DECISION

Number 012-016-019/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 30 Year 2002 concerning Commission for the Eradication of the Criminal Act of Corruption (State Gazette of the Republic of Indonesia Year 2002 Number 137, Supplement to State Gazette of the Republic of Indonesia Number 4250, hereinafter shall be referred to as the CEC Law) against the 1945 Constitution of the Republic of Indonesia (hereinafter shall be referred to as the 1945 Constitution) filed by:

I. Petitioner in Case Number 012/PUU-IV/2006

Name	:	Drs. Mulyana Wirakusumah;
Place/Date of Birth	:	Bogor, November 23, 1948;
Religion	:	Islam;
Nationality	:	Indonesia;
Address	:	Jalan Kerinci VIII Number 67 RT. 010 RW. 002 Gunung Sub-district, Kebayoran Baru District, South Jakarta;

Who based on the special power of attorney dated the 16th of June 2006 has given the power to Sirra Prayuna, S.H., Wawan Irawan, SH.,M.H., Gunawan Nanung, S.H., Hari Izmir V. S.H., Toddy Laga Buana, S.H., respectively advocates and legal consultants having the address at Jalan Raya Pasar Minggu Number 29 Pancoran Jakarta 12780, for acting for and on behalf of the Petitioner;

Hereinafter shall be referred to as ---------- **PETITIONER I**;

II. Petitioners in Case Number 016/PUU-IV/2006

1. Name : Prof. Dr. Nazaruddin Sjamsuddin;
   Occupation : Professor at the University of Indonesia, Depok;
   Position : Chairman of the National Election Commission;
   Address : Jalan Minyak Raya Nomor 13, RT/RW.010/03, Duren Tiga, Pancoran, South Jakarta;

2. Name : Prof. Dr. Ramlan Surbakti, M.A.;
   Occupation : Professor at the Airlangga University, Surabaya;
   Position : Vice-Chairman of the National Election Commission;
   Address : Jalan Semolowaru Tengah XIII/4, RT. 02/RW. 04, Surabaya 60119;

3. Name : Prof. Dr. Rusadi Kantaprawira;
   Occupation : Professor at the Padjajaran University, Bandung;
   Position : Member of the National Election Commission;
   Address : Jalan Batu Indah I Nomor 26-B, RT/RW 002/003, Batununggal, Bandung;

4. Name : Drs. Daan Dimara, M.A.;
   Occupation : Lecturer at the Cendrawasih University, Jayapura;
   Position : Member of the National Election Commission;
   Address : Jalan Sentani, RT/RW 002/08, Hedam, Abepura, Jayapura;

5. Name : Dr. Chusnul Mar'iyah;
   Occupation : Lecturer at the University of Indonesia, Depok;
   Position : Member of the National Election Commission;
   Address : Jalan Teuku Cik Ditiro Number 3, RT/RW 008/002, Menteng, Central Jakarta.

6. Name : Dr. Valina Singka Subekti, M.A.;
   Occupation : Lecturer at the University of Indonesia, Depok;
   Position : Member of the National Election Commission;

Address : Jalan Cilandak Tengah II/1, RT/RW 006/001, Cilandak, South Jakarta;

7. Name : Safder Yusacc, S.Sos., M.Si.;
   Occupation : Retired Civil Servant;
   Position : Former Secretary General of the National Election Commission;
   Address : Jalan Cempaka Putih Timur IV Nomor 11A, Cempaka Putih, Central Jakarta.

8. Name : Drs. Hamdani Amin, M.Soc.Sc;
   Occupation : Civil Servant;
   Position : Former Head of the Finance Bureau of the Secretariat General of the National Election Commission;
   Address : Jalan Destarata VIII Nomor 5, RT/RW. 001/016, Tegalgundil, Bogor Utara, Kota Bogor 16152.

9. Name : Drs. R. Bambang Budiarto, M.Si.;
   Occupation : Civil Servant;
   Position : Head of the General Affairs Bureau of the Secretariat General of the National Election Commission;

Address : Jalan S. Sambas VII Nomor 3, RT/RW. 005/005, Kramat Pela, Kebayoran Baru, South Jakarta.

Based on the Special Power of Attorney dated the 27th of July 2006, the Petitioners mentioned above have given the power to Mohamad Assegaf, S.H., Januardi S. Haribowo, S.H., B.L. Noormandiri, S.H., Djoko Budihardjo, S.H., Dendy K. Amudi, S.H., Bayu Prasetio, S.H., M.H., respectively advocates having the address at the Mohamad Assegaf Law Firm, for, both individually and jointly, acting for and on behalf of the Petitioners;

Hereinafter referred to as ---------- **PETITIONER II;**

III. Petitioner in Case Number 019/PUU-IV/2006

Name : Capt. Tarcisius Walla;

Place/Date of Birth : Gorontalo, 8 November 1942;

Religion : Catholic;

Occupation : Retired Civil Servant;

Nationality : Indonesia;

Address : Jalan Cempaka Putih Timur 7 Nomor 16 Jakarta

Who based on the Special Power of Attorney dated on the 16th of June 2006 has given the power to Sirra Prayuna, S.H., Wawan Irawan,

SH.,M.H., Gunawan Nanung, S.H., Hari Izmir V. SH., Toddy Laga Buana, S.H., respectively Advocates and legal consultants having the address at Jalan Raya Pasar Minggu Nomor 29 Pancoran Jakarta 12780, for acting for and on behalf of the Petitioners;

Hereinafter referred to as ---------- **PETITIONER III**;

Having read the Petitions of the Petitioners;

Having heard the testimonies of the Petitioners;

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

Having heard and read the affidavit of the Government;

Having heard and read the affidavits of the Directly Related Party of the Commission for the Eradication of the Criminal Act of Corruption;

Having heard and read the affidavits of experts presented by the Petitioners;

Having heard and read the affidavits of experts presented by the directly Related Party the Commission for the Eradication of the Criminal Act of Corruption;

Having read the concluding opinions of the Directly Related Party the Commission for the Eradication of the Criminal Act of Corruption;

Having read the concluding opinions of Petitioner II;

Having read the concluding opinions of the Government;

Having examined the evidence presented by the Petitioners;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the *a quo* petition is as described above;

Considering whereas before taking into further consideration the substance or the main issue of the a quo petition, the Constitutional Court (thereinafter shall be called the Court) beforehand considers these matters:

1. Whether the Court has the authority to examine, try, and decide upon the petitions;
2. Whether the Petitioners have legal standing to be accepted as Petitioners before the Court in the a quo petitions;

With regard to the aforementioned two matters the Court is of the following opinions:

1. The Authority of the Court

Considering whereas the *a quo* petition is a petition for judicial review, in casu the CEC Law against the 1945 Constitution;

Considering whereas with regard to the authority of the Court, Article 24C paragraph (1) of the 1945 Constitution, among others, provides that 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. 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);

Considering whereas with the considerations described above, the Court has the authority to examine, try, and decide upon the *a quo* petitions.

2. Legal Standing of the Petitioners

Considering whereas, in a petition for a judicial review on a law against the 1945 Constitution, in order for a person or a certain party be accepted in their legal standing as a Petitioner in front of the court, Article 51 paragraph (1) of the Constitutional Court Law (CC Law) stipulates that “petitioners in the judicial review on law against the 1945 Constitution shall those who deem that their constitutional rights and/or authorities are harmed by the establishment of a law, namely:

a. Indonesian Citizen individuals;

b. units of customary law communities insofar as they are 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".

Meanwhile, the Elucidation on Article 51 paragraph (1) sub-paragraph (a) of the CC Law reaffirms that referred to as "individuals" in the aforementioned Article 51 paragraph (1) sub-paragraph (a) includes a group of people having the same interests;

Considering whereas therefore for an individual or a certain party to be accepted as a Petitioner in a petition for judicial review of law against the 1945 Constitution, in accordance with the provisions of Article 51 paragraph (1) of the CC Law, the individual or party concerned must:

(a) explain their qualifications in the petition, which is whether as an individual Indonesian citizen, a customary law community unit, legal entity or a state institution;

(b) the loss of constitutional rights and/or authority, in the qualification as intended in sub-paragraph (a), as the consequence of the application of the law being petitioned for review;

Considering also, whereas since the issuance of Decision Number 006/PUU-III/2005 until now, it has been determined by the Court that to warrant a

loss of constitutional rights and/or authority the following requirements must be met:

(1) The petitioners must have constitutional rights and/or authority granted by the 1945 Constitution;

(2) Such constitutional rights and/or authority shall be deemed by the Petitioners to have been harmed by the entry into effect of the law being petitioned;

(3) The loss of constitutional rights must be specific and actual in nature or at least potential in nature which pursuant to a logical reasoning will certainly take place;

(4) There is a causal connection (*causal verband*) between the aforementioned loss and the entry into force of the law being petitioned;

(5) There is a possibility that upon the granting of the petition, the constitutional losses shall not come into existence or shall cease to persist.

Considering whereas in accordance with the description on the provisions of Article 51 Paragraph (1) of the CC Law and the requirements of constitutional rights and/or authority losses as described above, the Court will then consider the legal standing of the Petitioners, in accordance with the Petitioners' explanation in the petitions along with the relevant evidence, as follows:

o **Petitioner I,** Drs. Mulyana Wirakusumah:

The Petitioner explaining his qualifications in the *a quo* Petition as an individual Indonesian citizen, argues that Article 6 sub-article (c) and Article 12 paragraph (1) sub-paragraph (a) of the CEC law are

contradictory to the 1945 Constitution because they have harmed the constitutional rights of the Petitioner as set forth in Article 28D paragraph (1) and Article 28F of the 1945 Constitution;

Whereas, according to the Petitioner, Article 6 Sub-article (c) of the CEC law, which reads as follows, *"The Commission for the Eradication of the Criminal Act of Corruption shall have the following duties: ...c. to conduct inquiries, investigations, and prosecutions against criminal acts of corruption"*, is contradictory to article 28D Paragraph (1) of the 1945 Constitution which reads, *"Every person shall have the right to equitable legal recognition, guarantee, protection and certainty as well as equal treatment before the law"* so that it has harmed the constitutional rights of the Petitioner for the following reasons:

- Article 6 Sub-article (c) of the CEC Law does not provide legal certainty because it violates the *lex certa* principle, which should have been the realization of the existence of legal certainty, namely the principle that requires a rule of law to be applicable firmly and binding because there is no hesitation in its implementation. Article 6 Sub-article (c) of the CEC Law has a content that unifies the functions of law enforcement, so as to result in a condition where there is a conflict between two or more provisions in different laws but they remain in effect and binding simultaneously and regulate the same issue, so that there is no legal certainty;

- The legal uncertainty intended by the Petitioner occurred because at the same time as Article 6 Sub-article (c) of the CEC Law came into effect, the provision of Article 14 paragraph (1) sub-paragraph (g) of Law of the Republic of Indonesia Number 2 Year 2002 concerning the National Police of the Republic of Indonesia (State Gazette of the Republic of Indonesia year 2002 Number 2, Supplement to State Gazette of the Republic of Indonesia Number 4168), which mainly states that inquiries and investigations on “all criminal acts” are the authority of the National Police of the Republic of Indonesia, which means that the criminal act of corruption is also included. The aforementioned execution of the authority by the National Police of the Republic of Indonesia, according to the Petitioner must be carried out by respecting the principles of monitoring and coordination with other law enforcers who also have the duties and authorities to conduct investigations, in this case the public prosecutor’s office and other investigators based on the laws.

- Whereas, according to the Petitioner, Article 6 Sub-article (c) of the CEC Law has turned the Commission for the Eradication of the Criminal Act of Corruption into a superbody, as an institution without any supervision, which has harmed the Petitioner where the Petitioner has been an object of inquisition which obviously has been abandoned since the application of Law Number 8 Year 1981 (KUHAP);

Furthermore, with regard to Article 12 Paragraph (1) sub-paragraph a of the CEC Law which reads, ”In the implementation of duties as referred in Article 6 Sub-article c, the Commission for the Eradication of the Criminal Act of Corruption has the authority to: a. Conduct wiretapping and record conversations”, according to Petitioner I is contradictory to Article 28F of the 1945 Constitution which reads, *“Every person shall have the right to communicate and to obtain information to develop him/herself and his/her social environment, and shall have the right to seek, obtain, posses, store, process, and convey information by using all available kinds of channels.”* The reasons pointed out by the Petitioner are:

- Article 12 Paragraph (1) of the CEC Law is a form of inaccuracy on the part of the lawmakers who did not consider the effective provision on the prohibition of wiretapping as regulated in Article 40 Law Number 36 Year 1999 which explicitly guarantees an individual’s personal rights against the act of wiretapping for the purpose of obtaining information illegally;

- Article 12 Paragraph (1) of the CEC Law violates the guarantee towards the privacy of an individual which is a universally accepted human right, as referred in Article 17 International Covenant on Civil and Political Rights, which have been ratified with Law Number 12 Year 2005 about the legalization of the International Covenant on Civil and Political Rights.

Considering on the basis of the aforementioned description, as Petitioner I has been investigated, prosecuted, and sentenced based on the mechanism stipulated in Article 6 and 12 Paragraph (1) letter a of the Commission for the Eradication of the Criminal Act of Corruption (CEC) Law, the Court is of the opinion that the Petitioner meets the legal standing in the *a quo* petition;

- **Petitioner II**, Prof. Dr. Nazaruddin Syamsuddin and friends, all together 9 people as explained in the Principal Case, can be regarded as a group of Indonesian Citizens who have a common interest. The petitioner argued that Article 1 Number 3, Article 2, Article 3, Article 11 letter b, Article 12 Paragraph (1) letter a, Article 20, Article 40, and Article 53 of The CEC Law are contradictory to Article 1 Paragraph 3, Article 24, Paragraph 1 and 2, Article 27 Paragraph 1, Article 28D Paragraph 1, Article 28I Paragraph 2 of the 1945 Constitution, with the following explanations:

  Whereas some of the Petitioners, *namely* Prof. Dr. Nazaruddin Syamsuddin; Prof. Dr. Rusadi Kantaprawira; Drs. Daan Dimara, MA; Safder Yusaacc, S.Sos, M.Si; Drs. Hamdani Amin, M.Soc.Sc; and Drs. R. Bambang Budiarto, M.Si argued that they have been subject to discriminatory treatment for the reasons of :

  - Having been and/or being examined at the Anti Corruption Court and/or having received decision from the court, at the first level, appeal and appeal to the supreme court. The petitioners are of the opinion

that they have been discriminated as their case was handled by the Commission for the Eradication of the Criminal Act of Corruption, thereby the legal procedure applied to the Petitioner was the legal procedure which was regulated in the Criminal Procedure Code, the legal procedure as regulated in the Law of The Republic of Indonesia Number 31 Year 1991 concerning the Eradication of Corruption Crimes as amended by Law of the Republic of Indonesia Number 20 year 2001 and the Commission for the Eradication of the Criminal Act of Corruption Law as the *lex specialis*. According to the petitioners they were faced with a situation whereby they could not choose which law to be applied because there were two laws that were applicable at the same time.

- Having been handled by the Commission for the Eradication of the Criminal Act of Corruption by applying the CEC Law. Whereas, according to the petitioners, the CEC Law fails to protect their basic rights. Furthermore, Article 40 of the CEC Law, which negates the Commission's authority to issue an Investigation/Prosecution Cessation Order, has violated the presumption of innocence principle, which is an important principle because according to Article 1 Paragraph 3 of the 1945 Constitution, Indonesia is a constitutional state;

Whereas the petitioners argued that their constitutional rights to legal protection and legal certainty have been violated for the following reasons:

- The establishment of the Anti Corruption Court, based on Article 53 of the CEC Law , which has the duty and authority to examine and make decision on criminal cases filed by the Commission, in relation to Article 1 number 3 of the CEC Law, means that examination before the Anti Corruption Court hearings are a part of the executive power;

- The basis of the establishment of the Anti Corruption Court, which is assumed as a part of the Court of General Jurisdiction, does not include any requirement of Chapter IX of the 1945 Constitution, Law on Judicial Authorities, or Law on the Supreme Court. Therefore, the legality of the Corruption Court is flawed, thereby corruption crimes examined and decided upon by the Court are also legally flawed.

- Evidences presented to the Anti Corruption Court, especially evidences that supported the defendant, were not considered at all or not considered properly by the panel of judges, as experienced by most of the petitioners, namely Prof. Dr. Nazaruddin Syamsuddin, Prof. Dr. Rusadi Kantaprawira, Safder Yusaacc, S.Sos, M.Si; Drs. Hamdani Amin, M.Soc.Sc; and Drs. R. Bambang Budiarto, M.Si;

- There are a lot of similarities in the matters stated in the indictment of the public prosecutor with the verdict, starting form the sentence

structure, composition, including the mistakes, so that there is a strong opinion that there was a forbidden cooperation between the public prosecutor and the judges in drafting the decision on the case, namely by way of *copy and paste* of the data given by the public prosecutor to the panel of judges.

Considering whereas based on the fact that Petitioners II, namely Prof. Dr. Nazaruddin Syamsuddin, Prof. Dr. Rusadi Kantaprawira, Safder Yusaacc, S.Sos, M.Si; Drs. Hamdani Amin, M.Soc.Sc; and Drs. R. Bambang Budiarto, M.Si, have been investigated, prosecuted and sentenced based on the mechanism set forth in the CEC law, the Court is of the opinion that Petitioners II meet the requirement of legal standing of a Petitioner in an a quo Petition;

Considering whereas the other Petitioners II, namely Prof. Dr. Ramlan Surbakti, MA; Dr. Chusnul Mar'iyah; Dr. Valina Singka Subekti, MA, are members of the National General Election Commission who have been examined as witnessed by the Commission for the Eradication of the Criminal Act of Corruption. The court is of the opinion that the other Petitioner II have suffered constitutional loss, or at least potentially, by the application of the articles being petitioned. Therefore, the other Petitioner II also meet the requirement of legal standing to submit an a quo petition. However, in relation to this matter, two Constitutional Judges are of the opinion that they do not have the legal standing for the reason that the constitutional loss requirements described above are not met;

- **Petitioner III**, Capt. Tarcisius Walla:

  Whereas Petitioner III has explained his qualification in the a quo petition as an Indonesian citizen who argued that his constitutional rights have been harmed by Article 72 of the CEC Law which reads," *This law shall come into force as of the date of its enactment*"

  The petitioner argued that the enactment of Article 72 of The CEC law has harmed the petitioner's constitutional rights on legal certainty so that it is contradictory to Article 28 D Paragraph 1 of the 1945 Constitution. Because, according to the petitioner, Article 72 of the CEC law has resulted in different interpretation among experts on whether the CEC Law is applicable as of the date or retroactively. As a result of such different interpretation, The Petitioner has been investigated, prosecuted and sentenced based on the CEC Law whereas the time of his action took place before the CEC law was enacted and applied.

  Based on the above descriptions and the evidence presented by the Petitioner, the Court is of the opinion that the Petitioner meets the requirement of legal standing as set forth in Article 51 Paragraph 1 of the Constitutional Court Law and the requirement of loss of constitutional rights and/or authority, as founded by the Constitutional Court. Therefore, the petitioner has the legal standing to act as a Petitioner in the a quo petition.

Considering whereas because the Court has the authority to examine, try and decides on the a quo petition and all of the petitioners have the legal standing to act as petitioners, the Court then has to consider the Main Issue of the Petition.

3. Principal Issue of the Petition

Considering whereas after reading the arguments of Petitioner I, II and III in their respective petition and their statements before the Court's hearings, as explained in the principal case, the legal issues that have to be considered and decided upon by the Court can be summarized as follows:

- Whether Article 1 number 3 of the CEC law which reads*, "Referred to herein as: ... 3. Eradication of Corruption Crimes is a series of actions to prevent and eradicate corruptions through the efforts of coordination, supervision, monitoring, investigation, prosecution, and court examination, with public participation based on applicable laws and regulations."* , has harmed the constitutional rights of Petitioner II so as to be contradictory to the 1945 constitution;

- Whether Article 2 of the CEC Law which reads, "The Commission for the Eradication of the Criminal Act of Corruption shall be established hereunder" has harmed the constitutional rights of Petitioners II and therefore its is contradictory to the 1945 constitution;

- Whether Article 3 of the CEC Law which reads " *The Commission for the Eradication of the Criminal Act of Corruption shall be a state institution that is free and independent from the influence of any power whatsoever in executing its duties*." has harmed the constitutional rights of Petitioners II and therefore it is contradictory to the 1945 constitution;

- Whether Article 6 letter c of the CEC law which reads," *the Commission for the Eradication of the Criminal Act of Corruption shall have the duty to: .c. conducting inquiries, investigations, and prosecutions on corruption crimes",* has harmed the constitutional rights of Petitioner I and therefore it is contradictory to the 1945 constitution.

- Whether Article 11 letter b of the CEC Law which reads, "*In performing its duties as stated in Article 6 letter c, the Commission for the Eradication of the Criminal Act of Corruption shall be authorized to perform inquiry, investigation, and prosecution of corruption crimes which...b. raise widespread and disrupting public attention; and/or"* has harmed the constitutional rights of Petitioners II and is therefore contradictory to the 1945 constitution.

- Whether Article 12 Paragraph 1 letter a of the CEC Law which reads, "*In performing inquiry and investigation as intended in article 6 letter c, the Commission for the Eradication of the Criminal Act of Corruption shall be authorized: a. to conduct wiretapping and record conversations"* has harmed

the constitutional rights of Petitioners II and is therefore contradictory to the 1945 constitution.

- Whether Article 20 of the CEC law which reads, "*the Commission for the Eradication of the Criminal Act of Corruption shall be responsible to the public on the implementation of its duties and shall submit reports openly and periodically to the president, the People's Legislative Assembly, and the State Audit Board. (2) The Public Accountability as intended in Article 1 shall be carried out through: a. mandatory audit on financial performance and accountability in accordance to the work program; b. Issuing annual reports; and c. Opening access to information."* has harmed the constitutional rights of Petitioners II and is therefore contradictory to the 1945 constitution.

- Whether Article 40 of the CEC law which reads "*the Commission for the Eradication of the Criminal Act of Corruption shall not be authorized to issue Investigation/Prosecution Cessation Order on corruption cases"* has harmed the constitutional rights of Petitioners II and is therefore contradictory to the 1945 constitution;

- Whether Article 53 of the CEC law which reads, "*Anti Corruption Court shall be established hereunder with the duty and authority to examine and decide upon corruption cases filed by The Commission for the Eradication of the Criminal Act of Corruption"* has harmed the constitutional rights of Petitioners II and is therefore contradictory to the 1945 constitution;

- Whether Article 72 of the CEC law which reads*, "This law shall come into effect as of the date of its enactment. For the purpose of public cognizance, it is hereby ordered that this law shall be promulgated in the State Gazette of the Republic of Indonesia."* has harmed the constitutional rights of Petitioner II and is therefore contradictory to the 1945 constitution;

Considering whereas to support their arguments, the Petitioners have presented experts whose testimonies have been heard in the court's hearings, which have been completely described in the Principal Case, each of whom stated basically as follows:

1. Dr. Chairul Huda, S.H., M.H.

   Criminal Law Expert from Muhamadiyah University Jakarta who was presented by Petitioner I, in a hearing held on October 11, 2006, who also gave affidavits, explained as follows:

   - With regard to Article 12 paragraph 1 letter a of the CEC law, the expert concerned was of the opinion that the authority to conduct wiretapping should not have been given to the Commission for the Eradication of the Criminal Act of Corruption as an institution, but instead it should be given to its officials (inquirers, investigators or public prosecutors of the Commission for the Eradication of the Criminal Act of Corruption). Aside from that, the CEC Law does not further regulate the wiretapping procedure, thereby the a quo law tends to violate the due process of

the law which requires that all authorities which limit or take away individual freedom do so selectively in accordance with the law;

- In relation to “trapping” conducted by the Commission, as experienced by Petitioner I, the expert was of the opinion that it is different from tapping and is just one of the investigation techniques which is acceptable as long as the authorization is given based on the law (article 3 Criminal Procedure code). Keeping in mind that the CEC Law does not give authorization to the Commission to carry out that type of investigation, the Commission for the Eradication of the Criminal Act of Corruption to execute such investigation technique, thus the Commission’s action of ”trapping” the Petitioner is a law enforcement issue not an issue of reviewing the CEC Law against the basic constitution.

- With regard to the retroactive principle, the expert explained that the principle of Criminal law is non retroactive and according to the expert should be valid for material and formal criminal law. However, in Indonesian law, only material criminal law includes the principle firmly. [Article 1 Paragraph 1 (the Criminal Code)]

2. Dr. Mudzakkir, S.H., M.H.

Expert of Criminal Law from Universitas Islam Indonesia Yogyakarta who was presented by Petitioner II, in the hearing held on October 11, 2006 who also gave affidavits explained:

- the authority of the commission regulated in article 11 of the CEC law is facultative, so the commission may or may not use it. When the commission uses it, the requirements of article 11 letter a and b and/or c of the CEC law will be valid . Also, because of the facultative nature, if there is a corruption case that meets the requirements of Article 11 of the CEC Law, letter a, b and/or c, the case can be investigated and prosecuted by other institutions other than the Commission, in addition to the Commission itself. Which means that the Commission can internally determine its own requirements on when a case meets or does not meet the requirements of Article 11 of the CEC Law letter a, b and/or c. Thus article 11 contains speculative interpretations (not certain);

- The formulation of Article 11 letter b of the CEC Law contains material which are not certain, subjective and it is difficult to determine objective measurement on when a case “attract attention that upsets the public”, therefore there is no certainty for legal guarantee. Thus, the expert believes that article 11 has the potential different interpretation which causes the violation of the suspects rights in acquiring fair and equal treatment, and discriminative before the law or the court;

- With regard to the specific criminal characteristics of the criminal code, lex specialis, of the general criminal provisions. The expert was of the opinion that that the term “specific” has two meanings. Firstly, specificity in the arrangement system of a legal material, because it is written in law that specifically regulates a certain material. Secondly, the specific requirements that which are used to deal with a specific situation, which deviates from the general norm. Because without the deviation, the legal issue can not be resolved accurately ,correctly and fairly. However, the deviation has to observe the general principle of the law and can not excessively violate a person’s rights. Specificity in the second meaning means has a time limit and can not be continuously done.

- with regard to the specificity of the commission. There are three stages in the criminal justice system: pre-adjudication stage, adjudication stage and post-adjudication stage. The pre–adjudication stage is the responsibility of the executive(president). The adjudication stage is judicial responsibility. The post adjudication stage, which is a decision execution stage which has permanent legal power, is the responsibility of the prosecutor, in this case is represented by the public prosecutor. How about the commission? According to the expert, the specificity of the commission regulated in the CEC Law is confusing. Because, based on the stipulation in article 3, the commission is an independent

institution, independent of the executive, legislative and judicial bodies. However, according to article 6 of the CEC Law, the commission is given authority to implement tasks which are the responsibility of the executive. The tasks of the Commission is to coordinate, supervise, prevent, and monitor, which are the responsibilities of the President, will be difficult to implement as the commission is not under the coordination of the President;

- With regard to the specificity of the corruption court. Expert was of the opinion that the court poses a separate problem because its specificity differs from other specific court. The corruption court competency is determined by the suing institution, ie The Commission (article 53 of the Commission for the Eradication of the Criminal Act of Corruption Law), whereas other specific court's competencies are determined by the types of cases. Corruption cases which prosecution is carried out by public prosecutor and public prosecutor of the corruption case eradication team can not indict the suspect through a Anti Corruption Court. The problem is caused by weakness in the formulation of the CEC Law, namely 1 the Corruption court is formed in the CEC Law which substance is the formulation of the institution. If the lawmakers intend to establish a corruption court, it should be stated in Law Number 31 year 1999 *juncto* Law Number 20 year 2001 concerning corruption eradication; 2 the CEC law, in its legal consideration, does not refer or put in the law number 14 year 1970 on Legal Power

Principal Requirements as the legal platform of the formation of the corruption court, 3 the public consideration on the issuance of the CEC law and the general explanation of the law do not state legal issue on Court of General Jurisdiction that examines criminal cases. Which means the formation of the Corruption court is not based on the existing legal problems;

- the establishment of other special courts shall at all times refer to Law regarding Basic Provisions on Judicial Authorities, namely Law Number 14 year 1970 for special courts established prior to year 2004 and Law Number 4 year 2004 for special courts established following year 2004. Only the CEC Law – regulating the establishment of Anti Corruption Court – that does not contain the aforementioned reference;

- the inclusion of a court (Anti Corruption Court) as a part of the corruption eradication activities, as reflected from the provisions of Article 1 Number 3 of the CEC Law, raises a question whether the Anti Corruption Court is able to perform its function as a judicial institution. The legal consequences of a formula that places a court (Anti Corruption Court) as a part of the legal concept of corruption eradication (Article 1 Number 3 of the CEC Law) are doubts on its independence, autonomy, freedom, and objectivity. Moreover, the CEC Law does not refer to the Law regarding Basic Provisions on Judicial Authorities (Law Number 14 year 1970);

- the absence of the CEC's authority to issue a Investigation/Prosecution Cessation Order, according to the expert, results in different treatment among the suspects of corruption crimes. There are suspects who are entitled to Investigation/Prosecution Cessation Order, and there are suspects who are not entitled to Investigation/Prosecution Cessation Order, whereas they are all guaranteed by the same constitution;

3. Prof. Dr. Philipus M. Hadjon, S.H.

The expert of state administration law from Universitas Airlangga presented by Petitioner II, in his testimonies in a hearing held on November 21, 2006, which were accompanied by affidavits, explained as follows:

- Article 24 Paragraph (3) of the 1945 Constitution states that other institutions the functions of which are related to Judicial Authorities shall be regulated in a law. Based on the aforementioned provision, the establishment of any institution related to Judicial Authorities (such as Anti Corruption Court) must clearly mention Article 24 Paragraph (3) of the 1945 Constitution as its legal basis. It must be mentioned in the **in view of** section. The CEC Law does not mention Article 24 paragraph (3) of the 1945 Constitution in its **in view of** part. Seen from the title, the CEC Law (Chapter VII) should not provide for the establishment of a Anti Corruption Court;

- the provisions of Article 51 Paragraph (1) of the CEC Law stating that the Prosecutor shall be a Public Prosecutor in the Commission for the Eradication of the Criminal Act of Corruption appointed and dismissed by the CEC. Meanwhile, Article 2 Paragraph (3) of Law Number 16 year 2002 regarding Public Prosecutor's Office of the Republic of Indonesia (Public Prosecutor's Office Law) states that Public Prosecutor's Office is an integrated and inseparable unit. Article 8 Paragraph (2) of the Public Prosecutor's Office Law states that a Prosecutor shall be appointed and dismissed by the Attorney General. Therefore, there is a question on whether a Public Prosecutor in the CEC observes the provisions of Article 8 Paragraph (2) of the Public Prosecutor's Office Law.

- although the 1945 Constitution does not expressly use the terminology "Privacy", the 1945 Constitution basically guarantees Constitutional Right to Privacy. The limitation, according to Article 28J Paragraph (2), is merely intended to guarantee the acknowledgment of as well as respect to other people's rights and freedom, and to fulfill fair claim in accordance with moral consideration, religious values, public security and order in a democratic society;

- in respect of Article 40 of the CEC Law, the Expert stated, in accordance with the provisions of Article 1 Paragraph (3) of the 1945 Constitution, Indonesia is a constitutional state. The principle of a

Constitutional State is the legality principle (*het legaliteit beginsel*). In relation to the legality principle, the exercise of state power related to individual rights and freedom is limited. In penal law, based on the legality principle, respect is given to the principle of presumption of innocence. Therefore, there is a question whether Article 40 of the CEC Law is contradictory to the principle of presumption of innocence or not.

4. Prof. Dr. Bernard Arief Sidharta, S.H.

Expert of legal philosophy and legal theory from Universitas Parahyangan presented by Petitioner II, in his testimony in a hearing held on November 21, 2006, who also gave affidavits, explained as follows:

- Whereas Indonesia is categorized as the most corrupt country but only a small number of the perpetrators are brought to court and punished. Corruption in Indonesia is so rampant that extraordinary treatment is required to cope with it. However, such action shall not automatically entitle or authorize the state to act arbitrarily or give reason for the state to become an authoritarian state or autocratic state;

- the dilemma is that in such condition, there are two opposite values, namely public interest value (public right) and individual interest value (individual right). Both rights, which should be complementary, are apparently included in human rights. In such condition, the

utilitarianistic consideration, namely making choices, should be applied. In this matter, the choice made is the public interest. Based on such choice, the implementation and protection of individual interest value must be adjusted so that public interest can be realized, therefore individual interest value shall be automatically overriden or reduced, but not eliminated. The override of such individual rights, which is realized through the establishment of a regulation and an institution, must be limited both from the aspects of time and implementation methods, all of which must be formulated in a law;

- the tendency of positivistic reasoning in Indonesia, and the tendency to interpret laws and regulations by ignoring the contextual considerations, the provisions allowing the act of reduction of individual rights must be presented explicitly and carefully in order to reduce arbitration. For example, Article 12 Paragraph (1) sub-paragraph a of the CEC Law, authorizing the CEC to wiretap and record conversation, does not mention the requirements that must be fulfilled to do it, the party authorized to give permission, how to do it, how to account for the aforementioned wiretapping action, and to whom. Thus, this provision is open to potential unproportional override of individual rights and therefore is no longer supported by Article 28J Paragraph (2) of the 1945 Constitution;

- Article 11 of the CEC Law clearly contains discrimination which provides different treatment for suspects of corruption crimes from the treatment of suspects of non-corruption crimes. However, bearing in mind that corruption has spread widely and is difficult to prove, such discrimination as one exceptional method is justifiable and is still supported by Article 28J Paragraph (1) of the 1945 Constitution. However, there is the second discrimination in such article, where fellow suspects of corruption crimes are treated differently. Some of them are treated conventionally (by the police and the public prosecutor's office) and some are treated in a non-conventional manner (in an exceptional manner by the CEC). This discrimination has no rational basis for justification. Moreover, the provision in such article does not mention when a corruption crime is treated exceptionally by the CEC and when it is treated conventionally by the police and the public prosecutor's office. Article 11 of the Law regarding Commission for the Eradication of the Criminal Act of Corruption only determines that if the requirements set forth in such article are met, the Commission for the Eradication of the Criminal Act of Corruption is authorized to handle the cases. This means, such provision is facultative, and since it is facultative and not imperative in nature, the Commission for the Eradication of the Criminal Act of Corruption is free to decide whether they will handle or not handle an incident alleged as corruption crimes. This means, Article 11 of the

CEC Law has overriden the legal certainty as set forth in Article 28D of the 1945 Constitution without any justifying reason;

- The words “examination in court hearings” in Article 1 Number 3 of the CEC Law, comprise a part or an element of the activity to hold a trial, which is the main duty of a court. The aforementioned main duty of a court shall be implemented by judges. In implementing such duty, the judges must be impartial. To be able to implement his duty impartially, the judges must be passive (therefore they are called as *zittende magistratuur*, sitting magistrate), must give the biggest possible opportunity to all parties to present facts, legal bases, and argumentations. These parties must be active, particularly the public prosecutor in criminal cases (therefore they are called as *staande magistratuur*, standing magistrate). Furthermore, to maintain the impartiality of the judges, they must be free from any influence and intervention from any party. With the basic ideas mentioned above, the establishment of a Anti Corruption Court (Article 53 of the CEC Law) under and within the CEC Law is problematic because it is placed within the authority of the CEC. The establishment of a Anti Corruption Court (Article 53 of the CEC Law) in relation to article 1 Number 3 of the CEC Law makes the establishment of the Anti Corruption Court can be deemed as a facility for the CEC to implement its duties so as to imply the dependence, bias, and non-independence of the Anti

Corruption Court. Therefore, the Anti Corruption Court should be established in a separate law;

- the provision that the CEC is not authorized to issue Investigation/Prosecution Cessation Order (Article 40 of the CEC Law), only by reason of preventing “illegal negotiation” between the CEC officials and the defendants, has proportionally reduced or overridden the individual rights of the principle of presumption of innocence, and therefore is not supported by Article 28J Paragraph (A) of the 1945 Constitution;

- whereas the establishment of the CEC is indeed needed to eradicate corruption that can no longer be handled in conventional ways, however, potential arbitration and worse consequences for everyone must be prevented because, as said by Francis Bacon, *“... there is no worse torture than the torture of laws”*.

5. Prof. Dr. Maria Farida Indrati, S.H., M.H.

Expert of legislative science from Universitas Indonesia presented by Petitioner II, in here testimonies in a trial held on November 21, 2006, who also gave affidavits, explained as follows:

- whereas based on the content of Article 24 Paragraph (1) of the 1945 Constitution, referred to as Judicial Authorities shall be the power to administer courts in order to enforce law and justice, meaning the party

assigned to perform judicial function in a constitutional state must be declared as unable to be influenced by anyone;

- whereas referred to as “other institutions which functions are related to Judicial Authorities are regulated in a law” shall be other institutions which functions are related to judicial institutions such as the public prosecutor’s office or the police as the prosecuting or investigatory institutions;

- whereas the inclusion of Article 24 Paragraph (3) of the 1945 Constitution is also to anticipate future development, for example in case of development of other institutions unrelated to the existing four judicial environments;

- all courts throughout the territory of the Republic of Indonesia are state judicatures and are established under a law, which must be a separate law, based upon philosophical, sociological and judicial bases;

- the philosophical basis and considerations in Law Number 30 year 2002 states, “*in order to establish a fair and prosperous society based on Pancasila and the 1945 Constitution, eradication of Corruption Crimes has not been done optimally”.* Therefore, it needs to be improved in an optimal, intensive and sustainable manner because corruption has caused financial losses to the state;

- in the judicial basis and in the considerations (in letter d), it is stated the need to establish a CEC Law, however, it must be in accordance with the consistency principle, where a title must reflect the content of law concerned. However, in violation of such principle, the CEC Law also establishes the Anti Corruption Court;

- based on Article 24 Paragraph (2) it can be concluded that there may not be two formal penal legal systems applicable for the CEC and in general, because the corruption cases filed by the CEC and the corruption cases filed by the Public Prosecutor's Office cannot be treated differently, respectively in the Anti Corruption Court and in Court of General Jurisdiction;

Also considering that the Court has heard the verbal statements and read the written statements of the Government, including the statements from the Attorney General's Office, read the written statements of the House of Representatives (DPR), and heard the verbal and read the written statements of the Related Party of the Commission for the Eradication of the Criminal Act of Corruption (CEC's Related Party), as completely described in the Principal Case, principally stating as follows:

1. Statements of the Government

The Government, in its two written statements both dated October 31, 2006 and signed Hamid Awaludin, Minister of Law and Human Rights, as

the Attorney-in-Fact of the President of the Republic of Indonesia, states as follows:

- disagree with the Applicants stating that the articles of the Law on the Commission for the Eradication of the Criminal Act of Corruption (CEC Law) requested for substantiation harm the constitutional rights of the Applicant because they are deemed violating the due process of law, do not provide legal certainty, and give rise to discriminative treatment;

- with respect to Article 1 sub-article 3 associated with Article 53 of CEC Law, which is deemed by Applicant I as violating the principle of judicial authority independence and causing legal uncertainty, the Government is of the opinion that Article 1 Sub-article 3 of CEC Law contains provisions setting forth the definitions, abbreviations, or acronyms used in regulations and other general terms applicable to the subsequent articles, among other things, provisions reflecting the principles, purposes, and objectives. Meanwhile, Article 53 contains the provisions setting forth the establishment of the Anti Corruption Court, which serves as a special court within the circle of the Court of General Jurisdiction, the authorities of which are to examine and pass judgments on corruption crimes prosecuted by CEC;

- with respect to Article 2 *juncto* Article 3 *juncto* Article 20 of the CEC Law deemed by Applicant I as violating the principles and concept of a rule of law state, the Government is of the opinion that not all state

institutions must be related in the constitution. The establishment of CEC is in line with Article 24 Paragraph (3) of the 1945 Constitution that reads, “other institutions the function of which relates to judicial authority shall be regulated by law”. In addition to that, the establishment of CEC is based on the reality that corruption in Indonesia has been widespread and systematic as such resulting in violations to the people’s economic and social rights. Corruption has become an extraordinary crime that the eradication thereof requires extraordinary measures;

- with respect to Article 6 sub-article c of the CEC Law deemed by Applicant I as disorganizing the Indonesian legal system because of the accumulation of the *due process of law* function, the Government is of the opinion that the provisions of Article 6 of the CEC Law are intended to prevent overlapping legal enforcement authorities. The granting of authorities to CEC, as set forth in Article 6 sub-article c, is intended to maximize the eradication of corruption;

- with respect to Article 11 sub-article b of Law of CEC deemed by Applicant II as causing legal uncertainty and injustice, the Government is of the opinion that the aforementioned provisions are intended to limit the cases that may be handled by CEC in order to prevent overlapping with other law enforcers (Police and Public Prosecutor’s Office);

- with respect to Article 12 Paragraph 1 sub-paragraph a, deemed by Applicant I as castrating, disrupting, and intimidating the freedom to search for, obtain, and process information, the Government is of the opinion that the authorities of CEC to record and wiretap the conversation of persons alleged of committing corruption crimes (not everybody) are merely intended to reveal corruption crimes because it is difficult to do that in a conventional manner. In addition to that, the rights derogated due to the application of such article do not include the *non derogable rights*;

- with respect to Article 40 of the CEC Law, deemed by Applicant II as violating the principles of equality before the law, legal certainty, and discriminative in nature, the Government is of the opinion that the article is in fact intended to prevent CEC, which possesses extensive and wide-ranging authorities, from abusing its authorities by using SP3;

- with respect to Article 72 of the CEC Law, deemed by Applicant III as causing legal uncertainty, the Government is of the opinion that the aforementioned article provides for the enactment of the CEC Law, namely as of December 27, 2002. Therefore, such provision actually provides a legal certainty;

- in addition to the matters described above, there are some articles of the CEC Law previously requested for substantiation. Therefore, the Government is of the opinion that the provisions of Article 60 of the Law on Constitutional Court (CC Law) apply so that no re-substantiation may be conducted on the aforementioned matters;

Besides giving statements through its attorney-in-fact, *in casu* the Minister of Law and Human Rights, the Government has also provided statements and conclusions on the *a quo* application through the Attorney General's Office, principally stating and confirming the Government's opinion that there is no issue of non-constitutionality in the articles of the CEC Law requested for substantiation;

2. Statements of DPR (House of Representatives)

DPR, in its three written statements directed to the three Applicants and accepted at the Clerk's Office of the Court on November 7, 2006, states that conventional law enforcement to eradicate corruption crimes has evidently faced various obstructions for all this time. Therefore, it is necessary to have an extraordinary law enforcement method by means of establishing a special institution that has extensive authorities, is independent, and free from any influence in its endeavors to eradicate corruption crimes, the implementation of which is optimal, intensive, effective, professional, and sustainable. Subsequently, specifically on the three a quo applications, DPR states as follows:

- with respect to Article 1 Sub-article 3 *juncto* Article 53 of the CEC Law, deemed by Applicant II as violating the principle of judicial authority independence and causing legal uncertainty, DPR is of the opinion that the CEC is established as a *trigger mechanism* for other existing law enforcers, namely the Police and Public Prosecutor's Office, so that the position of CEC does not overlap and assumed all the functions performed by the two existing institutions. In other words, CEC only carries out coordinative function. Likewise, the authority to conduct examination in a court hearing is not held by CEC, but the Anti Corruption Court existing within the circle of the Court of General Jurisdiction, which of course has full independence;

- with respect to the term "examination in a court hearing" in the general provisions, it explains what is included in the succession of corruption crime eradication, which is an undivided action starting from the coordination efforts, supervision, monitoring, inquiry, investigation, prosecution, up to the examination in a court hearing. The eradication process should not be stopped at the inquiry phase. The problem is that the meaning thereof is always divided for all this time resulting in a debate on who is responsible for corruption eradication -is it the inquire or the investigator?- whereas it is actually the responsibility of all Indonesian people for the enforcement of law and the realization of a country that is clean and free from collusion, corruption, and nepotism;

- with respect to the establishment of the Anti Corruption Court, which is not based on a separated law, it does not automatically mean that there is an integration of executive and judicative powers under CEC because there is a clear division of function between the both. In addition to that, in accordance with Article 24 Paragraph (3) of the 1945 Constitution stating that other institutions the function of which is related to judicial authority shall be regulated in laws, there is no requirement for a separate law to establish a judicial institution;

- referring to Article 54 of the CEC Law, it is not expressly stated that the Court for Criminal Crimes stands alone, but is within the circle of the Court of General Jurisdiction. Meanwhile, the ad hoc judges are appointed by the President based on the proposal of the Supreme Court. The law only provides for the establishment of the Court for Criminal Crimes while the CEC Law grants the authorities to judicative and executive institutions;

- with respect to the authority of CEC to conduct inquiry, investigation, and prosecution on corruption crimes “drawing the attention of and disturbing the community” (Article 11 sub-article b of the CEC Law), it is intended to expedite the performance of the required acts (inquiry, investigation, and prosecution) in order to prevent further potential disturbance and confusion in the community. The measurement for the term “disturbing the community” may not be interpreted narrowly due to

its high complexity that covers laws, economy, social affairs and institutional morality that engulf all layers of the community and endanger the existence of the Unitary State of the Republic of Indonesia;

- with respect to the authority of CEC to wiretap and record conversations [Article 12 Paragraph (1) sub-paragraph a], it is in fact the implementation Article 28D Paragraph (1) *juncto* Article 28G Paragraph (1) *juncto* Article 28J of the 1945 Constitution so that CEC has the “teeth” to deter the perpetrators of corruption effectively and efficiently and the results of such wiretapping may be followed up in a legal process. Such tapping by CEC constitutes the implementation of Article 26 of the CEC Law of the elucidation of which sets forth that the authority includes the authority to perform wiretapping. Because Article 26 of the CEC Law sets forth about wiretapping constituting a method to obtain evidences that does not exist in the Indonesian Criminal Code and highly affects the verification of corruption crime case, the provisions thereof are added Article 26A of Law Number 20 Year 2001 regarding the Amendment to the Law on Corruption Crimes. Conversation recording is not applicable to all people, but only to people that are under inquiry, investigation, and prosecution. Meanwhile, wiretapping must be performed by meeting the applicable procedure, secretly, and should not, to the best possible extent, disturb or be done unbeknown to the parties wiretapped. Such wiretapping

must be related to the case handled and is not permitted without any correlation, limitation, and must also be accountable by CEC not only based on the CEC Law but also other binding regulations;

- with respect to the absence of CEC's authority to issue SP3 (Article 40 of the CEC Law), it is explained that the CEC Law is the *lex specialis* of the Indonesian Criminal Code and the Law on Corruption Crime, in the sense that for all matters not provided for in the CEC Law, the other two laws apply. If the authority to issue SP3 is also granted to CEC, then CEC would not be different from other conventional institutions (Police, Public Prosecutor's Office), whereas CEC is established as a non-conventional effort;

- with respect to Article 72 of the CEC Law, deemed by Applicant III as related to legal uncertainty, DPR states that this provision is not a retroactive principle so that it is not related to legal uncertainty because the law used for prosecution remains Law No. 31 Year 1999, as amended with Law No. 20 Year 2001 regarding the Eradication of Corruption Crimes.

3. Statements of CEC's Related Party

CEC's Related Party, in its statements in the hearing dated September 19, 2006 as accompanied by written statements, states that – before explaining its opinion on the articles in the CEC Law is of the opinion that

Applicant I, Applicant II, and Applicant III does not meet the legal standing requirements as intended in Article 51 Paragraph (1) of the Constitutional Court Law. Subsequently, The CEC's Related Party states, among other things, as follows:

- regarding Article 1 Sub-article 3 related to Article 53 of the CEC Law, deemed by Applicant II as violating the principle of judicial authority independence and causing legal uncertainty and injustice, CEC states that Article 1 Sub-article 3 of the CEC Law sets forth the definition of "the eradication of corruption crimes" so that it is not the basis for the establishment of the Court for Criminal Crimes. The establishment of the Court for Criminal Crimes based on the CEC Law is not contradictory to the 1945 Constitution because the Court for Criminal Crimes is within the circle of Court of General Jurisdiction that it remains under the Supreme Court in accordance with the provisions of Article 24 Paragraph (2) of the 1945 Constitution. The establishment of a special court within the circle of Court of General Jurisdiction is possible based on the provisions of Article 24 Paragraph (3) of the 1945 Constitution. In Law Number 2 Year 1986 *juncto* Law Number 8 Year 2004, Article 8 clearly sets forth that special courts may be established within the circle of Court of General Jurisdiction as regulated by laws.";

- with respect to Article 2 *juncto* Article 3 *juncto* Article 20 of the CEC Law, deemed by Applicant II as violating the principle of a rule of law state, CEC states that the state administration system may not be assessed only in a normative manner from the perspective of the constitution. It can be broadly interpreted because not all state institutions are regulated in the constitution. It does not mean that an institution is not constitutional in nature only because it is not regulated in the constitution because the constitutional nature of an institution can be observed from its function in implementing its duties and authorities on behalf of the state. The existence of some state institution is set forth in the constitution and some others are not set forth in the constitution but are established based on laws, for example CEC established based on Law Number 30 Year 2002 as mandated in Article 43 of Law Number 31 Year 1999 regarding the Eradication of Corruption Crimes.

- with respect to Article 6 sub-article c of the CEC Law, deemed by Applicant I as giving rise to overlapping and not providing legal certainty, CEC states that the CEC Law is a law that regulates about “an institution” – constituting the mandate of Article 43 of Law Number 31 Year 1999 – and contains, among other things, the duties, authorities, obligations, position, responsibilities, composition, and organization of such institution. Article 6 of the CEC Law setting forth the institutional duties and authorities of CEC is the realization of the

provisions of Article 43 of Law Number 31 Year 1999. With CEC's coordinative and supervisory authorities, as set forth in Articles 7, 8, 9, and 10 of the CEC Law, there is no possibility for overlapping or potential conflict among CEC, the Police, and Public Prosecutor's Office in conducting inquiry, investigation, and prosecution. The inter-institutional relation and mechanism of CEC, Police, and Public Prosecutor's Office in conducting inquiry, investigation, and prosecution on corruption crimes are set forth clearly and in details in the provisions of Article 50 of the CEC Law. Therefore, legal certainty is realized;

- with respect to Article 11 sub-article b of the CEC Law, deemed by Applicant II as causing legal uncertainty and injustice, CEC states that there is indeed no official elucidation in the CEC Law on the standard for the term "drawing the attention of and disturbing the community" in Article 11 sub-article b of the CEC Law. However, it cannot be interpreted immediately as causing legal uncertainty and injustice. In this matter, according to CEC, the drafter of the law give a space to find the law (*rechtsvinding*) through the decision of judges to obtain legal certainty and justice. In addition to that, Article 11 limits the cases that may be handled by CEC, or serving as *lex specialis*, to avoid overlapping;

- regarding Article 12 Paragraph (1) sub-paragraph a of the CEC Law, deemed by Applicant I as violating its constitutional rights as set forth in Article 28F of the 1945 Constitution and the constitutionality of which is questioned by Applicant II, CEC states that the constitutional rights intended by Applicant I are not categorized as derogable rights pursuant to Article 28I Paragraph (1) the 1945 Constitution, so that they may be limited based on laws, as intended in Article 28J Paragraph (2) of the 1945 Constitution. The forms of such limitation, among other things, are set forth in Article 42 Paragraph (2) of Law Number 36 Year 1999 regarding Telecommunications stating as follows: “For the purpose of criminal proceeding, telecommunication operator may provide information required upon the request of the inquirer for certain crimes in accordance with applicable laws”. Based on the aforementioned provision, CEC’s authority to perform wiretapping and record conversation, as set forth in Article 12 Paragraph (1) sub-paragraph a of the CEC Law, serves an exception of Article 40 of Law Number 36 Year 1999 regarding Telecommunications;

- with respect to Article 40 of the CEC Law, deemed by Applicant II as violating the principles of equality before the law, legal certainty, and discriminative in nature, CEC states that the article has been requested for substantiation to the Constitutional Court and the Constitutional Court states in its decision Number 006/PUU-I/2003 that

it is not contradictory to the 1945 Constitution. Therefore, it cannot be re-substantiated;

- with respect to Article 72 of the CEC Law, deemed by Applicant III as causing legal uncertainty, according to CEC, the Applicant mistakenly relates Article 72 of the CEC Law to retroactive restriction because retroactive restriction only applies in material criminal law while Article 72 of the CEC Law relates to procedure or procedural law. The legal proceeding undergone by Applicant III does not violate the retroactive restriction because the crime committed by Applicant III occurred following the applicability of the material criminal law, namely Law Number 31 Year 1999 *juncto* Law Number 20 Year 2001.

Also considering that the Court has heard the verbal statements and read the written statements of the experts presented by CEC's Related Party, as completely described in the Principal Case, principally stating as follows:

1. Prof. Dr. Romli Atmasasmita, S.H., LL.M

An expert in international criminal law from Padjadjaran University, in the hearing dated November 21, 2006 as accompanied by written statements, states that:

- whereas the existence of CEC as "another institution the function of which relates to judicial authority" has a long historical background on corruption eradication, namely since 1960s, in the development of the

supporting laws and the establishment of institutions supporting the implementation of the laws. In addition to that, the formation of laws and regulations with respect to the eradication of corruption crimes must be related to the Indonesian criminal system inheriting the Civil Law System, which still prioritizes codification. The weakness of codification, as realized by the drafters of the Indonesian Criminal Law, is that it is not always capable of accommodating the continuously developing legal needs of the community. Therefore, the drafters of the Indonesian Criminal Law opened the opportunity to form special criminal laws and regulations outside the Indonesian Criminal Code, as set forth in Article 103 of the Indonesian Criminal Code (KUHP). in the event of conflict between KUHP and a special law formed based on Article 103 of KUHP, the expert is of the same opinion with Remelink that in such condition, the principle of *lex specialis derogat legi generali* applies (special laws prevail over general laws) and the principle of *lex porterior derogat legi priori* (laws issued later prevail over contradicting laws issued previously);

- whereas the CEC Law, serving as the legal basis for the establishment of CEC, is in line with Article 103 KUHP, including special exceptions not restricted by Article 103 of KUHP, both in material and formal legal provisions;

- whereas, according to the expert, the development of the formation of the CEC Law, with all the contents therein, that constitutes a special criminal law outside KUHP, besides fulfilling the legality principle reinforced with the principles of *lex specialis derogat legi generali* and *lex porterior derogat legi priori*, is also met the sociological and teleological aspects for the formation of laws and regulations;

- whereas, according to the expert, if all the purposes and objectives of the formation of the CEC Law are scrutinized by understanding the basis of the considerations and related to the formation procedure in accordance with Law Number 10 Year 2004 regarding the Formation of Laws and Regulation, there is no single legal gap, both in the form and substance, that deviates from the 1945 Constitution. In addition to that, all of the provisions, except those stated not binding under the decision of the Constitutional Court, have met the legal certainty and legal protection in line with Article 28D Paragraph (1) of the 1945 Constitution;

- whereas insofar as it relates to the implementation of the CEC Law, according to the expert in reference to the *ultra vires* doctrine, there is no fact that the acts of CEC's inquirers or general prosecutor exceed the limit of authority set forth in KUHAP or the exceptions as set forth in the CEC Law. Even if there is a fact, it is an implementation issue

and only the Supreme Court has the authority to perform the substantiation;

- whereas the provisions on wiretapping (Article 12 sub-article a of the CEC Law), according to the expert, are not contradictory to Article 28F of the 1945 Constitution. The aforementioned allegation of contradiction with the 1945 Constitution must be related to Article 6 sub-article c of the CEC Law and reinforced with Article 28J of the 1945 Constitution;

- whereas with respect to the non-retroactive principle in criminal law, after explaining the development since 1936 until now, the Expert concludes that the aforementioned principle still focus on material criminal law and not material criminal law[?]. Article 72 of the CEC Law has nothing to do with the retroactive restriction because corruption has been criminalized since 1971. The investigation and prosecution process carried out by CEC on corruption crimes prior to the establishment of CEC is actually an administrative *projustisia* policy based on the CEC Law;

- whereas, with respect to the element of “drawing the attention of and disturbing the community” in Article 11 sub-article b of the CEC Law, according to the expert, it is the concrete form of a thought explicitly confirmed in the “Considering” part of sub-article a of the CEC Law, which states, among other things, that corruption crimes constitute

violations of social and economic rights of the general public so that the participatory role of the community is as important as the role of law enforcers. Consequently, community participation is specifically set forth in the CEC Law (Chapter V). Therefore, the inclusion of the element of “drawing the attention of and disturbing the community” in Article 11 sub-article b of the CEC Law is in fact in line with Article 28F of the 1945 Constitution;

2. Prof. Dr. Komariah Emong Sapardjaja, S.H.

An expert in criminal law from Padjadjaran University, in the hearing dated November 21, 2006, as accompanied with written statements, states as follows:

- whereas the enactment of the CEC Law cannot be separated from the legal politics of Indonesia -as a nation and state- to eradicate corruption crimes to a greater degree. The birth of the CEC Law, besides due to the mandate of Law Number 31 Year 1999, as amended with Law Number 20 Year 2001, is also caused by the changed paradigm of the illegality of corruption crimes, namely as “violations to economic rights of the general public”. The existence of CEC, as expressly set forth in the CEC Law, is a form of the legal politics of the eradication of corruptions in the country;

- whereas CEC is an independent agency often classified as a state commission. Independent state commissions are state organs that are ideally independent and therefore positioned outside the executive, legislative, and judicative branches of power but actually have the “combined” functions of the three. After explaining the comparison with other countries and the opinions of several scholars regarding the characteristics of independent state commissions, the expert is of the opinion that CEC has the aforementioned characteristics or criteria. Therefore, the existence of CEC is not outside the state administration system but in fact is placed juridically within the state administration system;

- with respect to the existence of the Court for Criminal Crimes, the expert is of the opinion that the argument of the Applicants that the Court for Criminal Crimes is a part of the executive by referring to Article 53 of the CEC Law is not correct. By relating the provisions of Article 24 Paragraph (2) of the 1945 Constitution, Article 10 Paragraph (2), Article 15 Paragraph (1), and Elucidation of Article 15 Paragraph (1) of Law Number 4 Year 2004 regarding Judicial authority and the facts found in the field, the expert states that the Court for Criminal Crimes is a part of the judicative power;

- with respect to Article 11 *juncto* Article 53 of the CEC Law assumed by Applicant II as causing discriminative treatments, the expert –after

analyzing and correlating the provisions of Article 11, Article 8 Paragraph (2), Article 9, Article 54 Paragraph (2) and Paragraph (3), Article 53, and Article 54 of the CEC Law – is of the opinion that the aforementioned assumption of Applicant II is not correct. The separation of the handling of corruption cases through the Court for Criminal Crimes or the public prosecutor's office must be viewed in the context of confirmation posing certain conditions in handling corruption cases in order to expedite corruption eradication, all of the foregoing not in the context of discrimination but in the context of confirmation with the purpose of law enforcement of corruption crimes;

- with respect to Article 40 of the CEC Law not granting an authority to CEC to issue SP3 associated by Applicant II to the violation of the principle of presumption of innocence, the expert is of the opinion that: first, the provisions of Article 40 of the CEC Law serve as a *prudential and professional principle* to determine a person as a suspect because when a person is determined as a suspect in a corruption case by CEC, it gives rise to a consequence that the person will be brought up to the court. This principle becomes the momentum of circumspection for inquirers before stipulating the investigation process in a case. CEC also has a special mechanism to stop a case, namely in the event that the inquirers do not find sufficient preliminary evidences [Article 44 Paragraph (3) of the CEC Law]; second, the *crime control model* in the criminal judicial system in Indonesia may not be contradicted to the

principle of presumption of innocence. The principle of presumption of innocence serves as a guide for law enforcement officers on how to follow up and set aside the principle of presumption of guilt in their conduct toward the suspect. The point is, according to the expert, that the principle of presumption of innocence is legal normative in nature and is not oriented to the outcome, while the principle of presumption of guilt is descriptive factual in nature, which means that based on the existing facts, the suspect will be eventually declared as guilty. Therefore, the suspect must undergone a legal process from the inquiry stage, investigation, prosecution, up to the hearing stage and it should not be stopped in the middle;

- with respect to wiretapping and recording of conversation [Article 12 Paragraph (1) sub-paragraph a of the CEC Law], the expert is of the opinion that – besides quoting the legal considerations of the decision of the Constitutional Court Number 006/PUU-I/2003 – Article 12 Paragraph (1) sub-paragraph a of the CEC Law does not violate the constitutional rights citizens because no party is prohibited from communicating and obtaining information pursuant to Article 28F. With regard to the wiretapping by CEC, according to the expert, it is in the context of finding evidences to make clear a crime or known in the verification law known as *bewijsvoering* – literally meaning explanation on the methods to submit evidences to judge at a court. The expert also states that in countries using the *due process model*,

bewijsvoering only focus on formal matters, in which a suspect is often released by a court in a pre-court-hearing if the evidences are gathered unlawfully. It is confirmed by the expert that the authority to evaluate on the lawfulness of evidences are held by the court examining the case and it is performed on a case-by-case basis;

- with respect to the phrase “drawing the attention of and disturbing the community” in Article 11 sub-article b of the CEC Law, deemed by Applicant II as causing legal uncertainty, the Expert is of the opinion that the phrase cannot be immediately interpreted based on a certain amount or degree, especially based on press opinions only, because it truly involves the interest of the community harmed, which is spreading, systematic, and causing social and economic instability;

- with respect to the non-retroactive principle, in relation to the argument of Applicant III regarding Article 72 of the CEC Law deemed causing legal uncertainty, the Expert, principally, is of the opinion that the principle is generally applicable in material criminal law. The Expert also makes a comparison to the Transitional Provisions in Article 87 of the Constitutional Court Law with respect to the assignment of applications that have been received by the Supreme Court but have not been decided. It means that the Constitutional Court is authorized to decide applications that has existed prior to its establishment.

Considering whereas after considering the testimonies of all parties as have been described above along with the evidences presented by the Petitioners, the Court will then state its opinion regarding articles of the CEC Law being petitioned for judicial review in a quo petition. However, previously the Court deems it is necessary to confirm some matters as follows:

Whereas, in the life of every state claiming itself as a democratic rule of law state and democratic state based on law, there will always be conflict of interests which both are fundamental, namely interest to establish law (regulation) in order to secure and ensure the operation of legal system in the community as well as to protect community (public) interests and interest to maintain the rights or individual liberty as inherent element in a democratic rule of law state and democratic state based on law;

Whereas, as a consequence of the claim as a democratic rule of law state and democratic state based on law, as confirmed by Article 1 Paragraph (2) and Paragraph (3) of the 1945 Constitutions, it does not only mean that legal establishment process and its subject matter *(in casu law)* must comply with democratic principles, but it also means that democratic practices must be in compliance with principles of the rule of law state (*rechtsstaat*, rule of law) placing the 1945 Constitution as the supreme law. Therefore, the law, both its establishment process and its subject matter can be reviewed against the constitution as the supreme law;

Whereas, the authority to hear and decide upon a petition for judicial review on law against the 1945 Constitution, as confirmed by Article 24C Paragraph (1) of the 1945 Constitution includes a constitutional mandate to the Court to serve as the guardian of the Constitution. In connection therewith, the Court must ensure that there is no law violating individual freedoms or constitutional rights of the citizens for the purpose of creating legal system and protecting public interests solely. However, on the other side, the Court must also confirm that matters truly constituting public interests will not be set aside for the purpose of protecting individual freedoms and constitutional rights of the citizens;

Whereas, therefore all parties, especially the Court, must be of the opinion that every law is constitutional until there is an evidence through judicial process before the Court that the related law is unconstitutional. Therefore, this is not in line with the democratic rule of law state principles if the parties feeling their constitutional rights are violated by the implementation of a law and filing a petition for judicial review on law before the Court, in an a priori manner is deemed as unethical manner. The 1945 Constitution guarantees their rights, and the 1945 Constitution also provides the facilities for defending such rights before the Court;

Considering whereas, based on all of the aforementioned descriptions and considerations, the Court furthermore will consider arguments of the Petitioners regarding the articles of the CEC Law being petitioned as follows:

- **Article 2 of the CEC Law *juncto* Article 20 of the CEC Law.**

Article 2 of the CEC Law reads, "*The Commission for the Eradication of Criminal Acts of Corruption shall be established hereunder which hereinafter shall be referred to as the Commission for Corruption Eradication."*

Article 20 of the CEC Law reads, *"(1) The Commission for the Eradication of Criminal Act of Corruption shall be responsible to the public for the implementation of its duties and shall deliver its report transparently and periodically to the President of The Republic of Indonesia, the People's Legislative Assembly of The Republic of Indonesia and the State Audit Board. (2) Public accountability as intended in paragraph (1) shall be performed with the following methods: a. Mandatory audit on financial performance and accountability in accordance with its work program; b. issuing annual report; and c. opening information access."*

Petitioner II argued that Article 2 *juncto* Article 20 of the CEC Law violates the principles and concepts of rule of law state and therefore it is contradictory to Article 1 paragraph (3) of the 1945 Constitution because, according to the Petitioner II, both provisions have disrupted the state administration system.

With respect to the aforementioned arguments of Petitioner II, the Court is of the following opinion:

- whereas in current development of state administration system, as reflected in the provisions of the positive state administration law in many countries, particularly since the 20th Century, the existence of state commissions such as CEC has become a common practice. The classic doctrine regarding segregation of state power into three branches has now been far developed, among others, as indicated by the adoption of state commission institutionalization which in some countries are in the form of quasi state institutions having the authorities to perform state authorities functions. On the contrary, the provision of Article 20 of the CEC Law, which was argued as unconstitutional provisions by the Petitioner II, generally reflects the characteristics of such state commissions. On one hand, the existence of a state institution, in order to qualify as a state institution must not always be established under the order or must be stated in the constitution, but may also be established upon the order of a law or even subordinate rules and regulations (please refer to Decision of the Constitutional Court Number 005/PUU-I/2003 regarding Petition for Judicial Review on Law of The Republic of Indonesia Number 32 Year 2002 regarding Broadcasting). On the other hand, mentioning or regulating a state institution in the constitution does not always indicate legal qualifications that the state institution has more important position than the other state institutions established by other than a constitutional order. Furthermore, just because a state institution is

regulated or mentioned in the constitution, it does not automatically indicate that such state institution is equal to other state institutions which are also regulated or mentioned in the constitution (*please refer to* Decision of the Constitutional Court Number 005/PUU-IV/2006 in a petition for Judicial Review on Law of The Republic of Indonesia Number 22 Year 2004 concerning Judicial Commission and Law of The Republic of Indonesia Number 4 Year 2004 regarding Judicial Authorities);

- whereas the CEC was established in the context of creating a fair, prosperous, and safe society based on Pancasila and the 1945 Constitution of the Republic of Indonesia, as the eradication of criminal acts of corruption has not been performed optimally. Therefore, the eradication of criminal acts of corruption needs to be improved in a professional, intensive, and sustainable manner because corruption has inflicted losses to the state finance, state economy, and has also disrupted the national development. Meanwhile, the institution handling criminal acts of corruption cases has not functioned effectively and efficiently in eradicating the criminal acts of corruption, so that the establishment of institution such as CEC can be deemed constitutionally important and such institution can be classified as a state institution the function of which relates to the judicial authorities as intended in Article 24 Paragraph (3) of the 1945 Constitution.

Based on the aforementioned considerations, the arguments of Petitioner II insofar as it relates to unconstitutionality of Article 2 and Article 20 of the CEC Law are unfounded;

- **Article 3 of the CEC Law** reads, "*The Commission for the Eradication of Criminal Acts of Corruption shall be a state institution which is independent and free from the influence of any branch of power in performing its duties and authorities."*

  The Petitioner II argued that phrase "is independent and free from influence of any branch of power" in Article 3 of the CEC Law indicates that the CEC has an absolute power;

  With respect to the aforementioned argument of the Petitioner II, the Court is of the following opinion:

  - whereas the formulation of Article 3 of the CEC Law has eliminated the possibility of other interpretation than the one formulated in the provisions of the article, namely that CEC independency and freedom from the influence of any branch of power shall be in performing its duties and authorities. There is no constitutionality issue in the formulation of Article 3 of the CEC Law;

  - Whereas the confirmation regarding the CEC independency and freedom from the influence of any branch of in performing its duties

and authorities is important in order to prevent doubts among the CEC officers. This is because pursuant to the provisions of Article 11 of the CEC Law, the most potential parties to be investigated, inquired, or prosecuted by the CEC for criminal acts of corruption are particularly law enforcers or state administrators. In other words, the most potential parties to be investigated, examined, or prosecuted by the CEC in relation to criminal acts of corruption are the parties holding or executing state authorities.

Based on the abovementioned considerations, the argument of Petitioner II insofar as it relates to unconstitutionality of Article 3 of the CEC Law is unfounded.

- **Article 6 sub-article c of the CEC Law** reads, "*The Commission for the Eradication of Criminal Acts of Corruption shall have the duties of: a. ...; b. ...; c. conducting investigation, inquiry, and prosecution on criminal acts of corruption;*"

The Petitioner I argued that as the consequence of provisions of Article 6 sub-article c of the CEC Law Petitioner I has been subjected to inquisition *in inquisitoir* manner which has been abandoned since the application of Law Number 8 Year 1981 (KUHAP). The provisions of Article 6 sub-article c of the CEC Law, according to the Petitioner, has also made CEC to become a superbody. Therefore, according to the Petitioner, Article 6 sub-

article c of the CEC Law has violated the constitutional rights of the Petitioner with respect to legal certainty.

With respect to the aforementioned argument of the Petitioner, the Court is of the following opinion:

- whereas the Petitioner argument saying that as a consequence of the provision of Article 6 sub-article c of the CEC Law he had been subjected to inquisition is not accurate, as during the investigation process by the CEC, the Petitioner was treated as subject who can be accompanied by a lawyer (advocate) transparently *(acqusatoir)*. Even if it is true – quod non – the Petitioner was examined in inquisitorial manner, such matter was not caused by the norms described in the aforementioned Article 6 sub-article c, but due to misapplication of the norms. Article 6 sub-article c of the CEC Law is merely a part of provisions regulating the duties of the CEC;

- whereas, the fact that the inquiry or legal process on the Petitioner was, in certain matters, different from the procedures stipulated in the Criminal Procedure was not caused by Article 6 sub-article c of the CEC Law but rather by Article 39 Paragraph (1) of the CEC Law stipulating that, *"Investigation, inquiry, and prosecution of criminal acts of corruption shall be conducted based on the applicable criminal procedure law and based on Law Number 31 Year 1999 regarding Eradication of Criminal Acts of Corruption as amended by Law*

Number 20 Year 2001 concerning Amendments to Law Number 31 Year 1999 regarding Eradication of Criminal Acts of Corruption, unless stipulated otherwise in this Law." Therefore, the Petitioner has made mistake in identifying provisions which according to the Petitioner has violated his constitutional rights;

- whereas Article 6 sub-article c of the CEC Law, according to the Petitioner, has made the CEC to become a *super body*. The Petitioner argued, *".... with the application of Article 6 sub-article c of Law Number 30 Year 2002, the Commission for the Eradication of Criminal Acts of Corruption (CEC) has become a super body having authorities which should have been allocated for the National Police of The Republic of Indonesia (in relation to the authorities to conduct investigation and inquiry) and the Attorney General's Office of The Republic of Indonesia in relation to the authorities to conduct prosecution and as its direct consequence, the Petitioner had to undergo a process which was not based on due process of law when he was examined as a Suspect by the CEC, because there was NO any institution whatsoever conducting check and balance mechanisms to a series of action performed by the CEC.*" (*vide* petition of the Petitioner, page 3);

- whereas, the fact that the Petitioner was examined by the CEC in investigation, enquiry, and prosecution does not automatically result in

violation against due process of law principles, because in performing its duties CEC must also comply with the Criminal Procedure Law guaranteeing such principles of due process of law, as stipulated in Article 38 Paragraph (1) and (2) of the CEC Law;

Therefore, the argument of the Petitioner insofar as it relates to the provisions of Article 6 sub-article c us unfounded;

- **Article 11 sub-article b of the CEC Law** which reads, "*In performing the duties as intended in Article 6 sub-article c, the Commission for the Eradication of Criminal Act of Corruption shall have the authorities to conduct investigation, inquiry, and prosecution of criminal acts of corruption which: a. .....; b. attracts attention so as to cause public unrest; c. ...",* is deemed to have created uncertainty and injustice by Petitioner II due to the lack of certain standards regarding phrase "to cause public unrest" in the aforementioned Article 11 sub-article c of the CEC Law so it is vulnerable to abuse.

With respect to the aforementioned argument of the Petitioner II, the Court will give the following considerations:

Whereas legal norms formulated in writing into the articles or paragraphs of a law principally are proposition or statement consisting of a series of concepts or understanding. Therefore, a legal statement can only be understood correctly if there is a prior correct

comprehension of the concepts or understanding forming that statement. The problem is that a concept or understanding which is in the world of ideas *(wollen, sollen)* cannot create definition that can represent overall concept desired when they are verbalized into words. Therefore, statement or proposition made is then difficult to be understood. Of course, we cannot draw a conclusion that if this is the case that understanding or concept should not exist or would be better if it is eliminated with reason that it creates legal uncertainty. In legal context, such situation has become common practice instead of new matter. That is the reason of expanding study of legal interpretation. Therefore, in relation to the a quo petition, non-existent – or more exactly, difficulty – in determining standards regarding a matter, or circumstances, or action, or situation “causing public unrest” cannot be interpreted that the matter, circumstances, action, or situation causing such public unrest would become non-existent or be better if it is eliminated, or be declared unconstitutional. If this argumentation is adopted, the terms “public interests”, “public order”, “state interests”, and many more, which cannot be legally standardized, must be deemed non-existent or be better if they are eliminated and declared unconstitutional, because all of the aforementioned terms are vulnerable to abuse so that it creates uncertainty and injustice. The Court is not of the same opinion with this way of thinking. Because,

the difficulty of seeking for standards or legal definition of something “causing public unrest” does not eliminate the fact about the existence of such unrest;

- whereas, the Court does not have any intention to deny that difficulty in determining standards regarding matter, circumstances, action, or situation “causing public unrest” may potentially be abused. The Court’s intention is that this argument is not adequate to declare that provision of Article 11 sub-article b of the CEC Law is contradictory to the 1945 Constitution. If Article 11 of the CEC Law is read completely, it reads, “*In performing the duties as referred to in Article 6 sub-article c, the Commission for the Eradication of Criminal Acts of Corruption shall have the authority to conduct investigation, inquiry, and prosecution on criminal acts of corruption which:*

  a. *involving legal enforcers apparatus, state administrators, and other person having relation to the criminal acts of corruption conducted by legal enforces apparatus or state administrators;*
  b. *attracting attention causing public unrest; and/or*
  c. *related to state losses at least Rp.1.000.000.000 (one billion Rupiah)”*,

  therefore it is very obvious that the existent of words “and/or” after sentence “attract attention posing unrest for public” must be interpreted as requirement which cannot be eliminated in order to

provide authorities to the CEC in conducting investigation, inquiry, and prosecution of criminal acts of corruption set forth in Article 11 sub-article a which is accumulated with sub-article b or c or both (b and c). In other words, requirements set forth in sub-article a is absolute, while requirements set forth in sub-article b and sub-article c may be fulfilled either one or both. Meanwhile, if only sub-article b or sub-article c is fulfilled, or sub-article b and sub-article c, but requirements set forth in sub-article a is not exist then the CEC does have authorities to conduct investigation, moreover inquiry and prosecution. Therefore, if a person to whom an investigation, inquiry, or even prosecution by the CEC have been conducted, while only requirements set forth in sub-article b or c (or both) have been met, but requirements set forth in sub-article a is not fulfilled, therefore the related person may file objection before the court (because the CEC does not have authorities to issue Investigation/Prosecution Cessation Order) so that the judges decide that CEC does not have the authorities to conduct investigation, inquiry, or prosecution on criminal acts committed by the related parties. Similar objection can also be filed by a person if, for example, the CEC deems to have authorities because according to them requirements set forth in sub-article a and sub-article b have been met while according to the related person requirements set forth in sub-article b on the contrary have not been fulfilled, for

example by presenting expert witness to prove it. The decision on such matter shall fully be the judges or judicial competency within general jurisdiction. Therefore, the argument of Petitioner II stating that Article 11 sub-article b has created legal uncertainty, is not fully right. Legal certainty is continuously secured although the certainly shall only be obtained after judges have made decision which will evaluate whether the requirements of “causing public unrest” is met or not;

With respect to all aforementioned considerations, the Court is of the opinion that the argument of Petitioner II, insofar as it relates to Article 11 sub-article c of the CEC Law, is unfounded;

- **Article 12 paragraph (1) sub-article a of the CEC Law which** reads, “*In performing the duties of investigation, inquiry, and prosecution as intended in Article 6 sub-article c, the Commission for the Eradication of Criminal Acts of Corruption has authorities to: a. to tap and record conversations.....”*

With respect to petition of both Petitioner I and Petitioner II regarding unconstitutionality of Article 2 paragraph (1) sub-article a of the CEC Law, the Court deems necessary to confirm:

- whereas the intended article has ever been petitioned for judicial review filed by (at that time) the Commission for Examination of the Assets of State Administrators and a number of individual Indonesian

citizen with judicial verdict stated “petition is declared unacceptable” (vide Decision of the Constitutional Court Number 006/PUU-I/2003). Therefore, the provision of Article 60 of the MK Law is applicable and reads, *“With respect to content of paragraph, article, and/or part of the law have been reviewed, the judicial review cannot be re-petitioned”.* However, in accordance with the provisions of Article 41 Paragraph (2) of Regulation of the Constitutional Court Number 06/PMK/2005 concerning Guidelines on Litigation in Judicial Review on Law Case, condition as intended in Article 60 may only be excluded if there are *“different constitutionality reasons”* so that the content of paragraph, article, and/or part of a law which have ever been reviewed can be re-petitioned for judicial review. Article 41 Paragraph (2) of Regulation of the Constitutional Court Number 06/PMK/2005 reads, *”Notwithstanding the provisions of the abovementioned Paragraph (1), a petition for judicial review on law with respect to content of paragraph, article, and/or part similar to a case which has been decided by the Court can be re-petitioned for judicial review with different constitutionality requirements becoming reasons of related petition”.* Therefore, in relation to the a quo petition, it must be view if there are different constitutionality reasons in such a quo petition enable the Court considers the petition of Petitioners;

- whereas Decision of the Constitutional Court Number 006/PUU-I/2003, as mentioned above, in its legal considerations for deciding upon a

petition for judicial review on Article 12 Paragraph (1) sub-article a of the CEC Law stated, among others," .... *in order to prevent potential abuse of authorities to wiretap and record the Constitutional Court is of the opinion that it is necessary to stipulate a regulation providing terms and procedures of wiretapping and recording".* The aforementioned legal consideration of the Court is in accordance with provisions of Article 32 of Law Number 39 Year 1999 regarding Human Rights which reads, "*Freedom and secret in correspondence including communication through electronic facilities may not be interrupted, unless by the order of judges or other legal authorities in accordance with the provisions of rules and regulations."* The Court deems necessary to remind back the legal consideration of the Court in the aforementioned Decision Number 006/PUU-I/2003 as tapping and recording of the conversation constitute restriction of human rights, where such restriction can only be done by the law, as stipulated by Article 28J Paragraph (2) of the 1945 Constitution. The intended Law which should describe, among others, who has the authority to issue an order for wiretapping and recording of conversations and whether the order of wiretapping and recording of conversations may only be issued after adequate initial evidence are obtained, which means that wiretapping and recording of conversations is aimed to gather more evidence, or whether the wiretapping and recording of conversations may be performed to seek for adequate initial evidence. In accordance

with provisions of Article 28J Paragraph (2) of the 1945 Constitution, all of them must be regulated by law in order to prevent abuse for authorities violating human rights;

- whereas based on all of the abovementioned descriptions, and after reading the arguments conveyed by the Petitioners in relation to the petition for judicial review on Article 12 Paragraph (1) sub-article a of the CEC Law, it is evident that there is no “different constitutional reasons” in the arguments of the Petitioner, and the petition of the Petitioners concerning the unconstitutionality of Article 12 Paragraph (1) sub-article a of the CEC Law are unfounded;

- whereas although the petition of the Petitioner is unfounded, but as Article 12 Paragraph (1) sub-article a of the CEC Law relates to restriction of Human Rights, therefore in accordance with Article 28J Paragraph (2) of the 1945 Constitution, requirements and procedures of such wiretapping must be stipulated by law, whether in revision of the CEC Law or in other law;

- **Article 40 of the CEC Law** which reads, “*Commission for the Eradication of Criminal Acts of Corruption is not authorized to issue an Investigation/Prosecution Cessation Order in a criminal case of corruption*”.

  Petitioner II argued that the provision of Article 40 of the CEC Law contradicts the 1945 Constitution because it violates the presumption of innocence principle [Article 2 Paragraph (3) 1945 Constitution], violates

the principle of equal treatment before the law [Article 27 Paragraph (1) 1945 Constitution], as well as bring about legal uncertainty and it is also discriminative in nature [Article 28D Paragraph (1) and Article 28I Paragraph (2) 1945 Constitution]

With regard to the aforementioned argument of the Petitioner, the Court is of the following opinion:

- whereas Article 40 of the CEC Law has already been petitioned for review and also been decided by the Court as set forth in Decision Number 006/PUU-I/2003 with a verdict stating that petition was denied, so that the legal considerations as described for the petition for judicial review of Article 12 Paragraph (1) sub-paragraph (a) shall also applicable *mutatis mutandis* for the petition for judicial review of Article 40 of the CEC Law filed by Petitioner;

- whereas even though in the argument for the *a quo* Petition, as described completely in the Principal Issue of the case, it appears as if there is a difference between the Petitioner's argument in the a quo petition and the Petitioner's argument in Court Decision Number 006/PUU-I/2003 about the constitutional reason of Article 40 of the CEC law, but since the Court could not find a different constitutional reason filed by the Petitioner, therefore, the petition for judicial review of Article 40 of the CEC Law filed by the a quo Petitioner is unfounded;

- whereas, nevertheless, in order to avoid the emergence of doubt about the constitutionality of Article 40 of the CEC Law and also to prevent the possibility of the resubmission of petition for judicial review of the same provision in the future with any argument based on a different constitutional reason, the Court considers that it is necessary to clarify its standing with regard to the arguments presented by Petitioner II in this matter;

    a. It is a mistake to see and assess Article 40 of the CEC Law separately from the overall context of the other provisions of the CEC Law as well as the purpose and objective of the formation of CEC. By applying systematic and teleological interpretation, then there will appear a message that the lawmakers wanted to convey through Article 40 of the CEC Law, namely an order for the CEC to discontinue an inquiry to the investigation level, especially prosecution, if the CEC is not absolutely certain that the evidence is sufficient. The logic becomes clear when it is connected to the provision of Article 44 Paragraph (3) of the CEC Law which reads, "*In the event that investigators could not find sufficient initial evidence as intended in Paragraph (1), the investigators shall report it to the Commission for the Eradication of Criminal Acts of Corruption and the Commission for the Eradication of Criminal Acts of Corruption shall cease the investigation"*. The problem is that what would happen if

there is no crime as presumed and such matter is not known until the process has entered the investigation or prosecution stage, while the CEC has no authority to issue an Investigation/Prosecution Cessation Order. Will the investigators still refer the case to the prosecutors in the CEC, in the event that such situation is not known until the investigation stage? or will the prosecutors in the CEC still be obligated to file the case in accordance with the initial indictment to the court, if such condition is not known until the prosecution stage while it is actually not supported by sufficient evidence? In such a situation the Court is of the opinion that the CEC prosecutor is still obligated to bring the defendant before the court by filing a request to release the defendant. Such a case is better than giving the CEC the authority to issue an investigation/Prosecution Cessation Order, whether from the perspective of the defendant's interests, the public's interests, as well as the law enforcers' interests, in this case especially the investigators and the prosecutors of the CEC. From the perspective of the defendant's interests, he will obtain certainty of his innocence through the judge's decision, which is more accountable in terms of the forum and the process than if he obtained it through an investigation/Prosecution Cessation Order – which is deemed even by the lawmakers as frequent

"gameplaying" (please refer to the testimonies of the Government and People's Legislative Assembly in response to the petition for judicial review of the article). The reason is because a judge's decision is pronounced in a court open for the public. Meanwhile, from the perspective of public interests, the people can judge openly and objectively the reason of the request for the release of the defendant so that the people's sense of justice will also be protected. While from the perspective of the law enforcers, *in casu* the investigators and prosecutors of the CEC, such procedure will save them from the allegation of "gameplaying" (please refer to the testimonies of the Government and the People's Legislative Assembly in response to the petition of the a quo paragraph review). Accordingly, the credibility and integrity of the law enforcers will also be maintained before the public eyes;

b. with regard to the assumption of Petitioner II that they have been treated discriminatively if compared to those that have been processed through conventional procedure (by investigators of the Indonesian National Police and the Public Prosecutor's Office), the Court has the opinion that even if such different treatment can be considered as a form of discrimination, the cause of the condition is not Article 40 of the CEC Law, but other provisions instead, which is assessed

separately in other parts of this consideration. Article 40 is only a logical consequence of the specific characteristics of the corruption eradication procedure created by the lawmakers through the CEC Law;

c. in addition, it is inappropriate to make an issue of the lack of authority to issue an Investigation/Prosecution Cessation Order by the CEC based on the principle of presumption of innocence, because it is a principle that must be understood as an obligation for all parties not to treat a defendant as guilty insofar as the judge has not find him guilty. The burden of proof to prove the guilt of the defendant rests on the public prosecutor and the defendant is released from the burden to prove his innocence, unless if the principle of reverse authentification has been fully practiced. So long as there is no decision by the judge finding a defendant guilty, then his right and standing as a person that has not been found guilty of committing a crime is guaranteed and protected. This principle is still in effect regardless of the existence or nonexistence of the provision in Article 40 of the CEC Law;

Therefore, the Petitioner's argument so long as it relates to Article 40 has been found baseless.

- **Article 53 of the CEC Law *juncto* Article 1 Sub-article 3 of the CEC Law**

Article 1 Sub-article 3 of the CEC Law reads, *"Eradication of the criminal act of corruption is a series of actions to prevent and eradicate the criminal act of corruption through efforts of coordination, supervision, monitoring, inquiry, investigation, prosecution, and examination in court hearings, with public participation based on applicable laws and regulations."*

Article 53 of the CEC Law reads, *"A Criminal Case Court shall be established hereunder which shall have the duty and authority to examine and decide upon criminal acts of corruption based on the prosecution filed by the Commission for the Eradication of Criminal Acts of Corruption".*

Whereas Petitioner II argues that, if the provision of Article 1 Sub-article 3 is connected with Article 53 of the CEC Law and the preamble of the CEC Law point b stating, "*whereas the government institutions handling corruption crimes have not been functioning effectively and efficiently in eradicating criminal acts of corruption*" therefore, the *a quo* law places the Anti-Corruption Court as a part of the corruption eradication function, which is an executive function, not as a part of the judicial power. Therefore, according to Petitioner, it is difficult to expect that The Anti-Corruption Court can conduct its functions freely, independently and impartially. If it is true that the Anti-Corruption Court is a part of the judicial power, it should be established by a law which is separated from the law providing for a certain state institution, as have been in effect so far.

With regard to the Petitioner's aforementioned argument, the Court is of opinion:

- whereas the implementer of the judicial power, according to Article 24 Paragraph (2) of the 1945 Constitution, is a Supreme Court (and courts within the four court jurisdictions existing under the Supreme Court) and a Constitutional Court;

- whereas the courts from the four court jurisdictions as intended by Article 24 Paragraph (2) of the 1945 Constitution are the courts existing under the Supreme Court.;

- whereas, and accordingly, the establishment of special courts so long as they are still under one of the four court jurisdictions as regulated in Article 24 Paragraph (2) of the 1945 Constitution, is possible;

- whereas furthermore, Article 24A Paragraph (5) 1945 Constitution states, "The structure, status, membership and legal procedure of the Supreme Court as well as courts under its supervision shall be regulated by law". The phrase "regulated by law" in the aforementioned Article 24A Paragraph (5) of the 1945 Constitution means that the establishment of a court under the Supreme Court must be conducted by law. This is also in line with the provision of Article 15 Paragraph (1) of Law Number 4 Year 2004 concerning Judicial Authority as the implementation of Article 24A Paragraph (5) of the 1945 Constitution.

The aforementioned Article 15 Paragraph (1) reads, “Special courts can only be established within one of judicatures as intended in Article 10 which is regulated by a law”. The elucidation of the aforementioned paragraph reads, “Referred to as “special courts” in this provision, among others, are child court, commercial court, human rights courts, Anti-Corruption Courts, industrial relation court which are within the Courts of General Jurisdiction, and tax court in the courts of state administrative jurisdiction”. Although Law Number 4 Year 2004 concerning Judicial Authority was made after the CEC Law, similar provision has been included in article 10 Paragraph (1) (along with the Elucidation) of Law Number 14 Year 1970 concerning Principal Provisions of Judicial Authority. The provision of Article 10 Paragraph (1) reads, “*Judicial Authority shall be implemented by Courts within: a. General Jurisdiction; b. Religious Jurisdiction; c. Military Jurisdiction; d. State Administrative Jurisdiction”*. Meanwhile, the Elucidation reads, “*This law differentiates between four court jurisdictions where each has a certain adjudication authority and consists of Courts at the first and appellate levels. Religious, Military and State Administrative Courts are special courts, because they hear specific cases or address specific groups of people, whereas Court of General Jurisdiction is a court for the people in general for both civil and criminal cases. The differences in these four court jurisdictions,* ***do not eliminate the possibilities of differentiation/specialization in each jurisdiction,***

***for example in Courts of General Jurisdiction, it is possible to make a specialization in the forms of Traffic Court, Child Court, Economic Court, etc. by a law*.**"

- in addition, the phrase that reads *"regulated by a law*" in Article 24A Paragraph (5) of the 1945 Constitution also means that the structure, status, membership, and legal procedure of the Supreme Court as well as the courts under its supervision can not be regulated by other forms of statutes except law;

- whereas Article 53 of the CEC Law reads, *"A Criminal Case Court shall be established hereunder which shall have the duty and authority to examine and decide upon Criminal Acts of Corruption based on the prosecution filed by the Commission for the Eradication of Criminal Acts of Corruption".* The Anti-Corruption Court as intended in the aforementioned Article 53 of the CEC Law, according to Article 54 Paragraph (1) of the CEC Law, is under the Courts of General Jurisdiction. From the aspect of the lawmakers' intention to establish a Criminal Crime Court and place it in the jurisdiction of the Courts of General Jurisdiction, it is not contradictory to the 1945 Constitution. However, the problems are:

    - Whether or not Article 53 of the CEC Law which results in two judicial systems for handling criminal acts of corruption is contradictory to the 1945 Constitution;

- Whether or not the establishment of such a court (*in casu* Anti-Corruption Court) together in one law that regulates the formation of an institution that is not a judicial body (*in casu* The Commission for the Eradication of Criminal Acts of Corruption), as regulated in Article 53 of the CEC Law, is contradictory to the 1945 Constitution;

- Considering whereas Anti-Corruption Court according to the General Elucidation of the CEC Law states*,"…. In addition, to improve the efficiency and affectivity of law enforcement towards the criminal acts of corruption, this Law provides for the establishment of Anti-Corruption Court within the courts of general jurisdiction, which for the first time is established within the jurisdiction of the District Court of Central Jakarta. The aforementioned Anti-Corruption Court has the duty and authority to examine and decide upon criminal acts of corruption which shall be implemented by a panel of judges consisting of 2 (two) district court judges and 3 (three) ad hoc judges...*". Accordingly, Anti-Corruption Court is intended by lawmakers to be a special court, even though it is not stated explicitly in the CEC Law. However, if the Anti-Corruption Court is classified as a special court based only on the criteria that such Court specializes in handling criminal acts of corruption, in addition to a few other characteristics namely the structure of the panel of judges consisting of two district

court judges and three *ad hoc* judges, that must complete the aforementioned criminal act of corruption case within a period of 90 (ninety) days as from the filing of the cases [Article 58 Paragraph (1) of the CEC Law]. With such a specialized criteria, there are two courts in the same court jurisdiction, but with different legal procedure and structure of the panel of judges as well as different obligations to make decisions within a specific period of time, while this involves an act committed by persons who are equally charged with a criminal act of corruption, which is criminally liable by the same law, that can result in an extremely different final decision. The reality occurring in practice in district courts and anti-corruption court so far proves that there is a double standard in the effort to eradicate corruption through two different judicial mechanisms. Seen from the aspects considered above, Article 53 of the CEC Law that establishes two different institutions, clearly contradicts the 1945 Constitution. However, the establishment of the Anti-Corruption Court in the CEC Law and not by a separate law, even though it is technically less than perfect, does not automatically contradict the 1945 Constitution as long as the norms regulated in it are substantially not contradictory to the 1945 Constitution and the implications do not cause matters that contradict the 1945 Constitution. Article 24A Paragraph (5) of the 1945 Constitution reads, “The structure, status, membership and legal procedure of the Supreme Court and the courts under its supervision

shall be regulated by a law.” From the aspect of legislative techniques, the phrase “regulated by law” also means that the relevant matter must be regulated by statutes in the form of law, not in other forms of regulation;

- whereas accordingly Article 53 of the CEC Law has in fact contradict Article 24 Paragraphs (1) and (2), Article 24A Paragraph (5), as well as Article 28D Paragraph (1) of the 1945 Constitution;
- Whereas furthermore with regard to the petition of Petitioner that relates Article 53 with Article 1 sub-article 3 of the CEC Law, the formulation of which has been quoted above, saying that the provision contradicts the 1945 Constitution, the Court is of opinion that the argument of the Petitioner is unfounded. Article 1 Sub-article 3 of the CEC Law only contains the definition of the eradication of criminal acts of corruption that consists of both preventive and repressive aspects. Consequently, if we take a closer look on the definition contained in the aforementioned Article 1 Sub-article 3 of the CEC Law, we will find that the eradication of criminal acts of corruption consists of:

    a. preventive aspect, namely a series of action to prevent criminal acts of corruption, conducted through the efforts of coordination, supervision, and monitoring; and

b. repressive aspect, namely a series of action to eradicate criminal acts of corruption, conducted through efforts of inquiries, investigations, prosecutions, and court examinations;

In both of the aforementioned aspects, public participation is involved, the implementation of which is based on applicable laws and regulations;

- whereas the definition set forth in the general provisions seems to be contradictory to the 1945 Constitution because the Petitioner only sees the repressive side of the provision and later relates it to Article 53 of the CEC Law in such a way that it seems that the Anti-Corruption Court is a part of the CEC. The substance contained in the repressive aspect from the definition of the eradication of criminal acts of corruption from Article 1 Sub-article 3 of the CEC Law above is a depiction of the process of a criminal court for criminal acts of corruption, not about the formation of anti-corruption courts;

- whereas in judicial review of law against the constitution, in the event that there is a situation where there are two or more provisions connected to each other, the proof of unconstitutionality of one provision does not necessarily prove the unconstitutionality of the other provision. As it occurred in the a quo petition, the proof of the contradiction between Article 53 CEC Law and the 1945 Constitution

does not necessarily prove the contradiction of Article 1 Sub-article 3 of the CEC Law to the 1945 Constitution;

Whereas based on the considerations above, even though a Constitutional Judge is of a different opinion, the Court is of the opinion that the Petitioner's argument so long as it relates to the unconstitutionality of Article 1 Sub-article 3 of the CEC Law is unfounded.

- **Article 72 of the CEC Law** reads, *"This law shall come in effect as of the date of its enactment"*.

Petitioner III argued that Article 72 of the CEC Law violates the right of legal certainty as regulated in Article 28D Paragraph (1) of the 1945 Constitution.

With regard to the aforementioned argument made by Petitioner, the Court is of the following opinion:

- whereas the provision of Article 72 of the CEC Law which by Petitioner is argued to be contradictory to the 1945 Constitution is a closing provision that must exist in every law. According to the Court, the logical flow of the Petitioner is really odd because if described it will be as follows: the existence of article 72 of the CEC Law above, according to the Petitioner, results in legal uncertainty so that it must be found contradictory to the 1945 Constitution and declared as not having a binding legal force. In other words, it means that if the Article doesn't

exist then, according to the flow of logic of the Petitioner, there will be legal certainty. However, the situation that will occur if the Article does not exist will actually be that there's no legal certainty as we will not know when the aforementioned law (in casu the CEC Law) would come in effect. In other words, there is a fallacy made by the Petitioner a quo, because a certain matter is claimed by Petitioner as the cause of uncertainty (*in casu* Article 72 of the CEC Law) however, if the cause is eliminated, such action will lead to such uncertainty;

- whereas after reading the petition of the Petitioner, it seems that the actual intention of the Petitioner is as follows: the CEC Law, according to Article 27, comes into effect as of the date of its enactment, namely December 27, 2002. Meanwhile, the Petitioner has actually been investigated and prosecuted of having been involved in criminal acts the tempus delicti of which is before the entry into effect of the CEC Law. If such is the case, then the provision causing the investigation and prosecution of the Petitioner is not Article 72 of the CEC Law but rather another provision. However, the Petitioner did not file a petition for judicial review on such other provisions. Moreover, the placement of article 72 in the CEC Law is common in the formulation of laws to guarantee the legal certainty of its entry into force.

Therefore, the petition insofar as it is related to Article 72 of the CEC Law is ungrounded;

Considering whereas based on all of the aforementioned considerations, the Court is of the opinion that the petition, except the part related to Article 53 of the CEC Law concerning the Anti Corruption Court, is apparently not founded to be granted. Whereas the provisions of article 53 of the CEC Law are clearly contradictory to the 1945 Constitution. However, before determining the legal consequences on the binding legal force of Article 53, the Court needs to consider the following matters:

1. The legal consequences on the binding force power that binds Article 53 of the CEC Law have to be sufficiently considered so that judicial processes in the Anti Corruption Court on cases being handled would not be disrupted or cause legal problems;

2. The decisions made by the Court must not cause legal uncertainty (*rechtsonzekerheid*) which can cause problem in the handling or eradication of corruption crimes;

3. The decisions made by the Court must not also cause disincentive implications on the eradication of corruption which is the enemy of the Indonesian nation and society;

4. Revision of the CEC Law and the institutional arrangement of a special court needed for that purpose can not be conducted at once and requires sufficient time;

If Article 53 of the CEC Law which has been declared as contradictory to the 1945 constitution is at the same time declared as no longer having a binding legal force, the ongoing examination of corruption cases by the CEC and the Corruption Case Court will be disrupted or hampered because of the loss of legal basis. Such matter can disrupt the corruption eradication process and result in legal uncertainty which is not desired by the 1945 Constitution. Therefore, the Court must consider the need to provide time for a **smooth transition** process until the new regulation is formulated.

Considering whereas the Court is of the opinion that corruption which has caused losses to the social and economic rights of the Indonesian people as an extraordinary crime and a common enemy of the Indonesian nation as a whole. Thereby, the Court considers the targeted protection of basic rights to be achieved through the review of the relevant provisions by the Court as smaller in scale compared to the protection of social and economic rights of the people which have suffered considerable losses due to the acts of corruptions. Corruption has weakened the State's capacity to provide good public services and hindered the State from functioning effectively. Corruption has become a heavy economic burden as it creates high macro economic risks which are harmful to the financial stability, public security, law and order. Furthermore, it can also undermine the legitimacy and credibility of the State before the people;

Considering whereas by taking the aforementioned objective condition into account, even though Article 53 of the CEC Law is clearly contradictory to the

1945 Constitution, the Court feels that it is necessary to first describe the provisions and the legal effect related to the decision of the Court as follows:

- Article 47 of the Constitutional Court Law reads, ”*Decisions of the Constitutional Court shall have permanent legal force after being read out in a plenary session open to the public”;*

- Article 56 Paragraph 3 of the Constitutional Court Law reads, ”*In the event that the petition is granted as intended in paragraph 2, The Constitutional Court shall firmly declare the content of the paragraph, article, and/or part of the law contradictory to the 1945 Constitution of the Republic of Indonesia*”;

- Article 57 paragraph 1 of the Constitutional Court Law reads, ”*upon the decision of the Constitutional Court that declares that the content of articles, paragraphs and/or parts of a law contradictory to the 1945 Constitution, the content of the relevant paragraphs, articles or parts of the law shall no longer have binding legal force.”*;

- Article 58 of the Constitutional Court Law reads, ”Laws being reviewed by the Constitutional Court shall remain applicable before a decision is made declaring that the law is contradictory to the 1945 Constitution.”

Based on the above provisions, it can be concluded that the decision of the Constitutional Court acquires permanent legal force after being read out in a plenary session open to the public. This means that the decision is final in accordance with Article 24C of the 1945 Constitution. The legal effect of the

decision that declares that articles, paragraphs and/or parts of a law is contradictory to the 1945 and do not have a binding legal force comes into effect prospectively and not retrospectively immediately after the decision is announced in a plenary session open to the public. A law that is contradictory to the 1945 constitution is therefore considered non-existent and no longer applicable, and does not create rights and authorities and can not impose any obligations. Courts are bound to disregard the law that is contradictory to the 1945 Constitution.

However, that is only a general rule resulting from the f the unconstitutionality of a law. For a greater public interest as stated above, the Court feels that it is necessary to limit the legal consequence that arises from the statement of the unconstitutionality of a law. Such action has been taken by the Court in the Court Decision number 026/PUU-III/2005 dated March 22, 2006 concerning Judicial Review on Law of the Republic of Indonesia number 13 Year 2005 concerning the State Revenues and Expenditures Budget for fiscal year 2006, which only limits the legal consequence caused by the decision of the court as far as it concerns the highest limit of the Educational Budget.

Considering whereas to deal with such condition, the statesmanship and wisdom of all parties, especially the judges (*judicial wisdom and craftsmanship*) is very much needed. Therefore, limiting such legal consequence can be done by postponing the loss of the binding legal force of Article 53 which has been found to be contradictory to the 1945 Constitution in such a away by giving adequate time for the lawmakers to make the required revisions so that the law would be in

line with the 1945 Constitution. This is also intended so that the lawmakers can strengthen the overall constitutional basis needed for the establishment of the Commission for the Eradication of the Criminal Act of Corruption and the efforts for the eradication of corruption crimes;

Considering whereas the Court is of the opinion that the lawmakers have to immediately revise the CEC Law so as to be in line with the 1945 Constitution and make a law concerning the Anti Corruption Court as a special court and as the only judicial system for corruption cases, so that the dualism in the judicial system for corruption cases which is contradictory to the 1945 Constitution as mentioned above can be eliminated. The Revision of the CEC Law can also address the need to arrange for regulations on other matters, including the requirements and procedures for wiretapping as intended in article 12 paragraph 1 of the CEC Law which must be amended with regards to the above considerations.

Considering whereas in solving the two problems, as well the required institutional arrangements, the Court is of the opinion that the maximum time required for such purpose is three years. If the lawmakers can not meet the deadline, Article 53 of the CEC Law will no longer have binding legal force automatically. The revision of the law must have been completed before the formation of the new People’s Representative Assembly and Government resulting from the 2009 General Elections in order to strengthen the constitutional basis of the corruption eradication efforts. If after three years following the

pronouncement of this decision the law has not been revised to be in line with the 1945 Constitution especially with regard to the establishment of the Anti Corruption Court, the examination of all corruption cases will then become the jurisdiction of courts within the General Judicature;

Considering also, as stated above, the significant number of petitions filed for judicial review on the *a quo* law of the Commission for the Eradication of the Criminal Act of Corruption have to be received and considered as reasonable legal action that has to be respected to protect the rights guaranteed by the 1945 Constitution and must not be suspected as a form of unconstitutional fight back Denying the rights of the citizens to exercise their legal rights for seeking justice can be considered as a denial to the human rights and does not respect the principle of a nation of law. However, based on the fact that the CEC Law is one of the laws that is most often petitioned for review, so that the constitutionality of its key articles have been assessed by the Court, thus with this Decision, which requires the amendment of a quo law, without prejudice to the rights of the parties who feel that their constitutional rights are infringed by the application of the a quo law, , the Court is of the opinion that it will be more useful if all thoughts and aspirations intended to refine the materials of the a quo law are submitted to the lawmakers for a legislative review to strengthen the constitutional basis of the corruption eradication efforts. In such way, the certainty of the legal basis for the corruption eradication efforts would not be disrupted by the frequent petitions for review of the a quo law to the Court.

Considering whereas based on all of the above considerations, the Court is of the opinion that the petition can be granted as long as it concerns with the substance of Article 53 of the CEC Law and refuses the rest of the petitions.

In view of Article 56 Paragraph 2, Paragraph 3 and paragraph 5, Article 57 paragraph 1 and 3, and Article 58 of Law number 24 year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia year 2003 number 98, Supplement to the State Gazette of the Republic of Indonesia number 4316).

PASSING THE DECISION

To declare that the petition of Petitioner II is partly granted;

To declare that Article 53 of Law Number 30 Year 2002 concerning Commission for the Eradication of the Criminal Act of Corruption (State Gazette of the Republic of Indonesia Year 2002 Number 137, Supplement to State Gazette of the Republic of Indonesia Number 4250) is contradictory to the 1945 Constitution of the Republic of Indonesia;

To declare that Article 53 Law Number 30 Year 2002 concerning Commission for the Eradication of the Criminal Act of Corruption (State Gazette of the Republic of Indonesia Year 2002 Number 137, Supplement to State Gazette of the Republic of Indonesia Number 4250) shall still have binding legal force until the issuance of the amendments thereto at the latest 3 years since this decision is announced;

To declare that the rest of the petition of Petitioners II are refused;

To declare that the petition of Petitioner I is refused entirely;

To declare that the petition of Petitioner III is refused entirely;

To order the appropriate inclusion of this decision in the State Gazette of the Republic of Indonesia;

Hence it is decided in the consultative meeting of the judges attended by nine Constitutional Judges, **Jimly Asshiddiqie** as the Chairperson and member and **I Dewa Gede Palguna, Maruarar Siahaan, H. Achmad Roestandi, H.M. Laica Marzuki, H.A.S. Natabaya, Harjono, H. Abdul Mukthie Fadjar,** and **Soedarsono,** respectively as members, on Monday, December 18, 2006 and announced in the Plenary Session open to the public on this day, Tuesday, December 19, 2006, by us **Jimly Asshiddiqie** as the Chairperson and member and **I Dewa Gede Palguna, Maruarar Siahaan, H. Achmad Roestandi, H.M. Laica Marzuki, H.A.S. Natabaya, Harjono, H. Abdul Mukthie Fadjar,** and **Soedarsono,** respectively as members, assisted by Sunardi as a substitute Clerk, and attended by the Petitioners/Petitioners' Proxies, the Government or its representatives, the People's Legislative Assembly of the Republic of Indonesia or its representatives, and relevant party of the Commission for the Eradication of the Criminal Act of Corruption ;

CHAIRPERSON,

Jimly Asshiddiqie

MEMBERS,

I Dewa Gede Palguna	**Maruarar Siahaan**
H. Achmad Roestandi	**H. A. Mukthie Fadjar**
Harjono	**H. M. Laica Marzuki**
H.A.S. Natabaya	**Soedarsono**

DISSENTING OPINION

With regard to the decision of the Court which grants the petition of the above Petitioners, a Constitutional Judge had a dissenting opinion, namely Constitutional Judge H.M. Laica Marzuki**.**

Article 53 of the CEC Law reads, ”*Anti Corruption Court shall be established hereunder with the duty and authority to examine and decide upon corruption cases filed by The Commission for the Eradication of the Criminal Act of Corruption ”.* Article 53 of the CEC Law indicates that the establishment of the Anti Corruption Court is not regulated in a separate law, as stated in Article 24 Paragraph 2 of the 1945 Constitution.

Because the formation of the Corruption Court is simply included in the CEC Law, rather than regulated in a separate law, as normally required for the

establishment of a court, including special court, the formation of the Anti Corruption Court is only regulated within a law *(in de wet geregeld),* and in fact not regulated by a law *(bij de wet geregeld). Het is niet geregeld bij de wet.*

Prof. Harun Alrasid (2004:4) is of the opinion that “regulated in a law” (*in de wet geregeld)* is different from “regulated by a law” *(bij de wet geregeld)* as normally applicable. “Regulated in a law” (geregeld in de wet) answers the where, namely that further norms on this matter must be included in a law, not in other forms of regulation. If we look closer on the opinion of Prof. Harun Alrasid, Article 24 Paragraph 3 of the 1945 Constitution states, ”*Other bodies which functions are related to judicial authority shall be regulated in a law*” such as the police or the prosecutor’s office which are related to judicial authority. It is not necessary to make a separate law that specifically regulates functions related to the judicial authority, as long as the arrangements are included in a law (in de wet),not in other laws or regulations.

Meanwhile, when something is “regulated by a law” (bij de wet geregeld), thus it is imperative in nature, it is a constitutional order that it can only be regulated with a separate law. According to expert Prof. Dr. Maria Farida Indrati, S.H., M.H in court hearing, if viewed from the legal language aspect, Indonesian language experts are of the opinion that if the term “by a law” is used, it means that a separate law must be made or it has to be regulated by a separate law. The terms “*de wet regeld*”, “*bij de wet geregeld*”, as intended in the *Grondwet voor het Koninkrijk der Nederlanden, 1815*, *laatste wijzingen*: *Staatsblad 2002 nr*

144, on *Hoofdstuk 6*, under the title of *Rechtspraak*, is interpreted as " *regulated by act of parliament*". When it is in fact not regulated by a law (*niet geregeld bij de wet*), it shall be declared unconstitutional.

Article 8 of Law Number 10 Year 2004 concerning the Establishment of Laws and Regulations reads, *"The content which must be regulated by law shall include provisions that*:

a. further stipulations of the 195 Constitution which consist of:

1. human rights;

2. rights and obligations of citizens;

3. implementation and enforcement of the State's sovereignty and the distribution of the State's power;

4. the State's territory and regional divisions;

5. citizenship and population;

6. State's finance,

b. is ordered by a Law to be regulated by Law

The 1945 Constitution requires that the establishment of all judicial bodies, in this case special court, must be regulated by a law. Article 24A Paragraph 5 of the 1945 Constitution reads, "*the structure, position, membership and legal*

procedure of the Supreme Court and its subordinate judicial bodies shall be regulated by a law". This means that the structure, position, membership and legal procedure of courts within the general judicature, including special courts, must be regulated by a law *(bij de wet geregeld)*. Article 3 Paragraph (1) of Law number 4 Year 2004 concerning Judicial Authorities reads, "*all courts in all territory of the Republic of Indonesia shall be state courts and established by law."* Article 8 of Law Number 8 Year 2004 concerning Amendment to Law Number 2 Year 1986 concerning General Judicature reads, "*Special Courts may be established within the General Judicature which shall be regulated by a law*" Based on the above considerations, the establishment of the Anti Corruption Court as a special court within the General Judicature as stated in Article 53 of the CEC Law is deemed unconstitutional and contradictory to Article 24A Paragraph 5 of the 1945 Constitution.

The decision of the Court is legally binding in term of *ex nunc (van nu af, slechts voor de toelomst van kracht)* and non retroactive in term of *ex nunc (van toen af)*. Article 47 of the Constitutional Court reads, "The decision of the Constitutional Court shall have permanent legal force after being announced in a Plenary Hearing open to the public. Article 57 paragraph (2) of the Constitutional Court reads, "*Based on decisions of the Constitutional Court that declares that the contents of articles, paragraphs and/or parts of a law are contradictory to the 1945 Constitution, the contents of the paragraphs, articles or parts of the law shall no longer have binding legal force."*

The decisions of the Court shall have binding legal force *(in kracht van gewijsde)* after being pronounced and there shall be no other legal action that can be taken against the decisions. Non legally binding force of the decisions shall occur at the same time *(samen val van momentum)* as the pronouncement of the decisions.

The legal consequence *(rechtsgevolg)* of the decisions of the Court shall commence after it is pronounced and the applicability of the material norms, contents of paragraphs, articles and/or parts of the law that have been declared not legally binding by the Court, must not be postponed.

Corruption that is now prevalent in this country must still be eradicated. *Daar moet een eind aankomen!* In the future, Anti Corruption Court must be established in compliance with the appropriate due process of law, based on the Constitution. The enforcement of Material Law (*materiele recht*) must be performed based on the appropriate and effective formal laws. The problem is no longer simple when corruption is eradicated through formal law that is legally and constitutionally defective (*juridische gebreken*).

The petition for the judicial review of Article 53 of the CEC Law which is deemed contradictory to the 1945 Constitution should be granted and the article concerned should no longer have binding legal force after a decision is made.

SUBSTITUTE REGISTRAR,

Sunardi