

# RECONSTRUCTION OF ETHICS SUPERVISION SYSTEM TOWARDS CONSTITUTIONAL COURT JUSTICE

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## Abstract

Ethics supervision of constitutional justices is an important issue for the development of ethics supervision system in the Constitutional Court, because the supervision of constitutional justices is a means of maintaining the independence and impartiality of constitutional justices, which is in fact the main pillar of an independent judiciary. In its development, there has always been a debate about the ethics supervision of the constitutional justices, whether the justices should be overseen externally or internally. This is because, juridically, the law does not regulate it clearly. Based on the above background, the research issues drawn are: (1) What is the significance of ethics supervision toward constitutional justices ?; (2) What is the system of ethics supervision of constitutional justices according to Indonesia's current positive law, (3) How to reconstruct the system of ethics supervision of constitutional justices more optimally in the future? Based on the result of the research entitled "Reconstruction of Ethics Supervision System toward Constitutional Justice", the following conclusions are obtained: (1) Based on philosophical, juridical and empirical perspective, ethics supervision of constitutional justices has important meaning in order to maintain and uphold the honor, dignity, and the behavior of constitutional justices. (2) Based on the analysis of the evolution of the ethics supervision system, the result shows that the ethics supervision system toward constitutional justices which is always changing indicates that there is still no standard system as a guideline for the enforcement of alleged violation of ethics against the constitutional justices. Therefore, there is a need for normative reconstruction of the ethics supervision system toward constitutional justices through legislation. (3) The reconstruction of the ethics supervision system toward constitutional justices can be done through: a. Amendment to the 1945 Constitution by adding a new norm governing the provision on ethics supervision system toward constitutional justices, b. Amendment to the Constitutional Court Law.

**Keywords:** Constitutional Justice, Ethics Supervision System, Code of contact.

## I. INTRODUCTION

### A. Background

Article 1 (3) of the 1945 Constitution states “the state of Indonesia is a state based on law”. The important principle of rule of law state is a guarantee of the implementation of independent judicial power, free from the influence of other powers, (independence), and non-partisan (impartiality). Independence has three (3) dimensions, namely the functional dimension, structure or institutional, and personal. First, the functional dimension implies a prohibition against other institutions and all parties to influence or intervention; Second, the structure or institutional dimension, implies institutional justice must also be independent and impartial; Third, the personal dimension implies judges have the freedom on the basis of capabilities (expertise), accountability, and adherence to the code of ethics and code of conduct.<sup>1</sup>

Personal dimension in the sense that a judge is the representative of Allah (khalifah) on earth who holds respectable position (*nobile officium*) and noble. One task of a judge is to uphold law and justice, which is reflected in their decision in the name of the One and Only God, who will not only be accountable to the public, to the parties litigant, but also to God in the Hereafter.<sup>2</sup>The authority possessed by a judge in its implementation should be carried out in order to enforce the law and justice as mandated by Allah. In addition, a judge, either personally or institutionally, must be held accountable. It is such demand for accountability which requires that a judge should have moral and ethical integrity.<sup>3</sup> Therefore, to maintain moral integrity and ethics of judges, there needs to be supervision arrangement set forth in the guidelines of ethics and conduct of judges as the minimum standard that must be followed by a judge.<sup>4</sup>

A judge is an honorable office (*nobile officium*).<sup>5</sup> Therefore, the judge, as a man of noble-sounding title, is obliged to preserve the honor and dignity and

<sup>1</sup> Sekretariat Jenderal MK-RI, *Hukum Acara Mahkamah Konstitusi*, Jakarta: Sekretariat Jenderal Mahkamah Konstitusi, 2010, p. 19.

<sup>2</sup> Wildan Suyuti Mustofa, *Kode Etik Hakim*, Jakarta: Kencana Prenadamedia Group, Cetakan Kedua, 2013, p. 267.1

<sup>3</sup> Jurdi, *Komisi Yudisial*, Yogyakarta: Kreasi Wacana, 2007, p. 75.

<sup>4</sup> *Ibid.*

<sup>5</sup> Ahmad Fadil Sumadi, *Pengadilan, Fungsi Manajemen Mahkamah Agung Terhadap Pengadilan di Bawahnya Setelah Perubahan UUD 1945*, Malang: Setara Press, Cetakan Pertama, 2013, p. 217.

the nobility of good behavior in order to maintain the glory of office he bears. In this perspective the supervision of judges gains its importance.<sup>6</sup> Thus, the nature of the supervision of the judge is to maintain the glory of the judge and control the judges in performing their duties and authorities to prevent them from violation of moral and ethical integrity. Supervision or control in the judiciary can be distinguished between the supervision of the judicial institution and supervision of judges as the main actors of judicial power. As a judicial institution it should also be independent and impartial in running the judiciary, so it is not justified that other institutions influence the course of justice. As to the judges who have freedom, it is not in the sense of freedom without limits. Judicial independence is associated with the implementation of its constitutional duties, while the conduct of judges is not free from scrutiny. Therefore, monitoring is not intended to supervise judges in carrying out their duties and authorities, but to supervise the judges in their behavior (ethics)<sup>7</sup> in order to preserve and uphold the honor, dignity and behavior of judges.

Based on the above legal construction, according to the author, following Constitutional Court Decision Number 005 / PUU-IV / 2006, Constitutional Court Decision No. 49 / PUU-IX / 2011, and Constitutional Court Decision No. 1-2 / PUU-XII / 2014, control system of ethics against constitutional judges is unclear as the legal basis for the formation, position, composition and authority and procedures or oversight mechanism is not clear and does not have a strong juridical basis. Therefore, in this dissertation, the author will conduct an in-depth study related to the monitoring system of ethics to the constitutional justice, both the system that has been applied and that which is currently in force, so that comprehensive understanding concerning issues related to the supervision system of ethics at the Constitutional Court would be obtained.

Based on the above description, the objective of this study is to examine and analyze the supervision system of ethics of the constitutional judges and recommend the importance of reconstructing the supervision system of ethics to

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<sup>6</sup> *Ibid*, p. 216-217.

<sup>7</sup> In the conceptual part, because supervision in the judiciary is intended to supervise the conduct of judges (the Constitutional Court Justices), thus, in this study, supervision would mean supervision of ethics.

optimize the monitoring system of ethics against constitutional judges in order to preserve and uphold the honor, dignity, and the behaviour of constitutional justices in the future so that the constitutional judges will be protected from abuse of authority, their dignity preserved and the independent judicial power can be realized to enforce law and justice.

### **B. Research Question**

Referring to the above background, this study proposes three questions, namely:

1. What is the significance of ethics supervision against constitutional justices within the framework of independent judicial power?
2. How does the system of ethics supervision toward Constitutional Justices work in maintaining and upholding the honor, dignity and conducts of the Constitutional Justices according to the Indonesian positive law today?
3. How to optimize the reconstruction of supervision system of ethics toward Constitutional Justice in order to maintain and uphold the honor, dignity and conducts of the Constitutional Justice in the future?

### **C. Research Method**

This research is a normative legal research, which uses doctrinal method in analyzing principles and norms of legislation relating to the ethics supervision system toward constitutional justices. Normative legal research conceptualize the principles and doctrines as well as a set of norms in the legislation, in this case the norms related to ethics supervision system of constitutional justices in order to preserve and uphold the honor and dignity, as well as the behavior of the constitutional justices. There are 6 (six) approaches used in this study, namely: statute approach, comparative approach, historical approach, philosophical approach, case approach and legal interpretation approach.

In line with the research method, the researcher in this research will use primary, secondary, and tertiary legal materials, obtained in the Constitutional Court library as and other libraries outside the Court. Primary legal materials, including: (1) the 1945 Constitution of the Republic of Indonesia; (2) of Law

Number 48 Year 2009 regarding Judicial Power; (3) of Law Number 14 Year 1985 regarding the Supreme Court, as amended by Law No. 5 of 2004 on the Amendment to Law Number 14 Year 1985 regarding the Supreme Court, as amended by Law Number 3 of 2009 concerning Second Amendment to Law Number 14 Year 1985 regarding the Supreme Court; (4) Law Number 24 Year 2003 regarding the Constitutional Court, as amended by Law Number 8 of 2011 on the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court, as amended by Law Number 4 of 2014 regarding the Stipulation of Government Regulation in Lieu of Law Number 1 Year 2013 on the Second Amendment to Law Number 24 Year 2003 regarding the Constitutional Court to Become Law, and Government Regulation in Lieu of Law No. 1 Year 2013 on the Second Amendment to Law Number 24 Year 2003 regarding the Constitutional Court; (5) Law Number 22 Year 2004 concerning Judicial Commission as amended by Law Number 18 of 2011 on the Amendment to Law Number 22 Year 2004 concerning Judicial Commission; and Constitutional Court Regulations which are related the object of the research.

Secondary legal materials which include: Minutes of Discussion of the Amendment of the 1945 Constitution, Bill on the Constitutional Court and the its Minutes of Discussion, Bill on the Judicial Commission and its Minutes of Discussion, the decisions of the Constitutional Court and the decisions of other courts, research papers, law journals, other scholarly works. While tertiary legal materials, namely, among others are dictionaries and encyclopedias.

## **II. RESULT AND DISCUSSION**

### **The Importance of Ethics Supervision towards Constitutional Justice in the Framework of Independent Judiciary**

The Researcher will describe briefly the arguments underlying the importance of the ethic supervision of the constitutional judges, from a philosophical perspective, juridical, and empirical. Philosophical perspectives are based on philosophical approaches carried out by tracking the basic concepts, such as a human concept, the concept of ethics and the concept of freedom. Juridical

perspective will be presented by using a normative approach. While empirical perspective will be presented by using a case approach.

### **1. Philosophical Perspective**

First, from the aspect of human philosophy, the concept of supervision towards constitutional justices is based on the concept of honorable judges, namely keeping the human soul with soul, become patron of the parties to the dispute, be an impartial mediator, have the authority to establish justice, has the authority to determine a person's guilt and the authority to punish someone who is found guilty. Second, from the aspect of ethics, supervision of constitutional justices departed from ethics as a code of ethics, in this case the Code of Ethics and Conduct of Constitutional Justice. The values contained in the Code of Ethics and Conduct of Constitutional Justice originated from Moral Philosophy, but the Code itself functions as a working guideline or moral teachings of the constitutional justices. Thus, the Code is the legalization of moral values in order to be enforced by the workings of the legal norms. The working of the law is to provide the institution that has the legitimate authority; there is penalty and punishment for violators. To determine the morality of the constitutional justices, the Code of Ethics of Constitutional Court Justice adheres to deontological and consequentialist ethics. Deontological ethics means judging a moral or immoral action by seeing whether the conduct violates or does not violate the Code of Ethics. Whereas consequentialist ethics means judging that an action called immoral because it is bad for public interest.

### **2. Juridical/Legal Perspective**

Legal perspective can be traced from legal norms that are in the legislation. According Satjipto Rahardjo, states that the law is not only a statutory document that consists of thousands of articles, but rather a moral document, which saves a moral message to social life. Supervision of constitutional justices are the commands of laws and regulations, starting from the 1945 Constitution, the Act to the more technical rules which is Constitutional Court Regulation (PMK).

### **3. Empirical Perspective**

Empirically, it can be traced from several events concerning enforcement of alleged ethics violations committed by constitutional justices. Enforcement of alleged violations of ethics is not only done by the Honorary Council of the Constitutional Court, but has also been conducted by an Investigative Team and Ethics Panel of the Constitutional Court. However, empirically, the system of ethics supervision running today is carried out by a permanent Board of Ethics of the Constitutional Court and Assembly of Honor of the Constitutional Court which is *ad hoc* in nature.

Therefore, either from philosophical, juridical and empirical perspective, ethics supervision of the constitutional justices has significant importance in order to preserve and uphold the honor, dignity, and the conduct of the constitutional justices and the nobility of the Constitutional Court.

### **4. Ethics Supervision in the Framework of Judicial Power**

According to the theory of supervision of judges, supervision is the activity to locate, assess and correct irregularities that may occur or have occurred based on the prevailing laws and regulations.<sup>8</sup> While theory of rule of law state says that “*the important principle of rule of law state is the guarantee for the implementation of independent judicial power.*” Independence of the judiciary is reflected in the independence of the constitutional justices which is a key element within the judiciary itself. The independence of the judges should not be understood in absolute terms that an effective external institution in the field of judicial ethics is required as a balancing mechanism for independence and impartiality. The independence of judges, in some cases, has become a way for judges to act in tyrannical way by behaving in a distorted, corrupt and collusive manner. Thus, the judicial authority without adequate controls would likely give birth to absolutism in judicial institutions or judicial tyranny.<sup>9</sup>

<sup>8</sup> Imam Anshori, *Konsep Pengawasan Hakim*, Op.Cit. p. 26.

<sup>9</sup> A. Ahsin Thohari, *Desain Konstitusional Komisi Yudisial dalam Sistem Ketatanegaraan Indonesia*, Jurnal Legislasi Indonesia, Vol. 7 No. 1, Maret, Jakarta: Direktorat Kenderal Peraturan Perundang-undangan Kementerian Hukum dan HAM, 2010, p. 71.

Freedom of constitutional justice would not mean freedom without limit, but limited by laws and ethical codes that are implemented in the form of ethics supervision, and also freedom is an integral part of accountability. Therefore, the supervision of the constitutional justices do not conflict with the principle of independence of the judges as long as it is not in the realm of execution of their duties and functions.

### **The System of Ethics Supervision towards Constitutional Justices Based on Positive Law in Indonesia Today.**

This section consists of two sub-topics. First, exposure to the evolution and dynamics of the practices and regulation of ethics supervision towards constitutional justices which will be divided into five periods. Second, analysis on the dynamics of this supervision.

#### **1. Evolution of the System of Ethics Supervision towards Constitutional Justice**

Supervision of constitutional justice has been regulated and practiced since the Constitutional Justices were inaugurated on August 16, 2003, with the issuance of PMK No. 02 of 2003, on 24 September 2003 on the Code of Ethics and Code of Conduct of the Constitutional Justices. In fact, the discussion on the Code of Ethics and Code of Conduct of the Constitutional Justice was done prior to the discussion concerning rules of order of the court hearing, law of procedures, etc. This shows that the constitutional justices in the first period put integrity more important before performing their duties and authorities. In the process, the Court made several changes to the rules relating to the supervision of the justices. This suggests that the process of constitutional justice supervision regulation did not come out of the blue, but was influenced by the situation and empirical conditions that are also constantly changing.

In the opinion of M. Ali Safa'at, the monitoring would not be done to the verdict and the authority of the constitutional justices in carrying out justice, but towards the behavior of the justices so that their dignity, honor,

and statesmanship well-preserved. Based on the theory and the opinion of legal experts as explained above, as well as considering the development and the dynamics of the ethics supervision towards constitutional justices as mentioned earlier, the supervision system of constitutional justice can be divided into (5) five periodicities, namely:

1. *The first period*, started since the establishment of the Constitutional Court until the birth of the Constitutional Court Decision No. 005 / PUU-IV / 2006, dated August 23, 2006;

Development of this period can be traced through normative perspective and the implementation of ethics supervision towards constitutional justices. Normative perspective is derived by analyzing the provisions of Law No. 24 of 2003, and the Regulations of the Constitutional Court, as well as the decisions of the Constitutional Court, and in Law No. 22 of 2004 and its implementing rules. Meanwhile, implementation perspective is built by analyzing the application of a system of ethics supervision towards constitutional justices, both the system run by the Constitutional Court and the one practiced by the Judicial Commission.

This period ended with the cancellation of the entire rules on the supervision of the judge which is the authority of the Judicial Commission through Constitutional Court Decision No. 005 / PUU-IV / 2006 on Judicial Review of Law Number 22 Year 2004 concerning Judicial Commission and the Law Number 4 of 2004 on Judicial Power against the 1945 Constitution. This is the most important stage in the dynamics of the ethics supervision system of the constitutional justices.

In the first period, based on the theory of supervision of judges as described in paragraph 2.1.3, the application of the supervision system of ethics against constitutional justices is supposed to be an ideal system, because in addition to the internal control system through the Honorary Assembly of the Constitutional Court, external monitoring system which is the authority of the Judicial Commission is also applied.

2. *The second period*, beginning after the birth of the Constitutional Court Decision No. 005 / PUU-IV / 2006 until the enactment of Law No. 8 of 2011;

Analyzing the basis of the legal argument constructed by the Constitutional Court in the judgment of the Court Decision Number 005 / PUU-IV / 2006, the main reason why later the Constitutional Court annulled the authority of the Judicial Commission to oversee the Constitutional Court Justices is related to the freedom /independence of the judiciary. In its consideration, the Constitutional Court has always stressed that the independence of the judiciary is a bastion (safeguards) of the rule of law which is mandated by the constitution.<sup>10</sup> Moving on from these thoughts the Constitutional Court argues that judicial independence must be protected against all pressures, influence and interference from anyone. Judicial independence is a fundamental prerequisite for the realization of the idea of the rule of law state and a guarantee for the enforcement of law and justice.<sup>11</sup> Oversight by other state institutions, according to the Constitutional Court, is a form of interference in judicial independence.

The Constitutional Court also dismissed the notion that the Constitutional Court can be monitored by other state institutions on the basis of the principle of checks and balances. For according to the Constitutional Court, the principle of checks and balances applies only to the executive branch and the legislative. But interestingly it turns out that the Constitutional Court also actually realizes that the monitoring of the behavior of the constitutional justices can be actualized.

Due to the decision concerning the Judicial Commission and the Law on Judicial Power through the Constitutional Court Decision Number 005 / PUU-IV / 2006, the supervision system of the constitutional justices is no longer under the authority of the Judicial Commission. As

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<sup>10</sup> Ni'matul Huda, *Dinamika Ketatanegaraan Indonesia Dalam Putusan Mahkamah Konstitusi*, FH UII Press, Yogyakarta, 2011, p. 170.

<sup>11</sup> *Ibid.*, p. 171.

a consequence, the system of ethics supervision is internal only through the Honorary Assembly of the Constitutional Court as provided for in Article 23 paragraph (5) of the Constitutional Court Law and shall be further regulated by the Regulation of the Constitutional Court.

Related to the opinion of the Constitutional Court in the aforementioned decision, the author agrees with the opinion of M. Ali Safa'at<sup>12</sup> that regardless of the nature of a Constitutional Court ruling which is final and binding, permanent supervision is needed to prevent abuse of power. Oversight is not done to the verdict and authority of constitutional justices in carrying out justice, but towards the behavior of the justices so that their dignity, honor, and statesmanship are well-preserved.

The existence of institutions that conduct oversight would not in itself be regarded as disturbing the independence and impartiality of the Constitutional Court. Also, it would not be appropriate if there is a view that the supervisory agency has a higher position than those supervised. Just like the position of the Constitutional Court, which annuls the law made by the House of Representatives and the President, that is not higher than the two institutions. The Constitutional institution which is most appropriate to perform supervision would be the Judicial Commission. Further opinions are as follows:

*First*, the argument (judgment a quo) is less compelling and convincing. Concerning the argument about interpretation, what was used was systematic interpretation. But if broader interpretation was used<sup>13</sup> with the purpose to bring about a strong judiciary, supervision towards the conduct of the constitutional court justices is surely required

<sup>12</sup> M. Ali Safa'at, *Mahkamah Konstitusi dalam Sistem Checks and Balances*, dalam Mukthie Fadjar, *Konstitusionalisme Konstitusi*, *Op.Cit.* p. 33.

<sup>13</sup> Sekretariat Jenderal Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi*, *Op.Cit.*p. 63-80 (Satjipto Rahardjo, citing the opinion of Fitzgerald argued that in general, interpretation can be divided into two (2) types, namely (1) a literal interpretation, and (2) functional interpretation. Based on the findings of law, it can be divided into (1) a method of restrictive interpretation; and extensive interpretation. Meanwhile, according to Sudikno Mertokusumo and A. Pitlo, interpretation can be divided into (1) grammatical interpretation or interpretation based on language; (2) The teleological or sociological interpretation; (3) systematic or logical interpretation; (4) historical interpretation; (5) comparative interpretation; and (6) futuristic interpretation.)

so that their statesmanship can be well-preserved. From the perspective of original intent, testimony from the government and the House was also heard which stated that supervision by the Judicial Commission was also intended to be applied to the constitutional justices.

*Second*, the status of constitutional justices as judges due to their position which is elected for a period of five years would not be sufficient reason to remove it from the definition of “judges” who will be supervised by the Constitutional Court. The Judicial Commission can even conduct supervision to Supreme Court justices recruited from a non-career ladder. Recruitment system for the positions of judges is certainly less significant to serve as a basis for the distinction in supervision.

*Third*, when KY has the authority to supervise the conduct of the Constitutional Justices, it does not put KY in a higher position than the Constitutional Court. The subject matter of supervision is also outside the case and the judicial authority run by the Constitutional Court. Therefore, when the Judicial Commission carries the authority to supervise the conduct of the constitutional justices, the Constitutional Court does not need independence and impartiality in hearing and deciding cases concerning disputes on authority involving the Constitutional Court as one of the parties. In line with the above opinion, Titik Triwulan Tutik in her research states that if examined there are inconsistencies and weakness in the opinion in the opinion of the Court because the Constitution explicitly says that the judicial power is performed by the Supreme Court and the Constitutional Court.

Thus, as a consequence of judicial power, constitutional justices cannot be excluded from the definition of a judge under Article 24B paragraph (1) of the 1945 Constitution. Because judicial power is implemented by judges in all courts, then the consequence is that constitutional justice is included in the definition of judge. In addition, in the records of discussion of the amendment of the 1945 Constitution,

it was never mentioned that the constitutional justice is excluded from the definition of judge, and statutory provisions does not separate the definition of judges based on the scope, then all the judges in the realm of judicial power, including constitutional justices should be intended as a judge.

3. *The third period*, starting from the enactment of Law No. 8 of 2011, which was followed by Constitutional Court Decision No. 49/PUU-IX/2011 to the enactment of Government Regulation in Lieu of Law No. 1 of 2013 (Perppu No. 1 of 2013); *Periode ketiga*, dimulai sejak diundangkannya UU Nomor 8 Tahun 2011 yang diikuti dengan lahirnya Putusan Mahkamah Konstitusi Nomor 49/PUU-IX/2011 sampai dengan diundangkannya Peraturan Pemerintah Pengganti Undang-Undang Nomor 1 Tahun 2013 (Perppu Nomor 1 Tahun 2013);

A fairly fundamental change regarding mechanisms for enforcement of Code of Ethics of Constitutional Justice in Law No. 8 of 2011 is the normative construction which orders the Constitutional Court to develop a Code of Ethics and Code of Conduct of the Constitutional Justice and to establish Honorary Assembly of the Constitutional Court. Referring to the provisions of Article 27A paragraph (1) and (2) of Law No. 8 of 2011 which states that:

The Constitutional Court shall draw up the Code of Ethics and Code of Conduct for Constitutional Court Justices containing norms to be complied with by every constitutional court justice in the performance of their duties in order to safeguard integrity and impeccable personality, being just and statesmanship.

Furthermore paragraph (2) stipulates that:

In order to uphold the Code of Ethics and Code of Conduct for Constitutional Court Justices as referred to in paragraph (1), Honorary Assembly of the Constitutional Court shall be established with a membership consisting of:

- a. 1 (one) constitutional court justice;
- b. 1 (one) member of the Judicial Commission;

- c. 1 (one) person from the DPR;
- d. 1 (one) person from the government who organizes government affairs in the field of law; and
- e. 1 (one) supreme court justice.

Then Article 27A paragraph (7) of Law No. 8 of 2011, assets that further provisions regarding the composition, organization and order of procedure for sessions of Honorary Assembly of the Constitutional Court shall be regulated by a Regulation of the Constitutional Court. But interestingly a number of the provisions were submitted for a review to the Constitutional Court, and through the Constitutional Court Decision No. 49/PUU-IX/2011, the articles filed, namely Article 27A paragraph (2) point c, point d, and point e, paragraph (3), paragraph (4), paragraph (5) and paragraph (6) of Law No. 8 of 2011 were declared contrary to the 1945 Constitution.

However, empirically that the Constitutional Court is aware of the legal consequences that arise with such decision handed down, particularly with regard to the formulation of the code of ethics and code of conduct of constitutional justices, as well as membership of the Honorary Assembly of the Constitutional Court. Therefore, the Constitutional Court will further regulate it through PMK.

- 4. *The fourth period*, starting from the promulgation of Government Regulation in Lieu of Law No. 1 of 2013 to the birth of Constitutional Court Decision No. 1-2 / PUU-XII / 2014;

The regulation of ethics supervision system in this period can be regarded as a new phase of ethics supervision system against the constitutional justices. Because there are many changes to the system of ethics supervision adopted by Perppu No. 1 of 2013. A number of significant changes regarding the system of ethics supervision certainly cannot be separated from the background underlying the issuance of the Perppu.

In Perppu No. 1 of 2013 there were interesting and different regulations related to the ethics supervision system of constitutional justices compared with previous regulation. One fundamental difference in this regulation is to reinstate external supervision that the Judicial Commission to be involved in the ethics supervision of constitutional justices, though not the totality of the supervisory authority of constitutional justice under the authority of the Judicial Commission. Thus, the Government Regulation in Lieu of Law No. 1 of 2013 can be said to revive the norms that have been annulled by the Constitutional Court, although it is not entirely the authority of the Judicial Commission.

Article 1 paragraph 4 of Government Regulation in Lieu of Law No. 1 of 2013 states, *“Honorary Assembly of the Constitutional Court is an organ established by the Constitutional Court and the Judicial Commission to safeguard the honor and the behavior of constitutional justice”*.<sup>14</sup> The provision of this article clearly revives the authority of the Judicial Commission to be involved in overseeing the constitutional justices albeit with different scale and degree.

Government Regulation in Lieu of Law No. 1 of 2013 authorizes the enforcement of the Code of Ethics of Constitutional Justices to an institution named “Honorary Assembly of Constitutional Justice”. Nomenclature Honorary Assembly of the Constitutional Justice is a new one because in the previous period the nomenclature used was “Honorary Assembly of the Constitutional Court.” The establishment of the Honorary Assembly of Constitutional Justice was carried out jointly by the Constitutional Court and the Judicial Commission as provided for in Article 27A paragraph (4) which states, *“In order to enforce the Code of Ethics and Code of Conduct of the Constitutional Court referred to in paragraph (1), the Constitutional Court together with the Judicial Commission formed a permanent Honorary Assembly of the Constitutional*

<sup>14</sup> Republik Indonesia, *Peraturan Pemerintah Pengganti Undang-Undang Republik Indonesia Nomor 1 Tahun 2013 tentang Perubahan Kedua atas Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi*, LN Tahun 2013 Nomor 167, TLN Nomor 5456, Pasal 1 angka 4.

*Justice*.<sup>15</sup> This article also reconfirms the involvement of the Judicial Commission in the system of ethics supervision of constitutional justices. Based on this article, it is found out that the existence of the Honorary Assembly of the Constitutional Justice is permanent in nature, not an ad hoc institution. The permanent nature of the Honorary Assembly of the Constitutional Justice is also undoubtedly different from the Honorary Assembly which is temporary or ad hoc.

The composition of the Honorary Assembly of the Constitutional Justice is regulated under Article 27A paragraph (5) Government Regulation in Lieu of Law No. 1/2013 which governs that the membership of the Assembly is 5 (five) people consisting of:

- a. 1 (one) former constitutional justice;
- b. 1 (one) legal practitioner;
- c. 2 (two) academics in which one or both have backgrounds in law; and
- d. 1 (one) community leader.

Based on these compositions, all members of the Honorary Assembly of the Constitutional Justice are from outside the institution of the Constitutional Court. The term of office of the Honorary Assembly of the Constitutional Justice is 5 (five) years and can not be reelected.<sup>16</sup> Thus, the members of the Honorary Assembly of Constitutional Justice can only assume the post for one period only.

Based on the above consideration, it is understood that, in this period, there are two systems of ethics supervision towards constitutional justices, namely: *first*, the system of ethics supervision which is regulated in Government Regulation in Lieu of Law No. 1 of 2013 as has been passed into law No. 4 of 2014 on January 15, 2014 with the Honorary Assembly of the Constitutional Justice as an enforcing institution. *Secondly*, the system of ethics supervision as set forth in PMK No. 2 of 2013 that the

<sup>15</sup> *Ibid.*, Pasal 27A ayat (4).

<sup>16</sup> *Ibid.*, Pasal 27A ayat (7).

idea of its formation comes from the Constitutional Court itself, and the implementing organ is the Ethics Council of Constitutional Justice.

Interestingly, the system of ethics supervision set out in the Government Regulation in Lieu of Law No. 1 of 2013 as has been passed into law No. 4 of 2014 is not applicable for long. Along with the birth of the Constitutional Court Decision No. 1-2 / PUU-XII / 2014 on Judicial Review of Law No. 4 of 2014 on the Stipulation of Government Regulation in Lieu of Law No. 1 Year 2013 on the Second Amendment to Law Number 24 Year 2003 regarding Constitutional Court to Become Law, dated February 13, 2014 of which the verdict states that the Law No. 4 of 2014 is contrary to the 1945 Constitution and does not have binding legal force, the system of ethics supervision as regulated in the Law No. 4 of 2014, since then, comes to an end.

Based on the analysis of the Writer concerning the substance of the Constitutional Court Decision No. 1-2 / PUU-XII / 2014, there are at least three (3) main reasons related to ethics supervision system found which are as follows:

*First*, the principle of checks and balances does not apply to the branch of judiciary, but only for the legislative and executive branches of power. Complete judgment can be found in the legal considerations of the Constitutional Court paragraph 3.22 subparagraph one of decision a quo.

*Second*, independent power is the spirit of the judiciary, so that it can not be restricted let alone intervened. Complete judgment can be found in the legal considerations of the Constitutional Court decision paragraph 3.22 subparagraph two of decision a quo.

*Thirdly*, the involvement of the Judicial Commission in the supervision of constitutional justices constitutes smuggling of law that is conflicting with decisions of the Constitutional Court earlier. More reasoning can be found in the legal considerations of the Constitutional Court paragraph 3.22 subparagraph eleven of the decision a quo.

Those three reasons that convince the Constitutional Court to declare Law No. 4 of 2014, including ethics supervision systems of constitutional justices which revive the role of the Judicial Commission contrasts with the 1945 Constitution.

5. *The fifth period* began after the birth of the Constitutional Court Decision No. 1-2 / PUU-XII / 2014 until now.

As a legal consequence of the Constitutional Court Decision No. 1-2 / PUU-XII / 2014 in which one of the verdicts state:

Law No. 4 of 2014 on the Stipulation of Government Regulation in Lieu of Law No. 1 Year 2013 on the Second Amendment to Law Number 24 Year 2003 regarding the Constitutional Court to Become Law and its attachments (State Gazette of the Republic of Indonesia Year 2014 Number 5, Supplement to the State Gazette of the Republic of Indonesia Number 5493) contradictory to the 1945 Constitution of the Republic of Indonesia

then the Law No. 4 of 2014 is no longer valid because it has no binding legal force and Law No. 24 of 2003 as amended by Law No. 8 of 2011 on the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court applies back as before the change.

Furthermore, the Constitutional Court stipulates PMK No. 2 of 2014 on the Honorary Assembly of the Constitutional Court (PMK No. 2 of 2014), which revoked PMK No. 1 of 2013 and PMK No. 2 of 2013. Substantially there are not many changes regulated in PMK No. 2 of 2014. In fact, it can be said PMK No. 2 of 2014 substantially only incorporate the provisions contained in the PMK No. 1 of 2013 and PMK No. 2 of 2013.

Article 1 point 3 in connection with (*juncto*) Article 14 Paragraph (1) of PMK No. 2 of 2014 state as follows:

Board of Ethics of Constitutional Justice, hereinafter the Board of Ethics, is an organ formed by the Constitutional Court for maintaining the honor, nobility, dignity, and the Code of Ethics of Constitutional Justice in response to the report and information filed by the society on the alleged violation committed by a Reported Judge or an Alleged Judge.

While Article 14 Paragraph (2) of PMK No. 2 of 2014 states that the position of the Board of Ethics is permanent in nature.

Based on such legal construction, if observed, the presence of the Board of Ethics of the Constitutional Court is considered as a part of the Honorary Assembly of the Constitutional Court is not visible and can even be said that there is overlapping in its regulation. Since the two organs in question, both maintain and enforce the Code of Ethics and Code of Conduct of the Constitutional Justice. The difference is that there might be sanctions imposed on the reported judge or the alleged judge. In fact, it can be said that the Board of Ethics has a strategic role in the enforcement of the code of ethics of the constitutional justice. The Board of Ethics plays a role to perform a “day to day” supervision against the conduct of the constitutional justices and is permanent in nature. While the presence of the Honorary Assembly of the Constitutional Court is based on the recommendation of the Board of Ethics, and is ad hoc in nature.

On the one hand, the presence of the Board of Ethics provides fresh air to the prospect of enforcement of the code of ethics of the constitutional justices. But on the other hand, the presence of the Board of Ethics raises a number of questions among law observers. Some things that are considered problematic in relation to the existence of the Board of Ethics are as follows: *first*, the legal basis for the establishment of the Board of Ethics. As mentioned earlier, the establishment of the Board of Ethics is not based on the command of the law but only based on the PMK. In constitutional terms, it is certainly very problematic and potentially raises the issue of lack of legal certainty.

*Second*, related to the budget to finance the Board of Ethics. As the implications of the absence of a law which serves as the legal basis for the formation of the Board of Ethics, there appears a debate about whether the Board of Ethics can be financed using the State Budget (APBN). This issue is certainly crucial to answer, given the absence of the budget

allocated specifically, an institution would not be able to run well. *Third*, related to the qualifications Board of Ethics Council, whether it is an internal supervisory organ or an external oversight body. Considering the composition of the Board of Ethics, it is difficult to say that this institution is an internal watchdog, for the entire composition of the membership comes from outside the Constitutional Court (external). It is stipulated in Article 15 of PMK No. 2 of 2014 that the Board of Ethics has a fixed members of 3 (three) people for a period of 3 (three) years consisting of (1) one former constitutional justice, (1) one law professor, and (1) one community leader.<sup>17</sup> However, since the Board of Ethics is established by the Constitutional Court, it is also difficult to say that this institution is an external agency.

Ambivalence regarding the qualifications of the Board of Ethics is certainly very problematic, given the Constitutional Court in its decision No. 005 / PUU-IV / 2006 and strengthened in decision No. 1-2 / PUU-XII / 2014 has stated that the Constitutional Court as the executor of independent judicial power can not be intervened in any form. Oversight of other state institutions to the Constitutional Court would interfere with the independence of constitutional justices in exercising its authority. Based on the above explanation, if the Board of Ethics is qualified as an external supervisor, then it certainly shows inconsistencies of the Constitutional Court in addressing the design for the supervision system of the constitutional justices. Besides, the PMK No. 2 of 2014 also regulates the allocation of the duties and authorities between the Board of Ethics and the Honorary Assembly of the Constitutional Court. Nevertheless, the Board of Ethics and the Honorary Assembly of the Constitutional Court are both the organs established by the Constitutional Court to maintain and uphold the honor, dignity and the codes of ethics of the constitutional justices. Honorary Assembly is established based on the recommendation of the Board of Ethics, but there is an allocation of

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<sup>17</sup> See Article 15 Constitutional Court Regulation Number 2 of 2014 on the Honorary Assembly of the Constitutional Court .

roles and responsibilities between the two. Referring to the division of tasks and responsibilities between the Board of Ethics and the Honorary Assembly of the Constitutional Court, it can be concluded that Board of Ethics is authorized to oversee minor violations of the code of ethics of the constitutional justices, while the Honorary Assembly's authority is to enforce the code of ethics against major violations.

With the establishment of the Board of Ethics in this period, it can be concluded that the Constitutional Court still actually needs a supervisory agency in order to preserve and uphold the honor, dignity and the conduct constitutional justices, regardless of whether the agency is internal or external. The qualification of the Board of Ethics itself remains a debate as to whether the Board of Ethics that can be qualified as an internal supervisory agency or an external watchdog.

According to Mukthie Fajar,<sup>18</sup> in essence, based on its composition that comes from outside the Constitutional Court, the Board of Ethics can be categorized as an external oversight organ. However, institutionally, it was formed and is within the organizational structure of the Constitutional Court so that it can be classified as an internal supervisory body as well. It is this condition that makes it difficult to remove the position of the Board of Ethics from qualifying as an internal or external oversight institutions. Also, the establishment of the Council of Ethics does not have a firm legal basis, since the order of legislation is to establish the Honorary Assembly of the Constitutional Court, and not to create the Board of Ethics of Constitutional Justice.

In line with the opinion of Mukthie Fajar, according to the author, internal control is not effective and optimal enough for maintaining the honor, dignity, and code of ethics of the constitutional justices. In order to optimize and effectuate the ethics supervision of constitutional justices, the supervision should be conducted by internal and external

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<sup>18</sup> Interview with the Chairman of the Board of Ethics (Mukthie Fajar), in the office of the Board of Ethics, Constitutional Court Building, Tuesday, 27 December 2016.

supervisory watchdog. However, it has been widely understood that external supervisors juridically can not be done prior to their rearrangement through normative reconstruction in the 1945 Constitution and/or through an organic law. This is because in the Constitutional Court Decision Number 005/PUU-IV/2006, as explained above, among others, the Constitutional Court argued that constitutional justice does not include in the definition of “judges” as referred to in Article 24B paragraph (1) of the 1945 Constitution, whose ethical behavior overseen by the Judicial Commission. So the supervision of the implementation of the Code of Ethics of the Constitutional Justice is performed by a separate Honorary Assembly independently in accordance with Law No. 24 of 2003 as amended by Law No. 8 of 2011 on the Constitutional Court.

According to Muhammad Nuh,<sup>19</sup> the ineffective and the non-optimal function of internal oversight of judicial institutions can be caused by several factors as follows: first, the quality and integrity of the supervisors are inadequate. Second, submitting complaints, monitoring the process and outcome (no access). Third, the spirit of defending fellow corps (*esprit de corps*), which resulted in sentencing is not proportional with violations. Any effort to improve a poor condition would definitely get a reaction from those who benefit from these bad conditions. Fourth, there is a strong will from the leadership of law enforcement agencies to follow up on the results of the monitoring.

Therefore, in the future, it is necessary to design a more optimal system of ethics supervision toward constitutional justices that is through an internal and external control system. This is done to optimize and make more effective the system of ethics supervision for constitutional justices, so that the dignity and honor of the constitutional justices are always well-preserved. Moreover, with such great authority granted by the 1945 Constitution, abuse of power practices are very likely to occur in the Constitutional Court, so that the Constitutional Court should have

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<sup>19</sup> Muhammad Nuh, *Etika Profesi Hukum*, Bandung: Pustaka Setia, 2011, pp. 233-234.

an effective monitoring system of ethics to protect the constitutional justices from violations of the code of ethics and abuse of power.

### **Reconstruction of Ethics Supervision System towards Constitutional Justice**

Based on the normative construction as has been described in the previous Chapter, and in accordance with the objective of this study, which is the reconstruction of monitoring system of ethics against constitutional judges, in order to preserve and uphold the honor, dignity, and the conduct of constitutional justices, the main issues that may be proposed to be reconstructed have been identified namely some relevant norms concerning ethics supervision system of the constitutional justice through the amendment of Law No. 24 of 2003 as amended by Law No. 8 of 2011.

The researcher proposes three concepts to reconstruct ethics supervision system of the constitutional justices. *First*, at the level of argument about the judges in the constitution, the researcher agree with the opinion of the Constitutional Court, as contained in the Constitutional Court Decision No. 005/PUU-IV/2006, Decision No. 49/PUU-IX/2011 and Decision No. 1-2/PUU-XI/2016. These three decisions essentially affirm that constitutional justices are not included in the definition of judges whose ethical conduct is supervised by the Judicial Commission. For the sake of maintaining the honor, dignity, and the Code of Ethics and Code of Conduct of the Constitutional Justice, the supervision is performed by an internal supervisory body which is based on Law No. 8 of 2011. But regarding the notion of judges in general, the author argues that constitutional justice is a judge, and therefore in the normative reconstruction of the 1945 constitution, this norm should be formulated clearly and unequivocally.

*Second*, at the level of legal basis, internal supervision of the constitutional justices should be regulated through normative reconstruction in Law No. 8 of 2011. *Third*, at the level of supervisory organ, in my opinion, the regulation of the Board of Ethics of Constitutional Justice overlaps with the Honorary Assembly of the Constitutional Court, so it is necessary to simplify it by establishing one

ethics supervisory organ which is Honorary Assembly of the Constitutional Justice (MKHK).

Based on the whole description in this study, the author is of the opinion that to provide a firm juridical foundation, it is necessary to incorporate the norms into the 1945 Constitution. Therefore, there needs to be a reconstruction of norms concerning supervision system of the constitutional justices through the amendment of the 1945 Constitution. However, the amendment of the 1945 Constitution is not an easy mechanism, then to establish a monitoring system of ethics, what can be done in a not very long time is the amendments to the Constitutional Court Law. Therefore, the author proposes the normative reconstruction in the formulation of the Draft Amendment to Law Number 24 of 2003 as amended by Law No. 8 of 2011, especially regarding the strengthening of the ethics supervisory agency of the constitutional justices, namely:

1. Regulation concerning the drafting of the Code of Ethics and Code of Conduct of the Constitutional Justice;
2. Regulation regarding the Honorary Assembly of the Constitutional Justice which contains, membership composition, requirements for candidate members, the nature of the organ, and recruitment mechanism through Panel of Experts;
3. Provisions concerning the Panel of Experts as an organ established by the Court to conduct fit and proper test for MKHK prospective members;
4. Further provisions regarding the structure, organization, rules of procedure for the proceedings in the Honorary Assembly of Constitutional Justice;
5. Further provisions on the Panel of Experts.

### III. CONCLUSION

The Importance of ethics supervision towards Constitutional Justice in the Framework of independent Judicial Power, namely:

#### (1) Philosophical Perspective

The constitutional Justices are the main executors of the duties and authorities of the Constitutional Court in upholding the law and justice that

has respectable positions (noble officium). They have fulfilled the requirement of a Constitutional Justice and have been qualified as a judge, but it does not mean that the justices in carrying out their duties and responsibilities will be spared from mistake or wrongdoing. Therefore, to maintain that respectable office (noble officium) they shall keep the honor and dignity and good behavior in order to maintain the glory of the office they bear.

(2) Juridical Perspective.

Supervision of constitutional justice is a command of laws and regulations, namely the 1945 Constitution which contains basic norms of supervision of justices (Article 24B, Paragraph 1 of the 1945 Constitution) and Law No. 8 of 2011. Therefore, the Constitutional Justice must abide by and adhere to the normative provisions regarding supervision system regulated in the legislation.

(3) Empirical Perspective.

Empirically, the Constitutional Court through the organs it established (Investigation Team, Ethics Panel, and the Honorary Assembly of the Constitutional Court) has made several legal enforcement on alleged ethics violation committed by constitutional justices. This indicates that there is no guarantee that a constitutional justice, before being inaugurated by the President, although already passed the fit and proper test by the Panel of Experts, in carrying out his/her duties and authorities will be prevented from abuse of authority.

Thus, ethics supervision towards justices is a necessity that must be present, in order to preserve and uphold the honor, dignity, and the conduct of constitutional justices. Supervision is absolutely necessary because according to Lord Acton, *“the power tends to corrupt, absolute power corrupt absolutely”*.

Ethics Supervision System towards Constitutional Justice with the purpose to maintain and uphold the honor, dignity, and the behavior of the Constitutional Justice according to the Positive Law in Indonesia, namely:

- (1) In the context of supervision of the constitutional justices, in the beginning of the establishment of the Constitutional Court, after the election of the Chief Justice and Deputy Chief Justice of the Constitutional Court, constitutional justices discussed the Code of Ethics and Code of Conduct of Constitutional Justice, which is then passed through the PMK No. 02 of 2003, on September 24, 2003. This shows that the constitutional justices in the first period put integrity first before carrying out their tasks and authorities.
- (2) From the evolution of ethics supervision of constitutional justice, it is understood that the Constitutional Court made a number of changes to the rules relating to the ethics supervision of constitutional justices. This indicates that:

*First*, the constant change of the regulation on ethics supervision of constitutional justice shows that the process of regulating the ethics supervision is influenced by the situation and empirical conditions that are also constantly changing.

*Second*, in addition, these changes indicate that the Constitutional Court is open to changes.

*Third*, at first, there are two systems of supervision in the regulation concerning ethics supervision of the constitutional justice, namely internal control system performed by the Honorary Assembly of the Constitutional Court and external systems conducted by the Judicial Commission, but the external supervision is declared not to have binding legal force since the imposition of Constitutional Court Decision No. 005/PUU-IV/2006.

*Fourth*, in its development, the current systems of ethics supervision against constitutional justices is conducted internally by two organs namely the Honorary Assembly of the Constitutional Court and the Board of Ethics of Constitutional Justice.

Reconstruction of Ethics Supervision System of the Constitutional Justice for the Purpose of Maintaining and Upholding the Honor, Dignity, and Behavior of Future Constitutional Justice, namely:

(1) Some most important aspects which underlie the need to do a normative reconstruction of ethics supervision of constitutional justices are as follows. *First*, at the level of legal basis, internal oversight of constitutional justice is clearly and firmly regulated in Law Number 8 of 2011, so there needs to be normative reconstruction on the provisions related to the supervision of constitutional justices.

*Second*, regulation of the Board of Ethics of Constitutional Justice is ineffective and inefficient and overlaps with the Honorary Assembly of the Constitutional Court, so it is necessary to restructure it by only establishing one permanent supervisory organ.

*Third*, the Constitutional Court does not have the authority to create a new norm which replaces the norms of the Law through the Regulation of the Constitutional Court but must be through the revision of the Law.

(2) Furthermore, the researcher will propose the reconstruction in the formulation of norms in the Draft Amendment to Law Number 24 of 2003 as amended by Law No. 8 of 2011, as described above.

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