

CHAPTER TWO

LITERATURE REVIEW

A. Constitutional Court

The Constitutional Court is one of the state institutions that exercises independent judicial power to organize a court to enforce law and justice.²²

According to Vice Chairman Committee of Ad Hoc I Body of Workers in the People's Consultative Assembly, the background of the establishment of the Constitutional Court in Indonesia started with some constitutional problems.²³

The 1945 Constitution decreed that the Constitutional Court has four authorities and one duty, namely:

1. To review Acts;
2. To decide dispute on jurisdiction among the state organs which the authorities are given by the 1945 Constitution;
3. To decide dissolution of political parties;
4. To decide dispute over the result of election; and

In addition, the Constitutional Court also has an obligation to give decision on the opinion of the House of Representative (DPR) whether a president and/or vice president have committed crimes, misdemeanours, or

²²Mahkamah Konstitusi Republik Indonesia, 2015, "Kedudukan, Kewenangan dan Kewajiban", available at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilMK&id=3>, accessed on Wednesday, May 31th, at 8:15 pm.

²³ Ikhsan Rosyada Parluhutan Daulay, *Mahkamah Konstitusi: Memahami Keberadaannya Dalam Sistem Ketatanegaraan Republik Indonesia*, Jakarta: PT Rineka Copyright, 2006, page 20.

does not fulfil the requirements of being president and/or vice president as stated in the 1945 Constitution.²⁴

Based on the provision of Article 24C paragraph (3) amendment of the 1945 Constitution, the Constitutional Court consist of nine members of the Justices. There are three (3) Justices appointed by the President, three (3) Justices by the Supreme Court, and three (3) Justices by the House of Representatives. Riris Katharina highlights the reasons for the announcement of the number of nine Justices as follows:²⁵

1. In principle, the number of justices must be odd. This aims to make it easier for decision making;
2. In order to represent all the aspirations of power holders, namely the Supreme Court, the House of Representatives and the President;
3. An example in some other countries that already have the Constitutional Court, many of which the number of Justices are as many as nine members;
4. The number of nine members of Justices means that the session can be faster, short, and efficient.

Inauguration of Justices by the President to issue a Presidential Decree, it does not mean the justices are under the President. However, it is regarded as one of the task of the President in his capacity as the Head of State.²⁶

²⁴Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, Raja grafindo, Jakarta, 2004.

²⁵ Didit Estiko Hariadi and Suhartono (ED), *Mahkamah Konstitusi: Lembaga Negara Baru Pengawal Konstitusi*, Jakarta: P3I the Secretariat General of the DPR RI, Agarino Abadi, 2003, page 188.

²⁶*Ibid*, page 202.

The process of submission or recruitment of Justices looks dominated by political interest power holders. Justices are proposed by each 3 (three) members by the Supreme Court, 3 (three) members by the House of Representative and 3 (three) members by the President.²⁷ This does not close the possibility of political interest intervention to entry of political interests, especially through the House of Representatives and the President. Regarding this issue, it is interesting to note the opinions of Bambang Widjojanto, Saldi Isra, and Muhammad Miharadi.

Bambang Widjojanto in Kompas Daily June 16th 2003, for instance, stated that anyone in power requires a guarantee that his authority is not vulnerable to impeach. The President should be able to ensure and guarantee that the candidates Justices will be "pro" on its political interests. And also the House of Representative (DPR) need to have the various products legislation that its products are not easily canceled in the testing process in the Constitutional Court.

Saldi Isra in Kompas Daily June 23th 2003 also argued that although derived from 3 (three) different state institutions, there is no guarantee that the charging of Justices will be held open, participative and free from political interests. Therefore, the law governing the Constitutional Court must be capable of: (1) creating the same standards and criteria in both filtering, natural selection or election of Justices, (2) open space for public participation and how the participation was done, and (3) Justices should be able to get rid

²⁷ Check the Article 18 Paragraph (1) of Law Number 24 of 2003 on Constitutional Court.

of the political concessions with elaborating the Article 24C of the 1945 Constitution.

Muhammad Mihradi, quoting the research of National Law Reform Consortium in Kompas Daily July 4th 2003, also argued that the highlight that must be considered in forming the Constitutional Court, namely: (1) should be able to end the conception debate and interpretation of the constitution, (2) as the implementation of system and the implementation of democracy so that the position and the authority of the Constitutional Court as practitioners that encourage the process of check and balances, and (3) must be asserted that the Constitutional Court is a manifestation of the implementation of an independent judiciary, independently, and no partiality.

Establishment of the Constitutional Court as a special tribunal is separately from the Supreme Court. The Constitutional Court has special task that can be traced before the modern nation state. It is means the Constitutional Court basically examines the harmony of lower legal norms with higher legal norms.²⁸

The position of the Constitutional Court is an independent state institution on the field of judicial. The Constitutional Court and the Supreme Court have equal position on the structure of state. The Constitutional Court through its authority to examine the law, also may delay the implementation

²⁸ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Sinar Grafika, Jakarta, 2015, Second Edition.

of the authority of the Supreme Court in review of legislation which is under Act.²⁹

B. Supervision

The term “supervision” comes from "caution" other means "care".³⁰ Usually supervision is a basic function of management or controlling. According to Sujamto, the controlling function is two views namely of supervision and control. Supervision in the narrow meaning is all business or activities to know and assess the fact that is actually about the implementation of the task, whether in accordance with necessarily or not.³¹ Then the control is more forceful than the supervision, as it is an activity to ensure and direct the implementation of tasks that is accordance with that necessarily.³²

According to Winardi “Supervision is all the activities carried out by the managers in an effort to make sure that the actual results correspond to planned results”. Meanwhile, according to Basu Swasta “supervision is a function that ensures all activities that can provide desired results”.³³ While according to Komaruddin “Supervision is related to the ratio between the actual implementing plans, and the beginning for corrective measures against deviation”.³⁴ From all opinions of the above it can be concluded that

²⁹ Ikhsan Rosyada Parluhutan Daulay, *Mahkamah Konstitusi: Memahami Kebaradaannya dalam Sistem Ketatanegaraan Republik Indonesia*, Rineka Cipta, Jakarta, 2006. Page 61.

³⁰ The Language Center of the Ministry of National Education. *Kamus Bahasa Indonesia*, Jakarta, 2008, p. 123.

³¹ Sujamto, *Aspek-Aspek Pengawasan di Indonesia*, Jakarta, Sinar Grafika, 1996, page 53.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

supervision is important to running a plan. With supervision, the management can be fulfilled and run well.

Based on the legal perspective, the supervision is conducted to assess whether the performance of the duties has been done in accordance with the applicable legal norms and also achieve the specified purpose without violating the applicable legal norms. In the context of the rule of law, supervision is one of the essential elements in the realization of a good government, so that any state official should not refuse to be supervised. Performing of supervision is aimed at preventing the abuse of power, arbitrariness and abuse of authority.³⁵

Basically, the supervision aims at avoiding the possibility of deception or afield on the objectives to be achieved. Supervision expects to assist the implement action of policy that have been established to achieve effectively and efficiently. Supervision is done to determine or evaluate the work that is done. Supervision is also able to detect the extent of the leadership and also extent of afield that occurred in the execution of the work.

The supervision becomes important as the implementation of good governance. This related to supervision as one way to build and maintain the legitimacy of the citizens against the government's performance to create an effective supervision system. Effective supervision system consists of internal supervision and external supervision.

³⁵Idul Rishan, *Komisi Yudisial, Satu Upaya Mewujudkan Wibawa Peradilan*, Yogyakarta, Ganta Press, 2013, page 69.

In detail about the purpose of the supervision of activities in a management namely:³⁶

1. The implementation of tasks in accordance with rules of the procedures and commands that have been assigned;
2. The results are to conform with specified purpose;
3. Can be used effectively and efficiently; and
4. Known weakness and difficulty organizations to looking for improvement.

Talking about the implementation of supervision can be done through two ways, namely stick supervision and functional supervision. The stick supervision is a combination of direct supervisory supervision and management control systems. The stick supervision is an obligation. It therefore has an absolute nature, which means that it must be done. Although a leader or manager have been helped by special forces to carry out their own supervision of the implementation of soldiers task. This inherent supervision is very effective for the government apparatus, so it will manifest a good government. There are three (3) nature of the stick supervision, namely appropriate, quick, and cheap.³⁷

The second way is through the functional supervision. The functional supervision is supervision conducted by the supervisory institution that is established or appointed specifically for conducting supervision independently

³⁶ Wordpress, 2012, “*Pengawasan atau Kontrol Sebagai Fungsi Manajeme*”, available at <https://muhfathurrohman.wordpress.com/2012/09/29/pengawasan-dan-kontrol-sebagai-fungsi-manajemen/>, accessed on 10th December 2017, at 7.13 pm.

³⁷ Muchsan, 1997, “*Sistem Pengawasan Terhadap Aparat Pemerintahan dan Peradilan Tata Usaha Negara Di Indonesia*”, Yogyakarta, Liberty, Page 42-43.

against objects of supervised. The functional supervision is done by the institution that has the task and function of conducting supervision through audits, investigations, and assessment in accordance with the plan and prevailing provisions of act.³⁸

C. The Supervision of Justices

The important role of the Judicial Commission in the supervision of the Constitutional Justices has become boisterous since the arrest of the Chairman of the Constitutional Court Akil Mochtar on the case of corruption. Akil Mochtar who was accused to accept money related cases has been handled, after the authorization has been declared unconstitutional.

Then, the next issue is the Constitutional Court Decision Number 005/PUU-IV/2006 that limits the function of Judicial Commission on supervision. There are 31 Judges of Supreme Court requested examination the Law Number 22 of 2004 on Judicial Commission and Law Number 4 of 2004 on the Judicial Authority.³⁹

The reason why the Constitutional Court by the judicial authority must be excluded from the judges in the context of the 'control' is because the Judicial Commission is listed in 173-176 page of the Constitutional Court Decision Number 005/PUU-IV/2006. In the decision, there are 2 points why the Constitutional Court Justice shall be issued subject to 'the supervision' of

³⁸Idul Rishan, Komisi Yudisial, *SatuUpaya Mewujudkan Wibawa Peradilan*, Yogyakarta, Ganta Press, 2013, page 72

³⁹ Wordpress, 2007, "*Analisis Putusan MK No. 005/PUU-IV/2006 (Judicial Review UU KY)*", available at <https://bh4kt1.wordpress.com/2007/04/05/analisis-putusan-mk-no-005puu-iv2006-judicial-review-uu-ky/>, accessed on 11th January 2018, at 8.34 am.

the Judicial Commission. First, when seen from the order of chapters in the Constitution where the arrangement of the Supreme Court and judicial bodies underneath are regulated in article 24A, the Judicial Commission under Article 24B, and the Constitutional Court in 24C, according to the Constitutional Court, it means the maker of the Constitution did not intend to include the authority of the Judicial Commission against Justice.⁴⁰

Secondly, this reason that is according to the Constitutional Court itself is more serious than the previous reason, as it puts the Constitutional Justices as the subject of 'the supervision' of the Judicial Commission. While the Judicial Commission can be a party to the dispute of constitutional authority of state institutions under the authority of the Constitutional Court. It can be seen further from the quotation consideration decision number 005/PUU-IV/2006 it 174-175.⁴¹

Related potential independence and impartiality of the Constitutional Court if the Judicial Commission shall supervise the Justices while at the same time as the Constitutional Court is that the court that will decide disputes between the constitutional authorities of the Judicial Commission to other

⁴⁰The decision of the Constitutional Court 005/PPU-IV/2006 page 173-174

⁴¹In addition, the Constitutional Court must consider the substantive reasons more serious and fundamental to reject any attempt to place the attitude Constitutional Court as the object of scrutiny by other state institutions. The provision that expands understanding the behaviour of judges in Article 24B paragraph (1) 1945 Constitutional includes Justice behaviour can emasculate the authority and responsibility to obstruct the fulfilment of the Constitutional Court in maintaining the constitutionality of the mechanism of relations between state institutions whose authorities are granted by the 1945 Constitution. In fact, the establishment Constitutional Court based on the 1945 Constitution is in order to ensure that the 1945 Constitution executed as well as possible, including in the context of the constitutional relationship between state institutions. Therefore, one of the powers granted to the Constitutional Court as intended by Article 24C paragraph (1) of the 1945 Constitution, is to decide upon the dispute over the authority of state institutions whose authorities are granted by the 1945 Constitution.

state institutions. This is actually a '*ratio decidendi*' over declared it unlawful authorities 'the supervision' of the Judicial Commission on Justices, and because this argument of the Constitutional Court appeals to the norm, and apply it to the lower norm then conclude lower norm the contrary to a higher norm.

Constitutional Justice does not have a conflict of interest to the Judicial Commission. Judicial Commission is not a state institution that may have any disputes with the Constitutional Court.