DECISION

Case Number 066/PUU-II/2004

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

The Constitutional Court of the Republic of Indonesia

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in a case of petition for judicial review of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court and the Law of the Republic of Indonesia Number 1 Year 1987 regarding the Chamber of Commerce and Industry against the 1945 Constitution of the State of the Republic of Indonesia filed by:

1. DR. ELIAS L. TOBING, domiciled at Jalan Cempaka Putih Timur Raya Number 19, Central Jakarta;
2. DR. RD.H. NABA BUNAWAN, M.M., M.B.A., domiciled at Kp. Dukuh RT. 02 /05 Sudimara, Ciledug, Tangerang, Banten; in this matter authorizing:
    1. SYOFYANSORI, S.H.;
    2. T. SARIALAM H. SIHALOHO, S.H.;
    3. SANDY EBENEZER SITUNGKIR, S.H.

    all of whom are advocates of the Advocates and Lawyers' Office of SYOFYANSORI, S.H. & PARTNERS having its address at Jalan

Letjen. Suprapto Number 504 Tel. (021) 4205801 Jakarta-10530, respectively by virtue of a special power of attorney dated September 1, 2004, hereinafter referred to as the PETITIONERS;

Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard the statement of the Government;

Having heard the statement of the Related Parties;

Having read the written statement of the Government;

Having read the written statement of the People's Legislative Assembly of the Republic of Indonesia;

Having read the written statement of the Related Parties;

Having heard the statements of Witness and Expert;

Having examined the evidence;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the Petitioner's petition are as mentioned above;

Considering whereas prior to examining the principal issue of the case, the Constitutional Court must first take the following matters into account:

1. Whether the Court has the authority to examine, hear and decide upon the petition for judicial review of Law Number 1 Year 1987 regarding the Chamber of Commerce and Industry and Law Number 24 Year 2003 regarding the Constitutional Court ;

2. Whether the Petitioners' constitutional rights have been impaired by the coming into effect of the aforementioned two laws, *in casu* Article 4 of Law Number 1 Year 1987 and Article 50 of Law Number 24 Year 2003, so that the Petitioners have the legal standing to act as Petitioners before the Court;

In respect of the abovementioned two issues, the Constitutional Court is of the following opinion:

1. AUTHORITIES OF THE COURT

Whereas Article 24C Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia states ,"The Constitutional Court has the authority to hear cases at the first and final level the decisions of which shall be final, to conduct judicial review of laws against the Constitution, to decide disputes on the authorities of state institutions granted by the Constitution, to decide the dissolution of political parties, and to decide disputes concerning the results of general elections"; as reaffirmed in Article 10 Paragraph 1 of Law Number 24 Year 2003 regarding the Constitutional Court which states that the Constitutional Court has the authority to hear cases at the first and final level the

decisions of which shall be final, to conduct judicial review of laws against the 1945 Constitution;

Considering whereas the laws petitioned for judicial review are two laws, namely Law Number 1 Year 1987 regarding the Chamber of Commerce and Industry, and law Number 24 Year 2003 regarding the Constitutional Court. In this review both are closely related in determining the authority of the Court because the decision of the Court on the petition for substantive review of Article 50 of Law Number 24 Year 2003 will determine the Court's decision on the petition for substantive review of Article 4 of Law Number 1 Year 1987 regarding the Chamber of Commerce and Industry;

Considering whereas the Petitioners filed a petition for the review of Article 50 of Law Number 24 Year 2003 namely regarding laws enacted following the first amendment to the 1945 Constitution, thereby the petition of the Petitioners is not hindered by the formal provision of Law Number 24 Year 2003 regarding the Constitutional Court. Article 50 itself provides for the limitation that laws that can be petitioned for reviews shall be laws enacted following the amendment to the 1945 Constitution of the State of the Republic of Indonesia. Therefore, the Court has the authority to examine and decide upon the petition of the Petitioners in conducting judicial review of Law Number 24 Year 2003;

Considering whereas aside from filing a petition for judicial review of Law Number 24 Year 2003, the Petitioner also filed a petition

for judicial review of Article 4 of Law Number 1 Year 1987, whereby the authority of the Court to examine and decide upon the petition of the Petitioners to conduct substantive review of the *a quo* law will be determined by the Court's decision on the review of Article 50 of Law Number 24 Year 2003. Therefore, the Court's authority to examine and decide upon the petition of the Petitioners for substantive review of Law Number 1 Year 1987 will be declared in the first principal issue of the case of the judicial review of Law Number 24 Year 2003. However, regardless of the above matter, the Court already has its stand on the judicial review of laws enacted prior to the amendment to the constitution as referred to in Article 50 of Law Number 24 Year 2003, as set forth in case decision Number 004/PUU-I/2003. Therefore, regardless of dissenting opinions among the constitutional count justices concerning Article 50, the Court is of the opinion that it has the authority to examine and decide upon the *a quo* petition.

2. LEGAL STANDING OF THE PETITIONERS

Considering whereas Article 51 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court provides that parties that can file a petition for judicial review of laws against the 1945 Constitutions are parties who claim that their constitutional rights and/or authorities have been impaired by the coming into effect of a law, namely individual Indonesian Citizens, 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 as regulated in law, public or private legal entities or state institutions;

Considering whereas referred to as constitutional rights according to the elucidation of Article 51 Paragraph (1) of Law Number 24 Year 2003 are the rights regulated in the 1945 Constitution of the Republic of Indonesia;

Considering whereas therefore, for a person or a party to be accepted as a petitioner having the legal standing before the Constitutional Court in a petition for judicial review of a law, the person or party must have the capacity with qualifications fulfilling the provision of Article 51 Paragraph (1) of Law Number 24 Year 2003, and in that capacity considers that his constitutional rights have been impaired by the coming into effect of the law petitioned for review.

Considering whereas the Petitioners are respectively the Chairperson and Secretary General of the Chamber of Commerce and Industry of Small and Medium Enterprise who authorize: (1) Syofyansori, S.H. (2) T. Sarialam H. Sihaloho, S.H., (3) Sandy Ebenezer Situngkir, S.H., therefore the Court is of the opinion that the Petitioners meet the qualifications provided for in Article 51 Paragraph (1) of the Constitutional Court Law namely as individual Indonesian citizens;

Considering whereas the Court is of the opinion that the argument of the Petitioners which states that their constitutional rights

guaranteed by Article 28C Paragraph (2) of the 1945 Constitution have been impaired by Article 50 of Law Number 24 Year 2003 can be used as the basis to meet the requirements of the Petitioners’ legal standing for filing the petition for judicial review of Law Number 24 Year 2003 regarding the Constitutional Court;

Considering whereas in addition, the Petitioners also state that their constitutional rights guaranteed by Article 28E Paragraph (3) of the 1945 Constitution have also been impaired by Article 4 of Law Number 1 Year 1987 regarding Chamber of Commerce and Industry. The Petitioners as entrepreneurs have established the Small and Medium Enterprise Chamber of Commerce and Industry with Notary Deed Number 31 dated June 11, 2001 before Notary Darbi, SH and the application of the Petitioners to obtain legalization as a legal entity was rejected by the Minister of Justice and Human Rights (at that time) for the reason that according to Law Number 1 Year 1987 regarding Chamber of Commerce and Industry, there can only be one chamber of commerce and industry and hence the application for legalization submitted by the Petitioners was rejected;

Considering whereas with respect to the above facts, regardless of the opinion of a constitutional court justice who declared that the Petitioners do not have the legal standing, the Court is of the opinion that the constitutional rights of the Petitioners have indeed been impaired, and hence pursuant to Article 51 Paragraph (1) of Law Number 24 Year 2003, the Petitioners are considered to have the legal

standing. However, the examination of the petition for review of Article 4 of Law Number 1 Year 1987 regarding Chamber of Commerce and Industry will be determined by the decision of the Court in the examination of the petition for review of Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court which will be decided first in the examination of the *a quo* petition;

3. PRINCIPLE ISSUE OF THE CASE

I

REVIEW OF ARTICLE 50

OF LAW NUMBER 24 YEAR 2003

Considering whereas in their petition the Petitioners argue that Article 50 of the Constitutional Court Law has impaired their constitutional rights because Article 50 of the *a quo* Law hindered the Petitioners from obtaining the guarantee of the Petitioners' rights as stated in Article 28C Paragraph (2) of the 1945 Constitution, and according to the Petitioners, Article 50 of the *a quo* Law has created a double standard in the Indonesian legal system for allowing the application of a law which is contradictory the 1945 Constitution, *in casu* Article 4 of Law Number 1 Year 1987, which violates the constitutional rights of the Petitioners;

Considering whereas the Court has also heard the oral statement of the Government which was conveyed by the Minister of Law and Human Rights and the Director General of Laws and Regulations in a hearing dated

December 22, 2004 and read written statement of the Minister of Law and Human Rights dated January 12, 2005 which in essence stated that:

(a) Article 50 of Law Number 24 Year 2003 has been intended to limit laws that can be petitioned for review by the Constitutional Court on the basis that the law concerned was drafted based on the 1945 Constitution prior to the amendment hence can not be reviewed based on the 1945 Constitution following the amendment;

(b) Laws enacted prior to the amendment to the 1945 Constitution can only be reviewed by means of legislative review by the legislators and can not be reviewed by the Constitutional Court;

(c) The constitution of a country generally regulates provisions of general nature, whereas more detailed provisions can be regulated by lower laws and regulations, and Article 50 of Law Number 24 Year 2003 which stipulate the review of laws in a limited manner is a principle or norm that must be followed by every person and institution;

Considering whereas in the legal considerations of the Decision on Case Number 004/PUU-I/2003 in relation to judicial review of Law Number 14 Year 1985 regarding the Supreme Court, the court has stated its stance concerning the existence of Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court. Even though the Petitioners did not dispute the existence of Article 50 of Law Number 24 Year 2003 in the Case, the Court considered it necessary to consider to establish whether the Court has the

authority to review Law Number 14 Year 1985 regarding the Supreme Court petitioned for review by the Petitioners;

Considering whereas in the legal considerations of the Decision on Case Number 004/PUU-I/2003 6 (six) Constitutional Court Justices stated their opinion that Article 50 of Law Number 24 Year 2003 is contradictory to the 1945 Constitution, and therefore must be overridden and therefore the Constitutional Court has the authority to conduct judicial review of Law Number 14 Year 1985 regarding the Supreme Court which was enacted prior to the amendment to the 1945 Constitution, whereas 3 (three) other Constitutional Court Justices stated dissenting opinions;

Considering whereas in deciding the principle issue of case Number 066/PUU-II/2004 in the *a quo* petition, there were still two opinions among the Constitutional Court Justices on the constitutionality of Article 50 of Law Number 24 Year 2003. The opinion of the majority of Constitutional Court Justices stated that:

(a) Article 24C Paragraph (1) of the 1945 Constitution clearly states, "The Constitutional Court shall have the authority to hear cases at the first and final level the decisions of which shall be final, in conducting judicial review on laws against the Constitution...", without containing the limitation concerning the enactment of the law reviewed;

(b) Article 24C Paragraph (6) of the 1945 Constitution which reads, "The appointment and dismissal of the constitutional justices, the law of proceedings and other provisions on the Constitutional Court shall be

regulated by law”, is not intended to limit the authority of the Constitutional Court which is clearly stated in Paragraph (1) of Article 24C;

(c) Although Article 50 of Law Number 24 Year 2003 is included in the Eighth Section of CHAPTER V on THE PROCEDURAL LAW, the substance does not only concern procedural law but it also concerns the authority of the Constitutional Court which is regulated in a clear and limited manner by the 1945 Constitution, hence laws can not reduce or add on to the authority. If it is intended to limit the authority of the Court, such limitation must be indicated in the constitution itself and not in a lower regulation;

(d) TRANSITIONAL PROVISIONS Article I of the 1945 Constitution which reads, “All existing laws and regulations shall remain valid, as long as no new ones are established in conformity with this constitution”, can not be interpreted as limiting the authority of the Constitutional Court to conduct substantive review of laws against the 1945 Constitution;

(e) Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court will cause legal uncertainty which will definitely create injustice for the reason that there will be a double standard in a legal system: firstly, which is applied prior to the First Amendment to the 1945 Constitution; and secondly, which is applied on laws enacted following the application of the First Amendment to the 1945 Constitution;

(f) The position of laws shall be as the implementation of Article 24C Paragraph (6) of the 1945 Constitution are serving the function to implement the constitution and not to make new regulations, let alone

regulations which limit the implementation of the constitution. In order to implement Article 24C Paragraph (6) of the 1945 Constitution, the legislators have the authority to determine the best and most accurate way, however they cannot change matters which have firmly been provided for by the constitution. Article 50 of Law Number 24 Year 2003 is perceived as reducing the authority of the Constitutional Court granted by the 1945 Constitution and is contradictory to the universally recognized and accepted doctrine of legal norms hierarchy;

(g) It must be understood that the Constitutional Court is a state institution whose power and authority are determined by the constitution. The court is not an organ of laws, but rather it is an organ of the constitution. Therefore, the basis used by the Constitutional Court in carrying out its constitutional duties and authorities is the constitution. Even if other laws and regulations, in accordance with the principle of legality, must be followed by every person and institution as legal subjects of the national law, all laws and regulations concerned must be interpreted insofar as they are not contradictory to the 1945 Constitution;

Considering whereas based on the above considerations, the six (6) Constitutional Court Justices are of the opinion that Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court is contradictory to Article 24C Paragraph (1) of the 1945 Constitution and hence the petition of the Petitioners, insofar as it concerns Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court, must be granted;

With respect to the substance of Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court, 3 (three) Constitutional Court Justices, namely Prof. Dr. H.M. Laica Marzuki, S.H., H. Achmad Roestandi, S.H., and Prof. H.A.S. Natabaya, SH, LL.M. have dissenting opinions which are as follows:

- **Prof. Dr. H.M. Laica Marzuki, S.H.**

Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court requires that laws that can be petitioned for review are laws enacted following the amendment to the 1945 Constitution.

The Constitutional Court has two types of authorities *(bevoegheden),* namely constitutional authority, as regulated in Article 24C Paragraphs (1), (2) of the 1945 Constitution *juncto* Article 10 Paragraphs (1), (2) of Law Number 24 Year 2003 regarding the Constitutional Court and procedural authority regulated according to procedural law (*formeel recht*).

Article 50 of Law Number 24 Year 2003 contains the regulation of one of the procedural authorities of the Court, closely related to *bevoegheid des rechters* in relation to the judicial review of laws.

The Court certainly cannot reach too far in reviewing Article 4 of Law Number 1 Year 1987 (enacted on January 28, 1987). When Article 50 of Law Number 24 Year 2003 is declared to no longer have binding legal force, the Constitutional Court has stripped the procedural right (*formeel recht)* provided to it by the *de wetgever*. Whereas the

procedural right is made to enforce the principle of material law. Not only does Article 50 of Law Number 24 Year 2003 limit judicial review to laws enacted following the amendment of the 1945 Constitution to avoid case backlog (*papieren muur*), the Court itself is a product institution of the amendment period of the 1945 Constitution.

Article 50 of Law Number 24 Year 2003 is by no means intended to reduce the authority of the Constitutional Court in relation to judicial review of laws against the Constitution (Article 24C Paragraph (1) of the Constitution), since in fact it exercises and spells out the constitutional authorities, as common in a law, *wet, gesetz* implementing and clarifying the Constitution, *Grondwet* or *Gründgesetz*.

In that respect, considered in terms of the time (*tempus*) of enactment of Law Number 1 Year 1987 on January 28, 1987, the law must therefore be considered as applicable based on Article I of the Transitional Provisions section of the 1945 Constitution which provides that any existing laws and regulations shall remain valid insofar as no new ones are established in conformity with this constitution (amendment), which means that any changes to an existing law can only be made through the formulation of a new law by the People's Legislative Assembly and the President. Laws and regulations (*algemene verbindende voorschriften*) concerned can not be changed through a judge's decision, including the decision of the Constitutional Court.

Therefore, the Court should have not accepted the petition of the Petitioners.

- **H. Achmad Roestandi, SH.**

1. Juridical Approach

Article 50 of Law Number 24 Year 2003, is by no means contradictory to the 1945 Constitution, because the *a quo* article is only an implementation of part of Article 24C Paragraph (6) of the 1945 Constitution which reads:

"The appointment and dismissal of the constitutional justices, the law of proceedings and other provisions on the Constitutional Court shall be regulated by law".

The legislators put Article 50 under Chapter V with the title PROCEDURAL LAW and under the Eighth Section: Judicial review of laws against the Constitution, and neither under CHAPTER III entitled Authorities of the Constitutional Court nor under the First Section: Authority. In relation to procedural law, Article 50 is indirectly related to the authorities of the Constitutional Court.

In the 1945 Constitution, the authorities of the Constitutional Court are provided in Article 24C Paragraph (1) which reads:

"The Constitutional Court has the authority to hear cases at the first and final instance the decisions of which shall be final, to conduct judicial review of laws against the Constitution, to

decide disputes on the authorities of state institutions granted by the Constitution, to decide the dissolution of political parties, and to decide disputes concerning the results of general elections”.

This substance of Article 24C Paragraph (1) of the 1945 Constitution, with a slightly different wording, is fully set forth in Article 10 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court which reads:

“The Constitutional Court has the authority to hear cases at the first and final instance, the decisions of which shall be final:

a. to conduct judicial review of laws against the Constitution;

b. to decide disputes on the authorities of state institutions granted by the 1945 Constitution;

c. to decide the dissolution of political parties; and

d. to decide disputes concerning the results of general elections”.

It can be concluded from the above quotations that there is no reduction of or addition to the authorities of the Constitutional Court in Law Number 24 Year 2003. Therefore, the provision of Article 50 of Law Number 24 Year 2003, does not constitute reduction, but rather it is a clarification, or further explanation of the authorities of the Constitutional Court as indicated in Article 10 Paragraph (1) in the field of procedural law.

Even if the clarification is considered as if it is a limitation, such limitation is common in laws serving as clarifications of certain articles of the 1945 Constitution.

As a comparison, Law Number 23 Year 2003 regarding General Elections of the President and Vice President has also added requirements that have to be met by Presidential and Vice Presidential candidates as further clarification of Article 6 Paragraph (2) of the 1945 Constitution, for instance by adding the requirements of age, education, health, and good conduct. Whereas such additions are not indicated in Article 6 of the 1945 Constitution.

Therefore, the substance of Article 50 of Law Number 24 Year 2003 regarding the provision of time limit for a law to be eligible for review against the 1945 Constitution, can not be perceived as a reduction of the authorities of the constitutional Court as indicated in Article 24C Paragraph (1), hence the *a quo* article is not contradictory to the 1945 Constitution.

2. Approach from the aspect of the Objective of the Law

According to Gustav Radbruch, the objective of the law is to create legal justice, legal certainty and legal usefulness. Article 50 of Law Number 24 Year 2003 can be reviewed using the approach of the three objectives of the law.

a. Legal Justice Approach

Every law is made with reference to the spirit contained in the constitution applicable at that time. If the constitution changes, the spirit contained therein also changes. Meanwhile, laws enacted prior to the amendment to the constitution still refer to the old constitution (prior to the amendment).

Therefore, it seems unfair if a law made based on the old constitution is reviewed against the new constitution. Legal justice will be achieved if a law is reviewed against the constitution used as the basis at the time of the formulation of the law.

Therefore, the logic and legal construction of the legislators which limit laws which can be reviewed to laws enacted following the First Amendment to the 1945 Constitution (October 19, 1999), are reasonable under the legal justice approach.

Such interpretation does not mean that laws enacted prior to the First Amendment to the 1945 Constitution can not be reviewed; the laws can still be reviewed through legislative review, not through judicial review.

b. Legal Certainty Approach

Legal certainty must always accompany and counterbalance legal justice. Occasionally, a legal norm seems to be forced to sacrifice legal justice, for the sake of legal certainty, for instance in an expired law institution (*rechtsinstituut*). An expired law institution is indeed unfair, as it can free a person who is guilty from legal prosecution or declare a person who is not the owner to become the owner after a certain period of time. Even though violating the sense of justice, legal certainty is needed, because in the long run, legal certainty is in fact extremely needed to create true justice.

The time limit in Article 50 may not fulfill an immediate sense of justice, because of a different treatment, namely that there are laws eligible for reviews (laws enacted following the First Amendment of the 1945 Constitution) and there are laws not eligible for reviews (laws enacted prior to the First Amendment of the 1945 Constitution).

However, this different treatment is in fact needed in order to ensure legal certainty for law enforcers and the public in an effort to consolidate law enforcement.

c. Legal Usefulness Approach

The time limit in Article 50 is also needed because the legislators relate it to the forecast of large volume of cases coming in to the Constitutional Court. The forecast is reasonable considering the experience of the Supreme Court so far, whereby the backlogs are piling up and are not resolved any time soon. Due to the extremely lengthy delay of case settlement, decisions of the Supreme Court are often justice which is too late or stale. The same thing can happen to the Constitutional Court if there is no limitation. Furthermore, there are only nine (9) Constitutional Court Justices, whereas the deliberation meetings to decide upon a case must be attended by all of the Constitutional Court Justices.

3. Approach from the aspect of Hearing Ethics

Aside from using juridical and legal objective approaches, the judicial review of Article 50 of the Constitutional Court Law must also be considered from the aspect of hearing ethics. In hearing a case, all judiciaries always consider the relationship between the disputing parties or case object and the judges who examine, hear and decide upon the case. In civil or criminal law, for instance, the judge must withdraw if the disputing parties in fact have a close family or business relationship with the judge deciding the case. This withdrawal must be taken for the concern that the judge will take sides in deciding the case. In

relation to the judicial review of Article 50 of the Constitutional Court Law, there is a clear relationship between article to be reviewed and the constitutional justices, as the article regulates the authority of the court itself.

The hearing norm which obligates the judge to withdraw in the event that the case being adjudicated concerns his own interest, does not in any way mean to doubt the impartiality and personal integrity of the judges, but rather constitutes a universally recognized standard.

Considering the aforementioned matters does not mean that the constitutionality of Article 50 cannot be reviewed. The constitutionality review is still open but not by the Constitutional Court through judicial review, but rather by the legislators through legislative review.

- **Prof. H.A.S. Natabaya, S.H., LL.M.**

Whereas Article 50 of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court which reads " Laws that can be petitioned for review are laws enacted following the amendment to the 1945 Constitution of the State of the Republic of Indonesia", in the opinion of the Petitioners, has impaired the constitutional rights of the Petitioners and reduced the authority of the Constitutional Court stipulated in Article 24C Paragraph (1) of the 1945 Constitution, which among others states that the Constitutional Court

has the authority to hear cases at the first and final level the decisions of which shall be final, to conduct judicial review of laws against the Constitution.

Therefore, according to the Petitioners, Article 50 of the Constitutional Court Law is contradictory to Article 28C Paragraph (2) of the 1945 Constitution.

With respect to the above argument of the Petitioners, this Dissenting Opinion will view the above problem from several perspectives namely:

1. Whether the People's Legislative Assembly and the Government in formulating Law Number 24 Year 2003, particularly Article 50, have violated the Constitution.

2. The relationship between substance of a constitution and a law (organic law) viewed from the perspective of the Constitutional Law Science.

3. Whether the Judge is bound by Procedural Law (Adjective Law) in passing a decision.

Whereas Article I of the Transitional Provisions section of the 1945 Constitution states, " All existing laws and regulations shall remain valid, as long as no new ones are established in conformity with this constitution". Based on the provision of this Transitional Provision, the existence of all laws and regulations is recognized until new laws

are made in accordance with the constitution in the sense that review of laws can only be conducted by the People's Legislative Assembly and the Government through legislative review. This issue can be understood that if a constitution is replaced by a new constitution or is amended, the consequences of such replacement or amendment on the system of old legal norms which applies on the date the new constitution comes into effect or on the old articles so amended need to be regulated. The provisions regulating such consequences is called Transitional Law (*Transitoir*) because it regulates the transition from a system of the old legal norms based on an old constitution to a new system of legal norms based on a new constitution.

In every amendment to a constitution, 2 (two) questions will arise concerning:

1. the positions of the state organs on the date the amendment comes into effect;

2. the binding force of applicable laws and other regulations on the date the amendment comes into effect.

The positions of old organs may be provided to keep serving their functions until replaced by organs formulated in accordance with the provisions of the new constitution, whereas the binding force of applicable laws and other regulations on the amendment's date of application, needs to be differentiated into:

1. New constitutional provisions constituting complete legal norms which can be applied instantly at that time.

2. New constitutional provisions containing only one principle which needs to be regulated further by laws established in accordance with the new constitution.

It is generally recognized that existing laws and other regulations which are valid on the effective date of a new constitution, remain valid until they are revoked, supplemented or amended by other laws and regulations in accordance with the new constitution, except when they are contradictory to the provisions of the new constitution which has complete legal norms instantly applicable at that time.

In the above context of transitional legal norms, we determine whether the People's Legislative Assembly and the Government as the legislators being also the ones that implement the people' sovereignty in accordance with the 1945 Constitution, whose authorities are regulated in Article 20 Paragraphs (1), (2), (3) and (4) of the 1945 Constitution have taken legal actions beyond their authorities as regulated in the 1945 Constitution. Since Article 24 Paragraph (1) of the 1945 Constitution only provides for the types of authorities of the Constitutional Court (*constitutioneele bevoegdheden*) which among others are the authority to conduct judicial review of laws against the constitution, certainly an organic law is therefore needed to regulate the means to exercise such authority which has been given to the Constitutional Court. With reference to Article 24C Paragraph (6) which

reads “The appointment and dismissal of the constitutional justices, the law of proceedings and other provisions on the Constitutional Court shall be regulated by law”, which is also the mandate of the constitution, it is appropriate for the People’s Legislative Assembly and the Government to formulate Law Number 24 Year 2003 regarding the Constitutional Court with the substance material among others regulating the court’s procedural law (*vide* Chapter V) including provisions on the type of laws eligible for judicial review namely laws enacted following the first amendment to the 1945 Constitution dated October 19, 1999 (*vide* Article 50). It can be concluded from the above description that there are two types of authorities; firstly constitutional authority (*constitutioneele bevoegdheden*) regulated in Article 24C Paragraph (1), secondly, procedural law authority (*procedure bevoegdheden*) as regulated in Law Number 24 Year 2003 which is an organic law as the implementation of Article 24C Paragraph (6) of the 1945 Constitution, hence the regulation of the procedural authority (*procedure bevoegdheden*) of the Constitutional Court regulated in Article 50 of Law Number 24 Year 2003 does not eliminate or reduce the constitutional authority of the Constitutional Court. Therefore, the existence of Article 50 of Law Number 24 Year 2003 is not contradictory to Article 28C Paragraph (2) of the 1945 Constitution.

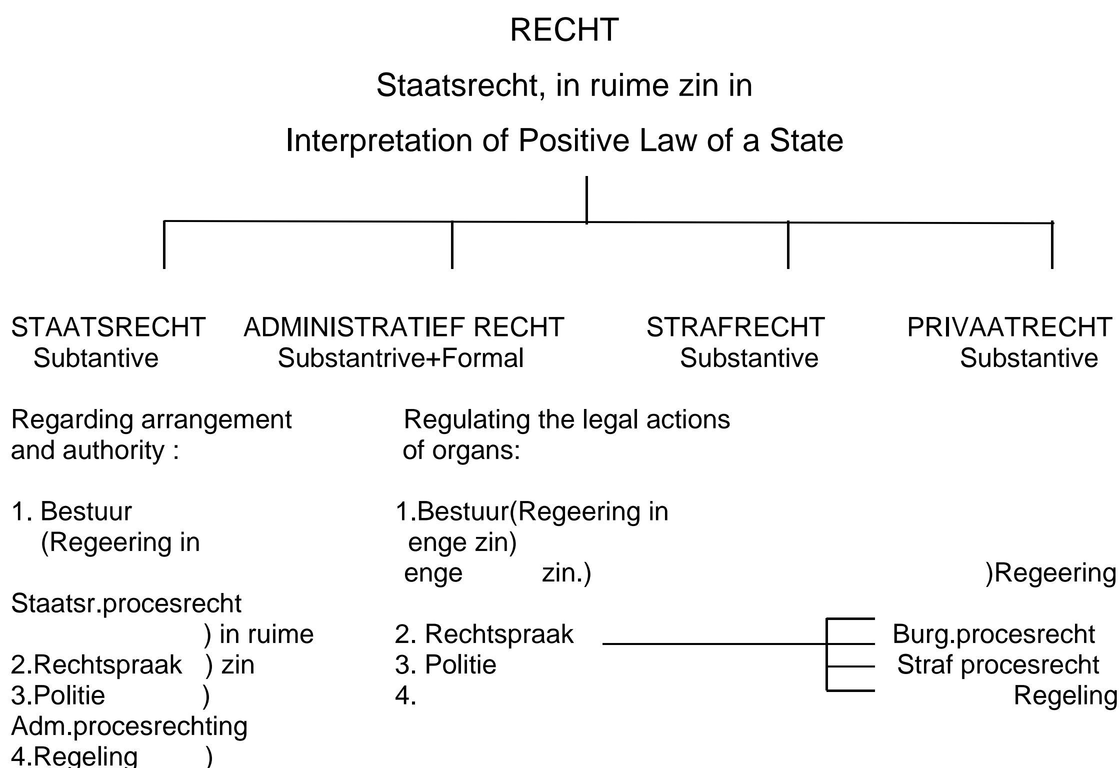
Whereas perceived from the perspective of the Constitutional Law Science, referred to as a constitution is the highest law of a state (*Hoogstewet*) which contains the basis of the entire legal system of the state.

Perceived from substantive perspective, the constitution differs from ordinary laws, because a constitution contains the highest fundamental legal norms regulating the form of the state and the structure of its government; its organs and authority are the basis the overall system of legal norms applicable in a state. In relation to the 1945 Constitution, it can be perceived that the provisions concerning state organs and their authorities have been regulated, among others, such as the People's Consultative Assembly and its authorities, the People's Legislative Assembly and its authorities, the President and his/her authorities, the Supreme Court and its authorities, the Constitutional Court and its authorities. A constitution does not regulate how the organs implement their authorities, because this matter will be regulated in organic laws or other regulations as the implementations of the provisions of the constitution.

In order to further perceive the interrelation between the constitution and the organic laws we can use the view of C. van Vollenhoven in trying to identify a system and the boundary between the Constitutional Law and Administrative Law so that we will get a clear insight (*inzicht*) regarding the essence of the Constitutional Law and the Administrative Law. C. van Volenhoven stated that the substance of the Constitutional Law pertains to *inrichting* (arrangement) and *bevoegdheid* (authority) of the state organ which consist of four duties of the state: *bestuur, rechtspraak, politie* and *regeling*", whereas Administrative Law is concerned with the relation

between the ones who give orders and those who take orders, on the one hand providing limitations to the state organs in governing (in the broad sense) according to their duties and authorities in performing *bestuur, rechtspraak, politie* and *regeling*, hence in relation to the *a quo* petition, such view will help us study the relationship between the substance of the constitution which generally contains regulations concerning the arrangement (*inrichting*) and authority (*bevoegdheid*) of the state organs, and organic laws, the substance of which regulates how the state organs exercise their authorities, in the field of *bestuur* (governance), *rechtspraak* (judiciary), *politie* (police), and *regeling* (laws and regulations).

Classification Diagram by C. Van Vollenhoven



Using the above view of C. van Vollenhoven, it can be concluded that both the arrangement (*inrichting*) and the organ of the Constitutional Court have been clearly regulated in Article 24C Paragraphs (1), (3), and (4), whereas regarding the way the authority of the Constitutional Court is exercised, the Constitution itself has ordered the legislators (*Wetgever*) through Article 24C Paragraph (6) to prepare the procedural law.

In line with the perspective described above, Hans Kalsen has also described The Content of the Constitution, particularly concerning the determination of the contents of future statutes; Hans Kelsen stated "*The constitution contains certain stipulations not only concerning the organs and the procedure by which future laws are to be enacted, but also concerning the contents of these laws*". From the above description it can be seen that the substantive content of a constitution not only regulates an organ and its procedure, but also regulates the substantive content of a law. Hans Kelsen stated further "*The constitution can also determine that laws are to have certain positive contents: thus it may require that if certain matters are regulated by law they must be regulated in the way prescribed by the constitution (which leaves it to the discretion of the legislative organ whether or not these matters shall be regulated) or the constitution, without leaving the legislative organ any discretion, may prescribe that certain matters are to be regulated by the legislative organ and are to be regulated in the way determined by the constitution.* (refer to Hans Kelsen*, **General Theory of Law and State,** translated by Anders Wedberg, Assistant Professor of Philosophy in the University of Stockholm, New York, Russell & Russell*, page 261).

In examining, hearing and deciding upon a case brought before the judge, a judge is bound by the provisions set forth in the procedural law (*formele recht*) of the court. Such matter is due to the function of procedural laws (*formele recht, adjective law*) being to maintain the substantive law (*materiele recht*).

Indeed, in relation to substantive laws (*materiele recht*), a judge has the freedom of interpretation which can not be performed arbitrarily; even though a judge has the freedom to interpret a law, he must be subject to the will of the legislators (*wetgever*) which is known as contained in the law concerned. In the event that the will of a law can not be read from the words of the law, a judge must find it in the history of the words in the legal system or in current daily used words. Every interpretation is an interpretation limited by the legislators, therefore a judge must not interpret a law arbitrarily upon his own will. Logemann stated "*men mag de norm waaraan men gebonden is niet willekeurig uitleggen, doch alleen de juiste uitleg mag gelden*", people must not arbitrarily interprete the binding principles, an accurate interpretation shall be one which is in line with the intent of the law makers. Logemann stated further "*de plicht om aan de kennelijke bedoeling te gehoorzamen geldt voor burger, administratie en rechter gelijkelijk*" (the obligation to be subject to the intent of the law makers which can be reasonably inferred as applicable to the citizens, state administration and judges) (refer to E.Utrecht/Moh. Saleh Djindang, ***Introduction to Indonesian Law,*** eleventh print, page 206).

For further clarification of a judge's being bound by the formal law (*adjective law*), such relation can be found in the description in Hans Kalsen's book, ***General Theory of Law and State*** who stated, "*Normally, the courts are bound by general norms determining their procedure as well as the contents of their decisions…. In every judicial decision, the general norm of adjective law is applied by which this, and only this, individual is authorized to act as a judge and to decide the concrete case at his own discretion* (refer to Hans Kelsen, page 144).

It is clear for us that in carrying out his duties, a judge is bound by the provisions of procedural law (*adjective law*) because without such norm, Kelsen said,"*It would be impossible to recognize the individual who decides the concrete case as a "judge", as an organ of the legal community, and his decision as law, as a binding norm belonging to the legal order constituting the legal community*".

With respect thereto, as a comparison, the practice of the German Constitutional Court (*Bundes-Verfassungsgericht*) also established time limit for the submission of a constitutional petition. Depending on whether the petition is against a decision of a state institution or against the law itself, different time limits can be set. In Germany the time limit to submit a constitutional petition against one decision is one month and, for a petition against a law, one year since the law acquired a permanent legal force. (refer to Prof. Dr. Siegfried Bross, a Constitutional Justice of the Federal Republic of Germany, "Constitutional Petition According to the Law of the Federal

Republic of Germany", a Paper of presented in a discussion at the Court's Office, Jakarta, April 4, 2005).

With due observance of the above description, this dissenting opinion declares that the petition of the *a quo* Petitioners can not be accepted (*niet ontvankelijk verklaard*), otherwise, it means that the Court has renounced the authority granted by the constitution through the legislators (*Wetgever*).

Such has been the dissenting opinions conveyed by the three constitutional court justices on the substance of the petition as far as it concerns Article 50 of Law Number 24 Year 2003.

Subsequently, considering whereas with the opinion of the Court as stated above that Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court is contradictory to the 1945 Constitution, the substance of which will be set forth in the verdict of this case, the examination on the judicial review of Law Number 1 Year 1987 as petitioned by the Petitioners can be continued as it is no longer hindered by Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court;

II

JUDICIAL REVIEW OF ARTICLE 4 OF LAW NUMBER 1 YEAR 1987

Considering whereas the Petitioners are small and medium entrepreneurs who, along with other small and medium entrepreneurs, feel the need for an organization in the form of a chamber of commerce and industry for small and medium enterprises as a forum for their struggles. In

order to meet the need, the Petitioners have established a chamber of commerce for small and medium enterprises (*Kadin UKM*) with Notary Deed Number 31 dated June 11, 2001 before Notary Darbi, S.H., Jakarta. The petitioners' application for the status of a legal entity has been rejected by Brand Director and Civil Director of the Ministry of Justice and Human Rights.(presently the Department of Law and Human Rights), as set forth in letters dated October 17, 2000 and October 18, 2001 (Exhibits P-7 & and P-24) for the reason that according to Law Number 1 Year 1987 regarding the Chamber of Commerce, there is only one Chamber of Commerce and Industry in Indonesia namely that which has been established by the Presidential Decision. The rejection has caused government apparatus to consider that the Chamber of Commerce for small and medium enterprises (Kadin UKM) is not legal as an organization, thereby impairing the operation of the organization. In addition to that, the Petitioners along with other small and medium entrepreneurs can not use the name "*Kadin*" (abbreviation of Chamber of Commerce and Industry) for their organization as it has become the brand of the existing Indonesian Chamber of Commerce and Industry (*Kadin Indonesia*);

Considering whereas based on the above experience of the Petitioners, the Petitioners filed a petition for judicial review of Article 4 of Law Number 1 Year 1987 which reads, "By this law it is established that there shall be only one Chamber of Commerce and Industry which constitutes a forum for Indonesian entrepreneurs, both those who are members and non-members of entrepreneurs' organization and/or company organization" which

according to Petitioners is contradictory to Article 28E Paragraph (3) and Article 28D Paragraph (3) of the 1945 Constitution;

Considering whereas Article 28E Paragraph (3) of the 1945 Constitution which reads, ”Every person shall have the right to the freedom of association, assembly and expression of opinion”, and Article 28D Paragraph (2) which reads, “Every person shall have the right to work and to receive fair and proper remuneration and treatment in work relationships”, have been made by the Petitioners as the basis to argue about the unconstitutionality of Article 4 of the *a quo* law, hence the legal issue that has to be considered further by the Court is: whether the right of freedom as regulated in Article 28E Paragraph (3) of the 1945 Constitution is appropriate to be used to review the constitutionality of Article 4 of the *a quo* law and that it has also caused the violation of the Petitioners' rights as regulated in Article 28D Paragraph (2) of the 1945 Constitution;

Considering whereas in order to examine the *a quo* petition the Court has heard the testimony of the government represented by: (1) the Minister of Law and Human Rights, Dr. Hamid Awaludin, SH, (2) the Minister of Trade, Dr. Mari E. Pangestu, (3) the Minister of Industry, Dr. Ir. Andung Nitimiharja, who in principle explain as follows:

- In order to improve the welfare of the people through economic development, there must be a partnership cooperation between the Government and the private sector, whereby such cooperation will be effective if the private sector is put in a forum, namely the Chamber of Commerce (Kadin), as has been going on so far;

- The existence of one Chamber of Commerce (Kadin) also makes it easier for the Government in entering into international negotiations related to the field of economy;

- The Government pays considerable and serious attention to small and medium enterprises which can be perceived from the existence of the Directorate General for Small and Medium Industries within the Ministry of Industry;

Considering whereas the Court has also received the written statement of the People's Legislative Assembly which principally explained as follows:

- In relation to the argument of the Petitioners on Article 4 of the Chamber of Commerce and Industry Law, according to the People's Legislative Assembly, there is no elimination of the constitutional rights of the Petitioners in Article 4 of the Chamber of Commerce and Industry Law because the freedom of association, assembly and expression of opinions in the Kadin organization is still guaranteed through the right of members and voting rights for Regular and Extra Ordinary members in Article 32 of *Kadin*'s Articles of Association as set forth in the Presidential Decree Number 14 Year 2004 regarding Approval of the Amendment to the Articles of Association and By Laws of the Chamber of Commerce and Industry. Since the amendment to the 1945 Constitution, particularly on Article 28E Paragraph (3) of the 1945 Constitution, there have been several laws made obligating the existence of a single organizational forum for its members, for example Law Number 18 Year 2003 regarding

Advocates, Law Number 30 Year 2004 regarding Notary Title and Law Number 29 Year 2004 regarding Medical Practices;

- On the rejection experienced by the Petitioners in the registration of *Kadin UKM* by the Ministry of Law and Human Rights, the People's Legislative Assembly is of the opinion that the rejection is in fact intended to ensure legal certainty and order which has become the duty of the Government in avoiding potential dualism in *Kadin* organization in Indonesia.

Considering whereas in examining the *a quo* petition, the Court has also heard the statement of the related party namely the Chairperson of the Chamber of Commerce and Industry (Kadin), who was accompanied by his Attorney-in-Fact, who principally explained as follows:

- That the existence of the Chamber of Commerce (Kadin) in the business world is a demand and need and hence Chambers of Commerce and Industry exist in many countries and are formed based on laws. In Indonesia itself, the urgent need for a forum such as *Kadin* has been felt since the are of colonialism namely with the establishment of *Kamer van Koophandel en Nijverheid in Nederlandsch Indie* based on *Besluit van den Gouverneur Generaal van Nederlandsch Indie van den 29sten October 1863*. Following the Indonesian independence, **Council of Trade and Company** was formed (*sic!* Trade and Company Assembly) based on Government Regulation Number 11 Year 1956, it was subsequently changed to **Private National Entrepreneurs' Consultative Body (*Bamunas*)** based on Presidential Regulation Number 2 Year 1964. Finally, during the New Order Government, in line with international

development, the Chamber of Commerce and Industry (Kadin) was formed by Presidential Decision Number 49 Year 1973 and was subsequently established by Law Number 1 Year 1987. Therefore, the existence of an organized forum for Indonesian entrepreneurs is a need and hence it is extremely wrong and inappropriate if there is subsequently an entrepreneurs' association seeking to have the same status as the Chamber of Commerce and Industry (Kadin) for the reason that its interests are not accommodated.

- Whereas **one Indonesian Chamber of Commerce** is needed due to the scope and nature of the Indonesian Chamber of Commerce activities which are cross-sectoral, integrated, regional and international to bridge the implementation of the improvement and development of mutual relations among Indonesian entrepreneurs including the interrelation between businesses which are intended to strengthen the national economic resilience which will certainly not be effective if it undertaken individually by businesses without any directions and order.

Considering whereas in the hearings for examining the *a quo* petition the statements of the witnesses presented by the Petitioners have also been heard which in essence respectively explain as follows:

1. Witness Adi Sasono:

According to witness' experience as a business actor and former Kadin administrator, there are irreconcilable differences in terms of characteristics and interest of large and small-medium enterprises, and

hence it is impossible to put them under one forum. The number of business units in Indonesia is approximately 42 million, the majority of them are informal with the turnover of under 100 million in 90%, whereby the small business units do not have bargaining position and in the economic interaction the law of the market prevails whereby the strong controls the small. Therefore, it is better for small and medium enterprise entrepreneurs to be allowed to unite and form their own forum.

2. **Witness Herdianto:**

The witness experienced first hand the obstacles posed by the East java Province Government when he was inaugurated as the Chairperson of the Chamber of Commerce and Industry for Small and Medium Enterprises (*Kadin UKM*) of East Java Province and at the time of the formation of the Kadin UKM management at the regency/city level in East Java Province. It was due to the circular of the East Java Regional Chamber of Commerce and Industry (Kadinda) addressed to the East Java Governor stating that Kadin UKM is illegal. Whereas the witness is of the opinion that the interests of small and medium enterprises are not accommodated.

Meanwhile witnesses presented by the Related Party (Kadin) respectively explain as follows:

1. **Witness Budoyo Basuki:**

The main duty of the Chamber of Commerce and Industry (Kadin) is to facilitate its members (business community) in cross-sectoral aspects, whereas association is sectoral in nature. Organizational problems and the problems of policy and program must be differentiated. According to the witness, the problem Small and Medium Enterprises (UKM) lies in the domain of policy and program. For instance, if an UKM has a difficulty in obtaining credit, it is not an organizational problem, but rather it is a problem of policy and program. The responsibility of the development of UKMs is neither the sole responsibility of the association, nor the sole responsibility of the Chamber of Commerce (Kadin) or the Government, but rather, it is the joint responsibility of all. As far as the witness knows, presently, the Chamber of Commerce and Industry (Kadin) has not optimized the empowerment of UKMs.

2. Witness Ir. Puji Raharjo

Kadin has two types of membership. First, the regular members, namely companies and employees; second, extraordinary members, comprising associations and unions. From the viewpoint of regulations concerning voting rights, Kadin members from UKMs are not prohibited from becoming Kadin administrators, however the witness states that the existing Kadin law in effect is not operational and so the issue is on the method to make the aforementioned law operational again. Based on a comparative study conducted by the witness, in the context of international relations, in each country there is only one “Kadin”. According to the witness, the “Kadin parliament” referred to in

Germany, for example, is in fact a general meeting of members who are representatives of members, not a general meeting of several "Kadins", Although indeed there are terms such as architects' chamber, farmers' chambers, handicraft's chamber, and so forth.

Considering whereas the Court has also heard the statements of experts presented by the Petitioner, each essentially explaining as follows:

1. Dr. Djisman Simanjuntak:

Small enterprises generally live in an extremely fragmented industry, with none being the dominant one, so every company basically just follows what is happening in the market (follower). Plenty of the big businesses live in the oligipolistic industry, where the behavior of big enterprises extremely influences the market. Therefore, the organization of both types of businesses require variety. As in Germany, where according to this witness, their National Chamber of Commerce" has a "parliamentary" characteristic comprising chambers of commerce. Since the competitive nature of small and big enterprises are different, then the witness is of the opinion that small enterprises need their own "Kadin".

In the science of economics, there is something recognized as the "games theory", where this theory is commonly applied in the world of big business, whereas small enterprises are not familiar with the aforementioned theory, since big enterprises are familiar with the technical term, "they are gaming" (playing with one another), whereas small enterprises are merely followers of whatever is shaping the

market. In view of the aforementioned two different characteristics, a separate organization is needed to enjoy maximum autonomy;

2. Prof. Dr. Harun Alrasid:

All of the authorities granted by the Constitution to the Constitutional Court are without any time limits (temporal sphere), and therefore the Constitutional Court is even authorized to examine and hear the petition against the Chamber of Commerce and Industry Law even though the intended law was enacted before the amendments to the 1945 Constitution.

Meanwhile Prof. Dr. Victor Purba, S.H., LL.M, an expert presented by the Related Party (Kadin), principally explained as follows:

- There are three form of economic systems, namely the market economy system (open economy), command economy system (closed economy), and the mixed economy system. The formulation of Kadin is related to the economic system and the government's desire regarding the need for a forum for entrepreneurs under one roof.

- Whereas the history of association of entrepreneurs begun before the independence, with the establishment of *Kamer van koophandel.* After Indonesia gained its independence, a Commerce Assembly was established in 1956, but which was later considered inappropriate and renamed with Private National Entrepreneurs' Consultative Body. This too, was still considered inappropriate and then in 1973 it was changed into

the Indonesian Chamber of Commerce and Industry which was abbreviated as *Kadin* (*Kamar Dagang dan Industri*).

- In relation to Article 4 of Law Number 1 Year 1987, the expert is of the opinion that there is nothing obstructing the Petitioners in establishing an organization. However, the name “Kadin” should not be used for said organization, since the *a quo* law explicitly states that Kadin is a forum for Indonesian entrepreneurs, where any person can be under it by selecting a name for an association or a union or other names, then according to the expert, Article 4 law Number 1 Year 1987 is not contradictory to the 1945 Constitution and not discriminatory either.
- Whereas concerning foreign chambers of commerce and industry as being unregistered, whereas in Indonesia it is registered in Indonesia, this is due to the fact that the chamber of commerce and industry Indonesia uses the name Indonesia. This is perfectly valid, since every person is entitled to register anything he/she desires to differentiate itself from the others.

Considering whereas the requirements of a single Kadin forum as stipulated in Law Number 1 Year 1987 are based on the issues in the “Considering” part of the considerations of the *a quo* law, namely: (1) measures are required to develop a healthy competition climate, to improve business guidance, to develop and encourage participation of the business community in the economic development, (2) national business guidance to create an orderly climate of harmonious cooperation in enterprises between states, cooperatives, and private entities as the backbone of the national

economy, and to bring about equality in community prosperity, to strengthen national unity and integrity as well as to enhancing national resilience;

Considering whereas with the provisions in Article 4 of the Chamber of Commerce and Industry Law as elaborated above, the *a quo* law does not allow the existence of more than one Chamber of Commerce and Industry (Kadin) as a forum for Indonesian entrepreneurs and the same was the interpretation provided by the Government, as experienced by the Petitioner, both when the Petitioner registered the Deed of Establishment of *Kadin UKM* in the department which was then named the Department of Justice and Human Rights (Exhibits P-6 and P-7) as well as when registering *Kadin UKM* as an organization of small and medium enterprise at the department which was then named the Department of Industry and Commerce (Exhibit P-12);

Considering based on the evidence presented by the related Parties in the hearing it was also exposed that the chamber of commerce system, which thereafter developed into the chamber of commerce and industry, in the countries of the world, is not a single system but vary in accordance with the state system of each country. According to the evidence presented by the Chamber of Commerce and Industry (*Kadin*) as the related party, in states that apply the Continental System, the "*Kadin*" is established by law and companies were obligated to become its members (Slovakia, Italy, Germany, Austria, France), whereas in countries that apply Anglo-Saxon system (U.S.A, England), the "*Kadin*" is established based on civil law and its membership was voluntary. Outside of those two systems, there is also a

mixed system, where the "*kadin*" is established based on law but its membership is voluntary (Swedia, Armenia, Indonesia). In the Continental and Mixed System, the name "*Kadin*" is protected, whereas in the Anglo-Saxon System, the name "Kadin" may be freely used. However, regardless of the state system applied by a certain nation, the nature or characteristic of the chamber of commerce is the same which is becoming the partner of entrepreneurs or the government in regulating economic activities, assisting in creating a conducive business climate, as a representation and a facility for the struggle of business agents from a variety of interests or business fields/sectors, as well as business levels (small, medium. Large);

Considering whereas the requirement of one *Kadin* in a system as applied in Indonesia, has been due to the scope of activities which is cross-sectoral, unified, regional, and international in nature as well as due to the existence of the elements of interests in implementing the state's functions within the functions of *Kadin*. Therefore, *Kadin* in the system applied in Indonesia, is actually a state organ in a broader sense, even though it cannot be defined as a state institution as it is commonly used in daily conversations. The definition of a state organ in a broader sense also includes individuals that implement certain state functions. "*An organ ... is an individual fulfilling a specific function. The quality of an individual of being an organ is constituted by his function. He is an organ because and in so far as he performs a law-creating or law-applying function*" (*please refer to* Hans Kelsen, **General Theory of Law and State**, 1961, page 192). The functions of *Kadin* as a state organ in a broader sense is clear in the regulation of Chapter IV of the

Chamber of Commerce and Industry Law (Functions and Activities), particularly Articles 7 and 8. Article 7 states:

"In order to realize the objective as intended in Article 3, the Chamber of Commerce and Industry conducts activities, among others, as follows:

a. The dissemination of information regarding Government policy in the field of economy to Indonesian entrepreneurs; ...

g. Organizing and enhancing relations and cooperation between Indonesian and foreign entrepreneurs, in conjunction with the needs and interests of development in the field of economy in accordance with the objective of National Development;

h. Organizing the domestic and foreign promotion, statistical analysis and business information centre";

Whereas Article 8 states,

"In addition to such activities as intended in Article 7, in order to guide Indonesian entrepreneurs and to create a healthy and orderly business climate, the Chamber of Commerce and Industry may also conduct the following:

a. Services whether in the form of providing letter of statement, mediation, arbitration, and recommendation concerning Indonesian entrepreneurs' business, including legalization of necessary documents for smooth business operation;

b. Other duties assigned by the Government".

Considering, the functions of the Chamber of Commerce and Industry (Kadin) as determined in the intended Articles 7 and 8, points out that, in addition to being a forum for entrepreneurs, the Chamber of Commerce and Industry (Kadin) serves the functions of the state and therefore it is included in the definition of a state organ in a broader sense, and therefore, the state has the necessary interest of in the need for one Chamber of Commerce and Industry (Kadin);

Considering whereas by paying attention, on the one hand, to the nature or characteristics of a chamber of commerce and industry as a government's partner in regulating economic activities, assisting in creating a conducive competition climate, as a representation and facility for the struggle of entrepreneurs from various interests or business fields/sectors, even business levels (small, medium, large) and on the other hand, the different patterns and characteristics between the large entrepreneurs and the small-medium entrepreneurs where the large entrepreneurs, according to the terms of Witness Adi Sasono and Expert Djisman Simanjuntak, have a tendency to control small entrepreneurs, then logically both are difficult to combine in one forum of chamber of commerce and industry. Such an opinion would be correct insofar as the Chamber of Commerce and Industry is only seen from the entrepreneurs' interest without referring to the function of Chamber of Commerce and Industry (Kadin) as a state organ in a broader sense;

Considering whereas the Petitioners argue that Article 4 of the Chamber of Commerce and Industry Law is contradictory to Article 28E Paragraph (3) of the 1945 Constitution which states, "Every person shall have

the right to the freedom of association, assembly and expression of opinion". The Petitioners deemed that Article 4 of the Chamber of Commerce and Industry Law has impaired and eliminated the rights of the Petitioner as regulated by Article 28E Paragraph (3) of the 1945 Constitution. With regards to this argument, a consideration shall be conveyed that with due observance of the mixed system applied by Indonesia in its regulation on the chamber of commerce and industry, then there should be no obligation for entrepreneurs, companies, or entrepreneurs' organizations to join the Chamber of Commerce and Industry (Kadin) since the membership in such a system is voluntary, even though the Chamber of Commerce and Industry (Kadin) itself is established by law. Consequently, *a contrario*, absence of such obligation can also mean that entrepreneurs, companies, or entrepreneurs' organizations are free to establish or not to establish their own forum in order to associate according to their own wishes, in accordance with the provisions of Article 28E Paragraph (3) of the 1945 Constitution as argued by the Petitioners. However, in case the business agents concerned intend to establish a forum for association according to their own wishes, there is no restriction whatsoever, insofar as such forum does not use the "*Kadin*" name. Accordingly, Article 4 of the Chamber of Commerce and Industry Law must not be interpreted even by the Government, as a requirement or obligation for entrepreneurs, companies or entrepreneurs' organizations to join the Chamber of Commerce and Industry (Kadin);

Considering whereas, as described above, in a mixed system, as followed by Indonesia, the name *Kadin* is protected. This must be understood that the "Kadin" which must be protected by law shall be the

"Kadin" which was established under the law, *in casu*, Law Number 1 Year 1987, namely the "Kadin" which is the abbreviation of *Kamar Dagang dan Industri* (the Chamber of Commerce and Industry), which – as expressed above – serves part of the functions of a state organ in a broader sense. Therefore, in accordance with the selected system, the government or the state may place restrictions should there be parties who would like to establish a forum association and use the *Kadin* name. And so, the rejection encountered by the Petitioner, both by the department, which at that time was named the Department of Justice and Human Rights or by the department, which was at the time named the Department of Industry and Commerce, as presented in the *a quo* petition, have occurred not because of an error in Article 4 of the Chamber of Commerce and Industry Law but as a logical consequence of the adhered system, which placed *Kadin* as a state organ in a broader sense. Thus, the prohibition from using the name "Kadin" for those other than the *Kadin* established based on Law Number 1 Year 1987, has been intended solely for the purpose that there will not be any confusion between the *Kadin* which serves part of the function of the state's organ in a broader sense and other organizations which use similar name but do not serve such functions; .

Considering, whereas even so, the Court assessed that the experience of the Petitioners reflected the urgent need among small and medium enterprises to obtain better service in the context of channeling their interests through the *Kadin* organization. In the future, small and medium enterprises, that hold pivotal roles as the basis of the people's economy, require more opportunities to grow and develop. Even if it was legally

impossible to establish a *Kadin* forum for themselves outside of the existing *Kadin*, then it would be the responsibility of the Kadin administrators to enhance the empowerment of small and medium enterprises. Time has changed, so the Kadin administrators need to adapt themselves so as to enhance the roles of small and medium enterprises in the future;

Considering whereas based on the considerations as elaborated above, the Court is of opinion that Article 4 of the *a quo* law does not obstruct the Petitioner's rights as guaranteed by Article 28E Paragraph (3) of the 1945 Constitution to establish a forum of association insofar as it is not intended or possibly interpreted as intending to serve the functions of Kadin established by law, both partly or in its entirety. Furthermore, the Court does not see the correlation between Article 4 of the *a quo* law and the violation of the Petitioner's rights as guaranteed by Article 28D Paragraph (2) of the 1945 Constitution to work and to receive fair and proper remuneration and treatment in work relationships, and therefore the Petitioner's arguments relating Article 4 of the *a quo* law to Article 28D Paragraph (2) of the 1945 Constitution are not relevant. Therefore, the Petitioner's petition insofar as concerning Article 4 of the Chamber of Commerce and Industry law must be declared as being **not sufficiently grounded to be granted;**

With regard to the considerations of the Court concerning the intended Article 4 of the Chamber of Commerce and Industry Law, 3 (three) Constitutional Court Justices, namely Maruarar Siahaan, S.H., Prof. H.A. Mukthie Fadjar, S.H., M.S., dan Dr. Harjono, S.H., MCL, conveyed dissenting opinions as follows:

- **Maruarar Siahaan, S.H.**

Article 4 of the Chamber of Commerce and Industry Law stipulates *Kadin* as the only organization on commerce and industry, which acts as a forum for Indonesian entrepreneurs, both for those who have or have not joined an entrepreneurs' and/or company organization. This elaboration and the facts in the hearing have lead to a conclusion on the prohibition from establishing Chamber of Commerce and Industry for Small and Medium Enterprises which is deemed by the Petitioners to be contradictory to the Constitution. We agree with the Petitioners' opinion with the following reasons.

It could certainly be deemed well if the ORGANIZATION of *Kadin* could individually absorb the entire aspirations of business agents components in the field of commerce and industry, either large or medium and small.

However, from the evidence of statements by Experts as well as witnesses presented by the Petitioners, the following is evident:

1. The administrators of the Chamber of Commerce and Industry (Kadin) do not provide adequate freedom for small and medium enterprises to receive attention in the struggle of Kadin;

2. The characteristics of big and small enterprises are extremely different, so that it is quite natural if the components of big

enterprises in the Chamber of Commerce and Industry (Kadin) do not pay much attention to small enterprises;

3. In practice, big businesses sometimes conduct activities which are actually unfair in nature towards small businesses and naturally, in the Law of Market Economy, big businesses will prey on small businesses so that the both of them may not be united within Kadin as a single forum;

4. The efforts of small and medium businesses to establish their own organization associated within the Kadin UKM has been obstructed on the basis of Article 4 of the Chamber of Commerce and Industry Law which requires a single organization of Kadin;

5. The aforementioned Article 4 and all of the restrictive actions towards the establishment of a Kadin UKM constitute a violation of the constitution particularly Article 28D paragraphs (1) and (2) as well as Article 28E of the 1945 Constitution;

The current issue is whether Kadin, with its stipulation as the single forum for Indonesian Entrepreneurs, can be considered as one of the Government bodies or institutions or public institutions that has certain public authority. A series of criteria must be applied to determine such an issue among others:

a. Whether the funds for the financing of such an institution originates from the state or from the State Revenues and Expenditures Budget;

b. Whether said institution is granted with the authority to regulate as a monopoly;

c. Whether said institution is subject to the Government's supervision;

d. Whether the functions of the institution is important for the community (public) or relates to government service;

e. Whether there is any departmental duty within the government being transferred to the said institution;

f. Whether the head and administrators of said organization are appointed and stipulated by the Government.

Regardless of the affirmation in Article 5 of the *a quo* law that Kadin is independent and not a government or a political organization, then it can also be observed from the abovementioned criteria, that in fact Kadin does not meet the such criteria, except for the fact that the function of the institution is important to the community, related to the service of the Government, so that Kadin cannot actually be considered as a government organization or an institution having public authority. Such an issue gives reason that the authority which restricts the basic rights of the citizens regulated in constitution such as the freedom of association in a democratic society, in addition to being contradictory to morals, religious values, security and public order, must be deemed as contradictory to the constitution. Such freedom of association must also be followed with the basic right to receive legal

acknowledgement, security, protection and certainty which are equal before the law, so that it would make effective the right to improve him/herself in striving for his/her rights collectively to build his community, nation and state [Article 28E Paragraph (3), Article 28D Paragraph (1), Article 28C Paragraph (2)];

Nevertheless, the issue that comes to mind is whether by declaring Article 4 of Law Number 1 Year 1987 contradictory to the 1945 Constitution concerning the freedom of association, legal acknowledgement, guarantee, protection and certainty as well as equal treatment before the law to improve him/herself and striving for his/her rights collectively, would mean allowing the development of Kadin in a plurality without any guiding principle, which could be utilized to gather strength of the business agents in building the extremely weak Indonesian commerce and industry, or whether it would also be necessary to place such a principle mentioned above, which provides guidance for similar matters;

There must be a single principle to become the basis for this matter, which is the principle of common interest, common purpose, without which it would be unfair to force the existence of a single organization. The components that become the members of the organization must have the same interest to be fought for while aiming at the same purpose which shall become the working basis for the organization, so there must not be any conflict of interests among its components as this may cause a single organization to become

counter-productive. As described above, and based on the evidence presented, the interests and aspirations of Kadin, whose members are generally large entrepreneurs, and that medium and small entrepreneurs are members only through association, where it seems that it is also a natural characteristic of large businesses to prey on the small ones, then the principle of common interest is not found as a fact in the case currently faced, and so the urgency of a single organization becomes non-existent. Besides, the Government policy indicated by the existence of ministry administering cooperative business and small and medium business entities corroborates this opinion. Every effort, prohibition and action that obstructs the freedom to establish *Kadin UKM*, and the attitude not to acknowledge its existence by only giving access to the existing Kadin organization are contradictory to the 1945 Constitution and therefore, Article 4 of Law Number 1 Year 1987 must be declared as having no binding legal effect.

The changing socio-political condition and situation, as well as the adoption of basic rights from the 1945 Constitution should have changed the entire paradigm being adhered to, so that the laws formulated and enacted prior to the amendments to the 1945 Constitution, by themselves experience a test that cause them to be contradictory to the Constitution, if not in accordance with the new paradigm in the amendments to the 1945 Constitution, and that based on the doctrine of eclipse which occurred naturally, such laws, as with Article 4 of Law Number 1 Year 1987, must be declared as having no binding legal effect.

- **Prof. H. A. Mukthie Fadjar, S.H., M.S.**

The Chamber of Commerce and Industry Law Year 1987 is a law enacted during the period of the application of a generally monolithic policy in all aspects of living as a community, a nation and a state, in ideology, politics, economics, and law. In order to be easily controlled, every organization were unified and uniform from the top down, and the term single forum became a popular term and it was an obligation at the time. Therefore, it could be understood that the provision of Article 4 of the Chamber of Commerce and Industry Law states, "By this law, shall be stipulated the existence of **one Chamber of Commerce and Industry which is a forum for Indonesian entrepreneurs**, both for those who have or have not joined any entrepreneurs' organization and/or company organization", which is often interpreted by the Government and Kadin administrators in such away that only *Kadin Indonesia* can be considered as the single forum for Indonesian entrepreneurs.

The name **"Kadin"** seems to be a trademark or patent from a discovery that must be registered with the Department of Law and Human Rights, while in fact the term "*kamar dagang dan industri*" (abrreviated to Kadin) which is a translation/equivalent of the term "the chambers of commerce and industry" in foreign countries, is actually a generic name/term which just recently became a special name/term or trademark after being added certain details, such as Indonesia, India,

China, *UKM*, and so forth, so as it may become *Kadin Indonesia*, *Kadin UKM*, and so forth.

However, now in the era of reform marked by the process of democratization and respect for Human Rights, a monolithic policy or uniform or single forum which is "top down" is no longer appropriate, and even if there is a tendency toward becoming single, such for advocates, then let it emerge from the bottom. In various countries, there is usually a Chamber of Commerce and Industry of national scope which is a confederation of a variety of chambers of commerce and industry whether formed on the basis of territory (district/region) or on the basis of race (such as in Singapore) or the scale of business, such as small business.

In the perspective of our Constitution, which is the 1945 Constitution, the tight/rigid policy concerning a single forum forced from above is no longer in accordance with, if not contradictory to the 1945 Constitution regarding the freedom of association and assembly [Article 28 and Article 28E Paragraph (3)]. Therefore, Article 4 of the Chamber of Commerce and Industry Law should have been declared unconstitutional and not having any binding legal effect.

- **Dr. Harjono, S.H., MCL.**

The Petitioners refer to Article 28C Paragraph (2) of the 1945 Constitution as when arguing about constitutional rights impaired by Article 4 of Law Number 1 Year 1987. The aforementioned Article 28C

Paragraph (2) is a product of the second amendment to the 1945 Constitution in 2000, which means that such article did not exist at the time Law Number 1 Year 1987 was enacted. Even though it was so, it does not mean that automatically every law established before the amendments to the 1945 Constitution is contradictory to the substance of the 1945 Constitution after the amendments. The rights argued by the Petitioner as being impaired are the rights guaranteed by Article 28C Paragraph (2) of the 1945 Constitution, which could be restricted by the existence of the provision set forth in Article 28J Paragraph (2) which reads, "In exercising his/her right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society";

The need for a single forum of *Kadin* as stipulated in Law Number 1 Year 1987 is based on matters stated in the "considering" part of the considerations the *a quo* law, namely: (1) measures are required to develop a healthy competition climate, to improve business guidance, to develop and encourage participation of the business community in the economic development, (2) national business guidance to create an orderly climate of harmonious cooperation in enterprises between states, cooperatives, and private entities as the backbone of the national economy, and to bring about equality in

community prosperity, to strengthen national unity and integrity as well as to enhancing national resilience;

The Court is supposed to be in the position not to assess whether the existence of *Kadin* is truly in accordance with the purpose of one Kadin's establishment as set forth in the considering part of the considerations of the *a quo* Chamber of Commerce and Industry Law. The Court, however, is supposed to assess whether the issues considered in the aforementioned consideration section are worthy or important enough to diminish the constitutional rights of the Petitioners. I am of the opinion that the matters set forth in the consideration section have not been sufficient, since they can still be accomplished without impairing the constitutional rights of the Petitioners;

Article 28C Paragraph (2) of the 1945 Constitution referred to by the Petitioners when arguing about impairment of their constitutional right, cannot be separated with other rights protected by the constitution among them is the right guaranteed by Article 28E Paragraph (3) which reads, "Every person shall have the right to the freedom of association, assembly and expression of opinion". The guarantee that every person has a right to strive for their rights collectively as protected by Article 28C Paragraph (2) will be closely related to the rights of "association, assembly", namely to establish an organization as guaranteed by Article 28E Paragraph (3) of the 1945 Constitution. In the implementation, both of the guarantees are insufficient to be given merely formally, meaning that there is no

obstruction to the use the aforementioned rights, but a person must also obtain equal treatment before the law as stated in Article 28D Paragraph (1), 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”;

The use of the words chamber of commerce and industry by the Petitioners as the name of an organization also becomes an obstruction in obtaining the status of legal entity. The term “*Kamar Dagang dan Industri*” is the equivalent of the English term *Chamber of Commerce and Industry*, which has obtained its own definition which is different from the definition of entrepreneur’s association or union because the chamber of commerce and industry is of inter-sectoral nature, which consequently has a generic definition. The chamber of commerce and industry will have a special definition if connected to other words to indicate its specification, such as “The Indonesian Chamber of Commerce and Industry”, or “The Chamber of Commerce and Small and Medium Industries” as a name;

The right of association is an essential right for man since it is in accordance with man’s nature as a social being. The other rights granted by the constitution are extremely influenced by the guarantee of the implementation of these rights. In accordance with man’s nature then the right to live and the right to truly maintain their living can be enjoyed if men are guaranteed in their freedom of association, because association is the most effective way for men to maintain their

existence. Such is also the case with the right to life, growth and development, protection from violence. The right to develop oneself through his/her basic needs, the right to enhance him/herself and his/her social environment, the right to communicate, the right to feel secure and be protected from the threat of fear, the right to live a physically and mentally prosperous life, the right to a cultural identity, where such rights are guaranteed within the 1945 Constitution. Therefore, with regard to association which is *prima facie* to associate in peace, which shall not on any basis whatsoever be restricted. The Court must use a strict scrutiny test if they find restrictions on the right of association;

Based on the above considerations, Article 4 of Law Number 1 Year 1987 has insufficient constitutional grounds to restrict the constitutional right of the Petitioners and accordingly the Court must grant the petition of the Petitioners;

Hence the dissenting opinions have been conveyed by three constitutional court justices on the substance of the petition insofar as it relates to Article 4 of Law Number 1 Year 1987;

Considering whereas based on the elaboration of the considerations above, then the Petitioners' petition insofar as it relates to Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court has been sufficiently grounded to be granted, despite the dissenting opinions of 3 (three) Constitutional Court Justices. Meanwhile, with respect to the petition for judicial review of Article 4 of Law Number 1 Year 1987 regarding the Chamber

of commerce and Industry, the petition does not have sufficient grounds to be granted with 3 (three) Constitutional Justices with dissenting opinions;

In view of Article 56 Paragraph (2) *juncto* Article 57 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court;

PASSING THE DECISION

To grant the petition of the petitioner partly;

To declare Article 50 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) contradictory to the 1945 Constitution of the Republic of Indonesia;

To declare that Article 50 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) has no binding legal effect;

To reject the petition of the Petitioners insofar as it relates to Article 4 of Law Number 1 Year 1987 regarding the Chamber of Commerce and Industry (State Gazette of the Republic of Indonesia Year 1987 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 3346);

To order the proper inclusion of this decision in the State Gazette;

Hence the decision was made in the Consultative Meeting of 9 (nine) Constitutional Court Justices on Monday, April 11, 2005 and was pronounced in a Plenary Session of Constitutional Court open for public on this day, Tuesday, April 12, 2005, by us Prof. Dr. Jimly Asshidiqie, S.H as the Chairperson and concurrent Member, and Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M., H. Achmad Roestandi, S.H., Dr. Harjono, S.H., M.C.L., Prof. H. A. Mukthie Fadjar, S.H., M.S., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., and Soedarsono, S.H., respectively as Members, with the assistance of Wiryanto S.H., M.Hum. as Substitute Registrar and in the presence of the Petitioners/their Attorneys, the Government and the People's Legislative Assembly, and the Related Party/Its Attorney;

CHIEF JUSTICE

signed.

Prof. Dr. Jimly Asshiddiqie, S.H.

JUSTICES,

signed

Prof.Dr.H.M.Laica Marzuki, S.H.

signed.

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

signed.

H.Achmad Roestandi, S.H.

signed.

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

signed.

signed.

Dr. Harjono, S.H., M.C.L. I Dewa Gede Palguna, S.H.,

M.H.

signed. signed.

Maruarar Siahaan, S.H. Soedarsono, S.H

SUBSTITUTE REGISTRAR

signed.

Wiryanto S.H., M.Hum.