political Research*, 39. 347-372, as quoted by Michelle Santoni and Francesco Zucchini, "Legislative Output and the Constitutional Court in Italy," *Kluwer Academic Publishers-Plenum Publishers* 17, no. 3 (2006): 166.

⁶ Latin for "We Order," a writ (more modernly called a "writ of mandate") which orders a public agency or governmental body to perform an act required by law when it has neglected or refused to do so. Writ of mandate or *writ of mandamus* is a court order to a government agency, including another court, to follow the law by correcting its prior actions or ceasing illegal acts. <http://thelawdictionary.org/mandamus/>. Accessed on 3 June, 2016.

⁷ Péter Paczolay, "Experience of the Execution of Constitutional Court's Decisions Declaring Legislative Omission In Hungary" (Execution of the Decisions of Constitutional Courts: A Cornerstone of the Process of Implementation of Constitutional Justice, Baku, 2008), 3.

⁸ Allan Brewer-Carias, "Constitutional Courts As Positive Legislators In Comparative Law," in *General Report on XVIII International Congress of Comparative Law* (International Academy of Comparative Law Washington, Washington, 2010), 145.

⁹ George Stephan Vanberg, *The Politics of Constitutional Review: Constitutional Court and Parliament in Germany* (New York: University of Rochester Rochester, 1999), 209.

For example, Decision Number 012-016-019/PUU-IV/2006 dated December 19, 2006 in the examination of the existence of the Corruption Court in the Corruption Eradication Commission Law. The CC declared its constitutional mandate as follows,

...according to the Court, **the legislator must immediately conduct the alignment of the Corruption Eradication Commission Act with the Constitution 1945 and form a law on the Corruption Court as a special court as the only system of corruption criminal justice, so the dualism of the corruption criminal justice system that has been Declared contrary to the 1945 Constitution as described above, may be omitted...**¹⁰ (bold by the author).

There are many other decisions with similar constitutional mandates. The mandate that can cause tension, especially because of the assumption that the CC takes over the authority of the Legislator in drafting the laws. Therefore, it is interesting and important to know the relation between the two institutions, especially from the perspective of checks and balances based on the 1945 Constitution.

Normatively, the CC decisions are final and binding to all state authorities.¹¹ But in reality, there are problems in the implementation of it. Gunārs Kūtris said, the implementation of the decision is not the task of the CC¹², but the domain of other state institutions.¹³ In addition, the presence of the CC is generally not politically desirable.¹⁴ Therefore, it is possible that the CC's decision is not implemented¹⁵ because of the relation of the two institutions. If that happens, it will be difficult to realize the constitutional legislation.

Regarding models of relations of two institutions, the term cooperative and confrontative proposed by Kathleen Barrett are used to describe the relationship

¹⁰ Judicial Review Number 30 of 2002 on Commission for the Eradication of Criminal Acts of Corruption against the 1945 Constitution, No. 012-016-019/PUU-IV/2006 (2006). Decision No. 012-016-019/PUU-IV/2006.

¹¹ Ernst Benda, "Pelaksanaan Keputusan Mahkamah Konstitusi", Keputusan Mahkamah Konstitusi", in Norbert Eschborn, *Tugas dan Tantangan Mahkamah Konstitusi Di Negara-Negara Transformasi dengan Contoh Indonesia* (Jakarta: Konrad Adenauer Stiftung, 2005), 18.

¹² Gunārs Kūtris, "Authority of the Constitutional Court as the Preconditions of Execution of the Decisions," in *Execution of The Decisions of Constitutional Courts: A Cornerstone of The Process of Implementation of Constitutional Justice* (the Occasion of the 10th Anniversary of The Constitutional Court of Azerbaijan, Baku, 2008).

¹³ Jongcheo Kim, "Some Problems with the Korean Constitutional Adjudication System," *Journal of Korean Law* 1, no. 2 (2001): 32.

¹⁴ Hans Kelsen, *General Theory of Law and State (20th Century Legal Philosophy Series Vol. I)* (Cambridge: Harvard University Press, 1949), 156.

¹⁵ Isra, *Pergeseran Fungsi Legislasi, Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial Indonesia*, 301.

of the constitutional court with legislators in a number of countries.¹⁶ Cooperative relations occur when both institutions work together to protect democracy and encourage the achievement of state goals. Meanwhile, confrontative relations occur when both institutions openly disagree with each other.¹⁷ Referring to that opinion, cooperative relationships are the most expected relations.

1.2 Research Questions

Based on above description, research questions are formulated as follow:

1. How is the philosophical, theoretical, and practical explanation of the legal consideration of the CC decision containing a constitutional mandate to legislators the framework of checks and balances principle according to the Constitution 1945? These questions are elaborated into the following 3 sub-questions:
 - a. Do the legal consideration of the CC's decision have binding power?
 - b. What is the purpose the CC to give a constitutional mandate to the legislators?
 - c. What about the constitutional mandate in the CC's decision in checks and balances perspective?
2. What is the relation between the CC and the legislators from the implementation of the CC's decision containing a constitutional mandate through legislation in the period of 2004-2015?

1.3 Researchs Methods

This research includes doctrinal law research with object or research target in the form of CC decision, law and other legal material. The result of legal research is not a new legal theory, but at least it is a new argument.¹⁸ The type of doctrinal law research is used to get a complete description of the legislation in the perspective of the CC's decision. On the other hand, this study is complemented by non-doctrinal legal research.

¹⁶ Kathleen Barrett, "Constitutional Courts, Legislative Autonomy, and Democracy: What Price Rights?" (Georgia State University, 2014), 7-12.

¹⁷ Barrett, 7-12.

¹⁸ Peter Mahmud Marzuki, *Penelitian Hukum* (Surabaya: Kencana, 2005), 207.

The object of the research is the CC decisions and the Act set in the period of 2004-2015. The CC decision is the decision of judicial review case whose legal opinions contain a constitutional mandate to legislator. Several approaches are used in this research, namely: (1) Philosophical Approach; (2) Statutory Approach; (3) Conceptual Approach; (4) Historical Approach; (5) Case Approach, and (6) Comparative Approach.

II. RESULT AND DISCUSSION

2.1 Variant of Constitutional Mandate in the CC's Decision

As stated above, the research object is the CC decision with legal consideration contains explicitly the constitutional mandate for the legislator in the drafting law. The number of decisions with final holdings or orders granted from 2004 to 2015 (as of December 31, 2015) are 203 decisions. Meanwhile, the total numbers of law established by the People Representatives' Council and the President from 2004 to the end of 2016 are 350 Act. Therefore, before answering the research question, it is important to present a decision with legal consideration containing a constitutional mandate with its variant. From 203 decisions during the period of 2004-2015, 29 decisions are qualified as research objects and grouped into 6 variants.

2.1.1 Recommendations to Amendment or Establishment of New Act

1	Decision Number 001-021-022/PUU-I/2003	...it is recommended that the legislators prepare a new Electricity Bill in accordance with Article 33 of the 1945 Constitution.
2	Decision Number 005/PUU-IV/2006	...the Constitutional Court also recommends to the People's Representative Council (DPR) and the President to take immediate steps to perfect the Judicial Commission Law. In fact, DPR and the President also recommended to make improvements that are integral...

3	Decision Number 4/PUU-VII/2009	...the Court encourages the Legislators to be more earnest to review all legislation so long as it relates to the right of former convicted Tailored to this Decision ...
4	Decision Number 49/PUU-IX/2011	...pending the amendment of the legislator, the election of the Chairman and Vice Chairman of the Constitutional Court shall be used by the old rules...
5	Decision Number 36/PUU-X/2012	...momentum for Legislators to undertake a rearrangement by promoting fair efficiency and reducing the proliferation of government organizations.
6	Decision Number 85/PUU-XI/2013	...while awaiting the establishment of a new Law paying attention to the decision of the Court

2.1.2 Providing an Alternative Norms to the Next Drafting Law

1	Decision Number 072-073/PUU-II/2004	<p>...legislator can make sure that the direct Regional Head Election is an extension of the notion of elections...</p> <p>....but the legislator can also determine that the direct Regional Head Election is not an election in the formal sense mentioned in Article 22E of the Constitution 1945.</p>
2	Decision Number 49/PUU-VIII/2010	<p>...legislators should review the legislative review immediately to provide certainty by choosing one of the alternatives of the Attorney General's term as follows.</p> <p>a. based on the period of the Cabinet and/or the term of office of the President appointing him;</p> <p>b. based on a fixed period of time without being linked to the cabinet's political office;</p> <p>c. by age or retirement age, or</p> <p>d. based on the discretion of the President/ official who appointed him</p>

2.1.3 Prohibition for the Legislator Including Certain Norms

1	Decision Number 013/PUU-I/2003	...the prosecution of any form of crime must be committed by law enforcement in a fair and definite manner, not by creating a new legal law through the formation of a “Perpu” or a new law.
2	Decision Number 013-022/PUU-IV/2006	...in the draft of the Criminal Code which is an effort to renew the Criminal Code of the colonial inheritance must also no longer contain articles of the same or similar content to Article 134, Article 136 bis, and Article 137 of the Criminal Code...
3	Decision Number 6/PUU-V/2007	...the efforts to renew the Criminal Code of the colonial legacy must also no longer contain articles of the same contents.
4	Decision Number 97/PUU-XI/2013	...the authority of a state institution which is limitatively determined by the Constitution 1945 can not be increased or decreased by the Law or the Constitutional Court’s decision because it will take the role of the Constitution.

2.1.4 The Requirement of the Legislator to contain specific Norms in the Next Drafting Law

1	Decision Number 006/PUU-IV/2006	...among others by realizing reconciliation in the form of a legal policy (law) in harmony with the 1945 Constitution and universally applicable human rights instruments.
2	Decisions Number 11-14-21-126 and 136/PUU-VII/2009	...so that the legal entity law of education in accordance with the Constitution 1945...
3	Decision Number 147/PUU-VII/2009	...pending the formators of the Act accommodating ways apart from voting and ticking...

4	Decision Number 115/PUU-VII/2009	...with this decision the legislators need to take the initiative to conduct legislative review.the formator of the Law makes amendments to the Law by containing provisions that are more proportionate in accordance with the soul of the decision of this Court
5	Decision Number 8/PUU-VIII/2010	...In order to improve the Right to Inquiry Act as a result of the unconstitutionality of Law No. 6/1954, Legislators need to anticipate to form Law as intended in Article 20A Paragraph (4) of the 1945 Constitution with due regard to Law Number 27 Year 2009 which related to the rights of Parliament and members of Parliament.
6	Decision Number 15/PUU-IX/2011	Legislators should distinguish between the procedures for forming or establishing a political party with rules on the conditions imposed on a political party in order for a political party to be eligible, as well as the provisions governing the legislature.
7	Decision Number 5/PUU-VIII /2010	...the Court stated that there is a need for a special law regulating wiretapping in general to the tapping procedure for each authorized institution
8	Decision Number 34/PUU-X/2012	... In the future, Legislators need to set the same requirements for candidates of the Registrar of the Supreme Court and the Constitutional Court
9	Decision Number 82/UU-XII/2014	...a special treatment against women guaranteed by the constitution that must be realized concretely in the legal policy adopted by legislator.
10	Decision Number 25/PUU-XII/2014	...the use of the Government Budget (<i>Anggaran Pendapatan dan Belanja Negara</i> or APBN) for operational costs of Financial Services Authority (<i>Otoritas Jasa Keuangan</i> or OJK) shall contain the time constraints which become the authority of the Actors to assess them.

11	Decision Number 5/UU-V/2007	<p>...requires that the Local Government Law adjust to the new developments that have been made by legislators themselves that is by giving the right to individuals to be able to run as regional head and deputy head of the region without having to go through a political party or a coalition of political parties.</p> <p>...to an entirely new material that must be added in the law is the duty of the Legislator to legislate it.</p>
12	Decision Number 133/UU-VII/2009	...the Law Number 30 Year 2002 should regulate the procedure of filling temporary vacancy of the Corruption Eradication Commission (<i>Komisi Pemberantasan Korupsi</i> or KPK) leadership....
13	Decision Number 58/PUU/XII/2014	...the distinction is regulated by legislator as a positive legislator as long as the regulation of the differentiation of electrical installations is not contradictory to the Constitution.

2.1.5 The Requirement to Amendment or Establishment of New Act by Giving a Time Limit

1	Decision Number 54/PUU-VI/2008	<p>...in order to obtain tobacco excise duty, it is necessary to amend the provisions of Article 66A paragraph (1) of Law Number 39 Year 2007.</p> <p>...that the allocation of tobacco excise taxes for tobacco-producing provinces in the APBN shall be fulfilled no later than the 2010 Fiscal Year.</p>
2	Decision Number 32/PUU-XI/2013	...two years and six months after the Court's decision is pronounced is sufficient time to complete the Act.

2.1.6 The Necessity to Amendment or Establishment of New Act by Providing Time Constraints with Consequences if the Requirement is not Implemented

1	Decision Number 012-016-019/PUU-IV/2006	<p>...legislator must immediately conduct alignment of the Corruption Eradication Commission Act with the Constitution 1945 and establish a law on the Corruption Court ...</p> <p>...if within three years can not be fulfilled by the legislator, the provision of Article 53 of the Corruption Eradication Commission Law by itself, by law (<i>van rechtswege</i>), has no binding legal force anymore.</p>
2	Decision Number 13/PUU-VI/2008	<p>...the Constitutional Court then needs to once again remind legislator to no later than in the APBN Law Fiscal Year 2009 must have fulfilled its constitutional obligation to provide a budget of at least 20% for education.</p>

2.2 Philosophical, Theoretical, and Practical Explanation on the Legal Consideration with a Constitutional Mandate in Checks and Balances Perspective

This section describes an analysis of (1) the binding force of the legal consideration of the CC's decision; (2) the purpose of the CC to provide a constitutional mandate in the legal consideration of decision, and (3) CC's constitutional mandate to legislators in the perspective of checks and balances according to the 1945 Constitution.

2.2.1 Binding Force of the Legal Consideration of the CC Decision

The core question is which part of the CC decision is in effect binding, is it part of the decision only, or does it include the legal consideration section of the decision? There are two opinions about it. The first, a part which has the binding force as law and must be implemented is the decision.¹⁹ So, if the legal

¹⁹ Refly Harun, An interview, 2017.

consideration wants to have a binding force, constitutional mandate should be incorporated into the decision. Allan Brewer-Carias calls instructions to legislators in some cases being non-binding. The second opinion, which has binding strength, is that all statements in the decisions include legal consideration and the holding orders.²⁰ V. Guttler said, not only the statements of the binding decision, but also the legal opinion.²¹ I Dewa Gede Palguna stated that the legal consideration within constitutional interpretation should be said to be binding. If only the holding orders are binding, the decisions becomes lost context.²²

Based on above opinions, the authors agree with the second one that the legal consideration of the CC decision have absolute binding force. In line with Ernst Benda²³, he said that almost all statements in the constitutional court decision are considered to have binding power, including *obiter dicta*.²⁴ The argument, in the case of a CC ruling requires the implementation, in this case through the process of change or replacement of the Act, then the legal consideration should be referred to see what the holding orders.

There are two arguments that the legal consideration of the CC decision are binding. Judicially, regarding the decision, there are arrangements in Articles 45 to 49 of the CC Act (Act Number 24 Year 2003). In Article 47, it is stated that the CC decision obtains a binding legal force since the completion has been pronounced. In Article 48, it explains the content of the decision of the CC.²⁵

²⁰ Although in other cases have mandatory characters. Allan Brewer-Carias classified it into two groups, namely (1) *Non Binding Directives to the Legislator*, and (2) *Binding Orders and Directives to the Legislator*. For example, the legal consideration of the German Constitutional Court and the Constitutional Court of Serbia are among others non-binding. A warning Decision is practiced in Germany, and is called "*appellate decisions*", which the Federal Constitutional Court of Germany Federal does not declare the unconstitutionality of a law, but rather gives "reprimands to legislators," whose contents are directed to the Legislator. Referrals can by asking legislators to make certain norms that are considered constitutional, by giving legislators a period of time to do so. After the time-out period, the provision will become unconstitutional and the Federal Constitutional Court of Germany must re-order the issue. The Constitutional Court of Serbia may provide opinions or indicate the need to adopt or revise the Act, as well as other relevant measures to be exercised in the protection of constitutionality and legality, which are used to exert pressure on the National Assembly to make laws compatible with constitutional or fix existing rules but declared unconstitutional. Nevertheless, said Carias, the opinion of the Constitutional Court has no binding legal force, see Brewer-Carias, "Constitutional Courts As Positive Legislators In Comparative Law," 145.

²¹ V Guttler, "Execution of Judgments of the Constitutional Court of the Czech Republic" (Czech, 2000), http://www.concourt.am/armenian/con_right/4-10-2000/Guttler.htm.

²² I Dewa Gede Palguna, An interview, 2017.

²³ Eschborn, *Tugas Dan Tantangan Mahkamah Konstitusi Di Negara-Negara Transformasi Dengan Contoh Indonesia*.

²⁴ *Obiter dicta*, according to Ernsts Benda is an additional explanation or consideration that may be useful to understand the decision of nanum is not absolutely necessary for the conclusion of the constitutionality of the norm of the Act, *ibid*.

²⁵ Article 48 paragraph (2) states, Decision of the Constitutional Court shall contain: (a) the head of the decision reads: FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD; (b) the identity of the Party; (c) summary of the petition, consideration of the facts revealed in the trial; (d) the legal opinions on which the decisions are based; (e) the holding orders, (f) day, date of decision, name of Constitutional Justices, and Clerk.

From the provisions of Article 47 and Article 48 paragraph (2), it can be seen that what is meant by the “decisions” of the CC which have legal binding is including the legal consideration. That is, it can be asserted that juridically, the legal consideration underlying the decision are to have binding power, together with the holding orders and other matters as referred in Article 48 paragraph (2).

Philosophically, the legal consideration of CC’s decision are the basis for the CC to decide a judicial review case. Its enforcement must be carried out in an unobstructed manner, in the meaning of binding so that the law becomes orderly and the law is applied intactly. Any decisions decided by the CC must be accepted, respected, and implemented. Moreover, every petition always contains: If the CC decides otherwise, please decide it as fair (*ex aquo et bono*). It indicates that in the case of judicial review, each party has entrusted the CC to adjudicate its disputes, including to surrender all its decision. The consequence of such beliefs, the Applicants are obliged to obey any decision of the CC, including if the CC has decided different from the parties. In that legal consideration, it is explained and affirmed about any decision by the CC in answering the application. Herein lies the strength of binding legal consideration because it requires the necessity of all parties to obey.

Furthermore, as the basis of the CC in deciding cases, the legal consideration is essentially the combination of 3 things, namely (1) utilization of legal knowledge, (2) authority of the CC, and (3) discretion of the Constitutional Justices. The legal consideration must be the result of the whole process of thinking Constitutional Justices using the method of constitutional interpretation that must be accountable according to law and jurisprudence. In addition, the legal consideration contains philosophy-based reasoning and legal theory, so that it can be understood and accepted to justice seekers in particular, and society at large. For this reason, the legal consideration of the decisions becomes an instrument for Constitutional Justices to fulfill obligations in plenary as interpreters of the Constitution. Based on these arguments, the legislator is bound to the constitutional mandate of the CC in legal consideration.

So, in simple word, philosophical explanation of the binding force of the legal consideration can be stated in 3 matters, namely (i) the nature of legal consideration of the CC's decision are the basis of the reason of the Constitutional Court to arrive at the provisions concerning the constitutionality of the legal norms reviewed. The reason is the spirit of the decision; (2) the legal consideration of the CC's decision is constructed from the process of utilizing the legal knowledge of constitutional justices by using the logic of the 1945 Constitution; (iii) the legal consideration of the CC's decision is useful to provide a description of constitutional justice and constitutional truth according to the 1945 Constitution related to the legal norms that have been reviewed.

Theoretically, the CC's decision is the professional respect of the constitutional judge (the most best legal expert) as the result of the dialectic of legal knowledge related to the norms of the Act being reviewed in the framework of judicial control under the doctrine of the unity of the constitution. Finally, in practice, legal explanations explain at what point the constitutional problem in the norm of the Act being reviewed. Legal consideration guides how decisions can be made, especially through legislation in the future. The legal consideration serves as a proof space to dismiss the notion that in deciding, the CC on relies on it discretion as the interpreter of the constitution.

2.2.2 The Purpose of the CC to Give a Constitutional Mandate

The doctrine of “the unity of the constitution”, which means that the constitution must be understood as a unity, not only in the context of understanding the contents, but also when the constitution is to be implemented through the formation of the act. This is actually the basis for the emergence of a constitutional mandate in its decision to be implemented by Legislators.

The existence of the constitutional mandate, the CC actually explicitly says that it is dangerous for the Legislators when legislation is not in accordance with the Constitution *in casu* the CC decision. If such case remains to be done, potentially its Act will be submitted for re-examination to the CC. So, it depends

on the Legislators, whether they want to legislate the Act as the CC's mandate or not. If not, then it is said, the risks and consequences are clear, when the Act does not conform to the CC decision, and then submitted a petition for judicial review of the Act, the CC shall just reviews, even invalidate it again on the basis of the previous relevant decision.

The variant of the constitutional mandate in the CC's decision, ranging from the soft character or formulated more vigorously, substantially depends on the urgency of the assessment of the CC at the time of deciding the case. That is, when selecting the formulation of the constitutional mandate in the consideration of the decision, the CC first looks at the urgency of making of the law relating to the case which is decided.

Through constitutional mandate, the CC has actually called on the Legislators to remove the unconstitutional nature of the act by changing the norms being reviewed. Furthermore, the CC's decision is on the same level as the 1945 Constitution where the 1945 Constitution is the source of the legitimacy of the Act being reviewed. The CC decision only redefines how norms and standards in the policies contained in the Act should be formulated. With the constitutional mandate, the Legislators are obliged to reformulate the prescriptions of norms in harmony with the values in the 1945 Constitution. That norms will be in line or not with the constitutional mandate of the CC. It can be seen whether the formation of the Act actually refers to the decision of the CC intended. The constitutional mandate in the legal consideration should be implemented by the Legislators if they want to produce an act with no constitutional problem. Even if it is ignored, then the consequences is the Act can be reviewed again. Most likely, the CC will declare it unconstitutional.

2.2.3 Constitutional Mandate in Checks and Balances Perspective

The principle of checks and balances according to the 1945 Constitution is based on the principle of limitation of power. Checks and balances keeps the government less powerful. So, what about the constitutional mandate in legal opinion in terms of the principle of checks and balances?

Constitution as supreme law of the land must be upheld. Enforcement of the Constitution can be done through 2 (two) terms, namely legislation by the People Representatives' Council and constitutional adjudication by the CC. Legislation plays an important role to clarify and detail the constitutional norms and regulate their implementation. Meanwhile, constitutional adjudication is important to "guard the constitutional values". Thus, the CC has the authority to ascertain whether the values of the 1945 Constitution are really enforced in practice. In that context, the CC has the authority to decide what the 1945 Constitution wants in its capacity as the sole interpreter of the constitution through constitutional interpretation methods. One of the basic premises of the 1945 Constitution as a written constitution is its capacity to "reach" the future, in the sense of its ability to adapt to issues that arise in the future. Such "range" territory is the authority of the CC. On that basis, the constitutional mandate to legislators in the legal consideration is an attempt of the CC to enforce the 1945 Constitution.

If related to the principle of checks and balances according to the 1945 Constitution as stated above, the flexibility of Legislators in carrying out the legislation function is limited by the interpretation of the CC in the decision. This is the consequence of the principle of supremacy of the constitutional in the context of a democratic constitutional state which places the 1945 Constitution as the supreme law with the CC as its guardian. Therefore, constitutional mandate in the legal consideration of the decision is not a form of confiscation of the authority to legislate an Act on behalf of constitutional interpretation. It is more appropriate to say that, through its decision, the CC precedes the Legislators in interpreting the Constitution.

From the above description, constitutional mandate in legal consideration of the decision contains the purpose of maintaining constitutional unity of the constitution, both in understanding the meaning of the contents of the Constitution, and when the Constitution is to be implemented, especially through legislation which becomes the authority of the Legislators as well as eliminating the unconstitutional nature of the Act with changes, or the establishment of a new act after the decision.

2.3 Relations of the Constitutional Court and the Legislators in the Implementation of the Decision of the Constitutional Court

This section presents 2 (two) parts, namely (1) Pattern of Implementation of CC's Decision by the People Representatives' Council and the President as Legislators; which includes an analysis of the CC decision which has been, and has not been implemented by Legislators; and (2) Pattern of the Relation of the CC with People Representatives' Council and the President as Legislators in Implementation of CC Decision.

2.3.1 Pattern of Implementation of the CC Decision by Legislators

2.3.1.1 CC's Decisions that have been Implemented through Legislation

Referring to the entire law produced until 2016, from 29 decisions containing the constitutional mandate to the legislator, 11 decisions have been made through legislation as shown below.

1) Decision Number 001-021-022/PUU-I/2003

The decision was implemented by the establishment of Law Number 30 Year 2009 on Electricity. The decision is binding in December 21, 2004 and only implemented in 2009, although the Electricity Draft Law entered Prolegnas Year 2006 which has been prepared since March 22, 2006. That is, the legislators take 5 (five) years to implement "suggestion" of CC, Commencing from the date the decision is binding until the enactment of Law Number 30 Year 2009 on 23 September 2009. The constitutional mandate of the CC uses the formula "recommended", then the legislators are free to meet or not meet the advice. From the aspect of substance, Law Number 30 Year 2009 on Electricity is the implementation of Decision Number 001-021-022 / PUU-I / 2003. Proven, Law Number 30 Year 2009 affirms the paradigm in the business of providing electricity no longer competition or competition that embraces the unbundling system as outlined in Article 10 paragraph (2) of Law Number 30 Year 2009 stating: The provision of electric power for the public interest as referred to in paragraph (1) can be integrated.

The formulation is considered to enable the unbundling system. The proof, the norm of Article 10 paragraph (2) of Law Number 30 Year 2009 was filed as a judicial review case to the CC. Through decision Number 111 / PUU-XIII / 2015 in December 14, 2016, the CC declares that Article 10 Paragraph (2) of Law Number 30 Year 2009 is contradictory to the 1945 Constitution and does not have binding legal force if the formula is defined as a justification of unbundling practices in business. The provision of electric power for the public interest in such a way as to eliminate state control in accordance with the principle of “controlled by the state”. The last, legislators did not mention the Decision Number 001-021-022/PUU-I/2003 in Considerations as well as in the Elucidation of Law Number 30 Year 2009.

2) Decision Number 072-073/PUU-II/2004

This decision was implemented by establishing Law Number 22 Year 2007 on the Organizer of General Election. It took more than 2 (two) years and 1 (one) month to implement the decision as from 22 March 2007 until the enactment of Law Number 22 Year 2007 on April 19, 2007. The constitutional mandate of the CC only covers the aspect of the substance, namely to provide an alternative choice to the Legislators to form a law which affirms that the election is determined to the election regime or not, then the matter of the timing of the implementation of the decision is not significant to be questioned because the CC does not time limit of completion of the Act. Legislators choose the alternative provided by the CC, that is direct election is an extension of the definition of General Election.²⁶ The decision is not included in Law Number 22 of 2007. This implies the formation of the Act using an authentic legislative interpretation, whereas the interpretation has been provided by the CC.

3) Decision Number 012-016-019/PUU-IV/2006

This decision shall be effected by formulating Law Number 46 of 2009 on the Corruption Court. The legislators implement 2 (two) constitutional

²⁶ In Article 1 paragraph (4) Law Number 22 of 2007 stated, *General Election of Regional Head and Deputy Regional Head is the General Election to elect the regional head and deputy head of region directly in the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia.*

mandates of the CC, namely (1) establishing the Law on Corruption Court; and (2) the Act shall be established within a maximum period of three years since Decision Number 012-016-019 / PUU-IV / 2006 was pronounced in a public plenary session. Law Number 46 of 2009 was established within a period of not more than 3 (three) years as stated in decision Number 012-016-019 / PUU-IV / 2006. The decision is valid since December 19, 2006 while Law Number 46 of 2009 was ratified in October 29, 2009. The decision listed in the Law Number 46 of 2009, it means the establishment of Law Number 46 of 2009 is based on the decision.

4) Decision Number 005/PUU-IV/2006

The decision is implemented by formulating Law Number 18 of 2011 concerning Amendment to the Judicial Commission Law. Although the constitutional mandate uses the “recommendation” formula, the Legislator do so by incorporating the amendment of the Judicial Commission Law into the Priority of Prolegnas 2008. We can say, Legislators need 5 years and 3 months to complete the Judicial Commission Law, which has since been decided in August 23, 2006 until the enactment of the Law on 19 November 2011. The constitutional mandate is not fully implemented, especially the harmonization and synchronization of other laws. Legislators do not include the decisions in the Act, although they are substantially in line with the Decision.

5) Decision Number 5/PUU-V/2007

The decisions implemented by establishing Law Number 12 of 2008 by including rules on single candidates on the local election. It takes approximately 9 (nine) months for the legislators to implement the Decision as Law No. 12 of 2008 in April 28, 2008 is passed. The implementation period is not significant because the CC has not set the time limit. The decisions listed in Considering of the Law and the constitutional mandate is set out in Article 56 and Article 59 of Law Number 12 of 2008.

6) Decision Number 13/PUU-VI/2008

The decision was implemented with legislating the Law Number 41 of 2008 on State Budget in 2009. Legislators refers to the decision. It is seen that Legislators implement the decision due to a strong mandate accompanied by the ultimatum that the CC will declare the unconstitutionality of the entire Law on State Budget for Fiscal of 2009 when the education budget is set at less than 20%.

7) Decision Number 54/PUU-VI/2008

The decisions was implemented by establishing the Law Number 47 of 2009 on State Budget of 2010. Allocation of tobacco excise taxes for tobacco-producing provinces in APBN has been fulfilled starting APBN 2010 where NTB Province is set to earn Rp 109. 382.755.901. Legislator have not yet implemented a constitutional mandate to amend Article 66 Paragraph (1) of Law Number 39 of 2007 because the CC also does not impose time limits. Time limits in the constitutional mandate more effective makes the legislators implement the Decision.

8) Decision Number 133/PUU-VII/2009

The government regulation in lieu of laws (Perpu) was due to the void of the leadership of the chief of the Corruption Eradication Commission (KPK). The formation of the government regulation in lieu of laws is not within the framework of implementing the decision. There is no inclusion of decision in the government regulation in lieu of laws. The regulation of filling the vacancy of the Leadership of the Corruption Eradication Commission is initiated by the President, not by the Legislator. So, the substance contained in Article 33 and Article 34 of the regulation Number 1 of 2015 is in line with the constitutional mandate of the CC.

9) Decision Number 147/PUU-VII/2009

This decisions was implemented by establishing Law Number 1 of 2014 on the Election of Governors, Regents and Mayors. Legislators need more

than 5 (five) years to carry out constitutional mandate of the CC considering that the CC also does not impose time limits on implementation. Legislators formulate the substance of the Decision in Article 85 paragraph (1) of Law Number 1 of 2014. The establishment of Law Number 1 of 2015 does not mention the decision as the basis for its formation.

10) Decision Number 8/PUU-VIII/2010

The regulation on the right to inquiry has been regulated in Article 177 of Law Number 27 of 2009 concerning the People's Consultative Assembly (MPR), the People Representatives' Council (DPR), the Regional Representatives' Council (DPD), and the Regional People Representatives' Council (DPRD). The constitutional mandate of the People Representatives' Council's rights in decision is implemented through Law Number 17 of 2014 on the People's Consultative Assembly, the People Representatives' Council, the Regional Representatives' Council, and the Regional People Representatives' Council. Substantively, the provisions on the Rights of Parliament Questionnaire have been formulated by the Legislators in Articles 199 to 209 of Law Number 17 of 2014. The Decision is not listed in the Law Number 17 of 2014.

11) Decision Number 97/PUU-XI/2013

Legislator implements the decision by establishing Law Number 8 of 2015. Legislator require approximately 10 (ten) months to carry out the decision. Substantially, the decision is set forth in Article 157 and Article 158 of Law Number 8 of 2015. Decisions are not listed in Law Number 8 of 2015.

In addition to the above pattern, there are 3 (three) decisions that are implemented but the decisions are different from the 11 decision above. These 3 (three) decisions are:

a. Decision Number 013/PUU-I/2003

Until the end of 2016, there are no laws that apply a norm of law that should be general and abstract in a concrete event. According to the authors, it shows that the legislators have implemented the decision.

b. Decision Number 006/PUU-IV/2006

Initially, efforts to form a law to replace the Truth and Reconciliation Commission (Komisi Kebenaran dan Rekonsiliasi) Act have been pursued. From 2008 to 2015, the Truth and Reconciliation Commission Act is included in the Draft of the Priority of Prolegnas 2015. However, in the development, efforts to resolve gross human rights violations of the past through reconciliation efforts are not done by legal policy. The President (in the capacity of the head of government) decided to form a new body, the Council of National Harmony (*Dewan Kerukunan Nasional/DKN*). Based on the authors, the decision has been made, but not by forming a new the Truth and Reconciliation Commission Act, but through the presidential decree on the establishment of the Council of National Harmony.²⁷

c. Decision Number 15/PUU-IX/2011

Statement of the CC in order that legislator distinguishes between the procedure of forming or establishing a political party with the rules on the conditions imposed on a political party so that a political party can follow the general election, and the provisions governing the Regional People Representatives' Council, difficult to understand and of course difficult to implement. Legislators have arranged all three in their respective laws. The constitutional mandate is aimed at assessing the provision of Article 51 Paragraph (1) of Law 2 of 2011 which confuses three things, namely (i) the procedures for the establishment or establishment of political parties; (ii) the rules on the conditions imposed on a political party in order for a political party to be eligible; and (iii) the institutional provisions of the Regional People Representatives' Council. Since the arrangement of 3 things already exists in a separate law, the implementation of the mandate is not seen from whether the Legislators make amendment or drafting new laws, but viewed from the presence or absence of norms

²⁷Prima Gumilang, "Perpres Pembentukan Dewan Kerukunan Tinggal Diteken Jokowi," *Cnnindonesia.Com*, 2017, <https://www.cnnindonesia.com/nasional/20170309182222-20-199074/perpres-pembentukan-dewan-kerukunan-tinggal-diteken-jokowi/>.

that confuse the above 3 things. Until 2016, there is no rule of law that confuses the arrangement of all 3 above. For this reason, according to me, legislators have implemented the decision.

2.3.1.2 CC's Decision which have not been Implemented by the Legislators

Until the end of 2016, there are 13 decisions with constitutional mandates that have not been implemented. The decisions are presented in the following table.

CC's Decision which have not been Implemented by Legislators

No.	DECISION	YEAR
1	Decision Number 013-022/PUU-IV/2006 in the judicial review of the Penal Code Law	2006
2	Decision Number 6/PUU-V/2007 in the judicial review of the Penal Code Law	2007
3	Decision Number 4/PUU-VII/2009 in the judicial review of norms of imprisonment for public officials in the Election Law and Law on the Establishment of Laws and Regulations	2009
4	Decision Number 11-14-21-126 and 136/PUU-VII/2009 in the judicial review of the Law on Education Law Entity	2010
5	Decision Number 115/PUU-VII/2009 in the judicial review of the Manpower Law	2010
6	Decision Number 49/PUU-VIII/2010 in the limit of term of Attorney General in the Attorney Law	2010
7	Decision Number 49/PUU-IX/2011 in the judicial review of the Constitutional Court Law	2011
8	Decision Number 5/PUU-IX/2011 in the regulation concerning interception in the Information and Electronic Transaction Law	2011
9	Decision Number 36/PUU-X/2012 (Law Number 22 Year 2001: BP Migas)	2012
10	Decision Number 34/PUU-X/2012 in the judicial review of the Constitutional Court Law on Pension Age for the Court's Clerk	2012

11	Decision Number 85/PUU-XI/2013 concerning the complete cancellation of the Water Resources Law	2015
12	Decision Number 25/PUU-XII/2014 in the judicial review of the Financial Services Authority Act	2015
13	Decision Number 58/PUU-XII/ 2014 in the judicial review of the Electricity Law	2015

The matters that make Legislators have not fulfilled the constitutional mandate of the CC decision are (1) the law that is ordered to be changed or perfected has not yet been discussed²⁸; (2) Legislators have not fulfilled the constitutional mandate of the CC because its implementation will include the amendment of many laws;²⁹ (3) The decision of the CC has been implemented, but not through changes or the formation of law, but by Government Regulation;³⁰ (4) Legislator thinks that legislative review is not urgent because the decision of the CC which is self-implementing is considered to have solved the constitutional problem.³¹

2.3.1.3 Decisions Not Implemented by Legislators

There are 2 decisions that are not implemented by Legislators shown in the table below.

²⁸ As an example of whether or not the constitutional mandate of Decision Number 013-022/PUU-IV/2006 and Decision Number 6/PUU-V/2007 will be seen when the Draft of the Criminal Code Bill is being discussed. Likewise, the draft amendment of the Constitutional Court which is currently in the process of amendment can be attributed to Decision Number 49/PUU-IX/2011 dan Decision Number 34/PUU-X/2012 (judicial review of the CC Law). Similarly, the Draft Water Resources Act associated with Decision Number 85/PUU-XI/2013 which is currently in the process of legislation.

²⁹ It is found in Decision Number 4/PUU-VII/2009 reviewing the Election Law. A review of a number of laws that contain the norms of a condition is not criminalized to a public official not an easy matter, although it must be done. Likewise, Decision Number 5/PUU-IX/2011 Concerning the testing of eavesdropping rules in the Information and Electronic Transaction Law. There are many laws that must be changed to unify the wiretapping rules in a single law.

³⁰ This is found in Decision Number 11-14-21-126 and 136/PUU-VII/2009 In the judicial review of the Law on Education Law. Government Regulation Number 66 Year 2010 is a consequence of the mandate of the Constitutional Court's decision when the Constitutional Court provides guidelines if the regulation concerning education legal entity is regulated by Law.

³¹ This is found in Decision Number 49/PUU-VIII/2010 regarding judicial review of the term of Attorney General in the Attorney Law. Included in this case Decision Number 115/PUU-VII/2009 In the judicial review of the Manpower Act. Similarly, Decision Number 36/PUU-X/2012 Regarding the examination of the existence of BP Migas in Law Number 22 Year 2001, Decision Number 25/PUU-XII / 2014 in the judicial review of the Financial Services Authority Law, and Decision Number 58/PUU-XII/2014 in the judicial review of the Electricity Law until 2016, there is no intention to make any changes or use of the Law.

CC's Decisions which have not been Implemented by Legislators

NO.	DECISION	YEAR	INFORMATION
1	Decision Number 82/PUU-XII/2014 regarding the representation of women in filling the leadership of DPR	2014	Law Number 42 Year 2014 which is a revision of the Act, done not in line with the CC Decision.
2	Decision Number 32/PUU-XI/2013 concerning regulation of insurance based on Mutual	2014	The deadline for the legislate of the law is determined to be a maximum of 2 years and 6 months after the pronounced decision has passed

In Law Number 42 of 2014, there is not any provision for the removal of the constitutional mandate of Decision Number 82/PUU-XII/2014. The regulation on filling the leadership of the Regional People Representatives' Council's fittings, whether Commission, Legislation Agency, Budget Agency, Inter-Parliamentary Cooperation Board, the Honorary Court of Parliament, or Household Affairs Agency, does not mention the matter of female representation according to the balance of the number of members of each fraction. If the priority of women representation according to the balance of the number of members of each fraction is regulated in the DPR regulations on the order, it is clearly not appropriate. Because, stated in the decision, "*the legal policy taken by the legislator*". Legislators are the People Representatives' Council and the President. It is true that the revisions have been made, but the content material is inconsistent with the decision of the CC. Similarly, the 16 Act generated until the end of 2016, there is not any law on Insurance Business in the form of mutual. Even if in the coming years the law is established, the law has exceeded the time limit specified in the constitutional mandate of the CC. The legislators do not implement this decision because the constitutional mandate does not impose deadlines and consequences if the constitutional mandate is not implemented. Therefore, the Legislators tend to prefer to choose the option to implement or not the decision. There is not any effect that will be accepted by the the legislators.

Based on all of the above arguments, mainly answering the second research question, whether against decisions that have been, neither, nor have been implemented, the authors draw the conclusion into the following matter: (a) there are not any standardized patterns in implementing the constitutional mandate in the legal opinion of the CC decision; (b) in term of time, legislators do not prioritize the implementation of decisions. It is also determined by the choice of formulation of the mandate. If it is compulsory, legislators will implement exactly as the mandate sentences; and (c) legislators implement the CC's decision through 2 patterns, namely: (a) affirming into the act; and (b) taking the substance of the constitutional mandate, without listed it in the act.

2.3.2 Pattern of Relation of CC and the Legislators in Implementation of CC's Decision

Regarding to 14 CC's decisions, it can be seen that, (i) only in 2 decisions, legislators implement in accordance with the constitutional mandate; and (ii) legislators implement the constitutional mandate in the form of a prohibition for legislators to contain certain norms as outlined in 4 decisions. Both of these indicate cooperative relations. The CC provides guidance for legislation products which are no longer problematic and legislators carry out the mandate. However, cooperative relationships are not fully realized in other decisions. In a decision with a constitutional mandate in the form of a requirement to contain specific norms in the formulation of new act, without time constraints, and without mentioning the consequences if the requirement is not exercised, the legislators do not position it as a priority of legislation. If it is implemented, legislators are often reluctant to call the CC's decision as the legislative basis. Similarly, with 13 decisions that have not been implemented, cooperative relationships can not be realized. For example, since the implementation of the constitutional mandate of the CC decision will include the amendment of many laws, legislators do not position it as a priority of legislation. Whereas precisely because the constitutional problem exists in many laws, legislation should be hastened to eliminate the problem. This also means that legislator perpetuate judicial legislation, a practice

that is not politically desired by legislators themselves. Meanwhile, against 2 decisions are not implemented, clearly proves confrontative relations. Although its constitutional mandate is so clear, but legislators ignore it.

If simplified, above dynamics are influenced by several factors. First, the CC needs to have more confidence to affirm its binding constitutional mandate. Although the CC must remain cautious in formulating a constitutional mandate, the CC should keep in mind that all statements in the decision have binding power. The CC may not allow itself to give a constitutional mandate that has only a persuasive effect. It is imperative that the constitutional mandate in legal opinions has consequences if the mandate is delayed or failed to be implemented by the legislator. The consequences are legitimate coercive instruments to ensure that decisions are made.

Second, because legal opinions have binding power, so in formulating the constitutional mandate, the CC must really ensure its legal opinions always in the framework of interpretation of the Constitution which is easily understood by legislator. The CC needs to pay attention to several signs (a) consider the possibility and clarity for legislator in implementing the decision; (b) to set a time limit when the decision should be implement; and (c) include consequences if the constitutional mandate is delayed or is not implemented.

Third, the constitutional mandate of the CC is in accordance with the principle of checks and balances according to the 1945 Constitution. The constitutional mandate is not an intervention, but implementation function of the CC as the sole interpreter of the constitution.

Fourth, on implementing of the CC decision, self respect should not be dependable. For this reason, in addition to the factors of the CC and the legislator, the rule of law is required to provide assurance. Moreover, cooperative relations can also be realized. So in this case, law must be above politics to get its justification.

Without cooperative relations, the existence of the CC and Legislator, as an important substance in the design of the Constitution 1945, will always be less than

optimal in implementing the Constitution 1945 values in a responsible manner. For the CC, in the name of the Constitution 1945, the principle of constitutional supremacy which establishes it as the sole interpreter of the constitution shall not contribute to impede cooperative relations. Similarly, the People Representatives' Council and the President as legislators, the parliamentary supremacy paradigm should be abandoned. The CC is not a 'little parliament' that can against the existence and the authority of legislators.

In order to realize cooperative relationships, we needs to reaffirm the need for new law that became the legal basis of obligations and how the decision of the CC is implemented. Therefore, Legislators need not be resistant to establishing it. The reason is (i) the purpose of new law is to strengthen the supremacy constitution, and (ii) relation of the CC and legislators realized by the commitment of the achievement of vision and national goals as stated in Paragraph IV Preamble of the Constitution 1945.

III. CONCLUSION AND SUGGESTION

3.1 Conclusion

1. Philosophically, theoretically, and practically explanation of CC's decision containing constitutional mandate to Legislators in the framework of checks and balances are as follows, 1) legal consideration of the CC's decision are absolute binding because it contains (i) the basis of the CC to declare the "constitutional" or "unconstitutional" norms being reviewed; (ii) an explanation at which point a constitutional problem occurs; and (iii) an explanation of how decisions should be implemented; 2) through constitutional mandate, the CC aims to provide guidance to legislators regarding what is the 1945 Constitution desire; 3) the constitutional mandate by the CC is not intervention to the authority of legislators, but it is actually implementation of the principle of checks and balances according to the 1945 Constitution;

2. Relation between the CC and legislators from the implementation of the CC decision shows ups and downs between cooperative and confrontative relations. Cooperative relations are realized when the constitutional mandate is formulated strongly when legislators carry out the mandate as it should be. Relationships tend to be cooperative as seen from the implementation of the constitutional mandate of the decisions, but do not position it into the priority of legislation. Meanwhile, confrontative relation is seen from the non-implementation of the CC's decision on (i) the allocation rule of women who holds the chair of the People Representatives' Council (DPR), and its equipment in the judicial review of Act on People's Consultative Assembly (MPR), the People Representatives' Council (DPR), the Regional Representatives' Council (DPD), and the Regional People Representatives' Council (DPRD); and (ii) for insurance to be confirmed through law as a mutual effort in the examination of the Insurance Law.

3.2 Suggestion

1. For the CC, because the CC decision have a broad spectrum, so formulation of the constitutional mandate in the decision needs to pay attention to the signs of (a) formulated in the context of constitutional interpretation and minimizing additional explanation (*obiter dicta*); (b) facilitate legislators to implement the decision; (c) imposes a time limit on implementation; and (d) inclusion of consequences if the constitutional mandate is delayed or not implemented.
2. For legislators, when discussing and approving in making law process, which is required not only by the majority vote for the purpose and understanding of the act, but also the majority vote for its constitutionality aspects, including ensuring whether the act has referred to the constitutional mandate of the CC;
3. Referring to the experience and practice in several countries, the steps to realize the cooperative relations of the CC and legislators is to create rules

on the implementation of the CC decision, in the Constitution 1945, in the act, and the CC's decision.

4. The legal rules regarding the implementation of the CC's decision is important to realize a lasting cooperative relationships. Therefore, the CC and legislator must be aware of the nature and meaning that the ultimate goal of the exercise of their respective powers is the same, namely enforcing the 1945 Constitution.

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LAWS OF RATIFICATION OF AN INTERNATIONAL TREATY IN INDONESIAN LAWS HIERARCHY

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Abstract

This journal article discusses the laws of ratification of an international treaty in Indonesian laws hierarchy. This journal uses a normative research approach where a draft agreement and laws are used as primary data apart from the laws and international treaties. There are some issues that still unsettled related to the legal status of the laws of ratification of an international treaty that have impacts in the implementation of the treaty. The laws of ratification of an international treaty now is still classified as general laws whose the content of the norm has been discussed by the People's Representatives Council, therefore the laws of ratification of an international treaty automatically become the object of Judicial Review at the Constitutional Court of the Republic of Indonesia. The cancellation of the laws of ratification of an international treaty impacts the cancellation of the deal on the treaty and it has failed the *pacta sunt servanda* principle, which becomes the basis of a treaty. To solve problems related to the cancellation of laws of ratification of an international treaty at the Constitutional Court, there are several efforts on state administration by classifying the laws which differ the general laws from the laws whose contents are related to the international treaty. Furthermore, a progressive new method on the state administration is needed by giving a Judicial Preview right to the Constitutional Court to conduct a review on the bill of the ratification of an international treaty based on its suitability to the constitution.

Keywords : Judicial Preview, Hierarchy, Laws, Dualism, Treaties

I. INTRODUCTION

1.1 Background of the Problem

Every country in this world cannot stand alone without any help and support from other countries. A relationship between countries or diplomatic relationship whose aim is to support countries' agenda, is realized through a treaty or international treaty. The important meaning of an international treaty for Indonesia is realized through the state's constitution, that is the 1945 Constitution of the Republic of Indonesia, which includes the clause about international treaty in Article 11 of the 1945 Constitution of the State of Republic of Indonesia, which states as follow:

- (1) The President with the approval of the People's Representative Council declares war, makes peace and concludes treaties with other countries.
- (2) The President when concluding other international treaties that give rise to extensive and fundamental consequences to the life of the people related to the financial burden of the state, and/or compelling amendment or enactment of laws shall be with the approval of the People's Representative Council.
- (3) Further provisions regarding international treaties shall be regulated by laws.

Before the amendment of the 1945 Constitution of the State of Republic of Indonesia, the Article 11 states "the President with the approval of the People's Representatives Council declares war, makes peace and concludes treaty with other countries". In Indonesia, international treaties has faced three different legal regimes.¹ The first period 1945-1960 is when the international treaty is based on three constitutions on those periods, that are the 1945 Constitution of the State of Republic of Indonesia, the 1949 Constitution of the Union of Republic of Indonesia, and the 1950 Constitution. The second period is between 1960-2000, although it is based on the 1945 Constitution of the State of the Republic of Indonesia, the international treaty is submitted to the condition ruled by Presidential Letter No. 2826 year 1960. Since 2000, the law Number 24 year 2000

¹ Damos Dumoli Agusman, "Dasar Konstitusional Perjanjian Internasional Mengais Latar Belakang Dan Dinamika Pasal 11 UUD 1945," *Direktorat Jendral Hukum Dan Perjanjian Internasional Kementerian Luar Negeri Republik Indonesia* 4 (2012): 1-7.

about International Treaties which is a mandate from the 1945 Constitution of the State of Republic of Indonesia is implemented.

As the implementation on the provision of Article 11 of the 1945 Constitution of the State of the Republic of Indonesia, the law of the Republic of Indonesia Number 24 Year 2000 about International Treaties has been applied. On Article 3 of International Treaties, it is mentioned that the Government of the Republic of Indonesia is submitted to international treaties through the following ways:

- a. Signing;
- b. Ratification;
- c. The exchange of treaty documents/diplomatic notes;
- d. Other ways as agreed by parties to international treaties.

Ratification of international treaties is done by the laws or the presidential decree. The ratification of international treaties is done by the laws with the following conditions:

- a. Political problem, peace, defense, and national security;
- b. Regional change or the border setting of the Republic of Indonesia;
- c. The sovereignty or sovereign rights of a country;
- d. Human rights and living environment;
- e. Establishment of a new law principle;
- f. The loan and/or foreign grants.

The ratification of international treaties whose the content is apart from the aforementioned points is done by the Presidential Decree. In relation to those provisions, it is important to be noticed that a regulation which controls the laws and regulation is the law of the Republic of Indonesia Number 12 Year 2011 about the Establishment of the Laws and Regulation.

It is mentioned in Article 1 Number 3 about the Law of the Establishment of the Laws and Regulation, it states that laws are laws and regulation established by the People's Representatives Council with the approval of the President. Then, it is further explained in Article 10 of that law, the contents which are subject to the law are: The further regulation about the provision of the 1945 Constitution

of the State of the Republic of Indonesia; an order of a law to be regulated in a law; ratification of particular international treaties; the follow up on verdicts of the Constitutional Court; and/or compliance of the legal needs of citizens and the follow up on verdicts of the Constitutional Court.

Both the constitution and the provisions of the law (Law of the Establishment of the Laws and Regulation & Law of International Treaties) have ensured that ratification of international treaties is part of the national rule of law through ratification. However, it does not mean problems do not exist. The main unanswered aspect both in the constitution and in the provision of the law in Indonesia is there is not any classification of law, which can be cancelled by the Constitution Court at any time. In fact, the content of the law might be different.

As it is mentioned in the 1945 Constitution of the State of the Republic of Indonesia in Article 24C that the Constitutional Court is authorized to hear at the first and the final level whose verdict is final to review laws toward the 1945 Constitution, to decide disputes over authority of state institutions whose authority is given by the 1945 Constitution of the State of the Republic of Indonesia, to decide disbandment of political parties, and to decide disputes on results of the general election. Authority about the final level whose verdict is final to review laws toward the 1945 Constitution including the international treaties which are ratified into a law. Article 7 (1) of the law of the Republic of Indonesia Number 24 Year 2000 about International Treaties which has been applied don't have a clear about international treaties position on laws classification in Indonesia. Based on practice international treaties which are ratified into a law classification such as a law Number 38 Year 2008 about the ratification of ASEAN Charter. It means if a legal product whose content is classified into the content of laws, including the international treaties which are ratified into a law, it can be review at a Constitutional Court.

In history of international treaties done by Indonesia, for the first time Indonesia faced a Judicial Review case related to the ratification of an international treaty in 2011 when the Constitutional Court accepted a petition for judicial review of a law Number 38 Year 2008 about the ratification of ASEAN Charter

filed by Institute for Global Justice dan several mass organizations such as trade union, fishermen's union etc.² Reasons for filing a Judicial Review on the law of the ratification of Asean Charter as written in the petition are:³

- a) ASEAN is regarded as neocolonialism and imperialism in form of international organization and proposes ASEAN as economic community as the strategy.
- b) By using the economic agreement binding the countries through ASEAN Charter, a free trade agreement is done between the member and other countries who are not part of ASEAN, which are considered by the petitioners as a threat for indonesia's economic sovereignty.
- c) The idea of ASEAN from economic perspective by using free trade concept and based on the single production, is a neoliberalism idea written in ASEAN Charter Article 1 paragraph (5), which states:

To create a single market and production base which is stable prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment, facilitated movement of business persons, professionals, talents and labours, and free flow of capital⁴

Article 2 paragraph (2) and states:

Adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitment and progressive reduction towards elimination of all barriers to regional economic integration, in a market driven economy

The aforementioned petition says the Constitutional Court has to declare that The Law No. 38 Year 2008 Article 1 paragraph (5) and Article 2 paragraph (2) in Charter of the Association of Southeast Asian Nations, have violated the Article 27 paragraph (2) and Article 33 paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia, and the integration of free market creates free trades which violates the economic sovereignty of a country, so the constitution of the ratification needs to be cancelled. Related to the petition, the Constitutional Court decides that the petition is unreasonable based on the law.

² Khaerudin, "MK Diminta Batalkan Ratifikasi Piagam Asean," *Kompas.Com*, 2012, <http://internasional.kompas.com/read/2012/11/23/2139259/MK.Diminta.Batalkan.Ratifikasi.Piagam.Asean>.

³ Simon Tumanggor, *Judicial Review Undang-Undang Pengesahan Piagam Perhimpunan Bangsa-Bangsa Asia Tenggara Jendela Informasi Bidang Hukum Bidang Perdagangan* (Jakarta: Kementerian Dalam Negeri RI, 2011), 3.

⁴ Judicial Review Law Number 38 of 2008 on Ratification of the Association of Southeast Asian Nations against the 1945 Constitution, No. 33/PUU-IX/2011 (2011). Decision No. 33/PUU-IX/2011.

From that case, if there is law of an International which has been signed and ratified and suddenly it got cancelled by the Constitutional Court, the process is not effective for the international diplomatic. Indonesia might lose the international trust since that case can be taken as a representative of Indonesia that Indonesia is an inconsistent states where the decision in the beginning until the end of the negotiation is consent to be bound in an international treaty, even Indonesia can get a penalty if there is a clause about the a penalty for withdrawing from an international treaty. The absence of classification for a law where a Judicial Review can be implemented becomes a sign that there has not a any way to solve disagreement between the laws and regulation and the regulations of the international treaty.

1.2 Formulation of the Problem

Based on the aforementioned fact in the previous point, the researcher formulates the the following research questions:

1. How is the laws of ratification of international treaties in Indonesian law hierarchy?
2. What steps that should be done to avoid the cancellation of the laws of ratification of international treaties through a Judicial Review at the Constitutional Court?

1.3 Method

This research is a normative research where a draft agreement and laws are used as primary data apart from the laws and international treaties. The previous research such as articles journal and dissertation, legal materials or written data such as legal codes, the courts' verdict, books, journal, magazines, newspaper, and other legal materials are used in the present study.

In relation to the problem about the laws of ratification of international treaties, the researcher uses Theory of Sovereignty to analyse the phenomena and problems related to the laws of ratification of international treaties.

1.4 Theory of Sovereignty

Henry C Black defines a country as follow:

A country is group of people who permanently live in a particular territory and bounded by the norm used in the country. That country runs its sovereignty independently and takes control the people and the resource inside the border area. Then the country is able to conduct a war and peace and concludes international relations with international communities.⁵

From the above definition, sovereignty becomes one of main elements to establish a country. Jean Bodin states that sovereignty is an attribute and a special character of a country. Without any sovereignty, a country does not exist.⁶

A sovereign state means there is not any higher power than the power of the state itself. In other words, a country has a single monopoly in that country. This supreme administrative space is limited by the border of the country which means the highest authority of a country is only available within its border. A country is the most important subject of an International Law (*par Excellence*) rather than other subjects. As a subject of international law, a country has rights and responsibilities under the international law.⁷

Based on Boer Mauna about the definition of sovereignty,⁸ where Boer Mauna explains the positive and negative impacts of a sovereignty.

1. The negative meaning of a sovereignty, it means that a country is not subject to the provisions of an international law whose status is higher. A sovereignty means a country is not subject to any power without the approval of that country.
2. The positive meaning of a sovereignty gives a position called as the supreme leader of the country. This is called full authority of a country and sovereignty gives power/authority for the country to exploit the natural resources in its national territory for the public welfare which is called as permanent sovereignty of the natural resources.

⁵ Huala Adolf, *Aspek-Aspek Negara Dalam Hukum Internasional* (Jakarta: Rajawali Press, 1991), 1–2.

⁶ Fred Isjwara, *Pengantar Ilmu Politik* (Bandung: Binacipta, 1996), 89.

⁷ Mochtar Kusumaatmadja, *Pengantar Hukum Internasional, Buku I Bagian Umum* (Jakarta: Binacipta, 2010), 16–17.

⁸ Boer Mauna, *Hukum Internasional. Pengertian, Peranan Dan Fungsi Dalam Era Dinamika Global* (Bandung: Alumni, 2005), 25.

II. RESULT AND DISCUSSION

2.1 Problem of the Status of the Laws of Ratification of an International Treaty

There are several problems about the laws of ratification of international treaties which has not been solved in order to guarantee its implementation, those problems are:

1. Law No. 24 Year 2000 about International Treaties which is not clear to explain the international treaties in the law system, but it only states that the international treaties are ratified by the law/Presidential decree without any further explanation about the meaning and consequences for the laws in Indonesia.
2. Another problem is in the hierarchy of the laws, as it is written in Article 7 paragraph (1) of the Law of the Establishment of the Laws and Regulation which does not explain detail of the international treaties in national law. If the manifestation of the ratification of the international treaties is in form of laws, it means the laws of the international treaties can be done through judicial review and the worst consequence is that laws can be cancelled and is not in line with the constitution or the 1945 Constitution of the State of the Republic of Indonesia. The consequence of the withdrawal of the international treaties can give a bad implication toward the foreign policy and weaken the position of Ministry of Foreign Affairs as a leader of a state diplomatic.
3. The Dualism Doctrine used by Indonesia can not give a clear position for international treaties in the national law hierarchy. This Dualism Doctrine places the international treaty outside the law hierarchy. Moreover, it seems like a compulsion placing the laws of ratification of international treaties into the law (in the hierarchy of the regulation of national law) because there is not any specific classification for the laws of ratification of international treaties.

2.2 International Treaties in the Hierarchy of Regulation of National Laws

International treaties agreed and signed by Indonesia, based on Article 1 paragraph 3 of the Law of the Republic of Indonesia No. 12 Year 2011 about the establishment/formation of the Establishment of Regulation of Law become a content material of law, the following are related materials as mentioned in Article 10:

- a. Further regulations about provisions in the 1945 Constitution of the State of the Republic of Indonesia;
- b. The order of the law to be ordered by the law;
- c. The ratification of particular international treaties;
- d. The follow up on verdicts of the Constitutional Court; and/or
- e. The compliance of legal need in society.

As the implementation from the mandate of the 1945 Constitution of the State of the Republic of Indonesia about international treaties, the Law of the Republic of Indonesia No. 24 Year 2004 is applied. It is about the International Treaties as a standard rule for international treaties in Indonesia. In the law in Article 3, it is mentioned that the Government of the Republic of Indonesia binds itself to the international treaties. The ratification of international treaties is done by the law if it relates to:

- a. Political problem, peace, defense, and national security;
- b. Regional change or the border setting of the Republic of Indonesia;
- c. The sovereignty or sovereign rights of a country;
- d. Human rights and living environment;
- e. The establishment of a new law principle;
- f. The loan and/or foreign grants.

The international ratification whose content is not available in the above explanation is done by Presidential Decree. In relation to that provision, the

regulation which rules the regulation of law that needs to be known, that is the Law of the Republic of Indonesia No. 12 Year 2011 about the Establishment of the Regulation of Law.

In Indonesian legal system, there is only one law, that is the legal system established by the People's Representatives Council, with the approval of the President and agreed by the President. Besides, there is not any other laws established by other central or district institutions, therefore both central and district laws are not available in Indonesia.⁹ There are provisions which underlie the establishment of laws in Indonesia such as:

1. Article 5 paragraph (1), Article 20, Article 21, Article 22 D paragraph (1), and Article 22 D paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia;
2. The Law of the Republic of Indonesia No. 12 Year 2011 about the establishment of Regulation of the law;
3. The Law of the Republic of Indonesia No. 17 Year 2014 about the People's Consultative Assembly, the People Representatives Council, the Regional Representatives Council, and Regional People Representatives Council.
4. Presidential Regulation of the Republic of Indonesia No. 87 Year 2014 about the Implementing Regulation No. 12 Year 2011 about the establishment of the regulation of law;
5. The Regulation of the House of Representatives Council of the Republic of Indonesia No. 1/DPRRI/2009 about the code of conduct.
6. The Regulation of the House of Representatives Council of the Republic of Indonesia No. 1 Year 2012 about the procedures for National Legislation Program;
7. The Regulation of the Representatives Council of Republic of Indonesia No. 2 Year 2012 about the Procedures of Bill's Preparation;
8. The verdicts of the Constitutional Court No. 92/PUU-X/2012 about the Judicial Review of the Law No. 27 Year 2009 about the People's Consultative

⁹ Maria Farida Indrati, *Ilmu Perundang-Undangan (1). (Jenis, Fungsi, Materi Muatan)* (Yogyakarta: Kanisius, 2007), 53.

Assembly, the Representatives Council, the Regional Representatives, and the Regional People Representatives and the Law No. 12 Year 2011 about the Establishment of Regulation of Law (UUP₃).

In other words, the international treaties which have been ratified by Indonesia is included in the nomenclature and law as it is has been legally defined by the Representatives Council of the Republic of Indonesia.

2.3 The Sovereignty of a Country Vs International Treaty

In Article 1 number 3 UUP₃, it is mentioned that a law is a regulation of law which is established by the People's Representatives with the approval of the President. Then in Article 10 of the Law of the Establishment of the Laws and Regulation, it is further explained that the content needed to be regulated by the law consists: the further regulation about the provision of the 1945 Constitution of the State of the Republic of Indonesia; the order of the law to be ordered by a law; the ratification of an international treaty; the follow up on the Constitutional Court's verdicts, and/or the compliance of legal needs in society and the follow up on the Constitutional Court's verdicts.

Both the constitution and the provision of Law of the Establishment of the Laws and Regulation have guaranteed the ratification of the international treaty which becomes part of the national legal provision through ratification. However, it does not mean there is no any problem at all. The main unanswered problem both in the constitution and the provisions of the laws in Indonesia is the absence of classification of laws which becomes the object of Judicial Review at the Constitution Court, as it is known that the contents of the laws are different.

As it is written on the 1945 Constitution of the State of the Republic of Indonesia in Article 24C that the Constitution Court is authorized to hear at the first and the final level whose the verdict is final to examine laws towards the 1945 Constitution, to resolve the dispute whose authorities are given by the 1945 Constitution of the State of the Republic of Indonesia, to decide on the

dissolution of political parties, and to decide on disputes about the result of the general election, it means any kind of content of a legal product, as long as it is in form of laws, it can be reviewed by the Constitutional Court, the authority of the Judicial Review of the Constitutional Court is one of the main problem on the implementation of an international treaty, the cancellation of a law is equal to the cancellation of the international treaty. It is necessary to be noticed that an international treaty has two important principles, the first principle is *pacta sunt servanda*, and the second it *rebus sic stantibus*.

In Article 26 of Vienna Convention, it is formulated the meaning of *pacta sunt servanda*, that each treaty which bonds the parties involved and that treaty needs to be implemented well. This principle is not only applied to the implementation of specific treaties, but also applied to the international treaties such as the UN Charter. The confirmation of this principle in creating a convention is very important to ensure the compliance of the international treaty. The *pacta sunt servanda* principle is related to the sanctity of treaties (the greatness of the treaty). In the past centuries, this principle was still firmly held, but in the latest era, this principle is no longer noticed. After many new countries established lately and the critical views about the problem related to unequal treaties, so it is doubtful whether the sanctity of treaties is still used (Preamble PBB Covenant). During the Vienna conference, some parties infer efforts to weaken the *pacta sunt servanda* by accepting the *Rebus Sic Stantibus* principle and *Jus Cogens* principle. These principles are used as the basic foundation by a country to declare not to be bound by an international treaty since it is not in line with the national law. Due to that case, the participants' proposals about the new article to rule the relationship between the national law and the compliance with the international treaty is accepted.¹⁰

Further in Article 27 of the Vienna Convention (*Rebus Sic Stantibus*) states that the parties of the treaty are not allowed to propose their own national law as an excuse to justify countries' act for not applying the international treaty. It is further mentioned that this Article 27 does not disadvantage the Article 46 of

¹⁰ Rosmi Hasibuan, "Suatu Tinjauan Umum Tentang Perjanjian Internasional" (Universitas Sumatera Utara, 2002), 8.

the convention. It can be concluded from Article 46 that a country is authorised to end a treaty as a way to convey disagreement for violating its national law.¹¹

From the two principles, it can be concluded that:

1. An international treaty has to be treated with respect, especially when the international treaty has been made and ratified by Indonesia. The cancellation of an international treaty by one of the parties will result both political and economical matter which can effect the stability of the country's foreign policy.
2. Based on the *Rebus Sic Stantibus* principle in Article 27 of Vienna Convention, the cancellation of an international treaty due to the violation of a country's constitution/sovereignty, or the reason that the instrument of the international treaty ratification is in form of laws, therefore the cancellation of the treaty can be done. Due to the previous explanation, a step to avoid the laws of ratification of an international treaty by the Constitutional Court is needed.

Substantially, in a judicial review of the Law of ASEAN Charter, it emphasizes that the free market is the violation of the country's sovereignty in economics. As it is written on the sub-section in the theory of sovereignty which is above the sovereignty of a country has both positive and negative meaning, based on Boer Mauna,¹² where the sovereignty of a country has two opposing points of view, both positive and negative aspects, which depend on the point of view of the country.

The sovereignty of a country is not absolute anymore, but in some cases it needs to honor other countries' sovereignty, which it is ruled by the international law. It is known as the Relative Sovereignty of State. In a context of international law, a sovereign state needs to be subject and to honor the international law and the sovereignty and border's integrity of other countries.¹³

If an international treaty which has been signed and ratified by Indonesia is cancelled by a party through a Constitutional Court, there will be consequences

¹¹ *Ibid.*

¹² Mauna, *Hukum Internasional. Pengertian, Peranan Dan Fungsi Dalam Era Dinamika Global.*

¹³ Isjwara, *Pengantar Ilmu Politik*, 89.

or sanctions for the country, economically or politically, so it is urgent for Indonesia to formulate a new country's administration which can answer the problem related to the laws of ratification of an international treaty.

The proposal of Judicial Review of the law of ASEAN Charter which is filed in 2011 has clearly defined the sovereignty of a country negatively, where the emphasis of the proposal is the violation of a country's sovereignty in economics where a country is not supposed to be subject to the international law, in this case is the ASEAN Charter, but it needs to be concerned is "the violation of a county's sovereignty/consitution" as a result from following the international treaty. The following is the point of view of the former Director of International Treaty, Ministry of Foreign Affair of the Republic of Indonesia, Damos Dumoli Agusman:

*Things to be noted, if the Constitutional Court decides that the ASEAN Charter is not in line with the 1945 Constitution of the State of Republic of Indonesia, the dilemma will arise and will be faced by Indonesia (as a country), that is honoring the 1945 Constitution of the State of Republic of Indonesia by violating the international law, or honoring the international law by violating the 1945 Constitution of the State of Republic of Indonesia. The reason is, based on the international law, Indonesia is not allowed to decline the treaty which has been ratified due to the violation of national law.*¹⁴

From the previous point of view by Damos Damoli, it is explained that the position of a Constitutional Court is very important to decide the implementation of the international treaty, the verdict of the Constitutional Court has an important implication for the country if the verdict is cancelling the laws of ratification. Therefore, it is important to involve the Constitutional Court as a guardian of constitution when making the international treaty which is always done by the executive board of the country.

2.4 A Specific Treatment for the Laws of Ratification of an International Treaty

In solving the problem related to the laws of ratification of an international treaty, there are several efforts that can done. The first, a Judicial Preview can

¹⁴ Agusman, "Dasar Konstitusional Perjanjian Internasional Mengais Latar Belakang Dan Dinamika Pasal 11 UUD 1945." See Judicial Review Law Number 38 of 2008 on Ratification of the Association of Southeast Asian Nations against the 1945 Constitution.

be done as a solution to the problem. The following are solution to overcome the problem from the present research:

1. A specific treatment for the laws of ratification for an international treaty is needed. This treatment can be implemented by revising the law of the Republic of Indonesia No. 12 Year 2011 about the establishment of the laws and regulation; further, in relation to additional Judicial Preview's right of international treaties' bill which will be ratified by Indonesia, a normative change related to the establishment of laws and regulations needs to be in line with each other.
2. The existence of Judicial Preview which involves the Constitutional Court as a state institution whose role is to assess the norm of an international treaty before being adopted by the country through ratification. In relation to the Judicial Preview, Cecil Fabre states as follow:

Under judicial review constitutional courts are moved to act only if a claimant complains that one or several of constitutional rights have been violated. They cannot act before violated occurs, and this is sometimes to be their weakness. Under Constitutional Judicial Preview, by contrast, the constitutionality of the laws can be checked before they are implemented, which can partly pre-empt violation of rights and enable the constitutional courts to assess the law from wider point of view than that offered by individual cases they have to adjudicate.¹⁵

A Judicial Preview is a real action to handle the problem of national administration against the law of international treaty by giving new rights for the Constitutional Court of the Republic of Indonesia to conduct a Judicial Preview for an international treaty which has been signed by delegations when the treaty is still in form of bill. There are several ways in order to give the new rights to the Constitutional Court such as the amandement of the 1945 Constitution (by inserting the new authority in Article 23 of the 1945 Constitution of the State of the Republic of Indonesia), the amandement of laws of The Constitutional Court, or deciding a judicial preview as a way to implement the state administration. Those three solutions are implemented with an exception

¹⁵ Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford University Press: Clarendon Press, 2004), 173.

where the bill of the international treaty, which gets a Judicial Preview by the Constitutional Court, does not have possibility to get any Judicial Review when the bill of the international treaty has been ratified or has been in form of law after going through a judicial preview.

The concept of Judicial Preview can be done in every draft of international treaty bill. There are ways done by the Constitutional Court to do a judicial preview toward the ratification of international treaty bill, such as:

1. The addition of the rights of the Constitutional Court in the 1945 Constitution of the State of the Republic of Indonesia.
2. Giving rights to the Constitutional Court through the constitution.
3. Through the state of administration, at the request of the People's Representatives Council.

By giving an authority to do a Judicial Preview toward the bill of the international treaty, the check and balances effort can be done since a Judicial Preview of the Constitutional Court becomes a tool to balance (stabilizer) the authority to make and ratify the international treaty which has been dominated by the executive board and the legislative board. A judicial preview of an international treaty can assure the establishment of constitutional supremacy.

III. CONCLUSION

There are several matters can be concluded in the present research, the first, the root of the problem from the unrelated condition between the position of the international treaty and the laws and regulation hierarchy is the Dualism System which places the international treaty outside the legal system of the country, as the result the international treaty seems like a legal system which is excluded from the country's law. An international treaty can be adopted by a country to become a legal norm if it goes through ratification, but hierarchically as it is written in the Law of the Establishment of the Laws and Regulation, the international treaty is forced to be a law so the status of the laws of ratification can be examined by the Constitutional Court.

The second, the allegiance of a country toward the treaty which has been made in an international law, logically it is not an act to decrease the sovereignty of a country (in positive way), before the international treaty is ratified, it is necessary to do some efforts to examine the provisions of the international treaty (constitutional review) so the violation of the constitution can be avoided. If the constitutional review of the laws of ratification of an international treaty keeps repeating, it is quite difficult for Indonesia to be involved in the international relationship especially in conventions which produce international treaty. Therefore, the sovereignty cannot be overvalued considering Indonesia also has national interest in the international political relationship. Judicial preview is the logical scenario to anticipate the cancellation of the laws of ratification of international treaties. The House of Representative asks the Constitutional Court to analyse the draft of the treaty of the international laws towards the 1945 Constitution. Judicial preview gives a new perspective about review on law of international ratification in Indonesia and keeps the international political relationship.

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THE INDONESIAN CONSTITUTIONAL COURT AND THE DEMOCRATIC INSTITUTIONS IN JUDICIAL REVIEW

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Abstract

This paper focuses on the relationship between the Indonesian Constitutional Court, the legislature, and the executive in judicial review. It aims to explain the Court strategies in deciding judicial review cases related to the right to work in relation with the executive and the legislature. It appears that while constitutionally the Court is granted with a strong form of judicial review (as reflected in the finality of its decisions), it also employed other approaches in deciding cases related to the right to work. These approaches include the declaration of incompatibility, conditional decision, and the invalidation of a statute in its entirety. This paper argues that Katharine G. Young's typology of judicial review is quite helpful as an interpretive tool to understand the Court approaches when it decided cases related the right to work. The use of various approaches by the Court affected the relationship between the Court, the executive, and the legislature. This is because the executive and the legislature are the implementing agencies of the Court rulings.

Keywords: Constitutional Court, Democratic Institutions, Judicial Review

I. INTRODUCTION

1.1 Background

The introduction of the Indonesian Constitutional Court in the most recent constitutional amendments in 1999-2002 showed Indonesia's strong commitment on human rights protection, constitutionalism, and democracy. The Court's power to conduct judicial review and to settle dispute on general elections¹

¹ Article 24C (1) of "The 1945 Constitution of the Republic of Indonesia" (1945).

provides a legal avenue for the people to defend their constitutional rights. This paper will analyze the relationship of the Constitutional Court and the democratic institutions (i.e. the government and the parliament) in judicial review. Generally, it is the duty of the legislature to make laws, the duty of executive to carries of laws, and the duty of the judiciary to enforce the laws. In judicial review however, these three institutions have unique relationship. The constitutional court does not enforce the made by the legislature, it instead reviews the constitutionality of laws against the constitution. The government and the parliament are the lawmakers while the constitutional court determines the constitutionality of statutes –the product of the lawmakers. In judicial review, the constitutional court plays a significant role in rendering decisions on judicial review. However, this important role ends when it comes to the implementation. The constitutional court heavily depends on the government and the legislature in effectuating its rulings.

1.2 Question

This article aims to answer an important question: what were the Constitutional Court approaches, as mentioned in its rulings, regarding the enforcement of its decisions? It argues while the Constitution has determined the court's approach in rendering decisions, in practice the Court employed different strategies other than the one that is expressly stated in the 1945 Constitution (post 1999-2002 constitutional amendments).

The constitutional court is often called as a counter majoritarian institution.² This is because the powers of this new Court to a certain extent contradict with the will of the democratic institutions. On the one hand, the government and the parliament have the power to enact statutes; on the other hand, the Court has the power to invalidate statutes-- the product of two state institutions, who are elected by the people through general elections.

² Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politic* (London: Yale University Press, 1986), 16.

Conceptually, the duty of the legislative is to make laws, the government's duty is to carry out the laws, and the duty of the court is to enforce the laws. In judicial review, however, the Court is the primary actor. It has the final say to decide whether a statute is in line with the Constitution. This important role, however, ends when it comes to the implementation of its rulings. The Court relies on the government and the legislature in effectuating its rulings. The Court does not have the sword and the purse³ to effectuate its decisions.

Using four judicial review cases of the right to work, this paper will examine how these three institutions interact in this legal review. Cases related to the right to work are selected because these cases show the unique relation between the court, the government, and the parliament. This article will use Katharine G. Young typology of judicial review to answer the research question mentioned above. Young's typology suggests in judicial review, the court decisions will likely reflect one of the five stances. These five stances include deferential, conversational, experimental, managerial, or superior/peremptory.⁴ This paper will also use Tracey E. George and Lee Epstein "legal and extralegal" model⁵ to understand the factors that were taken into account when the Court decides cases.

This paper proceeds as follows: Part I begin with an explanation of legal and extralegal model (i.e., legal formalism and legal realism) and Young's five stance of judicial review. Part II applies the theories mentioned above to the constitutional court rulings on judicial review of cases related to the right to work. To begin with, this part selects the Constitutional Court decisions i.e. court rulings on the right to work. Then it summarizes these selected cases to understand the context of each case. These court rulings are then analyzed to answer the research question mention above. After all

³ Alexander Hamilton, "The Federalist Papers : No. 78" (The Judiciary Department From McLEAN'S Edition), accessed October 31, 2017, http://avalon.law.yale.edu/18th_century/fed78.asp.

⁴ Katharine Young, *Constituting Economic and Social Rights* (Oxford University Press: Oxford University Press, 2012), 174. See also Katharine Young, "A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review," *International Journal of Constitutional Law* 8, no. 3 (2010): 385.

⁵ Lee Epstein and Tracey George, "On the Nature of Supreme Court Decision Making," *The American Political Science Review* 86, no. 2 (1992): 323.

cases are analyzed, it then reviews all court decisions to find out whether there is a pattern or a tendency when the Court decided judicial review cases on right to work. This paper ends with a conclusion.

II. DISCUSSION

2.1 How a Court Reach a Decision: Between Legal Formalism and Legal Realism

Do factors outside the legal rules influence judges' consideration when they decide cases? Or do judges decide cases based on what the law says? If judges have a similar view about the legal rules and they do not have significant difference among them in a way they understand the law to decide a similar issue, it is likely that the court will come up with the same legal arguments in its rulings. In practice, it is not uncommon that judges provide different opinions when they decide cases. It is likely that factors outside the legal rules influence judicial decisions.

Theoretically, there are two approaches on how a court reaches a decision: legal formalism and legal realism.⁶ Legal formalism posits that a court renders its decisions based on legal rules.⁷ The court should apply the legal principles which existed before all court decisions. It is the nature of law to require a mechanical application of its rules and principles. Judges' duty is to find the law, not to make the law. They should remain faithful to the norms derived from the constitution. The important elements of legal factors include the intent of the framers, the use of neutral principles, and precedent.⁸

Legal realism states that the court considers outside legal rules such as sociological, psychological and political factors in deciding cases.⁹ It is important for judges to make a choice as the legal rules to be applied. This theory believes

⁶ Brian Leiter, "Legal Formalism and Legal Realism: What Is the Issue?," *University of Chicago Public Law & Legal Theory Working Paper* 320 (2010): 111, http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1178&context=public_law_and_legal_theory.

⁷ *Ibid.*

⁸ Richard Pacelle Jr, Brett Curry, and Marshall, *Decision Making by the Modern Supreme Court* (Cambridge: Cambridge University Press, 2011), 29.

⁹ Leiter, "Legal Formalism and Legal Realism: What Is the Issue?," 111.

that existing laws are never complete. As a result, they cannot be directly applied to very specific cases in the real world.

2.2 Katharine G. Young's Typology of Judicial Review

One of the common debates regarding judicial review is that whether a court is the appropriate institution to deal with practical problems that often requires the government involvement to resolve these problems. For instance, in settling problems which requires significant financial resources is the Court the most appropriate institution? Or is the government more suitable to decide. If a court handles such cases, there is a criticism that a court does not represent the will of the people (lack of democratic legitimacy). It also does not have the practical knowledge in dealing with such issues. On the other hand, the government does not always appropriately use its powers based on the Constitution. The government as political body often uses its powers to advance its political agenda which may not in line with the constitution. Both positions potentially create judicial supremacy or government supremacy.

To resolve the above-mentioned problems, Katharine G. Young introduces a typology of judicial review.¹⁰ Using the South African Constitutional Court experience as an example, Young defines five stances of judicial review: deferential, conversational, experimental, managerial and preemptory.¹¹ By deferential, she means that the court assumes that the decision-making authority is greater placed on the legislature. By conversational, she means the court relies on the ability to have inter-branch dialogue to resolve the determination of rights. Experimental stance assumes that the court seeks to involve the relevant stakeholders including the government in resolving the economic and social rights problems. Managerial stance means that the court assumes direct responsibility in interpreting substantive and supervising their protection with strict and detailed plans. And preemptory stance assumes that the court is superior in interpreting the rights and in commanding and controlling and immediate response. She labels these

¹⁰ Young, "A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review," 385.

¹¹ *Ibid.*

five stances “the catalytic function of judicial review” because they may enhance the relationship between the court and the legislature to achieve a right protective outcome.¹² This theory provides a new approach on how the economic and social rights should be adjudicated. This approach, in which to a certain extent require inter-branches dialogue, may address the problems of legislative supremacy and judicial supremacy. This paper will use Young’s theory as a reference to answer the research question because it provides the most comprehensive typology on how the role and the relation of the court and the legislative/the executive in judicial review cases.

2.3 Applying Theories to Practice: The Constitutional Court Approaches in Judicial Review of Laws Related Right to Work

This part will analyze four court decisions: Outsourcing case,¹³ Minimum Educational Background to work Case,¹⁴ Fair treatment in employment case,¹⁵ and the right of the workers’ wages case.¹⁶ The analysis will cover the approaches in deciding these cases and the factors that were taken into account by the Court when it decides these four judicial review cases.

2.3.1 Outsourcing Case¹⁷

In this case, 37 individuals of activists and NGOs on labor right challenged the constitutionality of Law 13/2003 on Manpower to the Court arguing that some provisions of this law limited right to association, right to strike, and right to work (outsourcing policy). This was because this law required a minimum threshold to form a worker union. It also required the employees to inform the management 7 days before they exercise their right to strike. The outsourcing policy stated in this law, the petitioners argued, did not respect the workers

¹² *Ibid.*

¹³ Judicial Review Number 13 of 2003 on Manpower, No. 012/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003).

¹⁴ Judicial Review Number 39 of 2004 on Placement and Protection of the Indonesian Migrant Workers, No. 019–020/PUU–III/2005 (The Constitutional Court of the Republic of Indonesia 2005).

¹⁵ Judicial Review Number 13 of 2003 on Manpower, The Constitutional Court of the Republic of Indonesia 2003. Decision Number 58/PUU–IX/2011.

¹⁶ Judicial Review Number 13 of 2003 on Manpower against the 1945 Constitution, No. 67/PUU–XI/2013 (The Constitutional Court of the Republic of Indonesia 2003).

¹⁷ Judicial Review Number 13 of 2003 on Manpower, The Constitutional Court of the Republic of Indonesia 2003. Decision Number 12/PUU–I/2003.

right to have job security as this law allowed to company to dismiss the workers once the projects completed.

In a split decision, the Court ruled that the minimum threshold to form an association and the requirement to inform the management 7 days before the employee's strike was unconstitutional, but the provisions on outsourcing were constitutional.¹⁸ In this regard, the Court stated that outsourcing in this law did not reflect a modern form of slavery. Articles 64-66 of this law sufficiently guaranteed the right of workers. Two Justices¹⁹ dissented. They were of the opinion that this law did not sufficiently guarantee the right of workers, as reflected in provisions concerning: outsourcing, limiting right to form a union, and limiting the right to strike. These articles, the dissenters stated, lead to the uncertainty of the workers' future. It also degraded workers dignity.

In this case, the majority applied legal factors. They referred to relevant provisions of the constitution to determine the constitutionality of the provisions of the law. Similarly, the dissenters also adopted the same rules. But they ended up with a very different conclusion. The dissenters believed that outsourcing did not protect the right of the workers. It created uncertainty to the workers' future.

The court ruling, in this case, reflects a strong form of judicial review in the sense that the Court declared the provisions of the law were inconsistent with the Constitution and invalidated these provisions.²⁰ In Young's typology, this court decision largely reflects a peremptory stance. A peremptory stance is closer to judicial review that either strikes down or upholds the legislation.²¹ It involves a thorough examination of the government legislation. If the Court finds a constitutional infringement, it overturns the legislation. Similarly, in this case, the Court rigorously scrutinized the content of Manpower Law, particularly regarding whether the Law was consistent with the Constitution. It found a

¹⁸ *Ibid.*, 115.

¹⁹ The Constitutional Court of the Republic of Indonesia, "Sang Penggembala: Perjalanan Hidup Dan Pemikiran Hukum A. Mukthie Fadjar (Hakim Konstitusi Periode 2003-2008)," (Sekretariat Jenderal dan Kepaniteraan MKRI, 2008), 55-63.

²⁰ Mark Tushnet, "New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries," *Wake Forest Law Review* 38 (2003): 817.

²¹ Young, "A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review," 385.

constitutional infringement, and invalidated the statute.²² This Court decision, however, did not give any interpretation of the law or give guidance for the lawmakers to keep the law constitutional.

2.3.2 Minimum Educational Background to Work Case²³

The petitioners, three companies focusing migrant workers, challenged the constitutionality of article 35 d of the Law 39/2004²⁴ which requires a person graduated from middle school to be eligible to work as a migrant worker who would work for individuals –not for companies. They argued that this Article violated the right to work as guaranteed by Article 27 (2) of the Constitution. The Government argued that setting the minimum educational background for migrant workers aims to protect the interest of migrant workers such as preventing children exploitation and improving the quality of migrant workers' educational background.²⁵ Concerning the minimum age to work as migrant workers, the government argued that working overseas needs skills, physical and emotional readiness maturity that may be achieved if they reach 21 years old.²⁶ The Court agreed with the government's' argument regarding the minimum age requirement to be migrant workers. This limitation was important to protect the migrant worker's interests.²⁷ The Court, however, did not agree on the minimum educational background requirement. In a split decision, it declared that setting the minimum educational background to be a migrant worker beyond the requirement determined by specific jobs did not have a solid basis. The Court ruled that Article 35 d was inconsistent with the Constitution. As a result, it did not legally binding.

²² Judicial Review Number 13 of 2003 on Manpower against the 1945 Constitution, No. 001/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003). Judicial Review Number 13 of 2003 on Manpower against the 1945 Constitution, No. 021/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003). Judicial Review Number 13 of 2003 on Manpower against the 1945 Constitution, No. 022/PUU-1/2003 (The Constitutional Court of the Republic of Indonesia 2003).

²³ Judicial Review Number 39 of 2004 on Placement and Protection of the Indonesian Migrant Workers. Decision No. 019-020/PUU-III/2005. See also The Constitutional Court of the Republic of Indonesia, "Catatan Hakim Konstitusi Soedarsono: Putusan Mahkamah Konstitusi Tanpa Mufakat Bulat" (Sekretariat Jenderal dan Kepaniteraan MKRI, 2008), 299.

²⁴ Indonesian Law Number 39 of 2004 on the Placement and Protection of the Indonesian Migrant Workers" (2004).

²⁵ Judicial Review Number 39 of 2004 on Placement and Protection of the Indonesian Migrant Workers at 87. Decision No. 019-020/PUU-III/2005.

²⁶ *Ibid.*, 59-60.

²⁷ *Ibid.*, 108.

Two Justices dissented²⁸. Justice Natabaya questioned the legal standing of the petitioners. The petitioners did not experience constitutional damage because of Article 35 d. For him, the potential petitioners, in this case, were individuals who could not be migrant workers because they did not graduate from middle school. For this reason, he argued, this petition should be denied.

Justice Achmad Roestandhi was of the opinion that setting a minimum education requirement was the lawmakers' domain to decide – not the Court.²⁹ The government and the legislature had some alternatives to determine the policy concerning the placement of the Indonesian migrant workers. The lawmakers had chosen that to be eligible as a migrant worker a person should graduate from middle school. This policy could not be seen as a form of discrimination because this requirement applied to everyone. The different treatment between those who were middle school graduates and those who were not reflected justice. It treated two different things differently. Justice Achmad Roestandhi believed that the Law, in this case, acts as a tool of social engineering. This provision would motivate those who wanted to be migrant workers to finish their middle school education.³⁰

In this case, the Court ruling largely reflected a peremptory stance. Young's peremptory review assumed that the Court would overturn or sustain legislation if it found legislation was consistent or inconsistent with the Constitution. Similarly, in this case, the Court found the Migrant Worker Protection Law was inconsistent with the Constitution. As a result, the Court overturned the provisions of this Law. One of the dissenters, Justice Achmad Roestandhi, believed that the issue in this petition belongs to the lawmakers to decide. As a democratically elected body, the lawmaker was the most proper institution to decide matters that related to the interests of the people. Justice Roestandhi's approach appeared to be more restrained or deferential. He did not want the court to be involved in matters that belonged to other branches governments i.e. the lawmakers.

²⁸ Justice HAS Natabaya and Justice Achmad Roestandhi.

²⁹ Judicial Review Number 39 of 2004 on Placement and Protection of the Indonesian Migrant Workers at 116–17. Decision No. 019-020/PUU-III/2005.

³⁰ *Ibid.*, 116.

The Court should be committed to its judicial function and is not involved in lawmaking function.

A year later, two petitions³¹ submitted to the Court by nine individuals who could not work overseas as migrant workers because they were under 21 years old. The petitioners challenged the constitutionality of Article 31 (a) of Law 39/2004 on Manpower which set 21 years old as the minimum age to work overseas as migrant workers.³² They argued that this Article was inconsistent with Article 27 (2) and 28 D (2) of the Constitution which guarantee a right to work for every citizen and be treated fairly and equally at work.

In its consideration, the Court agreed that right to work was part of economic, social and cultural rights. It was considered as a positive right which needs government active involvement in the realization of this right. The Court referred to its previous decision (Decision 019-020/PUU-III/2005) which stated that the age requirement to work is the proper policy to avoid underage labor. The Court also referred to Article 2 of the ICCPR to explain the term discrimination. The Court found that Article 2 did not explicitly mention age as a factor that could lead to discrimination.³³ Further, the Court took into consideration the European Council Directive³⁴ to explain that different treatment on grounds of age did not constitute discrimination if they are objectively and reasonably justified by a legitimate aim. This includes the fixing of minimum conditions of age. The Court in a 5-4 decision ruled that Article 35 (a) was consistent with the Constitution.

Four justices dissented. They believed that Article 35 (a) of Law on Manpower was discriminatory and was inconsistent with Article 27 and Article 28 of the Constitution. Justice Laica Marzuki criticized the government's argument which concluded that workers aged 21 years old and up would be less possibility to

³¹ As reflected in Judicial Review Number 39 of 2004 on Placement and Protection of the Indonesian Migrant Workers against the 1945 Constitution, No. 028-029/PUU-IV/2006 (The Constitutional Court of the Republic of Indonesia 2006). Decision No. 028-029/PUU-IV/2006. See also "The Constitutional Court of the Republic of Indonesia, 'Ikhtisar Putusan Mahkamah Konstitusi 2003-2008'" (Sekretariat Jenderal dan Kepaniteraan MKRI, 2008), 671-74.

³² Especially those who would work for individuals –not for companies.

³³ Article 2 ICCPR "Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subjects to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³⁴ The European Council Directive 2007/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

be sexually harassed and they were more mature.³⁵ There was no evidence that confirmed this argument. In addition, national laws i.e. Law on Manpower and Law on Children Protection defines children as individuals under 18 years old. This means 18 years old should be the bottom line to work --not 21 years old.

Justice Abdul Mukthie Fadjar in a relatively similar ground stated that Article 35 a violated the right to work which was guaranteed by the constitution. There was no convincing evidence that workers aged 21 years old would be less likely to be sexually harassed or they were more mature.

Justice Maruarar Siahaan stated that the right to work was closely related to right to life. A person could not live without working. By working, an individual could fulfill his basic needs for life. In setting his argument, he referred to the Indian Supreme Court decision which connects right to work with right to livelihood.³⁶ He concluded the age limitation was a violation of right to work which was part of right to life – a nonderogable right which was constitutionally guaranteed.³⁷

Justice Harjono stated that the ILO Convention which had been ratified by Indonesian government set 18 years old as the minimum age to work.³⁸ The 1945 Constitution guarantees right to work which closely related to right to life (art. 28A). In addition, every person has the right to work and to be treated equally at work (art. 28D (2)). Every individual is also free to choose jobs, residence to live in Indonesian and leave it and has the right to return (art. 28E (1)). Therefore, the minimum age requirement as stated in Article 35 a could disadvantage the constitutional right of individuals who had not reached 21 to work as migrant workers and to choose a residence and to return as guaranteed by the Constitution.

³⁵ Judicial Review Number 13 of 2003 on Manpower, No. 028-029/PUU-IV/2006 (the Constitutional Court of the Republic of Indonesia 2006).

³⁶ *Ibid.*, 69. Decision No. 028-029/PUU-IV/2006. See also Maruarar Siahaan, *Undang-Undang Dasar 1945: Konstitusi Yang Hidup* (Jakarta: Sekretariat Jenderal dan Kepaniteraan MKRI, 2008), 195–99.

³⁷ Judicial Review Number 13 of 2003 on Manpower, the Constitutional Court of the Republic of Indonesia 2006 at 70–71. Decision No. 028-029/PUU-IV/2006.

³⁸ *Ibid.*, 72. Decision No. 028-029/PUU-IV/2006. See also The Constitutional Court of the Republic of Indonesia, "Konstitusi Sebagai Rumah Bangsa: Pemikiran Hukum Dr. Harjono, S.H., M.C.L. Wakil Ketua MK" (Sekretariat Jenderal dan Kepaniteraan MKRI, 2008), 254.

The majority utilized legal approach by referring to the ICCPR and a European Directive in rendering its decision. It did not refer to specific national legislation because the majority argued that there was no common standard regarding the age among statutes. In addition, it also cited its previous decision in a similar case which also clearly reflected a legal approach.

The dissenters used a similar approach. However, they used this approach quite differently. While the majority used international covenants as their reference, the dissenters consulted with an international covenant (the ILO), national legislation, and the provisions of the Constitution. One Justice cited the Indian Supreme Court decision to support his argument.

The court ruling showed the Court's adoption of peremptory stance. Peremptory review assumes that the court would invalidate or sustain a law once the court found that the law was consistent or inconsistent with the constitution. Likewise, in this case, the Court invalidated provisions which were inconsistent with the Constitution. By rendering this decision, the Court essentially controlled the realization this right. This court ruling did not provide an opportunity for the other branches of government to discuss with the court regarding the realization of these rights. In other words, this ruling did not consider the likelihood of a favorable legislative or executive response.

2.3.3 Fair Treatment in Employment Case³⁹

This petition was submitted by a worker who did not receive monthly wage on time for more than three months. When she filed this case to the industrial disputes settlement body asking for work dismissal, the company then paid her on time. As a result, the petition could not be followed up. This situation, she believed, violated her right to get fair and proper treatment in employment.

She then filed a petition to the Constitutional Court challenging the constitutionality of Article 169 (1) c of Law 13/2003 on Manpower which stated that worker(s) could file a work dismissal to industrial dispute settlement body

³⁹ Judicial Review Number 13 of 2003 on Manpower, No. 58/PUU-IX/2011 (the Constitutional Court of the Republic of Indonesia 2011).

if the employer did not pay the workers on time for three consecutive months or more. This provision, she argued, was inconsistent with Article 28D (1) (2) which stipulated that every individual has the right of recognition, guarantees, protection and legal certainty, and equal treatment before the law. Every person has the right to work and to receive fair and proper recompense and treatment in employment.

In its 26 pages decision, the Court was of the opinion that Article 169 (1) c created legal uncertainty and violate workers' constitutional right to receive a just and decent recompense in employment as mentioned in Article 28 (2) the 1945 Constitution. The Court unanimously declared that this provision was inconsistent with the Constitutions if it was not read as follow workers/laborers could ask for a work dismissal to the industrial disputes settlement body if the employer did not pay their salary on time for three consecutive months or more, even though the employer then pay their salary on time after that.

In this case, the Court used the petitioner's experience as the basis to decide the case. This approach was not commonly used by the Court. In most cases, it reviewed the provision of the law against the constitution, –not a concrete case against the constitution as reflected in this case. The Court seems to apply a concrete judicial review rather than an abstract judicial review which the Court usually did. In rendering the decision, the Court did not automatically invalidate the provision of the law. It placed a condition so that the article remained constitutional.⁴⁰ The provision of the law was constitutional only if it was interpreted in accordance with the court's interpretation. While the court did not automatically invalidate the provision of the law, its interpretation has changed its original meaning of the law.

The Court's declaration of incompatibility largely resembles a conversational stance or an experimental stance. The court decision in this case did not automatically invalidate a statute. It instead provided an opportunity for the

⁴⁰Regarding conditional decision can be seen at The Constitutional Court of the Republic of Indonesia, "Menegakkan Tiang Konstitusi: Memoir Lima Tahun Kepemimpinan Prof. Dr. Jimly Asshiddiqie, S.H., Di Mahkamah Konstitusi" (Sekretariat Jenderal dan Kepaniteraan MKRI, 2008), 175.

legislative, the executive, and the government to discuss the implementation of the court decision.

2.3.4 The Right of the Workers' Wages Case⁴¹

A year later, a similar petition was filed by an ex-worker who challenged the constitutionality of Article 96 of Law 13/2003 which stated that the demand of workers' wage payment would be expired after it exceeded two years.⁴² The petitioner was an ex-security officer in a company who was dismissed from his jobs. After three years left his jobs, he asked the company to pay his remaining wage. The Company argued it could not do so because Article 96 of Law on Manpower limit the payment period for two years.⁴³ This provision, the petitioner argued, was in contradiction with Article 28D (1) (2) and 28I (2) of the Constitution which guarantee right to work and receive recompense, equality, and nondiscriminatory treatment.

The Court agreed with the petitioner's argument and ruled that Article 96 disadvantaged the worker's constitutional right to receive his remaining pay. The Court was of the opinion that there should not be a time limit to do so even for the sake of legal certainty because it was the right of the worker to receive payment.⁴⁴ The Court ruled that Article 96 was inconsistent with the 1945 Constitution and it was not legally binding.

One justice⁴⁵dissented. He was of the opinion that time limit was important in legal relation. It created certainty for both parties the when a legal relation would begin and end. Without time limit, there would be no certainty. Instead of granting the petition, Justice Zoelva suggested that the majority grant the petition with certain conditions (conditional decision) such as Article 96 applied to employers who had good faith to fulfill its obligation but it did not apply to the employer who did not have good faith to pay the workers' wage.

⁴¹ Judicial Review Number 13 of 2003 on Manpower against the 1945 Constitution, The Constitutional Court of the Republic of Indonesia 2003 at 67.

⁴² Judicial Review Number 13 of 2003 on Manpower against the 1945 Constitution of the Republic of Indonesia, No. 100/PUU-X/2012 (the Constitutional Court of the Republic of Indonesia 2011). Decision No. 100/PUU-X/2012.

⁴³ *Ibid.*, 32–33.

⁴⁴ *Ibid.*, 62.

⁴⁵ Justice Hamdan Zoelva.

The court ruling, in this case, nullified Article 96 of Law on Manpower. The Court had the final say in determining the constitutionality of the provision of the law. In Young's typology, the court's ruling resembled a peremptory stance. A peremptory stance assumes that the court controls the realization of economic and social rights. The court decision invites either invalidate the law or uphold the law. This decision did not allow the court and the lawmakers to discuss the realization of economic and social right.

In 2013, nine individuals who worked in Pertamina (State-owned Oil Company) filed a petition to the court arguing that Article 95 (4) of Law 13/2003 on Manpower was inconsistent with Article 28D (1) and (2) of the Constitution.⁴⁶ Article 95 (4) stated that in the event of a company went bankrupt or liquidated in accordance with the existing legislation, the payment of workers' wages and their other rights should be paid in priority. The petitioners argued the phrase "should be paid in priority" violated their rights to work and get a reward and equal treatment in industrial relation as guaranteed by the Constitution. They argued that this article was unclear and discriminatory. In practice, worker's wage was paid after the company paid the state rights and its creditors. The petitioners argued this leads to the unclear meaning of Article 95 (4).

In deciding this case, the Court acknowledged its previous decision 18/PUU-VI/2008 which confirmed that the worker's wage would be paid after the company paid its creditors. In this case, the court took a different position from its previous ruling. The Court framed that the workers' right of payment closely related to right to life which cannot be put aside in any circumstances. Therefore, the government should protect and fulfill this right. The Court differentiated the right of workers and the right of workers to get payment. The right of the workers to get payment should become the top priority. However, it does not apply to the other rights of the workers. The Court partially granted the petition. It declared that Article 95 (4) of Law 13/2003 was inconsistent with the Constitution if it was not interpreted that workers' wage should be paid before

⁴⁶ Judicial Review Number 13 of 2003 on Manpower against the 1945 Constitution, The Constitutional Court of the Republic of Indonesia 2003. Decision No. 67/PUU-XI/2013.

the company paid the creditors. And the payment of the workers' rights can be made after the company paid the creditors.

In this case, the Court adopted strong form of judicial review by declaring the provision of the law unconstitutional with a specific condition. The Court further gave specific meaning to this provision which was different from the intention of the lawmakers as reflected in the provision of the law. It appeared that the court did not only carry out its judicial function by declaring the provision of the law was unconstitutional, but also changed the meaning of the law which was essentially the function of the legislature.⁴⁷ The court's ruling resembled a peremptory stance. A peremptory stance assumes that the court controls the realization of economic and social rights. The court decision invites either invalidate the law or uphold the law. This decision did not allow the court and the lawmakers to discuss the realization of economic and social right.

III. CONCLUSION

This paper has explained the Constitutional Court approaches in deciding judicial review cases related to the right to work. It appears that the Court employs several different approaches other than the one that is constitutionally guaranteed ranging from the Court declaration of null and void, suspension of invalidity, conditional decision, to the invalidation of the law in its entirety. In its early operation, the Court tend to adopt strong form of judicial review. The court seemed move from a strong form judicial review to conditional decisions which can be interpreted as weak form of judicial review if we see that the court maintain the constitutionality of the law. However, it can be seen the adoption of strong form of judicial review if we see the court decision guide the legislature in determining the content of the law.

Katharine G. Young typology of judicial review can be a useful interpretative tool to understand the Court approach in deciding judicial review cases. The Court decision which maintain the validity of statutes even though these statutes

⁴⁷Mark Tushnet and Rosalind Dixon, "Weak Form Review and Its Constitutional Relatives: An Asian Perspective in Rosalind Dixon and Tim Ginsburg," in *Comparative Constitutional Law in Asia* (Massachusetts: Edward Elgar Publishing, 2014), 103.

potentially were not in line with the Constitution showed the court's adoption of conversational stance. The court decisions which provided guidance for the government on how to follow up the court rulings reflected the court adoption of managerial stance. It managed how the government should appropriately follow up the court rulings.

In its early operation, the court tended to adopt peremptory of judicial review and started introducing conversational stance of judicial review. The Court then introduced conditionally constitutional decisions and conditionally unconstitutional decisions. These new approaches had the character of conversational or experimental of judicial review because it maintained the constitutionality of the law even though the court declared the law was not in line with the constitution. It could be also identified as managerial stance of judicial review because it directed the government with its guiding principles on how to follow up the court rulings. Whether the court utilized conversational, experimental, managerial, or peremptory judicial review were not always in line with the types of economic social rights cases the court dealt with.

This paper also has analyzed factors that were taken into account by the Constitutional Court when it decided judicial review cases related to right to work. It appears that the Constitutional Court Justices considered both legal and extra-legal factors when they decided judicial review on right to work cases. There was no consistent pattern when the court used legal factors or extralegal factors.

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A COMMENTARY THE INADMISSIBILITY OF NON- INDONESIAN CITIZENS IN JUDICIAL REVIEW BEFORE THE INDONESIAN CONSTITUTIONAL COURT

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Abstract

The Constitutional Court of Indonesia, in its judgment No 2-3/PUU—V/2007, ruled that non-Indonesian citizens have no legal standing to file judicial review before the Court. In determining the legal standing, the Court rejected applicants' constitutional loss which should actually serve as the substantial examination in judicial review but rather addressed this question on the basis of applicant's citizenship. This inadmissibility ruling, however, raises question on what legal standing actually mean in the context of judicial review. This paper reviews the Court's consideration in determining legal standing status and examines future legal consequences of such reasoning. By revisiting the substance of legal standing and judicial review derived from the 1945 Constitution, relevant Statutes, Court's practices and case law, as well as the dissenting opinion of the judges in this case, it is found that the Court overruled the substance to procedural examination on the basis of citizenship and therefore failed to address the actual question of legal standing. This paper concludes that the Court's reasoning has abandoned the constitutional loss as the very substance of legal standing and to which amounts to immunity of legal standing provision from a judicial review. Consequently, non-Indonesian citizens will never be recognized in judicial review mechanism before the Indonesian Constitutional Court.

Keywords: Non-Indonesian Citizens, Judicial Review, Immunity

I. INTRODUCTION

On the 23rd of October 2007, the Indonesian Constitution Court (hereinafter “the Court”) had rendered a decision upon judicial review submission registered under the Judgment No 2-3/PUU—V/2007. It was then delivered a week later in a trial hearing on Tuesday, dated on the 30th of October 2007. The substance of the case questioned the legality of death penalty that was in force under article 80 (1) (a); article 80 (2) (a); article 80 (3) (a); article 81 (3) (a); article 82 (1) (a); article 82 (2) (a); article 82 (3) (a) of the Indonesian Statute No 22 Year 1997 on Narcotics towards the 1945 Constitution of the Republic of Indonesia.¹ Two Indonesians and three Australian citizens filed for judicial review before the Constitutional Court, challenging the legality of death penalty in force under the Narcotics Law. The first two Indonesians were Edith Yunita Sianturi and Rani Andriani, while the three Australians were Myuran Sukumaran, Andrew Chan and Scott Anthony Rush.² All of them were convicted by the public court for capital punishment under the aforementioned law. Although the merit of their judicial review was rejected by the Constitutional Court, however, this case is considered as one of the most influential precedents for the Constitutional Court in determining forthcoming cases.³ This became the first case before the Constitutional Court filed by non-Indonesian citizens.⁴

The judgment declared that the case was admissible before the Constitutional Court but for the Indonesian applicants. They were granted to file judicial review under article 51 (1) (a) of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court stating that the applicants shall be Indonesian citizens. There were not much questions with regards to the application of this article for

¹ Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution, No. 2-3/PUU—V/2007 (The Constitutional Court of the Republic of Indonesia 2007).

² Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 1–2.

³ See, *inter alia*, Judicial Review Number 1 of 1979 on Extradition, No. 73/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia 2010). See Judicial Review Number 24 of 2003 on the Constitutional Court as it has been amended into Law Number 8 of 2011 on the Amendment of Law Number 24 of 2003 on the Constitutional Court against the 1945 Constitution, No. 137/PUU-XII/2014 (The Constitutional Court of the Republic of Indonesia 2014).

⁴ In 2011, four years later after the Judgment No 2-3/PUU—V/2007 delivered, the Constitution Court has unanimously rendered a Judgment No 73/PUU-VIII/2010 filed also by non-Indonesian citizen, a Romanian, Popa Nicolae, concerning on his arbitrary detention of article 34 (b), article 35 (1), and article 39 (4) of the Indonesian Statute No 1 Year 1979 on Extradition and article 51 (1) (a) the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court. The Constitutional Court declared the case inadmissible as the applicant had no legal standing to file for such judicial review.

the Indonesian citizens. The Court then examined the merit of judicial review for those Indonesian applicants and found to reject the case. On the other hand the Court declared that the case was inadmissible for the three Australian citizens. The Court found that they were not entitled to submit judicial review under the same article. This decision separated the Chambers' opinion into six to three in terms of applicants' legal standing.⁵

1.1 The Applicants Submissions

The Australian citizens proclaimed that article 51 (1) (a) of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court was not in compliance with the Indonesian Constitutional Court 1945.⁶ They further argued that they should have standing before the Court on the basis of these eight following grounds: *i)* the applicable regime of human rights law in the 1945 Constitution; *ii)* non-discrimination principle; *iii)* and the equality before the law as afforded by the 1945 Constitution; *iv)* the definition of constitutional loss; *v)* due process of law; *vi)* the threshold *vii)* the practice of other constitutional courts; *viii)* and the gravity of the rights and sentence.

First of all, they argued that the wording of "each person" adopted in the 1945 Constitution shall refer to human rights law regime, leaving the concept of citizenship and nationality.⁷ They claimed that article 51 (1) (a) which differs on the basis of citizenship was not in accordance with the 1945 Constitution. The 1945 Constitution provided that each person is subjected for human rights protection as long as he/she lives within Indonesia territory. This was confirmed by Article 26 (2) of the 1945 Constitution when defining resident as both Indonesian citizens and non-Indonesians who are within Indonesia territory, regardless its citizenship or nationality.⁸

Another point was raised relating to the principle of non-discrimination before the law. They made reference to article 28D (1) of the 1945 Constitution, stating that each person is entitled to be equally treated before the law without

⁵ *Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 432.*

⁶ *Ibid.*, 15.

⁷ *Ibid.*

⁸ *Ibid.*, 16.

any discrimination. Consequently, the constitutional loss defined in article 51 (1) may occur to either Indonesian citizens or non-Indonesian citizens,⁹ or in other words to each person regardless its citizenship or nationality as long as he/she is afforded constitutional rights under the 1945 Constitution.¹⁰

They further recalled the applicable hierarchy in the Indonesian legal system, which placed statutes as the manifestation of the 1945 Constitution. Subsequently, the protection of rights set forth under the statutes rooted from the 1945 Constitution shall also apply to both Indonesian and non-Indonesian citizens. There would be then inconsistency and contradiction to argue that the rights afforded by the 1945 Constitution apply exclusively to Indonesian citizens. If it is true that the 1945 Constitution and the rights set forth therein are reserved exclusively to Indonesian citizens, then statutes, that are the manifestation of the 1945 Constitution, shall be reserved merely for its citizens and not be applicable to non-Indonesian citizens. In this sense, they (Australian citizens) simply could not be prosecuted under the concerned statute.¹¹ Moreover, instead of “each person”, the term of “each citizen” should have been adopted in the 1945 Constitution if it is intended and applied exclusively for Indonesian citizens.¹²

They also reiterated that under article 24 (1) and 24 (1) (a) of the 1945 Constitution, judicial power is mandated to the Supreme Court and the Constitutional Court. Referring to those aforementioned articles, due process of law in seeking justice may also stand before the Supreme Court and the Constitutional Court of Indonesia. It goes saying to prove that each person, regardless its citizenship and nationality, is entitled to seek justice by means legal proceedings before Supreme Court and/or the Constitutional Court. It constituted breach of constitutional right when the Constitutional Court rejected judicial review by non-Indonesian citizens on the basis of citizenship or nationality.

They proposed certain conditions to what extent non-Indonesian citizens may exercise for judicial review. They argued that judicial review should be

⁹ *Ibid.*, 16–18.

¹⁰ *Ibid.*, 18–19.

¹¹ *Ibid.*, 18.

¹² *Ibid.*

granted to non-Indonesian citizens, when non-Indonesian citizens become the subject of a statute and when the statutes concern with the fundamental rights that inherent to each individual regardless its citizenship and nationality.¹³ Providing the practice of Germany, Mongolia and Australia constitutional court which grant legal standing for non-nationals to file for judicial review before their constitutional courts, the applicants sought for similar approach to be adopted by the Court in their case.¹⁴ Lastly, the gravity of the sentence itself was the self-evident and argued as one of the grounds for the legal standing of the applicants. The verdict of capital punishment had shown that they (Australian citizens) were having interest for such judicial review in this case.¹⁵

1.2 The Chamber's Opinion

In its judgment No 2-3/PUU—V/2007, the Chamber recalled to article 51 (1) of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court in addressing the question of legal standing of the applicants. In enforcing this article, the Court referred to its judgment No 006/PUU-III/2005 concerning the conditions of which the claim for constitutional loss could be exercised.¹⁶ The Court ruled that in order to establish constitutional loss, the applicants shall satisfy these five following requirements cumulatively.¹⁷ First, that the applicant possesses the constitutional rights and/or authorities as proscribed under the 1945 Constitution. Second, the applicant considers his or her constitutional rights and/or authorities have been deprived by the challenged statute. Third, such constitutional deprivation or loss should be specific and actual or imminently potential, on the basis of logical order is likely to occur. Fourth, there should be a *causal verband* or causality between the loss and the enactment of the concerned statute. Fifth, there should be the possibility when a favorable court decision is rendered, the constitutional loss would not occur or repeated.

¹³ *Ibid.*, 19–20.

¹⁴ *Ibid.*, 20.

¹⁵ *Ibid.*, 95.

¹⁶ *Ibid.*, 367. See Judicial Review Number 32 of 2004 on Regional Government against the 1945 Constitution, No. 006/PUU-III/2005 (The Constitutional Court 2005).

¹⁷ *Ibid.* See Judicial Review Number 56 Prp of 1960 on the Determination of Agricultural Land Area against the 1945 Constitution, No. 11/PUU-V/2007 (The Constitutional Court of the Republic of Indonesia 2007). Those aforementioned requirements are cumulative; meaning that all of those five conditions must be fulfilled in establishing constitutional loss.

The Court found that the two Indonesian citizens possessed the constitutional rights proscribed under article 28A and 28I (1) of the 1945 Indonesian Constitution regarding the right to life.¹⁸ The Chamber believed that the rights derived from those aforementioned articles are non-derogable rights. It proclaimed that the enactment of the death penalty under the Law of Narcotics could possibly be considered as an actual loss to them.¹⁹ The Chamber also found that these two Indonesian citizens have satisfied the requirement of article 51 (1), specifically in point (a) which states that the applicant shall be Indonesian citizen. In this regards, the Court granted legal standing for these two Indonesian citizens and declared their submission was admissible for judicial review before the Constitution Court.

However, the Court did not grant legal standing when examining the applicants of the three Australian citizens. The Court held its finding on these three following grounds: i) that article 51 (1) *expressis verbis* or clearly states that grants solely for Indonesian citizens to file for the judicial review before the Constitutional Court; ii) the inadmissibility of non-Indonesian citizens to examine the laws does not necessarily means that they do not have legal protection under the principle of due process of law, in this case they could resort for appeal, cassation and review before the supreme court; iii) the wording of each person and group of people with similar interest in the official explanation of this provision must be interpreted in connection with the individual Indonesian citizens, thus, the applicants were not qualified under article 51 (1). As they had no legal standing before the Constitutional Court,²⁰ the case was then declared inadmissible.

1.3 The Dissenting Opinions

With regards to the merit of the case on the legality of the death penalty, the Judges' opinions have been divided into five to four. There were four Judges submitted their dissenting opinions, where three of them addressed their dissenting views with regards to the legal standing of the applicants.

¹⁸ Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 367.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 367–68.

One of the dissenting judges, Justice Harjono, argued that the wording of the constitutional rights as proscribed under article 28A to 28J in the Indonesian Constitution 1945 adopted the term of “each person”. This adoption implies that the recognition of the rights is entitled to individual, including to non-Indonesian citizens, regardless their citizenships and nationalities.²¹ Nevertheless, this should not mean that non-Indonesian citizens *vis a vis* possess the same treatment and have the same rights²². He argued that there must be certain limitations on the application. Under the Indonesian legal system, he claimed, the laws could be differentiated into these three following types. First, the laws that are intended exclusively to Indonesian citizens. Non-Indonesian citizens would simply have no legal standing to challenge the first laws. Second, the laws are designated merely to non-Indonesian citizens. These laws may reflect as sovereignty and supremacy of a state, including its policies towards non-Indonesian citizens. They might be granted legal standing to challenge on this second laws, but it would be likely unsuccessful because it relates to state sovereignty and supremacy. And third, the laws that are implemented for both Indonesian citizens and non-Indonesian citizens. When non-Indonesian citizens challenge this third type of laws, it will rule both Indonesian citizens and non-Indonesian citizens, and the result of such examination would be concrete and genuinely affected both parties.²³ He acknowledged that the constitutional court judgment is *erga omnes* in nature. Once the Court has declared that a law does not bind legally, the Court ruling shall not apply exclusively for the applicants whom their rights have been deprived, but it shall apply to all Indonesian citizens. Therefore, when there is an application before the Constitutional Court filed by non-Indonesian citizens to examine the substance of the laws that might impact to the Indonesian citizens, they should be then granted the legal standing.²⁴

He further argued that the effect of such inadmissibility would delay the legality of law because it had to wait for qualified parties, by means Indonesian

²¹ Dissenting Opinion of Justice Harjanto in Constitutional Court Judgment on the Legality of Death Penalty under the Law of Narcotics (n 1) at 434

²² *Ibid.*, 434

²³ *Ibid.*, 434-435

²⁴ *Ibid.*, 435

citizens, who have the interest to file such examination.²⁵ Instead of annulling the application of article 51 (1), he suggested the Court to adopt a broader view to the application of this article²⁶, granting the standing to non-Indonesian citizens. Such argumentation showed genuine spirit of the original notion of judicial review.

Justice HM. Laica Marzuki, in his dissenting opinion, argued that if one strictly referred to article 51 (1) (a) then the right for judicial review would not be granted to non-Indonesian citizens. He noted, however, when the substance of the judicial review is in connection with the right to life of any individual proscribed under article 28A and 28I in the Indonesian Constitution 1945 then article 51 (1) (a) could be overruled.²⁷ He reiterated that article 51 (1) (a) could not prevent the examination because it was a question of life and death concerning the right to life as an absolute right and inherent dignity of human being. He then contended that article 28D (1) of the 1945 Constitution ensures equal treatment for each person before the law. The meaning of “each person” article 28D (1) of the 1945 Constitution shall not exclusively refer to the concept citizen right; indeed, it is equal right for each person who lives within Indonesia territory.²⁸ He further provided example of the constitution judgments on legal standing filed by non-Germany citizens and non-Mongolia citizens, and even stateless individual who illegally lived within the territory of Mongolia, were declared admissible by Germany Constitution Court and Mongolian Constitutional Court respectively.²⁹

A similar interpretation adopted by Justice Maruarar Siahaan in examining the request of judicial review by three Australian citizens. He held that the adoption of human rights into the Indonesian Constitution 1945 as the basic norm implies that human rights serve as the threshold in examining legality of laws towards the constitution. In so doing, the constitutional rights afforded

²⁵ *Ibid.*, 435-436

²⁶ *Ibid.*

²⁷ Dissenting Opinion of Justice HM. Laica Marzuki in Constitutional Court Judgment on the Legality of Death Penalty under the Law of Narcotics (n 1) at 442-443.

²⁸ *Ibid.*, 443

²⁹ *Ibid.*

by article 51 (1) (a) shall not solely apply nationally but also universally.³⁰ He recalled article 28 I (2) of the Indonesian Constitution 1945 which ensures non-discriminative treatment to each person.

Furthermore, the ratification of the International Covenant on Civil and Political Rights (ICCPR) by the Republic of Indonesia on the 28th of October 2005 as embodied under the Indonesian Statute No 12 Year 2005 shall point human rights to serve as one of decisive factors in judicial review. Consequently, legal standing on this case shall be expanded to non-Indonesian citizens when the substance of judicial review related to fundamental rights.³¹

However, he then provided for limitation of under what circumstance non-Indonesian citizens shall not have rights to question state policies concerning on citizenship. He referred to the Constitution of the Republic India which differentiates the Fundamental Rights into these two: exclusively applicable for Indian citizens and for each person including non-Indian citizens.³² This inferred that notwithstanding the wording of “each person” is hold under the Indonesian Constitution 1945, the rights possessed between Indonesian citizens and non-Indonesian citizens should be also easily differentiated. For instance, *inter alia*, in the political rights, the rights for election and to be elected that are embodied in the Indonesian Constitution 1945 shall apply exclusively for Indonesian citizens, and certainly not for non-Indonesian citizens. The court practices would assist to differentiate between the fundamental rights entitled for Indonesian citizens and the fundamental rights for non-Indonesian citizens that are guaranteed by the Indonesian legal system and its proceedings.³³ Lastly, he emphasized that unsystematic law or its disorder tends to occur within legal system because the laws are made in different times. It is then left to the judges to interpret the laws reflecting the spirit of the constitution so that it could be implemented in logical and systematical order.³⁴

³⁰ Dissenting Opinion of Justice Maruarar Siahaan in Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 446. It reviews the Legality of Death Penalty.

³¹ *Ibid.*, 446-447

³² *Ibid.*, 448

³³ *Ibid.*

³⁴ *Ibid.*, 450-451

II. THE COMMENTARY

It has already been discussed on the previous chapter how the Court ruled the question of legal standing to non-Indonesian citizens in judicial review before the Constitutional Court of Indonesia. This chapter goes further to determine the actual question of legal standing under article 51 (1) of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court. Departing from this starting point, this chapter notes the inconsistency revealed from the Court reasoning, as well as the conflict of laws arising from the Court's finding.

2.1 Legal Standing before the Indonesian Constitutional Court: Procedure Vs Substance

Before turning to discuss the procedural and substantive examinations of legal standing in the Indonesian Constitutional Court, it would be necessary to see what the genuine reasons, purposes and position of legal standing examination in the court proceedings are, and to briefly look at the notion of legal standing itself. It is not questioned here, however, that the position of legal standing as the preliminary examination before the Court goes for the merits.

Generally speaking, (legal) standing is defined as “preliminary jurisdictional requirement, formulated at a high level of generality and applied across the entire domain of law”.³⁵ It is more jurisdictional determination rather than determination on the substance³⁶ as the latter will amount to trial hearing. The examination of standing, as noted by William A. Fletcher, is intended to ensure that the (possibly) injured applicants could present the case effectively, able to make complaint or questioning the issue, that his/her case would inform the court for the consequence of its decisions, to control policy making functions³⁷ and in practical, to control the Court's “appellate docket”.³⁸ In addition to those, it is important to note that another purpose of standing is in order to avoid the overlapping jurisdiction between the Court and other governmental branches.³⁹

³⁵ William Fletcher, “The Structure of Standing,” *The Yale Law Journal* 98, no. 221 (1988).

³⁶ *Ibid.*, 229

³⁷ *Ibid.*, 222

³⁸ *Ibid.*, 228

³⁹ Stefanus Hendrianto, “Convergence or Borrowing: Standing in the Indonesian Constitutional Court,” *Constitutional Review* 1, no. 1 (2015): 41–42.

The ruling of legal standing enshrines under article 56 (1) and 56 (2) of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court. Article 56 (1) and (2) respectively read:

Article 56

- (1) When the Court finds that the applicant or/and his/her submissions does not satisfy the requirements as stipulated by article 50 and 51, the Court shall declare that the case is inadmissible
- (2) When the Court finds that the submission is reasonable, the Court shall declare that the case is admissible.

The Court may declare the case inadmissible when the applicants or their submissions do not satisfy the requirements of, *inter alia*, the legal standing as stipulated by article 51 in the same statute. However, pursuant to article 56 (2), the Court shall declare the case admissible when it finds reasonable basis in applicants submissions. It would be then correct to state that question on legal standing serves as preliminary examination before the Court goes to examine merit of the case⁴⁰ in the context of entire trial proceedings. There is nothing to suggest that such preliminary examination denotes as procedural determination. The Court, however, seemed to indicate these two to be similar. It was shown when the Court relied on the *expressis verbis* of article 51 (1).⁴¹ It was quite clear here that the Court considered more procedural examination on legal standing, leaving the question of possible constitutional loss of the applicants. The wording from George P Fletcher would seem appropriate to describe such approach that the procedural rules determine “the way game is played, and the game is always played the same way”.⁴²

However, such procedural determination is criticized, that at certain extent, would leave the actual nature of the problem. William A Fletcher suggested that in determining whether applicants have legal standing, the genuine question is whether the applicants have the rights to enforce the “asserted legal duty”. The actual question of legal standing lies on the merit of the case. He argued that

⁴⁰ Conf Bisariyadi, “Membedah Doktrin Kerugian Konstitusional,” *Jurnal Konstitusi* 14, no. 1 (2017): 39. It argues that due to the inconsistency application of the Court with regards to constitutional loss’ doctrine, the inadmissibility or *niet onvankelijk verklaard* decision may also be rendered by the Court when it concerns the examination of the merit.

⁴¹ Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 367–68.

⁴² George Fletcher, *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998), 8.

the interest protected by the laws is the same standard applied both to show that the applicants have the standing and consecutively to which the basis they rely their claims on the merit of the case.⁴³ Condemning the standing as procedural matter at the first place would leave the nature of the problem unresolved. Reflecting at this line of argument, he then concluded that the question of standing is the question of substantive law and consequently the answer of the standing questions would depend on the substantive of the laws.⁴⁴ This 'substance examination approach' on legal standing is what precisely Justice Harjono, Justice Maruarar Siahaan and Justice HM. Laica Marzuki held in their respective dissenting opinions. As the examination concerns the substantive laws (non-derogable rights) proscribed under the 1945 Constitution, the procedural questions could be simply overruled.

Indeed, in legal standing determination, such substantive approach seems to be more compelling with the construction of article 51 (1) and its following five requirements set by the Court in judgment No 006/PUU-III/2005. Article 51 (1) of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court, defines the parties entitled to exercise judicial review. It is read as follows:

- (1) Applicant is the party who considers that his/her constitutional right or authority has been deprived by the enactment of statute, namely:
 - a. Individual Indonesian citizens;
 - b. Customary community groups living in accordance with the society development and principles of the State of the Republic of Indonesia as provided by the laws;
 - c. Public or private legal entities; or
 - d. State institutions

⁴³ Some commentators noted that this would be the same question addressed by the Court in determining legal standing and the merit of the case. See, *inter alia*, Fletcher, "The Structure of Standing," 236. It would be odd when the Court granted the admissibility of the case but later rejected the case in the examination of the merit, because the same standard applied to both in determining the legal standing and merit of the case, there is overlapping standard applied for both examinations. See also Bisariyadi, "Membedah Doktrin Kerugian Konstitusional," 38. However, the admissibility test does not work that way. When looking at the nature of legal standing under article 56 (1) of the Indonesian Statute No 24 Year 2003 concerning Indonesian Constitutional Court, it would be seen that legal standing stands as procedural matter within court proceedings. Indeed, the threshold employed in determining between such procedural context and substance would not be the identical. In the context of procedural examination of legal standing for instance, the threshold applied by the Court is "reasonable basis to believe" (article 56 (2)). It is in fact the preliminary examination that there are possible constitutional losses possessed by the applicants.

⁴⁴ Fletcher, "The Structure of Standing," 225, 290–91. He argued that the doctrine of legal standing is the result of the overlapping development of the administrative state and the litigation to enforce public and primarily constitutional values. See also Philipus Hadjon, *Pengantar Hukum Administrasi Indonesia-Introduction to the Indonesian Administrative Law 3rd Edition* (Surabaya: Gadjah Mada University Press, 1994), 335.

In order to determine the *ratio legis*⁴⁵ or substance of an article, it can be easily identified that the substance is usually able to serve independently the article without requiring any other clauses. On the contrary, procedural cannot stand by itself in an article. When looking at the formulation of article 51 (1), one may easily find that this article comprises of substantive elements defining the applicants and its required pre-condition, and procedural elements providing list of subjected parties who are able to bring the judicial review. Without the procedural elements of the list parties, the article yet able to stand although it solely comprises with the definition of applicants and constitutional loss.

The first element of this provision, suggested as the substance, defines the parties who consider that their constitutional rights and/or authorities have been deprived by the enactment of statutes. It refers into pre-conditional requirements of possible constitutional injury. There is no mention to what constitute constitutional rights are. In order to determine the scope of constitutional rights and/or authorities, one should look at the official explanation of article 51 of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court. The explanation defines the terms of 'constitutional rights'. Pursuant to its official explanation, the meaning of constitutional right shall refer to the rights that proscribed under the 1945 Constitution of the Republic Indonesia.

Article 51 (1) further rules that such constitutional rights should be considered for being deprived by the enactment of statute. In other words, this article governs that the applicants should demonstrate the possible constitutional loss. Meanwhile in order to define constitutional loss, the Court recalls its judgment No 006/PUU-III/2005 which specifically addresses the requirements of constitutional loss.⁴⁶ Constitutional loss could be established when it satisfy these five cumulative conditions. First of all, the applicant shall have the constitutional rights and/or authorities proscribed under the 1945 Constitution. Second, the

⁴⁵ Satjipto Rahardjo, *Ilmu Hukum*, 6th ed. (Bandung: Citra Aditya Bakti, 2006), 45. He believed that each legal instrument has *ratio legis*, the basic principle of law underlying the instruments or also known as the spirit in the legal instruments.

⁴⁶ This set of requirements is arguably rooted from the case requirement of article III of the United States Constitution, to which requiring the applicants to show the injury in fact; the causality between the injury and the challenged statute; and the redressability sought. See also Hendrianto, "Convergence or Borrowing: Standing in the Indonesian Constitutional Court," 33; Bisariyadi, "Membedah Doktrin Kerugian Konstitusional," 27.

applicant believes that his or her constitutional rights and/or authorities have been deprived by the challenged statute. Third, such constitutional deprivation or loss should be specific and actual or imminently potential to occur on the basis of logical order. Fourth, that there should be a *causal verband* or causality between the loss and the enactment of the concerned statute. Lastly, there should be the possibility when a favorable court decision is rendered, the constitutional loss would not occur or repeated.⁴⁷

The formulation of article 51 (1) mentions list of four subjects who are able to submit judicial review before the Court. Nevertheless, such determination seems to be more supportive in nature, cannot stand by itself and therefore serves rather as procedural matters than substantive one. According to this second element, there are four subjects entitled to enforce judicial review, namely individual, including the group of people who possess the same interest,⁴⁸ Indonesian citizens; customary community groups living in accordance with the society development and principles of the State of the Republic of Indonesia as provided by the laws; public or private legal entities; and State institutions. If this logical formulation is affirmed, it seems then that the three dissenting judges relied on substantive part of article 51 in determining the actual question of legal standing, meanwhile the Court decision emphasized that the question of legal standing lies on the procedural matters

2.2 Inconsistency in the Chamber's Opinion

The Chamber's found the case was inadmissible for three Australian citizens on these three following grounds. First, that article 51 (1) (a) *expressis verbis* or has stated clearly that it is Indonesian citizens solely, in terms of citizenship, who are able to file for judicial review before the Constitutional Court. Second, the inadmissibility of non-Indonesian citizens to examine the laws does not necessarily mean that they loss their legal protections under the principle of due process of law, in this case they were granted the legal remedies of appeal, cassation and review before the supreme court. Third, that the wording of "each

⁴⁷ Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 367–68. It is about on the Legality of Death Penalty under the Law of Narcotics.

⁴⁸ Official Explanation of article 51 (1) (a) of "Indonesian Law Number 24 of 2003 on the Constitutional Court" (2003).

person and group of people with similar interest”, as stipulated in its official explanation of the statute, must be interpreted in connection with the individual Indonesian citizens.⁴⁹

2.2.1 The *Expressis Verbis* of Article 51 (1) (a)

In determining the legal standing, the Court argued that article 51 (1) (a) of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court *expressis verbis* stated that Indonesian citizens are solely entitled to file for judicial review.⁵⁰ The Court limited its argumentation on the basis of its *expressis verbis* of the concerned article. As mentioned in the previous sub chapter, article 51 (1) (a) serves as the procedural part of article 51. Briefly speaking, the Court answered the question of legal standing of the applicants by stating that because the rules say so.

It is true when the Court resorted to *expressis verbis* of article 51 (1) (a), then the Australian citizens simply do not fall within the scope of this article. This, however, does not seem to be correct examination in addressing questions of legal standing. To what extent such procedural argumentation is legitimate in determining legal standing status? It is essential here to recall the nature of judicial review.

The hierarchy of the norms of the *Stufenbaulehre Theory*⁵¹ has significantly affected into Indonesian legal system. This theory states that the norms have the hierarchy of different levels, and they are not standing side by side on the same level. It must constitute a unity between the norms, in which Hans Kelsen emphasizes “that the creation of one norm, the lower one, is determined by the higher and terminated by a highest, the basic norm, which being the supreme reason of validity of the whole legal order”.⁵² In Indonesian legal system, the concrete evidence of a hierarchical legal order is in force under article 7 of the Indonesian Statute No 12 Year 2001 concerning the Establishment of the

⁴⁹ Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 367–68.

⁵⁰ *Ibid.*

⁵¹ The *Stufenbaulehre Theory* or known as *Teori Stufenbau* in Indonesian legal system, developed by Hans Kelsen, is arguably initiated by and drawn from Hans Kelsen’s disciple, Adolf Julius Merkl in his article *Das doppelte recht-santlitz*. See Jakab Andras, *European Constitutional Language* (Cambridge University Press, 2016), 326.

⁵² Hans Kelsen, *General Theory of Law and State (20th Century Legal Philosophy Series Vol. 1)* (Cambridge: Harvard University Press, 1949), 124.

Regulations. The type and the hierarchical order of the Indonesian regulations consist of the 1945 Constitution of the Republic Indonesia; MPR Decisions;⁵³ Laws/Government Regulations in lieu of law;⁵⁴ Executive Regulations; Presidential Regulations; Provincial Government Regulations; and Regional/Municipal Government Regulations. This theory, however, has also reiterated that in practice there is no guarantee that the lower norms would be in compliance with the higher one.⁵⁵ In order to constitute such unity, it is required for 'check and balance' in legal system by means, *inter alia*, the judicial review.⁵⁶ Reflecting on these circumstances, it is then fundamental for the existence of judicial review in legal system, although the concept and definition of judicial review itself vary from each state to another. Nevertheless, among those different practices between states, it could be derived that judicial review may refer to the examination of the legal instruments by the court.⁵⁷

Under the Indonesian legal system, the term of judicial review refers into these two meanings, i) the examination of whether a law is in compliance with the constitution;⁵⁸ ii) and/or that the rules or legal instruments, -inferior than the law in a hierarchical system, is in accordance with the law.⁵⁹ The first falls within the jurisdiction of the Indonesian Constitutional Court, while the latter is mandated to the Supreme Court. Judicial review (in this context is constitutional review) before the Constitutional Court, has its purpose to examine the legality of the laws towards the Indonesian Constitution 1945 mandated by article 24C (1) of the 1945 Indonesian Constitution, article 10 (1) (a) of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court and article 29 (1) (a) of the Indonesian Statute No 48 Year 2009 concerning Judicial Power.

⁵³ MPR (*Majelis Permusyawaratan Rakyat*) refers as the People's Consultative Assembly of the Republic Indonesia.

⁵⁴ Although the regulation in lieu of law is first initiated by the President (executive), nevertheless, it shall, be submitted, at the closest hearing, before the House of Representatives of the Republic Indonesia for the approval, or rejection.

⁵⁵ Hans Kelsen, *Pure Theory of Law (2nd German Edition Max Knight)*. (New Jersey: The Law Book Exchange, Ltd, 2005), 205–6. See also also the Dissenting Opinion of Justice Maruarar Siahaan in Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 446. It explains the Legality of Death Penalty under the Law of Narcotics

⁵⁶ King Faisal Sulaiman, *Teori Peraturan Perundang-Undangan Dan Aspek Pengujiannya* (Yogyakarta: Thafa Media, 2017), 103.

⁵⁷ Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* (Jakarta: Konstitusi Pers, 2006), 1.

⁵⁸ Article 24C(1) of "The 1945 Constitution of the Republic of Indonesia" (1945); article 10(1)(a) of Indonesian Law Number 24 of 2003 on the Constitutional Court.; and Article 29(1)(a) of "Indonesian Law Number 48 of 2009 on Judicial Power" (2009).

⁵⁹ Article 29 (1) (a) of the Indonesian 20 (2) (b) Indonesian Law Number 48 of 2009 on Judicial Power.

Referring to the aforementioned nature of judicial review before the Constitutional Court, it can be drawn that statutes are subjected to examination towards the 1945 Constitution. Such examination is intended to check whether concerned statute is in compliance with the 1945 Constitution. In this regards, it would be then clear that the 1945 Constitution serves as the threshold for statutes examination.⁶⁰ It would be misleading for referring to other statutes in statute examination. It is considered as error of law when the Court adjudicated the question of legal standing of non-Indonesian citizens simply from the *expressis verbis* of article 51 (1) (a). This would be examining a statute towards the statute instead of the constitution.

In fact, if it is true that the 1945 Constitution and the rights set forth therein are reserved exclusively to Indonesian citizens, then statutes, that are the manifestation of the 1945 Constitution, shall be reserved exclusively for its citizens and not be applicable to non-Indonesian citizens. Accordingly, they simply could not be prosecuted under the concerned statute at the first place. This indicated court's error of law when it relied on procedural matter of article 51 (1). Indeed, the question of legal standing relied by the non-Indonesian citizens upon article 51 (1) (a) should be subjected first for preliminary examination by the Court in order to check the compliance of the concerned article towards the 1945 Constitution before determining the status of legal standing. Alternatively, the Court may also consider a more lenient approach suggested by Justice Harjono. Rather than declaring article 51 (1) unconstitutional, the Court may adopt a broader interpretation stipulating that the non-Indonesian citizens' applicants should fall within the course of article 51 (1) as a consequence of the 1945 Constitution application.⁶¹ Thus, the wording of article 51 (1) (a) is not *per se* a self-evident.

The Court argument of *expressis verbis*, however, has abandoned the *ratio legis*, the very substance, or the genuine meaning of article 51 (1). When the Court adopted procedural examination to determine status on legal standing, it

⁶⁰ Dissenting Opinion of Justice Maruarar Siahaan in Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 446.

⁶¹ Dissenting Opinion of Justice Harjanto, Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 435-36.

implies that there must be specific rules of procedure to be satisfied. It appears there is nothing error with this approach. In fact, this is concrete evidence of Gustav Radbruch long standing theory of law. According to Radbruch, there are three basic principles underlying the law, namely justice, utility and certainty. This theory is also known for its tense situation between those three main principles, called as the *spannungverhältnis*.⁶² It states when one hold the law for its certainty, there must be lack either to justice or utility of law on the other side. The same thing when the Court adopted its *expressis verbis* reasoning in this case. The Court seemed to hold for the uniformity in order to keep the rules of the game to be played in the same way. Consequently, the Court might achieve certainty and consistency application of law in terms of procedural context, but leaving behind the justice and utility principle of law. It would be appropriate here to refer this as the evidence of ‘overruled substance’.

Considering citizenship concept as the starting point, imply that the parties, other than Indonesian citizens, would simply have no legal standing before the Indonesian Constitutional Court. It could also be drawn that the parties of non-Indonesian citizens could not have the constitutional loss or injury under the Indonesian legal system. This is certainly a deprivation of the 1945 Constitution’s mandate to provide protection to each person in Indonesian territory.

Moreover, holding the second element of article 51 (1) (a) in legal standing determination would be simply superfluous. The second element, which comprises of subjected parties, could not stand as the *ratio legis* of article 51 (1). Legal standing requires what called as constitutional loss. Thus, when the Court argued that the second element is rather the substance of article 51 (1), then without constitutional loss, the individual Indonesian citizens, customary community groups living in accordance with the society development and principles of the State of the Republic of Indonesia as provided by the laws, public or private legal entities and State institutions should be automatically granted for legal standing before the Constitutional Court. If this argument is affirmed, it would be breach of the doctrine *zonder belang het is geen rechtsingang*, reads that

⁶² *Ibid.*, 19

without interest there would be no entry right.⁶³ In any circumstances, it is sufficiently reasonable to reject legal standing of an applicant on the basis of lacking constitutional loss rather than solely based on the subjected parties. Standing, in its origin however, does not stand in the individual Indonesian citizens, customary community groups living in accordance with the society development and principles of the State of the Republic of Indonesia as provided by the laws or even public or private legal entities and State institutions, but it lies in each legal subject with possibly constitutional injury by which he/she is subjected to the enactment of certain provisions of a statute. A party cannot have standing to challenge the constitutionality of a statute unless he is subjected to the provisions of that statute.

It is then suggested here that the *ratio legis* of article 51 (1) should actually goes to the first element. When the Court declared that the case was admissible for the Indonesian citizens, the Court argued that they have constitutional rights afforded by article 28A and article 28I of the 1945 Constitution (non-derogable in nature) that have been deprived by the enactment of death penalty under the Law of Narcotics, as they were convicted for death penalty and awaiting for its execution.⁶⁴ In this regards, they have legal standing to file judicial review before the Constitutional Court. This line of argumentation draws that constitutional loss is the basic concept of the application article 51 (1). The Court relied on the substance of this article to determine the legal standing of the applicants. It would be hard to argue that non-Indonesian citizens' applicants had no constitutional loss. Either Indonesian or non-Indonesian citizens' applicants questioned the same provisions, and all of them were convicted with the death penalty under the Narcotics Law. How could be possible to determine applicant legal standing but leaving the substance of injury? Meanwhile in order to determine the legal standing it should be demonstrated the connection of the injury and the enactment of concerned statute. This is what William A Fletcher defined that the examination of legal standing depends on the substance of the law.⁶⁵

⁶³ See Laica Marzuki, "Legal Standing, Sisi Lain Pengujian UU Di MK," *Kompas*, 2004, 8 edition.

⁶⁴ Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 367.

⁶⁵ Fletcher, "The Structure of Standing," 290-91.

Supporting the argument that constitutional loss stands as the actual question of legal standing, and therefore decisive in admissibility test, the following case might serve to be the evidence. Some seven years later after this case, the Court rendered constitutional court judgment No. 137/PUU-XII/2014 reviewing article 51 (1) of the Indonesian Statute No 24 Year 2003 concerning the Constitutional Court. There were seven lawyers, all of them were Indonesian citizens, submitted judicial review to the Court questioning the constitutionality of article 51 (1). They requested for the Court to declare that their client, non-Indonesian citizen, should have the right to exercise judicial review. Although the applicants were Indonesian citizens, the Court yet declared that the case was inadmissible due to 'lacking of sufficient interest', as stipulated by article 51 (1) and its jurisprudence No 006/PUU-III/2005. The Court found that although they were Indonesian citizens who represented non-Indonesian citizens they had no constitutional loss, required in article 51 (1) and court jurisprudence No 006/PUU-III/2005. Without legal interest or constitution loss, Indonesian citizens' applicants yet declares inadmissible, proving that even subjected parties under article 51 (1) does not necessarily determinant in the question of legal standing. Therefore the Court would not grant legal standing even to Indonesian citizens when they do not have the possible constitutional loss.

2.2.2 The Due Process of Law

The Court had determined that such inadmissibility decision does not necessarily constitute the breach of due process of law principle since the applicants were granted the legal remedies of appeal, cassation and review before the Supreme Court.⁶⁶ As a matter of fact, it was true that they were given their rights for legal remedies by means appeal and cassation by the time the constitutional judgment was delivered. This reasoning, however, preserved error of law.

The 1945 Constitution, in chapter IX, article 24, 24A, 24B, 24C and 25, stipulate the definition of judicial power in Indonesian legal system. Article 24 (1) defines:

- (1) The judicial power shall be independent to organize judicial administration in order to uphold the law and justice.

⁶⁶ Judicial Review Number 22 of 1997 on Narcotics against the 1945 Constitution at 367–68.

Article 24 (2) declared that:

(2) The judicial power shall be exercised by a Supreme Court and its judiciary organs within the jurisdiction of public courts, religious court, military court, state administration court, and by a Constitutional Court.

The power of Constitutional Court, in the context of due process of law, is stipulated under article 24C (1), is read:

(1) The Constitutional Court shall have the authority to adjudicate at the first level and last resort of which the decision shall be final in examining the laws towards the Constitution, deciding disputes concerning state institutions authorities whose are provided by the Constitution, deciding on the dissolution of political parties, and deciding disputes concerning election result.

Pursuant to those provisions, in order to uphold the law and justice, judicial power is mandated not solely to the Supreme Court, but also to the Constitutional Court. It would be then questionable when the Court drawn its conclusion that due process of law depends merely on the Supreme Court and its lower proceedings. The judicial power, in the context of enforcing the law and seeking for justice, is mandated also to the Constitutional Court. It means that Constitutional Court serves as one of the forums available to legal subject to sought for justice, more specifically for individual, regardless its citizenship or nationality because their rights are recognized under the 1945 Constitution. Since they were subjected to be prosecuted by the law and proceeded under the Supreme Court judiciary, at the same time they should be given their constitutional rights as mandated by the 1945 Constitution as the part of due process of law. There would constitute a breach of constitutional right if non-Indonesian citizens are lacking the access to stand before the Constitutional Court for judicial review. The fact that non-Indonesian citizens were not granted legal standing to question certain provision of the laws, showed that the Court seemed to leave its mandate assigned by the 1945 Constitution.

2.3 Conflict of Laws: The Immunity of Article 51 (1)

This reasoning on the inadmissibility decision serves as precedent in the Constitutional Court. Some four years after the judgment No 2-3/PUU—V/2007

delivered, the Constitutional Court has unanimously rendered a judgment No 73/PUU-VIII/2010 filed also by non-Indonesian citizen, a Romanian, Popa Nicolae, concerning on his arbitrary detention based on article 34 (b), article 35 (1), and article 39 (4) of the Indonesian Statute No 1 Year 1979 on Extradition and article 51 (1) (a) the Indonesian Statute No 24 Year 2003 concerning The Constitutional Court. The Constitutional Court declared the case inadmissible since the applicant, Romanian citizen, had no legal standing to file for such judicial review. His detention had been prolonged up to six times because the extradition law did not mention the maximum time period of the detention.⁶⁷ If the ruling of the Constitutional Court is followed, it would be very difficult to find Indonesian citizens who have the similar interest as Popa Nicolae in order to fulfill the requirements of legal standing for the judicial review.

These two cases,⁶⁸ along with article 51 (1) judicial review case in 2014⁶⁹, amount to immune status of article 51 (1) from judicial review. There would be no chance to review the existence of article 51 (1) towards the 1945 Constitution. Consequently, non-Indonesian citizens will never be recognized in judicial review mechanism before the Indonesian Constitutional Court. In fact, although they possibly have constitutional injury, they cannot challenge the statute because article 51 (1) does not recognize them as the applicants at the first place. It requires to be Indonesian citizens to submit for judicial review. Meanwhile, when Indonesian citizens seeks to review article 51 (1) before the Constitutional Court they will certainly be declared inadmissible due to simply insufficient constitutional loss or injury. In this context, there is no possible entrance to review article 51 (1) when at the same time this article is used as the basis for legal standing determination by the Court. Article 51 (1) leaves itself immune from judicial review before the Court, and this Court decision actually precludes the Court from its genuine mandate to examine the laws under the 1945 Constitution.

⁶⁷ Judicial Review Number 1 of 1979 on Extradition at 3.

⁶⁸ "Indonesian Law Number 22 of 1997 on Narcotics" (1997); Judicial Review Number 1 of 1979 on Extradition.

⁶⁹ Judicial Review Number 24 of 2003 on the Constitutional Court as it has been amended into Law Number 8 of 2011 on the Amendment of Law Number 24 of 2003 on the Constitutional Court against the 1945 Constitution. It reviews article 51 (1).

III. CONCLUDING REMARK

The determination to grant legal standing should be based on the constitutional loss of the applicant rather than on the subjected parties. The Court's decision in determining non-Indonesian citizens' legal standing based on the *expressis verbis* of article 51 (1) (a) has abandoned the substance of that concerned article, the constitutional loss. This ruling, however, amounts to the error application of the 1945 Constitution and culminating to immune status of article 51 (1) from judicial review. The genuine mandate of the Court for reviewing the laws is then obscured by such determination.

As the judgment of Constitutional Court is final and not subjected for any review, there is nothing here to suggest available avenues in order to correct this ruling. In forthcoming examinations, perhaps, the judges' dissenting opinion in this case could be invoked to remind the Court for the *ratio legis* of judicial review.

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AN ANALYSIS OF SUBJECTUM LITIS AND OBJECTUM LITIS ON DISPUTE ABOUT THE AUTHORITY OF STATE INSTITUTION FROM THE VERDICTS OF THE CONSTITUTIONAL COURT

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Abstract

The relationship of mutual control and balance between state institutions gives an opportunity for the emergence of the dispute about the authority of state institutions, especially the dispute about the constitutional authority. In relation to a dispute about authority of state institutions given by the 1945 constitution, a judicial institution is used to resolve the dispute. That judicial institution is the Constitutional Court. The court can evaluate the *subjectum litis* and *objectum litis* from the dispute about the authority of state institutions. Therefore that matter will be resolved definitively by the verdict of the Constitutional Court where the verdict is permanent and binding, then later it will become a jurisprudence, and it will be used as a reference. There are eight verdicts of the Constitutional Court related to disputes about the authority of state institutions which are related to the *subjectum litis* and *objectum litis*, such as: The verdict of The Constitutional Court No.004/SKLN-IV/2006; the verdict of the Constitutional Court No.030/SKLN-IV/2006; the verdict of the Constitutional Court No. 26/SKLN-V/2007; the verdict of the Constitutional Court No. 27/SKLN-VI/2008; the verdict of the Constitutional Court No. 1/SKLN-VIII/2010; the verdict of the Constitutional Court No. 2/SKLN-IX/2011; the verdict of the Constitutional Court No. 5/SKLN-IX/2011; and the verdict of the Constitutional Court No. 2/SKLN-X/2012.

Keywords: *Subjectum Litis, Objectum Litis, Authority Dispute*

I. INTRODUCTION

The amendment of the 1945 constitution which has been started since 1999 until 2002 is one of the demands of the reform movement in 1998. The amendment of the 1945 constitution has fundamentally changed the structure of the state administration which implicates the position and the relation between state institutions. To understand the definition, the concept, and the institutionalization, it needs to be based on the new paradigm of the new system of the state administration which has been realized in the 1945 Constitution as the manifestation from the will of the people and the idea of democracy.¹ The structure of the state administration or the organization of the country is an important aspect in the state of administration. Therefore, a state institution exists both the one written in the 1945 constitution or not written in the 1945 constitution. The state institutions written in the 1945 Constitution has undergone an amendment.²

In the concept of separation of powers, the principle of checks and balances between the authorities is considered as the essential and fundamental aspect. Based on the constitutionalism, the principle of separation of powers aims to limit the power of a state so it is expected to avoid the domination of one power over another one, to avoid the subjection and any arbitrary action by the authorities. That principle becomes characteristic of constitutionalism and becomes the main role of the constitution, so the possibility for arbitrariness can be controlled and minimized.

The principle of controlling and balancing each other between state institutions gives an opportunity for the emergence of the dispute between state

¹ Arifin Firmansyah, *Lembaga Negara Dan Sengketa Kewenangan Antarlembaga Negara* (Jakarta: Konsorsium Reformasi Hukum Nasional (KRHN), 2005), 6–16.

² "The 1945 Constitution of the Republic of Indonesia" (1945). The People's Consultative Assembly (Article 2 and Article 3); President (Article 4, Article 5, Article 7, Article 7A, Article 7B, Article 7C, Article 8, Article 9, Article 10, Article 11, Article 12, Article 13, Article 14, Article 15 dan Article 16); Regional Government (Article 18, Article 18A and Article 18B); The People Representative Council (Article 19, Article 20, Article 20A and Article 21); Regional Representative Council (Article 22C and Article 22D); General Election Commission (Article 22E); Central Bank (Article 23D); Financial Audit Board (Article 23E and Article 23F); Supreme Court (Article 24 and Article 24A); Judicial Commission (Article 24B); Constitutional Court (Article 24 and Article 24C); Indonesian National Armed Forces (Article 20); and Police of the Republic of Indonesia (Article 30). See Abdul Latif, *Fungsi Mahkamah Konstitusi dalam Upaya Mewujudkan Negara Hukum Demokrasi* (Yogyakarta: Kreasi Total Media, 2007), 196. Compare Abdul Mukthie Fadjar, *Hukum Konstitusi Dan Mahkamah Konstitusi* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2006), 184–91.

institutions, especially the dispute about constitutional authority. In a dispute about the state institutions whose authority is given by the 1945 constitution, so there is judicial institution to resolve the dispute. The judicial institution mentioned is the Constitutional Court of the Republic of Indonesia.³ The organic provisions in Article 24C of the 1945 constitution is the Law No. 24 Year 2003 about the Constitutional Court as it has been amended to the Law No.8 year 2011 about the Amendment on the Law No. 24 Year 2003 about the Constitutional Court. The provision of the Article 10 paragraph (1) and paragraph (2) of the Law No. 24 Year 2003 about the Constitutional Court is the provision of Article 24C paragraph (1) and paragraph (2) of the 1945 constitution.

The authority given by the 1945 constitution is not only a textual authority but also an authority which is implicitly part of the principal authority and an authority which is used to run the principal authority. According to the Constitutional Court, based on the 1945 constitution, a legislator is authorized to establish a state institution and also authorized to give an authority to that institution. If the establishment of a state institution and the authority to give an authority to that institution as it is mentioned in the law is against the 1945 constitution, the Constitutional Court can do a judicial review of a constitution towards the 1945 constitution. Moreover, the establishment of a law can also establish a state institution and give an authority to that institution, although it is not ordered by the 1945 constitution. Therefore, not all authority given by the law has to be understood as an authority which is ordered by the 1945 Constitution.

From the existence of various state institutions in Indonesia, there might be many things happen during the implementation of a state institution with other state institutions, a dispute for instance. Based on the previous explanation, the problem that will be discussed is the analysis of *subjectum litis* and *objectum*

³ The 1945 Constitution of the Republic of Indonesia. Article 24C paragraph (1) mentions that "*the Constitutional Court has the authority to adjudicate at the first and final instance, the judgement of which is final, to review laws against the Constitution, to judge on authority disputes of state institutions whose authorities are granted by the Constitution, to judge in the dissolution of a political party, and to judge on disputes regarding the result of a general election*". While Article 24 C paragraph (2) the 1945 Constitution mentions that *the Constitutional Court shall render a judgement on the petition of the People's Representative Council regarded an alleged violation by the President and/or the Vice President according to the Constitution*.

litis in resolving a dispute about the authority of state institutions in the Constitutional Court.

II. DISCUSSION

In relation to the authority between state institutions, there are many potential disputes that might occur and require attention. The potential disputes are caused by the unclear laws and regulations governing functions, roles, and an authority of an institution which results various interpretation due to the unclear laws and regulations of state institutions.⁴ The implications of check and balances mechanisms in a relation between state institutions on the same level during the implementation of the authority of each state institution might rise a dispute when interpreting the 1945 constitution. If the dispute occurs, an independent organ which is given an authority to resolve that dispute is needed. In a state administration system adopted by the constitution, the mechanism of resolving a dispute about that authority is given to a state insitution called a Constitutional Court.⁵

2.1 *Subjectum Litis*

Article 24 paragraph (1) of the 1945 constitution states that “the Constitutional Court is authorised to conduct a hearing from the first and final level which the verdict is final to ‘...*resolve the dispute about an authority between the state institutions which the authority is given by the constitution...*’”. Then, Article 10 paragraph (1) from the law of the Constitutional Court decides that “the Constitutional Court is authorized to conduct a hearing from the first and final level whose the verdict is final to: examine the law towards the 1945 constitution; resolve a dispute about the authority of state institution whose authority is given by the 1945 Constitution of the State of the Republic of Indonesia; resolve the dissolution of political parties; and resolve the dispute about the result of general eelction”.

⁴ Lukman Hakim, “Konsorsium Reformasi Hukum Nasional (KRHN),” *Yustisia Jurnal Hukum* 80 (2010): 3.

⁵ Mahkamah Konstitusi Republik Indonesia, “Hukum Acara Mahkamah Konstitusi” (Sekretaris Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 150.

From the above provision, it is known that the authorities of the Constitutional Court is to resolve disputes about authorities of state institutions whose authority is given by the 1945 constitution. The provision is the exit door in resolving a dispute about the authorities of state institutions through the law (due process of law). This authority owned by the Constitutional Court is a principal authorities besides the authority to test constitutionality of a law towards the 1945 Constitution.

Based on the provision in Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) of the law of the Constitutional Court, the proposal of a dispute about authority of state institutions can only be filed if the two cumulative requirements have been fulfilled, those are: 1) The petitioner is a state institution mentioned in the 1945 Constitution, and 2) The authority disputed is the authority which is given by the 1945 Constitution. This is in line with the provision of Article 61 paragraph (1) of the law of the Constitutional Court which decides that "*The petitioner is the state institution whose authority is given by the 1945 Constitution of the State of the Republic of Indonesia which have direct interest/authority toward the dispute*". According to Jimly Asshiddiqie, in a dispute about the authority of state institutions whose authority is given by the Constitution, there are two requirements has to be fulfilled, those are the constitutional authority decided by the Constitution and the dispute is a result from the differences of interpretation between two or more related state constitutions.

In a concept of positive *staatsrecht*, a state institution is the state's organ which is usually ruled / become the content of the constitution of a country.⁶ The first requirement is the *subjectum litis* or having a legal standing to file a petition to the Constitutional Court. Related to *subjectum litis*, it is required that the state institution needs to be the institution directly mentioned in the

⁶ See C.F Strong in Modern Political Constitution which states that Constitution is a frame of political society, organized through and by law, one in which law has established permanent institutions which recognized function and definite rights. See also Rosco J. Tresolini and Martin Shapiro in *American Constitutional Law* which states that there are three things that are regulated in American Constitutional Law, those are *the framework or structure of government, the power of the government, and it restrains the exercise of these power by governmental officials in order that certain individual right can be preserved*. See also Widodo Ekatjahjana and Totok Sudaryanto, *Sumber Hukum Tata Negara Formal di Indonesia* (Bandung: Citra Aditya Bhakti, 2001), 19–20.

1945 Constitution or the institution which is usually called as constitutional organ. State institutions established by the laws or other laws and regulation are not classified as *subjectum litis* in a resolve of a dispute about authority of state institutions to the Constitutional Court.

In relation to the second requirement, *objectum litis* which requires that “the authority of a state institution needs to be the authority given by the 1945 Constitution”, it means not all state institutions above can be categorised as petitioners in a resolve of a dispute about the state institutions. Therefore, to be able to become a petitioner in a dispute about a state institution, the two requirements has to be absolutely cumulative. Furthermore, Article 65 of the constitution of the Constitutional Court clearly states that the Supreme Court can not become a respondent in a dispute about the authority of state institutions. Then, Article 2 paragraph (3) PMK 08/2006 also mentions that the Supreme Court can not be the parties, both as a petitioner or as a respondent in a legal procedure on an authority dispute.⁷ On the other hand, outside the legal procedure on an authority dispute, the Supreme Court can involve in a dispute about the authority of a state institution.

If the provision in a law of the Constitutional Court and the Constitutional Court Regulation (Peraturan Mahkamah Konstitusi or PMK) are analyzed, in a formal judicial manner, the Supreme Court cannot become the party if the authority being disputed is related to function and legal procedure (judicial), both as the petitioner or as the respondent in a dispute about the authority of a state institution, but it does not mean that the Supreme Court will not have a dispute with other state institutions, for instances:

1. A dispute about an authority between Judicial Commission and the Supreme Court about the appointment of judges;
2. A dispute about an authority between Judicial Commission and the Supreme Court about supervision and imposition of sanctions for judges.
3. A dispute about an authority between the People Representative Council and the Supreme Court about the appointment of judges.

⁷ The Constitutional Court of the Republic of Indonesia, “Constitutional Court Regulation” (n.d.). The Constitutional Court Regulation No. 08/PMK/2006

Based on requirements about *subjectum litis and objectum litis*, and based on the Article 2 Paragraph (1) PMK 08/2006, it is decided that the parties who can become petitioners and respondents in a dispute about an authority of state institutions are the People Representatives Council (DPR), the Regional Representatives Council (DPD), The People's Consultative Assembly (MPR), the President, the Audit Board of the Republic of Indonesia (BPK), the local government, and other institutions whose authority is directly given by the 1945 Constitution of the State of the Republic of Indonesia.

The Constitutional Court's verdict has been consistent in determining which state institution can become a petitioner or a respondent in a resolve of a dispute of state institutions whose authority is given by the 1945 constitution. The Constitutional Court always uses two requirements which have been explained before, those are *subjectum litis*, the respondents or the petitioners are state institutions established based on the 1945 constitution, and *objectum litis*, the respondents or petitioners are state institutions whose authority is given by the 1945 constitution. Those two requirements are applied by the Constitutional Court absolutely cumulative. So, in a dispute about an authority of state institutions, if the *subjectum litis* has been fulfilled but the *objectum litis* is not fulfilled, it means the petition is always "not acceptable/denied".

2.2 *Objectum Litis*

Objectum litis of a dispute about state institutions will limit parties which can become petitioners or respondents during the hearing conducted by the Constitutional Court. The authority of state institutions which can become the object of a dispute is only related to the authority given by the 1945 Constitution to a particular state institution. Therefore, not every state institution, which fulfills the criteria as an organ or state institution running the functions of state and government administration, and having a dispute with other state institutions, can automatically become the party in the dispute. In a dispute about an authority of state institutions, the

legal standing of the petitioner needs to be based on direct interest in the disputed authority. Therefore the petitioner who files a petition needs to fulfill the following criteria:⁸ The petition is a state institution whose authority is given by the 1945 Constitution; having direct interest in the disputed authority; and relating to causal loss towards one's authority with other institution's authority.

As it has been explained before, both the 1945 Constitution or the law of the Constitutional Court have not explained clearly about the party which is included in the state institution or about the authority directly given by the constitution as it is mentioned in Article 24C paragraph (1) of the 1945 constitution, this matter gives an authority for the Constitutional Court related to the *subjectum litis* and the *objectum litis* of a dispute about state institutions whose authority is given by the law. Therefore, this matter will be decided definitively in the verdict of the Constitutional Court whose verdict is permanent and binding, and later will become a jurisprudence and will be used as reference.⁹

To determine the *subjectum litis* or the *objectum litis* of a dispute about a state institution whose authority is given by the 1945 Constitution, the Constitutional Court does *grammatische interpretatie* (interpreting the grammatical aspect). According to the Constitutional Court, the use of a phrase "a dispute about an authority" before the phrase "state institutions" has an important meaning, since the nature of the Article 24C paragraph (1) of the 1945 Constitution is indeed "the dispute about an authority" or "what is being disputed", not about "who are in the dispute (parties who are involving in the dispute)". The phrase "state institution" in Article 24C paragraph (1) of the 1945 Constitution needs to be correlated each other and can not be separated with the phrase "whose authority is given by the constitution". By formulating the sub-clause "state institutions whose authority is given

⁸ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2006), 194–95.

⁹ Maruarar Siahaan, "Sengketa Kewenangan Antarlembaga Negara" (pada Diklat Panitera Pengganti Mahkamah Konstitusi, Jakarta, 2008), 13.

by the constitution”, implicitly there is a statement “the state institutions whose authority is not given by the constitution”. Therefore, in determining the *subjectum litis* or *the objectum litis* of a dispute about the authority of state institutions whose the authority is given by the 1945 Constitution, the authorities given by the Constitution need to be defined/determined first, then determine to what institutions those authorities are given.

In interpreting the authority from the 1945 Constitution, the Constitutional Court states that the Constitutional Court is not only doing the textual interpretation of the provision of the 1945 Constitution which gives authorities to the particular state institution, but also there will be possibilities of other implicit authorities which can be found in the primary authorities and other authorities needed (necessary and proper) in order to run those primary authorities which might be included in a law. However, not all authorities given by the law has to be interpreted as authorities which are ordered by the Constitution.

III. VERDICTS OF THE CONSTITUTIONAL COURT IN RELATION TO THE REQUIREMENTS OF SUBJECTUM LITIS AND OBJECTUM LITIS IN A DISPUTE ABOUT AN AUTHORITY OF STATE INSTITUTION

The following are explanations about verdicts of the Constitutional Court related to the requirements of *subjectum litis* and *objectum litis* in a dispute about authorities of state institutions:

3.1 The Verdicts of the Constitutional Court No.004/SKLN-IV/2006 in July 12, 2016, and the Verdict is Denied/Not Accepted (*niet ontvankelijk verklaard*).

The verdict of the Constitutional Court No. 004/SKLN-IV/2006 is a case filed by Drs. H. M. Saleh Manaf (the Regent of Bekasi) and Drs. Solihin Sari (Vice Regent of Bekasi).¹⁰ The petitioner argues his capacity as a state

¹⁰ Judicial Review on Dispute over the authority of State Institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by Drs. H. M. Saleh Manaf (the Regent of Bekasi) and Drs. Solihin Sari (Vice Regent of Bekasi) againsts the President of the Republic of Indonesia (Respondent I), Ministry of Home Affairs of the Republic of Indonesia (Respondent II), and the Regional People Representatives Council of Bekasi Regency (Respondent III), No. 004/SKLN-IV/2006 (The Constitutional Court of the Republic of Indonesia 2006).

institution to file a petition for dispute about the authority of the state institution as mentioned in Article 24C of the 1945 Constitution. His capacity as the Regent of Bekasi questions the following points: (i) The authority of the Respondents II in issuing a decree of the Minister of Home Affairs No. 131.32-11 Year 2006 in 4 January 2006 about the Revocation of the Decree of the Ministry of Home Affairs No. 131.32-36 Year 2004 in 8 January 2004 about the ratification of the dismissal and appointment of the Regent of Bekasi, West Java Province, and the authority of the Respondent II in issuing the decree of Ministry of Home Affairs No. 132.32-35 Year 2006 in 19 January 2006 about the the Revocation of the Decree of the Ministry of Home Affairs No. 132.32-37 year 2004 about the Ratification of the Dismissal and Appointment of the Vice Regent of Bekasi, West Java, and (ii) the authority of the Respondent III to issue the Decree of the House of Regional Representatives of Bekasi Regency No. 06/KEP/172.2-DPR/2006 in 28 February 2006 about the approval of the Regional People Representatives Council of Bekasi Regency towards the appointment of the Local Regulation's Draft related to the Revenue and Capital Expenditure of Bekasi Regency in 2006.

The petitioner argues that the Respondent I should correct the action of the Minister of Home Affairs since the minister is the President's aide, and the Respondent II is the responsibility of the President where the President appoints and dismisses the minister as it is mentioned in the Article 17 paragraph (1) and (2) of the 1945 Constitution. In the statement, the Constitutional Court gives interpretation related to the Article 24C of the 1945 Constitution by defining and explaining the *subjectum litis* and *objectum litis* of a dispute about the authority of institutions.

In relation to the case, the Court has formulated "a dispute about the authority of state institutions whose authority is given by the constitution" needs to be understood that the main point of the formula is about the "authority". Therefore, based on the formula, the *objectum litis* of a dispute about the authority is "the authority about something". In relation to "who holds the authority" or the one who is given the authority will be found

in the provision of the Constitution. The phrase “state institution” in Article 24C paragraph (1) of the 1945 Constitution needs to be interpreted fully with the phrase “the authority given by the constitution”. The use “a dispute about an authority” preceded the phrase “state institutions” has an important meaning, since the nature of Article 24C paragraph (1) of the 1945 Constitution is indeed about the “authority dispute” or about “what is being disputed” and not about “who are involved in the dispute”. The meaning will be different if the formulation of Article 24C paragraph (1) of the 1945 Constitution is “.....a dispute about state institutions whose authority is given by the constitution”. The main point of the last formulation is about the disputed parties/ parties who are involved in a dispute, those are the state institutions, and the object of the dispute is not important anymore.

The phrase “state institution” in Article 24C paragraph (1) of the 1945 constitution has to be related each other and can not be separated with the phrase “whose authority is given by the constitution”. By the existent of the formulation “state institutions whose authority is given by the constitution”, implicitly the phrase “state institutions whose authority is not given by the constitution” is approved. Therefore, the definition of a state institution has to be understood as general and the phrases “state institutions whose authority is given by the constitution” and “state institutions whose authority is not given by the constitution” can be distinguished. Therefore, the Court argued that a dispute between the Petitioner and the Respondent III is not a dispute about the authority of a state institution whose authority is given by the constitution as it is mentioned by the Article 24C of the 1945 Constitution.

3.2 The Verdict of the Constitutional Court No. 030/SKLN-IV/2006 in April 17, and the Verdict is Denied/Not Accepted (*niet ontvankelijk verklaard*).

The verdict of the Constitutional Court No. 030/SKLN-IV/2006 is a case filed by Indonesian Broadcasting Commission (as a Petitioner).¹¹ The

¹¹ Judicial Review on Dispute over the authority of State Institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by Indonesian Broadcasting Commission (as a Petitioner) against the President of the Republic of Indonesia q.q. the Minister of Communications and Informatics (as the Respondent), No. 030/SKLN-IV/2006 (The Constitutional Court of the Republic of Indonesia 2006).

main petition in the case *a quo* is a dispute about the authority between the Petitioner against the Respondent about: (i) an authority for granting broadcasting licence, and (ii) an authority of rule-making in terms of broadcasting. The petitioner argued that those two authorities are not textually in the 1945 Constitution. However, those authorities should be interpreted as the beginning of the state's authority to protect the human rights as guaranteed in Article 28F of the 1945 Constitution.

The Court, in that Verdict, clearly states the law consideration in defining the *subjectum litis* and *objectum litis* from the dispute about the authority of state institutions in the Verdict of the Constitutional Court No. 004/SKLN-IV/2006. From the *subjectum litis* in this petition, the Petitioner is Indonesian Broadcasting Commission and the Respondents are the President *q.q.* the Minister of Communications and Informatics. Based on the provision in Article 4 paragraph (1), Article 5, and Article 7 of the 1945 Constitution, the President *q.q.* the Minister of Communications and Informatics are state institutions whose authority are given by the 1945 Constitution. Therefore, the Respondent is the *subjectum litis* in the case *a quo*. On the other hand, the 1945 Constitution does not mention and give a constitutional authority to the Indonesian Broadcasting Commission. Thus, the Indonesian Broadcasting Commission is not a state institution as it is meant by the Article 24C paragraph (1) of the 1945 Constitution, *juncto* Article 61 paragraph (1) of the Constitutional Court Law.

3.3 The Verdict of the Constitutional Court No. 26/SKLN-V/2007 in March 11, 2008, and the Verdict is Denied/Not Accepted (*niet ontvankelijk verklaard*).

The verdict of the Constitutional Court No. 26/SKLN-V/2007 is a case filed by the Independent Election Commission of Southeast Aceh Regency level (Petitioner I) and the Regional People Representatives Council (Petitioner II).¹² The main petition in that case is an authority dispute between the

¹² Judicial Review on Dispute over the authority of State Institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by the Independent Election Commission of Southeast Aceh Regency level (Petitioner I) and the Regional People Representatives Council (Petitioner II) against the Independent Election Commission of Nanggroe Aceh Darussalam Province level (Respondent I), the Governor of

Petitioner I against the Respondent I, since the one supposed to issue the Election Results News about the election of the Regent and Vice Regent of Southeast Aceh Regency is the Petitioner I, but it has been taken over by the Respondent I, and the proposal of the appointment of the elected Regent/Vice Regent to be the Regent/Vice Regent of Southeast Aceh Regency which is supposed to be the authority of the Petitioner II but it has been taken over by the Respondent II. Therefore, the ratification of the appointment of the elected district heads of Southeast Aceh, Ir. Hasanuddin B as the Regent, and M.M. and Drs. H. Syamsul Bahri as the Vice Regent, is not legitimate.

The Court on the verdict *a quo* clearly states the primary law consideration in defining the *subjectum litis* and *objectum litis* from the dispute about the authority of state institutions in the Verdict of the Constitutional Court No. 004/SKLN-IV/2006 and the regulation of the Constitutional Court No. 08/PMK/2006 about the Rules of Procedure in the dispute about Constitutional Authority of State Institutions whose authority is given by the 1945 Constitution. An Independent Election Commission, both Independent Election Commission of Southeast Aceh Regency and Nanggroe Aceh Darussalam (NAD) Province, based on the Law No. 11 Year 2006 junctis Qanun No. 2 Year 2004 as it has been revised to Qanun No. 3 Year 2005 and Qanun No. 7 Tahun 2006, are given an authority by the law to conduct general elections of President/Vice President, members of the People Representatives Council, members of the Regional People Representatives Councils, members of the People Representatives Council of Aceh (DPRA)/the People Representatives Council of Aceh Regency (DPRK), governor and vice governor, regent and vice regent, and mayor and vice mayor. Thus, it can be decided that the Independent Election Commission of NAD province or Southeast Aceh Regency are not state constitutions meant by the Article 24C paragraph (1) of the 1945 Constitution, Article 61 paragraph (1) of the Law No. 24 Year 2003 about the Constitutional Court (further it is called

Nanggroe Aceh Darussalam (Respondent II), and the President of Republic of Indonesia c.q the Minister of Home Affairs of the Republic of Indonesia (Respondent III), No. 26/SKLN-V/2007 (The Constitutional Court of the Republic of Indonesia 2007). Verdict No. 26/SKLN-V/2007.

as UUMK), and the Article 2 paragraph (1) about the Regulations of the Constitutional Court No. 08/PMK/2006.

The early formation of the Independent Election Commission of NAD Province and Southeast Aceh Regency are related to the conflict settlement in Aceh Province. Based on TAP MPR No. IV/MPR/1999 and TAP MPR No. IV/MPR/2000, in order to have a conflict settlement, Aceh is decided to be a special autonomous area, which is later confirmed by the Law No. 18 Year 2001 which gives an authority to conduct direct elections of regional heads, which the implementation is given to the Independent Election Commission. Meanwhile, to conduct a national general election, based on the Law No. 12 No.2003, the General Election Commissions (KPU) of province/regency/city are established. Then in the Law No. 32 Year 2004 about the Local Government, those General Election Commissions are declared as the Regional General Election Commissions (KPUD) whose duty is to conduct a general election of regional heads (Pilkada). To avoid dualism, all of the members of the Regional General Election Commissions of regency/city level become the member of the Independent Election Commission (*ex officio*). This decision is ruled in Article 226 Paragraph (3) e of the Law No. 32 Year 2004, *“the members of Independent Election Commission from the members of the General Election Commissions of the Republic of Indonesia consists of the Head and the Members of the Regional General Election Commissions of Nanggroe Aceh Darussalam Province”*. This provision is further explained in Qanun No. 2 Year 2004, as it has been amended with Qanun No.3 Year 2005 and Qanun No. 7 Year 2006. Thus, the Independent Election Commission has its authority from the Law No. 11 Year 2006 about the Government of Aceh, so the Independent Election Commission of province/regency/city levels are not state institutions whose authority is given by the 1945 Constitution and they are also not a national and permanent institutions. Those institutions only exist in NAD Province. Besides, as it is mentioned in Article 265 of Law No. 11 Year 2006, *juncto* Article 11 Paragraph (7) of Qanun of NAD Province No. 3 Year 2005, the Independent Election Commission, where the

Law No. 11 Year 2006 were made/established, will end three months after the inauguration of the Regent/Vice Regent.

In relation to the authority of the People Representatives Council of Aceh Regency of Southeast Aceh together with the head of the region as the local government, they are authorized to organize and manage their own government affairs in order to run their autonomy as widely as possible. Thus, the government is authorized to enact the local regulations and other regulations to run the autonomy. In conclusion, the People Representatives Council of Aceh Regency of Southeast Aceh is included as a state institution mentioned as *subjectum litis* of an authority dispute in front of the Court. To answer the problem, based on the verdict of the Court No. 027/SKLN-IV/2006, both in terms of *objectum litis* or *subjectum litis* of the disputed authority filed by the Petitioner II, the Court decides that it is not a dispute about authority of state institutions as it is meant in Article 24C paragraph (1) of 1945 Constitution, *juncto* Article 10 paragraph (1) b of the Law of the Constitutional Court.

3.4 The Verdict of the Constitutional Court No.27/SKLN-VI/2008 February 10, 2009, and the Verdict is Denied/Not Accepted (*niet ontvankelijk verklaard*).

The verdict of the Constitutional Court No. 27/SKLN-VI/2008 is a case filed by Drs. Aziz Kharie, ME (as the Chairman of the General Election Commissions of North Maluku and as the mandate holder of the General Election Commissions).³³ The principal issue of *a quo* is about the authority of the Respondent to appoint the governor and vice governor of North Maluku by using the Presidential Decree No. 85/P Year 2008, which it is considered by the Petitioner as taking over and neglecting the constitutional authority of the Petitioner in appointing the elected candidate pairs of governor and vice governor as follow-up to the results of the General Election of the Regional

³³ Judicial Review on Dispute over the authority of State Institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by Drs. Aziz Kharie, ME (as the Chairman of the General Election Commissions of North Maluku and as the mandate holder of the General Election Commissions) against the President of the Republic of Indonesia (as the Respondent), No. 27/SKLN-VI/2008 (The Constitutional Court of the Republic of Indonesia 2008). Verdict No. 27/SKLN-VI/2008.

Head and the Vice of Regional Head (Pemilukada) of North Maluku Province which is conducted by the Petitioner.

In relation to the *subjectum litis* of the Petitioner, the Court explains that the provision of 22E paragraph (5) of the 1945 Constitution *juncto* Article 1 point 4 of the Law 22/2007 shows that the national, permanent, and independent General Election Commissions whose authority is given by the 1945 Constitution to conduct a general election will be called as KPU (*Komisi Pemilihan Umum* with capital letter for each first letter of the word or Central KPU). On the other hand, the General Election Commissions in province level *in casu* the General Election Commission of North Maluku Province is not a state constitution whose authority is given by the 1945 Constitution. It is only the organ of the General Election Commissions (the organ of Central KPU) whose authority is given by the Law *in casu* UU 22/2007, not by the 1945 Constitution. Besides, the General Election of the Regional Head and the Vice of Regional Head (Pemilukada) is not a general election as being mentioned in Article 22E paragraph (2) of the 1945 Constitution. It is only the realization of the Law in the provision in Article 18 paragraph (4) of the 1945 Constitution.

In relation to the case filed by the Petitioner, the Court evaluates that the letter from the General Election Commission addressed to the General Election Commission of North Maluku is only to let the General Election Commission of North Maluku Province to follow-up the problem of the General Election of the Regional Head and the Vice of Regional Head (Pemilukada) in North Maluku. Therefore, from the point of view of *subjectum litis* of a case *a quo*, the Court states that the Petitioner, the General Election Commission of North Maluku, is not a state institution as it is mentioned in the 1945 Constitution and its authority is not given by the 1945 Constitution. On the other hand, the President as the Respondent is indeed a state institution whose authority and position are given by the 1945 Constitution. Therefore, the Petitioner does not fulfill the requirement

mentioned in Article 24C paragraph (1) of the 1945 Constitution and Article 61 paragraph (1) of the Law of the Constitutional Court.

3.5 The Verdict of the Constitutional Court No. 1/SKLN-VIII/2010 in March 11, 2011, and the Verdict is Denied/Not Accepted (*niet ontvankelijk verklaard*).

The verdict of the Constitutional Court No. 1/SKLN-VIII/2010 is a case filed by Ir.H. Abdullah Tuasikal, M.Si (as the Regent of Central Maluku) and Asis Mahulette, S.H (as the head of the Regional People Representatives Council of Central Maluku Regency).¹⁴ The principal issue is about the existent of the regulation of the Minister of Home Affairs No. 29 Year 2010 concerning the regional border between West Seram Regency and Central Maluku Province on 13 April 2010 whose consideration is not in line with the Verdict of the Constitutional Court No. 123/PUU-VII/2009 in February 2, 2010, since it still refers to the attachment II of the Law No. 40 year 2003 about the establishment of the East Seram Regency, West Seram Regency, and Aru Island in Maluku Province, whereas the Verdict of the Constitutional Court *a quo* has changed the norm in Article 7 paragraph (4) of the Law No. 40 Year 2003 about the establishment of the East Seram Regency, West Seram Regency, and Aru Island in Maluku Province and being followed by the explanation and the Attachment II about the border of West Seram Regency as long as it relates to Article 7 paragraph (2) b. This case causes the border of the Petitioner determined by the Minister of Home Affairs becomes inconsistent with the verdict of the Constitutional Court *a quo*, so it has diminished part of the region owned by the Petitioner, that is Central Maluku Regency. From the legal consideration, the Court explains the meaning of Article 24C of the 1945 Constitution by defining and explaining the *subjectum litis* and *objectum litis* from the dispute about authority of state institutions.

¹⁴ Judicial Review on Dispute over the authority of State Institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by Ir.H. Abdullah Tuasikal, M.Si (as the Regent of Central Maluku) and Asis Mahulette, S.H (as the head of the Regional People Representatives Council of Central Maluku Regency) against the Respondent, the Minister of Home Affairs of the Republic of Indonesia., No. 1/SKLN-VIII/2010 (The Constitutional Court of the Republic of Indonesia 2010).

Based on the Court, from the point of view of *subjectum litis*, according to Article 18 paragraph (1), paragraph (2), paragraph (3), and paragraph (4) of the 1945 Constitution, and relate to Article 1 Number 2 of the Law 32/2004, the Regent as the head of local government in a regency level, together with the Regional People Representatives Council of the Regency, represents the local government, so it is considered as a state institution who owns an authority given by the 1945 Constitution. The authority is to organize and to manage the governmental business based on the autonomous and co-administration task principle of the Petitioner, those are the Regent of Central Maluku and the head of the Regional People Representatives Council of Central Maluku. Those two institutions are state institutions mentioned by the 1945 Constitution and they have authority given by the 1945 Constitution. Therefore, the Petitioner has a legal standing.

Based on the petition, the principal issue related to the petition is about the appointment of area boundaries set by the Minister of Home Affairs based on the regulation of the Minister of Home Affairs No. 29 Year 2010 about the border of the West Seram Regency with Central Maluku province in April 13, 2010. Therefore, the authority owned by the Petitioner is the authority which is not given by the 1945 Constitution. The case filed by the Petitioner is the contradiction between the regulation of the Minister of Home Affairs No. 29 Year 2010 about the area boundaries of West Seram and Central Maluku Province against the verdict of the Constitutional Court No. 123/PUU-VII/2009 on 2 February 2010, which has changed the attachment of the Law No. 40 year 2003 about the establishment of East Seram regency, West Seram Regency, and Aru Island Regency in Maluku province, which are part of the Court's authority. In conclusion, since the *subjectum litis* is correlated to the *objectum litis*, the petition is not subject or object of the dispute about authority of state institutions. Therefore, based on the Constitutional Court, the petition does not fulfill the provision of Article 61 of the Law of the Constitutional Court *juncto* Article 2 of the Constitutional Court Regulation No. 08/PMK/2006.

3.6 The Verdict of the Constitutional Court No. 2/SKLN-IX/2011 in September 29, 2011, and the Verdict is Denied/Not Accepted (*niet ontvankelijk verklaard*).

The verdict of the Constitutional Court No. 2/SKLN-IX/2011 is the case filed by H. Andi Harahap, S.Sos (as the Regent of North Penajam Paser) and Nanang Ali, S.E (as the head of the Regional People Representatives Council of North Penajam Paser Regency).¹⁵ The principal issue on the dispute about authority of state institutions is related to the decree of the Minister of Environment and Forestry about the determination of Taman Hutan Raya Bukit Soeharto territory, which according to the Petitioner, the Respondent (Minister of Environment and Forestry) does not notice the territorial expansion of Paser Regency which has been expanded into Paser Regency and North Penajam Paser Regency based on the Law No. 7 Year 2002 about the establishment of North Penajam Paser Regency in the North Kalimantan Province.

In relation to the *subjectum litis* of the Petitioner, the Court explains that based on the Article 18 paragraph (3) and paragraph (4) of the 1945 Constitution, the local government consists of the Regional People Representatives Council and the Local Government (governor, regent, or mayor). It is reaffirmed in Article 3 paragraph (1) b of the Law No. 32 year 2004 about the local government which states “the local government consists of regency/city consisting of local government of regency/city and the Regional People Representatives Council of a regency/city”. Thus, according to the Court, the Petitioner as a regent, and the head of the Regional People Representatives Council of North Penajam Paser Regency are state institutions mentioned by the 1945 Constitution. On the other hand, from the point of view of *subjectum litis* of the Respondent, the Court explains that based on Article 17 paragraph (3) of the 1945 Constitution states that “Each minister

¹⁵ Judicial Review on Dispute over the authority of State Institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by H. Andi Harahap, S.Sos (as the Regent of North Penajam Paser) and Nanang Ali, S.E (as the head of the Regional People Representatives Council of North Penajam Paser Regency) against the Minister of Environment and Forestry of the Republic of Indonesia as the Respondent., No. 2/SKLN-IX/2011 (The Constitutional Court of the Republic of Indonesia 2011).

is in charge of a particular responsibility in the government”. The Article is further interpreted in Article 5 paragraph (2), Article 4 paragraph (2) b of the Law No.39 Year 2008 about the state of ministry which explains that the forestry is part of the governmental affairs whose the scope is regulated in the 1945 Constitution. Therefore, the Respondent, *in casu* the Minister of Environment and Forestry, are the unit of the government and part of the state institutions mentioned in the 1945 Constitution who are in charge of the forestry affairs.

In relation to the constitutional authority being disputed by the Petitioner, the Court explains that the constitutional authority of the local government which is regulated in Article 18 of the 1945 Constitution is only a direction and affirmation for the legislator. The aim is to make the autonomy regulation runs as broad as possible, except the affairs which have been regulated by the law and considered as the central governmental affairs. On the other hand, the Law No. 32 Year 2004 has set the governmental affairs which are considered as the central governmental affairs such as foreign political affairs; defense and security affairs; justice affairs; national monetary and fiscal affairs, and religion affairs [*vide* of Article 10 paragraph (3) of the Law No. 32 Year 2004 about the local government]. However, the central governmental affairs are not only those 7 mentioned matters since the forestry affairs, the Law No. 41 Year 1999 about the Forestry states that the central government is authorized to set the status of a particular territory as part of forest area or not forest area [*vide* of Article 4 paragraph (2) of the Law No. 41 year 1999 about the forestry affairs]. Since the authority of the central government is based on the Article 33 paragraph (3) of the 1945 Constitution, the Court states that there is not any constitutional authority which is being disputed as it is mentioned in Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) b of the Law of the Constitutional Court, Article 3 paragraph (2) of the Constitutional Court Regulation (PMK) 08/2006.

3.7 The Verdict of the Constitutional Court No. 5/SKLN-IX/2011 in February 8, 2012, and the Verdict is Denied/Not Accepted (*niet ontvankelijk verklaard*).

The verdict of the Constitutional Court No. 5/SKLN-IX/2011 is a case filed by the Working Committee of Indonesian Advocate (KKAI).¹⁶ The principal petition related to the issue of letter No. 089/KMA/VI/2010 on 25 June 2010 *juncto* letter No. 052/KMA/HK.01/III/2011 on 23 March 2011 where the Respondent is considered having authority to regulate the organization of advocate, by mentioning PERADI (Indonesian Advocates Association) and KAI (Indonesian Advocate Congress) as if there was already a deal in front of the Respondent that Indonesian Advocates Association is the only one organization of Indonesian advocates by conveying to the head of the Court who can take an oath of the candidate of the advocate who has fulfilled the requirements by following the provision that the oath has to be appointed by the person in charge of the Indonesian Advocate Association, as it is mentioned on the deal on 24 June 2010.

The Petitioner states that the letters issued by the Respondent are considered exceeding the authority given by the 1945 Constitution, since the Indonesian Advocate Association and Indonesian Advocate Congress are indeed not in the Advocate's Law. Therefore, the existent of Indonesian Advocates Association and Indonesian Advocate Congress causes legal uncertainty since it is considered as violating the rights of advocates (in this case: the Working Committee of Indonesian Advocate) to get justice by violating Petitioner's constitutional rights as a state institution. The letter of the Respondent in appointing Indonesian Advocates Association and Indonesian Advocate Congress, by the Petitioner, is considered as an intervention and discrimination by hampering the Petitioner in running the functions of the organization. The requirements of the legal standing that

¹⁶ Judicial Review on Dispute over the authority of State Institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by the Working Committee of Indonesian Advocate (KKAI) against the Supreme Court of Indonesia as the Respondent., No. 5/SKLN-IX/2011 (The Constitutional Court of the Republic of Indonesia 2011).

needs to be fulfilled in a dispute about the authority of state institutions whose authority given by the 1945 Constitution are:

- a. The Petitioner and Respondent (*subjectum litis*) are state institutions (obligatory) whose authorities are given by the 1945 Constitution;
- b. The authority being disputed (*objectum litis*) is the authority which is given by the 1945 Constitution (Obligatory).
- c. The Petitioner must have direct interest toward the disputed authority which is given by the 1945 Constitution.

Based on the three provisions above, to examine the petition of disputed authority of state institutions whose authority is given by the 1945 Constitution, the Court needs to ensure cumulatively the following points:

- I. Is the Petitioner a state institution?
- II. Is the authority of the state institution given by the 1945 Constitution?
- III. Is the authority disputed by the state institutions?

If one of the cumulative requirements above can not be fulfilled, the Court is not authorized to conduct a hearing. The Court will explain the *subjectum litis*. The Petitioner is Working Committee of Indonesian Advocate which is not a state institution and is not mentioned in the 1945 Constitution, so the Petitioner is not a state institution. Therefore, based on the Constitutional Court's decision, the petition *a quo* is not a dispute about authority of state institution meant by the Article 24C Paragraph (1) of the 1945 Constitution, Article 61 paragraph (1) of the Law of the Constitutional Court, Article 3 paragraph (1) of the Constitutional Court Regulation No. 08/PMK/2006 about Rules of Procedure in a dispute about authority of state institutions.

3.8 The Verdict of the Constitutional Court No. 2/SKLN-X/2012 in July 31, 2012, and the Verdict is Denied/ Not Accepted (*niet ontvankelijk verklaard*).

The verdict of the Constitutional Court No. 2/SKLN-X/2012 is a case filed by the President.¹⁷ The principal issue of the petition by President which is

¹⁷ Judicial Review on Dispute over the authority of State Institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by the President against the Respondent, the People Representatives Council and the Audit Board of the Republic of Indonesia., No. 2/SKLN-X/2012 (The Constitutional Court of the Republic of Indonesia 2012).

related to a dispute about an authority of the state institution is about the presence of the People Representatives Council's approval on the President's plan to purchase 7% shares of PT. Newmont Nusa Tenggara. In the dispute about authority of state institutions involving three institutions, that are the President (Petitioner), the People Representatives Council (Respondent I), and the Audit Board of the Republic of Indonesia (Respondent II), the Constitutional Court states that only the President and the People Representatives Council who have fulfilled the *objectum litis* required in a dispute about authority of state institutions.¹⁸ In this case, the Court states that based on Article 4 paragraph (1), Article 23, and Article 23C of the 1945 Constitution, the President's authority is running the government which is correlated with the state's budget. Those are arranging the government's annual program which is arranged in form of State Budget Proposal (RAPBN), then the proposal will be submitted to wait the approval from the People Representatives Council, and managing the state's budget which has been approved by the People Representatives Council. On the other hand, the authorities of the Respondent I are to give approval for the State Budget Proposal submitted by the President and to control the budget management run by the President. However, related to the Respondent II, the Constitutional Court states that it does not fulfill the criteria of *objectum litis* as it has been fulfilled by the Petitioner and the Respondent I. According to the Court, the Audit Board of the Republic of Indonesia is only examining the budget management. Thus, the disputed authority between the President and the Audit Board of the Republic of Indonesia does not exist. The Audit Board of the Republic of Indonesia can not be considered as the party being disputed in this case. The consideration of the legal standing of this case, the Constitutional Court states:

¹⁸ The Consideration of the Constitutional Court, it states that: "According to the Constitutional Court, the object of disputed authority of the case is the authority of the Petitioner to purchase 7% of the share of PT. Newmont Nusa Tenggara, where it is the derivation authority from the attribution authority mentioned by the 1945 Constitution. Therefore, the disputed authority by the Petitioner *a quo* is an authority that can be the object of a dispute in a Dispute over the Authority of State Institutions. Since the Respondent I is considered has violated the implementation of the authority, therefore there was an object of disputed authority between the Petitioner and Respondent I, so it fulfilled the *objectum litis* in a case *a quo*. On the other hand, against the Respondent II, according to the Court, since the authority of the Respondent II (Financial Audit Board) is only checking the budget, there is not any disputed authority between the Petitioner and Respondent II. Therefore, the Respondent II cannot be considered as the disputed party in this case".

“the Petitioner has a legal standing to file a petition about the dispute about the authority against the Respondent I, and the dispute about the authority against the Respondent II is not valid”. In line with this statement, the expert, Arief Hidayat, states that: *“in relation to the Respondent II (the Audit Board of Republic of Indonesia), a dispute about an authority with the government does not exist as long as it is related to the mandate of the law, since the function of the Audit Board of the Republic of Indonesia is to audit (which has been arranged in LHP mandated by the Law), not analysing/interpreting the law used by the institution”.*

Although the *subjectum litis* and *objectum litis* of this case has fulfilled the criteria of a dispute about authority, the Constitutional Court denied the petition. Basically the authority brought to the Constitutional Court is about the authority of the President *c.q* the Minister of Finance as the State Treasurer through Government Investment Center (PIP). The President is authorized to do divestment of 7% of shares to PT. NNT without asking the approval of the People Representatives Council. According to the President, the reason is due to the government’s power, which the state budget management is part of it, and it is the domain of the executive. On the other hand, a different point of view from the President, the People Representative Council states its objection that before the President does the divestment of 7% of shares to PT. NNT which is represented by the Minister of Finance as the State Treasurer through the Government Investment Center (PIP), the President needs to submit an approval first to the People Representative Council as the representative of people of Indonesia.

The Constitutional Court considers three points, the first is the Government Investment Center is the Public Service Agency (BLU) according to the law. The Public Service Agency is established to improve services to the public in order to advance the public welfare and to educate the nation. The wealth of Public Service Agency is the wealth of the country which can not be separated as the wealth of the State Owned Enterprises (BUMN). The second, the Government Investment Center is a hierarchical organ under the Minister of Finance. Due to its position, the state budget plan and the budget of the Government Investment Center are consolidated into

the budget plan of the Ministry of Finance which based on the Article 15 paragraph (5) of the Law of the State's Finance, the State Budget approved by the People Representatives Council covers the unit of the organization, function, program, activities and the type of budget. Thus, all the investment programs of the Government Investment Center have to be included in the budget plan and later will be included in the State Budget Proposal (RAPBN), then it is approved by the People Representatives Council. The approval of the People Representatives Council becomes very important so the President's order *c.q* The Minister of Financial is not arbitrary or does not exceeds the limit in spending the investment funds or the accumulation of the revenue of the Government Investment Center, since the Government Investment Centeris is not a state enterprises which can be separated. The third, in a state administration in Indonesia, especially the relation between the President and the People Representatives Council, related to the Government Investment Center, the allocation of the investment fund of the Government Investment Center is clearly mentioned in the State Budget or it has been discussed and approved during the discussion of the State Budget Proposal (RAPBN). In a case where the President wants to spend the fund from the Government Investment Center which has not been approved by the People Representatives Council, if it is not for the infrastructure, the President needs to ask for approval from the People Representatives Council, for instance to repurchase (buy back) the State Owned Enterprises' shares which has gone public through the Government Investment Center on 14 October 2008. In this case, the Minister of Finance, as the State Treasurer, cannot automatically do the investment by using the fund from the Government Investment Center and/or the accumulation of the revenue of the Government Investment Center, except if the fund will be used for the infrastructure or other programs which have been approved by the People Representatives Council in a discussion of the State Budget Proposal, or specifically it has been approved by the People Representatives Council.

According to the previous explanation, the Constitutional Court assesses that since the purchase of the divestment above using the fund from the Government Investment Center can potentially causes loss for the state that could have a negative impact on the national economy, the purchase of the divestment needs to ask for approval from the People Representatives Council as stated in the consideration:

“...The use of fund from the Government Investment Center without the approval of the Respondent I can potentially causes loss that could have a negative impact on the national economy and potentially leads to a misuse of fund if the accumulation of fund from the Government Investment Center which the amount is getting bigger, is used by the President c.q the Minister of Finance without involving the Respondent I. On the other hand, the Respondent I is authorized to do a supervision. The case will be different if the Government Investment Center is a state company whose wealth is separated from the state’s wealth. In a case of A quo, the Court cannot find any convincing evidence that the purchase of 7% shares of PT. Newmont Nusa Tenggara has been discussed and approved by the Respondent I in a Law of State Budget Plan (UU RAPBN) since in fact in the constitution itself, the State Budget does not mention the investment specifically.”

The further legal consideration toward the primary case, the Constitutional Court states:

“The Court assessed that the purchase of 7% of divestment shares of PT Newmont Nusa Tenggara is the constitutional authority of the Petitioner in running the state which can only be done by: (i) the approval of the Respondent I, both through the Law of State Budget (UU APBN) or specifically approved by the Respondent I; (ii) it is implemented openly and responsibly for the welfare of the nation; and (iii) it is implemented under the supervision of the Respondent I. Since the purchase of 7% shares of PT Newmont Nusa Tenggara specifically has not been included in the State Budget and also has not gotten any approval from the People Representatives Council, the petition does not have a legal standing.”

Therefore, the Constitutional Court assessed that in purchasing 7% shares of PT Newmont Nusa Tenggara planned by the President, an approval from the People Representatives Council is still needed. Based on the explanation, it can be concluded that the refusal of the Constitutional Court toward

the petition of the dispute about authority of state institutions filed by the President is not the *subjectum litis* and *objectum litis* of the case of *a quo* which have not been fulfilled, but because the Constitutional Court assessed the absence of constitutional problem on the Petition.

IV. CONCLUSIONS

To determine the *subjectum litis* of a dispute about state institutions, thoroughness is needed since there are institutions whose names are explicitly mentioned in the provision and some others are only mentioned by its function. There are institutions or organs whose name, function, or the authority which will be governed by a lower level regulation. An authority which is not clearly mentioned in a constitution but it is necessary to run its constitutional authority given explicitly is an authority which is given by the constitution, although it is then clearly explained in a law as the implementation of the 1945 Constitution. The regulation of a material of an authority does not automatically make it become a non-constitutional authority. On the other hand, if an authority is mentioned in a law, it does not mean that the law becomes the source of that authority. The problem is whether that authority is inherent or not, and the authority needs to be realized as it is clearly assigned by the constitution.

From several verdicts of the Constitutional Court above, it can be concluded, first, the Court can assess the *subjectum litis* and *objectum litis* of a dispute about authority of state institutions by using the Article 61 of Law of the Constitutional Court which covers the following points:

- (1) The petitioner is state institutions whose authority is given by the 1945 Constitution of the State of the Republic of Indonesia which has direct interest toward the disputed authority.
- (2) The petitioner needs to clearly elaborate the petition related to its direct interest, elaborate the disputed authority, and clearly elaborate the state institutions who become the respondent.

Based on the Article 61 of Law of the Constitutional Court mentioned above, it can be concluded as follow:

- a) Both the petitioner and the respondent are state institutions whose authorities are given by the 1945 constitution;

- b) There is a disputed constitutional authority filed by the petitioner and the respondent, where the constitutional's authority of the petitioner is taken over and/or intervened by the respondent;
- c) The petitioner needs to have direct interest toward the disputed constitutional authority.

Therefore, the authority of the court and the legal standing of the petitioner cannot be separated. The incomplete one of the three cumulative requirements above in a petition makes the court does not have any authority to conduct a hearing of a petition. The second, in relation to the assessment of *subjectum litis* in a formal juridical manner, the Constitutional Court is authorized to resolve the dispute about authority of state institutions given by the 1945 constitution

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THE CRITICISM ON THE MEANING OF “OPEN LEGAL POLICY” IN VERDICTS OF JUDICIAL REVIEW AT THE CONSTITUTIONAL COURT

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Abstract

In several verdicts of judicial review, the Constitutional Court formulates a concept of Open Legal Policy. The concept begins from a condition when a norm of law submitted to judicial review by the 1945 Constitution does not have reference in the 1945 Constitution. In other words, the open legal policy is a condition when the Constitutional Court cannot find any reference for the norm submitted to the judicial review. By using a construction method, this present research tries to find the meaning of a concept of open legal policy arranged by the Constitutional Court, then assessing whether the concept is in line with the spirit of judicial review. If the formulation of the concept done by the Constitutional Court has not been ideal, the deconstruction will be conducted toward the meaning that already exists until the open legal policy ideal with the perspective of the constitution is found. In this research, the finding shows different meaning of open legal policy between various verdicts of the Constitutional Court. Moreover, a new meaning is proposed including improvement of criteria of the open legal policy based on the difference between the object of regulation (*what*) and the content of the regulation (*how*).

Keywords: Open Legal Policy, Construction, Deconstruction

I. INTRODUCTION

The Constitutional Court is a court which is established based on mandate of Article 24 paragraph (2) and the Transitional Provisions Article III of the 1945 Constitution of the State of the Republic of Indonesia (further it is called as

the 1945 Constitution). The authority of the Constitutional Court is regulated in Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution.

Judicial review is the main authority of the Constitutional Court since the aim of the Constitutional Court is as an institution who is authorized to do a judicial review (examining constitutionality of law). Judicial review is basically an assessment about suitability between substance of the norm of law with norm of the 1945 Constitution.

Judicial review becomes relative and difficult when the 1945 Constitution does not explicitly regulates the material of law which is in the process of judicial review. If the material is not clearly mentioned in the 1945 Constitution, the Constitutional Court needs to use a general norm written in the 1945 Constitution as reference. The Constitutional Court even needs to use implied meaning of the 1945 Constitution.

Whether the norm of the 1945 Constitution used as reference has already been available in a judicial review, the Constitutional Court still needs to assess whether that norm is in line with the constitution. The absence of the 1945 Constitution, which clearly regulates the material of law in a judicial review, results a new concept in assessing constitutionality of the law. That is the concept of open legal policy (*Kebijakan Hukum Terbuka/KHT*).

In various verdicts, the Constitutional Court declares that law is valued as constitutional since the provision of the material of the law is open legal policy, that is the policy in the field of law (legal policy) whose the characteristic is open. Several verdicts of the Constitutional Court¹ shows that the concept of open legal policy is valued and categorized as “constitutional”. It means, the entire open

¹ Judicial Review Number 12 of 2003 on General Election of the Members of the People Representatives’ Council, Regional Representatives’ Council, and Regional People Representatives’ Council against the 1945 Constitution, No. 16/PUU-V/2007 (The Constitutional Court of the Republic of Indonesia 2007); Judicial Review Number 42 of 2008 on General Election of President and Vice President against the 1945 Constitution of the Republic of Indonesia, No. 51–52–59/PUU–VI/2008 (the Constitutional Court of the Republic of Indonesia 2008); Judicial Review Number 10 of 2008 on General Election of the Members of the People Representatives’ Council, Regional Representatives’ Council, and Regional People Representatives’ Council, No. 3/PUU-VII/2009 (the Constitutional Court of the Republic of Indonesia 2009); Judicial Review Number 23 of 2011 on the Management of Zakat against the 1945 Constitution, No. 86/PUU-X/2012 (The Constitutional Court of the Republic of Indonesia 2012); Judicial Review Number 8 of 2012 on General Election of the Members of the People Representatives’ Council, Regional Representatives’ Council, and Regional People Representatives’ Council against the 1945 Constitution of the Republic of Indonesia, No. 2/PUU-XI/2013 (The Constitutional Court of the Republic of Indonesia 2013); Judicial Review Number 44 of 2009 on Hospital against the 1945 Constitution of the Republic of Indonesia, No. 38/PUU-XI/2013 (2013).

legal policy are valued and in line with the constitution². The Constitutional Court has never used the concept of open legal policy when stating that a law is unconstitutional.³

If the open legal policy is interpreted as freedom for legislator to freely creates the content of law, this matter potentially will result arbitrariness if there is not any guidance from the 1945 Constitution. The meaning of open legal policy then will be used by the legislator to “justify” law when it is under judicial review by the Constitutional Court.⁴

However, a contradictive indication arised when the Verdict No. 4/PUU-VII/2009 exists, the Constitutional Court states that “...from the perspective of legal morality, that is justice, although the formulation of such norm has fulfilled the procedural requirements, it cannot automatically be categorized as a legal policy which does not need to be assessed/reviewed through a judicial review since the legal norm of the *a quo* is clearly not in line with justice.”⁵

II. RESEARCH QUESTIONS

From the background of the problem above, it can be formulated the following research questions:

1. What is the meaning of Open Legal Policy in verdicts of judicial review at the Constitutional Court?

² Moh. Mahfud MD states that when the 1945 Constitution submitted the regulation of a particular material to the law (attribution), then the law is going through a judicial review by the Constitutional Court, then the Court cannot decide whether that law is cancelled or not. If the Court conducts a judicial review to decide whether the Law is cancelled or not, it means, according to Mahfud MD, the Court has exceed its limit by entering the legislative area (establishing a law). See M. D Mahfud, *Perdebatan Hukum Tata Negara* (Jakarta: LP3ES, 2009), 99; M. D Mahfud, *Konstitusi dan Hukum dalam Kontroversi Isu* (Jakarta: Rajawali Press, 2009), 28–283.

³ Judicial Review Number 32 of 2004 on Regional Government against the 1945 Constitution, No. 006/PUU-III/2005 (The Constitutional Court 2005). Here, the term open legal policy was used for the first time, but the Constitutional Court uses it in verdicts thereafter. In that verdict, the Constitutional Court argues that legislators can freely decides whether the election of regional head is part of the General Election ruled by the 1945 Constitution in Artikel 22E or whether the election is not part Article 22E of the 1945 Constitution . So, the Constitutional Court is authorized to resolve that conflict.

⁴ Judicial Review Number 15 of 2011 on General Election against the 1945 Constitution, No. 31/PUU-XI/2013 (the Constitutional Court of the Republic of Indonesia 2013); Judicial Review Number 3 of 2009 on the Second Amendment of Indonesian Law Number 14 of 1985 on the Constitutional Court against the 1945 Constitution of the Republic of Indonesia, No. 25/PUU-XI/2013 (the Constitutional Court of the Republic of Indonesia 2013); Judicial Review Number 8 of 2015 on the Amendment of Indonesian Law Number 1 of 2015 on the Enactment of Government Regulation in Lieu of Laws Number 1 of 2014 on the Election of Governor, Regent, and Mayor into Law against the 1945 Constitution of the Republic of Indonesia, No. 80/PUU-XIII/2015 (The Constitutional Court of the Republic of Indonesia 2015).

⁵ Judicial Review Number 10 of 2008 on General Election of the Members of the People Representatives’ Council, Regional Representatives’ Council, and Regional People Representatives’ Council; Judicial Review Number 32 of 2004 on Regional Government against the 1945 Constitution.

2. How is the ideal criteria of the open legal policy in verdicts of judicial review at the Constitutional Court?

III. RESEARCH METHOD

3.1 Research Paradigm

Rational acts of a human are basically meaningful. There is always an implied meaning behind the act of human that is used as the shield to justify that act. That matter is like a structure of a building which is used to form, navigate, stimulate, and control the act of a human being.

In a perspective of knowledge, by using the term by Thomas Kuhn, that structure is also can be called as a paradigm.⁶ George Ritzer explains that the paradigm initiated by Kuhn is, “...a fundamental picture of particular primary problem”.⁷

Further, Ritzer explains that a paradigm helps someone to decide something that should be studied, questions that should be proposed, the way to propose questions, and tools to interpret the data to answer the questions. Ritzer clearly states that a paradigm is a “consensus unit” in a knowledge that helps people to distinguish between one community to another one. A paradigm can be used to categorize, decide, and connect various theories, methods, and the instruments involved.⁸

In brief, the law’s paradigm consists of: i) paradigm of natural law, ii) paradigm of historical law, iii) utilitarianism, iv) the paradigm of positive law, v) the paradigm of sociological law, vi) the paradigm of pragmatic realist law,⁹ vii) paradigm of deliberative democracy,¹⁰ and viii) the paradigm of postmodernism law.¹¹

⁶ Thomas Kuhn, *Peran Paradigma dalam Revolusi Sains*, 6th Printing (Bandung: PT. Remaja Rosdakarya., 2008), 10–11.

⁷ George Ritzer and Douglas Goodman, *Teori Sosiologi Modern* (Jakarta: Kencana, 2004), A-13.

⁸ *Ibid.*

⁹ Lili Rasjidi and Ida Bagus Wyasa Putra, *Hukum Sebagai Suatu Sistem* (Bandung: Mandar Maju, 2003), 109–28.

¹⁰ Deliberative democracy is a democracy whose law is to gain legitimacy from a discourse of the people/citizen/ parties who have the same interest. Those parties are on the same level. See Reza Wattimena, *Melampai Negara Hukum Klasik: Locke-Rousseau-Habermas* (Yogyakarta: Kanisius, 2007). Compare to Budi Hardiman, *Melampai Positivisme dan Modernitas* (Yogyakarta: Kanisius, 2003), 128–30.

¹¹ Postmodernism tends to deny and leave ideas involving in modernism era. See Akhyar Yusuf Lubis, *Postmodernisme Teori dan Metode* (Jakarta: Raja Grafindo Persada, 2014), 15.

This present research is based on the paradigm of post-modernism.¹² The reason behind it is this research tries to find interpretation of open legal policy used by the Constitutional Court in verdicts of judicial review. Therefore, this research is limited to discuss provisions (verdicts of the Constitutional Court), principal matters, doctrines, arguments, opinions, theories, and legal philosophy.

3.2 Research Method

In relation to the idea of open legal policy conveyed by the Constitutional Court which has been categorized earlier, it is categorized before being constructed to find the meaning and reference of the open legal policy. After the constructivism found a concept of open legal policy, then the earlier one is completed and rechecked by using other sources and interviews.

In the present research, the method of construction is defined as a method which tries to complete the meaning of open legal policy. The meaning had not been complete since the phrase “open legal policy” is not fully formulated in particular laws and regulations. The Constitutional Court only formulated it in chunk through verdicts of judicial reviews.

Keith E. Whittington argues that the construction (in a phrase of the construction of constitution) is not a matter of finding meaning who has not arised (pre-existing), whose the meaning is hidden in documents of the establishment of constitution. The construction tries to find the meaning and also to learn political reasons behind the establishment of a constitution. In this method, the political characters are even bolder than the legal characters.¹³

The next step is to do analysis towards the concept of open legal policy. The aim is to assess whether the concept has been in line with other concepts in legal science, and whether the concept has been able to answer or given solution to the legal problems related to the establishment and judicial review of law. If the existing concept cannot become the legal solution, therefore an effort by using hermeneutics is done, especially through deconstructive hermeneutics.

¹² The limitation of the modernism and post-modernism cannot be defined clearly. Criticisms on modernism does not always end as post-modernisms (it is like postmodernism ideas of Derrida, Bourdieau, dan Giddens). Some criticism stay on modernism (such as Habermas).

¹³ Whittington Keith, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Kansas: University Press of Kansas, 1999), 5.

Based on Derrinda, deconstruction is...“*a way to read a text interpretatively or a hermeneutics in a radical manner*”.¹⁴ So, what is the difference between hermeneutics used to find the original intent from hermeneutics used as a method to do a deconstruction? Hardiman explains as follow,

*“A deconstruction is different from the ‘normal’ hermeneutik which tries to reconstruct the real meaning of a text. A deconstruction leaves the rehabilitating effort. Instead of providing the real meaning of a text, a deconstruction assumes the absence of promordial meaning (Ursinn).”*¹⁵

A radical hermeneutics is chosen since that character helps us to find the appropriate meaning by letting us stop and move everywhere. The result from this deconstruction is not a stable meaning. However, from the instability, which makes the meaning becomes “fragile” to be changed, the connecting line needed by the Constitutional Court is found. Based on Kimmerle, a deconstruction is an interpretation which is marked as “continuous change of perspective”.¹⁶

A Constitutional Court as a court which becomes the final judge to interpret a constitution,¹⁷ when conducting a hearing of a case, it is faced by a need to find a meaning which is in line with the constitution or the 1945 Constitution. However, sometimes the meaning which can answer the need related to justice is not the real one. The contextual meaning when the legal norm is established sometimes can answer it. Sometimes those two meaning cannot even answer the need of justice, so another way to find the meaning is needed, a current contextual meaning for instance.

Without the ability to do a radical deconstruction, the Constitutional Court will lost its “soul” as a constitutional court whose duty is to protect the rights of the people. It means, this will downgrade the Constitutional Court into a general court whose duty is only to implement the law.

Both the constructive or deconstructive method is basically comes from the similarity of the purpose, such as explaining, interpreting, and/or completing the

¹⁴ Budi Hardiman, *Filsafat Fragmentaris* (Yogyakarta: Kanisius, 2007), 163.

¹⁵ Hardiman, 163; Budi Hardiman, *Seni Memahami: Hermeneutik dari Schleiermacher Sampai Derrida* (Yogyakarta: Kanisius, 2015), 283–85.

¹⁶ Hardiman, *Seni Memahami: Hermeneutik Dari Schleiermacher Sampai Derrida*, 285.

¹⁷ Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi: Perspektif Baru Tentang ‘Rule of Law and Rule of Ethics’ & Constitutional Law and Constitutional Ethics*, 2nd Edition (Jakarta: Sinar Grafika, 2015), 238.

concept of open legal policy which has been formulated by the Constitutional Court. The two methods are in the area of new law (new finding), therefore it can be categorized as legal hermeneutics.¹⁸

IV. FINDINGS AND ANALYSIS

4.1 The Criteria of Open Legal Policy (KHT) in Verdicts of Judicial Review Conducted by the Constitutional Court

The research is conducted to 940 verdicts of judicial reviews. The verdicts are from the very first time of verdict done by the Constitutional Court in August 2003 until the verdict done in October 2016. From 940 verdicts, there are 77 verdicts which consist of term Open Legal Policy, and the rest (863 verdicts) does not consist of the term open legal policy.

Further, from 77 verdicts consisting of term Open Legal Policy, 30 verdicts also consist of a brief description and/or explanation/argumentation behind the reason why the Constitutional Court reviewed the provision of law and categorized it into open legal policy. 47 verdicts only mention term Open Legal Policy without providing further explanation/argumenation which can be used as reference to find the meaning of Open Legal Policy.

In a verdict No. 27/PUU-V/2007 about a judicial review No. 3 Year 2005 about the National Sports System, the Constitutional Court conveys “...*that matter is the option (related to the policy) given to the legislator to regulate the law which does not have any relation to the constitutionality of a norm*”. The quotation shows that based on the Constitutional Court, there is an option of legal policy which becomes the rights or obligation of the legislator. The constitutionality of the option cannot be reviewed. That concept is repeated by the Constitutional Court, that is in the verdict No. 30/PUU-XIII/2015, verdict No. 46/PUU-XIII/2015, and verdict No. 120/PUU-XIII/2015.

¹⁸ Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar* (Yogyakarta: Liberty, 2004), 56. See also Aharon Barak, *Purposive Interpretation in Law* (New Jersey: Princeton University Press, 2005), 55.

It is different from the four verdicts which review that the constitutionality of the open legal policy cannot be reviewed/examined, the constitutionality of the open legal policy of some verdicts can be reviewed, even have to be reviewed. In a verdict No. 006/PUU-III/2005 about judicial review 32/2004 about the local government, it is stated that “...the legal policy which cannot be reviewed except if it is done arbitrarily (*willekeur*) and exceeds the authority of the legislator (*detournement de pouvoir*).”¹⁹ The bolded phrases show the requirements for an open legal policy to be able to be reviewed to a judicial review. The requirement for following a judicial review is different from the requirement to be categorised as open legal policy.

“Requirements of a judicial review” is a condition which has to be fulfilled (in this case is legal provisions), so it can follow a procedure of the review. Whether the requirements are fulfilled or not, this will not affect the result of the review. Although the requirements have been fulfilled, it does not guarantee for passing the review. The requirement of a review is like an entry gate to follow a judicial review. Meanwhile, to pass the review itself, there is an assessment to be fulfilled.

An object of a review is not always what is being faced by the requirements of the review. A legal provisions in front of “requirements of a judicial review” cannot be considered as an object of a judicial review. “Requirements for a review” have to be fulfilled by the provisions of a particular law so it can be stated as an object of a judicial review. After the legal provisions become an object of a judicial review, so it finally can be examined/reviewed through judicial review.

¹⁹ The principle for not being arbitrary and the principle for not exceeding the authority of a legislator are part of good governmental principles in Netherland which come from a jurisprudence of general courts. It is then developed to be Wet AROB especially for the ban of detournement de pouvoir and the ban for being arbitrary. The principle is conducted in Indonesia in a law 5/1986 about State Administrative Judiciary which is changed with the law 9/2004 and 51/2009. It is possible that the Constitutional Court refers to the principle which is formulated in the explanation of Article 53 (2) b of law 9/2004. See also Philipus Hadjon et al., *Pengantar Hukum Administrasi Indonesia*, 7th Printing (Yogyakarta: Gadjah Mada University Press, 2001), 270–82; Cekli Pratiwi et al., *Penjelasan Hukum Asas-Asas Umum Pemerintahan yang Baik (AUPB) Hukum Administrasi Negara* (Jakarta: LeIP, 2016), 25–30; Muchsan, *Pengantar Hukum Administrasi Negara Indonesia* (Yogyakarta: Liberty, 1982); Soehartono, “Eksistensi Asas-Asas Umum Pemerintahan yang Baik sebagai Dasar Pengujian Keabsahan Keputusan Tata Usaha Negara di Peradilan Tata Usaha Negara,” *Jurnal Yustisia* 83 (n.d.); I Gede Eka Putra, *AAUPB sebagai Dasar Pengujian dan Alasan Menggugat Keputusan Tata Usaha Negara* (Pengadilan Tata Usahan Negara 2017).

Chart 1
Steps for the Requirements for A Judicial Review of Legal Norm

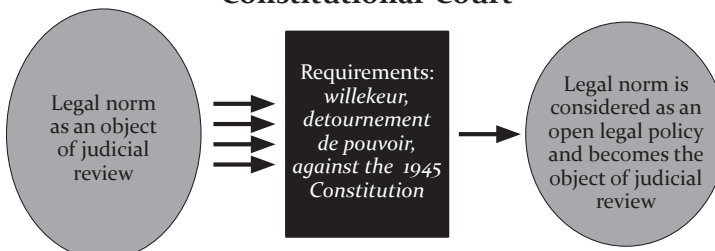


Sources: Author

The difference between the requirements for a review from “requirements to be assessed/categorised as an open legal policy” is the condition which has to be fulfilled by the object of the review so it can be categorised as legal norm whose characteristic is like the open legal policy. If the requirements cannot be fulfilled, so the object of a review can be categorised as a legal norm whose characteristic is not like an open legal policy.

In a verdict No. 006/PUU-III/2005, the Constitutional Courts argues that “...is a legal policy which cannot be reviewed except it is done arbitrarily (*willekeur*) and exceeds the authority of the legislator (*detournement de pouvoir*)”. The previous quotation from a verdict explains that there is a possibility that arbitrariness (*willekeur*) and exceeding the authority (*detournement de pouvoir*) are two requirements for a legal norm of open legal policy to be reviewed in a judicial review.

Chart 2
The Steps: Requirements for a Legal Norm to be the Object of a Judicial Review and Being Assessed as an Open Legal Policy by the Constitutional Court



Source: Author

If the meaning is as being stated before, judicial review written in verdict No. 006/PUU-III/2005 is a review of legal norm of open legal policy toward the Constitution 1945. In other words, the verdict of the Constitutional Court quoted above assumes that a norm that will be reviewed needs to be a legal norm of an open legal policy. The concept of the review needs assumption. The assumption is at a pre-judicial review, the Constitutional Court needs to know whether the legal norm is open legal policy.

The understanding is confirmed by verdict No. 10/PUU-III/2005 about the judicial review of Law 32/2004 about a local government. It conveys that:

“...as long as the option of the policy does not exceed the authority of the legislator and it does not misuse the authority, and also does not against provisions written in 1945 Constitution, so this kind of policy cannot be reviewed in through judicial review by the Court”.

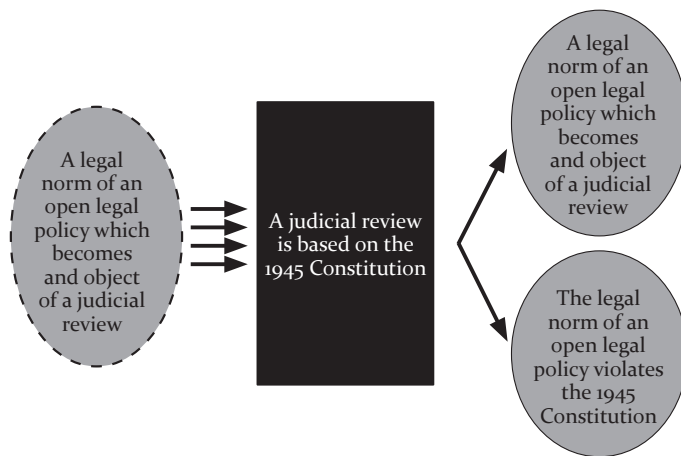
The question arised is how the Constitutional Court knows that the policy does not exceed the authority of the legislator, does not misuse the authority, and does not against the 1945 Constitution, without conducting a judicial review towards the option (policy)?

In the verdict No. 10/PUU-III/2005, this verdict confirms the concept of “requirements of a review” written in verdict No. 006/PUU-III/2005, that the Constitutional Court needs to know whether the legal norm is open legal policy or not, then the Court can decide to do a judicial review or not. From the provision, it is known that in judicial review, the Constitutional Court provides several steps to filter the case, those are i) deciding whether a legal norm is open legal policy ii) whether a norm of open legal policy is considered having constitutional value or not.

This kind of concept needs further assumption, that is an assumption that “valued as open legal policy” is not always “valued its constitutionality”. It means, a legal norm which is valued as open legal policy by the Court is in fact not always having constitutionality value. In brief, from the sentence, the mening can be infered from the sentence “...therefore the option of the policy can not follow judicial review...” in a verdict 10/PUU-III/2005, in a *contrario* manner shows

options of policy which can follow a judicial review. This meaning is confirmed by a verdict No. 130/PUU-VII/2009 about a review of a law 10/2008 about a general election of the members of People Representative Council, Regional Representatives, and Regional People Representatives Council.

Chart 3
The Steps of Judicial Review
of a “Legal Norm Which is Considered as an Open Legal Policy” in
Verdicts of the Constitutional Court



Source: Author

A condition where the legal norm is “valued as open legal policy” which is not identically “valued as constitutional” arised new problem since the foundation of the review is constitution. A legal argument is needed when that legal norm is reviewed twice. Those two reviews should use the same basis but the output are different.

Chart 1 until 3 above show something that logically can not be done by the Constitutional Court, that is distinguishing the difference between “the requirements of a review”,²⁰ “requirements to be valued as open legal system”,²¹

²⁰ Requirements of a review is an entry gate for reviewing the constitutionality of a legal norm valued as an open legal policy.

²¹ Requirement to be valued as an open legal policy is a requirement to assess/categorize whether a legal norm being reviewds is an open legal policy.

and “requirements of open legal policy to be considered as constitutional”.²² The reason is the basis of three reviews are from the same basis, that is the 1945 Constitution.

In relation to that condition which is considered as complicated, 30 verdicts of the Constitutional Court were chosen for the object of the research. Three categorizations were found. Those three categorizations were considered having different requirements, but in fact several requirements were also used by different categorizations.

Table 1

The Requirements of the Three Categorizations of the Open Legal Policy.

Criteria	Requirements of a Legal Norm to be valued as Open Legal Policy	Requirements for Proving the Constitutionality of a Legal Norm which Have been Valued as Open Legal Policy	Requirements for a Legal Norm (which has been valued as Open Legal Policy) so It Would not Be Reviewed
1	It does not violate the 1945 Constitution		
2	It has to pay attention to the demand/postulate in a fair manner and in line with the moral consideration, religious value, security value, and public order value;	It is not an intolerable injustice;	It has fulfilled the justice;
3	It ensures the rights of citizen;	It does not against the political rights.	
4		It is not conducted arbitrarily (<i>willekeur</i>);	
5		It does not exceed and/or violate the authority (<i>detournement de pouvoir</i>);	

²² Requirements of an open legal policy to be valued as constitutional is a requirement to assess/value whether that legal norm (which has been valued as open legal policy) is in line with the constitution or not.

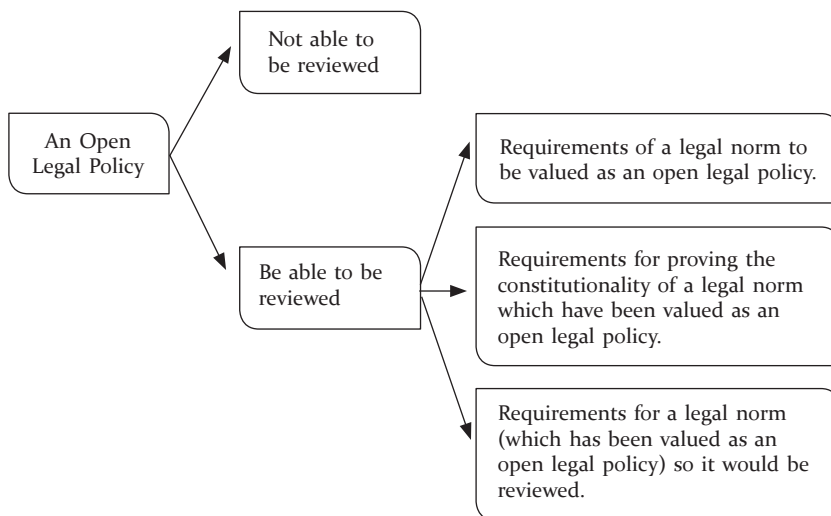
6		It does not violates moral values;	It does not arise dispute/problem in (an) institution(s);
7		It does not violate rational values;	
8		It does not violate the sovereignty of people;	
	It is logically and legally accepted.		
10	It is useful.		

Source: Author

The similarities are logically not accepted. A categorization cannot have any similarities in requirements/criteria with other categorization. If those categorizations have similarities in the requirements, it means the requirements have to be merged into one categorization.

Chart 4

The Position of Judicial Review of Open Legal Policy in Verdicts of the Constitutional Court



Sources: Author

The formulation done by the Constitutional Court taken from various verdicts, and the meaning of the open legal policy proposed by the President or the People Representatives Council in several judicial reviews, show tendency in interpreting the open legal policy as an absolute freedom for the legislator to formulate the norm of a law. That absolute freedom is potentially misused so a disadvantageous law will arise.

A freedom is actually paradoxical. The absolute freedom or limitless freedom of a legislator will limit and even erase the freedom of people who are regulated by the law. The absolute freedom also negates the constitutional understanding which have ben formed to appreciate and ensure the freedom of the people of a state.

4.2 Criticism on Open Legal Policy

From the perspective of the term, open legal policy still has inconsistency between the meaning of the combination of each word with the meaning desired by the Constitutional Court. Clearly, there is difference between the meaning of open legal policy from the semantic point of view with the meaning desired by the Constitutional Court.

The term open legal policy is formed from three words, i) policy, ii) legal, iii) open. The meaning from the three words are:²³

- a) Policy, is an option taken by an authorized party to do or not to do something as a response toward a particular condition;
- b) Legal, is a provision made by a particular institution in order to create a peaceful life (and well-organized matters) by regulating the behaviour of the society; and
- c) Open, is a freedom to choose without being affected by anyone or anything, whether it is in form of coercion or limitation.

²³ The three terms (Policy, Legal, Open) refer to several dictionaries. See Tim Penyusun Kamus Pusat Bahasa, "Kamus Besar Bahasa Indonesia, (3rd Ed., 1st Printing)," *Kamus Besar Bahasa Indonesia*, (3rd Ed., 1st Printing) (Jakarta: Balai Pustaka, 2001); Dheeraj and Sinha, "Legal Dictionary," *Legal Dictionary* (Kuala Lumpur: International Law Book Services, 1996); S. L Salwsan and U Narang, "Academic's Legal Dictionary," *Academic's Legal Dictionary* (New Delhi: Academic India Publisher, 2004); Bryan Garner, *Black's Law Dictionary*, 9th Edition (Minnesota: West, 2009); Susan Wild and Jonathan Wallace, "Webster's New World," *Law Dictionary* (Canada: Webster's New World, 2006); Elizabeth Martin, "A Dictionary of Law," *A Dictionary of Law* (Oxford: Oxford University Press, 2003).

It is quite odd to understand the open legal policy from its terms. The confusion is the difference between grammatical meaning and real meaning desired by the Constitutional Court. There is also a contradiction between each terms used in the phrase “Open Legal Policy”. The term open legal policy as a legal term has failed to give an appropriate meaning since it raises confusion. The reason behind the unclear meaning of open legal policy is that the three words does not belong to the same level and categorization.

In line with Gilbert Ryle, this case is like a category mistake,²⁴ that is when the two terms from different categorizations are combined without any explanation. When the word “policy”, “legal”, and “open” are considered at the same level, the meaning of the combination of the three terms is “an act, a verdict, a draft of regulation, in the field of law which can be done freely by legislators”. Is it the correct meaning desired by the Constitutional Court?

To know the desired meaning of an Open Legal Policy, a reposition of each word building the term is needed. The circle/environment where the terms are used is obligatory to be known. Different circle will define different meaning. Ludwig Wittgenstein II argues,²⁵ “*Don’t ask for the meaning, ask for the use ... Every kind of statement has his own kind of logic*”.²⁶ This is in line with Kaelan “... *the meaning of a word is its use in the sentence, the meaning of a sentence is its use in the language, and the meaning if a language is its use in different contexts in life*”.²⁷

Therefore, the term “legal” needs to be understood together with its context (in relation to the establishment of law). The term “legal” cannot be understood by using broad meaning (in general way). After that, the term “policy” can be combined with the term “legal”, and the meaning of “policy” can be understood as an activity to create laws.

²⁴ Based on Gilbert Ryle, a category mistake is “... a mistake that happens when someone tries to describe a fact about a particular group/categorization by using characteristics of other group(s)”. See Rizal Mustansyir, *Filsafat Analitik: Sejarah, Perkembangan, dan Peranan Para Tokohnya* (Yogyakarta: Pustaka Pelajar, 2007), 118. Compare Adelbert Snijders, *Manusia dan Kebenaran: Sebuah Filsafat Pengetahuan* (Yogyakarta: Kanisius, 2006), 139–40.

²⁵ Snijders, *Manusia Dan Kebenaran: Sebuah Filsafat Pengetahuan*, 112–13. See K Bertens, *Filsafat Barat Kontemporer: Inggris-Jerman* (Jakarta: Gramedia, 2002), 52–53.

²⁶ Snijders, *Manusia Dan Kebenaran: Sebuah Filsafat Pengetahuan*, 138.

²⁷ Kaelan, “Filsafat Analitis Menurut Ludwig Wittgenstein: Relevansinya Bagi Pengembangan Pragmatik,” *Jurnal Humaniora* 16, no. 2 (2004). Compare to Mustansyir, *Filsafat Analitik: Sejarah, Perkembangan, Dan Peranan Para Tokohnya*.

The term “open” is not at the same level as the two previous terms. It is lower than them and the meaning of “open” has to be understood by using its context, that is the context of a judicial review. The term “open” will have an appropriate meaning and will not against the term “legal” when the position of “open” is lower than the term “legal policy”.

When the level of the term “open” is lower than the phrase “legal policy” of legislators in a context of judicial review, the meaning of the term “open” is a freedom for legislators to interpret the 1945 Constitution, but the freedom still get to follow a judicial review by other institution outside the legislators – *in casu* the Constitutional Court.

The effort to know the real meaning of an open legal policy found its supporting argument. This argument is in form of the aim of a judicial review. The aim of a concept of a judicial review will raise ideas of new open legal policy which can be developed. It is also aimed to limit its authority. The concept of open legal policy needs to be reviewed through a judicial review. If the concept of the open legal policy is not appropriate/does not pass the judicial review, the formulation is not correct/appropriate.

John Agresto formulates 10 main points of judicial review by a judicial institution, that is:²⁸

1. To protect the constitution as the supreme law;
2. To ensure the implementation of the aim of the constitution;
3. To give protection to the fundamental values of the country written in the constitution;
4. To control the legislative;
5. To ensure the implementation of a country and make the people of the country respect and obey the constitution;
6. To ensure the implementation of checks and balances principle;
7. To avoid a tyrannical majority or to control the principle of majority law;
8. To implement the values and principles of constitutional democracy;

²⁸ Benny Harman, *Mempertimbangkan Mahkamah Konstitusi: Sejarah Pemikiran Pengujian UU terhadap UUD* (Jakarta: KPG, 2013), 95–96.

9. To implement the ideology of rule of law state.
10. To keep the consistency of the hierarchy of the legal norms.

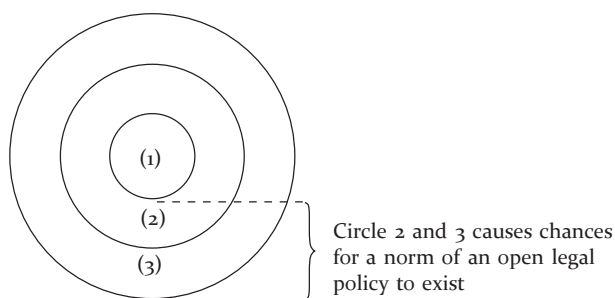
The new understanding about the open legal policy is from the logic of *stufenbau* which is established by Kelsen dan Nawiasky, that is all the laws and regulations have to be assessed and reviewed by the higher norms. If there is a law which cannot be reviewed (where that law is not the supreme/highest law), this condition is against the concept of *stufenbau* which causes a violation towards the existence of legal norms above the law.

The absence of control towards the legislators causes a tyrannical majority as it is worried by Agresto. This tyranny arises since the law becomes the supreme/highest law and replaces the 1945 Constitution.

4.3 The Circle of Constitutionality

To be more comprehensive in understanding the position of an open legal policy in a verdict of a judicial review conducted by the Constitutional Court, the circle/the environment of the constitutionality is also needed to be known as it is seen on the chart.

Chart 5
The Concept of The Circle of Constitutionality



- (1) Circle of explicit order of the constitution;
- (2) Circle of implicit order of the constitution;
- (3) Circle which is created after the implementation of the two circles mentioned above.

Source: Author

The chart of Circles of Constitutionality above consists of three concentric circles. The first circle is inside the second circle. The second circle is inside the third circle. Each circle represents a categorization of a particular norm of a constitution:

1. The explicit order of the 1945 Constitution, is a circle consisting clear constitutional norms which are mentioned/ordered by the 1945 Constitution. To understand the meaning of these norms, it is needed to read word, phrase, or sentence of the article and/or paragraph consisting the norms.²⁹For instance, the norm in Article 4 paragraph (2) and Article 6A paragraph (2) of the 1945 Constitution.
2. The implicit order of the 1945 Constitution, is a circle consisting of constitutional norms which the contents are not mentioned/ordered directly by the 1945 Constitution. To find the implicit norm, a deep interpretation is needed. For instance, the Article 22E paragraph (5) of the 1945 Constitution which states: “General elections are conducted by a commission of general elections having national, permanent, and autonomous character”. The Indonesia’s Election Supervisory Body (Bawaslu) is not regulated by the 1945 Constitution, but the Constitutional Court interprets the Article 22E paragraph (5) teleologically so the The Indonesia’s Election Supervisory Body is included as the part of “General Election Commission”.³⁰
3. A circle created due to the implementation of the two other circles (explicit and implicit).

The idea of the the third circle is inspired from the questions delivered by M V. Tushnet about the existence of constitution outside the current constitution in the tradition of state administration in the US.³¹ In context in Indonesia,

²⁹ In the method of constitutional interpretation, this interpretation is known as grammatical interpretation. See Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, 56–78.

³⁰ See the verdict of the Constitutional Court Number Judicial Review Number. 22 of 2007 on General Election, No. 11/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia 2010). See also Mardian Wibowo, “Justices’ Freedom of Constitutional Interpretation Method in The Indonesian Constitutional Court,” *Mimbar Hukum* 25, no. 2 (n.d.): 290–91.

³¹ Tushnet states that “a constitution outside the circle of constitution” is a set of norms created from the practice of a state administration where the practice is the order of the constitution or being ordered directly by the constitution. The term “The Constitution Outside the Constitution” can be found in Mark Tushnet, *Why The Constitution Matters* (London: Yale University Publisher, 2010), 7. Hans Kelsen differentiates between a formal constitution from material constitution. The formal one is “a Constitution with a capital ‘C’; a single document which purports to define institutions of the state and delineates their relative powers and duties”. On the other hand, material constitution “...consists of those legal rules that regulate the production of other (general) legal

a norm which is created as the result from the implementation of the two other norms consists of people’s customs/habit existing before Indonesia exists, then it develops into states administration. The most obvious example of the third circle is about the convention of state administration in form of deliberations in a session conducted by the People’s Consultative Assembly.³² This method is not regulated in the 1945 Constitution but it becomes prioritized obligation in the session it self. However, when the People’s Consultative Assembly does not conduct a deliberations, they just do voting, this matter is a violation of the law.³³

Another example is the Law 12/2011 about the establishment of Laws and Regulations (Law 12/2011). The result of the judicial review of this law should be as a reviewed norm. However, the result of the existence Article 51A paragraph (3) from Law of the Constitutional Court is assigning the Law 12/2011 to be the foundation of the Judicial review. Therefore, the role of the Law 12/2011 is as a constitution.

In relation to the open legal policy, the norms exist between the second and the third norm are norms which give a chance/possibility for the new open legal policy.

4.4 The New Meaning of an Open Legal Policy

Open legal policy should be divided into two, those are i) an absolute open legal policy, and ii) a relative open legal policy. It is possible to create another type of open legal policy outside the two mentioned before.

An absolute open legal policy is a policy which cannot be reviewed by the Constitutional Court. This policy is a conception which becomes the basis of

rules; the constitution is the highest level of law within national law”. According to Kelsen, not all the states have a formal constitution, but all states must have material constitution. See N. W Barber, *The Constitutional State* (Oxford: Oxford University Press, 2010), 75–76.

³² Referring to stufenbau Kelsen and Nawiasky, the deliberation is a norm of presupposition (a norm which is presupposed as a very basis from the hierarchy of a norm). However, the existence of a deliberation as a convention in a state administration can be considered as other laws outside the law of a state. I Nyoman Nurjaya conveys that, “...empirically a law in a society can be explained in form of state law, it is also in form of religious law, customary law. However, from the point of view anthropology, the inner order mechanism or self-regulation in the communities is law whose function is as a tool to keep the social life”. See I Nyoman Nurjaya, “Perkembangan Pemikiran Konsep Pluralisme Hukum” (Konferensi Internasional tentang Penguasaan Tanah dan Kekayaan Alam di Indonesia, Jakarta, 2004), 10.

³³ Compare to Barber’s argument about customs position in constitution. See Barber, *The Constitutional State*, 85–86.

freedom of a particular state. If this absolute open legal policy does not exist, the state will not be able to run the state freely. Explicitly, this absolute policy does not have any legal foundation in the 1945 constitution. However, implicitly, the legal foundation of this open legal policy can be found in the provisions regulating the authority of the president, People’s Representatives Councils, and Regional Representatives Council.

This absolute open legal policy is about *what* material that will be regulated in a law, for instance about the bio diversity, *koperasi* (cooperatives), and business competition, etc. The constitutionality of those materials cannot be reviewed since the *what* do not contain any moral values, usage values, or other values. Its characteristic is free from any value.

A characteristic of *what* which cannot be reviewed does not automatically make a law consisting of *what* becomes not able to be reviewed. The review towards the *what* and a review towards the law consisting the *what* are two different matters. Every law can be filed to the Constitutional Court. In a judicial review, the Constitutional Court is not allowed to deny a petition. However, if the material of the petition is about the *what*, the Constitutional Court still conduct a hearing and the verdict of the hearing will be “denied”. In brief, things that are included in *what* are noun.³⁴ So, it can be said that any noun can be chosen as the object of a law by legislators.

From analytics and linguistics perspectives,³⁵ as a material, the *what* is in form of a noun which does not have any reference except from the *what* itself. A noun should be neutral. The act of a human being that will result a difference in a noun. A rope –as a noun-, it is a neutral matter for the first time, but it will have negative meaning when someone uses it as a hanging sentence. On the other hand, it will give positif meaning when someone uses it as a tool to pull a bucket of water.

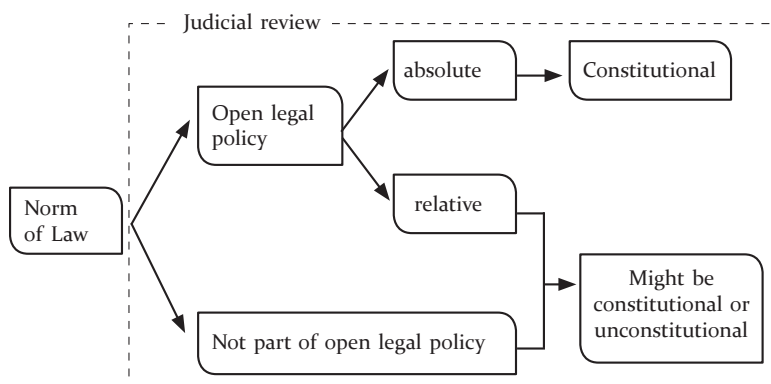
³⁴ In linguistics (Indonesian language) a word is divided into two, i) lexical and ii) order. A lexical word has lexical meaning. A lexical word is divided into a) noun, b) verb, c) adjective, and d) adverb. While the order word does not refer to those things, but the aim is to show the grammatical relation in a construction. See S Effendi, Kentjono Djoko, and Suhardi Basuki, *Tata Bahasa Dasar Bahasa Indonesia* (Bandung: Remaja Rosdakarya, 2015), 31–34.

³⁵ Compare to J.J. H. Bruggink *Rechts-Reflecties, Grondbegrippen uit de rechtstheorie* translated by B. Arief Sidharta about “Hukum dan Ilmu Bahasa”. See J. J. H Bruggink, *Refleksi tentang Hukum* (Bandung: Citra Aditya Bakti, 1999), 18, 31–35.

A material of a law that can be reviewed is *how* material. The *how* indeed has purposes. The implementation of the *how* is related to the interest of other people. A regulation related to doctors have not had benefit or disadvantage for anyone. This statement will be different if there is a norm stating that doctors can be prosecuted for their medical treatment which is considered as harmful/malpractice, although the doctors have been reviewed by the Honorary Council of Indonesian Medical Discipline.³⁶ The provision which regulates the *how* of the doctors becomes a provision whose constitutionality can be reviewed. Meanwhile, the doctors, as the *what* who were chosen to be regulated, their constitutionality cannot be reviewed since doctors are in the area of free values.

How, a regulated material of a law is in the area (part of) the relative open legal policy. It means that the legislators are authorized to formulate any law they want since the 1945 Constitution does not regulate the provision of that material. However, the principles behind *how* should or even has to be reviewed (by the Constitutional Court) towards the 1945 Constitution. The reason is because the basis principle of the *how* is principles which are not free from any values.

Chart 6
The Ideal Position of Open Legal Policy in a Judicial Review of Norms of Law



Source: Author

³⁶ See Judicial Review Number 29 of 2004 on Medical Practice against the 1945 Constitution of the Republic of Indonesia, No. 14/PUU-XII/2014 (The Constitutional Court of the Republic of Indonesia 2014).

This research proposes that the concept of a relative open legal policy is defined as an authority of a legislator to choose and formulate a norm of law which does not have an explicit reference in 1945 Constitution, where the formulation of that norm can not against the i) implicit norm of the 1945 Constitution; and ii) norms from the implementation of explicit norm or implicit norm of the 1945 Constitution.

V. CONCLUSIONS AND SUGGESTIONS

In various verdicts, the Constitutional Court has not explicitly defined the open legal policy. However, the term open legal policy has been implicitly defined as legal policy which can be made by legislator when the 1945 Constitution does not regulate the content material of the law that will be established.

The analysis of several verdicts of the Constitutional Court found three requirements for the categorization of the open legal policy. This research found ideal criteria of a norm of law which are included in the categorization of the open legal policy, those are:

- a. Criteria for the categorization of the absolute open legal policy:
 - The norm is not clearly regulated in the 1945 Constitution;
 - The norm which consists the *what* (about the chosen object that will be regulated).
- b. Criteria for the categorization of the relative open legal policy:
 - The norm is not clearly regulated in the 1945 Constitution;
 - The norm which consists the *how* of an object of law that will be regulated;
 - It does not violate the 1945 Constitution.

Based on the findings about the meaning of open legal policy, the author suggests that the Constitutiona Court can do the following matters related to the judicial review:

1. Clearly differentiate between an absolute open legal policy from the relative open legal policy;

2. A judicial review of the norm of relative open legal policy is reviewed by using implicit norm of the 1945 Constitution and the norm from the implementation of 1945 Constitution.

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The identity covers the author's name, affiliation and institutional address, and the e-mail address.

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Index

- A**
Amendments 148, 189, 190
Appellate
 Decisions 151
 Docket 217
Audit Board of The Republic
 of Indonesia 238, 253,
 254, 255, 260
Authority 142, 143, 147, 148,
 152, 155, 167, 174, 177,
 182, 185, 186, 219, 228,
 232, 234-255, 257-260,
 263, 269, 270-274, 278,
 282, 284
- C**
Causal Verband 212, 221
Checks And Balances 141,
 143, 144, 150, 154, 155,
 166, 167, 233, 278
Children Protection 199
Citizenship 208, 210-212,
 216, 221, 225, 228
Confrontative 141
Constitutional
 Court 141-143, 145-
 148, 150, 151, 153,
 156, 162, 163, 169-
 171, 174-176, 179,
 180-187, 189-191,
 193-196, 198-215,
 217-255, 257-269,
 271-286, 288
 Loss 208, 210-212, 218,
 220, 221, 225-227,
 229, 230
Cooperative 141, 144, 168
Cooperatives 282
- D**
Death Penalty 209, 213, 226
Democracy 144, 169, 189,
 233, 265, 278
Detournement De Pouvoir
 269, 270, 271, 274
Dispute 189, 200, 232-244,
 246, 248-250, 253-255,
 258, 259
Dissenting Opinion 214, 215,
 216, 223, 224
- E**
Expressis Verbis 213, 218,
 221, 222, 224, 225, 230
- F**
Financial Audit Board 233,
 254
- G**
General Election Commission
 233, 247, 280
Government Investment
 Center 255-257
Grammatische Interpretatie
 239
- I**
ICCPR 198, 200
ILO 199, 200
ILO Convention 199
Indonesian National Armed
 Forces 233
- J**
Judicial
 Commission 158, 233,
 237
 Law 145
 Review 142, 145, 152,
 154, 157, 162, 163,
 168, 171, 174-176,
 180-182, 184, 186,
 188, 189, 191, 193-
 200, 202, 203, 206-
 210, 212, 213, 216,
 221-224, 226, 227,
 229, 231, 262-266,
 268-273, 278, 279,
 281, 282, 284, 285
Supremacy 193, 194

L

Lawmakers 190, 196, 197,
203, 204

Legal

Formalism 191, 192

Realism 192, 206

Standing 208-210, 212-
219, 221, 222, 224-
230

Legislator 141-152, 155, 156-
162, 164-169, 234, 251,
264, 268-272, 276-279,
282-284

M

Manpower 194-196, 198-199,
200, 202, 203, 206

Law 162, 195

Migrant

Worker Protection Law
197

Workers 196-199

N

Nationalities 214

Nationality 210-212, 228

Niet Ontvankelijk Verklaard
240, 242, 243, 246, 248,
250, 252, 253

Nonderogable 199

Non-Derogable Rights 213,
219

O

Obiter Dicta 151, 168

Objectum Litis 232, 238

Open Legal Policy 262,
264, 268, 271, 273-277,
281, 283

Outsourcing

Case 194

Policy 194

P

Pacta Sunt Servanda 171,
182

People Representatives

Council 141, 142, 145,
155, 156, 160, 161,
164, 167, 168, 180,
238, 240, 241, 243,
244, 246, 248-250,
253-257, 259, 260,
272, 276

Council of Aceh Regency
244, 246

People's

Consultative Assembly
160, 168, 180, 223,
233, 238, 281

Representative Council
172

Representatives Councils
282

Petitioner 236-241, 243,
258, 259

Petitioners 194, 196-198, 203

Q

Qanun 244, 245

R

Ratification 171, 173, 175,
178, 184, 188, 241, 244

Ratio Legis 220, 224, 225,
226, 230

Rebus Sic Stantibus 182

Regional

Government 212, 231,
233, 264, 286

People Representatives'
Council 160, 161,
164, 168, 233, 244,
263, 264, 285, 286

Representatives 263, 264,
272, 282, 285, 286

S

Separation of Powers 233

Spannungverhältnis 225

State

Administration 171, 185,
233, 235, 256, 280,
281

Budget Proposal 254, 256

Institutions 143, 147, 185,
190, 219, 221, 225,

- 226, 232-246, 248-251, 253, 254, 258, 259
- Owned Enterprises 255, 256
- Subjectum Litis 232, 235
- Supreme Court 148, 190-192, 199, 200, 205, 206, 211, 223, 227, 228, 233, 237, 252, 261
- T**
- The 1945 Constitution 141-143, 145, 147, 148, 150, 153-155, 157, 166, 167, 169, 172-175, 178-181, 184-188, 190, 194, 196, 198, 201-203, 206
- The Government Investment Center 255, 256, 257
- The International Covenant On Civil And Political Rights (ICCPR) 216
- The Legislature 148, 189-191, 193, 194, 197, 204
- The People Representative Council 233
- The People's Consultative Assembly 160, 180, 223, 238, 281
- The Stufenbaulehre Theory 222
- Treaty 171, 178, 181, 184
- V**
- Verdicts 174, 179, 180, 181, 232, 240, 262-266, 268, 269, 274, 276, 284
- Vis A Vis 214

Author Index

A

Abdul Mukthie Fadjar 199
 Achmad Roestandi 197
 Adolf Julius Merkl 222
 Agresto 278, 279
 Agusman 172, 184, 187
 Aharon Barak 268
 Alexander Bickel 190
 Alexander Hamilton 191
 Allan Brewer-Carias 142,
 151
 Arifin Firmansyah 233

B

Barber's 281
 B. Arief Sidharta 282
 Barrett 143, 144, 169
 Benny Harman 278
 Bisariyadi 218, 219, 220,
 230
 Boer Mauna 177, 183
 Brewer-Carias 142, 151,
 169
 Bryan Garner 276

C

Cécile Fabre 185

D

Damos Dumoli Agusman
 172, 184

Derrinda 267

Dheeraj 276, 285

Douglas Goodman 265,
 287

E

Elizabeth Martin 276
 Ernst Benda 143, 151

F

Fajar Laksono 141
 Flethcer 217, 218, 219,
 226, 230
 Francesco Zucchini 142,
 170

Fred Isjwara 177

G

George Flethcer 218
 George P Fletcher 218
 George Ritzer 265
 George Stephan Vanberg
 142
 Gilbert Ryle 277
 Gustav Radbruch 225

H

Hamdan Zoelva 202
 Hans Kelsen 143, 222, 223
 Harjono 199, 207, 214,
 219, 224

HAS Natabaya 197

Hendrianto 217, 220, 230

HM. Laica Marzuki 215,
 219

Huala Adolf 177

I

Ida Bagus Wyasa Putra
 265, 287
 I Dewa Gede Palguna 151
 I Nyoman Nurjaya 262,
 281
 Isjwara 177, 183, 187
 Isra 142, 143, 169

J

Jimly Asshiddiqie 201, 207,
 223, 267
 J.J. H. Bruggink Rechts
 282
 John Agresto 278
 John Ferejohn 142
 Jonathan Wallace 276, 288
 Jr, Brett Curry 192

K

Kaelan 277, 286
 Katharine G. Young's 189,
 193
 Kathleen Barrett 143, 144
 Keith E. Whittington 266

Kelsen 279, 280, 281
Kentjono Djoko 282, 285
Khaerudin 175, 188
Kimmerle 267
King Faisal Sulaiman 223

L

Laica Marzuki 198, 215,
219, 226
Lee Epstein 191
Leiter 192, 206
Lili Rasjidi 265

M

Maria Farida Indrati 180
Mark Tushnet 195, 204
Marshall 192, 206
Maruarar Siahaan 199,
215, 216, 219, 223, 224,
239
Mauna 177, 183, 188
Mertokusumo 268, 280,
287

Michelle Santoni 142
Mochtar Kusumaatmadja 177
Moh. Mahfud MD 264

N

Nawiasky 279, 281

P

Peter Mahmud Marzuki 144
Péter Paczolay 142
Popa Nicolae 209, 229
Prima Gumilang 161

R

Refly Harun 150
Richard Pacelle 192
Rosalind Dixon 204, 207
Rosmi Hasibuan 182

S

Saldi Isra 142
Satjipto Rahardjo 220
See Laica Marzuki 226

S Effendi 282
Simon Tumanggor 175
Sinha 276, 285
S. L Salwsan 276
Snijders 277, 287
Susan Wild 276

T

Thomas Kuhn 265
Tracey E. George 191

U

U Narang 276, 287

V

V. Guttler 151
Volkansek, M.L. 142

W

Whittington Keith 266
Willekeur 269-271, 274
William A Fletcher 217,
218, 226



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