

CHAPTER TWO

LITERATURE REVIEW

A. Constitutional Court

The idea of the establishment of the judicial review started from the case of Marbury versus Madison in 1803, where Marbury apply to the US Supreme Court to issue a *writ of mandamus* related to the letter of appointment Marbury and his friends as a judge. In a ruling issued in consideration justified the right although Marbury and his friends are lawful, but the lawsuit of Marbury and his friends rejected. Because it is not the authority of the US Supreme Court to issue a *writ of mandamus* as requested. But the decision is precisely to overturn legislation regulating the issuance of a *writ of mandamus* that is contrary to the Constitution the United States precisely Article III Section 2. While the authority to overturn this law is not listed in the US Constitution.¹

The establishment of the Constitutional Court was the idea by Hans Kelsen. He is a highly influential law scholar of the 20th century (1881-1973) and also a constitutional expert and professor of Public and Administration Law of the University of Vienna. He was asked to draw up the Constitution

¹Meirina Fajarwati, 2016, "Reformasi Proses Rekrutmen Hakim Mahkamah Konstitusi Indonesia", p. 1, available at: http://rechtsvinding.bphn.go.id/jurnal_online/REFORMULASI%20PROSES%20REKRUITMEN%20HAKIM%20MAHKAMAH%20KONSTITUSI%20INDONESIA.pdf, accessed on 24 December 2016 at 2.07pm.

for the Republic of Austria that emerged from the ruins of the Austro-Hungarian empire in 1919. He believes that the constitution as a set of superior legal norms (higher than ordinary law and should be enforced). Kelsen also recognizes the distrust of the ordinary court to carry out such constitutional enforcement duties, so he drafted a special tribunal separated from the ordinary courts to oversee the law and annul it if it has contradiction to the Constitution. Although Kelsen designed this model for Austria, which established the first of the Constitutional Court is Czechoslovakia in February 1920. Then in October 1920 the design of Kelsen of the Constitutional Court was realized in Austria.²

In Indonesia the idea of the establishment of the Constitutional Court as a judicial institution that is equal to the Supreme Court is a new thing. But the idea of judicial review as a constitutional adjudication to compare, assess, or test the results of the working mechanism of political democracy had already existed before the time of independence which was disputed by the founding fathers in the BPUPKI,³ when the bill of the 1945 Constitution was first drafted. This idea which was delivered by Muhammad Yamin at the time, suggested that the Supreme Court (formerly called as the *Balai Agung*) was given the authority to review the legislation. The review of the legislation,

²Anonymous, 2015, "Sejarah dan Pembentukan, Kedudukan Serta Kewenangan Mahkamah Konstitusi" available at: <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=11768#.WawdsHYjHIU>, accessed on Sunday, 3 September 2017 at 11.27pm.

³The BPUPKI is a committee for preparation of the Indonesian independence

according to Yamin can be done by comparing each product of legislation with three systems of norms, namely the constitution, Islamic Sharia law and customary law.⁴

The establishment of the Constitutional Court in Indonesia was marked by the appointment of nine (9) constitutional judges on 16 August 2003 through Presidential Decree No. 147 / M of 2003. Indonesia is the 78th country that established a Constitutional Court, as well the first country in the world in the 21st century that established the Constitutional Court.⁵ The Constitutional Court in Indonesia was established by the third amendment of Constitution of Indonesia, which was ratified by the People's Consultative Assembly on 9 November 2001.⁶ Before the establishment of the Constitutional Court, the People's Consultative Assembly delegated the authority to review laws to the Supreme Court. This decision had been taken since the adoption of the Transitional Provisions of Article III of the 1945 Constitution results of the fourth amendment on 10 August 2002. For a while functional tasks under the authority of the Constitutional Court as mandated that in the 1945 Constitution became the responsibility and fully implemented by the Supreme Court. Then, to prepare more detailed of the formation of the Constitutional

⁴Meirina Fajarwati, *op, cit*, p. 1-2.

⁵Soimin and Mashuriyanto, 2013, *Mahkamah Konstitusi dalam Sistem Ketatanegaraan Indonesia*, Yogyakarta, UII Pres Yogyakarta, p. 51.

⁶Anonymous, "Constitutional Court/Mahkamah Konstitusi-Indonesia", available at: <http://www.opentrial.org/lexpose-for-justice/indonesia/proto-expose-indonesia/2-uncategorised/180-constitutional-court-mahkamah-konstitusi-indonesia-10.55-pm/25>, accessed on 23 November 2016 at 2.27pm.

Court, the Parliament and the government discussed the bill on the Constitutional Court. After going through the in-depth discussion, Parliament and Government approved to enact Law Number 24 Year 2003 regarding to the Constitutional Court on 13 August 2003, which was signed by President Megawati Soekarnoputri on the same day, and set forth in the State Gazette Year 2003 Number 98, Additional State Gazette No. 4316.⁷

In the study of the science of constitutional law, the existence of the Constitutional Court is idealized as the guardian of the Constitution and the interpreter of the Constitution. The Constitutional Court as adopted in the 1945 Constitution has two ideal functions, namely: as the guardian and the interpreters of the Constitution. As the guardian of the Constitution, it serves to ensure, encourage, direct, and guide, that the 1945 Constitution run as well as possible by state officials and the subject of constitutional law such as citizens, so that the values it contained could run properly and responsibly. The judges also has authority to act as interpreters, because the Constitutional Court is constructed as the highest institution, the only one authorized interpreter of the 1945 Constitution. Through this second function of the Constitutional Court serves to cover up any weaknesses and / or deficiencies contained in the 1945 Constitution.⁸

⁷ Soimin and Mashuriyanto, *op. cit.*, p. 52.

⁸ *Ibid.*, p. 51.

B. Judges in the Constitutional Court

According to the 1945 Constitution, judicial power is an independent authority carried out by a Supreme Court, judicial bodies underneath, and a Constitutional Court to conduct judiciary to uphold law and justice.⁹ Related to the independence of judicial power, actually the matter is already regulated constitutionally in the 1945 Constitution. Judicial power is an independent power, meaning that apart from the influence of the Government, it must be held guarantees in the Law on the status of judges.

Basically, as a branch of judicial power, the Constitutional Court holds the principle of the administration of justice as an impartial party (impartiality) and independent. This is because any legal system that is used and the system of governance practiced, implementation of the principles of independence and impartiality of the judiciary must be guaranteed in every country which use principle of constitutional democracy.

The position of constitutional judges is to run the authority of the Constitutional Court as one of the institutions of judicial power. The Constitutional Court consist of nine judges as the State Officers are set by the President. Each three judges were appointed by the Supreme Court, the President and the House of Representatives.

⁹Bambang Sutyoso and Sri Hastuti Puspitasari, 2005, *Aspek-Aspek Perkembangan Kekuasaan Kehakiman di Indonesia*, Yogyakarta, UII Press, p. 11.

The existence of each of the constitutional judges is an autonomous and independent institution, instead of in hierarchy, in making the decision as the executor of constitutional authority. In examining, adjudicating and deciding the case in the Constitutional Court, the Chairman and the Deputy of Chairman cannot be influenced by the opinion of the other judges.¹⁰

C. The Recruitment System of the Constitutional Court Judges

In this stage, the recruitment system of constitutional judges means two issues, i.e. qualification of being judges and selection mechanism of constitutional judges.

The structure of the Constitutional Court consists of nine members of the constitutional judges, including a chairman, who concurrently acts as one of the member, a deputy chairman, who concurrently acts as one of the members and seven members. To exercise the power smoothly, the Constitutional Court is equipped with general secretariat and the clerks.

The appointment of the constitutional judges is primarily regulated in the 1945 Constitution. The appointment of the nine Constitutional Court judges is conducted by different institutions. In the 1945 Constitution, it determines that the three judges are appointed by the Supreme Court, another three judges was appointed by the President of Republic Indonesia and the

¹⁰Soimin and Mashuriyanto, *op. cit*, p. 54.

remaining other three judges were appointed by the House of Representatives. Those selected judges will be set as the constitutional judges by the Presidential Decree.

Clearly, the appointment of the constitutional judges mandated in the 1945 Constitution only includes the provision of State institutions that has the authority to appoint the constitutional judges as well as the main requirement as the Constitutional Court judges.¹¹ Constitutional Court judges must have an integrity and, good personality. They should be statesmen who know the constitution and the constitutional obligation and are not the state officials.

¹¹ Mira Fajriyah, *op. cit*, p. 256.