DECISION

Number 005/PUU-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, trying and deciding upon constitutional cases at the first and last level, has passed its decision in the case of a Petition for Judicial Review on Law of the Republic of Indonesia Number 22 Year 2004 concerning Judicial Commission (hereinafter shall be referred to as the JC Law) and Judicial Review on Law of the Republic of Indonesia Number 4 Year 2004 concerning Judicial Authority (hereinafter shall be referred to as the JA Law) against the 1945 Constitution of the Republic of Indonesia (hereinafter shall be referred to as the 1945 Constitution) filed by:

1.	Name	:	**PROF. DR. PAULUS EFFENDI LOTULUNG, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
2.	Name	:	**DRS.H. ANDI SYAMSU ALAM, SH.MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
3.	Namae	:	**DRS.H. AHMAD KAMIL, SH.M.HUM.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
4.	Name	:	**H. ABDUL KADIR MAPPONG, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
5.	Name	:	**ISKANDAR KAMIL, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
6.	Name	:	**HARIFIN A. TUMPA, SH. MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
7.	Name	:	**PROF. DR. H. MUCHSIN, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
8.	Name	:	**PROF. DR. VALERINE J.L.K., SH.MA.**

	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
9.	Name	:	**H. DIRWOTO, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
10.	Name	:	**DR. H. ABDURRAHMAN, SH.MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
11.	Name	:	**PROF. DR. H. KAIMUDDIN SALLE, SH.MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
12.	Name	:	**MANSUR KARTAYASA, SH.MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
13.	Name	:	**PROF. REHNGENA PURBA, SH.MS.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
14.	Name	:	**PROF. DR. H.M. HAKIM NYAK PHA, SH.DEA.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
15.	Name	:	**DRS. H. HAMDAN, SH.MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
16.	Name	:	**H.M. IMRON ANWARI, SH.SpN.MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
17.	Name	:	**TITI NURMALA SIAHAAN SIAGIAN, SH.MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
18.	Name	:	**WIDAYATNO SASTRO HARDJONO, SH.MSc.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
19.	Name	:	**MOEGIHARDJO, SH.**

	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
20.	Name	:	**H. MUHAMMAD TAUFIQ, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
21.	Name	:	**H. R. IMAM HARJADI, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
22.	Name	:	**ABBAS SAID, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
23.	Name	:	**ANDAR PURBA, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
24.	Name	:	**DJOKO SARWOKO, SH.MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
25.	Name	:	**I MADE TARA, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
26.	Name	:	**ATJA SONDJAJA, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
27.	Name	:	**H. IMAM SOEBECHI, SH. MH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
28.	Name	:	**MARINA SIDABUTAR, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
29.	Name	:	**H. USMAN KARIM, SH.**
	Title	:	Justice of the Supreme Court of the Republic of Indonesia.
	Address	:	Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;
30.	Name	:	**DRS. H. HABIBURRAHMAN, M.HUM.**

Title : Justice of the Supreme Court of the Republic of Indonesia.
Address : Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;

31. Name : **M. BAHAUDIN QUADRY, SH.**
Title : Justice of the Supreme Court of the Republic of Indonesia.
Address : Jl. Medan Merdeka Utara Kav.9-13, Jakarta Pusat;

Hereinafter shall be referred to as ---------- **the Petitioners**;

In this case, they have authorized **1. Prof. Dr. Indrianto Senoadji, SH., 2. Wimboyono Senoadji, SH., MH., 3. Denny Kailimang, SH., MH., 4. O.C. Kaligis, SH., MH., 5. Juan Felix Tampubolon, SH., MH.,** having the address at Kompleks Majapahit Permai Block B-122, Central Jakarta Tel. (021) 3853250, HP. 0818935555, based on a Power of Attorney dated March 8, 2006;

Having read the petition of the Petitioners;

Having heard the testimonies of the Petitioners;

Having heard the testimonies of the Government;

Having heard the testimonies of the People's Legislative Assembly of the Republic of Indonesia;

Having read the affidavits of the Government and the People's Legislative Assembly of the Republic of Indonesia;

Having heard the testimonies of the Directly Related Party: the Judicial Commission;

Having read the affidavits of the Directly Related Party: the Judicial Commission;

Having read the affidavits of and heard the testimonies of Indirectly Related Parties;

Having heard the testimonies of the Experts presented by the Petitioners and Witnesses and Experts presented by the Parties Indirectly Related to the Judicial Commission;

Having examined the evidence;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the petition are as stated above;

Considering whereas there were 3 (three) things which must be taken into considerations by the Constitutional Court, namely:

1. The authority of the Constitutional Court to examine, try and make decision on the petition submitted by the Petitioners;
2. The legal standing of the Petitioners to submit the *a quo* petition*;*
3. The subject matter of the petition regarding the constitutionality of the laws on which a judicial review is petitioned by Petitioners;

Considering, whereas with regard to the aforementioned three matters, the Constitutional Court is of the following opinions:

1. The Authority of the Constitutional Court

Considering whereas based on the provision of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter shall be referred to as the 1945 Constitution), the Constitutional Court has the authority "*to try cases at the first and final level, the decisions of which shall be final, to conduct judicial review on laws against the Constitution, to settle disputes on authorities between state institutions whose authorities are bestowed by the Constitution, to decide upon the dissolution of political parties, and to decide upon electoral disputes".* The provision is restated in Article 10 paragraph (1) of Law of the Republic of Indonesia Number 24 Year 2003 concerning Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter shall be referred to as the CC Law) and Article 12 paragraph (1) of Law of the Republic of Indonesia Number 4 Year 2004 concerning Judicial Authority (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to State Gazette of the Republic of Indonesia Number 4358, hereinafter shall be referred to as the JA Law);

Considering that the petition of the Petitioners is regarding judicial review on Law of the Republic of Indonesia Number 22 Year 2004 concerning Judicial Commission (State Gazette of the Republic of Indonesia Year 2004 Number 89, Supplement to State Gazette of the Republic of Indonesia Number 4415, hereinafter shall be referred to as the JC Law) and the JA Law against the 1945 Constitution, so that the *a quo* petition is within the jurisdiction of the Constitutional Court;

Considering whereas, even though the Constitutional Court has the authority to examine, try and pass decision on the *a quo* petition, however, to eliminate doubts about the objectivity, neutrality, and impartiality of the Constitutional Court in exercising its authority as granted by the 1945 Constitution, it is necessary to previously consider the request of the attorneys of the Judicial Commission, as the Directly Related Party, which was specifically conveyed in the hearing held on April 11, 2006, for a declaration of the Constitutional Court. The declaration requested by the Related Party JC was that the Constitutional Court would refuse or declare that it would not conduct the judicial review on the provisions of the JC Law as requested in the *a quo* petition insofar as it was related to the Constitutional Justices, either explicitly or implicitly. With regard to the request for such declaration, it is necessary and important for the Constitutional Court to point out its stance as follows:

a. Whereas the presence of the Constitutional Court, as the state institution authorized by the 1945 Constitution to try and pass final decisions at the first and last level on state administration issues, is a logical consequence

of the new state administration system to be established by the 1945 Constitution following a series of amendments. Such new state administration system is a system which basic ideas are intended to make Indonesia into a democratic constitutional state (*democratische rechtsstaat*), namely a democratic state based on constitution (constitutional democracy), as reflected in the provisions of Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution, which constitute the elaboration of the Preamble of the 1945 Constitution, especially the fourth paragraph. Therefore, the entire provisions of the 1945 Constitution, as an integrated system, constitute the further elaboration of the basic ideas and accordingly, they can be explained based on such basic ideas;

b. Whereas the first requirement for every country applying the principles of rule of law and constitutional democracy is constitutionalism principle, namely the principle placing the constitution as the highest law, the substance of which is contained in the Fourth Paragraph of the Preamble of the 1945 Constitution, as the realization of the statement of the country's independence, which is reflected among others in the sentence, "…. *Indonesia's national independence shall be formulated in a Constitution of the State of Indonesia*". Accordingly, the constitution is *the fundamental statement of what a group of people gathered together as citizens of a particular nation view as the basic rules and values which they share and to which they agree to bind themselves* (please refer to Barry M. Hager, *Rule of Law, A Lexicon for Policy Makers*, 2000). Based on this reason, for countries applying the principles of *rule of law* and *constitutional democracy,* "*constitutions should serve as the highest form of law to which all other laws and governmental actions must conform. As such, constitutions should embody the fundamental precepts of a democratic society rather than serving to incorporate ever-changing laws more appropriately dealt with by statute. Similarly, governmental structures and actions should seriously conform with constitutional norms, and constitutions should not mere ceremonial or aspirational documents*" (please refer to John Norton More, 1990). Therefore, there must be a mechanism ensuring that the provisions of the constitution are actually implemented in the daily life of the state. To ensure the enforcement and implementation of the constitution, the presence of the Constitutional Court is a certain thing, namely as an institution functioning as the guardian of the constitution, and because of such function the Constitutional Court is the sole judicial interpreter of the constitution. Based on such thought, all the authorities granted by the constitution to the Constitutional Court, as set forth in Article 24C paragraph (1) of the 1945 Constitution, are from a constitutional source and constitutionally founded;

c. Whereas in carrying out the function of the Constitutional Court as the guardian of the constitution, Constitutional Justices have taken the oath that they *"will fulfill their obligations as Constitutional Judges to the best of*

their abilities and to the fairest extent, ***uphold*** *the 1945 Constitution of the State of the Republic of Indonesia, and apply all laws and regulations in the most honest manner* ***according to*** *the 1945 Constitution of the State of the Republic of Indonesia, and to serve the state and the nation"*, in accordance with the provisions of Article 21 paragraph (1) of the CC Law. The oath brings the consequence that it would be against the constitution if Constitutional Justices fail to settle a constitutional dispute filed to them for decision, while the dispute, according to the constitution, is absolutely under its jurisdiction, especially when the dispute has no relation whatsoever to the personal interests of the Constitutional Judges, but it is instead a constitutional dispute;

d. Whereas the *a quo* petition is a petition for a judicial review on a law against the 1945 Constitution. The Constitutional Court fully realizes that, in carrying out its authorities to conduct judicial review on laws against the 1945 Constitution, The Constitutional Court must always carefully consider two matters. **First**, that a law is the product of works conducted by two state institutions elected democratically, so that every law seen from the perspective of *procedural democracy* is a reflection of the will of the majority people. **Second**, however, the will of the majority people shall not disregard the *substantial democracy* as set forth in the constitution, which constitutes *the supreme law* in every state applying the principles of *rule of law* and *constitutional democracy*. There is often an erroneous opinion that in exercising its authority to conduct judicial review on laws against the constitution, the Constitutional Court has the duty of repealing laws. Therefore, it is very important for the Constitutional Court to confirm, as stated by Justice Robert in the case of U.S. v. Butler, that, "*All the power it has ... is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends*", please refer to Craig R. Ducat, *Constitutional Interpretation*, 2000;

e. Whereas in addition to the aforementioned considerations, even though the request conveyed by the JC is asking for a declaration, but essentially it is requesting for an intermediate decision, while pursuant to the procedural law of judicial review, Article 58 of the CC Law, "*Laws being reviewed by the Constitutional Court shall remain applicable pending a decision stating that the laws are contradictory to the 1945 Constitution of the state of the Republic of Indonesia*". Therefore, intermediate decisions are basically not recognized in the judicial review on laws against the 1945 Constitution. The only possibility for the Constitutional Court to pass intermediate decision in a judicial review on a law against the 1945 Constitution, either upon a petition of a Petitioner or upon the initiative of the Constitutional Court, is when the review is related to law making process. This is provided for in Article 16 of the Regulation of the

Constitutional Court Number 06/PMK/2005 concerning Petition for Legal Proceedings in a Case of Judicial Review on Laws, namely as follows:

(1) In the case that the Petitioner argues about the presence of an alleged crime in the making of the law on which the judicial review is requested, The Constitutional Court may cease temporarily the examination on the petition or postpone the decision;

(2) In the case that the argument about the alleged criminal action as intended in point (1) is supported by evidence, the Constitutional Court may postpone the examination and notify the relevant officials to take follow-up actions on the alleged criminal action informed by the Petitioner;

(3) In the case that the alleged criminal actions as intended in point (1) have been handled by the competent officials, for the purposes of examination and decision-making, the Constitutional Court may ask for information to the parties in charge of the investigation and/or prosecution;

(4) The cessation of an examination process or postponement of decisions as intended in point (1) shall be stipulated in a Decision of the Constitutional Court to be read out before a court session open to pubic.

Whereas, the request for declaration submitted by the JC is not provided in the scope of the provisions of Article 16 of the Constitutional Court Regulation Number 06/PMK/2005 above;

f. Whereas even though the purpose of petition for declaration by the Judicial Commission (KY) is to prevent the Constitutional Court from becoming judges in their own cases and so that the Constitutional Court is protected against partial stance for being deemed to have interest that make itself not impartial, which actually constitutes the principles of procedural law in a good judiciary, but the Constitutional Court is of the opinion that the aforementioned matter may not **negate** higher legal provisions, namely constitution (the 1945 Constitution) that has granted constitutional authority to the Court to examine, try and decide constitutional cases in an independent manner, including one of which is to review a law against the 1945 Constitution;

g. Impartiality as a universal ethic principle to avoid conflict of interest is actually focused on the examination process of ordinary cases such as those relating to civil and criminal cases in which matter the factor of conflict of **individual interest** constitutes the object of dispute (*objectum litis*) examined and tried by judges. The object of dispute (*objectum litis*) of judiciary process of *a quo* cases at the Constitutional Court is the constitutionality issue of law which further concerns the public interest

guaranteed by the constitution as the supreme law, not merely individual interest. Therefore, in *a quo* cases, the application of impartiality principle cannot be used as the reason to set aside constitutional obligations mainly aimed at examining and deciding *a quo* cases, so that the Constitutional Court will further focus on its functions and duties to safeguard and defend the constitution by remaining maintaining the impartiality principle in the entire process. Consequently, the *nemo judex idoneus in propria causa* (*niemand is geschikt om als rechter in zijn eigen zaak op te treden*) principle*,* namely that every judge may not serve as a judge in his/her own case, cannot be applied in this case;

Considering that based on the entire reasons above, as the guardian of the constitution, the Constitutional Court states that there are no adequate reasons to grant the petition for declaration as requested by the Directly Related Party (KY). Therefore, the Constitutional Court must still examine, try and decide in its entirety the *a quo* petition in accordance with its constitutional authority by remaining maintaining its independence, impartiality and integrity for the sake of enforcing the constitution;

2. Legal Standing of the Petitioners

Considering whereas Article 51 paragraph (1) of the Constitutional Court Law (UUMK) stipulates that petitioners in the review of law against the 1945 Constitution are those who deem that their constitutional rights and/or authorities are harmed by the coming into effect of a law, namely a) Indonesian Citizen individuals, including group of people having the same interest; b) units of customary law communities insofar as still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia regulated in a law; c) public or private legal entities; or d) state institutions.

Considering that since the issuance of Decision Number 006/PUU-III/2005, the Constitutional Court has determined 5 (five) requirements for the existence of constitutional losses as intended in Article 51 paragraph (1) of the Constitutional Court Law (UUMK) as follows:

a. petitioners must have constitutional rights granted by the 1945 Constitution;
b. such constitutional rights shall be deemed to have been harmed by the coming into effect of a law;
c. the constitutional right losses shall be specific and actual in nature or at least potential in nature which pursuant to a logical reasoning will take place for sure;
d. there is a causal connection (*causal verband)* between the constitutional right losses and the law against which review is petitioned;

e. there is a possibility that upon the granting of a petition, the constitutional right losses argued shall not come into existence or shall not occur any longer;

Considering that the Petitioners in the a quo petition are 31 Supreme Court Justices argued themselves as Indonesian Citizen individuals serving as the Supreme Court Justices of the Supreme Court of the Republic of Indonesia (hereinafter referred to as the MA). The Petitioners argue that their constitutional rights/authorities granted by Article 24 paragraph (1) of the 1945 Constitution, namely right to freedom as Supreme Court Justices has been disrupted and/or harmed by the coming into effect of Articles 20, 21, 22 paragraph (1) sub-paragraph e and paragraph (5), Article 23 paragraphs (2), (3) and (5), Article 24 paragraph (1) and Article 25 paragraphs (3) and (4) all related to (jis) Article 1 sub-article 5 of the Judicial Commission Law (UUKY) insofar as regarding words “Supreme Court Justices” and Constitutional Justices”, as well as Article 34 paragraph (3) of the Judicial Authority Law (UUKK) insofar as regarding words “supreme court justices”;

Considering that the Judicial Commission (KY) in the hearing is of the opinion that the Petitioners do not have any legal standing to file an *a quo* petition, since its constitutional rights harmed by the UUKY and UUKK are not clear, namely that Article 24 paragraph (1) of the 1945 Constitution is regarding the freedom of judiciary power executors, namely MA and judiciary boards below MA as well as the Constitutional Court, their judges do not serve as judiciary power officials who cannot represent the interest of the judiciary power executors. In addition, KY is also of the opinion that the Petitioners are mistaken in concluding that their constitutional rights are harmed only because they become the object of supervision, which means making the independence of Supreme Court justices absolute;

Considering that against the issue of legal standing, the Constitutional Court is of the following opinion:

a. Whereas the Petitioners fulfill the qualification of Indonesian Citizen individual petitioners, including group of people who have the same interest;
b. Whereas as Indonesian Citizen individuals having the profession of and holding positions (ambt) as Supreme Court justices, the Petitioners shall have constitutional rights granted by the 1945 Constitution, namely their rights to freedom as judges to examine, try and decide a case they handle. The provisions of Article 24 paragraph (1) of the 1945 Constitution read as follows, “Judiciary power constitutes a free power to administer a judiciary for the purpose of enforcing law and justice”, while paragraph (2) reads as follows, “Judiciary power shall be exercised by a Supreme Court and judiciary boards below it within the public judicature, religious judicature, military judicature, state administration judicature and by a

Constitutional Court". The aforementioned matter is then spelled out in the provisions of Articles 31 and 33 of UUKK. Article 31 of UUKK reads as follows, "Judges constitute officials exercising judiciary power regulated in a law", while Article 33 of UUKK reads as follows, "In performing their duties and functions, judges shall be obligated to maintain judiciary independence."

Based on the provisions of the 1945 Constitution and UUKK above, freedom or independence shall be granted to judiciary power executing institutions – namely MA and judiciary boards below MA and the Constitutional Court – to administer judiciary in order to enforce law and justice. However, the institutional freedom/independence of judiciary boards shall automatically be reflected in the freedom of judges as judiciary power executors. Therefore, as a consequence that judges are judiciary power executor (*rechters als uitvoerder van rechterlijke macht*) (Article 31 of UUKK), judges shall be obligated to maintain judiciary independence (Article 33 of UUKK) who inherently also hold independence as judges, hence, a court head may not intervene in judges who are handling a case. Article 2 of Law of the Republic of Indonesia Number 14 Year 1985 regarding the Supreme Court amended by Law of the Republic of Indonesia Number 5 Year 2004 stipulates that MA constitute the supreme court out of all judiciaries performing its duties free from the influence of the Government and other influences and MA shall examine and decide cases with at least 3 (three) justices. The provisions indicate that MA as an institution may only exercise its powers through its justices. Therefore, MA as a working environment (*ambt*) to act is personified by Supreme Court Justices as position holders (*ambtsdrager*) [*De werkkring, die het ambt is, moet door een mens worden vervuld; de persoon, die het ambt is, door een mens worden vertegenwoordigd. Dit is de ambtsdrager*]. Consequently, judiciary independence as institution defined as free from the influence of the Government and other influences, has individual aspect of judges as a right and obligation guaranteed by the 1945 Constitution, so that the institutional aspect of judiciary independence is parallel with the individual aspect of judge independence. The freedom of the Supreme Court Justices to exercise their judicial authorities as the judicial authorities of MA must be guaranteed and safeguarded from coercion, directive and intimidation of the extra-judicial parties;

c. Whereas the Petitioners deem the freedom in exercising judicial authorities constituting constitutional rights of the justices guaranteed by the 1945 Constitution has been harmed by the coming into effect of UUKY and UUKK, especially articles regarding supervision – to be discussed in the consideration regarding the principal case. Actually, **judiciary independence may not be risked with actions taken under the guise of disciplining naughty judges** (Sandra Day O'Connor, Former US Justice, 2005, "The Importance of Judicial Independence*",* in USA Journal: "Democracy Issues");

d. Whereas there is a causal connection (*causal verband*) between the constitutional right losses of the Petitioners and the provisions regarding supervisory regulation indicated in UUKY and UUKK and the implementation methods thereof by KY deemed by the Petitioners to have entered the judicial domain of the Petitioners as Justices due to the blurred standards in UUKY and UUKK, and if the petition of the Petitioners is granted, it is believed that the constitutional rights of the Petitioners, namely their independence as Supreme Court Justices shall not or does not be harmed any longer;

e. Whereas the Petitioners have direct interest relations with the supervision of KY over the Supreme Court justices, but against the Constitutional Justices, there is an indirect overlap with the interest of the Petitioners, because both serve as judiciary power executing state institutions that are free, the position of which is equal as stipulated in the provisions of Article 24 paragraph (2) of the 1945 Constitution. Even actually, judiciary freedom and the freedom of judges constitute the interest of all justice seekers (*justitiabelen*);

Considering whereas based on the aforementioned description of considerations, the Constitutional Court is of the opinion that the Petitioners have a legal standing (*legitima persona standi in judicio*) to file a quo petition with a Constitutional Justice is of a different opinion that insofar as regarding the provisions related to Constitutional Judges, the Petitioners do not have any legal standing because there are no right losses or specific constitutional powers experienced by the Petitioners, as Supreme Court Justices as a result of the coming into effect of the provisions regulating the Constitutional Court and Constitutional Judges in UUKY;

Considering further, since the Constitutional Court has the authority to examine, try and decide a quo petitions and the Petitioners have legal standing, the Constitutional Court shall subsequently take the principal petition of the Petitioners into account;

3. The Principal Petition

Considering that in their principal petition, the Petitioners have argued the unconstitutionality of several articles of UUKY and Article 34 paragraph (3) of UUKK which respectively read as follows:

1) Article 1 Sub-article 5 of UUKY: “Judges shall be the Supreme Court Justices and judges at judiciary boards within all judiciaries being below the Supreme Court as well as justices of the Constitutional Court as intended in the 1945 Constitution of the Republic of Indonesia”.

2) Article 20 of UUKY: “In exercising its power as intended in Article 13 sub-article b, the Judicial Commission shall have the duty to supervise the behavior of Judges in the context of enforcing the honor and grandeur of dignity as well as to maintain the behavior of judges”.

3) Article 21 of UUKY: ”For the purpose of exercising power as intended in Article 13 sub-article b, the Judicial Commission shall have the duty to file proposal for the application of sanctions on judges to the Chief Justice of the Supreme Court and/or Constitutional Court”.
4) Article 22 paragraph (1) of UUKY: “In conducting the supervision as intended in Article 20, the Judicial Commission:
   a. *…;*
   b. *…;*
   c. *…;*
   d. *…;*
   e. shall prepare a report on the examination result in the form of recommendation and shall be submitted to the Supreme Court and/or Constitutional Court and the carbon copies thereof shall be forwarded to the President and the House of Representatives”.
5) Article 22 paragraph (5) of UUKY: “In the event that judiciary boards or judges do not fulfil their obligations as intended in paragraph (4), the Supreme Court and/or Constitutional Court shall be obligated to make a stipulation in the form of coercion to the judiciary boards or judges to provide information or data requested”.
6) Article 23 paragraph (2) of UUKY: “Proposal for the application of sanctions as intended in paragraph (1) sub-paragraph a along with the reasons for such errors shall be binding and shall be submitted by the Judicial Commission to the Chief Justice and/or Constitutional Court”.
7) Article 23 paragraph (3) of UUKY: “Proposal for the application of sanctions as intended in paragraph (1) sub-paragraphs b and c shall be handed over by the Judicial Commission to the Supreme Court and/or Constitutional Court”.
8) Article 23 paragraph (5) of UUKY: “In the event that a self-defence is rejected, a proposal for the discharge of a judge shall be filed by the Supreme Court and/or Constitutional Court to the President by no later than 14 (fourteen) days as from the rejection of self-defence by the Judge Honorary Council”.
9) Article 24 paragraph (1) of UUKY: “The Judicial Commission may propose to the Supreme Court and/or Constitutional Court to grant rewards to judges for their achievements and services in enforcing the honor and grandeur as well as maintaining the behaviour of Judges”.
10) Article 25 paragraph (3) of UUKY: “Decision as intended in paragraph (2) shall be valid if the meeting is attended by at lest 5 (five) Members of the Judicial Commission, except decision regarding the nomination of candidates of Supreme Court Justices to the House of Representatives and the proposal for the discharge of Supreme Court Justices and/or Constitutional Court Justices in the presence of all Members of the Judicial Commission”.
11) Article 25 paragraph (4) of UUKY: “In the event of delay for 3 (three) consecutive times on a decision regarding the nomination of candidates of the Supreme Court Justices to the House of the Representatives and

proposal for the discharge of Supreme Court Justices and/or Constitutional Court Justices, the decision shall be deemed as valid if attended by 5 (five) members".

12) Article 34 paragraph (3) of UUKK: "In the context of maintaining the honor, grandeur of dignitity as well as behaviour of Supreme Court justices and judges, the Judicial Commission shall conduct the supervision provided for in a law".

Considering whereas the Petitioners argue the unconstitutionality reasons of Articles of UUKY and UUKK mentioned above as follows:

a. Whereas based on the provisions of Article 24B paragraph (1) of the 1945 Constitution which read as follows, *"The Judicial Commission shall be independent in nature and shall have the authority to propose the appointment of Supreme Court Justices and shall have another authority in the context of maintaining and enforcing the honor, grandeur of dignity as well as behaviour of judges"*, if read in a spirit and context at each other, pursuant to the Petitioners, it means that KY shall have another authority in the context of maintaining and enforcing the honor and grandeur of dignity as well as behaviour of judges shall be in the context of exercising the authority of KY to propose the appointment of Supreme Court Justices;
b. Whereas pursuant to the Petitioners, another authority of KY shall not reach the Supreme Court Justices and the Constitutional Court justices, but shall only reach the judges from the judiciary boards below the MA because in order to become Supreme Court Justices and Constitutional Court justices shall not all originate from the First Instance Judges and Appellate Judges not even reaching ad hoc judges. This is corroborated by the provisions of Article 25 of the 1945 Constitution which read as follows, "The requirements to become and to be observed as judges shall be stipulated by virtue of a law";
c. Whereas pursuant to the Petitioners, the expansion of definition of "judges" in Article 24B paragraph (1) of the 1945 Constitution by Article 1 sub-article 5 and other related articles of UUKY as well as Article 34 paragraph (3) of UUKK are contradictory to the universally applicable legal principles, namely *lex certa, lex stricta,* and *lex superiori derogat legi inferiori* principles*;*
d. Whereas pursuant to the Petitioners, the supervision conducted by KY against Supreme Court justices by summoning them for several cases it tried is contradictory to the judiciary independence principles and the Supreme Court justices are guaranteed by Article 24 paragraph (1) of the 1945 Constitution;
e. Whereas universally the supervisory authority of KY shall not reach the Supreme Court justices because KY is the partner of MA in the supervision of judges within judiciary boards below MA, hence, according

to the Petitioners, Article 20 of UUKY is contradictory to the 1945 Constitution;

f. Whereas proposal for the discharge of Supreme Court justices has been regulated in the Supreme Court Law (UUMA) and proposal for the discharge of Constitutional Court judges has been regulated in the Constitutional Court Law (UUMK) which shall not require the interference of KY, hence, according to the Petitioners, Articles 21, 23 paragraphs (2) and (3), as well as (5), Article 24 paragraph (1), and Article 25 paragraphs (3) and (4) of UUKY are contradictory to Article 24B paragraph (1) and Article 25 of the 1945 Constitution;

g. Whereas therefore the Petitioners in their petitum kindly request the Constitutional Court to declare the articles of UUKY and UUKK above as contradictory to the 1945 Constitution, hence, they shall not have binding legal force;

Considering whereas in order to corroborate their arguments, the Petitioners have filed exhibits P-1 up to P-28 and have presented 2 (two) experts, namely Prof. Dr. Philipus M. Hadjon, S.H. (Professor of Airlangga University in Surabaya) and Hobbes Sinaga, S.H., M.H. (Dean of Faculty of Law of Christian University of Indonesia in Jakarta who is also former PAH I Member of BP MPR) who provided oral and written depositions which shall be included in full in the description regarding the Case which basically expressed the following:

1) Prof. Dr. Philipus M. Hadjon, S.H., by using a contextual approach in analyzing Article 24B paragraph (1) of the 1945 Constitution, is of the opinion that the definition of judges in such article does not include the definition of Supreme Court justices and Constitutional Court justices. Based on the opinion of Jan McLeod in his book entitled “Legal Method”, the aforementioned contextual approach, according to Expert, contains 3 (three) important principles, namely (1) *noscitur a sociis* principle, which means one word shall be defined from the context related thereto (a thing is known by its associates); (2) *ejusdem generic* principle, which means that the definition of the same class; and (3) *expressio unius exclusio alterius* principle, which means the expression (or the inclusion) of one thing implies the exclusion of another. Based on the aforementioned contextual approach, according to Experts, Supreme Court Justices and Constitutional Court Justices have a different concept from judges;

Based on the first principle, namely *noscitur a sociis* principle, in its context that in the preamble thereof shall be to propose the appointment of Supreme Court Justices and such other duties “maintaining and enforcing the honor as well as … and so on and the behaviour of judges”. Therefore, considering that Indonesia does not have a specific term for Supreme Court Justices, unlike the United States that has judge and justice as well as the Netherlands that has *rechter* and *de leden van den Hoge Raad der Nederlanden* or the Philippines that recognizes the concept of Member of the Supreme Court, hence, Indonesia only recognizes the term Supreme Court Justice, therefore, the

meaning of word judges does not include Supreme Court Justices nor Constitutional Court Justices. The second principle namely *ejusdem generis* principle contains a meaning of the same class, in the same genus, in the same group. Whereas referred to as the same group in the same genus, shall be the Supreme Court Justices and Constitutional Court Justices. According to Expert, there is a difference in concept between the Supreme Court Justices and judges. The third principle namely *expressio unius exclusio alterius* principle means that **judges** in the context of Article 24B paragraph (1) does not include **Supreme Court Justices**, therefore, provisions in laws regarding the authority of the Judicial Commission to supervise the behavior of judges by defining **Supreme Court Justices** and **Constitutional Court Justices** as **judges** in the context of Article 24B paragraph (1) of the 1945 Constitution must be rejected.

2) Hobbes Sinaga, S.H., M.H.

Expert Hobbes Sinaga, the Dean of Faculty of Law of Christian University of Indonesia, and former PAH I Member of BP MPR-RI who was involved in the amendment to the 1945 Constitution, made a deposition based on his expertise and stated that at the moment Indonesia has two institutions as judicial power executors namely the Supreme Court and the Constitutional Court. The recruitment of judges in the two institutions is different. The Constitutional Court judges shall be nominated by the Supreme Court, House of Representatives (DPR) and the President, while the Supreme Court Justices shall be elected through a fit and proper test process at the DPR. In order to maintain the independence of the Supreme Court, a Judicial Commission was established with the authority to nominate the appointment of Supreme Court Justices. This means that the Judicial Commission shall only recruit candidates, while the full authority to elect permanent candidates remains at the hand of DPR. Therefore, the position of the Judicial Commission is not equal to the DPR that grants approval, not equal to the President who stipulates, either. The main duty of the Judicial Commission shall be to propose the appointment, while other authority constitutes additional authority which should not be larger than the main authority. The party that enforces the grandeur and dignity and honor of judges is not the Judicial Commission but the judges themselves.

The Judicial Commission does not have any relationship with the Constitutional Court, hence, it is not relevant if the Judicial Commission also supervises judges in the Constitutional Court.

Considering whereas the Government and the House of Representatives (DPR) have provided depositions before the hearing which shall be subsequently contained in the description regarding the case basically state as follows:

1. **The Government**

KY is a state institution the duties and functions of which are not as judicial power executor, although its functions are related to the judicial power. KY has the duty to nominate the appointment of Supreme Court justices and has another

authority in the context of maintaining and enforcing the honor, grandeur of dignity as well as behaviour of judges.

Whereas this should be a strong will of law makers so as to realize a checks and balances mechanism with regard to the implementation of indepence of judicial power and other power branches.

KY does not intervene in the implementation of duties of examining, trying and deciding cases conducted by the court in the context of enforcing law and justice.

2. House of Representatives (DPR)

Whereas Article 1 sub-article 5 of UUKY is related to the expansion of definition of judges including Supreme Court Justices, initially it was proposed by the Government in its List of Problem Inventories (DIM), while the Draft Law being the initiative of the DPR does not contain that, hence the amendment shall subsequently read as follows, “judges shall be Justices at the Supreme Court and judges at all judiciary boards below it”;

In a public hearing among other things an NGO gave an input which basically said that KY is an independent institution that has the nature of external supervision, while internal supervision shall be conducted by the Supreme Court itself, this is related to our joint spirit and intent to present and create honor, grandeur of dignity of judges;

The words maintaining the honor and grandeur of dignity of judges in Article 24B paragraph (1) of the 1945 Constitution shall be realized in the supervision, while the word “enforcing” shall be realized in the disciplining duty or disciplinary sanction application. This is based on the spirit of checks and balances, mutual counterbalancing and control among existing state institutions, including the Supreme Court (MA).

Considering whereas the Constitutional Court has also summoned a number of former Ad Hoc I Committee members of the People’s Consultative Assembly Working Committee who were involved in the discussion of the amendment to the 1945 Constitution to listen to their depositions as witnesses who each of them have basically expressed the following matters:

1. Harun Kamil, SH.

Whereas the formation of the Judicial Commission initially had the duty to propose the appointment of Supreme Court Justices, while the party functioning to maintain the honor and grandeur of dignity and behaviour of judges shall be handed over to the Judge Honorary Council, however, the idea for the establishment of a Judge Honorary Council has not been agreed on, hence, the relevant authority shall be added to become the authority of the KY;

2. Drs. Baharuddin Aritonang, M.Hum.

Basically, the witness stated that during the discussion of the amendment to the 1945 Constitution, the witness was of a different opinion if the Judicial Commission that has only two authorities is included in the 1945 Constitution. However, since the Judicial Commission has become part of the 1945 Constitution, the issue that must be solved is how to formulate the supervision of judges. At that time what I had in my mind was that not by establishing other institutions which will later on become overlapped, even on the one hand particularly viewed from the calculation of the state budget shall become a large burden and shall be borne by the state. Now, the number of the quasi institutions has been more than 40s (forties). Based on our constitution, we have two, one of which is the general elections commission which subsequently by virtue of the laws became the National Elections Commission (KPU) and the second one is the Judicial Commission (KY). According to the witness, KY does not need to be included in the Constitution in light of KY only has two duties/authorities namely proposing the appointment of Supreme Court Justices and another authority namely to maintain and enforce the honor, grandeur, dignity as well as behavior of judges and to establish a new institution;

3. Patrialis Akbar, SH.

Whereas the purpose of Article 24B paragraph (1) of the 1945 Constitution is that the Judicial Commission in addition to having the authority to propose the appointment of Supreme Court Justices shall also have another authority namely to maintain and enforce the honor, grandeur of dignity as well as behavior of judges and such other authority is not related to the authority to propose the appointment of Supreme Court Justices, because those things constitute two authorities discussed separately;

4. Police Major General (Ret.) Drs. Sutjipno

The Judicial Commission was established or developed to guarantee checks and balances in the entire state administration process of the Republic Indonesia. However, it does not mean that KY is a separate power branch, but KY is a only a supporting element;

The Judicial Commission in the context of checks and balances is to control the behaviour of judges for the sake of maintaining the dignity and honor of judges in its entirety. Consequently, the main target of KY is judge personnel administrative aspect namely the judges within the entire judicative power circles and not the judicative operational aspect;

The Judicial Commission merely serves as supervisory apparatus or control apparatus and keeper of behaviour of judges which means judicative personnel administrative aspects and not judicative operational aspect with purpose and objective for maintaining the dignity and honor of judges;

The Judicial Commission only serves as administrative apparatus in the context of judge personnel development in the implementation of code of conduct of judges within the entire judicative circles;

5. Sutjipto, S.H.

Whereas basically the witness deposition is equal to the depositions made by other witnesses previously namely based on the minutes of hearing namely that in the discussion of Article 24B paragraph (1) of the 1945 Constitution, the Judicial Commission shall have two authorities namely proposing the appointment of Supreme Court Justices and another authority in the context of maintaining and enforcing the honor, grandeur of dignity as well as behaviour of judges;

Considering whereas in the hearing of the Constitutional Court, the deposition of the KY concerned has also been listened to as a direct related party accompanied by its attorney-at-law which also presented some Experts namely Prof. Dr. Mahfud M.D., Prof. Dr. Amran Halim, Denny Indrayana, S.H., LL.M., Ph.D., as well as witness Drs. Agun Gunanjar. The depositions of the KY concerned together with the experts and witness presented have been fully contained in the description regarding the case which basically read as follows:

1. **Deposition of KY**

Whereas the petitioner does not really understand the substance of judicial review. Whereas the core of the judicial review is the consistency of law in this regard UUKY and UUKK with the 1945 Constitution, especially article 24B paragraph (1), not questioning or reviewing the content and method or procedures for the amendment of the 1945 Constitution;

Whereas the Petitioners and the panel of judges do not have the authority to assess or correct procedures for the amendment and content/material of articles of the 1945 Constitution, because all constitutes the authority of MPR and the Petitioners have gone too far exceeding the limit of authority of the session of the Panel of Constitutional Court;

The Judicial Commission's supervising judges should certainly be based on the power granted by Article 24B paragraph (1) of the 1945 Constitution spelled out in Article 22 paragraph (1) of UUKY. In the event that in exercising the supervision, KY does not base it on Article 22 paragraph (1) above, certainly such supervision shall be invalid and arbitrary. The things conducted by KY using power approach or based on the power granted to it are in accordance with the rule of law state concept *(rechtsstaat)* adhered to by the 1945 Constitution;

Whereas all examinations conducted by KY shall be based on UUKY and Regulation made and established by KY based on the delegation or attribution of power. If people say that KY has entered the technical-judicial areas of courts by reading and reviewing the judge decision concerned, it only serves as an entry point. Since universally civilized community has accepted that the honor and grandeur of dignity of a judge can be seen from the decision made. KY functions not only to supervise the behaviour of judges outside the court but also to

supervise the behaviour of judges in performing judiciary duties so as to avoid judicial corruption which becomes a national issue that needs to be eradicated at present;

Whereas KY is of the opinion that the object of supervision includes all judges, inclusive of Supreme Court Justices and Constitutional Court Justices. This is based on the provisions of Article 20 and Article 1 sub-article 5 of the Judicial Commission Law (UUKY);

2. Prof. Dr. H. Mahfud., M.D. (Professor of Constitutional Law , UII, Yogyakarta)

He is of the opinion that, principally, legal politics is the direction intended by law or legal direction to be implemented. Legal politics can be understood from the existing sentences insofar as they are clear and non-debatable. If it is debatable, such legal politics can be discovered from the historical background of the idea on the formation of this Judicial Commission. He is also of the opinion that it is irrelevant to make a comparison with theories or laws applicable in other countries because the legal politics of each country is different. The Indonesian Legal Politics is the one written in the constitution. Based on the statements in the minutes and Blueprint of the Supreme Court, it is clear that there is an aspiration that this Judicial Commission has the duty not only to appoint a Justice, but also to supervise and control.

3. Prof. DR. Amran Halim (Expert in Indonesian Language)

Principally, he states that based on the perspective of language science, Article 24B paragraph (1) of the 1945 Constitution is a sentence that have two equal clauses because of the word “and”. It means that the clause in the left side of the word “and” and that in the right side have equal position and meaning. It means that the two parts have equal position and function. The first part does not prevail over the second and vice versa, because the two parts are truly equal. Such equality is in the form of clauses. The first clause reads “*The Judicial commission shall be independent and authorized to propose the appointment of a Justice”.* The second clause reads “*The Judicial Commission shall be independent and have other authorities in the context of maintaining….”.* In language perspective, the first part of Article 24B paragraph (1) of the 1995 Constitution only concerns about Supreme Court Justice, while the second part covers all judges;

4. Denny Indrayana, S.H., LL.M., Ph.D. (Lecturer of Constitutional Law, UGM, Yogyakarta)

Principally, the expert Denny Indrayana states that one of the main moral messages in Article 24B paragraph (1) of the 1945 Constitution closely relates to the issue of the honor and dignity of all judges in supporting reliable justice enforcement efforts and the realization of the concept that Indonesia is a rule-of-law state. It is also emphasized that the existence of constitutional provisions regarding Judicial Commission is based on a constitutional message that the Justice in the Supreme Court and judges are very determining figures in the

struggle to enforce law and justice. An interpretation that the Judicial Commission is only entitled to supervise judges at the first and appellate level is an inaccurate interpretation because it is discriminative and collusive in nature. It is discriminative because it only applies supervision to District Court and Appellate Court Judges, but not to other judges;

He is of the opinion that the reason behind the *public distrust* and the problematic internal supervision of the Supreme Court are one of the true reasons of the establishment of the Judicial Commission, especially with respect to other authorities in the context of maintaining and upholding the honor and dignity of all judges;

He is of the opinion that supervision on Justice does not violate the independency of judicial authorities. The independency of judicial authorities is not an independent legal principle. Such principle must be parallel with the legal principles of transparency and accountability. The last two principles are the ones realized in the form of supervision on judges by the Judicial Commission. With respect to the importance of the principle of independency along with transparency and accountability, independency is parallel with impartiality and integrity, the implementation of which requires supervision on the conduct of the judges to prevent deviation from the principle of good behavior;

He also provides exposition on the practices of judicial commissions in other countries that emphasize more on the supervision of judges and not on the appointment of Supreme Court Justice.

5. Witness Drs. Agun Gunanjar (Member of the House of Representatives - DPR, former member of the PAH I of the People's Consultative Assembly - MPR)

In the beginning, the Judicial Commission only had the authority to propose the appointment of Justice, while the supervision was performed by the Honorary Board. Eventually, the two authorities are held by the Judicial Commission because Honorary Board is not formulated in the 1945 Constitution and the authority of the Judicial Commission is related to the supervision of judges, including Supreme Court justice;

Whereas the reason for the difference between Supreme Court Justice and judge in Article 24B paragraph (1) of the 1945 Constitution, is because it refers to Supreme Court Justice in relation to appointment proposal to avoid political intervention in the context of *checks and balances.* It is because the process or procedure for the appointment of a justice is different from that of judges of the first and appeal level. The appointment of judges in District and Appellate Courts uses closed system, while the open system is applied in the Supreme Court. Subsequently, with respect to the term judge, it covers all judges, including justice;

Whereas the focus of the discussion in the third amendment to the 1945 Constitution, especially relating to the discussion on the existence of Judicial Commission, is about the Supreme Court;

Considering whereas the National Law Reform Commission, Indonesian Transparency Society (MTI), and Kontras, respectively applying as Indirectly

Related Parties, have also given their testimonies in the court. The complete verbal testimonies of the Indirectly Related Parties are stated in the description of the principal case principally supporting the arguments of KY;

OPINION OF THE COURT

Considering whereas after hearing the testimonies and conclusion of the Petitioners, Government, DPR, KY as Directly Related Party, and the Indirectly Related Parties, as well as examining the exhibits submitted by the Petitioners and hearing the explanation of the Experts presented by the Petitioners or KY, and the testimonies of the witnesses, the Constitutional Court is of the opinion that, in considering the application of the a quo Applicants, there are several substantial matters to be considered in relation to the definition of the following terms:

1. The Definition of Judge, whether or not it includes Constitutional Justice and Supreme Court Justice;
2. The Relation among State Institutions and the Concept of Supervision; and
3. The Behavior of Judges;

Considering whereas the three main issues above are related to the independence of courts and judges, the Constitutional Court considers that it is necessary to state its opinion first concerning the independence of judges as a conceptual framework in understanding the aforementioned three issues;

Independence of Courts and Judges

Considering whereas in a democratic rule-of-law state, as set forth in Article 1 paragraph (3) of the 1945 Constitution that reads, ”*Indonesia shall be a rule-of-law state*”, the independence of courts and judges is an essential element of a rule-of-law state or *rechtsstaat* (*rule of law*). Due to the importance of such principle, the conception of the division of power among the executive, legislative, and judicative institutions and the conception of judicial independence are perceived as fundamental conceptions and determined as one of the main elements of the constitution and serve as the spirit of the constitution itself. Even prior to the amendment to the 1945 Constitution, in which the principle of division of power was not adopted, the principle of the division and independence of judicial authorities had already confirmed and it was reflected in Article 24 and its Elucidation. Now, after the first to fourth amendments to the 1945 Constitution, in which the branches of power of the state are divided based on the principle of *checks and balances*, mainly in the relation between the legislative and executive institutions, the division of judicative power from the influence of other branches of power is more emphasized so that the independence of judicative power is structural, in addition to functional, in nature, namely with the adoption of the one-roof system as set forth in Article 13 paragraph (1) of UUKK.

Considering, based on the aforementioned descriptions, according to the 1945 Constitution, judicial independence itself serves as a safeguard from the rule of law. Such principle is also universally adopted as reflected in the Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Milan, on August 26 up to September 6, 1985, and ratified with the Resolutions of the General Assembly of the UN Number 40/32 dated November 29, 1985 and Number 40/146 dated December 13, 1985, the articles 1, 4, 7, 14, and 15 of which read among other things as follows:

1. *The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary;*
2. *…*
3. *…*
4. *There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law;*
5. *…*
6. *…*
7. *It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions*;
8. *…*
9. …
10. …
11. …
12. …
13. …
14. *The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.*
15. *The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.*

Therefore, judicial independence must be protected against all pressures, influences, and intervention of any party whosoever. Judicial independence is a principal perquisite for the realization of the purpose of a rule-of-law state and serves as the guarantee for the enforcement of law and justice. This principle is inherent in and must be reflected in the examination and decision making process on every case and is closely related to the independence of courts as honorable, dignified, trustable judicial institution. The independence of judges and courts is materialized in the independence of judges, whether individually or

as an institution, from various influences outside themselves in the form of persuasion, pressure, coercion, threat, or retribution due to certain political or economic interests from the government of the ruling political power or groups, with compensation or reward in the form of position, economic benefits, or other forms;

Considering whereas the independence of judges is closely related to the impartiality of judges both in examination and decision making process. A dependent judge cannot be expected to act neutral or impartially in performing his/her duties. Likewise, a judicial institution dependent to other organs in certain fields and unable to independently manage itself could also result in non-neutral attitude in performing its duties. Such independence also has different aspects. Functional independence contains a prohibition for other branches of power to intervene with judges in performing their judicial duties. However, such independence must not be interpreted as absolute, because it is limited by law and justice. The aforementioned independence is also to be interpreted that judges are free to pass their verdicts in accordance with their beliefs based on legal interpretation, although verdicts based on such interpretation and belief may be contradictory to those having political and administrative powers. If the verdicts are not in line with the wish of the ruling party, it cannot be used as an excuse to affect retribution against judges, whether personally or against the authority of judicial institutions ["*….when a decision adverse to the beliefs or desires of those with political power, can not affect retribution on the judges personally or on the power of the court*" (Theodore L. Becker in Herman Schwartz, *Struggle for Constitutional Justice*, 2003 page 261)];

Considering whereas because such independence relates to the examination and decision making process in cases faced by judges, to obtain verdicts that are free from pressure, influence, whether physical or psychical in nature, and corruption due to KKN (Corruption, Collusion, Nepotism), therefore, actually, **such independence is not the *privilege* of judges**, but an *indispensable right* or *inherent right* of judges in the context of ensuring the fulfillment of the human right of citizens to obtain fair trial. Therefore, mutually, judges are required to act independently and impartially in order to meet the human rights of justice seekers (*justitiabelen).* It automatically includes the right of judges to be free from pressures, influences, and threats. The 1945 Constitution gives such guarantee, which is subsequently described in the UUKK and other laws. Independence must be interpreted within the limits determined by law and in the context of fair enforcement of the law, as mentioned above. Independence is also in line with accountability realized through supervision. However, the sensitivity level of judges is extremely high because there are two opposite parties defending the interests of the conflicting parties. Therefore, the independence of judges also serves as, in addition to inherent right, a perquisite for the impartial act of judges in performing judicial duties. The form of accountability demanded from judges requiring a format that can accommodate such sensitivity. Carelessness both in the formulation of accountability

mechanism in the form of supervision and in the implementation thereof may result in negative impacts to the existing judicial process. The necessary trust to require compliance with and acceptance to the verdicts made by judges is currently in a critical condition. However, the remaining low level of trust must be maintained to prevent it from complete lost. Therefore, the intention to maintain the honor, dignity, and attitude of judges is in fact counterproductive and will eventually result in *legal chaos*;

Considering, whereas based on a conceptual framework regarding independence of courts and judges, The Constitutional Court shall subsequently assess and consider the principal issues as described above as follows:

1) Definition of Judge

Considering whereas regarding the different opinions on whether or not the definition of judge in the phrase "*….shall have other authorities in the context of maintaining and upholding the honor and dignity and attitude of* ***judges****"*, as set forth in Article 24B paragraph (1) of the 1945 Constitution, includes Constitutional Justice and Supreme Court Justice, the Constitutional Court is of the following opinions:

1.a. Constitutional Justice

Considering, whereas as described in the section regarding the authority of the Constitutional Court, the petition filed by the Applicants in its formal form is an petition to request for the substantiation of laws to the constitution. However, principally, the substance of such application contains the nuance of a constitutional authority dispute between the Supreme Court and the Judicial Commission as fellow state institutions the authority of which is set forth in the 1945 Constitution. Therefore, the Constitutional Court shall consider the substantive matters applied by the Petitioners by assessing the norms in the UUKY and UUKK to be substantiated to the 1945 Constitution and also based on the constitutionality of authorities.

Whereas if systematically reviewed and in accordance with the interpretation based on the "*original intent*" of the formulation of the provisions of the 1945 Constitution, provisions concerning KY in Article 24B of the 1945 Constitution do not relate to provisions concerning MK set forth in Article 24C of the 1945 Constitution. Based on the systematic of the placement of the provisions of the Judicial Commission after the article setting forth about the Supreme Court, namely Article 24A, and before the article setting forth about the Constitutional Court, namely Article 24C, it is understood that the provisions on the Judicial Commission in Article 24B of the 1945 Constitution are not intended to include constitutional justices as set forth in Article 24C of the 1945 Constitution. It is confirmed with the evidences in the form of minutes of meeting of the *Ad Hoc* I Committee of the MPR Working Committee and testimonies of ex-members of the *Ad Hoc* Committee in the trial that the formulation of the

provisions concerning KY in Article 24B of the 1945 Constitution is never intended to include constitutional justices as intended in Article 24C of the 1945 Constitution.

The exclusion of the attitude of constitutional justices in the definition of the attitude of judges according to Article 24B paragraph (1) of the 1945 Constitution is also contained in the provisions of UUMK and UUKK formulated prior to the formulation of UUKY. In UUMK, the function to supervise the attitude of Constitutional Justices is held by the Honorary Board set forth separately in Article 23 of UUMK. Likewise, Article 34 paragraph (3) of UUKK does not determine that Constitutional Justices become the objects of supervision by KY. In addition to that, different from ordinary judges, Constitutional Justices are basically not professional judges, but judges because of their position. Constitutional Justices are appointed for 5 (five) years and they shall return to their original profession after they no longer serve as Constitutional Justices. Moreover, the entire mechanism for the selection and appointment of Constitutional Justices set forth in the 1945 Constitution does not indicate the involvement of KY.

In addition to that, the Constitutional Court must also consider more serious and basic substantive reasons to reject all means to place the attitude of Constitutional Justices as the object of supervision by other state institutions. By placing the attitude of Constitutional Judges as the object of supervision by KY, the authority of the Constitutional Court as a constitutional authority dispute settlement institution is disrupted and it will be trapped in an assumption that it is an institution that cannot act impartially, especially if an authority dispute between KY and other institutions occurs in the practice, such as in the case between MA and KY related to a quo case. Therefore, the provisions extending the definition of the attitude of judges in Article 24B paragraph (1) of the 1945 Constitution to include the attitude of Constitutional Justices may castrated the authority and obstruct the fulfillment of the responsibilities of the Constitutional Court in maintaining the constitutionality of the mechanism of inter-state-institution relationship the authority of which is granted by the 1945 Constitution. Whereas, the establishment of the Constitutional Court based on the 1945 Constitution is in the context of ensuring the proper implementation of the 1945 Constitution, including in the context of constitutional relationship among state institutions. Therefore, one of the authorities granted to the Constitutional Court as intended in Article 24C paragraph (1) of the 1945 Constitution is to resolve authority dispute between state institutions the authority of which is granted by the 1945 Constitution;

Laws may not castrate the aforementioned MK authority. The effort to neuter the aforementioned authority of the Constitutional Court, first, is reflected in the provisions of Article 65 of UUMK that reads, “The Supreme Court may not become a party in a dispute of authority between state institutions the authority of which is granted by the 1945 Constitution of Indonesia to the Constitutional Court; second, such castration is also reflected in the provisions of UUKY articles extending the definition of the attitude of judges to include Constitutional Justices as objects of supervision by KY. Based on the aforementioned two provisions,

the position of the Constitutional Court as an institution resolving the dispute of authority between state institutions becomes powerless, especially of one of the aforementioned state institutions is KY. Such provisions of law, according to the Constitutional Court, are contradictory to the 1945 Constitution. Therefore, in Article 2 paragraph (3) of the Regulation of the Constitutional Court Number 08/PMK/2006, the provisions of Article 65 of UUMK is interpreted by the Constitutional Court that the Supreme Court (MA) may not become a party, whether as the petitioner or respondent, **only** in dispute on technical judicial authority of the Supreme Court. In other words, according to the Constitutional Court, the Supreme Court may be involved as a party in a case of authority dispute, insofar as such dispute does not relate to the implementation of the technical judicial authority of the Supreme Court. Therefore, the dispute arising between the Supreme Court and the Judicial Commission not related to the implementation of the Supreme Court's technical judicial authority as intended in the aforementioned Article 2 paragraph (3) of the Regulation of the Constitutional Court Number 08/PMK/2006, may become a case in the Constitutional Court. Meanwhile, to correct the failure in the stipulation of norms of law by placing constitutional courts as the object of supervision by KY as intended UUKY, the provisions concerning constitutional court in the articles of UUKY must be declared as contradictory to the 1945 Constitution. Subsequently, they must be declared as invalid. Therefore, in the event of future dispute on state institution authority between MA and KY, or on constitutional authority dispute between KY and other state institutions, the position of the Constitutional Court as the only judicial institution that may pass final and binding decisions in the context of resolving such disputes will not be disrupted once more so that the constitutionality of the pattern of the relation among state institutions in the future can be managed properly pursuant to the mandate of the 1945 Constitution. Based on the aforementioned considerations, insofar as it concerns the provisions of Article 1 item 5 and other articles in UUKY concerning Constitutional Justices, it is reasonable to declare them as contradictory to the 1945 Constitution;

1.b. Justice of The Supreme Court

Considering, whereas questioning whether or not Justice of the Supreme Court is included in the definition of judges, as formulated in Article 1 item 5 of UUKY, actually it is not a mere semantic issue. The question "who the judge is", if seen independently as intended in UUKY, is an issue of legal policy, which is not always questioned in the perspective of constitutionality. However, seeing Article 24B paragraph (1) of the 1945 Constitution, and not seeing it in a general meaning, it is important to see the different. There are two authorities granted to KY in Article 24B paragraph (1) of the 1945 Constitution separated by the word "and", namely the authority to recruit justice and the other authority. Given the placement order and the testimony of ex-members of PAH I BP MPR, the other authority "in the context of maintaining and upholding the honor and dignity and attitude of judges" cannot be deemed as equal because such authority is granted

because it is unreasonable to form a constitutional organ with the duty limited to the recruitment of justice. Therefore, although the existence of the other authority is connected using the word “and”, which can be interpreted as equal, it is illogical to deem the duty as equal. It is only an additional duty. In this perspective, Justice is not included in the definition of Judges as set forth in Article 1 item 5 of UUKY. As stated by the expert presented by the Petitioner, namely Prof Dr. Philippus M. Hadjon SH, the meaning of a word is determined by the context. Therefore, the meaning of judges in Article 24B paragraph (1) of the 1945 Constitution is used in the context *“and shall have other authorities to maintain and uphold the honor and dignity and attitude of judges”*, so that the term “judges” is used in relation to the other authorities of the Judicial Commission, in addition to the authority to appoint a supreme court justice. In the perspective of the same class of the principle of *ejusdem generis*, the relevant question is that whether or not the context of Article 24B paragraph (1) of the 1945 Constitution, Justice is included in the group of judges related to second authority of KY. Therefore, if the other authority covers supreme court justice in the context of Article 24B paragraph (1) of the 1945 Constitution, it must be clearly stated. Based on such reason, Article 1 item 5 of UUKY and Article 34 paragraph (3) of UUKK, according to the Expert, is contradictory to Article 24B paragraph (1) of the 1945 Constitution;

On the other hand, the testimony of Experts Prof. Dr. Mahfud M.D., S.H. and Denny Indrayana, S.H., LL.M., Ph.D., states that Justice, whether in the perspective of legal policy of regulators or *constitutional morality*, is included in the definition of judges becoming the object of supervision by KY. Meanwhile, some ex-members of PAH I BP MPR whose testimonies have been heard in the trial, have provided different testimonies, so as they cannot be concluded as a complete reflection of the *original intent* of Article 24B paragraph (1) of the 1945 Constitution;

Considering whereas, if the intention is to have different regulating provisions for MA as the supreme supervisor of courts and judges’ attitude, and supreme court justice is not always originated from judge, the interpretation whether or not it is contradictory to Article 24B paragraph (1) of the 1945 Constitution is not only based on the grammatical text or context, but also based on a broader social context, general understanding, and mainly the principles of the constitutions itself. Even if the authority of KY to propose a Supreme Court Justice of high quality and integrity and decent attitude could result in Supreme Court Justice who also have dignity and proper attitude so that he/she has, morally, the legitimacy to not being supervised and even to become the supervisor of subordinate judges, it cannot be used as an excuse to exclude Supreme Court Justice from the supervisory objects. The principle of equality before the law and non-discrimination principle do not support such standpoint. In addition, a Supreme Court Justice who has high integrity at the time of his/her appointment may change during his/her career. It is odd to interpret that Supreme Court Justice is not included in the category of Judges because of the position at the top judicial hierarchy and is not subject to supervision. Despite the textual, contextual, teleological, and categorical interpretations, a Supreme Court

Justice is a Judge. In fact, Justice is a member of the Indonesian Judge Association (IKAHI) and the statement that supreme court justice is a judge has never been questioned. From the perspective of supervisory authority, pursuant to the accountability principle, there is not enough reason to exclude supreme court justice from the object of supervision. Universally, it has become a norm. Independence must be in line with accountability. Therefore, it is ideal that a justice has the integrity and quality in accordance with Article 24A paragraph (2) of the 1945 Constitution. However, it does not mean that supreme court justice is free from supervision in the context of supporting the creation of clean and dignified judicature for the realization of the *rule of law*. Therefore, insofar as it concerns supreme court justice, the provisions of Article 1 item 5 of UUKY, based on the *spirit of the constitution* perspective, it is unreasonable to state that it is contradictory to the 1945 Constitution.

2) Interrelation of State Institutions and Concept of Supervision

2.a. Interrelation of State Institutions

Considering whereas according to the Constitutional Court, the 1945 Constitution clearly differentiates the state's branches of power in the legislative, executive and judicative sectors as reflected in the functions of MPR, DPR and DPD, President and Vice President, as well as Supreme Court, State Audit Agency, and the Constitutional Court as the main state organs/principal state organs. The aforementioned state institutions instrumentally reflect the institution of the main state functions/*principal state functions.* Therefore, such state institutions may be called the *main state organs, principal state organs,* or *main state institutions,* the interrelation of which is bound by the principle of "*checks and balances*". Therefore, the principle of "*checks and balances*" is closely related to the principle of *separation of powers*, and may not be related to the issue of the relation pattern of all state institutions, such as in the context of the relation between the Supreme Court and the Judicial Court. Therefore, the understanding of the interrelation of state institutions in the perspective of "*checks and balances*" outside the context of *separation of powers*, for example in the relation between the Supreme Court and the Judicial Commission, is not appropriate. Although it is true that the Judicial Commission has a supervisory role, such supervision is not in the context of *checks and balances* and it is also not the supervision on the function of judicial authorities, but only a supervision on the individual attitude of judges;

Considering whereas the practice of the principle of "*checks and balances*" is often understood improperly as evident in a testimony stated in the trial that one of the perspective adopted in the formulation of the provisions of Article 24B in relation to Article 24A of the 1945 Constitution is the principle of "*checks and balances*", namely in the context of counterbalancing and controlling judicial authorities exercised by the Supreme Court. The aforementioned condition illustrates that the "*original intent*" of the formulation of a norm in the constitution may be based on a false understanding on a certain definition. A

similar error is repeated in the General Elucidation of UUKY that reads, "*Article 24B of the 1945 Constitution of the Republic of Indonesia provides a firm legal ground for reform in the legislation sector, namely by providing authority to the Judicial Commission to establish checks and balances. Although the Judicial Commission is not the exerciser of judicial authorities, it functions relate to the judicial authorities.*" Therefore, the Constitutional Court as the *sole judicial interpreter of the constitution* may not merely stick to the interpretation method of *originality*, namely only based on the "*original intent*" of the formulation of the articles of the 1945 Constitution, especially if such interpretation results in the inapplicability of the provisions of the 1945 Constitution as a system and or contradiction to the main idea underlying the constitutions in relation to the objectives to be realized. The Constitutional Court must understand the 1945 Constitution in the context of full spirit contained therein to establish a more appropriate state administration in the effort to achieve the state's objective (*staatsideé*), namely to realize a democratic rule-of-law stat and a democratic state based on law, which constitutes the elaboration of the main ideas contained in the Preamble of the 1945 Constitution;

Considering, whereas in addition to main state institutions, or commonly referred to as state high institutions as intended above, the 1945 Constitution also stipulates other constitutional state institutions such as the Judicial Commission, National Police, National Military, Central Bank, General Election Commission, Presidential Advisory Council, and so forth. However, the stipulation of those institutions in the 1945 Constitution would not automatically cause the state institutions as set forth in the Constitution, including the Judicial Commission, to be understood in the definition of state (high) institutions as the main organs. The Judicial commission as a state institution does not execute any of state power as universally understood. As a state commission, the nature of the Judicial Commission's duties is related to the function of judicial authorities namely with respect to appointment of supreme court justices and other authorities in the context of maintaining and upholding the honor, dignity, and conducts of judges. Therefore, the existence of such state commissions is commonly referred to as the "*auxiliary state organs*" or "*auxiliary agencies*" which according to Soetjipno, a former member of PAH I of BP MPR in a Constitutional Court's session on May 10, 2006, the Judicial Commission constitutes a "*supporting element*" in the system of judicial authorities (see the minutes of Court Hearing dated May 10, 2006). However, since the issues of justice appointment, honor, dignity and conducts of judges are deemed crucial, the provisions concerning the matters are expressly set forth in the 1945 Constitution. The position of the Judicial Commission is also stipulated in the 1945 Constitution as an independent state commission, the composition, position and membership of which are provided for in a separate law, therefore, this state commission is not under the influence of the Supreme Court or controlled by other power branches. Its independence does not necessarily mean that coordination and cooperation between the Judicial Commission and Supreme Court are not needed. In this context, the relation between the Judicial

Commission and Supreme Court can be said independent in nature but interrelated.

Considering, in addition, the Constitutional Court is also of the opinion that the regulation and non regulation of a state institution in the constitution may not be interpreted as the only factor that determines the constitutional level of the state institution in question. For example, the regulation of the national police institution and its constitutional authority in Article 30 of the 1945 Constitution as opposed to the non regulation of the Attorney General's Office in the 1945 Constitution, cannot be interpreted that the 1945 Constitution deems the National Police as more important or higher in its constitutional position than the Attorney General's office. The same is the case for state commissions such as Judicial Commission (KY) which is provided in detail, National Elections Commission (KPU) provided in general in the 1945 Constitution, National Human Rights Commission (KOMNASHAM), Business Competition Supervisory Commission (KPPU), and others solely established under law. To determine the legal status of the institutions or their members and executives in the field of protocol and so forth, depends on the drafter of the law to stipulate them in the law. Therefore, to avoid confusion in the relation between state institutions, the law drafter must endeavor to accurately formulate detailed and clear legal policies in the laws regulating the aforementioned state institutions.

Considering whereas the Judicial Commission constitutes an organ the regulation of which is included in Chapter IX on Judicial Authorities, in which the Supreme Court is regulated in 24A, the Judicial Commission is regulated in 24A paragraph (3) and Article 24B, and the Constitutional Court is regulated in 24C. This regulation indicates that pursuant to the 1945 Constitution, the Judicial Commission is within the scope of judicial authorities, although it is not the actor of the judicial authorities. Article 24A paragraph (3) of the 1945 Constitution reads as follow, ”Prospective supreme court justices shall be proposed by the Judicial Commission to the People's Legislative Assembly for approval and shall subsequently be stipulated as supreme court justices by the President”. The regulation indicates that the existence of the Judicial Commission in the state system is related to the Supreme Court. However, Article 24 paragraph (2) of the 1945 Constitution asserts that the Judicial Commission is not a judicial authorities executor, but as a ***supporting element*** or ***state auxiliary organ*** as asserted by the former member of PAH I BP MPR as described above that are not argued by other members of PAH I BP MPR. Therefore, in accordance with the spirit of the constitution above, the principles of *checks and balances* may not be applied in the internal relation pattern of judicial authorities, because the relation of *checks and balances* may not continue between the Supreme Court as a *principal organ* and the Judicial Commission as an *auxiliary organ*. The Judicial Commission is not the executor of the judicial authorities, but a *supporting element* in the context of supporting the judicial authorities which is independent, clean and dignified, although the Judicial Commission is independent in performing its duties;

Therefore, in such perspective, the relation between the Judicial Commission as a *supporting organ* and the Supreme Court as a *main organ* in the field of supervision of judges' conducts should be better understood as a partnership relation without undermining their respective independence as described below;

2.b. Supervision

Considering Article 24B paragraph (1) of the 1945 Constitution stipulates that the judicial commission is independent, with the main authority of proposing the appointment of a Supreme Court Justice, in addition to other authorities in the context of maintaining and upholding the honor, dignity and conducts of judges. With the phrase of *"in the context of maintaining and upholding the honor, dignity and the conducts of judges*", according to the Constitutional court, the authority of the Judicial Commission as intended in the above provision, even though with certain limitation, can be defined as supervision, not the authority to supervise court institutions but individual judges. As the executors of judicial authorities, both the Supreme Court and courts hereunder and the Constitutional court are independent in their power (Article 24 of the 1945 Constitution) therefore in performing its **judicial authorities** courts may not be supervised by other state institutions. As judges' independence, courts' independence serves as the pillar for a rule-of-law state which is also one of elements for human rights protection namely the independence of the judiciary. The 1945 Constitution expressly stipulates that the Judicial Commission has other authorities in the context of maintaining the honor, dignity, and conducts of judges ";

The Constitutional court is of the opinion that with the use of phrase of "**in the context of maintaining and upholding** "and not the phrase of "**to maintain and uphold**", the nature of authority held by the Judicial Commission is complementary. It means that the duty of maintaining the honor, dignity, and conducts of judges is not the authority exclusively held by the Judicial Commission. The Supreme Court as the highest state court among the four lower courts thereunder also has the function of supervision which includes supervision on the judicial technical aspect, administrative supervision and supervision on the conducts of judges as stipulated in Article 24 paragraph (2) of the 1945 Constitution which is provided for further in Article 11 paragraph (4) of UUKK and Article 32 of Law on Supreme Court, which respectively reads as follows:

- Article 24 paragraph (2) of the 1945 Constitution :
  "*the judiciary power shall be executed by a Supreme court and courts t**hereunder** within the general courts, religious courts, military courts, state administration courts, and by a Constitutional court*";
- Article 11 paragraph (4) of UUKK:
  "*The Supreme court shall perform the highest supervision on the acts of courts thereunder pursuant to the provisions of law*";

- Article 32 of Law on Supreme Court:
  ”(1) *The Supreme Court shall perform the highest supervision on the organization of court within all courts in executing the judicial authorities*.
  (2) *The Supreme Court shall supervise the conducts and acts of Judges in all courts in performing their duties*.
  (3) *The Supreme Court shall be entitled to request for information concerning matters related to the court technical aspects from all courts*.
  (4) *The Supreme Court shall be entitled to give direction, reprimand or warning deemed necessary to all Courts*.
  (5) *Supervision and authority as intended in paragraph (1) up to paragraph (4) may not limit the independence of Judges in examining and deciding cases*”;

Considering whereas based on the phrase of “*courts* ***thereunder***” in Article 24 paragraph (2) of the 1945 Constitution, which is subsequently set out in Article 11 paragraph (4) of UUKK and Article 32 of Law on Supreme Court, it is evident that the Supreme Court is one of executors of the judicial authorities which subordinates courts in general courts, religious courts, and state administration court. Therefore, the aforementioned phrase contains the meaning that inherently the Supreme Court has the function of being the highest supervisor of all courts thereunder. The scope of the aforementioned supervisory function includes the fields of judicial technical aspects, administration, and conducts of judges related to the code of ethics and conducts;

Considering, based on the above description, it is also evident that if the ”*other authorities* ***in the context of*** *maintaining and upholding the honor, dignity and conducts of judges*” in Article 24B paragraph (1) of the 1945 Constitution were fully defined as supervision, the same is only a part of the scope of supervision, namely related to judges' conducts. The judges as intended above shall be individual judges **in or out of official duty,** so that they have honor, dignity and good conduct. The implementation of such supervision will, in addition to not in the definition of supervising courts, not negate the supervisory function that is also held by the Supreme Court. That function is related to the main authority of the Judicial Commission, namely to recruit and propose the appointment of supreme court justices, which pursuant to Article 24A paragraph (2) of the 1945 Constitution, are required to have flawless integrity and personality, just and experienced in the field of law. The definition of **in the context of** as a part of supervisory authority indicates that there are other obligations that are equally important namely the duty of giving guidance which according to the Constitutional Court has the meaning of efforts, acts and activities performed in an efficient and effective manner to improve judges' professionalism in so long as it is related to the implementation of the code of ethics. The provisions of Article 24B paragraph (1) of the 1945 Constitution, should not be simply defined as supervision, but should include development of

judges' professionalism ethics in order to meet the mandate of Article 24A paragraph (2) of the 1945 Constitution;

Considering whereas based on the above description and reasons - , the Article 24B paragraph (1) of the 1945 CONSTITUTION in so far as concerning ” *other authorities **in the context of** maintaining and upholding the honor, dignity and conducts of judges*, on one hand is not accurate to be defined only as external ethic supervision, but on the other hand it is also inaccurate to define it apart from the context of Article 24A paragraph (3) to realize supreme court justices – and judges in courts under the Supreme Court- who have flawless integrity and personality, just, professional, and experience in the field of law. In other words, referred to as "other authorities: in Article 24B paragraph (1) of the 1945 Constitution is closely related to the main authority of the Judicial Commission namely to propose the appointment of supreme court justices;

Considering whereas subsequently if the provision of Article 24B paragraph (1) of the 1945 Constitution is described in detail manner to be compared with articles related to supervision in the Law on Judicial Commission, the following will appear:

- Article 24B paragraph (1) of the 1945 Constitution which reads as excerpt above can be described to become:
  (i) “other authorities in the context of **maintaining** the honor, dignity and conducts of judges;
  (ii) “Other authorities in the context of upholding the honor, dignity and conducts of judges.

  Therefore, the intent of Article 24B paragraph (1) of the 1945 Constitution above fully refers to the implementation of code of ethics and code of conduct of judges. The difference is the word "to maintain"' is preventive in nature, while the word "to uphold" is corrective in nature in the form of authority to submit recommendation to the Supreme Court. Such corrective authority can lead to repressive acts namely if the recommendation submitted by the Judicial Commission to the Supreme Court is followed upon by the Supreme Court by imposing sanction if the Supreme Court is of the opinion that the recommendation is reasonable;
- Article 20 of Law on Judicial Commission as the elaboration of Article 24B paragraph (1) of the 1945 Constitution reading, ”*In performing the authorities as intended in Article 13 letter b the Judicial commission has the duty of **supervising judges' conducts in the context of upholding the honor and dignity of and maintaining judges' conducts***” can be described as follows:
  (i) Supervision of judges' conducts in the context of upholding the honor and dignity;
  (ii) Supervision of judges' conducts in the context of maintaining judges' conducts.

Meanwhile, Article 13 letter b referred by Article 20 of the Law on Judicial Commission above, reads, "*The Judicial commission shall have the authority of: a. ..., and b. upholding the honor and dignity of and maintaining the conducts of judges*". Therefore, based on Article 20 and Article 13 letter b of the Law on the Judicial Commission above, it is evident that:

(i) The formulation of Article 20 of the Law on the Judicial Commission is very clearly different from the formulation of Article 24B paragraph (1) of the 1945 Constitution. Article 20 of the Law on the Judicial Commission stipulates,".... *in the context of upholding the honor, dignity of and maintaining judges' conducts*". Meanwhile Article 24B paragraph (1) of the 1945 Constitution stipulates, ".... *in the context of* ***maintaining and upholding*** *the honor, dignity and conducts of judges*". Hence, the scope of other authorities in the formulation of Article 20 on the Law on the Judicial Commission is different from the formulation of the Article 24B paragraph (1) of the 1945 Constitution which creates the implication of legal uncertainty (*rechtsonzekerheid*) in the application. Because, Article 24B paragraph (1) of the 1945 Constitution has been defined by Article 20 on the Law on the Judicial Commission merely as supervision on conducts, while Article 24B paragraph (1) of the 1945 Constitution stipulates that the "*other authorities*" of the Judicial Commission shall be "***in the context of*** *maintaining and upholding*" that can be interpreted as not only preventive and corrective measures, but also improving the understanding, consciousness, quality and professional commitment that lead to the expected level of honor, dignity and conducts of judges. It does not only result from supervision, but mainly from the development and education on professional ethics for judges, including education on judge ethics to the community. In such context, the partnership relation between the Judicial Commission and the Supreme Court is absolutely required without affecting their respective independence;

(ii) On the other hand, the elaboration of supervision concept in the Law on the Judicial Commission creates uncertainty because the object of "other authorities" of the Judicial Commission pursuant to Article 24B paragraph (1) of the 1945 Constitution should be implementation of code of ethics and code of conducts of judges in the context of maintaining the honor, dignity and conducts of judges. Therefore, first there must be clarity on the norms regulating the definition and scope of judges' conducts, especially those relating to the material norms including the certainty about who prepare the aforementioned code of ethics and code of conducts. The aforementioned matters are not at all provided for in the Law on the Judicial Commission. Matters that are provided for in detail in the Law on the Judicial Commission are only related to supervision. Such unclarity cause uncertainty because supervision

is provided for in detail, while judges' conducts as the object to be supervised are not clear. Such unclarity causes inaccurate interpretation and even contradicts the 1945 Constitution, because it has created an interpretation that subsequently become the official stance of the Judicial Commission that assessment on judges' conducts shall be made through assessment on the decision. It is evident from the statement of M. Thahir Saimima, S.H., Deputy Chairman of the Judicial Commission in a session on June 27, 2006, or the written statement of the Judicial Commission dated July 6, 2006. Such official position and stance of the Judicial Commission have been performed in practice as reflected in two letters of the Judicial Commission as follows:

1. Letter of the Judicial Commission to the Chief Justice of The Supreme Court Number 1284/P.KY/2006 dated May 8, 2006, among other things, requires explanation on the decision of the Supreme Court of the Republic of Indonesia Number KMA/03/SK/2006 regarding appointment of the Central Jakarta District Court to examine and try Defendant D.L. Sitorus (Exhibit P-23), because the Judicial Commission is of the opinion that the considerations and the decision taken by the Chief Justice are not in line with the dictum of the decision;
2. Letter of the Judicial Commission to the Chief Justice of The Supreme Court Number 143/P.KY/V/2006 dated May 17, 2006 regarding recommendation for imposition of sanction on the Panel of Judges handling the case involving defendant Edward C.W. Neloe (Exhibit P-24), after examining the members and Chairperson of the Panel of Judges in the case, because of information the Panel of Judges handed down decision to release the defendants. The finding of the Judicial Commission during examination is that there is a misperception/difference in opinion concerning the content of Law Number 31 Year 1999 regarding Corruption Act, which stipulates that it "may" inflict losses to the state/state economy, which was interpreted by the judge as a material offence, the loss to the state must be real, no matter the amount as the consequence of a tort. Based on different interpretation and perception on the content of Article 2 paragraph (1) of the Law Number 31 Year 1999 regarding Corruption Act, especially the word "may" where the elucidation stipulates that the offence is a formal offence. It further stipulates that the panel of judges follows the opinion of Expert Witnesses stating that the word "may" should be deleted, whereas the Law expressly stipulates it, so that the Judicial Commission is of the opinion the Panel of Judges has amended the content of the law which should be

> the authority of the lawmakers. In its analysis and opinion on the examination on the judge in question, the Judicial Commission also asserts that the act of the Panel of Judges applying Law Number 1 Year 2004 regarding State Treasury as the basis of its legal considerations is obviously an attempt to seek justification that the loss to the state must be real, furthermore adding the opinion that the Law Number 1 Year 2004 has the urgency only on financial management in regional autonomy and yet the corruption occurred (*tempus delictie*) in 2002;

Considering, based on the aforementioned description, it is evident that the phrase of "*in the context of maintaining and upholding the honor, dignity and conducts of judges",* which should only grant parts of authority on supervision of ethics to the Judicial Commission, consciously or otherwise, has been interpreted and practiced as the supervision on judicial technical aspect by way of examining the decision. The norm of supervision which is universally applicable in all legal systems in the world on court decisions is that court decision may not be assessed by other institutions unless through a legal proceeding (*rechtsmidellen*) in accordance with the procedural law. Assessment on the judge decision intended as supervision outside the available procedural law mechanism contradicts the principle of ***res judicata pro veritate habetur*** meaning that the judge's decision must be deemed as correct ***(de inhoud van het vonnis geld als waard)***. Hence, if a judge's decision is deemed to contain error, supervision by way of assessment and or correction on the matter must be through legal proceeding (*rechtsmidellen*) pursuant to the applicable provisions of the procedural law. The above described principle does not limit the right of citizens, especially legal experts, to assess the judge decision through scientific activities in a scientific forum or media such as seminars, reviews in journals of law, or other scientific activities;

Considering whereas the need for external supervision as set forth in Article 24B paragraph (1) of the 1945 Constitution, based on its formulation, is triggered by the condition of supreme court justices and judges who in the past were deemed to be untouchable by supervision. The matter has become prominent during the amendment process of the 1945 Constitution, which was followed by demands raised by various levels of the community because of ineffective internal supervision by the Supreme Court. Internal supervision all this time is deemed to be problematic and unsuccessful because of the spirit of the corp, lack transparency and accountability and the absence of effective supervision method (Academic Draft of the Law on the Judicial Commission, 2004, p. 52). Article 20 of the Law on the Judicial Commission asserts that the authority of the Judicial Commission shall be supervision on conducts in the context of upholding the honor and dignity of and maintain judges' conducts. Such supervision concept is stated by the Directly Related Party and several Experts as the elaboration of the *checks and balances* concept that become the

spirit of constitution, as the continuation of the doctrine of *separation of powers*) that based the revision and amendment of the 1945 Constitution;

Considering whereas however, as previously described the concept of *checks and balances* as the continuation of the doctrine of *separation of powers* is related to the power branches, the executive, legislature and judicative. Hence, the aforementioned concept is not appropriate to be applied between the judicial authorities because of the following reasons:

a. The Judicial Commission is not the executor of the judicial authorities but only as a supporting organ, which expressly does not have the authority to supervise matters which are technical justicial and technical administrative in manner, but only uphold the honor and dignity and conducts of judges
b. The measurement used in asses sing the honor, dignity and conducts of judges, **should** first **be formulated** in the Law on the Judicial Commission so that it can have a clear limitation on the scope of its duties that can be used as a certain guideline both by the supervising and supervised parties in order to avoid confusion. The absence of a clear formulation concerning the honor, dignity and especially the conducts of judges cause not only confusion but further a legal uncertainty that can have the implication of paralyzing the work of the judicial system. Because such uncertainty will cause a judge to be doubted concerning which acts based on the ethic may be performed, must be performed or prohibited to be performed, so that in the end a judge is not dependent in deciding a case that lead to a loss to the justice seekers. In addition, such uncertainty can also become the cause of the emergence of a relation pattern among state institutions, particularly between the Judicial Commission and the Supreme Court which is not in line with the mechanism as set forth in the 1945 ConstitutioN, which may potentially produce a situation that is contrary to the objective of the establishment of the Judicial Commission;
c. Whereas the breach on the code of ethics and code of conducts by a judge, may serve as an indicator concerning larger breaches that can only be better traced if it is performed by also examining the implementation of the judge's technical justicial duties. However, examining the justicial technical aspect does not fall into the authority of the Judicial Commission. The stance that a Judge's decision is the judge's honor cannot be used as a justification for the act of the Judicial Commission to examine the implementation of the judge's justicial duties including his decisions under the reason of supervising judges' conducts. Review on the decision of a judge, since it is related to the technical judicial aspect, may only be performed by the Supreme Court. If that occurs the Judicial Commission has crossed the line permitted and may result in charges of intervention and a threat to the freedom of judges. Even the Supreme Court, as a state institution having the technical judicial supervision authority, in implementing its authority must be through the mechanism of legal

remedy (*rechtsmiddelen*) as set forth in the procedural law, not through direct intervention on the decision or judges trying the case.

d. Therefore examination and investigation on a breach of conduct by a judge, without conflicting the Judge's independence require in-depth understanding and experience that cannot be performed alone by the Judicial Commission without support of internal supervision within the Supreme Court.

Considering whereas based on the above matters, implementation of external and internal supervision must be under a close cooperation, so that the concept of *checks and balances* cannot be applied within the internal scope of the judiciary power. In addition, the object of external supervision is judges' conducts not the Supreme Court's supervision on courts thereunder as an institution. Based on the above opinion and facts the Supreme Court and the Judicial Commission must have a close cooperation in the concept of partnership. This concept is applied in most countries in the world by involving the supreme court or judges in the management composition and/or membership of the judicial commission or referred to under different names as shown in various study results (see Ahsin Thohari, *Judicial commission and Court Reform*, 2004, Wim Voermans, *Judicial commission in Several European Countries*, 2002, Carlo Guarnieri, "*Courts as an Instrument of Horizontal Accountability: The Case of Latin Europe*", in Josė Marĭa Maravall and Adam Przeworski, *Democracy and the Rule of Law*, 2003). Under such partnership mechanism confrontation can be avoided, and the coordination will instead be established between the Judicial Commission and the Supreme Court.

Considering whereas the Constitutional Court will subsequently consider the definition of "independent" in Article 24B paragraph (1) of the 1945 Constitution which reads:, "*The Judicial commission shall be independent in proposing the appointment of justices and have other authorities in the context of maintaining and upholding the honor, dignity and conducts of judges*". The question that must be answered in this respect is what interpretation that must be given on the condition that the Judicial Commission is **independent** which is subsequently defined in the Law on the Judicial Commission as a condition that the Judicial Commission in the implementation of its authorities is free from intervention or influence of other powers (see Article 2 of the Law on the Judicial Commission). The Constitutional court is of the opinion that the definition that "the Judicial Commission" in the implementation of its duties is free from interference or influence of other power" must be understood as the independence of the institution in making decision not the independence of individual members of the Judicial Commission. It means that the independence of the Judicial Commission must be defined as the independence from interference and influence of other parties in making decisions in the implementation of its authority to propose prospective supreme court justices or in the context of implementation of other authorities pursuant to the 1945 Constitution. Therefore, the Judicial Commission cannot be said of not

independent or in other words there is interference from outsiders or other powers, because of the reason that the decision making is based on the facts obtained through cooperation or coordination with the actor of judicial authorities, in this case, the Supreme Court. In accordance with the fact universally, the composition of the judicial commission does not only consist of former judges, law practitioners, academicians, and community members as stated above, but also supreme court justices. Even generally the judicial commission or those referred to under different names in the world, ex-officio is chaired by the chief justice of the Supreme Court.

Considering whereas apart from major problems faced by the Supreme Court including the problems said by the Judicial Commission as a *judicial corruption*, the mechanism of external supervision which is separate from internal supervision cannot be applied between the Supreme Court and the Judicial Commission, in so far as it is based on the concept of *checks and balances*, because *checks and balances* cannot be applied by the auxiliary organs on the main organs. The opinion stating that the Judicial Commission performs the function of *checks and balances* on the Supreme Court is not in line with the spirit of the constitution. The Judicial Commission as an auxiliary organ of the judicative power will find it difficult in implementing its authority if it is based on such *checks and balances* concept, as it can create a mechanism that contains constitutional defect and at the same time ineffective, which in the end will produce a crisis that undermine the trust on court institution and proceedings. Without communication between the state main organs and the state auxiliary organs based on the principle of mutual respect, the existence of such state auxiliary organ will only be considered as a constraint in the overall state system based on the principles of *Constitutional democracy* and *democratische rechtsstaat* as set forth in Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution;

Considering whereas the performance of supervisory function resulting from legal uncertainty (*rechtsonzekerheid*) due to the absence of clear norms in respect of the scope of definition of justice' behavior and judicial technical control related to the accountability borders of judge's behavior perspective with judge's independence in performing his judicial duties, is obviously intervention against judicial authorities in the form of direct or indirect pressure or tension, because the Judicial Commission places its own interpretation as the correct and accurate legal interpretation as indicated in the evidences filed by the Applicant (P-23, P-24, and so on). Even if it is true that there has been mistake or error on the judge's side in the performance of his judicial duties, it is not the function of the Judicial Commission to perform control with that regard, hence it is clear and obvious that the performance of function to preserve dignity and honor and uphold conduct of justice, as referred to in the 1945 Constitution, have shifted (*functie verschuiving*) to judicial technical control that is not the intension of the 1945 Constitution. In other words, the inaccurate, unclear, and non-detailed law provisions concerning the technique of control on judge's behavior, have given

opportunity to the law implementing agencies, in this matter Judicial Commission and Supreme Court, to severally regulate and develop egocentric interpretation, which in turn generates contradiction resulting in legal uncertainty in its implementation. Lawmakers therefore must regulate the aforementioned control clearly and in details by way of making changes in the context of elaboration, harmonization, and synchronization of Law on Judicial Authority, Law on Judicial Commission, and Law on Supreme Court by always referring to the 1945 Constitution;

Considering, based on the above-mentioned fact, whereas the non-existence of a limitation in norms in the Law on Judicial Commission in relation to "control" and in relation to "judicial conduct" constituting the scope of duties of the Judicial Commission as the implementation of "other authorities" has apparently resulted in legal uncertainty (*rechtonzekerheid*). The above is evident from formulation in Articles 20, 21, 22, 23, insofar related to control, Article 24 paragraph (1) insofar related to constitutional justice, and Article 25 paragraph (3) and paragraph (4) of the Law on Judicial Commission;

Considering whereas furthermore in relation to Article 34 paragraph (3) of the Law on Judicial Authority that reads "*In order to preserve the honor, dignity and conduct of supreme court justice and judge, control shall be performed by the Judicial Commission regulated in the law*", the Constitutional Court is of the opinion that the aforementioned article is not in accordance with the formulation of Article 24B paragraph (1) of the 1945 Constitution that reads "*The Judicial Commission shall be independent and shall have the authority to propose the appointment of supreme court justice as well as other authorities in order to preserve* ***and uphold*** *the honor, dignity, and conduct of judge*." With the aforementioned formulation of Article 34 paragraph (3) of the Law on Judicial Authority, other authorities of the Judicial Commission in order to uphold honor, dignity and conduct of justice become non-existent. Whereas in fact, according to the consideration of the Constitutional Court in item 2.b. above, the Judicial Commission also has the aforementioned authorities. Therefore, the deletion or reduction of authorities of the Judicial Commission in the formulation of Article 34 paragraph (3) of the Law on Judicial Authority must be stated as unconstitutional. The unconstitutionality of the provisions of Article 34 paragraph (3) of the Law on Judicial Authority is not because of relation to the definition of supreme court justice, as argued by the Petitioner, but because the formulation of the aforementioned article has reduced some "other authorities in order to preserve **and uphold** honor, dignity, and conduct of judge" that should be owned by the Judicial Commission according to Article 24B paragraph (1) of the 1945 Constitution;

Considering, whereas based on the description as mentioned in the above-mentioned consideration, it is evident that provisions on control and judicial conduct as described above are the **core** provisions that influence other provisions related to the two matters. Hence, uncertainty on the two matters

results in the uncertainty of other provisions related to the aforementioned provisions on control and judicial conduct. Hence, Articles 20, 21, 22, 23, insofar related to control, and Article 24 paragraph (1) insofar related to constitutional justice, and Article 25 paragraph (3) and paragraph (4) of the Law on Judicial Commission are contradictory to Article 24, Article 24A, and Article 24B of the 1945 Constitution;

3) On Judicial Conduct

Considering whereas, as described in the above-mentioned consideration, the scope of other authorities of the Judicial Commission, in order to preserve and uphold honor, dignity, and conduct of justice, refers to the code of ethics and/or code of conduct. Hence, in relation to the *a quo* petition, it refers to the Code of Ethics of Indonesian Judge. However, it is necessary to first answer the question of whether there is difference between the code of ethics and the code of conduct. In general, it is said that a code of conduct determine judicial behavior or conduct that are acceptable and that are unacceptable. The code of conduct shall remind justice of the restricted conduct and that any breach against the code of conduct may result in sanction. The code of conduct is a standard. Any judge must know that he may not perform conduct lower than the stipulated standard. Ethics are different from the restricted conduct. Ethics relate to hope or desire. Ethic is the ideal goal to achieve, namely to become the best judge. However, there are ethical considerations that support the achievement of the aforementioned desire or hope. With a code of conduct, judge and the community are enabled to say that they know what may and what may not be done by a judge. The next step is to develop a code of ethics that will give motivation to judge to move to higher, better and more effective level in providing services to the community, and to uphold the rule of law. Thus, following the establishment of a code of conduct, in order to each higher level, there is perhaps desire to establish a code of ethics. Eventhough it is true that code of conduct is different from code of ethics, however, according to the Constitutional Court, the code of ethics is the source of values and moralities that will guide justice to become good justice, as further described in the code of conduct. From the code of ethics, it is then formulated what may and what may not or what are inappropriate to be done by judge inside or outside the office;

Considering whereas Indonesian Judge have had the experience of having codes of ethics, the first one with the name of Panca Dharma Hakim Indonesia of 1966, the second one namely *Kode Etik Hakim Indonesia* (Code of Ethics of Indonesian Judges) of 2002, and the last one namely *Pedoman Perilaku Hakim* (Guidelines on Judicial Conduct) ratified by the Chief Justice of the Supreme Court on May 30, 2006. Meanwhile, the Constitutional Court have a separate Code of Constitutional Judicial Ethics and Conduct, which is mainly based on The Bangalore Principles of Judicial Conduct of 2002 and added with the Indonesian cultural values. The aforementioned code of Constitutional Judicial ethics and conduct has been declared with the name of *Sapta Karsa Hutama* on October 17, 2005, which is further set forth in the Regulation of the

Constitutional Court Number 07/PMK/2005, constituting the revision of the Code of Ethics of Constitutional Justice as set forth in the Regulation of the Constitutional Court Number 02/PMK/2003. The aforementioned guidelines on judicial conduct are intended to regulate the allowed, restricted, mandatory, and suggested or non-suggested judicial conduct, both inside or outside the office, in order to form justice as judicial authorities officials (*ambtsdrager van rechtelijkemacht*) having ideal and fair integrity and personality so as to become the final fort in law and fairness enforcement efforts. The aforementioned guidelines of conduct are the elaboration of provisions of the code of ethics that are universally and generally applicable and accepted as the moral values and norms followed by people or a group of people in regulating their conduct, with the purpose of identifying what are good and what are bad in their conduct among their fellows in their group. The professional code of ethics, as seen in the Code of Constitutional Judicial Ethics and Conduct as well as Guidelines on Indonesian Judicial Conduct applicable in the Supreme Court, contains a series of basic principles and the morality values that must be upheld by justice, inside and outside their office. The aforementioned principles and values are further detailed in the form of judicial conduct that is deemed in accordance with the aforementioned principles or values. For example, the value of fair conduct is translated as principle in the form of description of what are deemed as fair, and it is subsequently detailed how the foregoing is described in Judicial conduct while performing judicial duties. Similarly, when integrity value or principle is adopted as part of the professional code of ethics, the aforementioned integrity principle has been given limit, that "*constitutes mental attitude reflecting the integrity and balance of personality of any judge as a person and as state official in performing his respective duties. The integrity of personality includes honesty, loyalty, and sincerity in performing his professional duties, equipped with mental strength to set aside and reject all persuasions and temptation on position, asset, popularity or other inducements. Personality balance includes mental and physical balance, and spiritual intelligence, emotional intelligence, and intellectual intelligence balance in his performance of duties*." From the implementation of the aforementioned principle, it can be known for example that the judge guarantees that his conduct is not disgraceful from the appropriate observation perspective or his attitude and conduct must strengthen people's trust on judicial image and authority. Fairness is not only performed but must also been seen as performed;

Considering whereas the Code of Ethics of the Indonesian Judge Association (IKAHI) in article 2 contains the **purposes and objectives of the aforementioned Code of Ethics**, namely

(i) as instrument to:
    a) guide and form justice' characters,
    b) supervise justice' attitude, and also
(ii) as facility to:
    a) control social matters,
    b) prevent extra judicial interruption, and

c) prevent the occurrence of misunderstanding among community members,

(iii) provide guarantee on the increase of judge's morality and judge's functional independence, and

(iv) grow people's trust on judicial institutions;

Considering whereas, as previously described, Article 24B paragraph (1) of the 1956 Constitution stipulates the existence of "other authorities" of the Judicial Commission on order to preserve and uphold honor, dignity, and conduct of judge, therefore the Judicial Commission must use the concrete code of ethics and guidelines on conduct, as stipulated, as benchmark in performing its duties. The aforementioned Article 24B paragraph (1) of the 1945 Constitution has been described in the Law on Judicial Commission as control, which by ex-members of PAH I BP MPR Year 1999-2004 is interpreted as external control to equip the internal control performed by the Supreme Court itself. However, the external control mentioned in the aforementioned Article 24B paragraph (1) **is aimed at** preserving and upholding the honor and dignity as well as conduct of judge. If this sentence is interpreted as control and described in Article 13 letter b juncto Article 20, Article 21, and Article 23 of the Law on Judicial Commission as control in order to uphold the honor and dignity as well as to preserve conduct of judge, the Judicial Commission must consistently have the duty to perform control over judicial conduct, in order to uphold honor and dignity as well as to preserve conduct of judge. From Article 20 of the Law on Judicial Conduct, it is evident that the object of the control performed by the Judicial Commission is judicial conduct. The aforementioned judicial conduct control and upholding is of course seen from the measure of existing Code of Conduct and Code of Ethics used as measure, with the example of principle and implementation as described above, so as to be avoided from overlapping with other controls outside the area of ethics or conduct.

It is true that an action is not regulated only by one type of norm, but by various types of norms at the same time, where a disgraceful action is restricted by legal norm, ethical norm, and religious norm. The above-mentioned concurrent application of norms increases urgency in relation to the need for regulation on judicial ethics and conduct and procedures for their preservation and upholding in a Codes of Judicial Ethics and Conduct as control benchmark. The aforementioned professional code of ethics is prepared and ratified by the professional organization itself, not by another institution, *in casu* by judicial professional organization, the Supreme Court or IKAHI, not by the Judicial Commission;

The taking of action or imposition of sanction on the breach against the Code of Ethics and Code is also performed by professional organization. Meanwhile, control over the implementation of the Codes of Ethics and Conduct can be performed by professional organization, and the parties outside the profession. This is intended to comply with the social responsibilities, constituting one of the professionalism elements, through transparency and accountability. Control can be divided into several activities, for example calling, examination,

evaluation, ending with recommendation to professional organization, in this matter the Supreme Court.

CONCLUSION

Considering based on all the aforementioned considerations, the Constitutional Court finally reaches the following conclusions:

First, the petition of the Petitioners insofar as related to the expansion of the definition of judges according to Article 24B paragraph (1) of the 1945 Constitution which includes constitutional justices is proved to be contradictory to the 1945 Constitution so that the petition of the Petitioners must be granted. Therefore, afterwards, constitutional justices shall not be included in the definition of judges whose ethical conduct is supervised by the Judicial Commission. Supervision on the implementation of the ethical codes of constitutional justices shall be conducted by a separate Honorary Council pursuant to the provisions of Article 23 of the CC Law as the implementation of Article 24C paragraph (6) of the 1945 Constitution. Afterwards, the position of the Constitutional Court as the institution settling disputes on statutory authorities between state institutions bestowed by the constitution, including disputes involving the JC and the SC, shall not be disrupted by the expansion of the definition of judges that includes constitutional justices. This is also directly related to the interests of the Petitioners for obtaining constitutional settlement of the problem faced in the relation between the SC and the JC, in which if the petition of the Petitioners on constitutional justice is not granted, the credibility and legitimacy of the Constitutional Court itself in examining, trying, and deciding upon the *a quo* case can be at all time questioned.

Second, the petition of the Petitioners insofar as it is related to the definition of judges according to Article 24B paragraph (1) of the 1945 Constitution, which covers also supreme court justices, is proved to be not adequately founded. We cannot find convincing constitutional basis for the problem related to the question as to whether the definition of judges pursuant to Article 24B paragraph (1) of the 1945 Constitution also covers justices or not. Law-makers may determine that for the purpose of hierarchical supervision and for long-term purposes based on teleological considerations that in the future when all supreme court justices are the products of the recruitment by the JC, it would be sufficient for the JC to monitor the ethical conducts of judges lower than supreme court justices. If the law so stipulates, the Constitutional Court is of the opinion that it is not contradictory to the 1945 Constitution. However, if the law stipulates that justices are covered by the definition of judges whose ethical conducts are supervised by the JC externally, as elaborated in the explanation above, The Constitutional Court is of the opinion that it is also not contradictory to the 1945 Constitution. Moreover, the current supreme court justices were not recruited based on the new provisions which involve the role of the JC as stipulated in the 1945 Constitution. Such legal policy, according to the Constitutional Court, is also not contradictory to the 1945 Constitution. Therefore, it all depends on the law-making institutions, namely the Parliament and the

President, to determine the legal policy to be selected in the context of implementing the provisions of Article 24B paragraph (1) of the 1945 Constitution. Therefore, there is not adequate reasons for granting the petition of the Petitioners insofar as it is related to supreme court justices;

Third, the more substantial or fundamental issue to be decided upon is the petition of the Petitioners related to the regulation on the supervision procedure. As to this issue, The Constitutional Court is of the opinion that:

(i) The formulation of Article 13 letter (b) *juncto* Article 20 of the JC Law concerning other authorities as the elaboration of Article 24B paragraph (1) of the 1945 Constitution uses different sentences, so as to cause problems in its formulation in the JC Law resulting in legal uncertainty (*rechtsonzekerheid*);

(ii) The JC Law is proved to have inadequate provisions on the supervision procedures, to be unclear and inexplicit in determining the subject performing the supervision, the object of the supervision, the instruments to be used, and how the supervision is to be implemented. The unclear and incomplete provisions on supervision in the JC Law as well as the different formulation of the sentences as intended in point (i) make all provisions in the JC Law obscure and lead to legal uncertainty (*rechtsonzekerheid*) in its implementation;

(iii) The concept of supervision set forth in the JC Law is based on incorrect conceptual paradigm, namely as if the relation between the SC and the JC is a "*checks and balances*" relationship between different spheres of power in the context of the separation of powers, so as to cause incorrect interpretation, especially in its implementation. If this problem is left unresolved, the tension in the relationship between the JC and the SC would persist and people seeking justice would become more confused, which in turn can delegitimize the judicial authority and make it more untrustworthy;

Therefore, all provisions of the JC Law on supervision must be declared contradictory to the 1945 Constitution and do not have binding legal force because they are proved to have caused legal uncertainty (*rechtsonzekerheid*). To address the consequences of prolonged legal vacancy related to the duties of the JC, especially in relation to the supervision of the conducts of judges, the JC Law must immediately be revised through a law amendment process as required. The intention to make such amendment to this law has been conveyed several times both by the SC and also by the JC. Therefore, the Constitutional Court also recommends to the Parliament and the President to immediately take measures for the revision of the JC Law. In fact, the Parliament and the President are also suggested to make integrated improvements by also making amendments in order to harmonize and synchronize the Judicial Authority Law, the Supreme Court Law, the Constitutional Court Law, and other laws related to the integrated judicial system. Such legislation duty is the responsibility of the Parliament and the Government. The Supreme Court, Judicial Commission and also the Constitutional Court are law enforcement institutions, and accordingly they must

leave the legislative matters to the law-makers. Involving the Supreme Court, Judicial Commission and also the Constitutional Court in the making of a law regulating them is certainly a logical and accurate measure. However, it is not the constitutional duty of the Supreme Court, Judicial Commission and also the Constitutional Court to take an open initiative to make such amendments. It is appropriate for every state institution to restrict themselves from doing an activity which is not their main duty, unless it is intended as a supporting activity;

Meanwhile, the Supreme Court is also expected to improve its supervisory function, especially by being more open in responding to criticisms, expectations and suggestions from various parties. The principle of judicial independence must be construed by judges as a responsibility for creating a fair trial, which constitutes a prerequisite for the enforcement of the *rule of law.* Therefore, such principle of judiciary independence entails an obligation for judges to free themselves from enticements, pressures, coercions, threats, or fear for retaliation because of certain political or economic interests of the government or the ruling political power, certain groups, with a reward or promised reward in the form of positional benefits, economic benefits, or others, and from abusing the principle of judicial independence as a cover for avoiding supervision;

In view of Article 56 paragraphs (2), (3), and (5), as well as Article 57 paragraphs (1) and (3) of Law of the Republic of Indonesia Number 24 Year 2003 concerning Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia number 4316);

PASSING THE DECISION

- **Declaring that the petition of the Petitioners shall be partially granted;**
- **Declaring that:**
  - **Article 1 point 5, to the extent that it concerns with "justices of the Constitutional Court";**
  - **Article 20, which reads, "*In carrying out the authority as intended in Article 13 point b the Judicial Commission shall have the duty of supervising the conduct of judges in order to uphold the honor and the noble dignity and control the conducts of judges*";**
  - **Article 21, which reads, "*For the purpose of the implementation of the authority as intended in Article 13 letter b, the Judicial Commission shall have the duty of conveying recommendations with regard to the imposition of sanctions on judges to the leadership of the Supreme Court and/or the Constitutional Court*";**
  - **Article 22 paragraph (1) point e, which reads, "*In performing the supervision as intended in Article 20, the Judicial Commission shall: e. Make reports on the results of its examination in the form of recommendations and convey the***

***same to the Supreme Court and/or the Constitutional Court, and the copies thereof shall be submitted to the President and the Parliament*"**;

- **Article 22 paragraph (5), which reads, "*In the event that a court or a judge fails to fulfill the obligation as intended in paragraph (4), The Supreme Court and/or the Constitutional Court must issue an order to compel the court or judge to give the requested information or data*";**
- **Article 23 paragraph (2), which reads, "*the recommendations on the imposition of sanction as intended in paragraph (1) letter a along with the reasons thereof shall be binding in nature, conveyed by the Judicial Commission to the leadership of the Supreme Court and/or Constitutional Court*";**
- **Article 23 paragraph (3), which reads, " *the recommendations on the imposition of sanction as intended in paragraph (1) letters b and c shall be conveyed by the Judicial Commission to the leadership of the Supreme Court and/or Constitutional Court*", and;**
- **Article 23 paragraph (5), which reads, "*In the event that the self-defense is refused, the recommendation on the dismissal of a judge shall be conveyed by the Supreme Court and/or the Constitutional Court to the President by no later than 14 (fourteen) days following the refusal of the self-defense by the Judges' Honorary Council*";**
- **Article 24 paragraph (1), insofar as it relates to the phrase "and/or the Constitutional Court";**
- **Article 25 paragraph (3), insofar as it relates to the phrase "and/or the Constitutional Court";**
- **Article 25 paragraph (4), insofar as it relates to the phrase "and/or the Constitutional Court";**

  of Law of the Republic of Indonesia Number 22 Year 2004 concerning Judicial Commission (State Gazette of the Republic of Indonesia Year 2004 Number 89, Supplement to State Gazette of the Republic of Indonesia Number 4415), are contradictory to the Constitution of the State of the Republic of Indonesia of 1945;
- **Article 34 paragraph (3), which reads, *"In order to maintain the honor, noble dignity and conducts of supreme court justices and judges, the supervision shall be conducted by the Judicial Commission as provided by the law",* of Law of the Republic of Indonesia Number 4 Year 2004 concerning Judicial Authority (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to State Gazette of the Republic of Indonesia Number 4358), is contradictory to the Constitution of the State of the Republic of Indonesia of 1945;**

- **Declaring that:**

- **Article 1 point 5, insofar as it relates to the phrase "justices of the Constitutional Court",**
- **Article 20,**
- **Article 21,**
- **Article 22 paragraph (1) letter e,**
- **Article 22 paragraph (5),**
- **Article 23 paragraph (2),**
- **Article 23 paragraph (3), and**
- **Article 23 paragraph (5)**
- **Article 24 paragraph (1), insofar as it relates to the phrase "and/or the Constitutional Court";**
- **Article 25 paragraph (3), insofar as it relates to the phrase "and/or the Constitutional Court";**
- **Article 25 paragraph (4), insofar as it relates to the phrase "and/or the Constitutional Court";**

  of Law of the Republic of Indonesia Number 22 Year 2004 concerning Judicial Commission (State Gazette of the Republic of Indonesia Year 2004 Number 89, Supplement to State Gazette of the Republic of Indonesia Number 4415), do not have binding legal force;
- **Article 34 paragraph (3) of Law of the Republic of Indonesia Number 4 Year 2004 concerning Judicial Authority (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to State Gazette of the Republic of Indonesia Number 4358), do not have binding legal force;**

- **Ordering the Registrar to publish the content of this decision in the State Gazette of the Republic of Indonesia as appropriate;**
- **Rejecting the other parts of the petition.**

*** *** ***

Hence the decision was made in the Justice Deliberation Meeting attended by 9 (nine) Constitutional Judges, Prof. Dr. Jimly Asshiddiqie, S.H., as the Chief Justice, acting also as a Member, H. Achmad Roestandi, S.H., Prof. H. A. Mukthie Fadjar, S.H. M.S., I Dewa Gede Palguna, S.H., M.H., Prof. Dr. H. M. Laica Marzuki, S.H., Prof. H. A. S. Natabaya, S.H., LL.M., Dr. Harjono, S.H., M.C.L., Maruarar Siahaan, S.H., and Soedarsono, S.H., on Wednesday, August 16, 2006, and was read out in a Plennary Session of the Constitutional Court open for public on this day Wednesday, August 23, 2006, by us Prof. Dr. Jimly Asshiddiqie, S.H., as the Chief Justice acting also as a Member, H. Achmad Roestandi, S.H., Prof. H. A. Mukthie Fadjar, S.H. M.S., I Dewa Gede Palguna, S.H., M.H., Prof. H. A. S. Natabaya, S.H., LL.M., Dr. Harjono, S.H., M.C.L., Maruarar Siahaan, S.H., and Soedarsono, S.H., respectively as Members, and assisted by Cholidin Nasir, S.H., acting as Substitute Clerk and attended also by the Petitioners and their Attorneys, the Government/its Attorneys, House of Representatives/its Attorneys, Directly Related Party/its Attorney, and Indirectly Related Parties;

CHIEF JUSTICE,

SIGNED

Prof. Dr. Jimly Asshiddiqie, S.H.

MEMBERS,

SIGNED
H. Achmad Roestandi, S.H.

SIGNED
Prof. H. A. Mukthie Fadjar, S.H.,M.S.

SIGNED
I Dewa Gede Palguna, S.H., M.H.

SIGNED
Prof. H. A. S. Natabaya, S.H. , LL.M.

SIGNED
Dr. Harjono, S.H., MCL.

SIGNED
Maruarar Siahaan, S.H.

SIGNED
Soedarsono, S.H.

SUBSTITUTE
REGISTRAR
SIGNED
Cholidin Nasir, SH.