CHAPTER II

LITERATURE REVIEW

A. General Election

General Election is the implementation of sovereignty of the people which is conducted through a direct, public, free, secret, honest, and fair based on Pancasila and 1945 Constitution.[1] General Election is a process of electing people to fill certain political positions. Based on Article 22E of 1945 Constitution, the General Election is for electing members of People's Representatives Body, Regional Representatives Council, President and Vice-President, and Regional Representatives Assembly.

In General Election, the voters are called constituents, and the politicians ussually offer them with promises and programs in the campaign period. A campaign is conducted based on schedule made by the Election Commission. After voting, recapitulation of the votes is started. The Election is conducted based on the rules of game which are made by the People's Representative Council, President, General Election Commission, and Election Supervisory Body.

B. Presidential Election

Indonesia is a rule of law State which is based on Pancasila and the 1945 Constitution. The 1945 Constitution is the highest law of the nation.

[1]See Article 1 (1), Law No. 8/2012 on General Election of Member of House of Representatives Body, Regional Representatives Counsil, and Regional Representatives Assembly.

It is a document with consists of political, social, and cultural consensus among the citizens which one made by the founding father.

The election is a form of people sovereignty. Since 2004, general election in Indonesia is completely conducted through a direct election. People are free to choose who will become their representatives in Executive and Legislative institutions. It is aimed at implementing a more concrete democracy in Indonesia. Election in democratic state is to determine the national leader constitutionally.[2] Election can also be a form of the responsibility of state officials to the voters. Election will determine which political party that rules the country for the next five years. In other words, the results of election depend also on the ruling party performance weather people will believe them or leave them.[3]

Indonesia chooses the presidential system as a form of government. The Presidential system is a system of governemnt where a head of government is also a head of state and leads an executive branch that separates from the legislative branch. Presidential system has some prinsiples, namely:

a. Head of state is also the head of government;
b. The government is not responsible to the legislature, goverment and the parliament is equal and cannot dissolve each other;
c. The ministers are appointed and responsible to the President;

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[2]B. Hestu Cipto Handoyo, 2009, *Hukum Tata Negara Indoneisa*, Yogyakarta: Universitas Atma Jaya Yogyakarta, page. 239.
[3]Achmad Roestandi, 2006, *Mahkamah Konstitusi Dalam Tanya Jawab, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia*, Jakarta: page. 144.

d. Executive and legislative are equal; and

e. Fixed executive[4]

In electing national leaders, Indonesia holds two steps of general election; Legislative Election and Presidential Election. First, legislative election is for electing members of the DPR, members of the DPD, and members of the Local Parliaments. Second, Presidential Election is electing the President and Vice-President.[5]

After the election of members of DPR, there will be obtained which party occupies the most seats (in parliamentary elections). Only the Political Party fulfilling 20% of DPR seats or 25% of national valid votes can propose their candidate of President and Vice-President in the Presidential Election.[6] There is possibility of coalitions of Political Parties that were outvotes in the Parliamentary Election who have similiar vission and mission to join together and propose their candidate.

The democratic and civilized Presidential Election is carried out through the participation of the people based on the direct, public, free, secret, honest, and fair principles. Article 6A of the 1945 Constitution states that the President and Vice-President are elected directly by the people. The candidate may be nominated by a political party or the coalition of political parties which can fulfill the minimum 25% of

[4]Septi Nur Wijayanti & Iwan Satriawan, 2009, *Hukum Tata Negara*, Yogyakarta: Faculty of Law Universitas Muhammadiyah Yogyakarta, page. 37.
[5]Achmad Roestandi, Op. cit., page. 239.
[6] See Article 9, Law No. 42 of 2008 concerning Presidential Election.

national votes. In the Law No. 42 of 2008 on General Election for President and Vice-President, it clearly states that:

> *"The implementation of Presidential Elections with high quality must meet a healthy degree of competition, participatory, and can be relied upon in accordance with the development of democracy and the dynamics of the community in our nation and state. Presidental Election is conducted to choose the President and Vice-President with stronger support from the people therefore they can run the state strongly in order to achieve the national goals as mandated in the preamble of 1945 Constitution."*[7]

Direct election is the implementation of the sovereignty of the people in electing their representatives and government in the light of democratic constitutional state. Article 21 paragraph (3) of the Universal Declaration of Human Rights states that:

> *"The willingness of the people must be basic powers of government; the willingness expressed in periodic elections is honest and carried out according to the general suffrage and togetherness, as well as by secret ballot or demand other ways that also guarantees freedom of sound."*[8]

In other words, the international community also acknowledge that the right to choose people representatives as the representation of the people itself is conducted through direct election based on particular requirements, as well as a mechanism as regulated in laws and regulation.

In July 2014, Indonesia determined its destiny in choosing its leader through the Presidential Election. There were some cases arised in the Presidential Election 2014. The candidates who lost in the election and

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[7]Penjelasan Umum Undang-undang No. 42 Tahun 2008 Tentang Pemilihan Umum Calon Presiden dan Wakil Presiden

[8]B. Hestu Cipto Handoyo, 2003, *Hukum Tata Negara, Kewarganegaraan & Hak Asasi Manusia*, Yogyakarta: Universitas Atma Jaya Yogyakarta, pages. 216-217.

felt that there was breach of laws in the process of election, they may bring petition to the Constitutional Court. They may challange the result of election in Court. The Court is expected to resolve the disputes and satisfies the parties.

Constitutional Court as one of the judicial powers has an important role in upholding the Constitution and the rule of law. It is the duty and authority of the Constitutional Court as provided in Article 24C of the 1945 Constitution and Article 1 point 1 and 3 and Article 10 letter D Law No. 24 of 2003 on Constitutional Court which states that one of the authorities of the Constitutional Court is to decide disputes about election results.

C. Constitutional Court and Authorities

The establishment of the Constitutional Court as a special tribunal separately from the Supreme Court is a conception that can be traced long before modern state-nation, where the lower norm has to be in harmony with the higher norm.[9] This is called as judicial review mechanism. The history of modern judicial review can be traced to the experience of the Supreme Court in the United State in case Marbury VS Madison.

In different sense, Hans Kelsen, an Australian scholar who was very influential in the 20th century, proposed to draw a Constitution for the Republic of Austria in 1919. Kelsen believed that the Constitution

[9]Herman Schwartz, 2002, *The struggle for Constitutional Justice in Post-Communist Europe*, Chicago: the University of Chicago Press Books page. 13.

should be required as a set of legal norms which is superior (higher) of the ordinary law and should be enforced in this way. Kelsen also acknowledges the distrust of the judicial body to carry out enforcement duties such Constitution, so he designed a special court that is separate from the ordinary courts to oversee the law and nullify if it was contrary to the Constitution. Although Kelsen designed this model for Austria, however, Czechoslovakia was the first country which established Constitutional Court on February 1920. Austia followed establishing the Court in October 1920.[10]

After World War II, the notion of a Constitutional Court with judicial review spread throughout Europe, by giving the Constitutional Court separately from the Supreme Court. However, France adopted this conception differently by forming Constitutional Council *(conseil constitutionel)*. The former French colony follow the France as a pattern.[11]When the Soviet Union collapsed, the former Communist countries in Eastern Europe reformed their country from authoritarian to liberal constitutional democracies. These countries amanded their Constitution which one of the results is the establishment of a new Court separately to the Supreme Court, a Constitutional Court. This Court has a

[10]*Ibid*., page. 18.
[11]Jimly Asshiddiqie dan Mustafa Fakhri,*Mahkamah Konstitusi: Kompilasi Ketentuan Konstitusi, undang-undang dan Peraturan di 78 Negara*, Jakarta: PSHTN FH UI dan MK, page. 3.

main authority to review any laws which are considered contrary to the Constitution.[12]

Until now, there are 78 countries that adopt the system of Constitutional Court separately from the Supreme Court and Indonesia is one of them. In 13th August 2003, the President and the Parliament enacted Law No. 24 of 2003 which established Constitutional Court of the Republic of Indonesia. Then, it was followed by appointing 9 Judges of the Constitutional Court in 16th August 2003.

Looking at the construction as described in the Constitution and universally accepted, particularly in the countries which have adopted the existance of the Constitutional Court, the Court has function as guardian of the Constitution. This function is to guarantee that the state apparatus conduct the practice of state in line with the Constitution. In addition the Court also has function as the sole interpreter of the Constitution.[13]

In some countries, the Constitutional Court is even called as the protector of the Constitution. This statement seems more reasonable when the Amendement of the 1945 Constitution incorperated some article on human rights into the 1945 Constitution. In different sense, the explanation of the Constitutional Court Act states that:

> *"... One of the important changes of the substance of the 1945 Constitution of Indonesia is the existance of the Constitutional Court*

[12]Maruar Siahaan, 2011, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Jakarta: Sinar Grafika, page 4.
[13]Maruarar Siahaan, Ibid., page 7.

as an institution of the state that handle particular cases in the field of constitutional law, in order to guard the Constitution to be implemented with responsibility in accordance with the will of the people and goals of democracy. The existence of the Constitutional Court at the same time to guarantee the implementation of a stable government also as the correction of previous practice of government as the result of multi-interpretation of the Constitution."

In more clear statement Jimly Asshiddiqie elaborates as follows:

"In the context of Constitution, the Constitutional Court is construed as the guardian of the Constitution that serves to uphold Constitutional Justice in the community life. The Constitutional Court has duty to encourage and ensure that the Constitution is respected and implemented by all components of the state consistently and responsibly. In the discourse of the weakness of the existing constitutional system, the Constitutional Court has a role as an interpreter of spirit of the Constitution in oreder to be a live and flower the practice, the state, and society."[14]

Article 24C paragraph (1) and (2) explains the authority of the Constitutional Court as follows:

1. The Constitutional Court has the authority to adjudicate at the first and final instance, the judgment of which is final, to review laws against the Constitution, to judge on authority disputes of state institutions whoses authorities are granted by the Constitution, to judge on the dissolution of a political parties, and to judge on disputes regarding the results of general election.
2. The Constitutional Court shall render a judgement on the petititon of the People's Representative Council regarding an alleged violations by the President and/or Vice President according to the Constitution.

[14]Blue Print, 2004*Membangun Mahkamah Konstitusi, sebagai Institusi Peradilan Konstitusi yang Modern dan Terpercaya*, Sekretariat Jendral MKRI, page. Iv.

The authority of the Constitutional Court specifically addressed in Article 10 of the Constitutional Court Act as follows:

a. To review the laws against the Constitution of the State of Republic of Indonesia of the Years 1945;
b. To judge on authority disputes of state institutions whose authorities are granted by the Constitution of the State of Republic of Indonesia of the Years 1945;
c. To judge on the dissolution of a political party;
d. To judge on a dispute regarding the result of general election; and
e. The Constitutional Court shall render a judgement on the opinion of DPR alleging that the President and/or Vice-President have/has committed a violation of law in the form of treason against the state, corruption, bribery, other felonies, or disgraceful act, and/or no longer meets the qualification as President and/or Vice-President as referred to in the Constitution of the State of the Republic of Indonesia of the Year 1945.

D. Legal Basis Principles of Dispute Settlement on the Result of Presidential Election in the Constitutional Court

Based on Article 20 paragraph (1) 1945 Constitution, the People's Representative Council holds the power to make law. Furthermore, in article 20 paragraphs (2) 1945 constitution that the bill shall be discussed by the People's Representative Council and the President in order to acquire joint approval.

The process of establishing the law is regulated in Law No. 12 of 2011 on the Law-Making. In addition, the process of establishing law is outlined in Law No. 27 of 2009 about People Consultative Assembly, People's Representatives, the Regional Representative Council, and the Regional People's Representative Council. Based on Article 10 paragraph (1) of Law No. 12 of 2011, the substances that must be regulated in legislation are:

1. Further Regulation regarding the provisions of the 1945 Constitution.
2. Order of a statute to be regulated by the law
3. The ratification of particular treaty
4. The follow-up of the Constitutional Court Decision, and
5. The fulfillment of the need of law in the society.

Basically, the legal basis regarding to the authority of Constitutional Court in handling the dispute on the result of Presidential Election is regulated in the Article 24C of the 1945 Constitution, that stated the Constitutional Court has the authority to Adjudicate at the first and final instance, the judgement of which is final, to review laws against the Constitution, to judge on authoruty disputes of state institutions whose authorities are granted by the Constitution, to judge on the dissolution of political party, and to judge a dispute regarding the result of general election.

The disputes brought to the Constitutional Court have its own characters and different from the controversies faced by ordinary courts.

This is caused by the public interest implicated in it, though the application is submitted by a person or individual. The decisions decided by the Constitutional Court will take legal effect not only to individuals who apply, but also others, such as state institutions, and the government officials or the public in general.

The status and authority of Constitutional Court is a judicial body exercising judicial power in addition to the Supreme Court and the judicial ranks below. The Constitutional Court has authority in examining and deciding the constitution, but the Constitutional Court is also subject to the law of Judiciary Act in runing the authority.

The application of this principle means that the Constitutional Court has to use the authority in deciding the disputes based on the laws. The Court has to hear the parties or relevant parties and give both parties a balance of right to be heard in Court. As one body to receive, examine, and decide upon the applicant, the Court must be a neutral and independent organ which also hear testimony from as many stakeholders as possible.

Therefore, the Constitutional Court should be subject to the principles of justice as regulated in procedural law, the law of Judiciary Act and principles universally recognized. These principles will be briefly described as follows:

1. The Hearing is Open to Public

Law No. 48 of 2009 on the Judicial Power in Article 13 specify that the trial is open to public except the law determines another. It is universally applicable and valid in all Jurisdictions.

Article 40 paragraph (1) Constitutional Court Act determines that the Constitutional Court session is open to public, unless the judge consultative meeting. Disclosure of this trial is a form of social control and also accountability of judges. Transparency and public access is widely carried out by the Constitutional Court, not only hearing but also the proceedings that can be seen or read through the transcript, the transcript and the decision published through the internet site. This is a step to streamline the control of the Constitutional Court.

The availability of a copy of the decision in the form of hard copies can be obtained by the applicant and the defendant after hearing the decision is made and an implementation of principle of the hearing is open to the public and the principles of transparancy in the Constitutional Court as stated in Article 14 of the Constitutional Court Act.

However, there is an exception of this principle. In the criminal cases which involved children as an accused, the trial will be performed in a close session. Similarly, it is also applied in any case

relating to ethics and morality.[15] But the announcement of a decision of the case must be done in a session open to the public. If not, the decision is considered as null and void.

2. Independent and Impartial

Article 2 of the Constitutional Court Act states that the Constitutional Court is one of the state institutions that performs independent judicial power to organize judicial administration to uphold the law and justice. Article 3 of Judiciary Act states that in carrying out the duties and functions, judges shall maintain judicial independence.

The independence is very close to the impartiality or the impartiality of judges in examination and decision making. Judges who are not independent or self-sufficient can not be expected to be neutral in carrying out its duties.[16] Likewise, a court that is dependent on other bodies in specific areas and cannot organize itself will also lead to an attitude that is not neutral in carrying out their duties. Independence and impartiality are concept that flow from the doctrine of separation of powers that must be done explicitly that the branches of state powers do not affect each other.

[15] See Article 153 (3) of Criminal Procedure Codes.
[16] Jimly Asshiddiqie, 2006, *Pengantar Ilmu Hukum Tata Negara Second Books*, Jakarta: Sekretariat Jenderal dan Kepaniteraan MKRI, page 54.

Indeed, the conception of independence and impartiality of judges has several aspects, as stipulated in Article 5, paragraph (2) and (3) the Judiciary Act that can be seen as functional, institutional, and personal of each judge. Functional freedom in constitutional law contains a prohibition for other state power to intervene the proceedings by the judge either under consideration or imposition decision.

In this case, it can be interpreted that independence is not only limited to freedom from interference by other powers (executive and legislative), but also freedom from coercion, directive or recommendation from the extra-judicial.[17] The provisions of Article 3 paragraph (3) of the Judiciary Act stating that a violation of article 3 paragraph (2) of the Judiciary Act governing the prohibition of interference in the affairs of justice by other parties out of judicial authorities, that would be convicted, are referring to directive, coercion, bribery or collusion.

Freedom does not contain an absolute nature because it is restricted by law and justice based on a view of life, consciousness, and the ideals of the legal and moral ideals which include psychological atmosphere and character of the people formulated in

[17]Indonesia (b) Undang-Undang tentang Ketentuan-ketentuan Pokok Kekuasaan Kehakiman, Undang-Undang No. 14, LN No. 74, Tahun 1970, TLN No. 2961, Penjelasan Pasal 1, sebagaimana diperbaharui dengan Undang-Undang No. 4 Tahun 2004 (Indonesia (c), Undanag-Undang Kekuasaan Kehakiman, Undang-Undang No. 4 LN No. 8 Tahun 2004, TLN No. 4358). Undang-Undang No. 4 Tahun 2004 diganti dengan Undang-Undang No. 48 Tahun 2009.

Pancasila. The judges have the freedom to carry out their duties for justice and rsponsible only for God.

In other words, the freedom of judges is not only functionally attached to accountability to the public, but also to God. The judge must be guided by conscience in implementing judicial duties.

Independence and impartiality become more important in facing influential political force of the uplift, selecting judges to sit in the Constitutional Court and all the parties outside of the pressure mechanism applicable law. Without independence, impartiality, and trust from the society, the Constitutional Court will not have the authority (dignity). These qualities are needed by all justices, but more importantly by the Constitutional Court because the Constitutional Court will decide cases continuosly. The statement that judges are independent and impartial is not enough, but the Constitution should also contain guarantees for the independence of judges.

Declaration of Constitutional Court Judges regarding the codes of ethics and behaviour of Constitutional Judges, in the first part states:

> *"The independence of judges is a fundamental prerequisite for the implementation ofa legal state. This principle is inherent and should be reflected in the examination and decision making on every cases, and this is closely related to the independence of Courts as authoritative, dignified and reliable institution. Independence of judges and courts manifested in self-reliance and independence of judges from various influences, which is come from outside the judge in the form of intervention that are affecting directly or indirectly in the form of persuasion, pressure, coercion,*

threats or acts for political interests, or economic government or the ruling political power, or groups, with compensation or to gain position, economic benefits, etc."

Theodore L. Becker defines the independence of judges as follows:

a. The degree which judges believe they can decide and do decide in accordance with their own personal attitudes, values and conceptions of the judicial role (in their interpretation of the law).

b. In opposition to what others who have or are believed to have political or judicial power, think about or desire in like matters.

c. (Is) in effect particularly when the decision adverse to the beliefs of desires of those with political power cannot effects retribution on the judges personally or on the power of the courts.[18]

Approxmately, the definition of independence of judges can be interpreted that "the level of trust judges is they can decide in personal, value, and conception challenges of his role in interpreting the law. Contrary to those who have the political power or the judicial and in fact if the decision is not in accordance with the wishes of those in power, they cannot retaliate against a judge personally or to the judicial authority."

The independence of judges is a part of functional freedom that they have. Functional freedom above will be supported with freedom

[18]Herman Scwartz, 2002, the Struggle for Constitutional Justice in Post-Communist Europe, Chicago: the University of Chicago Press Book, page. 261.

of personal and structural. When talking about personal ability, it means that professionalism personally of judges in field of law, economic security, and collateral position. A judge, who is not equipped with good technical skills, will not be able to apply functional freedom well.

Freedom with supporting the professionalism, include three things:

a. Expertise or skill;
b. Accountability or liability; and
c. Adherence to the code of ethics.

The Profesional judges meets these criteria. Thus professionalism is expected to support the independent judicial authority. In addition to the professionalism, personal traffic must also be owned, which includes integrity and personal resilience to resist the effects of non-judicial.

The quality of impartiality will be based on behavioral guidelines (*code of conduct*) judges, within inside or outside the Court, which flows from the code of conduct. Code of conduct and guidelines for behavior must be socialized, so it can be monitored by the public.

Declaration of Constitutional Court Judges, the second part talking about impartiality, states:

> *"Impartiality is a principle inherent in the nature of the function of the judge as the party that is expected to provide solutions to every case brought before it. Impartiality includes a neutral stance, along with a deep appreciation of the importance of balance of interest related to the case. This principle is inherent and must be reflected in the proceedings until decision-making, so that the court decision can be accepted as legal solutions that are fair to all litigants and public."*

In practice, this principle requires the judge to be not inclined to either party, and without prejudice. Judges are not allowed to comment on cases that will, are being investigated and decided, either by judges who examine and decide, or other judges, except with the decision that has a magnitude in terms of clarifying the content of the decision or in the framework of scientific activities. Judge who cannot show neutrality could be asked to resign or have to resign, either because it has no prejudice against one party or the judge have any family relationship with one of the parties.

Structural independence called one roof through a long and strenuous struggle eventually obtained by all the organs of judicial power. The judicial authorities under the leadership of the Supreme Court have responsibility for the personnel administration, organization and finances after amendments of the Supreme Court Act, general jurisdiction of law, religious law and military justice. Thus, it is expected that the independence of judges is not feared influenced by government authorities in the field of personnel and authority.

The institutional independence of the Constitutional Court is specifically described in Article 2 of Constitutional Court Act. The Constitutional Court is one of the state institutions that perform independent judicial power to organize judicial administration to uphold the law and justice. So that, the Constitutional Court is responsible for governing the organization, personnel, administration, and finances in accordance with the principles of good governance and clean. (Article 12 of the Constitutional Court Act).

Structural independence does not support the functional freedom automaticaly because criteria, mechanisms and procedures in the field of administration and finance still in the paradigm of the executive which has been used and difficult to understand the structure that supports the function of an independent judiciary with the need and support personnel, organizational and financial different. But the struggle and effort of the Constitutional Court itself will assert as a constitutional institution that is independent and free from outside influence in the running of judicial power.

Independence of judges individually and institutionally means to support the attitude and the need for judges to be impartial or neutral to examine, hear and decide the case. The independence of judges is not a privilege; it is a necessary condition so that impartiality in performing judicial duties can be realized. This is the rights of community that obtain a decision that brings a very important impact

on life, dignity and property, from the court that is independent and impartial, with which they can accept the decision of the Court as binding law.

3. Quick, Simple, and Low Cost Procedure

Article 4 paragraphs (2) of Judiciary Act determine that the court is exercised with a simple, quick, and low cost. Explanation of the paragraph (2) states that the definition of simple is the examination and settlement of cases are conducted in a way that is efficient and effective, while low cost means the cost of a case that can be covered by the people. But it does not mean it willsacrifice the accuracy in seeking the truth and justice.

However, the Constitutional Court does not ask money for the registration and any court fees from the applicant. All costs related to the trial in the Constitutional Court are part of state budget. This is understandable because the actions are carried out in the general court, for the seizure and execution which is the biggest burden, unknown in the Constitutional Court.

Summons to attend the hearing and requested a copy of the judgment which the applicant or defendant is provided at the expense of the Constitutional Court. Other parties who need decisions may download from the internet site of Constitutional Court which can be accessed any time or ask a hard copy to the Constitutional Court by his

own expense. Even though the cost is very cheap, the trial of the Constitutional Court still have problem to be solved with technology, because the Constitutional Court is in the capital and the applicant is sometimes very far from the capital. Therefore, it takes high cost to call and attend the trial in Jakarta. Low cost issues in the trial to be something that is actually faced by the applicant.

In hearings on election dispute, the Constitutional Court uses the facilities of the Republic Indonesian police headquarters (*National Police Headquarters*) to implement remote session by teleconference facilities are very helpful in terms of speed and cost of the trial. The same thing has ever seen at the High Court of Australia that listened to petition from another city while judges convened in the Capital, Canberra. In the future this technique will be very easy to be used and help the integration of the region effectively.

4. The right to be heard in a balance principle (Audie et Alteram Partem)

The cases are examined and tried in regular courts, whether plaintiff or defendant, or the public prosecutor nor the defendant have the same right to be heard in a balance principle and each party has an equal opportunity to submit evidence to support the arguments of each. In slightly different shades, on judicial review, the applicant and the government and People's Representatives nor the parties related to the law petitioned for review are given the same right to be heard.

Even the other stakeholders who feel to have an interest in legislation reviewed should be heard if the relevant parties expressed desire to treat gives information. At least they provide a written statement which shall be considered by the Constitutional Court if the statement contains a value that can make clear juridical problems related to the manufacturing procedures of law, the charge of material, parts of chapters or verses of laws that have been reviewed. In the proceedings, related parties will be assessed by the Court as an ad informandum.

In the dispute of state institutions authorities, election results and the dissolution of political party, which explicitly called for the defendant, this principle would seem assertive in their implementation. Defendant must be heard in the trial, and this is the procedural rights that cannot be avoided. This right includes proving opponent (*tegen bewijs*) against the evidence of the applicant.

The failure of judges to implement this principle will give the impression even accusations that the Court is not impartial judge or unfair. In judicial terms, it shall be used as a reason to annul the decision.

5. Judge must be active and passive in the proceedings

This statement can be seen paradoxically, as well as active and passive must be adhered to judge. However, the special characteristics

of the Constitutional Court with a strong public interest rather than individual interest have led to the trial process that can not be left solely to the initiative of the parties. Constitutional control mechanism should be driven by applicant with one application and in such a case the judge must be passive and cannot be active to take the initiative to drive mechanism without cases filed with the petition. So the registered cases shall be examined, due to the public interest contained therein, directly or indirectly, will force judges to be active in the process and not rely on process only on the initiative of the parties, in order to explore the information and evidence which considered necessary to make clear and bright points raised in the petition.

Therefore, the judge must be active to explore the data and information necessary even to sift through the minutes of the discussion of the law. It may be said that since the judge will always consider public interest in its decision, either when it will grant or then will declare the legislation referred does not have legal binding to force and refuse. Judges must be careful and diligent to look for information needed. Therefore, the nature of the examination conducted by the Constitutional Court is inquisitorial and cannot be adversarial. Misunderstanding about this will cause unnecessary incident in the early formation of the Constitutional Court. This is due to applicants who are using the paradigm of the general court that cause tensions.

6. Ius Curia Novit

Article 10 of Judiciary Act states "the courts are prohibited from refusing to examine, hear and decide a case filed on the grounds that the law does not exist or is less obvious, but it is obliged to examine and hear." In other words, the Court understands the law necessary to resolve the case, so that the court may not refuse cases considering there is no law governing the case.

E. Effectiveness

Effectiveness is a success in achieving targets or beneficiaries that have been set in every activity or program. The level of effectiveness can be measured by comparing between the predetermined plans with the real results that have been realized. However, if the result of the work and efforts made improper thus causing the target not achieved as expected, then it is said to be ineffective. This is in accordance with the opinion of H. Emerson quoted by Soewarno Handayaningrat S. which stating that effectiveness is a measure in the sense of achieving predetermined objectives.[19]

The effectiveness shows a success on achieving or not achieve the target set. If the results of the activities are closer to the target, meaning the higher effectiveness and if the results of the activities can be achieved

[19]Handayaningrat, Soewarno, 1994. *Pengantar Studi Ilmu Administrasi dan Manajemen*. Jakarta: Haji Masagung, page. 16.

until the time limit has been determined, then the program or activity can be said to be effective.

Furthermore, according to Kurniawan, in his book entitled Transforming of Public Services, defines effectiveness as follows:

> *"The effectiveness is an ability to implement duties, functions (operations or missions program activities) rather than an organization or the like and there are not any pressures or tensions between its implementation".*[20]

Based on some opinions on the effectiveness above, it can be concluded that a program or activity can be said to be effective if a predetermined plan has reached the target or have obtained results as planned.

[20]Kurniawan, Agung, 2005, *Transformasi Pelayanan Publik*. Yogyakarta: Pembaruan, page. 109.