

CHAPTER I

INTRODUCTION

A. Background of Study

The Constitutional Court is a state institution serves as a bodyguard and interpreter of the Constitution through it's decisions.¹ In carrying out it's constitutional duties, the Constitutional Court seeks to realize its institutional vision, namely the establishment of a constitution in order to realize the ideals of a state of law and democracy for the sake of a dignified nationality and state of life. This vision becomes a guideline for the Constitutional Court in exercising judicial power in an independent and responsible manner according to the constitutional mandate.

When examined further, the establishment of the Constitutional Court was encouraged and influenced by the factual conditions that occurred at that time, namely as a consequence of the realization of a democratic legal state and a democratic state based on law. The fact shows that a law that is formed democratically (*undang-undang*) is not always in accordance with the provisions of the 1945 Constitution which applies as the highest law. Therefore, an institution which is authorized to test the constitutionality of the law is needed. Then after the second and third amendments to the 1945 Constitution, it changed the relations of power by adopting separation of powers based on the principle of checks and balances. The number of state institutions and all of their determinations makes a great potential for disputes between state institutions. While the change in the MPR's supremacy paradigm to constitutional supremacy, makes it no longer the highest state institution authorized to resolve disputes between state institutions. Therefore, a separate institution is needed to resolve the dispute.

¹ Janedjri M. Gaffar, *Kedudukan, Fungsi dan Peran Mahkamah Konstitusi dalam Sistem Ketatanegaraan Republik Indonesia*, Mahkamah Konstitusi, p.11.

The function and role of the Constitutional Court in Indonesia has been instituted under Article 24C paragraph (1) of the 1945 Constitution which stipulates that the Court has four constitutional authority and a constitutional obligation. This provision is emphasized in Article 10 paragraph (1) letters a through d of Law Number 24 of 2003 concerning the Constitutional Court. The four authorities of the Constitutional Court are²:

1. Examining the laws against the 1945 Constitution (judicial review)
2. Resolves authority disputes between state institutions whose authority is granted by the 1945 Constitution.
3. Decides the dissolution of political parties.
4. Decide disputes about election results.

Meanwhile, based on Article 7 verse (1) to (5) and Article 24 C verse (2) of the 1945 Constitution which is affirmed in article 10 verse (2) of Law Number 24 of 2003 concerning the Constitutional Court, the Constitutional Court's obligation is to give a decision on the opinion of the House of Parliament (DPR) that The President and / Vice President have committed a violation of law, or a disgraceful act, or have not fulfilled the requirements as President and / Deputy President as referred to in the 1945 Constitution.

The Constitutional Court as a new state institution is given equal position by the constitution, so that it is in line with other state institutions. The principle of strict separation of powers between branches of legislative, executive and judicial power by prioritizing the existence of *checks and balances* between each other.³

The function and role of the Constitutional Court is to maintain the constitution to uphold the principle of constitutionality of the law. This is also the case for countries that establish the Constitutional Court in its state system. In the context of safeguarding the constitution, its function of testing the law could no longer be avoided by the Indonesian state administration

² UU No.24 Tahun 2003 tentang Mahkamah Konstitusi and HRT. Sri Soemantri, p. 285.

³ Sri Soemantri, *Hukum Tata Negara Indonesia*, Rosda: Bandung 2015, p. 202

because the 1945 Constitution emphasized that what the system embraced was no longer parliamentary supremacy but constitutional supremacy.⁴ The constitutional court established with a function to guarantee that there will be no more legal products coming out of the constitutional corridor so that the constitutionality rights of citizens are maintained and the constitution itself is guarded by its constitutionality.

The mechanism to test whether a law is contradictory or not with the constitution is through *judicial review* which is the authority of the Constitutional Court. If a law or one part of it is declared proven to be inconsistent with the constitution, then the legal product will be canceled by the Constitutional Court. Through this mechanism the Constitutional Court carries out its function so that all legal products refer to the constitution.

Judicial review is regulated in the Ninth part of Law Number 24 Year 2003 from article 50 to article 60. The law is a political product usually is the manifestation of the political interests of its makers. As a political product, the contents may contain interests that are contradict the constitution. In accordance with the principle of the legal hierarchy, it is not permissible to fill in a lower regulation that contradicts or does not refer to the rules above. To test whether a law is contradictory or not with the constitution, the mechanism is a judicial review.⁵ If the law is proven to be inconsistent with the constitution, then the legal product is canceled by the Constitutional Court.

In practice the Constitutional Court is often faced with cases that require a comprehensive thought in answering legal cases submitted to Court, which in the end the Constitutional Court's judgement that give rise to pros and cons in society. One example of the Constitutional Court ruling that reaps the pros and cons among legal experts is the decision No.005 / PUU-IV / 2006 concerning the testing of Law No.22 of 2004 concerning the Judicial Commission (Komisi Yudisial) concerning the principle *nemo*

⁴ Ibid, p. 32.

⁵ Jimly Asshiddiqie, *Konstitusi Bernegara*, Malang: Setara Press 2016, p. 272.

judex idoneus in propria causa (that no one can be a judge in his own case).

Request for review of this law was submitted by 30 Supreme Court Justices who felt their constitutional rights were harmed. Here the author is not too concerned about this case materially but the author wants to know more in the formal reasons the Constitutional Court continues to accept this case. Even though the Constitutional Court is aware of the principle mentioned above, that the judge may not be a judge in his own case.

The background of the existence of this decision is the Supreme Court Judges feel that their constitutional rights have been harmed by the authority to supervise and sanction the Judicial Commission more precisely about the phrase "supervision of judges". The Supreme Court presume that the Judicial Commission is not authorized to supervise and put sanction to Supreme Court' Judge and Constitutional Court's Judges according to the applicant regarding the meaning of the judges listed in Law No. 22 Year 2004 concerning the Judicial Commission are judges under the Supreme Court namely *Hakim Tinggi (hakim banding)* and *Hakim Pengadilan Tingkat Pertama*.⁶

Specifically on Law No. 22 Year 2004 Supreme Court Judges request the articles below to be examined Article 1, 20, 21, 22 verse (1), verse (5), Article 23 verse (2), (3), (5), article 24 verse (1), article 25 verse (3) and (4). Those article related to phrase "*Hakim dan Hakim Konstitusi*".

So that this decision raises friction between the Constitutional Court as the owner of the authority to do judicial review and the Judicial Commission as the object being examined. The Constitutional Court is the only institution authorized by the 1945 Constitution to test the law against the Constitution, but in the other hand the case requested by the Supreme Court Judge is a case involving Constitutional Judge.

Nemo judex idoneus in propria causa is a principle that must be obey in the judiciary as a form of realization of the impartiality of judges. But whether in this case the Constitutional Judge is still impartial by examining

⁶ Putusan Perkara No. 005/PUU-IV/2006, p. 113

Decision No. 005 / PUU-IV / 2006 that the object of the case concerns the Constitutional Judge itself. However, the Judge still has to examine and decide the case based on the arguments and facts.

Nemo judex idoneus in propria causa important because the Constitutional Judge himself explain that this principle can not be implemented in this decision but Constitutional Court.⁷

According with the above matter, Islam has the concept of *istiqlal qadha* which is the manifestation of the freedom of judiciary. This was manifested in the hadith of the Prophet who would still cut off Fatimah's hand if he was found stealing. At that time the Prophet was the head of state as well as a judge who had the task of resolving disputes between religious people, not only muslims. Of course, freedom of justice has been applied by the Prophet Muhammad principally.⁸

So the author will try to take the relation between the reasons why the Constitutional Court continues to violate the principle *judex idoneus in propria causa* seen from the viewpoint of *istiqlal qadha* in Islam that reflects the freedom of the Judge in making decisions.

Regarding this difference, how can the Constitutional Court as the sole guardian of the constitution provide a solution in order to be able to answer the problems of constitutionality proposed to it. As a result in this thesis the author will discuss about The Analisis of Constitutional Court Decision No. 005/PUU-IV/2006 (Based on *Nemo Judex Idoneus in Propria Causa* and *Istiqlal Qadha* Principle).

B. Problem Formulation

Based on the background above, the problem will be researched are as follows:

1. How does the decisions of the Constitutional Court No.005 / PUU-

⁷ Putusan Perkara No. 005/PUU-IV/2006, p. 153

⁸ Nur Aina Abdullah, *Istiqlal qadha Wujudkah Pelaksanaanya dalam Sistem Kehakiman di Malaysia*, Jurnal Univertsiti Kebangsaan Malaysia, p. 119

IV / 2006 seen from the principle of *nemo judex idoneus in propria causa*?

2. How does Islam's view the decisions of the Constitutional Court No.005 / PUU-IV / 2006 based on the principle of *istiqlal qadha*?

C. Research Objectives

Objectives of this study are as follows:

1. To find out the decisions of the Constitutional Court No.005 / PUU-IV / 2006 in terms of the principle of *Nemo judex idoneus in propria causa*
2. To find out the Islamic views related to the decision of the Constitutional Court No.005 / PUU-IV / 2006 based on *istiqlal qadha* principle..

D. Usability of Research

The benefits obtained from this study are as follows:

1. Theoretically
 - a. To add knowledge to the author and also the reader about "Analysis of the Constitutional Court Decision No. 005 / PUU-IV / 2006 based on the Principle of *Nemo judex idoneus in propria causa* and the *istiqlal* principle of *qadha*".
 - b. To train the ability of the author in conducting research.
 - c. To apply knowledge theoretically and relate it to data obtained from field research.
2. Practically
 - a. To obtain knowledge from field research practice.
 - b. To provide information to the public about "Analysis of the Constitutional Court Decision No. 005 / PUU-IV / 2006 Based on the Principle of *Nemo judex idoneus in propria causa* and *istiqlal qadha* principle".

E. Literature Review

Based on the search of the author, there are several similar studies about the principle of *judex idoneus in propria causa* relating to the Constitutional Court.

First, the research conducted by Yanis Maladi, a lecturer at the Faculty of Law at the University of Mataram, and the doctoral supervisor of the University of Brawijaya, with the title of the research, "*Benturan asas Nemo judex idoneus in propria causa and Ius curia novit Principes* (Telaah Yuridis Putusan MK No. 005 / PUU-IV / 2006)". This study discusses the authority of the *judicial review* of the Constitutional Court as an institution that examines Law No.22 of 2004 concerning the supervision of judges conducted by the Judicial Commission against the 1945 Constitution.⁹ In the study written by Yanis Maladi there are several points, namely explaining that the Constitutional Court is the guardian of the constitution the results of the amendments to the 1945 Constitution which were given the authority to examine the law; Yanis Maladi also explained the two principles and was followed by an explanation of why the judges preferred to win the principle of *ius curia novit*.

Second, research by Saldi Isra, Professor of Law at Andalas University, West Sumatra. The research title is "*Putusan Mahkamah Konstitusi No. 005 / PUU / IV / 2006 (Isi, Implikasi dan masa depan Komisi Yudisial)*".

In this paper, explained that one of the major steps to reform the constitution, besides that is a reform of the judicial authority. Judicial power is mandated through Article 24 Paragraph (2) of the 1945 Constitution to the Supreme Court and the Constitutional Court. Furthermore, in Article 24 A Paragraph (2) of the 1945 Constitution it is stated that "*Supreme Court Justices must have integrity and personality that is impeccable, fair, professional and experienced in the field of law.*" To maintain the independence and

⁹ Yanis Maladi, *Benturan Asas Nemo judex idoneus in propria causa dan Asas Ius curia novit (Telaah Yuridis putusan Mahkamah Konstitusi Nomor 005/PUU-IV/2006)*, (Jurnal Konstitusi, Vol.7, April 2010).

integrity of judges, the amendments to the 1945 Constitution also gave rise to new institution, namely the Judicial Commission (KY).¹⁰

In this paper also explained about the connection between the principle of *judex idoneus in propria causa*. It was stated that as one of the principles in the procedural law of the Constitutional Court, the Constitutional Court must not deviate it. This means that the reason for litigation in the Constitutional Court is not the same as litigation in ordinary court cannot be used as an argument to ignore the principle. Until now, the Constitutional Court has used several arguments that litigation in the Constitutional Court is not the same as litigation in ordinary courts, but there is no argument that can explain this thoroughly.

Third, research by Fitri Marsela, a student at Universitas Negeri Semarang with the title "Kajian Yuridis terhadap penafsiran Hakim Konstitusi Terkait asas Nemo Judex in Causa Sua dalam Putusan MK Number 1-2 / PUU-XII / 2014".

This study discusses the Decision of Case Number 1-2 / PUU-XII / 2014 about judicial review of Law Number 4 of 2014. The law mentioned above is the Law of the Constitutional Court after being amended from Law No. 24 of 2003. The judge accepted this case as a violation of the principle. The author examines the arguments and methods of interpretation of judges who also violate the principles of the *nemo judex in causa sua*, and the judge should resign.¹¹

Fourth, research by Nur Aina Abdullah, a student from Universiti Kebangsaan Malaysia with the title "Konsep Kebebasan Kehakiman menurut Syariah Islam". In this journal, at least the author address two important points, first the principle of freedom of justice in Islam and

¹⁰ <https://www.saldiisra.web.id/index.php/buku-jurnal/jurnal/19-jurnalnasional/422-putusan-mahkamah-konstitusi-no-005puu-iv2006-isi-implikasi-dan-masa-depan-komisi-yudisial.html> accessed on October, 9 2018.

¹¹ Fitri Dwi Marsela, *Kajian Yuridis terhadap penafsiran Hakim Konstitusi Terkait asas Nemo Judex in Causa Sua dalam Putusan MK Number 1-2 / PUU-XII / 2014*, (Skripsi UNNES, 2014).

second application in Malaysian courts.

Based on the above studies, the author tries to make an analysis of the Constitutional Court Decision No. 005 / PUU-IV / 2006 with the viewpoint of *judex idoneus in propria causa* principle and then the author will try to analyze the actions chosen by Constitutional Justices from the standpoint of judicial freedom (*istiqlal qadha*) in Islam with its elements.¹²

F. Theoretical Basis

Before entering into a clearer discussion, the author will briefly explain what is in this study so that readers can understand it.

1. The principle of *nemo judex idoneus in propria causa*

Principle *nemo judex idoneus in propria causa* is one principle of procedural law of the Constitutional Court used in any judicial process in Indonesia because it is a manifestation of the principle of impartiality judge as giving justice.

The principle of *nemo judex in propria causa* or the principle of *nemo iudex in causa sua* is a Latin term which means "no one should be a judge for his own case." Practically, the principle of *demonstration in propria causa* is the principle which states that a person may not be a judge in a case if they have an interest in the case.¹³

The principle of inherent impartiality and must be reflected in the stages of the case inspection process to the decision making stage, so that the court's decision can be truly accepted as a legal solution that is fair to all parties who litigate and by the general public in general. The impartiality of judges must be seen in the idea that the judges will base their decisions on the law and the facts at the trial, not on the basis of the relationship with one of the litigants, not the case for the case. own. The impartiality of constitutional justices has been regulated in Law No.48 of 2009, Law No.24

¹² Nur Aina Abdullah, *Konsep Kebebasan Kehakiman menurut Syariah Islam*, (Jurnal Universiti Kebangsaan Malaysia).

¹³ <http://www.legal-glossary.org/2013/03/23/nemo-judex-in-sua-causa/>, accessed on Friday, March 22, 2019.

of 2003 and also in the code of ethics of judiciary.

Therefore, the judge must resign from the trial process if he sees that there is potential for impartiality, thus this argument confirms that the judge should not deviate from the principle of *judex idoneus in propria causa*.

2. Istiqlal qadha

The term *istiqlal qadha* is "the judges must be free from the influence of the government, certain individuals, even their desires which can influence them from achieving the highest objective of justice, namely upholding justice between humans and returning the right to the right owner"¹⁴

Further understanding " must be safe than the intervention of other parties in it, namely the legislature and executive body "¹⁵

Based on this concept the judges are required to be very careful in upholding justice in resolving cases. Then there are three elements that must be fulfilled in the implementation of this concept sure of neutrality (*Al Khiyad*), competency of judges (*Ikhtishash*), freedom of judges (*hurriyatul ra'yi*).

G. Research Methods

Type of research method can be classified based on the purpose and level of nature, here the author applies the library research method. According to Jujun S. Sumantri that basic or pure research is research that aims to find new knowledge that has never been known before, whereas applied research is aimed at solving problems in practical life.¹⁶

In getting the data and processing properly, a research methodology is needed so that the results of this study become a good scientific work. Data generated from research methods produce a scientific work that can

¹⁴ Muhammad Abdul Qadir Abu Faris, *Al Qadha fil Islam*, (Amman : Darul Furqon 1995), p. 189.

¹⁵ Hamid Muhammad Abu Talib, *Tanzim Al Qadha'iy Al Islamiy*, (Mesir :Matba'ah Sa'adah 1982), p. 45.

¹⁶ Sugiyono, *Metode Penelitian Kuantitatif, Kualitatif dan R&D*, (Bandung: Alfabeta, 13th Edition, 2011), p. 4.

be accounted for.

The method used for the discussion of this paper is as follows:

1. Type of Research

Research This research is library research, namely by collecting data on library materials that are in accordance with the object of this discussion, including books, journals, and previous research¹⁷ on the principle *nemo iudex idoneus in propria causa* and the principle of *istiqlal qadha*.

2. Object of Research

The object of the research in this study is case No.005/PUU-IV/2006. That is to explain the principle of impartiality (impartiality) of the judge in deciding the case then analyzing it with the concept of a judge in the principle of *istiqlal qadha*.

3. Data Collection

Collection material is obtained through the documentation method. Namely by collecting, reading and studying more in reading books, papers, encyclopedias, journals, magazines, newspapers, internet articles, and other sources related to this writing as theoretical data. Primary data of this research is Decision No.005/PUU-IV/2006 and secondary is book written by Hamid Muhammad Abu Thalib, *Tandzim al Qadhaiy Al Islamiy*.

4. Data Analysis

In terms of the types of research above, this research is a study comparative analysis descriptive based on the results of the literature study (library research).¹⁸ The materials obtained will be studied using analytical, comparative and descriptive:

a. The analytical method is intended to analyze the system of

¹⁷ Susiadi, *Metode Penelitian*, (Lampung: Pusat Penelitian dan Penerbitan LP2M Institut Agama Islam Negeri Raden Intan Lampung, 2015), p. 25

¹⁸ Burhan Ashshofa, *Metode Penelitian Hukum*, (Jakarta: Rineka Cipta, Cetakan Keempat, 2004), p. 15

impartiality by the judge before making decision No. 005 / PUU-IV / 2006 and about the concept of judges' ethical behavior in *istiqlal qadha*.

- b. The comparative method is intended to compare the concept of impartiality judicial with the principle of *istiqlal qadha* in Islam.
- c. Descriptive methods are intended to explain the system and the concept of *nemo judex idoneus in propria causa* and *istiqlal qadha* and do a study.