

**EXCERPT FROM DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA**

Decision Number 5/PUU-IX/2011 Concerning Judicial Review of Law Number 30
Year 2002 concerning the Commission for the Eradication of Criminal Acts of
Corruption under the 1945 Constitution of the State of The Republic of Indonesia

DECISION

Number 5/PUU-IX/2011

FOR THE SAKE OF JUSTICE UNDER THE ONE

ALMIGHTY GOD

**THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA**

[1.1] Examining, hearing, and deciding upon constitutional cases at the first and final levels, has passed a decision in the case of petition for Judicial Review of Law Number 30 Year 2002 concerning the Commission for the Eradication of Criminal Acts of Corruption under the 1945 Constitution of the State of The Republic of Indonesia, filed by:

[1.2] 1. Name : **Feri Amsari, S.H., M.H.;**
Occupation : Lecturer of Andalas University Padang;
Address : Jalan Kampus Limau Manis, Faculty of Law of
Andalas University, Padang, West Sumatera;

- 2 Name : **Ardisal, SH.;**
Occupation : Vice Director of Padang Legal Aid Foundation;
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Padang, West Sumatera;
3. Name : **Drs. Teten Masduki;**
Occupation : Private Person;
Address : Jalan Kalimantan II/8 Neighborhood Ward 007/
Neighborhood Block 006 Gedong, Pasar Rebo
District, East Jakarta;
4. Name : **Zainal Arifin Mochtar Husein;**
Occupation : Lecturer of the Faculty of Law of Gadjah Mada
University (UGM);
Address : Perum Dayu Permai B.99
Neighborhood Ward 10/ Neighborhood Block 40,
Sinduhardjo,
Ngaklik, Sleman, Yogyakarta;

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

Indonesia Corruption Watch (ICW), in this matter represented by **Danang Widoyoko** as Coordinator of ICW, is an Indonesian legal entity in engaging in the field of corruption eradication;

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

By virtue of a Special Power of Attorney dated December 6, 2010, having authorized to **Abdul Azis, S.H., Abdul Kadir Wokanubun, S.H., Abdul Muttalib, S.H., Ahmad Irwandi Lubis, S.H., Alvon Kurnia Palma, S.H., Dasmy Delda, S.H., Donal Fariz, S.H., Carolina S Martha, S.H., Chairuddin, S.H., Era Purnama Sari, S.H., Erna Ratnaningsih, S.H. LL.M., Eti Gustina, S.H., M.H., Febri Diansyah, S.H., Hospinovizal Sabri, S.H., Indra Firsada, S.H., Irsyad Tamrin, S.H., M.H., M. Saiful Aris, S.H., M.H., M. Farid, S.H., Maharani Caroline, S.H., Mercy Herman Umboh, SH., Muslim Muis, S.H., Ni Luh Gede Yastini, S.H., Nuriono, S.H., Nurkholis Hidayat, S.H., Poniman, S.Hi., Roni Saputra, S.H., Siti Rahma Mary, S.H., M.Si., Surya Adinata, SH., Suryadi, S.H., Syamsul Munir, S.Hi., Syahrijal Munthe, SH., Tandio Bawor Purbaya, S.H., Vino Oktavia, S.H., Veri Junaidi, S.H., Yurika N, SH., Zulkifli Hasanuddin, S.H., and Wahrul Fauzi Silalahi, S.H.,** all of whom **being** Advocates and Legal Aid Service Staff, associated in the Advocacy Team for KPK Law, selecting its legal domicile in Jalan Diponegoro Number 74 Central Jakarta, both severally and jointly acting for and on behalf of the authorizer;

Hereinafter referred to as ----- **Petitioners;**

[1.3] Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard and read the statement of the Government;

Having read the statement of the People's Legislative Assembly;

Having examined the evidence of the Petitioners;

Having heard the statement of the experts of the Petitioners;

Having read the conclusion of the Petitioners;

2. FACTS OF THE CASE

and so forth

3. LEGAL CONSIDERATIONS

[3.1] Whereas the principal legal issue of the Petition *a quo* of Petitioners are to conduct Judicial Review of Article 34 of Law Number 30 Year 2002 concerning Corruption Eradication Commission (State Gazette of the Republic of Indonesia Year 2002 Number 137, Supplement to the State Gazette of the Republic of Indonesia Number 4250 hereinafter referred to as the Corruption Eradication Commission Law) against Article 28D paragraph (1) the 1945 Constitution of the State of The Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Whereas prior to examining the substance of the petition, the Constitutional Court (hereinafter referred to the Court) shall first consider the following matters:

- a. authority of the Court to examine, hear and decide upon the petition *a quo*;
- b. legal standing of the Petitioners;

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

Authority of the Court

[3.3] Whereas according to Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) sub-paragraph a 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, hereinafter referred to as the Constitutional Court Law) *juncto* Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358), the Court has authority to hear at the first and final levels, the decision of which shall be final in nature to conduct judicial review of Laws under the 1945 Constitution;

[3.4] Whereas the Petitioners' petition is intended to review the constitutionality of the norms of Article 34 of the Corruption Eradication Commission Law under the 1945 Constitution, therefore the Court has authority to examine, hear and decide upon the petition *a quo*;

Legal Standing of the Petitioners

[3.5] Whereas based on Article 51 paragraph (1) of the Constitutional Court Law, the parties that can file a petition for judicial review of a law under the 1945 Constitution shall be those considering that their constitutional rights and/or authority granted by the 1945 Constitution are impaired by the coming into effect

of a Law, namely:

- a. individual Indonesian citizens (including groups of people having a common interest);
- b. customary law community groups insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;
- c. public or private legal entities; or
- d. state institutions;

Hence, in the judicial review of a Law under the 1945 Constitution, the Petitioners must explain and substantiate the following:

- a. their qualification as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. whether or not there is any impairment of constitutional right and/or authority granted by the 1945 Constitution as a result of the coming into effect of the law being petitioned for review;

[3.6] Whereas also that the Court, following the Decision of the Constitutional Court Number 006/PUU-III/2005 dated May 31, 2005 and the Decision of the Constitutional Court Number 11/PUU-V/2007 dated September 20, 2007, as well as subsequent Decisions, the Court is of the opinion that the impairment of constitutional rights and/or authority as intended in 51 paragraph (1) of the Constitutional Court Law must meet five requirements, namely:

- a. the existence of constitutional rights and/or authority of the Petitioners

- granted by the 1945 Constitution;
- b. the Petitioners consider that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
 - c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
 - d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and law petitioned for review;
 - e. the possibility that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will argued by the Petitioners will not or will no longer occur;

[3.7] Whereas based on Article 51 paragraph (1) of the Constitutional Court Law and the requirements for the impairment of foregoing constitutional rights and/or authority, then the Court shall consider the legal standing of the Petitioners in the Petition *a quo*;

[3.8] Whereas the Petitioners claim themselves to be individual Indonesian citizens and legal entities (Exhibit P-1 up to Exhibit P-3) considering that such constitutional rights and/or authority have been impaired by the coming into effect of the Article 34 of the Corruption Eradication Commission Law;

Petitioners I argued that the Petitioners' constitutional interests as tax payers and citizens concerned with public interests and fight against corruption have been violated with the legal uncertainty in the interpretation of Article 34 of the Corruption Eradication Commission Law related the term of office of the elected Corruption Eradication Commission substitute Leadership. Petitioner II as a legal entity that has the vision and mission to advocate the public interest and the eradication of corruption considers that the interpretation and implementation of the provisions of Article 34 of the Corruption Eradication Commission Law can widely weaken the Corruption Eradication Commission's institution and corruption eradication;

Based on the description, the Petitioners argue that the interpretation of the term of office of the substitute Leadership of the Corruption Eradication Commission for 1 year would impede the optimization and effectiveness of the eradication of corruption as well as arouse legal uncertainty with respect to the term of office of the substitute Leadership of the Corruption Eradication Commission leading to:

- Non-optimum works of the substitute Leadership of the Corruption Eradication Commission in corruption eradication. This denies the nature of the establishment of the Corruption Eradication Commission as stated in the *considering* consideration section sub-paragraphs a and b of the Corruption Eradication Commission Law;
- legal uncertainty relating to the term of office of the substitute Leadership of the Corruption Eradication Commission when the People's Legislative

Assembly changes the replacement leadership of the Corruption Eradication Commission as provided for in Article 32 paragraph (1) of the Corruption Eradication Commission Law;

The petitioners argue that the Corruption Eradication Commission is a very reliable partner to corruption eradication works. The legal uncertainty, has caused ineffectiveness in corruption eradication works carried out by the Corruption Eradication Commission as well as weakening the functions of prevention and prosecution performed by the Corruption Eradication Commission, thus impeding the work of the Corruption Eradication Commission with a direct consequence to the corruption eradication advocacy conducted by the Petitioners. Based on the description, the Petitioners argue that Article 34 of the Corruption Eradication Commission Law is inconsistent with Article 28D paragraph (1) of the 1945 Constitution;

On the other hand, the People's Legislative Assembly and the Government believe that the Petitioners have no legal standing to file the petition *a quo* on the ground that the Petitioners are not in a position or not in a state as argued by the Petitioners because basically they had they desired or wanted to, at that time, the Petitioners would have been able to the selection or to follow the selection of a replacement candidate of the Corruption Eradication Commission leadership that has been conducted. According to the Government and the People's Legislative Assembly in the event that the Petitioners' assumption is correct or that the Petitioners are true, according to the Government, the ones who should have

petitioned for this review or the review of a norm considered inconsistent with the 1945 Constitution, as described above, are the parties elected as substitute Leadership of the Corruption Eradication Commission. Based on the foregoing considerations, the Petitioners have no legal standing and the Petitioners' petition is improper and *obscuur libel*;

[3.9] Whereas the Court refers to the Court Decision Number 27/PUU-VII/2009 dated June 16, 2010 which describing the legal standing of individuals and NGOs filing a petition for judicial review of Law as follows: "*From the practice of the Court (2003-2009), individual Indonesian citizens, especially tax payers' (tax payer, vide Decision Number 003/PUU-I/2003), various associations and NGOs concerned about law for public interest, legal entities, regional governments, state institutions, and others which by the Court are considered to have legal standing to file a Judicial review petition, both formal and substantive review of laws under the 1945 Constitution*";

[3.10] Whereas based on the considerations in preceding paragraph **[3.7]**, paragraph **[3.8]**, and paragraph **[3.9]**, and associated with the constitutional impairment arguments stated by Petitioner I as an individual Indonesian citizens and Petitioner II as a public and/or private legal entity concerned with corruption eradication, Court considers that the Petitioners have legal standing in filing the petition *a quo*;

[3.11] Whereas since the Court has authority and the Petitioners have legal standing, then the Court shall consider the Substance of the Petition;

Substance of the Petition

[3.12] Whereas the Petitioners in their petition substantially review the constitutionality of Article 34 of the Corruption Eradication Commission Law, which states that *"the Leadership of the Corruption Eradication Commission shall hold the office for 4 (four) years and may be reelected only for one term of office"*;

[3.13] Whereas the Petitioners argue that Article 34 of the Corruption Eradication Commission Law is inconsistent with Article 28D paragraph (1) of the 1945 Constitution for the following main reasons:

- Pursuant to the Corruption Eradication Commission Law, the Leadership of the Corruption Eradication Commission consists of 5 people and holds its office for 4 years, but a problem appeared when Antasari Azhar was dismissed as one of the Leadership of the Corruption Eradication Commission by the President. The next question is, who would replace him and how long is his/her term of office in relation to Article 33 paragraph (1), paragraph (2), and Article 34 of the Corruption Eradication Commission Law;
- Whereas for selecting substitute leadership of the Corruption Eradication Commission, the Selection Committee of the Corruption Eradication Commission performed the selection on May 25, 2010 up to 27 August 2010 to find two names selected. Busyro Muqoddas and Bambang Widjojanto were elected as candidates for such substitute leadership. Before these two names were submitted to the People's Legislative

Assembly of the Republic of Indonesia, the Selection Committee of the substitute leadership of the Corruption Eradication Commission through one of its members namely Todung Mulya Lubis, stated that the term of office of the substitute leadership of the Corruption Eradication Commission shall be 4 years. Meanwhile, Commission III of the People's Legislative Assembly stated the opposite, that the term of office of the substitute leadership of the Corruption Eradication Commission shall be 1 year;

- The People's Legislative Assembly based its Interpretation of the term of office of the substitute leadership of the Corruption Eradication Commission pursuant to Article 21 paragraph (5) where the leadership of KPK works collegially and collectively. So that the provisions of Article 34 of the Corruption Eradication Commission Law shall be interpreted in such a way that the term of office of substitute leadership of the Corruption Eradication Commission ends simultaneously. Therefore, the elected substitute leadership of the Corruption Eradication Commission only continues the remaining term of office, namely one year;
- Whereas the interpretation of the members of the People's Legislative Assembly of Article 34 of the Corruption Eradication Commission Law that caused the elected substitute leadership of the Corruption Eradication Commission namely Busyro Muqoddas, to serve for one year only, so that it has resulted in legal uncertainty of the term of office of the elected substitute leadership of the Corruption Eradication Commission. The

uncertainty of the term of office also had an impact on the effectiveness of the Corruption Eradication Commission in the eradication of criminal acts of corruption, even at the same time potentially weaken the anti-corruption agenda by the Corruption Eradication Commission which is aimed to realize a fair, prosperous, and welfare society based on *Pancasila* and the 1945 Constitution;

- The interpretation of the term of office of substitute Leadership of the Corruption Eradication Commission for one year by the People's Legislative Assembly and confirmed by Presidential Decree Number 129 /P Year 2010 concerning the appointment of Muhammad Busyro Muqoddas as the substitute of the Leadership of the Corruption Eradication Commission and also as the elected Leadership of the Corruption Eradication Commission based on the textual norms of the Corruption Eradication Commission Law under normal circumstances. While in the Act *a quo* did not mention the normatively the term of office of the substitute leadership of the Corruption Eradication Commission in an unusual condition. The term of office provisions referred to in Article 34 of the Corruption Eradication Commission Law should be interpreted not only for the leadership of Corruption Eradication Commission, but also for the substitute leadership of the Corruption Eradication Commission. This is in accordance with the method of systematic, logical, teleological, and analogical interpretation;
- Whereas the interpretation of the term of office of the substitute leadership

of the Corruption Eradication Commission by the People's Legislative Assembly and the Government in the provision of Article 34 of the Corruption Eradication Commission Law has created legal uncertainty in respect of the term of office of the substitute Leadership of the Corruption Eradication Commission occurring when one of the leadership of the Corruption Eradication Commission resigns or is dismissed as provided in Article 32 paragraph (1) sub-paragraph 1, sub-paragraph 4, sub-paragraph 5 and sub-paragraph 6, so that the Constitutional Court should give the correct interpretation of the provision of Article 34 of the Corruption Eradication Commission Law, so that in the future there will be no more diverse interpretations among the interested parties of the provision resulting in the absence of legal certainty which is inconsistent with Article 28D paragraph (1) of the 1945 Constitution which reads, *"Every person shall have the right to the recognition, the guarantee, the protection and the **legal certainty** of just laws as well as equal treatment before the law."*

[3.14] Whereas to prove their arguments, the Petitioners have presented written evidence namely Exhibit P-1 up to P-11, as well as three experts named **Prof. Dr. Saldi Isra, SH., Erry Riyana Hardja Pamengkas, SE., and Dr. Todung Mulya Lubis, SH., LL.M.**, giving their statements under oath at the hearings dated May 23, 2011 and May 31, 2011, completely included in the Facts of the Case part above, which are principally as follows:

Expert Prof. Dr. Saldi Isra, SH.

- Article 34 of the Corruption Eradication Commission Law, according to the experts, shall be the only article talking about the term of office or duration of the Leadership of the Corruption Eradication Commission and when referring to the elucidation of Article 34 of the Corruption Eradication Commission Law, it states that the Article *a quo* is self-explanatory, meaning that there is no other explanation that can be referenced to explain this. The term of office of anyone serving as the Leadership of the Corruption Eradication Commission Law is four years, whether he/she has been appointed at the beginning or later in the event of change of leadership during the term. People who continue or replace the Leadership of the Corruption Eradication Commission Law that has stopped in the middle of the term, should have the same four-year term of office with the other leaders, in a sense that in the event that he/she is appointed after 2 or 3 years of the normal term, then the term shall be counted 4 years starting from his/her appointment when replacing that position. Processes of such replacement could refer to the replacement process for Constitutional Court Justices which is should be properly imitated or used as a system for independent institutions, because at the Constitutional Court, the process of replacement happens naturally;
- The Expert makes a comparison with the term of office continuation for the members of the People's Legislative Assembly. In the event of interim replacement, the concept is clear namely the interim replacement which is taking the remainder of the term of office left by the previous members, so

that people who substitute the members of the People's Legislative Assembly, the Regional People's Legislative Assembly members or the Regional Representatives Council are people who get the next most votes. Supposedly, according to the expert, in the event that the concept is acceptable to replace the leadership or the Commissioner of the Corruption Eradication Commission, should not be conducted through a new election, and the leaders should be those are at the sixth ranking in votes in the People's Legislative Assembly. The procedure for the interim replacement is different between the People's Legislative Assembly and the Corruption Eradication Commission, because the substitute is no longer the person who got the next most votes when the *fit and proper test* is conducted in the People's Legislative Assembly;

- The Corruption Eradication Commission is an independent state institution because first, it is mentioned explicitly in the Corruption Eradication Commission Law, second, the Corruption Eradication Commission is independent for not being part of the structure of the executive institution; in the event that the Corruption Eradication Commission becomes part of the executive agency structure then the Corruption Eradication Commission will be referred to as an executive agency rather than an independent agency. The expert understands the Corruption Eradication Commission as an independent agency because it is an independent state agency, then many theories on **state structure** mention how to fill independent state institutions, and the most commonly used is the pattern

called stages terms, and for the Corruption Eradication Commission, the officials are simultaneously appointed. For the first period they are simultaneously appointed, and simultaneously discharged because there is no replacement in the middle of the term, but the some second period commissioners quit in the middle of the term. The expert understands it as the first step for implementing the stages terms. The staffing for independent agencies in many countries is not conducted by simultaneous replacement and simultaneous re-staffing for the sake of continuity. There are several disadvantages when it is carried out simultaneously because the term of office for the leadership is four years, so that one regime can determine the staffing process of independent institutions including the Corruption Eradication Commission. In the event that there is room to begin the stage term, the Constitutional Court should strengthen such a pattern so that the replacement will not continue the remainder of the existing term but starting from zero. In the event that three commissioners quit or four people quit, it still has the existing commissioners for the sake of continuity. This is the first characteristic of an independent state agency. The second characteristic is stated in the theory of constitutional law, put forward by Asimov, that a person or a head of an independent state institution should be dismissed with obvious causes, while the powers beyond it, including the executive power, should not be free to decide how the process of dismissal of the commissioners of the independent state institution;, the third is that the process of filling or

replacement of commissioners should be done in a hierarchical pattern, not in the framework of a single stage. The filling of positions in an independent state agency should not be conducted simultaneously although at the beginning it was conducted simultaneously, such as the replacement system in the U.S. Senate, which is at first simultaneous but it will then be arranged differently for the purpose of building continuity. Therefore, according to the expert, the theories used in many countries can be used as a pattern for independent state commissions because in the event that all are replaced simultaneously, the disadvantage would be that a particular regime can become dominant in determining the filling process;

- When talking about organizing state administration system especially independent institutions, it is time to start the filling process gradually, especially for state institutions given independent status that do not become part of the executive agencies, including those outside the Corruption Eradication Commission. When all are replaced then the new persons will work from zero for an independent institution but if the existing persons are maintained while the new ones are admitted, it will be easier to make adjustments;
- There is no handbook that can be used to interpret, one of which uses a systematic interpretation, though in different areas. One of the comparisons offered by the expert is the theory that says, "If an institution is given independent status, its filling or replacement process should not

done simultaneously." Related to Busyro Muqoddas, when linked with the Presidential Decree, this case emerges because of the interpretation of the Government of the article, while according to the expert, the most competent institution to interpret it is the Constitutional Court, so it should not be interpreted by parties other than the holders of judicial power.

Expert Erry Riyana Hardja Pamengkas, SE.

- The Corruption Eradication Commission substitute members shall fully serve for 4 years based on the principle of expediency, namely *first*, the continuity of leadership is more assured on a collective and collegial basis as mandated by the Corruption Eradication Commission Law, *second*, the 2007-2011 Leadership of Corruption Eradication Commission consists of all new members, although there are some people from internal sources, but not from the leadership element, so the principle of continuity of leadership is not achieved and the dominance of the leadership of Antasari Azhar during the first year appeared so intense in the media, which should not be like that. It became one of the reasons why the continuity of leadership could not be collectively achieved because the leadership did not come from internal sources of the old leadership element;
- There is a kind of culture shock to become leaders, who would be then unable to make balanced collectivity of leadership in the togetherness of leadership, so that the a leader who becomes the head is dominant, but it should not be like that;

- Another reason consistent with the common reasons stated is the reason of cost, because the resources mobilized by the selection committee to select a candidate member of the leadership of the Corruption Eradication Commission is very large, not only from the aspect of the cost in the amount of Rp1, 6 billion, but also the energy exhausted. The focus and mobilization of resources for checking, whether conducted by NGOs alone or by other institutions, are difficult to be valued in money. So according to expert, this issue has been used as the reason confirm that the leadership of anyone elected should not hold office for the remaining term, but for a full term of four years;

Expert Dr. Todung Mulya Lubis, SH., LL.M.

- The newly elected leadership of the Corruption Eradication Commission, has not been elected together in one package, but serves for 4 years as from his election as the leadership of the Corruption Eradication Commission. There are several reasons for that, namely that there is no stipulation that all of the leadership of the Corruption Eradication Commission should be elected at the same time and should end at the same time, so there is no provision that all of the leadership of the Corruption Eradication Commission shall serve for the same term. Therefore, the leaderships or Commissioners of the Corruption Eradication Commission consist of five members and when related to Article 34 of the Corruption Eradication Commission Law, the leadership of the Corruption Eradication Commission shall hold the office for four

- years and may be reelected for another term only. Thus, then according to the expert, the leadership of the Corruption Eradication Commission consists of 5 members of the Corruption Eradication Commission with each of them serving a term of 4 years;
- The expert does not see in the Corruption Eradication Commission Law what is referred to as interim replacement, so that the interpretation of the expert still concludes that although elected in the middle of a term, not in one package, the term should be interpreted as serving a full term, meaning that the term of office shall be four years. The irresolution in the Law *a quo* creates problems, but expert views that there is a challenge to make a single interpretation, whether the traditional interpretation applied all this time is valid or invalid;
 - In terms of continuity, the work continuity of agencies, it would be better if the leadership of a strategic and important institution such as the Corruption Eradication Commission is not all new. This will create work continuity of agencies from time to time, so that from the aspect of continuity, the choice will be very useful in terms of work effectiveness of the leadership individuals of the Corruption Eradication Commission, newly appointed at the end of 2010; this option will also be much better, because if it must be ended in 2011, it is not very effective due to the short term, so it will not benefit the public, especially for the eradication of corruption, for law enforcement tasks, even for entire selection process until the appointment will be almost equal to half of the remaining term of

office;

- In terms of cost and in terms of time, it is clearly a waste, an expense that cannot be justified, and in terms of independence of the Corruption Eradication Commission, these options will also be more beneficial in the future because by looking at the experience in some other countries, election with staggered nature not simultaneously in one package, has been used as a reference everywhere, in order to maintain effectiveness, continuity, and at the same time the independence of the leadership, as well as the interpretation that the expert wants to build as a way out to ensure there is no leadership of the Corruption Eradication Commission appointed simultaneously by the same Board or president which will strengthen the institution of the Corruption Eradication Commission in the future;
- The staggered system has also started to be used by many parties, including non-governmental organizations, so it becomes a trend, one interpretation made to ensure continuity and legal certainty guaranteed by Article 28D Paragraph (1) of the 1945 Constitution. The elected leaders of the Corruption Eradication Commission are entitled to obtain legal certainty and equal opportunities, although the interpretation has not been fully accepted in the legal community, but expert views it from the perspective of state administration in Indonesia as a challenge and it can also be based on reference to the experience in other countries;
- The expert's understanding of the meaning of substitute member

candidates, whether the concerned is permanently unavailable or has become a convict in this case, the issue is to fill the vacancy of the leadership of the Corruption Eradication Commission, replacing one vacancy in relation to Article 34 of the Corruption Eradication Commission Law/. The leadership of the Commission, whether the Head or Vice Head of the Corruption Eradication Commission, shall hold office for four years and the substitute should also be given the same right to serve for four years. It is not in the context of interim replacement as in the People's Legislative Assembly continuing the remaining term. If only Article 33 of the Corruption Eradication Commission Law is considered, we would be misled by the interpretation that the substitute candidate is the functional successor to continue the remaining term of office, but in the context of a more holistic and systematic interpretation, according to the expert, anyone appointed to fill a vacancy, shall have the same right to continue, to serve for the term of office, as written in Article 34 of the Corruption Eradication Commission Law namely for four years;

- This is a breakthrough interpretation which is the jurisdiction of the Constitutional Court and therefore the experts submit everything to the discretion and wisdom of the Panel of Justices of the Constitutional Court. Article 28D paragraph (1) of the 1945 Constitution grants the constitutional right to every citizen, and the expert uses the staggered approach to the replacement that occurs in various commissions or agencies. The constitutionality issue is related to Article 28D paragraph (1) of the 1945

Constitution because the functional function must be distinguished from the representation function, which has the right of the guarantee of legal certainty and justice;

[3.15] Whereas with respect to the Petitioners' petition, the Government has given its official statement in the hearing on April 28, 2011 and has submitted a written statement received at the Registry Office of the Court on May 18, 2011, which in principle explain as follows:

- That in respect of the aforementioned petition of the Petitioners, there are two issues that the Government could convey. First, whether it is true that the provisions of Article 34 of the Corruption Eradication Commission Law is considered inconsistent with the provision of Article 28D paragraph (1) of the 1945 Constitution; Second, whether the provisions of Article 34 of the Corruption Eradication Commission Law should be re-interpreted or needs to be requested for interpretation or to be interpreted as conditionally constitutional as described by the Government.
- After thoroughly examining various decisions of the Constitutional Court on conditional constitutionality, the Government argues that the interpretation or re-interpretation of conditional constitutionality with respect to the substance of the norm in a paragraph, chapter or section in a law, is made in the event of in the norm or article *a quo* has results in constitutional impairment, either to the individual, a citizen of Indonesia, private and public legal entities, customary law communities and state institutions, and to the substance of these norms, and there is no

constitutional legal door or at least there is a dead-lock in the implementation. According to the Government, the implementation of the provision of Article 34 of the Corruption Eradication Commission Law, which states, "*Corruption Eradication Commission Leadership shall hold office for 4 years and can be re-elected for another term only*", does not create doubts or confusion and in its implementation it does not result in things that cannot be implemented. This is proven and indicated by Presidential Decree No. 129/P/2010. This means that it will be very different In the event that we look at or pay attention to it, as the Constitutional Court has decided the issue related to the term of office of with the Attorney General. There is no provision on the time of dismissal and the time re-appointment, but in the Corruption Eradication Commission Law, Article 34 of the Corruption Eradication Commission Law petitioned for review is already clear, without any doubt or ambiguity and that there have been actions of appointment and dismissal.

- The provision of Article 34 of the Corruption Eradication Commission Law does not need to be interpreted as conditionally constitutional and Article 34 of the Corruption Eradication Commission Law is not inconsistent with Article 28D paragraph (1) of the 1945 Constitution.

[3.16] Whereas with respect to the Petitioners' petition, the People's Legislative Assembly has given its written statement received at the Registry Office of the Court on June 9, 2011, completely included in the Facts of the Case part above, which is principally as follows:

- In accordance with the Report of Commission III of the People's Legislative Assembly concerning the Results of the Selection of Candidates of Substitute Leadership of the Corruption Eradication Commission on the plenary session of the People's Legislative Assembly on November 30, 2010, it has been reported that in the Plenary Meeting of Commission III concerning the term of office of the Candidates of Substitute Leadership of the Corruption Eradication Commission, Commission III after hearing the views of nine (9) factions, in which eight (8) factions stated that the term of office of the Candidate of the Substitute Leadership of the Corruption Eradication Commission is to continue the remaining term of office of the 2007-2011 leadership of the Corruption Eradication Commission which will end in December 2011, while one (1) the faction namely the PPP faction declared that the term of office of the Substitute Leadership of the Corruption Eradication Commission is 4 (four) years. But eventually the Plenary Meeting of Commission III decided that the relevant term of office is to continue the remaining term of office of the 2007-2011 leadership of the Corruption Eradication Commission which will end in December 2011. The People's Legislative Assembly has issued Decree No. 01/DPR RI/II/2010-2011 concerning the Approval of the People's Legislative Assembly of the Republic of Indonesia on the Candidates of Substitute Leadership of the Corruption Eradication Commission that decided the Approval of the People's Legislative Assembly of the Republic of Indonesia on the Candidates of Substitute

Leadership of the Corruption Eradication Commission, namely Dr. Muhammad Busyro Muqoddas, SH., M. Hum., and approved the term of office of the substitute chairperson of the Corruption Eradication Commission being to continue the remaining term of office of the 2007 - 2011 leadership of the Corruption Eradication Commission which will end in December 2011;

- The People's Legislative Assembly is of the opinion that the provision of Article 34 of the Approval of the People's Legislative Assembly of the Republic of Indonesia on the Candidates of Substitute Leadership of the Corruption Eradication Commission Law stating that: "*The Corruption Eradication Commission Leadership shall hold office for 4 (four) years and may be re-elected for another term only*", the implementation does not cause any doubt, ambiguity, loss as well as being in a position that it cannot be implemented, as indicated by the Decree of the President of the Republic of Indonesia Number 129 / P Year 2010, which stipulated Dr. Muhammad Busyro Muqoddas, SH., M. Hum., as the Head and concurrent member of the Corruption Eradication Commission for the remaining term of office of 2007-2011, which has fulfilled the legal certainty (*rechtszekerheid*) with respect to the term of office of the Leadership and Members of the Corruption Eradication Commission;
- Based on these arguments, the People's Legislative Assembly is of the opinion that the provision of Article 34 of the Law *a quo* does not cause loss or potentially eliminate the constitutional rights of the Petitioners and

therefore the judicial review petition under the Law *a quo* is not justified by law, so that the provision of Article 34 of the Law *a quo* is not inconsistent with Article 28D paragraph (1) of the 1945 Constitution.

Opinion of the Court

[3.17] Whereas after the Court carefully examined the petitioners' petition, the written evidence of the Petitioners, the statements of the Petitioners' experts, the Government's statement, the written statement of the People's Legislative Assembly, and the written conclusions of the Petitioner, the principal issue that must be answered by the Court is:

“Does term of office of members of the leadership of the Corruption Eradication Commission replacing the members who have already quit under Article 34 of the Corruption Eradication Commission Law constitutionally only continue the term of office of the leadership replaced or gets a full term of office for four years?”

[3.18] Whereas before the Court answers this question, there is a legal fact that the People's Legislative Assembly and the President determine the term of office of members replacing the leadership of the Corruption Eradication Commission who quit during his/her term of office as merely continuing the remaining term of office of the leadership of the Corruption Eradication Commission replaced. In determining the term of office of the substitute leadership, the People's Legislative Assembly based on the interpretation of Article 21 paragraph (5) the Corruption Eradication Commission Law determines that the leadership of

Corruption Eradication Commission works in a collectively collegial manner, so that the provisions of Article 34 of the Law is interpreted in such a way that the leadership of the Corruption Eradication Commission quit simultaneously. Thus, the substitute leadership replacing the leadership members who quit in his term of office only act as an interim replacement, because they just continue the term of office of the members of the leadership who have been replaced. On the other hand, the Petitioners refer to Article 34 of the Corruption Eradication Commission Law, which states, "*leadership of the Corruption Eradication Commission shall hold office for 4 (four) years and may be re-elected for another term only*", which according to the Petitioners a term of four years for the leadership of the Corruption Eradication Commission is applicable to the Leadership appointed concurrently from the beginning as well as the leadership replacing the leadership who quit during their term of office;

[3.19] Whereas according to the Court, the People's Legislative Assembly and the President can interpret a provision of a Law within the framework of the implementation of the Law *a quo*. However, the Court also has authority to assess the constitutionality of interpretation of a norm of the Law by both the People's Legislative Assembly and the President, in the event that the interpretation results in threats to the respect for, protection and fulfillment of the constitutional rights of citizens as well as in order to ensure the implementation of the mandate and constitutional norms correctly. That does not mean that the Court has gone beyond its authority to test the inconsistencies of norm of Law with the 1945 Constitution as textually expressed in the Law. The provision of

Article 1 paragraph (2) of the 1945 Constitution which states, "*Sovereignty belongs to the people and shall be carried out according to the 1945 Constitution*", means that the state government administration by the organs of state must be based on the constitution. On the basis, Indonesia is a state that adopts a constitutional government system, for which in its implementation the Constitutional Court has been formed to oversee and ensure that the constitutional system is running. Therefore, in performing its duties and responsibilities as a judicial institution guarding the constitutional norms of the constitution in order to run properly in accordance with the spirit embodied in the Constitution, the Court, in addition to reading and understanding the text of the constitutional, is also obliged to explore and find the philosophical values and principles contained in the constitution in order to decide any issues brought to the Court. In this case, in the event that the Court finds the interpretation of the norms of law inconsistent with, deviant from and/or not in accordance with the norms and spirit of the constitution, then based on the functions, duties, and authority to guard the constitution, the Court has authority to assess the constitutionality of the interpretation of a norm of Law. Therefore, in evaluating the petition *a quo* of the Petitioners, the Court must also assess the interpretation of the provisions of the Law *a quo* at the implementation level to ensure implementation of the constitutional system adopted by the 1945 Constitution;

[3.20] Whereas the Court will assess the constitutionality of the interpretation of the provision of Article 34 of the Corruption Eradication Commission Law under

the norms contained in the 1945 Constitution. The Petitioners argue that the determination of the term of office of members of Substitute Leadership of the Corruption Eradication Commission only continuing the remaining term of office of the leadership of the Corruption Eradication Commission that quit before reaching the end of the four-year period is inconsistent with the principle of a fair legal certainty as provided for in Article 28D paragraph (1) of the 1945 Constitution. According to the Petitioners, the term of office of the substitute leadership of the Corruption Eradication Commission is not only finish the remaining term of office of the leadership replaced, but rather, they shall hold the full term of office of four years.

According to the Court, the provision of Article 34 of the Corruption Eradication Commission Law itself is very clear and unequivocal that the term of office of the leadership of the Corruption Eradication Commission is four years, and it does not pose a question of constitutionality. However, the provision of Article 34 of the Corruption Eradication Commission Law is a constitutional issue when the People's Legislative Assembly and the President interpret the provision of Article 34 of the Corruption Eradication Commission Law in such a manner that it does not apply to all members of the leadership of the Corruption Eradication Commission and only applies to the leadership of the Corruption Eradication Commission namely the five persons appointed simultaneously since the beginning of the period, while for the substitute leadership replacing the members of the leadership who quit during their term of office, only to continue the remaining the term of office of the leaderships replaced. The People's

Legislative Assembly and the President with their interpretation being based on the provision of Article 21 paragraph (5) of the Corruption Eradication Commission Law determine that the leadership of the Corruption Eradication Commission has a collective nature, so the five members of the leadership of the Corruption Eradication Commission are interpreted collectively in serving one four-year period. In this case, according to the People's Legislative Assembly and the President, in the event that any member of the leadership of the Corruption Eradication Commission who quits during his term of office will be replaced by a substitute leadership who will only continue the remaining term of office of the leadership being replaced. The interpretation of the People's Legislative Assembly and the President is also based on the provisions of Article 33 paragraph (1) and paragraph (2) of the Corruption Eradication Commission Law that textually mentions that the substitute leadership of the Corruption Eradication Commission shall replace the leadership who quits during his term of office. This interpretation is questioned by the Petitioners, because such interpretation leads to the unclear meaning of Article 34 of the Corruption Eradication Commission Law that violates the principles of the constitution, namely among others, the principle of fair legal certainty which must be respected, protected, and fulfilled according to the constitution. According to the Petitioners, in accordance with Article 34 of the Corruption Eradication Commission Law, the term of office of substitute leadership is four years, not only serving the remaining term of office of the member being replaced. According to the Court, such difference in interpretation raises constitutional issues that must

be assessed by the Court, namely the interpretation which is true according to the constitution in order to respect, protect and fulfill the principle of a fair legal certainty for the public, for the organizers of the state, for the Corruption Eradication Commission, as well as for the leadership of the Corruption Eradication Commission duly elected as substitute leadership of the Corruption Eradication Commission to replace the leadership of the Corruption Eradication Commission who have quit. In the event that the Court does not provide assurance as to the interpretation of the term of office of the leadership of the Corruption Eradication Commission then the issue of replacement of the leadership of the Corruption Eradication Commission who quit in the middle of the term of office will continue to be debatable during the replacement of the leadership of the Corruption Eradication Commission in the future which is in fact inconsistent with the principle of fair legal certainty guaranteed by the constitution;

[3.21] Whereas in order to test the constitutionality of the correct interpretation of the norms of the provision of Article 34 of the Law *a quo*, the Court relies on the general principles contained in the constitution namely the principle of fair legal certainty, the principle of equality and justice, the principle of legal expediency and the principle of public interest. These principles are the basic values embodied in the constitution and the spirit of the existence of a state based on the constitutional system. In addition, these principles are also reaffirmed in Law Number 10 Year 2004 concerning the Formulation of Laws and Regulations (State Gazette of the Republic of Indonesia Year 2004 Number 53, Supplement

to the State Gazette of the Republic of Indonesia Number 4389) as the elaboration of Article 22A of the 1945 Constitution in Article 6 which outlines the principles of the substance of laws that must meet the principles of, among other things: justice, equality in law and government as well as the principle of legal certainty. The principles are also confirmed in Article 3 of Law No. 28 of 1999 concerning State Administration which is Free from Corruption, Collusion and Nepotism (State Gazette of the Republic of Indonesia Year 1999 Number 75, Supplement to the State Gazette of the Republic of Indonesia Number 3851), namely the principle legal certainty, the principle of orderly state administration, the principle of public interest, the principle of transparency, the principle of proportionality, the principle of professionalism, and the principle of accountability;

[3.22] Whereas pursuant to the provision of Article 33 paragraph (2) of the Corruption Eradication Commission Law, the mechanism of selection of a substitute member of the leadership of the Corruption Eradication Commission that quit during the term of office is similar to the mechanism of selection and appointment of the members of leadership appointed simultaneously at the beginning of the period. This selection process takes a long time and the cost is quite high because at least it involves the formation of the selection committee, the registration process conducted in an open and transparent process involving the publication in the media, and after the names of candidates are determined, the selection process followed by the announcement to the public to obtain response and then delivered to the People's Legislative Assembly to be selected

again by the People's Legislative Assembly through the mechanism of the fit and proper test. The rigorous and lengthy selection process is deemed necessary considering the importance of the leadership of the Corruption Eradication Commission, especially when related to the urgency the agenda of corruption eradication in Indonesia;

[3.23] Whereas the selection process and selection of such substitute leadership of the Corruption Eradication Commission when viewed from the principle of justice in government administration namely justice for the people, then the appointment of substitute members who hold the remaining term of office for only one year is something considered unfair to the public, because the state must spend very large cost and the administrators of the state performing the selection process have spent a relatively long time just to elect a replacement substitute member who holds the remaining term of one year. According to the Court, justice for the people is the highest source of constitutional values that should be the basis for the assessment of the Court, because the constitutional justice is none other than justice for the constituents, namely justice for the people that form and agree on the constitution. This justice for the people has become very important in upholding the principles of the constitution to avoid an elitist state administration and violates the democratic principles followed by the 1945 Constitution, particularly participatory democracy. According to the Court, such interpretation also creates injustice to someone elected as a substitute member who has fought and spent a lot of energy, time, and cost for passing the selection and is elected to become KPK Leadership replacement. Elected substitute

members who just continue the remaining term of office of the members replaced obtain different treatment from the members of the leaders elected simultaneously at the beginning of the full period of four years, while a substitute member has to undergo any selection process and under similar conditions, so that it violates the principle of equal treatment of all citizens before the law and government [*vide* Article 27 paragraph (1), Article 28D paragraph (1), and Article 28D Paragraph (3) of the 1945 Constitution];

[3.24] Whereas according to the Court, in the event that the substitute leadership of the member of the Corruption Eradication Commission only hold the remaining term of office of the leadership member replaced by him/her, it violates the principle of expediency which is the purpose of the law. A law has been created and provided in order to achieve maximum benefit. The selection process of substitute leadership of the Corruption Eradication Commission pursuant to Article 33 paragraph (2) of the Corruption Eradication Commission Law holding only remaining term of office will spend relatively similar cost as the selection process of five leaderships of the Corruption Eradication Commission. This is really a waste which is unnecessary and unnatural. According to the Court, if it is interpreted that the leadership replacement is just to replace and finish the remaining term of office of the leadership replaced, the replacement mechanism does not have to go through a long and complicated selection process with such large cost just like in the selection of five leadership members of the Corruption Eradication Commission appointed simultaneously. It will be sufficient if the substitute leadership replacing the leadership during the term of office are just

taken from the candidates of the leadership of the Corruption Eradication Commission who participated in the previous selection obtaining the next highest rank, similar to the interim replacement of the members of the People's Legislative Assembly or Regional Representative Council which according to Article 217 paragraph (3) of Law Number 27 Year 2009 concerning the People's Consultative Assembly, People's Legislative Assembly and Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2009 Number 123, Supplement to the State Gazette of the Republic of Indonesia Number 5043) which states, *"The term of office of the interim replacement members of the People's Legislative Assembly shall continue the remaining term of office of the replaced members of the People's Legislative Assembly replaced"* and Article 286 paragraph (3) which states, *"The term of office for the interim replacement of the Regional Representative Council shall continue the remaining term of office of the replaced members of the Regional Representative Council"*. That is better meeting the principles of efficiency and fairness. Therefore, based on the provision of Article 33 paragraph (2) of the Corruption Eradication Commission Law which requires the filling of the replacement leadership through the same selection process with the selection process of the five members of the leaderships of the Corruption Eradication Commission appointed simultaneously, according to the Court, the replacement of the substitute leadership is not the same as the interim replacement of members of the People's Legislative Assembly and the Regional Representative Council. The interim replacement of the members of the People's Legislative Assembly and the Regional

Representative Council is not conducted through a new selection process and it is reaffirmed in the Law that they will only continue the remaining term of office of the members being replaced. The Corruption Eradication Commission Law confirms that the replacement of the leadership of the Corruption Eradication Commission is done through a new selection process and the law does not determine that the replacement leadership only continues the remaining term of office of the replaced leadership. According to the Court, this indicates that the term of office of the substitute leadership of the Corruption Eradication Commission cannot be interpreted the same as the interim replacement for the members of the People's Legislative Assembly and the Regional Representative Council. Thus, the term of office of the leadership of the Corruption Eradication Commission specified in Article 34 of the Corruption Eradication Commission Law cannot be interpreted in any other way, except for four years, for both leaders appointed simultaneously from the beginning as well as the substitute leadership. Reducing the meaning of Article 34 of the Corruption Eradication Commission Law by not applying the service term of four years to be held by the substitute leadership of the Corruption Eradication Commission is a violation of the principle of legal certainty guaranteed by the constitution;

[3.25] Whereas in addition, according to the Court, the Corruption Eradication Commission is an independent state agency given specific tasks and powers, namely among others, to carry out most functions associated with judicial power to conduct investigation, inquiry, and prosecution as well as to supervise the handling of corruption cases by other state institutions. To achieve the purpose

and objective of the establishment of the Corruption Eradication Commission as a special state institution to eradicate corruption, then in carrying out the duties and authority effectively, the Corruption Eradication Commission is required to work in a professional, independent and sustainable manner. According to the Court, the Corruption Eradication Commission will not carry out the duties and responsibilities in a professional and sustainable manner to a maximum extent without continuity of leadership of the Corruption Eradication Commission. To ensure the continuity of the duties of the leadership of the Corruption Eradication Commission, so that the leadership does not have start together all over again, then the leadership of the Corruption Eradication Commission should not be replaced simultaneously. Therefore, it would be more proportionate and to ensure fair legal certainty and equal treatment before the law in the event that there is an interim replacement among the leadership of the Corruption Eradication Commission appointed for a period of four years [*vide* Article 28D paragraph (1) of the 1945 Constitution];

[3.26] Whereas although according to Article 47 of the Constitutional Court Law, the Constitutional Court's decision shall be valid since it was stipulated (prospective), but for the sake of expediency principle which is the universal legal principle and purpose then for certain cases the Court may enforce its decision retroactively. It has become the jurisprudence in the Court's Decision Number 110-111-112-113/PUU-VII/2009 dated August 7, 2009 that has become the foundation for determining the members of the People's Legislative Assembly of the 2009-2014 period, especially in relation to the determination of the members

of People's Legislative Assembly based on Phase III calculation which initially had been incorrectly stipulated by the General Elections Commission. The reason underlying the determination of such retroactive application specifically is, among others, that the application of substance of a law "has been" and "continues" to be based incorrect interpretation so as to create legal uncertainty and constitutional impairment and it should therefore be discontinued. The discontinuation of legal uncertainty and constitutional impairment must reach out retroactively since the determination of such incorrect interpretation, which began to create legal uncertainty and constitutional impairment as seen in the case *a quo*. Therefore, to avoid legal uncertainty in the transition period as a result of this decision, in relation to the term of office of the (newly elected) substitute leadership of the Corruption Eradication Commission, then this decision shall apply to the substitute leadership of the Corruption Eradication Commission which have been selected and have assumed the office now for a term of office of four years after being elected;

[3.27] Whereas based on the foregoing description of the considerations, the Court is of the opinion that Article 34 of the Corruption Eradication Commission Law is conditionally unconstitutional, which is inconsistent with the 1945 Constitution as long as it is not interpreted that the term of office of the Corruption Eradication Commission leaders appointed simultaneously from the beginning as well as a substitute for leadership replacing the former leadership who quit in the middle of the term shall be four years and they may be re-elected for another only;

[3.28] Whereas based on all the foregoing legal considerations, the Court is of the opinion that the arguments of the Petitioners' petition have legal grounds;

4. CONCLUSION

Based on the foregoing considerations of facts and laws, the Court has come to the following conclusions:

[4.1] The Court has authority to examine, hear, and decide upon the petition *a quo*;

[4.2] The Petitioners have legal standing to file the petition *a quo*;

[4.3] The arguments of the Petitioners' Petition have legal basis;

Based on the 1945 Constitution of the State of The Republic of Indonesia and in view of Law Number 24 Year 2003 regarding 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) and Law Number 49 Year 2009 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette Number 5076);

5. ORDERS OF DECISION

Passing the decision

- Granting the Petitioners' petition in its entirety;
- Declaring Article 34 of Law Number 30 Year 2002 concerning Corruption

Eradication Commission (State Gazette of the Republic of Indonesia Year 2002 Number 137, Supplement to the State Gazette of the Republic of Indonesia Number 4250) inconsistent with the 1945 Constitution of the State of The Republic of Indonesia to the extent it is not interpreted that the leadership of the Corruption Eradication Commission namely both the leadership appointed simultaneously as well as the substitute leadership replacing the leadership who quit in the middle of their term of office, shall hold office for 4 (four) years, and thereafter they may be re-elected for another only;

- Declaring that that Article 34 of Law Number 30 Year 2002 concerning Corruption Eradication Commission (State Gazette of the Republic of Indonesia Year 2002 Number 137, Supplement to the State Gazette of the Republic of Indonesia Number 4250) shall not have any binding legal effect to the extent it is not interpreted that the leadership of the Corruption Eradication Commission namely both the leadership appointed simultaneously as well as the substitute leadership replacing the leadership who quit in the middle of their term of office, shall hold office for 4 (four) years, and thereafter they may be re-elected for another only;
- Ordering the promulgation of this Decision properly in the Official Gazette of the Republic of Indonesia;

In witness whereof, this decision was made in the Consultative Meeting of Justices by nine Constitutional Court Judges on Thursday, dated the sixteenth of June two thousand eleven; namely Moh. Mahfud MD., as the Chairperson and

concurrent Member, Achmad Sodiki, M. Akil Mochtar, Maria Farida Indrati, Hamdan Zoelva, Ahmad Fadlil Sumadi, Anwar Usman, Harjono, and Muhammad Alim, respectively as Members and was pronounced in the Plenary Session of the Constitutional Court open for the public on Monday, dated the twentieth of June two thousand eleven by nine Constitutional Court Judges, namely Moh. Mahfud MD., as the Chairperson and concurrent Member, Achmad Sodiki, M. Akil Mochtar, Maria Farida Indrati, Hamdan Zoelva, Ahmad Fadlil Sumadi, Anwar Usman, Harjono, and Muhammad Alim, respectively as Members assisted by Hani Adhani as substitute registrar, and in the presence of the Petitioners or their Attorneys, the Government or its representative, and without the presence of the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Moh. Mahfud MD.

JUSTICES,

Achmad Sodiki

M. Akil Mochtar

Maria Farida Indrati

Hamdan Zoelva

Ahmad Fadlil Sumadi

Anwar Usman

Harjono

Muhammad Alim

6. DISSENTING OPINION

With respect to Article 34 of the Corruption Eradication Commission Law which states “*The leadership of the Corruption Eradication Commission shall hold office for 4 (four) years and may be re-elected for another term of office only.*”

Constitutional Court Justice M. Akil Mochtar presents a *dissenting opinion* as follows:

I. Concerning legal standing of the Petitioners

Whereas the article *a quo* is not related to the constitutional rights of the Petitioners at all. Even if such article impairs the constitutional rights of Indonesian citizens, such impairment is not related to the impairment of constitutional rights of the Petitioners as argued;

Whereas the Petitioners do not meet the qualifications as stipulated in Article 51 paragraph (1) of the Constitutional Court because in judicial review petition of the Laws *a quo* Petitioners are not able to explain and prove:

1. Their qualification as the Petitioners in the petition *a quo*;
2. Constitutional rights and/or authorities of the Petitioners considered to have been impaired by the coming into effect of the Law *a quo*;

Moreover, in the event that the impairment is measured by the parameters of the decisions of the Court Number 006/PUU-III/2005 and Number 11/PUU-V/2007, the impairment shall meet the following criteria:

- a. the existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;

- b. the Petitioners consider that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and law petitioned for review;
- e. the possibility that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will argued by the Petitioners will not or will no longer occur;

That even if the petitioners as an individual Indonesian citizens and legal entities claimed to have been impaired by the coming into effect of Article 34 of the Corruption Eradication Commission Law, the impairment is not specific or actual or at least potential in nature which, based on logical reasoning can be assured of occurring, there is no causal relationship (*causal verband*) between the impairment argued by the Petitioners and the coming into effect of Article 34 *a quo* petitioned for review. Moreover, there is no guarantee that if the petitioners' petition is granted, the impairment will not or no longer occur. Although the Petitioners argue that as taxpayers and as they are concerned with public interest and with the eradication of corruption, there is no causal relationship

between the constitutional impairment of the Petitioners and the coming into effect of Article 34 of the Corruption Eradication Commission Law and also there is no specific, actual or potential impairment which, based on logical reasoning is assured of occurring. Therefore, the party having the right to file the Petition against Article 34 of the Corruption Eradication Commission Law should be the current leadership of the Corruption Eradication Commission who consider that their constitutional rights can be specifically, actually and potentially impaired by the coming into effect of Article 34 of the Law *a quo*.

Thus, I am of the opinion that the Petitioners have no legal standing to file the petition *a quo*.

II. In the Substance of the Petition

Whereas the Corruption Eradication Commission Law was created in a situation when Indonesia experienced an "**emergency situation**" of law enforcement, particularly in relation to criminal acts of corruption, the increasing number of the crimes of corruption not being matched by increasing performance of law enforcement officers namely police and prosecutors. Therefore, the Corruption Eradication Commission established with authority to coordinate, supervise, conduct an investigation, and prosecution of criminal acts of corruption can in some cases take over corruption cases being handled by both the law enforcement agencies, if there are sufficient provided for in Article 8, Article 9, and Article 10 of the Corruption Eradication Commission Law. Indeed the debate of the pro and contra on the term of office for candidates of the substitute leadership of the Corruption Eradication Commission, began a year

ago when the selection committee recruited a candidate of the substitute leadership of the Corruption Eradication Commission because one of the leadership of the Corruption Eradication Commission was accused of a criminal act [*vide* Article 32 Paragraph (1) number 3 of the Corruption Eradication Commission Law]. Therefore, the Petitioners question the term of office of the candidate of the **substitute** leadership of the Corruption Eradication Commission not of the candidate of leadership of the Corruption Eradication Commission; compare the provisions of Article 29 *juncto* Article 21 paragraph (1) subparagraph a, and Article 33 *juncto* Article 29 of the Corruption Eradication Commission Law. For that purpose, the interpretation of Article 34 of the Law *a quo* must be made using a proportional approach using to legal interpretation universally recognized namely historical, systematic, and teleological (holistic) interpretation;

Whereas based on the systematic interpretation, the Corruption Eradication Commission Law, particularly concerning the replacement of the leadership of the Corruption Eradication Commission, must be traced from the provision of Article 30 of the Corruption Eradication Commission Law **concerning procedures for the selection of the leadership of the Corruption Eradication Commission rather than the candidates of the substitute leadership of the Corruption Eradication Commission**, namely by first forming the selection committee, selecting candidates twice the number of positions required, and the People's Legislative Assembly will choose five candidates needed. Systematically and logically, the candidates of the leadership

of the Corruption Eradication Commission which must be filed by the Government shall be 10 (ten) candidates selected by the committee for the selection of the leadership of the Corruption Eradication Commission. This is based on historical-logical interpretation, rational considerations, in the number of candidates of the leadership of the Corruption Eradication Commission needed for term of office of 4 years by reference to the provisions of Article 21 paragraph (1) sub-paragraph a of the Corruption Eradication Commission Law which reads *"The Leadership of the Corruption Eradication Commission shall consist of five members of the Corruption Eradication Commission "*.

Whereas the term of office provision in Article 34 of the Corruption Eradication Commission Law is 4 years, intended for the selection of candidates for the leadership of the Corruption Eradication Commission in a normal or usual manner, pursuant to Article 21 paragraph (1) sub-paragraph a *juncto* Article 29 and not for candidates of substitute leadership of the Corruption Eradication Commission as provided for in Article 33 of the Corruption Eradication Commission Law, only the procedures must be based on Article 29, Article 30 and Article 31 of the Corruption Eradication Commission Law, which are applied to the selection of candidates of the leadership of the Corruption Eradication Commission whose term of office has expired and not for a substitute candidate for the leadership because of the vacant leadership of the Corruption Eradication Commission. Whereas, pursuant to the provision of Article 33 of the Corruption Eradication Commission Law, in the event of a vacancy, the President shall propose a substitute candidate member to the People's Legislative Assembly and

is required under the Law to propose a multiple number of vacancies of the leadership of the Corruption Eradication Commission, and the People's Legislative Assembly shall choose the substitute candidate of the leadership of the Corruption Eradication Commission required (such as the previous selection process of the substitute candidate of the leadership of the Corruption Eradication Commission). Thus, based on a systematic-logical interpretation, the term of office of the substitute leadership of the Corruption Eradication Commission will end along with the expiration of the term of office of the last elected leadership of the Corruption Eradication Commission.

Whereas in the event that the interpretation of Article 34 of the Corruption Eradication Commission Law follows the Interpretation of the Court that declared *"inconsistent with the 1945 constitution of the state of the republic of Indonesia to the extent it is not interpreted that the leadership of the Corruption Eradication Commission namely both the leadership appointed simultaneously as well as the substitute leadership replacing the leadership who quit in the middle of their term of office, shall hold office for 4 (four) years, and thereafter they may be re-elected for another only"*, will in fact create legal uncertainty, conflict of norms and confusion in the recruitment system of the candidates of the leadership of the Corruption Eradication Commission in the future, because accordance with Article 21 paragraph (1) sub-paragraph a of Corruption Eradication Commission Law, the leadership of the Corruption Eradication Commission shall consist of 5 (five) members of the Corruption Eradication Commission and in the event that the President, based on the Court decision *a quo*, the President will propose only

8 (eight) candidates of the leadership of the Corruption Eradication Commission, **while the People's Legislative Assembly shall choose 5 (five) candidates of the leadership of the Corruption Eradication Commission in accordance with Article 30 paragraph 10 of the Corruption Eradication Commission Law stating that the People's Legislative Assembly shall choose and stipulate five candidates required.** Thus, in my opinion, in the future, there will be the leadership of the Corruption Eradication Commission that consists of 6 people, unless the President is consistent with Presidential Decree Number 129/M Year 2010 dated December 10, 2010 which states that the term of office of the current substitute leadership of the Corruption Eradication Commission shall be to continue the remaining term of 2007-2011 or the President will still propose the candidates of the leadership of the Corruption Eradication Commission, twice the number needed, which is 10 people (see Article 30 paragraph 9 of the Corruption Eradication Commission Law).

Based on the foregoing description, in my opinion, the petition for judicial review of Article 34 of Law Commission is not an issue of constitutionality of norms which are general or abstract but implementation problems in the field of law or a matter of concrete norms, which is the legal policy of the Lawmakers, considering the filling the leadership and members of state institutions are different with their respective characteristics, and therefore it is appropriate that the Petitioners' petition shall be rejected by the Court.

SUBSTITUTE REGISTRAR,

sgd.

Hani Adhani

The Copy of this Decision is valid and in accordance with the original published to the public based on Article 14 of Law Number 24 Year 2003 regarding the Constitutional Court.

Jakarta, June 20, 2011

Registrar,

The image shows the official seal of the Constitutional Court of the Republic of Indonesia. The seal is circular with the text "MAHKAMAH KONSTITUSI" at the top and "REPUBLIK INDONESIA" at the bottom. In the center is a Garuda, the national emblem of Indonesia. A handwritten signature in black ink is written across the seal, extending to the right.

Kasianur Sidauruk

Complete decision can be seen in the site www.mahkamahkonstitusi.go.id or can be obtained free of charge at the Secretariat General and Registry Office of the Constitutional Court, Jl. Medan Merdeka Barat No. 6 Central Jakarta, Tel. (021) 23529000