

## CHAPTER II

### LITERATURE REVIEW

#### A. Constitutional Court

The third amendment of the 1945 Constitution has created a new institution called the Constitutional Court which has a special authority. The establishment of this new institution is also an evidence of distrust to Supreme Court which is considered as incompetent and slow judicial reform agenda at the end of 1990.<sup>1</sup> In performing its function as guardian of the Constitution, the Constitutional Court has five authorities and one obligation, namely (i) to examine the Act which contradicts with the 1945 Constitution, (ii) to decide disputes on the authority of the constitutional between state institutions, (iii) to decide disputes concerning the results of elections, (iv) to dissolve political parties, (v) to decide about opinion of the Parliament which contains allegations that the president violates the law, or no longer qualifies as President or Vice President as determined in the 1945 Constitution before it can be proposed to be dismissed by the Assembly.<sup>2</sup>

The establishment of the Constitutional Court is considered as a new era in the system of judicial power in Indonesia. Some areas which is untouchable by the law, such as the issue of judicial review of legislation, now can be carried

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<sup>1</sup>Septi Nur Wijayanti, Iwan Satriawan, 2009, *Hukum Tata Negara*, Yogyakarta, Fakultas Hukum Universitas Muhammadiyah Yogyakarta, p. 106.

<sup>2</sup>*Ibid.*

out by the Constitutional Court.<sup>3</sup> Indonesia is the 78th country that established the Constitutional Court. Establishment of the Constitutional Court itself is a phenomenon of the modern state of the 20th century.<sup>4</sup>

The Constitutional Court has big authority, even when compared to the Supreme Court. The magnitude of the authority of the Constitutional Court can be seen from the type of its authority and the degree of the quality of decisions of the Constitutional Court, and also can annul the political decisions that have been made by the House of Representatives and the President. In other word, the Constitutional Judges has the power greater than the 560 members of Parliament and the President.<sup>5</sup>

The idea of the establishment of Constitutional Court was to carry out justice to uphold law and justice. The Constitutional Court is the adjudication judiciary in which the decision is final in examining the laws against the 1945 Constitution, decide disputes on the authority of state institutions whose authorities are given by the Constitution, dissolution of political parties, and to decide disputes concerning the results of the general election.<sup>6</sup> The whole authorities vested in the Constitutional Court are basically to uphold justice and Constitutional Law, which is guaranteed and protected by the 1945 Constitution.

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<sup>3</sup>Bambang Sutyoso, 2009, *Tata Cara Penyelesaian Sengketa di Lingkungan Mahkamah Konstitusi*, Yogyakarta, Universitas Islam Indonesia Press, p. 1.

<sup>4</sup>Mahkamah Konstitusi Republik Indonesia, 2010, *Hukum Acara Mahkamah Konstitusi*, Jakarta, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, p. 5.

<sup>5</sup>Septi Nur Wijayanti, Iwan Satriawan, *Op.Cit*, p.108.

<sup>6</sup> Ahmad Syahrizal, 2006, *Peradilan Konstitusi*, Jakarta, PT. Pradnya Paramita, p.263.

The Constitutional Court is in the frontline of the potential violation of the most fundamental rights of every citizen.<sup>7</sup>

After the third amendment of the 1945 Constitution, it can be concluded that the 1945 Constitution consciously also gives great power to the institution of judicial power, that is the Constitutional Court. With the authority of the Constitutional Court, the Constitutional Court must be able to create the great decision through the Constitutional Judges.

If the Constitutional Court is progressive, meaning that it is in accordance with the aspirations of society positively, the decision of the Constitutional Court may be a step in the checks and balances Constitutional Court against the power of the Parliament and the President. However, if the Decision of Constitutional Court are conservative such as contrary to the positive aspirations of the society, then it could threaten the balance of the relationship between state institutions.<sup>8</sup> Therefore, the accuracy of the decision of the Constitutional Court in resolving constitutional disputes is very important to be maintained, and the role of Constitutional judges is very crucial because the Constitutional Court Judges are very independent. However, there is no external organ which supervising them.<sup>9</sup>

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<sup>7</sup> *Ibid*, p.264.

<sup>8</sup>Septi Nur Wijayanti, Iwan Satriawan, *Op.Cit*, p.110.

<sup>9</sup>*Ibid*, p.111.

## B. Code of Conduct

Code of Conduct and/or the code of conduct of judges is a guide in order to preserve and uphold the honor, dignity and behavior of judges in carrying out their profession, and public relations outside the office.<sup>10</sup> Code of conduct is basically an important element of judiciary.

Strengthening ethics in the profession need to be stated in the rules of normative, written, and have law enforcement. Therefore, it is necessary to make a professional code of ethics for each profession, so the profession code of ethics becomes part of the positive law.<sup>11</sup> The code of conduct is a measure of morality members of the legal profession, motivation actions, and scope of the action was performed. The code of conduct should be understood by everyone in their profession, especially judges in Indonesia so that it becomes a self-imposed to him and to always be carried out and maintained under any circumstances.<sup>12</sup>

The Code is a value that must be constantly updated but it is open to be assessed, and if it is necessary it can be revised or adjusted to the ongoing condition. Therefore, the implementation of this code of conduct should be monitored constantly and under the social control of the board of trustees or supervisory commission.<sup>13</sup>

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<sup>10</sup>Wildan Suyuthi Mustofa, 2004, *Kode Etik Hakim*, Jakarta, Kencana Prenadamedia, p.45.

<sup>11</sup>KelikPramudyadanAnantoWidiatmoko, 2010, *Pedoman Etika Profesi Aparat Hukum Hakim, Jaksa, Polisi, Notaris, dan Advokat*, Jakarta, PT Suka Buku, p.10.

<sup>12</sup>Wildan Suyuthi Mustofa, *Op.Cit*, p.50.

<sup>13</sup>*Ibid*, p.51.

Robert D. Kohn revealed five benefits of a code of conduct, namely:

(1) The code of conduct became an important element to protect its members when dealing with unfair competition and dishonest, and in developing the profession in accordance with the ideals and the sense of justice; (2) The code of conduct ensures a sense of solidarity and collegiality among members to respect each other; (3) The code of conduct reinforce the bond of brotherhood among the members; (4) The code of conduct requires members should have the quality of legal knowledge, and (5) The code of conduct requires its members to prioritize services to the community.<sup>14</sup>

It can be seen from the above description that the code of conduct is very important in the legal profession especially all judges, whether they are Constitutional Judges, Justices, or Judges in general court. The purposes and objectives of the establishment of profession code of ethics of judges as follows:

1) As a tool for fostering and shaping the character of judges as well as for monitoring the behavior of the judge. The professionalism of the performance of a judge can be formed by improving the understanding and application of the existing rules, and it cannot leave the principles of the code of conduct of judges agreed. This means that a judge cannot perform his profession without regard to the ethics of the profession that is so with the ethics of the profession are expected to arise awareness and responsibility to uphold justice.<sup>15</sup> 2) As a means of social control, where it is to prevent judges get interference from other parties in determining the verdict in court, so the role of the code of conduct in this regard to be the supervisor who becomes a tool of control for all activities undertaken by judges in Indonesia and expected to minimize the existence of abusive practices in the judiciary. 3) To provide a guarantee for the improvement of morality judges and functional independence for judges; and 4) To foster public confidence in the judiciary.<sup>16</sup>

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<sup>14</sup>*Ibid.*

<sup>15</sup>*Ibid.*, p.127.

<sup>16</sup>*Ibid.*, p.128.

As a rule that should be used as guidelines for a judge, the code of conduct of Judges must be implemented in daily life, such as carrying out the duty, having relationships among colleagues, having relationships among the employees, having community relations, and having relationships with family.<sup>17</sup>

### **C. Judge of Constitutional Court**

Constitutional Court Judges are people who have the position of judges in the Constitutional Court who examine, prosecute and decide cases under the authority and duties of the Constitutional Court.<sup>18</sup> Constitutional Court Judges in carrying out their duties and powers should be independent, and the independence of judges in the judiciary is an essential prerequisite for the realization of the purpose of law in a country and a guarantee for the enforcement of law and justice.<sup>19</sup>

Constitutional Judges have a very important role in the decision of the Constitutional Court because every case is in the hands of the Constitutional Judges. Therefore, Constitutional Judges decision should be independent

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<sup>17</sup>*Ibid*, p.144.

<sup>18</sup>Regulation of Constitutional Court Nomor 02/PMK/2003 about Code of Conduct and Guidelines of behaviour Constitutional Court judges, Article 1 point 3, viewed on November 22th, 2016,, at 18:35 am.

<sup>19</sup>Titik Triwulan Tutik, 2016, *Pengawasan Hakim Konstitusi Dalam Sistem Pengawasan Hakim Menurut Undang-Undang Dasar Negara RI*, taken from [file:///C:/Users/Axioo/Downloads/Documents/ipi260763\\_3.pdf](file:///C:/Users/Axioo/Downloads/Documents/ipi260763_3.pdf), viewed on November 22<sup>th</sup>, 2016, at 19:36am.

without any pressure, persuasion, and coercion from others because it would violate the code of conduct of the Constitutional Court Judges.

The independence of the judge means that judges are free to decide the case based on the values they believe and the interpretation of the law.<sup>20</sup> However, we should know that the Independence of Judges Constitution itself is limited by law and it is an attempt to apply the law fairly.

Independence of a judge must be accompanied by moral integrity, dignity, honor the dignity of the judiciary, since otherwise the manipulation and the mafia can take refuge under an independent judiciary, so that the judges who abuse their powers greatly affect the welfare of the community. However, the judges have the freedom, and the independence of judges in performing his judicial authority is not absolute because the task of the judge is to uphold law and justice based on Pancasila, so that the decision reflects the sense of justice of the Indonesian people.<sup>21</sup>

In general, not only Constitutional Judges but all the Judges in Indonesia are the main actors in the judicial process, and the judges are required to have integrity, moral intelligence, and professionals in which they must enforce law and justice for the people. Constitutional judges have a very big responsibility, because justice in the hands of the judges of the constitution, and constitutional

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<sup>20</sup>Wijayanto Setiawan, 2007, "Peran Hakim Agung Dalam Penemuan Hukum (Rechtsvinding) dan Penciptaan Hukum (Rechtsschepping) pada Era Reformasi dan Transformasi", *Jurnal Perspektif Hukum* Vol. VII No. 2, Fakultas Hukum Universitas Hang Tuah Surabaya, p. 88-89.

<sup>21</sup>Wildan Suyuthi Mustofa, *Op, Cit*, p.96.

judges in performing their duties as a determinant of justice should have a sensitivity that is important in assessing each case referred to it.<sup>22</sup>

Constitutional Judges have the duty and authority to resolve certain disputes. Therefore, the Constitutional Judges is required to be accurate and intelligent in deciding a case, especially in resolving general election disputes and disputes dissolution of political parties because both of these cases have a very big impact for the society.<sup>23</sup>

When Constitutional Judges in carrying out their duties deviated from the applicable provisions they will get sanction of dismissal with respect and disrespect. Therefore, the role of Constitutional Judges is very important in establishing justice in Indonesia and professionalism of constitutional judges itself will determine the quality of decisions made by constitutional judges in the constitutional court.

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<sup>22</sup>Supriadi, 2010, *Etika & Tanggung Jawab Profesi Hukum di Indonesia*, Jakarta, Sinar Grafika, p.110.

<sup>23</sup>*Ibid.*