**THE CONSTITUTIONAL COURT OF**

**THE REPUBLIC OF INDONESIA**

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# SEPARATION OF POWERS AND INDEPENDENCE OF CONSTITUTIONAL COURT IN INDONESIA[1]

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## I. The Concept of Separation of Powers

The concept of separation of powers in state administration is one of the key characteristics of a modern constitutional state. This concept is a result of a long experience that all powers which were previously concentrated on a King or a Queen, especially in countries applying theocracy, led to unrest and abuse of authority. It was John Locke who came up with the idea about the necessity to divide state power into 3 (three) functions, namely legislative, executive, and federative. Based on John Locke's idea, Montesquieu in his book published in 1748, *"L'Esprit des Lois*" (*The Spirit of Laws*), divided state power into 3 (three) branches, namely legislative, executive and judicial powers.

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The idea of the separation of power developed fast and was adjusted to the developments in each country. van Vollenhoven from The Netherlands, for example, divided power into 4 (four) functions, namely *regeling* (legislature), *bestuur* (executive government), *rechtspraak* (judiciary), and *politie* (*social order*). Therefore, Montesquieu's idea is not absolutely applicable in the same manner in every state. Moreover, this concept emerged for the first time more than 250 years ago and it certainly could not possibly anticipate the current developments in the modern state administration system. However, the idea conveyed by John Locke or Montesquieu can still be regarded as an initial doctrine in the concept of *separation of powers,* which subsequently developed into *division of powers* and *distribution of powers,* as it is impossible to make a rigid separation of the three branches of power. Even though those branches have different powers and do not intervene with each other, they are interconnected for the functioning of the state administration by maintaining the mechanism of checks and balances.

In relation to the application of the separation of powers, The 1945 Constitution, prior to its amendments, actually confirmed the adoption of the constitutional state concept (*rechtsstaat*) by the Republic of Indonesia. However, Indonesia did not fully adopt the concept since the beginning, because in reality the provisions set forth in the Constitution were made based on Indonesia's domestic needs. This is reflected in the authority of the President to make laws, in addition to his position as the head of government and the head of state. Even though he requires the approval of the Parliament (DPR) for making laws, the constitutional norm setting forth the authority of

the President to make law has led to the concentration of powers on the President (*executive heavy*) in the history of Indonesian state administration. The absence of mechanism for balancing and monitoring the law-making authority through the process of judicial review at the time made such concentration even more obvious.

All components of the Indonesian nation realized the flaws in the constitutional statement about the separation of powers in the history of Indonesian state administration, and they found a momentum of change in the reform era in 1998. Therefore, one of the changes agreed in the formulation of the amendments to the 1945 Constitution as one of the reform agenda items, was to purify the presidential system, including the confirmation of the principle of separation of powers as one of the components of the presidential system. In the context of Indonesian state administration system following the amendments to the Constitution in 1999 -2002, the concept of separation of powers is applied by referring to the following principles: *First,* the legislative, executive and judicial powers have different functions, namely to make laws, to implement laws and to administer courts in order to enforce laws and justice, respectively. *Second,* it is not allowed to hold concurrent positions in those three branches of power. *Third,* none of these institutions can intervene in the implementation of their respective functions. *Fourth*, the principle of *checks and balances* prevails among the branches of power. *Fifth,* the branches have equal positions with coordinative function rather than subordinative function.

Regardless of all of the foregoing, it has to be noted that the idea to purify the presidential system cannot be implemented with certainty because there is no way of ascertaining the system is pure. Every state has a theory that it has developed, but none of them can be regarded as pure, because in reality each state has different domestic values.

## II. Checks and Balances Mechanism

The checks and balances mechanism is one of the principles that needs to be strengthened in Indonesia's state administration system. The idea of checks and balances has actually been brought up in public debates. The idea of judicial review, for example, already existed during the formulation of the 1945 Constitution prior to Indonesian independence. It was first conveyed by one of the founding fathers, Moh. Yamin. The idea of judicial review continued to present, especially among academicians, but it had never been successfully legally institutionalized. Therefore, prior to the amendments to the Constitution, Indonesian judicial body did not have the authority to conduct constitutional review. At that time, judicial review of laws could only be conducted by the legislative body through the mechanism of legislative review or political review, whereas the real power of this body used to be strongly dominated by the President.

One of the efforts to strengthen the checks and balances mechanism between the judicial and legislative powers has been the establishment of the Constitutional Court which has the authority to conduct judicial review of laws against the 1945 Constitution, both materially and formally, whereas the

Supreme Court has the authority to conduct judicial review of regulations against laws and regulations of a higher rank in the hierarchy.

In addition to the authority to conduct judicial review of laws against the Constitution, the Constitutional Court has other authorities as well that are closely related to the application of the checks and balances mechanism, namely to decide in disputes of authorities between state institutions the authorities of which are granted under the 1945 Constitution, to decide upon the dissolution of political parties, and to decide upon electoral disputes. The Indonesian Constitutional Court also has the obligation to decide upon the opinion of the Parliament (DPR) about alleged violations of the 1945 Constitution committed by the President and/or Vice President or better known as impeachment. Considering such highly important authorities, especially those related to its function in the implementation of the checks and balances mechanism, the Indonesian Constitutional Court is certainly not free from the oversight by other branches of power, namely the legislative and the executive.

Each state puts Constitutional Court in a different position within their state administration system and national political map. Sometimes, the Constitutional Court is not wanted and its work is hampered in such a way that it is unable to perform its functions maximally. For example, as Justice Svetlana Sydikova of the Constitutional Court of Kyrgyztan stated in the 6$^{th}$ Conference of Asian Constitutional Court Judges 2009 in Mongolia, the Constitutional Court and the legislative body of Kyrgyzstan do not always have a good relationship. For almost more than two years, the Constitutional

Court of Kyrgyzstan had been unable to perform its activities because the number of justices never met the quorum required to make decisions. This was due to an intentional procrastination in the nomination of new justices to replace retiring justices by the President.

Based on the aforementioned illustration, we come to the conclusion that the dependence and independence of a Constitutional Court in the context of the separation of powers are likely to affect to a great extent the performance and functions of the Constitutional Court in the implementation of the checks and balances mechanism.

## III. The Independence of the Indonesian Constitutional Court

The independence of the Constitutional Court is guaranteed by the Constitution as set forth in Article 24 of the 1945 Constitution which reads as follows: *"The judicial power shall be independent and shall posses the power to organize the judicature in order to enforce law and justice*". The aforementioned provision is reaffirmed in Article 2 of the Constitutional Court Law which reads as follows, *"Constitutional Court is a state institution which executes independent judiciary functions to hold trials in order to enforce law and justice*". This means that there shall be no intervention in any form or in any manner whatsoever against the Constitutional Court by any branch of power.

Such written provisions certainly do not guarantee that a state institution is automatically independent. Therefore, since its establishment in 2003 the Indonesian Constitutional Court has been developing and working

not only based on the principle of independence, but also based on the principles of impartiality, accountability and transparency. Those principles can be related to the Constitutional Court as an institution and to the Justices and its employees with the organizational systems running in it.

It is appropriate to say that the Indonesian Constitutional Court has given an enormous contribution to the development of constitutionalism, democracy, and the spirit of judicial reform in Indonesia. Generally speaking, the Indonesian Constitutional Court has also earned public trust because it is deemed to have developed its system and working procedures in an appropriate manner. Decisions made by the Indonesian Constitutional Court have always been seen as being able to solve legal and constitutional issues. Due to its relatively strong legitimation, every Decision of the Constitutional Court is accepted as a final and binding decision by the government, the parliament, state institutions, the people as well as non-governmental organizations. Thus far, none of the Decisions of Indonesian Constitutional Court has been disregarded, either decisions on judicial review of laws or decisions on electoral disputes. Even if some of the decisions are considered controversial by the public, the debates usually stop at the academic level and do not go further to political issues. If a decision of the Constitutional Court has not been implemented, the general public and the press usually put concerted strong pressure on the institution that has the obligation to implement the decision. This means that the decisions of the Constitutional Court are respected not only by all parties concerned, but they are also implemented by the relevant institutions.

The Constitutional Court Law also grants the freedom to the Indonesian Constitutional Court to further regulate the matters required for the uninterrupted implementation of its duties and authorities. Therefore, every development in the implementation of the duties and authorities of the Constitutional Court requiring regulations, the Court makes its own regulations through judicial practices and decisions, or in the form of Constitutional Court Regulations, so that it does not depend on other branches of power.

The Constitutional Court provides for its own budget and financial matters required for implementing its duties and authorities, internally in accordance with the state financial capacity, even though it has to obtain the approval of the Parliament which has the budgeting function. Thus far, there has never been any substantial objection from the Parliament to the draft budget of the Constitutional Court, because the application and reporting of the Court's finance have always been conducted in a transparent and accountable manner. This is at least proved by the granting of the best opinion on the results of audits by the Audit Board (BPK) for four consecutive years.

The Constitutional Court is also granted full authority to provide for and plan the recruitment of employees and its organizational management, insofar as it is in line with applicable laws and regulations. Potential intervention and interference by external parties can thus be prevented.

## IV. The Independence of Constitutional Justices

The Indonesian Constitutional Court consists of 9 (nine) justices. 3 (three) of them are nominated by the President, the other 3 (three) are nominated by the Parliament and the remaining 3 (three) are nominated by the Supreme Court. Such recruitment mechanism is a materialization of the efforts to create checks and balances function to be implemented by the Constitutional Court. Even though they are selected by 3 (three) different branches of power, the Constitutional Justices must work independently in order to remain free from the influence or intervention by any branch of power. Once they are appointed as Constitutional Justices as the representation of the three different branches of power, they must be detached from the subjective interest of the institution selecting them and must dedicate all of their energy, efforts and thoughts for the Constitutional Court.

In order to maintain the independence of Constitutional Justices, the Indonesian Constitutional Court has also formulated the Constitutional Justice Code of Ethics. The Code of Ethics has been made with reference to the principles set out in *The Bangalore Principles of Judicial Conduct,* namely the principles of *independence, impartiality, integrity, propriety, equality, competence* and *diligence,* as well as *implementation*. By adhering to the Code of Ethics, Constitutional Justices are able to remain unaffected by any influence or intervention by any party in performing their duties, including the public opinion or mass media reports. If a Constitutional Justice violates the Code of Ethics, the Constitutional Court will internally form an Honorary Council of the Constitutional Court for conducting examinations and imposing sanctions, if necessary, merely for maintaining independence, impartiality and accountability of the Constitutional Court to the public. In order to strengthen

the independence of the Constitutional Court, the Parliament (DPR) is currently discussing the most appropriate format for taking part in overseeing the conduct of Constitutional Justices by other independent institutions.

Endeavors for creating independence of Constitutional Justices of course start as early as the selection process for recruitment by providing the broadest opportunity for public participation to the greatest possible extent. The main requirement for becoming a Constitutional Justice in Indonesia is possessing impeccable integrity and personality, being fair, and being a statesman with a good mastery of the constitution and state administration. In this case, being a good statesman is a very important and essential prerequisite because the only public office in Indonesia requiring statesmanship is the position of Constitutional Justice, while it is not required for candidates for President, Minister or Member of the Parliament. The Constitutional Court holds the view that statesman must be construed as a person who places the interest of the state above his or her personal interest or the interest of his or her group, so that he or she must be independent and impartial by prioritizing the norms of the constitution, law and justice.

Other requirements to become a Constitutional Justice include the following: having Indonesian nationality, having educational background in law, having never been imposed with the criminal sanction of imprisonment for 5 (five) years based on a final court decision, not being declared bankrupt, having professional experience in the field of law for at least 10 (ten) years. In addition to being independent, Constitutional Justices are also required to be impartial and for that reason Constitutional Justices are prohibited from

holding other concurrent positions as public officials, members of political party, entrepreneurs, advocates or civil servants. The minimum age for becoming Constitutional Justice is 40 (forty) years, with the consideration that the person concerned has adequate experience in the field of law and state administration in examining, trying and adjudicating in constitutional cases.

In an effort to avoid judicial corruption due to the non-fulfillment of the needs of Justices, the protocolar position and financial rights of Constitutional Justices are treated in accordance with the provisions of laws and regulations applicable for state officials. Constitutional Justices also have the right of immunity, namely that they can only be subject to politional action upon the order of the Attorney General after obtaining the approval of the President, except in certain circumstances, such as being caught in the act of committing a crime.

One of the most debated subjects in discussions regarding the independence of Constitutional Justices is related to the term of office, namely whether it should be only for a certain period of time, up to reaching retirement age, or for life. In Indonesia, the provision on the term of office of Constitutional Justices adopts a combined mechanism, namely it is subject to a limit of 5 (five) years and potential reappointment for another subsequent 1 (one) term of office, or upon reaching the age of 67 years. Accordingly, it is expected that the regeneration and refreshment of the reasoning of Constitutional Justices will be able to keep up with the current changes and developments in state administration.

## V. Operating Procedures of the Court

In addition to the institutional organization and the position of Constitutional Justices within the same, the independence of the Constitutional Court is also reflected in the development of ideas and schemes in handling cases in the implementation of its authorities. In handling cases which fall under its competence, the Indonesian Constitutional Court does not consider whether the case is filed by a political majority or a political minority. The mechanism for the submission of petition for judicial review in Indonesia does not set forth any minimum pre-requisite in the form of approval from the parliament or other judicial bodies as applied by some states. Therefore, minority groups striving for their interests or even an individual citizen have equal rights before the Constitutional Court without having to be concerned about any effort by the majority group to influence the independence of Constitutional Justices. Many petitions granted by the Indonesian Constitutional Court were submitted by minority groups.

According to the system applied in Indonesia, constitutional review is conducted after its ratification by the Parliament, rather than the other way round, as is the case, for instance, with the system applied in France, which is more commonly known as *judicial preview*. Therefore, the Indonesian Constitutional Court does not interfere with matters related to the formation of laws, which is the authority of the Parliament. Similarly, when asked for opinion, suggestion or recommendation by the Parliament, the Constitutional Court does not give any comment or response regarding any Law which is still in the process of being formulated. The purpose of this is to avoid conflict of interest when the Constitutional Court conducts a constitutionality review of a

law, for which the Court is requested by the Parliament to give its opinion, suggestion or recommendation. By doing so, the institutional relationship between the Constitutional Court and the Parliament is maintained while keeping a distance in accordance with their respective functions, although this does not mean that they must always be in constant disagreement with each other.

Hans Kelsen's doctrine, the Constitutional Court has the function of a *negative legislator* because it has the authority to delete or remove any article, paragraph or other provisions in a law which is contradictory to the 1945 Constitution, has also been widely accepted by the Indonesian general public, including the Parliament which has the function of a *positive legislator*. There are still some ongoing debates among academicians whether or not the Constitutional Court has the authority to make a decision which exceeds the petition, or commonly known as *ultra petitia*. In the Constitutional Court's view, in certain circumstances and conditions *ultra petita* should be allowed, because in examining constitutional cases closely related to the developments of law, politics, democracy, and state administration, the Constitutional Court cannot be bound by the existing conditions. In fact, it has become a usual practice for the Indonesian Constitutional Court in its decisions not refer merely to procedural justice, but also to substantive justice, hence the Constitutional Court can go beyond laws and regulations that hamper the realization of justice, legal certainty and usefulness.

One of the proofs of the independence of every Justice of the Constitutional Court in Indonesia is the opportunity to give either concurring

opinion or dissenting opinion in the making of any decision. A Panel of Justices usually holds a Deliberation Meeting of Justices in order to discuss the case at hand behind closed doors. Each Constitutional Justice gives his or her legal opinion which is presented, discussed and subjected to scientific debate. If in the making of a decision on a certain case one of the Justices insists on his or her own opinion which is different from that of the majority of Justices, he or she is allowed to state his or her reasoning in the Decision in a special section provided specifically for concurring opinion or dissenting opinion.

However, after once a decision is passed, none of the Constitutional Justice are allowed to engage in debate regarding the official decision passed by the Constitutional Court, including the Justices who conveyed either concurring opinion or dissenting opinion. In fact, Constitutional Justices are strictly prohibited from discussing a case in their office or at other places. Discussions concerning a case are only allowed to be conducted in the Deliberation Chamber officially used for that purpose, so that the independence of Justices can be internally maintained because none of them will try to influence the other.

## VI. Transparency of the Court

Another equally important matter in strengthening the independence and legitimation of the Constitutional Court and Constitutional Justices is the hearing process which is implemented transparently and it is open to the general public and the press. Not a single legal fact or information can be concealed or manipulated, because the entire process is recorded in audio

and visual recordings, or minutes. In addition to providing facilities and the opportunity to the greatest possible extent to the public and the press, the Constitutional Court also has 34 video conference networks placed at law schools in all provinces in Indonesia as well as video streaming facility through its website, enabling people in the country and abroad who cannot attend a Court hearing, which is not broadcast by television stations, to follow the hearing live at their respective locations.

Moreover, the text of a decision being read out by the Constitutional Justices is displayed on a big screen using computer technology, enabling people present in the Court session to read the decision being read out in turns by the Constitutional Justices. Following the pronouncement of a decision, the full and complete text of the decision is immediately provided to the parties to the case in hard copies, while a softcopy of the decision concerned is immediately uploaded to the Court's Official Website within not more than 15 minutes after the decision has been read out. The Constitutional Court also publishes some of the important decisions in national newspapers and magazines on the following day after its pronouncement. Accordingly, not a single state official or common citizen has the opportunity to modify the contents of a decision or claim that they do not know the decision and use it as a reason for not implementing it.

In addition, in order not to obstruct justice seekers from all economic levels, people intending to file a petition with the Indonesian Constitutional Court both *offline* or *online* are not charged any fee or in other words it is free of charge. The use of the video conference facility, request for court transcript

in the form of audio or visual recordings, as well as texts are also free of charge. Therefore, The Constitutional Court in Indonesia has been viewed by the people at large as a pioneer in Indonesian judicial reform leading the way towards a modern and trustworthy judiciary.

## VII. Conclusion

The establishment of Constitutional Courts since the beginning of the 21st century, or of other judicial bodies with similar authorities as Constitutional Courts, has been one of the instruments that can potentially strengthen the principle of *separation of powers* in government administration in modern constitutional states. The roles and functions implemented by the Constitutional Court in safeguarding the orderly implementation of the functions and duties of state institutions, especially the executive and legislative, are of a highly strategic importance. However, the high level of sensitivities related to the Constitutional Court's authorities are deemed to have the potential of hampering the implementation of activities by the other branches of power may lead to a reduced level of independence of the Constitutional Court.

Based on the experience of many countries, the independence and position of the Constitutional Court demonstrate a great deal of variety. While some Constitutional Courts have very strong authorities and independence, others have weak authorities and independence. During the existence of the Indonesian Constitutional Court, its independence or the independence of its Constitutional Justices can be regarded as properly maintained. The President or the leadership of other state institutions has never attempted to

influence any decision to be made by the Constitutional Court. This certainly does not occur automatically, but it is rather facilitated by the state administration system intentionally designed for such purpose through the amendments to the 1945 Constitution and the formulation of the Constitutional Court Law.

In order to create such independence, the Constitutional Court applies the principles of good governance, namely independence, transparency and accountability, as well as the principles set out in the International Framework for Court Excellence (IFCE). In addition to that, the independence of Constitutional Justices in Indonesia is also supported by the Code of Ethics for Constitutional Justices, which was prepared based on the Bangalore Principles of Judicial Conduct. Equally important has been the very strong trust vested by the people and the press in the Constitutional Court, particularly with regard to its decisions. For all of the above mentioned reasons, every decision made by the Constitutional Court as its main product has been respected and implemented with full responsibility by the legislative body, the executive body, other state institutions as well as the parties to the cases and the general public at all times.

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**BRIEF BIOGRAPHY OF THE CHIEF JUSTICE OF**

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

**Prof. Dr. Mohammad Mahfud Mahmodin** known as **Mahfud MD** was born in Sampang Madura, Indonesia on 13 May 1957, and completed his law education at the Faculty of Law of the Indonesian Islamic University (UII), Yogyakarta (1983). In addition to that, he also studied at the Arabic Literature Department of the Faculty of Letters and Culture of Gadjah Mada University, Yogyakarta. He completed his postgraduate education in Political Science at Gadjah Mada University, Yogyakarta (1989). He attained his Doctor degree in Constitutional Law from the postgraduate program at the same university (1993).

He has been serving as a teacher and professor at the Faculty of Law of UII Yogyakarta since 1984. He served as the Minister of Defense in 2000-2001, Minister of Justice and Human Rights in 2001, Member of the Parliament in 2004-2008, and Deputy Chairman of the Legislation Body of Parliament in 2007. He was then elected as a Constitutional Justice for the period 2008-2013 upon the nomination of the Parliament and was subsequently appointed as the Chief Justice of the Constitutional Court for the period of 2008-2011.

**Mahfud MD**. has written several books including:

1. *Selayang Pandang Tentang HTN dan HAN* (Brief Introduction on Constitutional and Administrative Law), (as editor), published by the Faculty of Law of UII, Yogyakarta, 1987.
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