

INDEPENDENCE OF THE INDONESIAN CONSTITUTIONAL COURT IN NORMS AND PRACTICES

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Abstract

Article 24 (1) of the 1945 Constitution States after the third amendment, “the judicial power shall be independent in administering justice so as to uphold the law and equality.” The Indonesian Constitutional Court is one of the performers of the independent judicial power who plays a significant role in the enforcement of the constitution and the principle of the state based on the law by its authority and obligations as determined by the 1945 Constitution. This paper intends to study the Indonesian Constitutional Court to find out whether the Constitutional Court in exercising its constitutional authority can be independent. Also, this article will examine not just institutional independence but also judges independence to understand current issues related to the role of ethics and conduct of judges. The independence of the Indonesian Constitutional Court supported by the 1945 Constitution after the amendments from 1999 until 2002, and further stipulated in Law. However, it can be said that this institution has ups and downs of public trust due to corruption cases conducted by constitutional justices. Also, in several political instances showed efforts of political institutions to limit the authority of the Constitutional Court. In its experiences, the Constitutional Court succeeded in convincing the parties through its decisions and strengthening institutional independence against the influence that tried to destabilize its institutions. The Council of Ethics of Constitutional Judges that maintains the values and behavior of judges also continuously works and efficient enough in overseeing the ethics and conduct of judges. The decision of the Ethics Council may also be accepted as a proportional decision.

Keywords: Constitutional Court, Independence, Council of Ethics

I. INTRODUCTION

A. Background

Based on the provision of Article 24C of the 1945 Constitution, the Constitutional Court of Indonesia has the authority to try cases at the first and final level, the decisions of which shall be final, to conduct judicial review of laws against the Constitution, to settle disputes on authorities between state institutions whose powers are bestowed by the Constitution, to decide upon the dissolution of political parties, and to decide upon electoral disputes. The Constitutional Court shall render a judgment on the opinion of the DPR alleging that the President and/or the Vice President have/has committed a violation of law in the form of treason against the state, corruption, bribery, other felonies, or disgraceful acts, 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. The provision is restated in Article 10 Constitutional Court Law¹ and Article 12 paragraph (1) of Law of the Republic of Indonesia Number 4 The year 2004 concerning Judicial Authority.

According to Decision 005/PUU-IV/2006, the presence of the Constitutional Court, as the state institution authorized by the 1945 Constitution to try and pass final decisions at the first and last level on state administration issues, is a logical consequence of the new state government system to be established by the 1945 Constitution following a series of amendments. Such new state government system is a system which basic ideas are intended to make Indonesia into a democratic constitutional state (*demokratische rechtsstaat*), namely a democratic state based on constitution (constitutional democracy), as reflected in the provisions of Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution, which constitute the elaboration of the Preamble of the 1945 Constitution, especially the fourth paragraph. Therefore, the entire provisions of the 1945 Constitution, as an integrated system, constitute the further elaboration of the basic ideas and accordingly, they can be explained based on such basic ideas.²

¹ Constitutional Court Law is the Law of the Republic of Indonesia Number 24 of the year 2003 regarding the Constitutional Court as amended by the Law Number 8 of the Year 2011 regarding the Amendment to the Law Number 24 of the year 2003 regarding the Constitutional Court.

² Indonesian Constitutional Court Decision Number 005/PUU-IV/2006, August 23, 2006.

Whereas the first requirement for every country applying the principles of rule of law and constitutional democracy is constitutionalism principle, namely the principle placing the constitution as the highest law, the substance of which is contained in the Fourth Paragraph of the Preamble of the 1945 Constitution, as the realization of the statement of the country's independence, which is reflected among others in the sentence, "... *Indonesia's national independence shall be formulated in a Constitution of the State of Indonesia*". Accordingly, the constitution is *the fundamental statement of what a group of people gathered together as citizens of a particular nation view as the basic rules and values which they share and to which they agree to bind themselves* (please refer to Barry M. Hager, *Rule of Law, A Lexicon for Policy Makers*, 2000). Based on this reason, for countries applying the principles of rule of law and constitutional democracy, "*constitutions should serve as the highest form of law to which all other laws and governmental actions must conform. As such, constitutions should embody the fundamental precepts of a democratic society rather than serving to incorporate ever-changing laws more appropriately dealt with by statute. Similarly, governmental structures and actions should seriously conform with constitutional norms, and constitutions should not mere ceremonial or aspirational documents*" (please refer to John Norton More, 1990).³

Therefore, according to Constitutional Court on Decision 005/PUU-IV/2006, there must be a mechanism ensuring that the provisions of the Constitution are implemented in the daily life of the state. To ensure the enforcement and implementation of the constitution, the presence of the Constitutional Court is a sure thing, namely as an institution functioning as the guardian of the constitution, and because of such function, the Constitutional Court is the sole judicial interpreter of the constitution. Based on such thought, all the authorities granted by the constitution to the Constitutional Court, as outlined in Article 24C paragraph (1) of the 1945 Constitution, are from a constitutional source and constitutionally founded.⁴

According to Wasis Susetio, the presence of the Constitutional Court of Indonesia (Mahkamah Konstitusi—MK) in a new democracy, as an institution needed to strengthen and protect the human right in a transitional period, requires a careful and intelligent approach to avoid confrontations which are highly detrimental to the strengthening of its existence.⁵

³ *Ibid.*

⁴ *Ibid.*

⁵ Wasis Susetio, "Guarding Constitution of Indonesia through the Court", [<http://www.ialsnet.org/meetings/constit/papers/>]

MK must consider the opposition voiced by politicians and other state administrators who do not accept MK's decisions so as not to relapse to the condition similar to the one prior to the reform era. Institutional strengthening by applying natural methods requires strategic approaches to certain cases, which are not only based on populist opinions. The progress made by the Indonesian Constitutional Court in the last three years has been remarkable, yet also caused a concern for many people and politicians. Such condition must be addressed prudently by the judge of the Constitutional Court. Prudence is needed to avoid being trapped in compliments and to carry out the action plan to gain public opinion that is favorable for the achievement of a consolidated democracy through the existence of MK, which serves as the checks and balances mechanism in a sound state administration system.⁶

With the role held by the Constitutional Court, it is important to understand the extent to which independence it has. As mentioned by Decision 005/PUU-IV/2006⁷, in a democratic rule-of-law state, as outlined in Article 1 paragraph (3) of the 1945 Constitution that reads, "*Indonesia shall be a rule-of-law state*," the independence of courts and judges is an essential element of a rule-of-law state or *rechtsstaat*. Due to the importance of such principle, the conception of the division of power among the executive, legislative, and judicative institutions and the conception of judicial independence are perceived as fundamental notions and determined as one of the main elements of the constitution and serve as the spirit of the law itself.⁸

Even before the amendment to the 1945 Constitution, in which the principle of division of power was not adopted, the principle of the division and independence of judicial authorities had already confirmed, and it was reflected in Article 24 and its Elucidation. Now, after the first to fourth amendments to the 1945 Constitution, in which the branches of power of the state are divided based on the principle of *checks and balances*, mainly in the relation between the legislative and executive institutions, the division of judicative power from the influence of other branches of authority is more emphasized.⁹

SusetioWasis%28Indonesia%29.pdf].

⁶ *Ibid.*

⁷ Decision 005/PUU-IV/2006 was read out in a Plenary Session of the Constitutional Court open for public on this day Wednesday, August 23, 2006, by Prof. Dr. Jimly Asshiddiqie, S.H., as the Chairperson acting also as a Member, H. Achmad Roestand, S.H., Prof. H. A. Mukthie Fadjar, S.H. M.S., I Dewa Gede Palguna, S.H., M.H., Prof. H. A. S. Natabaya, S.H., LL.M., Dr. Harjono, S.H., M.C.L., Maruarar Siahaan, S.H., and Soedarsono, S.H. This decision is very crucial to explain about Independence of Courts and Judges issues in general.

⁸ *Ibid.*

⁹ *Ibid.*

Related to that, Yustina Trihoni Nalesti Dewi, et.al. wrote, constitutional reform becomes a driving force strengthening the independence of judicial power. The amendment to Article 24 of the 1945 Constitution surely has made Indonesian Judicial Authority gains legal legitimacy to run the full freedom that focuses on the independence of judges who are not influenced by other powers out of the structure of judicial power.¹⁰

B. Research Method

This paper intends to study the Constitutional Court of Indonesia as one of the state institutions conducting the independent judicial power to perform the judiciary to enforce law and justice to find out whether the Constitutional Court in exercising its constitutional authority can be independent. Also, this paper will examine not just institutional but also judges to understand current issues related to the role of ethics and conduct of judges.

II. DISCUSSION

A. Independence of Constitutional Court

In the reform era, Indonesia has taken comprehensive reform measures by bringing the sovereignty back to the hand of the people. The peak of such efforts was the amendments to the 1945 Constitution which were made within four consecutive years, namely the First Amendment in 1999, the Second Amendment in 2000, the Third Amendment in 2001, and the Fourth Amendment in 2002. The objectives of the Amendments were to complement the core rules of living as a state, which caused the abuse of power in the past.¹¹ These changes, according to Jimly Asshiddiqie, resulted in a blueprint of state administration system which is different from the previous one. Two of the fundamental principles adopted and reinforced in the new formulation of the 1945 Constitution are: (i) the principle of constitutional democracy, and (ii) the principle of the democratic rule of law or "*demokratische rechtsstaat*."¹²

¹⁰ Yustina Trihoni Nalesti Dewi, W. Riawan Tjandra, and Grant R. Niemann, "Independence of Judicial Power as a Foundation of Human Rights Judicial Function in Indonesia", *International Journal of Social Science and Humanity*, Vol. 6, No. 3, March 2016, p. 242.

¹¹ Moh. Mahfud MD, "The Role of the Constitutional Court in the Development of Democracy in Indonesia", paper is presented in the World Conference on Constitutional Justice, Cape Town, January 23-4, 2009, p. 1.

¹² Jimly Asshiddiqie, "Creating a Constitutional Court In a New Democracy", paper presented in Australia, March 2009, p. 1.

The objective of the First Amendment to the 1945 Constitution is to restrict the authority of the President and to strengthen the position of the House of People's Representatives as a legislative institution. The Second Amendment covers issues regarding state territory and regional governance, perfecting the first amendment in the matters about the strengthening of the position of the House of People's Representative, and detailed provisions regarding Human Rights. The Third Amendment to the 1945 Constitution covers the rules regarding the Principles for the foundation of state affairs, public institutions, relations among state institutions, and provisions relating to the General Election. The Fourth Amendment covers the provisions regarding state agencies and relationships among state institutions, the elimination of the Supreme Consultative Board, provisions regarding education and culture, provisions regarding economics and social welfare, and transitional rules as well as additional rules.¹³

Before the enactment of the third amendment to the 1945 Constitution in 2001, the judicial power was dealt under two articles. Article 24(1) of the 1945 Constitution states that: "The judiciary in Indonesia shall be exercised by the Supreme Court and such other judicial bodies as may be established by law." Section (2) of then states that the composition and powers of the judicial bodies shall be, as provided for by law. Whereas, Article 25 of the 1945 Constitution states, "the requirements for the appointment and removal of judges shall be as provided for by law." In the Elucidation of Article 24 and Article 25, it is explicitly averred that the judicial power shall be independent, that is to say, free from the influence of the executive. As a result of the third amendment to the 1945 Constitution, Article 24 (1) now reads as follows: "The judicial power shall be independent in administering justice so as to uphold the law and equality."¹⁴

In the opinion of Bagir Manan, the concept of independence of the judiciary is one of the cardinal principles of democracy.¹⁵ Almost all literature or the views of legal scholars state that the independent power of the court is a strengthening tool for the implementation of democracy, and upholding the rule of law. The

¹³ *Ibid.*

¹⁴ Bagir Manan, "Independence of the Judiciary, Indonesian Experience", [<http://www.supremecourt.gov.pk/jjc/Articles/2/10.pdf>], p. 3.

¹⁵ *Ibid.*

independent powers of the judiciary are undoubtedly the strongest pillar of democracy. However, that has not guaranteed the independence of judicial powers in any sense of the word.¹⁶

According to the 1945 Constitution after amendment, judicial independence itself serves as a safeguard from the rule of law. Article 24 Constitutional Court Law states the judiciary shall be an independent authority to perform the bench to enforcing law and justice. Moreover, the Constitutional Court is one of the performers of the independent judicial power who plays a significant role in the enforcement of the constitution and the principle of the state based on the law by its authority and obligations as determined by the Constitution.¹⁷

Decision 005/PUU-IV/2006 states, such principle is also universally adopted as reflected in the Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Milan, on August 26 up to September 6, 1985, and ratified with the Resolutions of the General Assembly of the UN Number 40/32 dated November 29, 1985 and Number 40/146 dated December 13, 1985, the articles 1, 4, 7, 14, and 15.¹⁸

Therefore, judicial independence must be protected against all pressures, influences, and intervention of any party whosoever. Judicial independence is an essential prerequisite for the realization of the purpose of a rule-of-law state and serves as the guarantee for the enforcement of law and justice. This principle is inherent in and must be reflected in the examination and decision-making process in every case and is closely related to the independence of courts as honorable, dignified, trustable legal institution.¹⁹

¹⁶ *Ibid.*, p. 4.

¹⁷ Consideration of the Law Number 8 of the Year 2011 regarding the Amendment to the Law Number 24 of the Year 2003 regarding the Constitutional Court.

¹⁸ Which read among other things as follows: 1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary; 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law; 7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions; 14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. 15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters. Read Indonesian Constitutional Court Decision Number 005/PUU-IV/2006, August 23, 2006.

¹⁹ *Ibid.*

Related to that, Bagir Manan argues, the government system and organs, are not the only factors that would influence the independence of the judiciary, it is very much influenced by the social and cultural factors also. The culture of permissiveness or tolerance on the breach of law and social system are very significant in effect on the independence of judicial powers. Therefore, in the efforts to uphold the independent powers of the judiciary, besides managing a democratic government, as based on law, it is also crucial to maintain a social life and promote a culture of law obedience, and the respect for judges and judicial powers.²⁰

The Constitutional Court shall be domiciled in the Capital City of the State of the Republic of Indonesia. According to Article 7 Constitutional Court Law, an Office of the Registrar and Secretariat General shall be established by the Constitutional Court to assist in the execution of the tasks and authorities of the Constitutional Court.

The Office of the Registrar is a functional office which exercises judiciary technical, administrative functions of the Constitutional Court. The judiciary technical, administrative tasks comprise the coordination of judiciary technical implementation at the Constitutional Court; development and implementation of case administration; development of professional services for bench activities at the Constitutional Court; and the execution of other tasks assigned by the Chief Justice of the Constitutional Court by its field of works.

The Secretariat General shall exercise technical, administrative tasks of the Constitutional Court. The technical administrative tasks comprise: the coordination of administrative executions in the environment of the Secretariat General and the Office of the Registrar; the formulation of professional administrative support plan and program; the conduct of cooperation with the society and inter-institutional relations; the rendering of facility support for court hearing activities; and the execution of other tasks assigned by the Chief Justice of the Constitutional Court in accordance with its field of jobs.²¹

²⁰ Bagir Manan, *Op.Cit.*, p. 4.

²¹ Further provisions regarding the structure of organization, function, duties, and authorities of the Office of the Registrar and of the Secretariat General of the Constitutional Court shall be regulated by a Regulation of the President at the proposal of the Constitutional Court.

According to Constitutional Court Law, the Constitutional Court shall have the responsibility to regulate its organization, its personnel, its administration, and its finances by the principle of good and clean governance. The budget of the Constitutional Court charged to a separate budget in the State Budget of Income and Expenditure. However, the Constitutional Court shall announce periodical reports to the society transparently regarding petitions registered, examined, and judged on and management of the finances and other administrative tasks. The society also shall have access for acquiring judgments of the Constitutional Court.²²

The Constitutional Court has the authority to adjudicate at the first and final instance, whose decision shall be final. According to Elucidation of Article 10 Constitutional Court Law, a decision of the Constitutional Court shall be final, namely that a ruling of the Constitutional Court shall immediately obtain permanent legal force as of its pronouncement and no legal efforts can be made. The final character of a decision of the Constitutional Court also comprises legal binding force (final and compulsory).

A ruling of the Constitutional Court shall be signed by the judge who examined, adjudicated, and decided the case, and the Registrar. A decision of the Constitutional Court shall obtain permanent legal force as of its complete pronouncement in a plenary session open to the public. The legal consideration of the judgment shall contain the legal basis constituting the basis of the decision. In the interest of the execution of authorities, the Constitutional Court has the power to summon a state official, government official, or a member of the society to provide information.

Up to the end of 2016, the Court has registered 2.319 cases. From all the cases, 1.993 cases have decided with results: 352 cases granted (*kabul*), 1.052 cases rejected (*ditolak*), 667 cases dismissed (*tidak diterima*), 135 cases withdrawn (*tarik kembali*), and 16 cases failed (*gugur*).²³

²² Luthfi Widagdo Eddyono, "Kemerdekaan Kekuasaan Kehakiman", [https://www.academia.edu/3412699/Kemerdekaan_Kekuasaan_Kehakiman].

²³ Mahkamah Konstitusi Republik Indonesia, *Harmoni Sosial dan Budaya Demokrasi yang Berkeadilan*, Laporan Tahunan Mahkamah Konstitusi 2016, Kepaniteraan dan Sekretariat Jenderal MKRI, Jakarta, 2017, p. 9.



Source: Annual Report Indonesian Constitutional Court 2016.

According to Fritz Edward Siregar, Indonesia's Constitutional Court has functioned well as a protector of constitutional rights and defender of the 1945 Constitution. However, the National Representative Council (*Dewan Perwakilan Rakyat*) and the Executive (President) are showing signs of wanting to restrain the influence of the Court. In 2011, the government amended the Indonesian Constitutional Court Act to reduce the authority of the Court.²⁴

As Bagir Manan stated that the constitutional guarantee, legal rules or law, in general, do not guarantee the reality of independence of judicial authorities. The independence of judicial powers mostly depends on external factors.²⁵ Article 45A prohibited the Court from issuing decisions was not sought by applicants (*ultra petita*). Article 57(2a) prevented the Court's from making decisions that override legislated provisions that comply with the 1945 Constitution. By citing Article 45 of the South Korean Constitutional Court and the ruling of the U.S. Supreme Court in *Marbury vs. Madison*, the Court struck back by declaring

²⁴ Fritz Siregar, "Indonesian Constitutional Politics", *Int'l J. Const. L. Blog*, Oct. 20, 2013, available at: [http://www.iconnectblog.com/2013/10/indonesian-constitutional-politics]. Read more Decision Number 48/PUU-IX/2011 and Number 49/PUU-IX/2011.

²⁵ Bagir Manan, *Op.Cit.*, p. 4.

most of the articles in the 2011 amendment, including Article 45A and Article 57(2a), constitutionally invalid.²⁶

Article 45A states, “a judgment of the Constitutional Court shall not contain a verdict not petitioned by the petitioner or exceeding the petition of the petitioner, save to certain matters related to the subject matter of the petition.” Article 57 (2a) states, “a judgment of the Constitutional Court shall not contain a. A verdict other than as referred to in section (1) and section (2); b. A ruling to the lawmakers; and c. A norm formulation instead of the rule of law declared to be contrary to the Constitution of the State of the Republic of Indonesia of the Year 1945.” As of Tuesday, dated 18 October 2011, these articles has no longer legal binding force by a judgment of the Constitutional Court Number 48/ PUU-IX/2011.

Since then, the Court have received many cases related to its authority and institution. Many articles of Constitutional Court Law have declared to have no legal binding force by Decision Number 48/PUU-IX/2011, Decision Number 49/PUU-IX/2011 dated 18 October 2011, Decision Number 34/PUU-X/2012 dated 25 September 2012, and Decision Number 7/PUU-XI/2013 dated 28 March 2013.

No.	Constitutional Court Law	Note
1.	Article 4 (4f): <i>“The election of the Chief Justice and the Deputy Chief Justice of the Constitutional Court shall be conducted in 1 (one) meeting for election.”</i>	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
2.	Article 4 (4g): <i>“A candidate having obtained the majority vote in the election as referred to in section (4f) shall be designated as the Chief Justice of the Constitutional Court.”</i>	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.

²⁶ Fritz Siregar, “Indonesian Constitutional Politics”, *Op.Cit.*

3.	Article 4 (4h): <i>“A candidate having obtained the second majority vote in the election as referred to in section (4f) shall be designated as the Deputy Chief Justice of the Constitutional Court.”</i>	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
4.	Article 7A (1): <i>“The Office of the Registrar as referred to in Article 7 is a functional office which exercises judiciary technical administrative tasks of the Constitutional Court.”</i>	As of Tuesday, 25 September 2012, this section has the legal binding force to the extent it is accompanied by the phrase “with the retirement age of 62 (sixty-two) years for a Registrar, a Junior Registrar, and a Substitute Registrar” by a Judgment of the Constitutional Court Number 34/PUU-X/2012.
5.	Explanation Article 10 (1): <i>“A judgment of the Constitutional Court shall be final, namely that a judgment of the Constitutional Court shall immediately obtain permanent legal force as of its pronouncement and no legal efforts can be made. The final character of a judgment of the Constitutional Court in this Law also comprises legal binding force (final and binding).”</i>	As of Tuesday, dated 18 October 2011, this explanation of article has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
6.	Explanation Article 10 (2): <i>“Referred to as “opinion of the DPR” is an opinion of the DPR regarding an allegation of violation by the President and/or the Vice President resolved in a General Resolution in accordance with the laws regarding the People’s Consultative Assembly, the People’s Representative Council, the Regional Representative Council and the Regional People’s Representative Council, and the Regulation of the People’s Representative Council regarding the Code of Conduct.”</i>	As of Tuesday, dated 18 October 2011, this explanation of article has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.

7.	<p>Article 15 (2) d: <i>“In order to be eligible for appointment as a constitutional court justice, besides having to comply with the conditions as referred to in section (1), a candidate constitutional court justice shall comply with the conditions:</i> <i>d. he/she shall be of the age of at least 47 (forty -seven) years and at the highest of 65 (sixty-five) years when appointed.”</i></p>	<p>As of Thursday, dated 28 March 2013, this provision (letter d) has no longer legal binding force to the extent it does not mean “having the age of at least 47 (forty-seven) years and at the highest of 65 (sixty-five) years at the first appointment” by virtue of a Judgment of the Constitutional Court Number 7/PUU-XI/2013.</p>
8.	<p>Article 15 (2) h: <i>“In order to be eligible for appointment as a constitutional court justice, besides having to comply with the conditions as referred to in section (1), a candidate constitutional court justice shall comply with the conditions:</i> <i>h. He/she shall have work experience in the field of law of at least 15 (fifteen) years and/or have been a state official.”</i></p>	<p>As of Tuesday, dated 18 October 2011, this provision (letter h.) to the the extent of the phrase “and/or has been a state official,” has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.</p>
9.	<p>Article 26 (5): <i>“A replacing constitutional court justice as referred to in section (2) shall continue the remaining term of office of the constitutional court justice he/she replaces.”</i></p>	<p>As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.</p>
10.	<p>Article 27A (2) c: <i>“In order to uphold the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices as referred to in section (1), the Assembly of Honor of the Constitutional Court shall be established with a membership consisting of:</i> <i>c. 1 (one) person from the DPR.”</i></p>	<p>As of Tuesday, dated 18 October 2011, this provision (letter c.) has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.</p>

11.	Article 27A (2) d: <i>“In order to uphold the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices as referred to in section (1), the Assembly of Honor of the Constitutional Court shall be established with a membership consisting of: d. 1 (one) person from the government who organizes government affairs in the field of law.”</i>	As of Tuesday, dated 18 October 2011, this provision (letter d.) has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
12.	Article 27A (2) e: <i>“In order to uphold the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices as referred to in section (1), the Assembly of Honor of the Constitutional Court shall be established with a membership consisting of: e. 1 (one) supreme court justice.”</i>	As of Tuesday, dated 18 October 2011, this provision (letter e.) has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
13.	Article 27A (3): <i>“In the execution of its tasks, the Assembly of Honor of the Constitutional Court shall be guided by a. the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices; b. the order of procedure for sessions of the Assembly of Honor the Constitutional Court; and c. the norms and the statutory rules and regulations.”</i>	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
14.	Article 27A (4): <i>“The order of procedure of sessions of the Assembly of Honor the Constitutional Court as referred to in section (3) letter b contains the mechanism for the enforcement of the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices and type of sanctions.”</i>	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.

15.	Article 27A (5): <i>“The sanctions as referred to in section (4) may be in the form of a. a written reprimand; b. a temporary suspension; or c. discharge.”</i>	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
16.	Article 27A (6): <i>“The membership of the Assembly of Honor the Constitutional Court stemming from the constitutional court justices as referred to in section (2) letter a shall be stipulated by the Constitutional Court.”</i>	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
17.	Article 45A: <i>“A judgment of the Constitutional Court shall not contain a verdict not petitioned by the petitioner or exceeding the petition of the petitioner, save to certain matters related to the subject matter of the petition.”</i>	As of Tuesday, dated 18 October 2011, this article has no longer legal binding force by a judgment of the Constitutional Court Number 48/PUU-IX/2011.
18.	Article 50A: <i>“The Constitutional Court in its review of a law against the Constitution of the State of the Republic of Indonesia of the Year 1945 shall not utilize other laws for its legal consideration.”</i>	As of Tuesday, dated 18 October 2011, this article has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
19.	Article 57 (2a): <i>“A judgment of the Constitutional Court shall not contain: a. a verdict other than as referred to in section (1) and section (2); b. A ruling to the lawmakers; and c. a norm formulation in lieu of a norm of the law declared to be contrary to the Constitution of the State of the Republic of Indonesia of the Year 1945.”</i>	As of Tuesday, dated 18 October 2011, this article has no longer legal binding force by a judgment of the Constitutional Court Number 48/PUU-IX/2011.
20.	Article 59 (2): <i>“If an amendment is required to a law which has been reviewed, the DPR or the President shall forthwith follow-up the judgment of the Constitutional Court as referred to in section (1) in accordance with the statutory rules and regulations.”</i>	As of Tuesday, dated 18 October 2011, this section has no longer legal binding force by a decision of the Constitutional Court Number 49/PUU-IX/2011.

21.	Article 87: “By the time this Law enters into force: a. the constitutional court justice serving to date as Chief Justice or Deputy Chief Justice of the Constitutional Court shall remain serving as Chief Justice or Deputy Chief Justice of the Constitutional Court up to the expiry of his/her term of office by virtue of the provisions of the Law Number 24 of the Year 2003 regarding the Constitutional Court; and b. The constitutional court justices serving to date shall remain serving up to his/her discharge by the provisions of the Law Number 24 of the Year 2003 regarding the Constitutional Court.”	As of Tuesday, dated 18 October 2011, this article has no longer legal binding force by a judgment of the Constitutional Court Number 49/PUU-IX/2011.
22.	Law Number 4 of the Year 2014 regarding Government Regulations in Lieu Number 1 of the Year 2013 regarding Second Amendment of Law Number 24 of the Year 2003 regarding the Constitutional Court to Become Law.	As of Thursday, dated 13 February 2014, this Law has no longer legal binding force by a judgment of the Constitutional Court Number 1-2/PUU-XII/2014.

At the climax, on Thursday, 13 February 2014, Law Number 4 of the Year 2014 regarding Government Regulations in Lieu Number 1 of the Year 2013 regarding Second Amendment of Law Number 24 of the Year 2003 regarding the Constitutional Court to Become Law has no longer legal binding force by a judgment of the Constitutional Court Number 1-2/PUU-XII/2014. The Court has been strengthening independence by using its decision.

B. Independence of Constitutional Judges

There are a number of international legal instruments that enshrine the importance of judicial independence. These include: Article 10 the Universal Declaration of Human Rights, Article 14 the International Covenant on Civil And Political Rights (ICCPR), paragraph 27 the Vienna Declaration and Program of Action 1993, the International Bar Association Code of Minimum Standards of

Judicial Independence, New Delhi 1982, and the Universal Declaration of the Independence of Justice, Montreal 1983.²⁷

According to Preamble of the Bangalore Principles of Judicial Conduct (2002), the Universal Declaration of Human Rights recognizes as fundamental principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and any criminal charge. The International Covenant on Civil and Political Rights also guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by statute.²⁸

The other fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in constitutional conventions and traditions. The importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice. The competent, independent and impartial judiciary is likewise essential if the courts are to fulfill their role in upholding constitutionalism and the rule of law.²⁹

Value 1, Independence Principle the Bangalore Principles of Judicial Conduct (2002), states, “Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.”³⁰ Decision 005/PUU-IV/2006 also states that the independence of judges and courts is materialized in the independence of judiciary, whether individually or as an institution, from various influences outside themselves in the form of persuasion, pressure, coercion, threat, or retribution due to particular political or economic interests of the government of the ruling political power or groups,

²⁷ *Ibid.*, p. 3.

²⁸ The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002. [http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf].

²⁹ *Ibid.*

³⁰ *Ibid.*

with compensation or reward in the form of position, economic benefits, or other forms.³¹

Considering whereas the independence of judges is closely related to the impartiality of judges both in examination and decision-making process. A dependent judge cannot be expected to act neutral or impartially in performing his/her duties. Likewise, a judicial institution dependent to other organs in certain fields and unable to independently manage itself could also result in non-neutral attitude in performing its duties. Such independence also has different aspects. Functional Independence contains a prohibition for other branches of power to intervene with judges in performing their judicial duties. However, such independence must not be interpreted as absolute, because it is limited by law and justice. The aforementioned independence is also to be interpreted that judges are free to pass their verdicts in accordance with their beliefs based on legal interpretation, although verdicts based on such interpretation and belief may be contradictory to those having political and administrative powers. If the verdicts are not in line with the wish of the ruling party, it cannot be used as an excuse to affect retribution against judges, whether personally or against the authority of judicial institutions [“... when a decision adverse to the beliefs or desires of those with political power, can not affect retribution on the judges personally or on the power of the court” (Theodore L. Becker in Herman Schwartz, *Struggle for Constitutional Justice*, 2003 page 261)];³²

Such independence relates to the examination and decision-making process in cases faced by judges, to obtain verdicts that are free from pressure, influence, whether physical or psychical in nature, and corruption due to Corruption, Collusion, Nepotism, therefore, actually, such independence is not the *privilege* of judges, but an *indispensable right* or *inherent right* of justices in the context of ensuring the fulfillment of the human right of citizens to obtain fair trial. Therefore, mutually, judges are required to act independently and impartially to meet the human rights of justice seekers (*justitiabelen*). It automatically includes the right of magistrates to be free from pressures, influences, and threats.³³

Decision 005/PUU-IV/2006 in the argument that independence must be interpreted within limits determined by law and in the context of fair enforcement of the law, as mentioned above. Independence is also in line with accountability

³¹ Indonesian Constitutional Court Decision Number 005/PUU-IV/2006, August 23, 2006.

³² *Ibid.*

³³ *Ibid.*

realized through supervision. However, the sensitivity level of judges is extremely high because two opposite parties are defending the interests of the conflicting parties. Therefore, the independence of judiciary also serves as, in addition to inherent right, a prerequisite for the impartial act of magistrates in performing judicial duties.³⁴

The form of accountability demanded from judges requiring a format that can accommodate such sensitivity. Carelessness both in the formulation of responsibility mechanism in the kind of supervision and the implementation thereof may result in negative impacts to the existing judicial process. The necessary trust to require compliance with and acceptance to the verdicts made by judges is currently in a critical condition. However, the remaining low level of trust must be maintained to prevent it from complete lost. Therefore, the intention to keep the honor, dignity, and attitude of judges is, in fact, counterproductive and will eventually result in *legal chaos*.³⁵

According to Article 21 Constitutional Court Law, before taking office, the Constitutional Court Justices shall swear an oath or a promise by their respective religions. The sworn oath and promise are conducted in front of the President. The pledge or promise shall be as follows:

The Oath of a Constitutional Court Justice

“In the name of Allah I swear that I will do my best in fulfilling all obligations as a Constitutional Court Justice, and I will be as good and fair as possible, abide by the 1945 Constitution of the Republic of Indonesia, and apply all legislations and laws as strict as possible in accordance with the 1945 Constitution of the Republic of Indonesia, and serve the country and the nation.”

The Promise of a Constitutional Court Justice

“I solemnly promise that I will do my best in fulfilling my obligations as a Constitutional Court Justice, and I will be, and I will be as good and fair as possible, abide by the 1945 Constitution of the Republic of Indonesia, and apply all legislations and laws as strict as possible in accordance with the 1945 Constitution of the Republic of Indonesia, and serve the country and the nation.”³⁶

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ [<http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilMK&id=7&menu=2>].

The Constitutional Court has nine constitutional court justice members who shall be designated by a Decree of the President. The issuance of a Decree of the President in this provision is of an administrative character. The structure of the Constitutional Court consists of one chief justice being concurrently a member, one deputy chief justice being concurrently a member, and 7 (seven) constitutional court justice members. A constitutional court judge is a state official.

The constitutional court judges shall be proposed respectively 3 (three) people by the Supreme Court, 3 (three) people by the DPR, and 3 (three) people by the President. The candidacy of the constitutional court justices shall be executed transparently and participatory. A candidate constitutional court justice shall be published in print as well as electronic mass media so that the society can give input regarding the respective candidate justice.

The provisions relating to the procedures for the selection, election, and submission of the constitutional court judges shall be regulated by the individual authorized institutions. The election of the Constitutional Court judges shall be executed objectively and accountable. The term of office of a constitutional court justice is five years, and he/she can be re-elected only for one subsequent term of office.

Constitutional Court judge shall comply with the following conditions: a. He/she shall have integrity and impeccable personality; b. He/she shall be just; and c. He/she shall be a statesman/stateswoman having command over the constitution and constitutionalism. To be eligible for appointment as a constitutional court justice, besides having to comply with that conditions, a candidate constitutional court judge shall comply with the conditions:

- a. he/she shall be an Indonesian citizen;
- b. he/she shall hold a doctor's and a master's degree with a basis of an undergraduate's background of higher education in law;
- c. he/she shall have faith in God the One Only and be of noble character;
- d. he/she shall be of the age of at least 47 (forty-seven) years and at the highest of 65 (sixty-five) years at the first appointment;
- e. he/she shall be physically and mentally capable of performing his/her duties and obligations;

- f. he/she shall have never been sentenced to criminal imprisonment by a court judgment which has obtained permanent legal force;
- g. he/she is not being declared bankrupt by virtue of a court judgment; and
- h. he/she shall have work experience in the field of law of at least 15 (fifteen) years.³⁷

Constitutional Court justice will be discharged honorably due to a. His/her demise; b. His/her resignation on own accord submitted to the Chief Justice of the Constitutional Court; c. He/she reaches the age of 70 (seventy) years; d. Expiry of his/her term of office; e. Physical or mental disease for 3 (three) consecutive months so that he/she cannot perform his/her tasks as substantiated by a medical statement of a physician.

Constitutional Court justice is discharged dishonorably if a. He/she is convicted to criminal imprisonment by a court judgment having obtained permanent legal force due to committing a criminal act threatened with criminal imprisonment; b. He/she commits disgraceful acts; c. He/she has been absent from sessions being his/her duties and obligations for 5 (five) consecutive times without valid reasons; d. He/she has violated his/her oath or pledge of office; e. he/she deliberately obstructs the Constitutional Court to render a judgment within a period as referred to in Article 7B Section (4) of the 1945 Constitution; f. he/she has violated the prohibition to hold concurrent offices as referred to in Article 17; g. He/she no longer meets the qualifications as a constitutional court justice; and h. He/she has violated the Ethical Code and the Guidelines for Conduct of a Constitutional Justice.

The protocol status and the financial entitlements of the Chief Justice, the Deputy Chief Justice, and the members of the Constitutional Court shall be subject to the provisions of the statutory rules and regulations for state officials. The state shall grant security guaranty for constitutional court justices in the exercise of their duties and responsibilities as executors of the judicial power. A constitutional court judge is prohibited from holding office as a concurrently

³⁷ These requirement according to Constitutional Court Law, Decision of the Constitutional Court Number 7/PUU-XI/2013 and Decision of the Constitutional Court Number 49/PUU-IX/2011.

- a. Another state official; b. A member of a political party; c. A businessperson;
- d. An advocate; e. A civil servant.

A constitutional court justice can only be subjected to police acts by order of the Attorney General after having obtained the approval in writing of the President, save in matters of a. Being caught red-handed while committing a criminal act; or b. by the adequate initial evidence he/she is alleged to have committed a criminal offense which is subject to capital punishment, a criminal offense against the security of the state, or a particular criminal act.

Unfortunately, on Wednesday, October 2, 2013, the Corruption Eradication Commission arrested Akil Mochtar, the Chief Justice of the Indonesian Constitutional Court, for alleged bribery.³⁸ On Thursday, January 27, 2017, Justice Patrialis allegedly accepted gratification related to the Judicial Review of Law (UU) No. 41/2014 on Animal Health and Husbandry also by the Corruption Eradication Commission.³⁹

C. The Ethical Code and the Guidelines for Conduct of a Constitutional Justice

Article 27A Constitutional Law states the Constitutional Court shall draw up the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices containing norms to be complied with by every constitutional court judge in the performance of their duties to safeguard the integrity and impeccable personality, being just, and statesmanship.⁴⁰

The Constitutional Court already have a Code of Constitutional Judicial Ethics and Conduct, which is mainly based on The Bangalore Principles of Conduct of 2002 and added with the Indonesian cultural values. The code of Constitutional Judicial ethics and conduct has been declared with the name of *Sapta Karsa Hutama* on October 17, 2005, and revised on December 1, 2006.

According to Decision 005/PUU-IV/2006, the aforementioned guidelines on judicial conduct are intended to regulate the allowed, restricted, mandatory,

³⁸ Stefanus Hendrianto, The Indonesian Constitutional Court at a Tipping Point, Int'l J. Const. L. Blog, October 3, 2013, available at: <http://www.icconnectblog.com/2013/10/the-indonesian-constitutional-court-at-a-tipping-point>

³⁹ [<https://en.tempo.co/read/news/2017/01/27/055840547/Patrialis-Akbar-Corruption-Case-Brings-Disaster-for-Public>].

⁴⁰ This norms states on the Law Number 8 of the Year 2011 regarding the Amendment to the Law Number 24 of the year 2003 regarding the Constitutional Court.

and suggested or non-suggested judicial conduct, both inside or outside the office, in order to form justice as judicial authorities officials (*ambtsdrager van rechtelijkemacht*) having ideal and fair integrity and personality so as to become the final fort in law and fairness enforcement efforts. The aforementioned guidelines of conduct are the elaboration of provisions of the code of ethics that are universally and generally applicable and accepted as the moral values and norms followed by people or a group of individuals in regulating their conduct, with the purpose of identifying what are good and what are bad in their behaviour among their fellows in their group.⁴¹

The professional code of ethics, as seen in the Code of Constitutional Judicial Ethics and Conduct as well as Guidelines for Indonesian Judicial Conduct applicable in the Supreme Court, contains a series of basic principles and the morality values that must be upheld by justice, inside and outside their office. The aforementioned principles and values are further detailed in the form of judicial conduct that is deemed in accordance with the aforementioned principles or values. For example, the value of fair conduct is translated as a principle in the form of description of what are deemed as fair, and it is subsequently detailed how the foregoing is described in Judicial conduct while performing judicial duties. Similarly, when integrity value or principle is adopted as part of the professional code of ethics, the aforementioned integrity principle has been given a limit, that “*constitutes mental attitude reflecting the integrity and balance of personality of any judge as a person and as a state official in performing his respective duties. The integrity of personality includes honesty, loyalty, and sincerity in performing his professional duties, equipped with the mental strength to set aside and reject all persuasions and temptation on position, asset, popularity or other inducements. Personality balance includes mental and physical balance, and spiritual intellectual, emotional intellectual, and intellectual balance in his performance of duties.*” From the implementation of the aforementioned principle, it can be known for example that the judge guarantees that his conduct is not disgraceful from the appropriate observation perspective or his attitude and conduct must strengthen people’s trust on judicial image and authority. Fairness is not only performed but must also be seen as performed.⁴²

In order to safeguard and uphold integrity and impeccable personality, justice, and statesmanship, a constitutional court judge shall comply with statutory rules

⁴¹ Indonesian Constitutional Court Decision Number 005/PUU-IV/2006, August 23, 2006.

⁴² *Ibid.*

and regulations, attend sessions, implement the procedural law as it should be, follow the Ethical Code and the Guidelines of Conduct for Constitutional Court Justices, treat litigants justly, indiscriminative, and impartially; and render judgments in an objective manner by virtue of facts and law which can be accounted for. A constitutional court justice is prohibited: to violate his/her oath/pledge of office, to receive a gift or promise from the litigants, either directly or indirectly; and to give out court opinions or statements on cases being handled by him/her before judgment.

As wrote by Stefanus Hendrianto, In 2009, the Court's Council of Ethics found that Justice Arsyad's family had held meetings with Arsyad's law clerk to discuss the cases. The Council concluded that Arsyad violated the judiciary code of ethics because he failed to stop his family members from making a deal with parties involved in cases being handled by the Court. Arsyad maintained that he did not commit any crime and he denied that his daughter had introduced the candidate to him. Nevertheless, Arsyad tendered his resignation.⁴³

On March 2016, the Council of Ethics recommended that Chief Justice Arief Hidayat is given a special warning. The Ethics Council ruled that the Chief Justice acted with a lack of prudence in issuing the letter of recommendation because it could create negative perceptions. Nevertheless, it did not find any gross violations of ethics and broadly accepted Chief Justice Hidayat's version of events.⁴⁴

III. CONCLUSION

The independence of the Indonesian Constitutional Court supported by the 1945 Constitution after the amendments from 1999 until 2002, and further stipulated in Law. However, it can be said that this institution has ups and downs of public trust due to corruption cases conducted by constitutional justices. Also, in several political instances showed efforts of political institutions to limit the

⁴³ Stefanus Hendrianto, *The Indonesian Constitutional Court at a Tipping Point*, Int'l J. Const. L. Blog, October 3, 2013, available at: [<http://www.icconnectblog.com/2013/10/the-indonesian-constitutional-court-at-a-tipping-point>].

⁴⁴ Read more Stefanus Hendrianto, *The "Ethics" of the Indonesian Constitutional Court: How Low Can It Go?*, Int'l J. Const. L. Blog, May 25, 2016, at: [<http://www.icconnectblog.com/2016/05/the-ethics-of-the-indonesian-constitutional-court-how-low-can-it-go/>].

authority of the Constitutional Court. In its experiences, the Constitutional Court succeeded in convincing the parties through its decisions and strengthening institutional independence against the influence that tried to destabilize its institutions.

The Council of Ethics of Constitutional Judges to maintain the values and behavior of judges is also continuously work and efficient enough in overseeing the ethics and conduct of judges. The decision of the Ethics Council may also be accepted as a proportional decision. However, there are other issues that need to be studied more deeply, such as the political links between the tenure of the judge and the appointment of judges by the institution authorized by it, and the extent to which the independence of the Constitutional Court can be influenced by institutional leadership factors.

I agree with Fritz Edward Siregar that wrote, the Constitutional Court of Indonesia used the limited window that it had to drive political change and retain its legitimacy.⁴⁵ “Even though the Court was attacked, it continued to live with no consequences and gained even more public support. The Court has been bold enough to take this momentum and become one of the most respected and trustworthy institutions in Indonesia”.⁴⁶

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⁴⁶ *Ibid.*

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