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THE ROLE OF THE CONSTITUTIONAL COURT IN INDONESIAN LEGAL REFORM

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I. WHAT CAUSED THE EMERGENCE OF THE CONSTITUTIONAL COURT IN INDONESIA?

The Constitutional Court is a product of reform, especially in the institutional aspects of state in Indonesia. The existence of this institution has resulted in a new freshness in the political, democratic, and national life of Indonesia. The existence of the Constitutional Court serves as a fresh wind for each citizen, especially in protecting their basic rights against every action taken by the state that they deem to be inconsistent with the Constitution. The emergence of the Constitutional Court and its existence in the state administration reform of Indonesia has a long history. The author has analyzed all of this into several parts, namely: four waves regarding the presentation of law and the question regarding the two concepts of the state. Furthermore, it will analyze the authority of the Constitutional Court and how to position the Constitutional Court in the state administration reform process. Subsequently, at the end of this article, a conclusion will be drawn which is focused on the problematic nature of the Constitutional Court in the constitution and what exactly were the rationale behind the Bill on the Constitutional Court.

II. FOUR WAVES OF IDEAS REGARDING JUDICIAL REVIEW

In the history of state administration in Indonesia, there was an evolution of ideas or thoughts regarding the importance of judicial institutions which verify laws against the constitution. The culmination point of this progress occurred in 2001 when the People's Consultative Assembly, through the third amendment of the 1945 Constitution of the Republic of Indonesia, decided to establish a Constitutional Court in order to verify laws

against the Constitution.[1] This Decree of the People's Consultative Assembly serves as the final wave of a long struggle that commenced in 1945 in accomplishing the idea of establishing a constitutional state in order to achieve the objectives of the proclamation state.

The first wave occurred in the Session of the *BPUPK* in 1945 when this institution arranged a draft of the Constitution for the state.[2] In this *BPUPK* session, Yamin, a member, proposed this draft. However, other members, including Soepomo, rejected this draft of the Constitution which was arranged by the *BPUPK* and taken over by and legalized by *PPKI* (Committee for the Preparation of Indonesian Independence) on 18 August 1945 as the proclamation constitution, did not attach the authority of the Constitutional Court to verify laws.[3] The legislators of the 1949 *RIS* Constitution and 1950 *UUDS* (1950 Provisional Constitution) seemed to follow the idea of the founders and drafters of the 1945 Constitution and rejected the judicial authority to verify laws.

The second wave occurred when the Constituent Assembly elected at the 1955 General Election held their sessions during the period from 1957 to 1958 in order to arrange and draft a new Constitution as the replacement for the 1950 *UUDS*. The session held by the Constituent Assembly approved a Constitutional Court to hold the authority for verifying laws and governmental actions by employing the 1945 Constitution as the benchmark for determining validity of laws and actions. Yet, it was canceled because President Soekarno, through the Presidential Decree dated 5 July 1959 re-enacted the Proclamation Constitution of 17 August 1945 and dissolved the Constituent Assembly. This decree was deemed to have re-enacted the 1945 Constitution which clearly did not allow for a Constitutional Court to verify laws and governmental regulations or actions.

The third wave occurred at the beginning of the New Order administration (1965-1970) and reached its culmination in 1970 when the *DPR-GR* together with the Government discussed Law No. 14 of 1970 regarding the Principles of Judicial Authority as the replacement for Law No. 19 of 1964.[4] After 1970, until the collapse of the authoritarian regime of Soeharto in 1998, the debate regarding the issue of a Constitutional Court was not only on the back-burner but had largely been forgotten as an issue at all. The People's Consultative Assembly elected at General Elections in the New Order era did not change its stance on this issue in spite of the growing

aspirations of the community demanding the existence of judicial institutions to measure and verify laws that were potentially in breach of the provisions of the Constitution.

The final or fourth wave occurred when the *MPR* (People's Consultative Assembly) elected at the 1999 General Election, the first democratically held election in the post-Soeharto era, discussed the amendment of 1945 Constitution. This occurred in the period from 1999 through to 2004. The representatives of the parties and groups in the *MPR* deemed that it was necessary to tightly control the legislative and executive authority in order to prevent any violation against the norms existing in the Constitution. However, the representatives of parties and groups in the *MPR,* consist of groups which have persistently rejected the control of the legislative product in the form of law fall within the jurisdiction of a judicial body tasked with determining whether the law as *conditio sine qua non* for the sake of the accomplishment of principles of democratic legal country (constitutional government) as demanded by the reform movement.

The struggle between these two groups only ended after the third amendment of the 1945 Constitution, where it was agreed to delegate the authority to a judicial authority by establishing the Constitutional Court.[5] The stipulation in the third amendment of the 1945 Constitution specifies that the Constitutional Court is authorized to verify laws that are deemed to be in breach of the Constitution. In order to guarantee that this stipulation is implemented, the fourth amendment of the 1945 Constitution explicitly states that legislators have a deadline for the passage of a bill that will establish the Constitutional Court.[6]

A. The Controversy between the Two Concepts of the State

The controversy of ideas and thoughts between the group demanding the existence of authority of a judicial body to verify laws and the group rejecting this idea in the four waves of state administration history of Indonesia as explained above, is actually closely related to the idea or concept of state (*staatside*) being adhered to.[7] In general, there are two concepts regarding the state (*staatside*) which are very influential in the world and in practice among the supporters and followers of the two concepts which are competing and struggling for influence, including in Indonesia. These two competing concepts which influence the development of ideas in the area of

state administration law is the idea of people sovereignty with constitutional supremacy,[8] which is developed based on the concept of constitutional democratic government and the concept people's sovereignty based on the doctrine of parliamentary supremacy (legislative supremacy).[9]

The controversy existing between the supporters of each idea regarding the state will in turn have a direct implication on the pattern of the relationship which is developed between the legislative power on the one hand and the judicial power on the other hand. The debate between the group rejecting and the one supporting the judicial body being authorized to verify laws is a reflection of the strict controversy between the supporters and followers of the two main concepts regarding the principle of people's sovereignty.[10]

B. The concept of People's Sovereignty with Parliamentary Supremacy

The concept of parliamentary supremacy is the core of democracy.[11] According to the concept which adheres to the idea of the peoples' sovereign state with the doctrine of parliamentary supremacy, the judicial review by the judicial body is a betrayal and represents disloyalty against the democratic principle where it is held that the highest sovereignty is in the hand of the people while the law is only a manifestation of demand by the sovereign people.[12]

In such a doctrine of a state, the adagium *Vox Populi*, *Vox Dei* which means that what becomes of the decisions of the sovereign people, including the law or governmental regulations which are established based on the mandate provided by the people as the holder of that sovereignty, may not be assessed or annulled by any other institution.[13] If there is another institution which may verify, assess, and annul the law established by people as the holder of that sovereignty, it means the highest sovereignty is not absolutely held by people or its representatives which are elected through a democratic mechanism, instead, it is in the hands of the institution which has the authority to annul the Law.[14]

Another argument that may be employed to refuse the institutionalization of the law verification system for alleged breaches of the Constitution through the judicial authority is that, theoretically, there was no scientific basis that corroborated the authority of verifying the law, either the basis following the Marshall model that delegates the authority of

verifying the law to the Constitutional Court or the one following the Kelsen model that delegates the authority to a Board following the French model that is then delegated to the judicial authority. The followers of the parliamentary supremacy concept do not refuse at all the thesis made by Marshall and Kelsen regarding the necessity of limiting and controlling the authority of legislators in order to prevent the misuse of authority by this institution. Including, that the Constitution is a legal norm[15] of a state in the highest position among the existing legal norms and that it should be fully protected. The followers of the parliamentary supremacy doctrine do not refuse the concept of constitutionalism which necessitates all state authorities, including the legislative authority to be limited and controlled as being suggested by the supporters of the concept of constitutional supremacy. Limitation and control against the legislative authority should be significant. However, it should be performed by the legislators themselves and not by other state institutions. The law verification system as a form of control against the legislator may be justified as long as it is performed by the legislators themselves or the people through its representatives which are elected through a democratic General Election process. It has become a kind of ironic law in the countries adhering to the concept of people's sovereignty such as England, Netherlands, and France.[16]

C. Concept of People's Sovereignty with Constitutional Supremacy

The emergence of the peoples' sovereign state with constitutional supremacy is a phenomena that started to occur in the early 19th century as the anti-thesis against the concept of peoples' sovereign state with parliamentary supremacy which was practiced in some European countries over the several centuries previous to this. In reality, the concept of the peoples' sovereign state with parliamentary supremacy is frequently accompanied by negative excesses, such as the misuse of authority by the parliament in legislating the law due to ineffective control against the authority of legislators. In practice, the Constitution as the highest legal norm in limiting the authority of legislators is not as effective as if it was not accompanied by a concrete mechanism regarding and by which the legislative body's products are verified and measured as to whether they are in accordance with the norms existing in the Constitution. How, for instance, if in practice, there is a law that violates the norms of the Constitution. Without

the existence of such a mechanism, then the Constitution will only function as a historic document containing the declaration of independence, yet having no concrete meaning due to the lack of a mechanism which may force every state administrator, especially the legislative body to abide by the Constitution and to impose sanctions for any violation of the provisions that it contains.

According to the concept which demands the peoples' sovereign state based on the Constitutional Supremacy doctrine, this institutionalization of authority for verifying laws that are deemed to be in breach of the Constitution is frequently called constitutional democracy—a *conditio sine qua non*, an absolut thing serving as the most effective means in limiting the state's authority *in casu* the authority of the legislators.[17] In other words, the idea of a constitutional state (constitutionalism) may only be achieved through the institutionalization of a law verification system by a judicial institution. The main idea in the concept of a constitutional state is that there are always three main branches of the state's authority. And of the three branches of the state's authority there is not any one branch beyond the control of a legal institution, including the legislative authority. The state adhering to the concept of peoples' sovereign state with Constitutional Supremacy doctrine does not only establish the Constitution as the superior norm but also necessitates the existence of an effective mechanism for assessing and verifying the quality of each established Law.[18] The institutionalization of authority for verifying the Law is an effective method to be applied that the norms stipulated in the Articles of the Constitution may not serve as dead letters.

In the countries adhering to this concept of a democratic constitution, the law verification system has been appropriately institutionalized. There are some countries that delegate the control against legislative authority to a Constitutional Court, following the Marshall model in the state administration system of the USA and some other countries delegate it to a separate institution outside of the Supreme Court, such as a Constitutional Court in order to follow the Kelsenian model such as in the state administration system applied by Germany. Some countries delegate such control to a distinctive institution beyond the judicial authority, such as Constitutional Board such as in the state administration system applied by France. This Constitutional Board is autonomous in nature[19] and not part of

the political power. Despite the forms of institutionalization of law verification systems in each country, each country is different due to the different social and political backgrounds of these countries, however, intrinsically they become the principles in administering the country that the authority of legislators should be controlled in order that these powers do not become arbitrary. In the context of Indonesia, in order that such control may be more effective, it should be applied effectively by an institution, namely the Constitutional Court with various ideas of its establishment and the authority of the Constitutional Court itself.

III. THE IDEA OF THE ESTABLISHMENT BEHIND THE CONSTITUTIONAL COURT

The idea of establishment of a Constitutional Court is discussed in two parts, namely: the idea of Constitutionalism and the authority of the Constitutional Court.

A. The Idea of Constitutionalism

The establishment of a Constitutional Court in each country is triggered for a variety of reasons, however in general, the establishment of a Constitutional Court is initiated by a process of political change from authoritarian power into democracy. The rejection of authoritarianism has an impact on the demand for a democratic state administration which appreciates human rights.[20] Likewise, for the establishment of the Constitutional Court in Indonesia. Basically, the establishment of the Constitutional Court may not be separated from the past experiences in the administration of the authoritarian regime, essentially a closed power that does not respect human rights. The idea of establishing the Constitutional Court is motivated by a desire to have better administration of authority and state administration. There are at least four triggers for the foundation of a Constitutional Court; namely, (1) as a development of the constitutionalism concept, (2) a checks and balances mechanism; (3) clean and transparent state administration, and 4) protection for human rights.

1. The Idea of Constitutionalism

The Concept of Constitutionalism is a concept that seeks to provide a limitation on authority. This concept has two elements. The first element is the concept of a legal state where the legal power universally controls the state's authority, and in this respect, the law performs as a control of politics. The second element is the concept of citizen civil rights or the stating that the freedom of citizens is guaranteed by the constitution and the state's authority is limited by the constitution, and this authority must be legitimized by the constitution.[21] Institutionalization of the Constitutional Court is the implementation of the constitutionalism concept, demanding the existence of power limitations and this institution obtains a mandate from the constitution to settle the problems relating to the constitution and state administration.

2. As A Checks and Balances Mechanism

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

3. Clean and Good Government

A proper governmental system necessitates the existence of clean, transparent, and participative state administration. The Constitutional Court is an authority which may be positioned to perform this type of accountability control against public officials in the performance of their duties and functions, in this sense there will always be a reference to the morality and the interest of citizens.

4. Protection of Human Rights

Unlimited authority frequently leads to the performance of arbitrary actions in state administration and violations of human rights. The Constitutional Court is a branch of authority which functions to maintain state administration in order that it always refers to democratic principles as well as respecting and protecting human rights.

B. The Authority of the Constitutional Court

In accordance with the stipulation in Article 24C of the Constitution, the Constitutional Court has the authority to list hearings in both the first and final instance. In essence, the decisions handed down by the Constitutional Court are final and binding when dealing with matters within its jurisdiction such as constitutional validity of laws and the outcomes of general elections. In addition the Constitutional Court is also to decide matters where the House of Representatives alleges violations of the Constitution by either the President or Vice-President.

If traced from the debate of *PAH I MPR*, the establishment of the Constitutional Court cannot actually be separated from the political context of the dismissal of President Abdurrahman Wahid by the *MPR* in the 2001. The process and mechanism of this dismissal have much affected the idea of the establishment of the Constitutional Court, that the dismissal of a President should be performed legally in accordance with legal regulations and not arbitrarily. Starting form the dismissal of a President and/or Vice-President, it subsequently appeared that the idea of providing another authority to the Constitutional Court in this regard was warranted.

The main function of the Constitutional Court is to maintain the consistent performance of the Constitution and that this is done responsibly by each state administrator. Furthermore, that it must be implemented in policies forms which are in accordance with the demands of people and the aspirations of democracy. The function of the Constitutional Court is reflected in the authority explained above. However, in relation to the administration of the assigned authority, there are still some problems to be settled and others that must be anticipated.

Before discussing the problems, we should observe the following table:

(1) Verification of laws in Violation of the Constitution

Type	Verification of Legal System	Mechanism of verification
1. Formale toetsingsrecht 2. Materieele toetsingsrecht	1. Constitutional Court. 2. Supreme Court	1. There are some problems. 2. Performed by an institution.

(2) Settlement of Disputes on the Authority Among State Institutions

Constitutional authority against two institutions	The institutions as the authority of Constitutional Court
House of Representatives and President.	1. The state institutions specified in the constitution. 2. State institutions the authority of which is not specified by the state.

(3) Decision on the Dissolution of a Political Party

Principle	The freedom of association	Process
1. Democratic principle. 2. Human rights principle.	1. Political party. 2. Ambivalence of Constitution.	1. To prioritize the equality. 2. To uphold the truth. 3. Justice is not based on the ruler's will.

(4) Disputes Regarding the Outcome of the General Election

General Election	Settlement of conflict by the Constitutional Court
1. What type of election. 2. At what level is the dispute on the outcome of the general election may become the authority of the Constitutional Court.	1. It should be considered regarding time limits. 2. Who has the right to submit the claim. 3. Who is being claimed against.

(5) Impeachment

Duty of Constitutional Court	Types of Breach	Process of Investigation
To provide the verdict in relation to the judgment of the	1. President and Vice President are alleged to have committed a	1. To try and decide on the judgment of House of

House of Representatives that the President and Vice President has committed a breach of law.	breach of law in the form of betrayal against the state, corruption, bribery, other severe criminal acts, and shameful deeds. 2. President and Vice President do not meet the criteria to become the President and Vice President.	Representatives no later than 90 days after the receipt of the application by the Constitutional Court (Article 7B(4) of the Constitution. 2. In accordance with the change of system and state administration structure being developed in Indonesia.

Source:Author.

1. Judicial Review against the Constitution[22]

The authority for verifying laws in breach of the Constitution (judicial review), theoretically and practically include two types, namely formal verification (*formale toetsingrecht*) and material verification (*materielle toetsingrecht*). The formal verification is an authority of assessing whether or not a legislative product is produced in accordance with the prevailing procedures. While a material verification is an authority to examine and measure whether or not a legal regulation contradicts with a higher level regulation, as well as whether or not an authority has the right to establish a certain regulation.[23] In this context, the formulation of the Third Amendment to the 1945 Constitution Article 24C(1) does not limit the right of verification. The limitation is the subject to be verified or measures as specifically noted in the limitation of the law.

In the legal system of Indonesia, there are two institutions that have the authority to perform verification on legal regulations; the Constitutional Court and the Supreme Court.[24] The Constitutional Court has the authority of verifying law deemed to be in breach of the Constitution and the Supreme Court has the authority to verify legal regulations under prevailing laws. It is not so clear regarding the consideration in differentiating Judicial Review against the Constitution and regulations below the law.

The mechanism for verifying legal regulations under the abovementioned model is likely to produce problems. First, the vision of integrity and the concept of law or legal regulation enforcement, as there are

two institutions having authority for these matters, it is fair to say that any divergence between the institutions will be manifested as the problems noted above. Second, this verification model may lead to inconsistency or verdicts that contradict with legal regulations. What if a Governmental Regulation is declared not to contradict with a law by the Supreme Court while the Constitutional Court declares that the law serving as the "umbrella" covering the Governmental Regulation does not contradict with the Constitution.

Ideally, the verification of legal regulations is performed by an institution that may avoid the inconsistency of verdicts while at the same time allowing the explicit vision and legal conception to be upheld. Therefore, in order to prevent this problem, there is a need for a mechanism which may serve as a bridge between the Supreme Court and the Constitutional Court in the process of verification so that there are consistent verdicts handed down by both Courts.

2. Dispute Settlement on Authority Among State Institutions

One of authorities of the Constitutional Court is to settle the disputes relating to the authority among state institutions, which are stipulated in the Constitution. There are two requirements that must be satisfied before the Constitutional Court can exercise its authority; there is a state institution and the authority of this institution is stated in the Constitution. The conception of a state institution, the authority of which is specified by the Constitution, may invite various interpretations[25]. This is because the amended Constitution has no clear conception regarding state institutions,[26] particularly when one considers the emergence of many new institutions, either the ones specified in the Constitution and those not expressly stated in the Constitution. At last count there were at least nine state institutions the authority of which is specified in the Constitution; namely, the People's Consultative Assembly;[27] House of Representatives; Local House of Representatives; President; Supreme Court; Constitutional Court; Finance Audit Agency; and Judicial Commission.[28] Meanwhile, there are many state institutions the authority of which is not directly stated in the Constitution, examples of which include the National Commission of Human Rights, the National Ombudsman Commission (KON), KPKPN, and others.

The meaning regarding state institutions the authority of which is stated in the Constitution may certainly lead to various interpretations as to

which institution will fall under the jurisdiction of the Constitutional Court. For instance; whether the Constitutional Court also has the authority to settle disputes arising between Local Governments and the Central Government, and also disputes among Local Governments themselves. The authority is indeed present and generally referred to in the Constitution. However, it is important to clarify whether or not the Local Government and Municipality/City belong to the category of state institution or not.[29] In some countries such as South Africa, South Korea, Germany, the Russian Federation, the Czech Republic, and Yugoslavia, the authority of the Constitutional Court also includes disputes between Central Government and Local Government and among the Local Governments.

3. Decision on the Dissolution of a Political Party

In accordance with the mandate of the Constitution, the Constitutional Court also has the authority to decide on the dissolution of a political party. The problem is whether the dissolution of a political party contradicts with the principles of democracy and human rights. The amendment of the 1945 Constitution explicitly provides a guarantee of freedom and liberty for all citizens to associate and gather. One menas of giving effect to this guarantee is the right to form and be a member of a political party. This is an ambiguity in the Constitution where there is an apparent guarantee to freedom of association yet there are also provisions that permit the dissolution of political parties.

In some countries, such as Korea, the reasoning of dispersing a political party is explicit. Article 55 of the Law on the Constitutional Court of the Nation specifies that a political party may be dissolved in case the objective and activities performed by the political party contradict with the basic order of democracy. In Indonesia, the reasoning of dissolving a political party is specified in Law No. 31 of 2002 on Political Parties. A political party may be dissolved due to adhering, developing, disseminating, the doctrines or principles of Communism/Marxism/Leninism. This stipulation is very interpretative and has no a clear standard. What and how is the relevance between doctrines of Communism/Marxism/Leninism and the need to dissolve a political party? The following question is whether or not in a democracy such as Indonesia it is appropriate to dissolve political parties for their beliefs? The reasoning behind the dissolution of a political party in Indonesia

is very discriminative, not in accordance with the spirit of pluralism, freedom, and democracy.

4. Disputes regarding the Outcome of General Elections

Another authority held by the Constitutional Court is to settle disputes regarding the outcome of general elections. The problem is what type of general elections does this include and on what level these disputes regarding the outcome of general elections may fall under the jurisdiction of the Constitutional Court. According to Article 22E(2), general elections are conducted to elect members of the House of Representatives, Local House of Representatives, President and Vice-President. This means that the Constitutional Court would have the requisite mandate to settle every dispute regarding the outcome of general elections for all types of general elections and for all levels of election.[30] Is it sufficiently proportional to provide such an extensive authority, considering that the possibility of the Constitutional Court only exists in the central government, and besides, the number of Judges on the Constitutional Court is nine. It can be ascertained, the Constitutional Court will not be operating at a maximum level in trying, examining, and settling the disputes regarding the outcome of general elections, viewed from the possible number of cases being admitted and the percentage of cases that may be settled by the Constitutional Court with all its limitations. This is especially the case when one considers the euphoria of democracy is likely to see citizens demand that their rights be satisfied and these citizens will endeavor to exploit all of the judicial mechanisms available to them including the Constitutional Court. Therefore, there should be limitations against what level of disputes may be settled by the Constitutional Court, including a definition of time limits, and who shall have the right to impeach and be impeached.

5. Impeachment

The Constitutional Court is obliged to provide a verdict on the judgment of House of Representative, that the President and/or Vice President is alleged to have committed a breach of law and/or does not meet the qualification to become President and/or Vice President according to the Constitution. In reference to Article 7B(1) of the Constitution, the breach as stipulated consists of two things, **First**, that the President and/or Vice

President is alleged to commit a breach of law in the form of betrayal against th state, corruption, bribery, other severe criminal actions, or unlawful deed. **Second**, the President and/or Vice President do not any longer meet the qualification to be President and/or Vice President. The process of examining, trying, and deciding on the judgment of the House of Representatives is to be no longer than 90 days after the request is received by the Constitutional Court (Article 7B(4) of the Constitution).

The involvement of the Constitutional Court in the process of the dismissal of President and/or Vice President cannot be separated from the past experience and constitutes a logical consequence of the changing system and state administration being developed in Indonesia. Besides, the eagerness to provide a limitation so that a President and/or Vice President will not be dismissed merely due to political convenience of the parliament. This should ensure that there is also an accountable legal basis and consideration for any dismissal action taken. Nevertheless, the concept which is developed by the Constitution in the process of dismissing the President and/or Vice President still leaves some problems unresolved, such as: **First**, the draft of the Constitution may still be interpreted arbitrarily by the ruling political interests, such as in the context of "other severe criminal actions" or "unlawful deeds". **Second**, what and how is the investigation mechanism to be applied by the Constitutional Court in relation to the allegation which is meant by the House of Representatives, particularly as this relates to deeds relating to criminal acts. Is the 90-day period sufficient for investigating and deciding on the allegation of a breach by the President and/or Vice President considering the processes under the criminal procedure law necessitates the material truth for a case may take several months. **Third**, what is the binding nature of a verdict of the Constitutional Court to dismiss a President and/or Vice President when one considers that the verdict of the Constitutional Court should be conveyed by the House of Representatives to the People's Consultative Assembly. There is a possibility that the People's Consultative Assembly will annul the verdict of the Constitutional Court.

IV. THE CONSTITUTIONAL COURT IN LEGAL REFORM

Law No. 24 of 2003 on the Constitutional Court which characterizes the enforcement of operational regulations on the administration of

constitutional duties of the Constitutional Court of the Republic of Indonesia. Ratification of this Law has opened an opportunity for the appointment of 9 judges to the Constitutional Court for the first time in our history of state administration, namely: (1) Mohammad Laica Marzuki, (2) Soedarsono, (3) Maruarar Siahaan, (4) Jimly Assiiddiqie, (5) Achmad Rostandi, (6) I Gde Dewa Palguna, (7) H.A.S. Natabaya, (8) Muktie Fajar, and (9) Harjono.

Administratively, these nine (9) persons are appointed to be Judges of the Constitutional Court by virtue of Presidential Decree No. 147/M of 2003 and dated 15 August 2004. They took a joint oath, which was witnessed by the ruling President at that time, Megawati Soekarnoputri, at the State Palace on 16 August 2004. This was exactly 1 day before the deadline specified by Article III of the Transitional Provisions of the 1945 Constitution of the Republic of Indonesia.

Article III of the Transitional Provisions which are stipulated in the Fourth Amendment of the Constitution specifies: "The Constitutional Court is to be established no later than 17 August, and prior to its establishment, all its authorities shall be performed by the Constitutional Court". Therefore, besides the 13th, 15th, and 16th of August 2003, there is one more historic day for the Constitutional Court, 10 August 2002, the ratification of the Fourth Amendment of the 1945 Constitution of the Republic of Indonesia specifying that as of that date, the authority of Constitutional Court has legally existed, however, provisionally executed by the Constitutional Court acting as the provisional executive of the Constitutional Court.

During the period between 10 August 2002 to 10 August 2003 the Registrar of the Supreme Court has registered 14 cases relating to the validity of laws submitted by a variety of community interests. These 14 cases are in accordance with the Transitional Provisions of Article 87 of Law No. 24 of 2003, the investigation is assigned by the Supreme Court to the Constitutional Court no later than 60 days after the establishment of the Constitutional Court.

Closely related to the dispute on the outcome of general elections for electing the members of the various chambers of parliament in 2004, the Constitutional Court has received 448 allegations and 2 lawsuits from 1 pair of candidates for President/Vice-President. Of the 450 cases submitted only 273 met the basic conditions to proceed including the President/Vice-President claim. These 274 cases were consolidated into 45 bundles of

applications, consisting of 23 applications from political parties, 21 applications from the candidate members of the *DPD*, and 1 application from the President/Vice-President. Of the 448 cases regarding disputes on the outcome of the general election, the approved ones only relate to 40 cases; 2 for the seats of *DPD-RI*, 4 for the seats of *DPR-RI*, 5 for the seats of the Provincial House of Representatives, and 29 for the seats of District/Municipality House of Representatives.

In these cases the law provides for 30 working days from the date of receipt for these matters to be resolved. The applications were received between 8 May and 22 June 2004. They were resolved in 28 days and the verdicts were handed down by the Court on 18 June 2004.

Similarly for the cases relating to the disputes first stage of the Presidential election the law provides for 14 working days for these matters to be resolved. The Court handed down their decision within 7 working days.

The existence of settlement mechanism for the dispute on the outcome of general elections should be welcomed. Though establishment of the Constitutional Court it's has become clear that Indonesia has re-affirmed its determination to settle any kind of political dispute and conflict through legal procedures. In the abovementioned context, the Chief Justice of the Constitutional Court, Jimly Asshiddiqie declared as well as invited: [31]

> From now on, let us stop various bad habits which are 'anti-democratic' in nature, that is to settle various political street disputes and conflicts or releasing all political anger and envy that should have been done. We should settle all differences of opinion regarding the implementation of the democracy agenda in our country through legal procedures based on the constitution. Do not change the dispute on the outcome of general elections into a political conflict, especially the conflict among the supporters of leaders. In the event that there is a difference of opinion regarding the outcome of the general elections, as being experienced by the candidates for President and Vice-President, Mr. Wiranto and Mr. Salahuddin Wahid, take this problem to the Constitutional Court. Insya Allah, this court shall provide the justice for all parties in order to guide our national life to the legal procedures so that the democratic system that we develop may run appropriately and justly.

Judicial Review

In relation to judicial review, up to now, there are more than 100 applications having been received by the Constitutional Court. However, the qualified ones number only 41 applications. 20 of these applications have been settled and decided properly, while the other 13 cases have been investigated to the trial investigation stage, therefore, within a short period, it is fair to state that these cases will too have been determined. The remaining 8 cases are still at the preliminary stage of investigation.

Among the cases of Judicial Review, the approved applications include three cases:

1. Case No. 011-017/PUU-I; 2003 regarding Judicial Review of Law No. 12 of 2003 on the General Elections which was an application by a former member of the *PKI* (Indonesian Communist Party).
2. Case No. 013/PUU-I/2003 regarding Judicial Review of Law No. 16 of 2003 on Law No. 15 Year 2003 on Terrorism.
3. Case No. 05/PUU-I/2003 regarding Judicial Review of Law No. 32 of 2002 on Broadcasting.

The above three cases have been published in the State Gazette, each of them numbered No. 18/2004 and dated 2 March 2004, No. 61/2004 and dated 30 July 2004, and No. 63/2004 and dated 6 August 2004, respectively. According to the author, based on the above data, it can be noted that the verdict of the Constitutional Court in the cases of verification where the submissions of the applicant have been upheld number just three cases. However, since the substance of the cases relate to principles, the three cases, especially the ones submitted by the former member of the *PKI* and the Terrorism case, have resulted in intense reactions among the general public and among legal scholars.

Other than these three cases, the other cases were rejected in their entirety or declared unable to proceed (*niet ontuankelijke werklaad*) due to various reasons. This fact is sufficient to show that it is not very easy for the Constitutional Court to approve an application if it is not supported by adequate proof according to the basic norms contained in our Constitution. Moreover, each case submitted to the Constitutional Court, either the ones

relating to law verification and those relating to the other four aspect of authority are not simple cases.

Every law which has been ratified, intrinsically has reflected the demand of the majority of the Indonesian people, because the House of Representatives and President that have jointly discussed and approved it. And it is indeed these institutions that receive a direct mandate from the people to carry out their duties to legislate and enforce the law. However, the law only reflects the political will of the House of Representatives and President, which may not be guaranteed to be consistent with the will of all sovereign people. The will of the whole people is reflected in the Constitution as the product of the People's Consultative Assembly as the people's consultative institution, and not reflected in laws which by the very nature only reflect the political will of the House of Representatives and the President.

The outcome of agreement in the political forum at the House of Representatives is determined on the basis of 'rule by majority' which should not contradict with the values and norms of justice which has the higher degree, contained in the constitution. Therefore, while the majority of people have demanded a legal norm which is binding to the public as specified in a law, if the institution protecting the Constitution in this case the Constitutional Court measures it in terms of the process of justice as something that contradicts the constitution, then the legal norm may be declared to be not binding on the public. However, the vote of the majority based on the democratic principle may not then ignore the democratic principles upon which it is based, although it is only supported by the vote of the minority. Eventually, it is the vote of the minority that really reflects the vote of all sovereign people.[32]

It is similar to other cases within the scope of authority of the Court. They all constitute the most serious cases for our state and nation, the verification of which requires carefulness, rational and objective attitudes, and a distinctive statesman attitude by prioritizing the national interest before any other interest, to maintain integrity, independence, and impartiality in verifying and deciding every case.[33]

In relation to the above explanation, Jimly Asshiddiqie[34] invited all law upholders in our country:

> "We jointly reinforce our determination, not only by words, but also real action that law and justice may indeed be upheld, starting from the upholding of the constitution as the highest law. The law and constitution should be able to determine and provide direction for the dynamics of political, social, and economic life of our nation. The dynamics of political, social, and economic life should run appropriately on the right rails and within the legal corridors. While we know the adagium in the circle of lawyers stating that "uphold justice, despite the sky falling", then we may complete these words with "The sky will never fall only because we uphold the law and justice. Therefore, uphold the law and justice without any hesitancy".

In the abovementioned quote, Jimly Asshiddiqie, notes that it is certainly not easy to implement this lofty determination. We all are ordinary persons, then we are supposed to open ourselves for all possible criticisms and inputs from everywhere, solely for the benefit of developing an institution that is really respectable due to its effective, efficient, and reliable performance in accomplishing all mandates of the Constitution so that our country will be more prosperous as a democratic law-based country (*demoeratisehe rechtsstaat*) and also as a democratic country based on law (constitutional democracy). Therefore, the Constitutional Court may always increase its dedication as the protector of the constitution and guide legal procedures for the process of democratization within the more prestigious national life.[35]

Reinforcement of Democracy through the Constitutional Court

For the author, in the perspective of democracy, the authority of the Constitutional Court may be considered as the reinforcement of values and principles of democracy as follows. *First*, the freedom of association and negotiation, which is reflected in, for instance, the application for material verification (judicial review) of Law No. 7/2004 on Water Resources. This action was brought to the Constitutional Court by more than 30 organizations and almost 1000 individuals on 10 May 2004. The Law on Water Resources is considered by many to contradict with the 1945 Constitution, specifically constitutionally guaranteed human rights.[36]

Second, equality before the law. This value is covered in five matters as the authority of Constitutional Court. It means that an individual, state institution, government, and people's representative body, according to the problems they may face, have an equal opportunity and right in submitting a case to the Constitutional Court.

Third, the control against authority. The Constitutional Court (judicative), through the complaint submitted by the House of Representatives (legislative), may always become the court for the President and/or Vice President (executive) who are alleged to have committed acts of corruption and no longer meets the qualifications to be President or Vice-President. This authority serve as a real form from the distribution of three authorities which have been acknowledged earlier; judicative, legislative, and executive (*trias politika*) as the pillars of democracy.[37] In the abovementioned context, the "Existence of the Constitutional Court in a law-based country such as Indonesia should be able to protect the constitution, to guarantee the checks and balances among the state institutions, to control the state decision-making process, and to control fundamental rights.[38]

The Constitutional Court as the Final Solution

The constitution of a country is a reflection of the will of all sovereign people, while the Law is only the political will of the People Representatives and Government. Although they are institutions elected by people and they reflect the vote of majority of people, but if the law contains norms which contradict with the Constitution, the Constitutional Court as the institution protecting the Constitution is provided with the authority necessary to declare it to be not binding on the public.[39]

The establishment of the Constitutional Court is also intended to provide legal procedures to overcome any problems relating to the outcome of general elections, which is recognized by all humankind as the main pillar in a modern democratic system. In the event that there is any difference of opinion regarding the count of votes among the electorate with the organizer of an independent general election, then the Constitutional Court will act as the first and final instance court in order to provide a final and binding verdict. Through a justice mechanism of this type, the divergence of opinion regarding the outcome of a general election will not change into a political conflict rather it is managed objectively and rationally as a law-related

dispute which must also be settled legally. In relation to the abovementioned explanation, Jimly Asshiddidqie said: "Properly make use of the existence of constitutional justice mechanism provided by our Constitution, and whenever the final and binding decision has been imposed by the Constitutional Court through an objective, rational, open and impartial means for the benefit of legal truth, then the decision will become the final solution with all respect and obedience, in accordance with our desire to achieve the legal principle as the commander. In this way, we should always develop the strong constitutional state tradition, in which the political, economic and social lifestyle of our nation will always move along the legal rails and corridors provided for by our constitution.[40]

As a law-based nation (*rechtstaat*), the Constitution of the Republic of Indonesia requires that the President and Vice-President as the leaders of the nation perform acts of governmental authority according to the Constitution. The President and Vice-President should be able to become the model of obedience and adherence to the law. They are directly elected by the people because they meet the criteria to become the President and/or Vice President. If the President and/or Vice President breach the law or no longer meets the qualification according to the Constitution, then the President and/or Vice President may be dismissed by the People's Consultative Assembly based on the proposal of House of Representatives after obtaining a verdict from the Constitutional Court. Furthermore, for candidate Presidents and Vice-Presidents to become the President and Vice President in the general election shall be decided as a pair of elected candidates and later we will be able to remind that the oath that you both will declare is as follows : In the name of Allah, I take an oath to meet all my obligation as the President/Vice President of Republic of Indonesia properly and justly, to abide by the Constitution and adhere to all Laws and their regulations honestly, as well as to dedicate myself to the State and Nation.".[41]

Constitutional Court Perform the Judicial Review

The amendment of the 1945 Constitution has mandated a major change in the state administration system of Indonesia, particularly the establishment of the Constitutional Court as a state institution having the right to perform judicial review of laws that are deemed to be in breach of the 1945 Constitution. Judicial review against the law has a significant meaning,

because up to now (prior to the establishment of the Constitutional Court of the Republic of Indonesia), the legislation called the law has a very powerful position, it can be said to be sacred, which may only be deprived or changed by the founding institution, the President and the House of Representatives.

In the Law on the Constitutional Court, it is specified that the party which may submit the application for judicial review against a law is the party whose constitutional right is injured.[42], or at least an interest where there is a real potential for that interest to be injured due to the existence of a law. This is the beginning of desacralization of law as well as the pillar of protection of citizens against the arbitrary actions of the state. In another sense, it can be said as a national "awareness to create and perform a mechanism of self-control".

Capital is proved to be the determinant element in the structure of authority. Without a strong desire of the state, represented in the appearance of legislative, executive, and judicative institutions to establish and accomplish the goals of the welfare state, then the law of Indonesia is involved in the pro-market ideology. Then, it has achieved a liberalization and privatization in almost every sector, starting from education, electricity, fuel, drinking water, privatization of *BUMN* (State-owned Enterprises), and many others.

Law may not create happiness anymore! The intrinsic concept of law as the guarantor of individual rights so that we may run a fair life and a life equal with other individuals has been ignored, particularly the fair life which offers a sense of equality before the law. Conversely, what we may find today, the law is created (not arranged) in order to guarantee the freedom for certain individuals only, *homo homini lupus*.[43]

It is in this non-conducive law environment that the Constitutional Court was established, burdened with moral responsibility to correct any deviation. The authority provided by the 1945 Constitution to the Constitutional Court in order to perform judicial review may result in the cancellation and deprivation of law as the strategic authority in achieving the welfare state.

Various processes of modification on the basic law are actually the efforts of all components of the nation in order to improve the quality of life of the nation through the development of an innovative law system. The law system itself should be developed by involving the factors of legal substance,

information systems, and leadership of the legal apparatus. The factor of leadership should be specified separately beyond the legal institution, because inside that there is an individual role for the legal apparatus which is very influential on the performance of law as a system.[44]

Every verdict by the Constitutional Court is indeed final and binding in nature. Nevertheless, the academic debate relating to the substance of the verdict is to be considered an academic freedom.

V. CONCLUSION

Through the accommodation of the Constitutional Court, it will automatically have a significant effect on the pattern of the relationship of state institutions and traditions of state administration that has been the norm up to now. The existence of the Constitutional Court should be welcomed, with an expectation that this institution will be able to support the process of systematic democratization and political culture, to accomplish the checks and balances in state administration, and to fill the gap where the community perceives that there is a lack of justice, which has for a long time been bound by the authoritarianism and abuse of power of past regimes. Nevertheless, the conceptualization of the Constitutional Court in the Constitution cannot be said to be perfect, it still leaves some principal and conceptual problems.[45]

There are some regulations of the Constitutional Court in the Constitution which are problematic, and they may affect the process of formulation or regulation of the Constitutional Court in the form of law. Some of these problems are relating to the position, authority, and recruitment of judges for the Constitutional Court.

The existence of Constitutional Court as an executive of judicial power (judicative) in addition to the Supreme Court has provided for an expectation that there will be greater encouragement for enforcement of the principle of the supremacy of the law and the development of a democratic governmental system. Furthermore, the stipulations in the Constitution should be further specified and established in the form of law, especially those relating to the position, functions, judges, and procedures. Therefore, it can be clearly identified how the Constitutional Court is to perform its functions. Considering, that the Constitutional Court is a new institution and

established with a strategic role, the arrangement of its law requires a process of socialization and participation. Through this process, the existence of an institution will be more legitimate and may function at an optimum level.

At present, we need very much the enforcement of law that is really able to provide certainty and a sense of justice. In the perspective of democracy, the law shall not only impose a sanction for those committing a crime, but also serve as power of balance for the performance of authority. Legal power or judicative power positioned autonomously and with equivalence and supported by a strong authority to perform as a control against the authority held by the executive and legislative is a necessity. The function of control is intended to provide protection for the constitutional rights against the possible deviation committed by other authority. It is also expected to be able to serve as a bridge in settling any disputes arising between the branches of authority on the basis of the Constitution. Based on this perspective, the function of judicative authority is very vital, not only for the enforcement of law supremacy, but also as the characteristic of a democratic state.

In does not mean that the authority is not necessary, because without authority, the state will not be able to effectively perform its duties. However, the authority should be controlled and the effective instrument for controlling the authority is the Constitution.

In a state adopting the concept of peoples' sovereignty (democracy) such as Indonesia, the state's authority should be limited in order to protect human rights and the instrument deemed to be most effective is the Constitution. In the concept of a democratic state, the constitution will contain the authorities and duties of the rulers, the rights of those being ruled, and the relationship between the rulers and those being ruled. The existence of the term constitutional democracy is the political concept of this century and is a reflection of the eagerness to achieve the adherence of people sovereignty to the constitution. Democracy should be ignored by the constitution.

May Indonesia become a more prosperous nation as a law-based democratic state (*Democratische rechstaat*) and as a Democratic State which is based on the law (constitutional democracy).

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NOTES

[1] This decree was achieved in the 7th Plenary Session of *MPR* (People's Consultative Assembly) of the Republic of Indonesia (2nd continuation) of the annual session of the MPR RI dated 9 November 2001. With the condition that it means that there has been a principal change in the state administration system in Indonesia. If, prior to the occurrence of the third amendment of the 1945 Constitution, the juridical authority does not have an authority to judge, verify and annul the stipulation contained in a Law if it contradicts with constitutional norms.

[2] Even, long before that, namely in the post Dutch colonial period in Indonesia, the judges in their verdicts, have performed the judgment and verification on the regulation (Law) issued by the colonial government in Indonesia and have annulled it if it is in contradiction with the Law of the Dutch. See S.M Amin, *Indonesia Di Bawah Rezim Demokrasi Terpimpin* (Jakarta: Publisher: Djambatan, 1998) pp. 216-217).

[3] The 1945 Constitution was effective for the first time on 18 August 1945 through the establishment of United States of the Republic of Indonesia by

virtue of 1949 RIS Constitution on 17 August 1949 and was effective for the second time since the issuance of Presidential Decree dated 5 July 1959 up to the occurrence of third amendment of 1945 Constitution in 2001.

[4] Based on the stipulation in Article 26 Law No. 14 of 1970, the Supreme Court has the power to declare the legislation as being illegal for regulations at a level lower than Law, which means that the Supreme Court has only the authority to verify the regulation under the Law and not to verify the Law against the Constitution.

[5] Indonesia, The 1945 Constitution of Republic of Indonesia, Article 24C;

[6] Based on the fourth amendment of the 1945 Constitution, the deadline for establishing the Law of the Constitutional Court is 16 August 2003 and prior to the establishment of Constitutional Court on the specified date, temporarily, all authorities, including the one to verify the Law is undertaken by the Supreme Court (Article III of Transitional Provisions of the 1945 Constitution) as the result of the Fourth Amendment in 2002, saying that the Constitutional Court is to be established no later than 16 August 2003. Prior to the establishment, all its authorities are undertaken by the Constitutional Court.

[7] Interview with Mr. Adnan Buyung Nasution on Tuesday, 1 December 2005.

[8] Doctrine of constitutional supremacy as the foundation to justify the analysis of Law against the Constitution by the juridical body was developed by John Marshall in labor legal practice and by Hans Kelsen in Europe when he was asked to arrange the Austrian Constitution in 1920. See Eric Barendts. op. cit page 20-21; and Alex Stone Sweet, Governing With Judges, Constitutional Politics in Europe, op. cit pp. 9-11.

[9] According to Adnan Buyung Nasution, both Yamin and Soepono demanded that the state that must be established is a people sovereignty state which is based on law. However, both of them have different opinions as to whether this people sovereignty will be based on the doctrine of parliamentary supremacy (Law) or based on the doctrine of constitutional supremacy. This

difference actually triggered the refusal by Soepono of the proposal of Yamin regarding the verification of Law by juridical bodies. Yamin demanded that people sovereignty should be based on Constitutional supremacy. Therefore, the product of Law should be verified by the Supreme Court with regards to whether it contradicts or not the Constitution. Whereas, Soepomo demanded that people sovereignty should be based on the doctrine of parliamentary supremacy. Therefore, the Law as the product of parliament should be verified by the Constitutional Court; based on an interview with Adnan Buyung Nasution, Jakarta, 1 December 2005. The doctrine of constitutional supremacy the as foundation for justifying the analysis against the Constitution by the juridical body was developed by John Marshall in the state law practice of the USA and by Hans Kelsen in Europe when asked to arrange the Austrian Constitution in 1920. See Eric Barendt, op. cit. pp. 20-21; and Alec Stone Sweet, Governing With Judges, Constitutional Politics in Europe, op. cit. pp. 9-11.

[10] Interview with Adnan Buyung Nasution, loc. cit.

[11] See Tom Ginsburg, Judicial Review in New Democracies, Constitutional Courts in Asia Cases (USA: Cambridge University Press, 2003) p. 1.

[12] See Muhammad Yamin, *Proklamasi dan Konstitusi Republik Indonesia* (Jakarta: Publisher Djambatan, 1952) pp. 58-59, compare with Jonathan Riley, *Imagining Another Madisonian Republic*, in John Farejohn, op. cit. p. 194, Agresto, op. cit, p. 45; Ervind Smith, *The Legitimacy of Judicial Review of Legislation – A Comparative Approach*, in Ervind Smith, Ed., *Constitutional Justice Under Old Constitutions*; op. cit. pp. 365-366; and Ginsburg, op cit. pp. 1-2.

[13] Democratic systems are not systems that may always guarantee the truth, justice, policy, even by the principle of majority or negotiation, vox populi, vox ded (The voice of people is the voice of God) which is frequently used by people in struggling for democracy but it is a slogan only. Frequently, precisely the truth is voiced by a single voice or minority voice. See the complete explanation regarding this matter in J. Soedjati Djiwandono, *Setengah Abad Negara Pancasila,* (Jakarta: CSIS, 1995), pp. 35-37.

[14] In England, the Law may not be disturbed because in that state, parliamentary supremacy (the sovereignty of parliament) is recognized, whereas in France, the principle of Law may not be disturbed because in this state, it consistently applies a *trias politica* system. If the court is provided with an authority to verify the Law, it means that the judicial body interferes with the political affairs and this contradicts the doctrine of *Tris Politica*. See Dicey, *"The Law of the Constitution,"* op. cit. pp. 3-4. See also the explanation of Bagir Manan before the PAH 1 of Badan Pekerja MPR which discusses and negotiates the design of the amendment of the 1945 Constitution, see the 9th, Session Treatise of PAH I Badan Pekerja MPR, on December 16th, 1999 in the MPR RI, *Buku Kedua Ayat 3A* (Jakarta: Secretariat General of MPR RI, 2000, p. 419.

[15] Jufrina Rizal and Agus Brotosusilo, Legal Philosophy, 1st Book, Postgraduate Program, Faculty of Law of Universitas Indonesia, only used within the Faculty of Law at the Universitas Indonesia, August 2003, pp. 87-89.

[16] Adnan Buyung Nasution, op. cit.

[17] See, Agreso, loc. cit., John Marshall; loc. cit. and Hamilton, loc. cit.

[18] The quality of a Law is determined by the extent to which the rules contained in the Law are in line with the imperatives contained in the Constitution as its standard or cornerstone. Hans Kelsen, besides emphasizing the constitution as the highest legal norm in a state, in which all branches of state power should abide by, it also establishes a constitutional court in order to judge and analyze whether the state administrators established by the constitution including the legislative authority branch (Law Establisher) has met the norms of the constitution. If the Law established by the Law establisher based on the assessment and analysis performed by the constitutional court contradicts with the norms of Law, then the rule contained in the Law should be annulled and does not have binding legal power. Similarly, in the event that there is any action committed by the other state administrator which is in contradiction with the Constitution,

then the action should be declared to be illegal and not legally binding. See Keslen, *"The General Theory of Law"*, loc. cit.

[19] Adnan Buyung Nasution, op. cit.

[20] Kelsen Hans, Pure Legal Theory, Principles of Normative Legal Science as an Empirical-Descriptive Legal Science, Jakarta, Rimdi Press, 1995, page 79-80.

[21] Prof. Soetandyo Wignjosoebroto, Law, Paradigm, Method and Problem, Elsan, Huma, Jakarta, 2003, page 405.

[22] Some Semiloka demand that the bill on the Constitutional Court has confirmed the authority of the Constitutional Court in the judicial review process which includes the authority to interpret the Constitution. There is also the notion that the nature of the Constitutional Court Judge is in verifying a law, particularly whether it is active or passive. The idea existing in the Semiloka Malang is that the Constitutional Court Judge should also be pro-active, meaning that there is no need to wait for an application for judicial review if they are aware of a constitutional issue within its jurisdiction. There is a realization that a judge should generally be passive however it has been suggested that Constitutional Court judges are tasked differently to other judges on other courts and as such have an inherent authority to be pro-active.

[23] Prof. DR. H. Sri Soemantri, SH, Material Verification Right in Indonesia, Alumni, Bandung, 1997, pp 6-11.

[24] In the Semiloka in Malang, the provision of authority to verify the regulation to these two institutions has a distinctive problem, considering that it will raise an opportunity for conflict between the Constitutional Court and the Supreme Court. It arises with respect to what mechanism may be applied for its settlement.

[25] Visser 't Hooft, Philosophy of Legal Science, filosofie van de Rechtswetenschapm in the section of: *"Interpretation : Recognizing is*

verifying, which is adopted from Law's Empire, 1986, Bandung, Legal Laboratory, Faculty of Law of Universitas Katolik Parahyangan, 2002, pp. 31-33.

[26] Compare with the Decision of the MPR Number III/MPR/1978 regarding the Position and Relationship of Work Administration of the State Highest Institution with/or among the state high institutions, mentioning the existing type and authority of state institutions. In the era of the post-amendment of the 1945 Constitution there had been no such regulation.

[27] Specifically regarding the *MPR*, thus far, it may not be obvious whether or not it is still an institution. The results of the Amendment to the 1945 Constitution regarding the MPR provides two opinions which declare that the MPR is a permanent institution as it presently exists. In contrast, the other opinion holds that the MPR will only exist in the future as a permanent forum.

[28] Prof. Dr. Mukrie Fadjar, SH, Professor of Faculty of Law, Universitas Brawijaya Malang detailed the state institution the authority of which is stipulated in the Constitution, namely: MPR, President (and Vice-President), DPR, DPD, BPK, MA, MK, Provincial Government and Regency/Municipal Government, General Election Committee, Judicial Committee, and Armed Forces/Police, "The Agenda Law of Constitutional Court in the Justice System in Indonesia", the issue of Semiloka of Bill of Constitutional Court, PP Otoda Umbraw-KRHN, December 18th, 2002.

[29] In the material discussion at the Constitutional Court at PAH I and at the Annual Session of the MPR, it was suggested that one of authorities of the Constitutional Court is to settle disputes between the Central Government and Local Governments as well as among the Central Governments. It was formulated explicitly in the Second Bill of Amendment of 1945 Constitution. The eagerness that the authority of the Constitutional Court also have the power to settle disputes between the Central Government and Local Governments is recommended by the Constitution, because the authority of the Central Government is provided by the Constitution, even the

enforcement of autonomy has the potency of conflict between the Central Government and Local Government.

[30] In relation to this problem, the participants of semiloka demanded the loose deadline in order to provide the opportunity for settling the difference of outcomes of the general election occurring in the provinces, including the mechanism of effective settlement in order to ensure justice and legal certainty relating to the dispute on the outcome of general election. In consideration of this matter, there is an eagerness of that, in the future, the Constitutional Court that may be established in the provinces. Other than to settle the disputes on the outcome of general elections, it is also expected to be able to settle the disputes of authority among local governments.

[31] Prof. Dr. Jimly Ashiddiqic, SH., in the preface of 1st Anniversary of Constitutional Court of Republic of Indonesia, Berita Mahkamah Konstitusi (BMK) No. 06 September 2004, p. 14.

[32] Henry B. Mayo, An Introduction to Democratic Theory, New York; Oxford University Press, 1960, p. 70.

[33] Covenant on Civil and Political Rights, Article 26: All people are equal before the Law and deserve the equal legal protection without discrimination. In this context, the Law prohibits any discrimination and assures all people for the equal and effective protection against discrimination on any basis such as race, skin color, gender, language, religion, political opinion or other opinions, nationality or social status, originality, property, citizenship or other status. See Prof. Miriam Budiardjo, Principles of Political Science, Jakarta, PT. Gramedia Pustaka Utama, 1989, p. 131.

[34] Jimly Asshiddiqic, preface in the 1st Anniversary of Constitutional Court, as the twin couple of juridical power institution together with the Supreme Court, in BMK No. 6 September 2004, p. 15.

[35] See: Benny K. Harman, Dissertation: "Development of Thinking Regarding the Importance of Verification of Law Against the Constitution in the History of Indonesian State Administration (1945 – 2004)", Universitas Indonesia,

2006, regarding the Authority of Constitutional Court in Verifying the Law Against the Constitution, p. 426.

[36] See: Benny K. Harman, Dissertation: "Development of Thinking Regarding the Importance of Verification of Law Against the Constitution in the History of Indonesian State Administration (1945 – 2004)", Universitas Indonesia, 2006, regarding the Authority of Constitutional Court in Verifying the Law Against the Constitution, pp. 426-427.

[37] See, Meriam Budiarjo, Principles of Political Science, Jakarta, PT. Gramedia Pustaka, 1989 pp. 156-157. The three Constitutions in Indonesia do not explicitly suggest that the doctrine of *trias politica* is adhered to, but because the three constitutions recognize the spirit of constitutional democracy, it may be concluded that Indonesia adheres to *trias politica* in the sense of a split of power. It may be seen in the division of Chapters in the 1945 Constitution. For example, Chapter III regarding the Authority of State Administration, Chapter VII regarding the House of Representatives and Chapter IX regarding the Juridical Authority, Legislative Authority is undertaken by the President in cooperation with the Board of Ministers, while the judicative authority is undertaken by the Supreme Court and other juridical bodies. Since the administration system is presidential, then the cabinet has no accountability to the House of Representatives and therefore it may not be decided by the House of Representatives in the service period. Conversely, the President may not liquidate the House of Representatives as the case in the parliamentary system in India and England. The President as the highest administrator of the state administration should abide by and be responsible to the People's Consultative Assembly, in which they serve as the *mandataris* (person receiving the mandate). The ministers are not allowed to hold the position of member of the House of Representatives. Thus, in general, the characteristics of the *trias politica* principle in the sense of a split of power being involved in the state administration system of Indonesia. See, Meriam Budiarjo, Principles of Political Science, Jakarta, PT. Gramedia Pustaka, 1989, pp. 156-157.

[38] Rhetoric of Prof. Dr. Jimly Asshiddiquie, SH in the Dialog Forum with Press members which was conducted in cooperation with between the Constitutional Court and Lembaga Kantor Berita Nasional Antara (17/5).

[39] Jimly Asshiddiqie, One Year Period of Constitutional Court Controlling the Indonesian Constitution, BMK, No. 07 October – November 2004, p. 17.

[40] Jimly Ashiddiqie, *Ibid*, p. 17.

[41] Jimly Ashiddiqie, *Ibid*,

[42] Adriani Dwi Kartika Zulivan: 'To entrust the Hope to the Constitutional Court", BMK, No. 11 July – August 2005, p. 5.

[43] Ibid, p. 6.

[43] Ibid, p. 7.

[45] A. Fickar Hadjar, et al., Principles of Bill of Constitutional Court, Consortium of National Legal Reform (KRHN), 2003, p. 6.