

# DEFINING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY POST POLITICAL TRANSITION

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## Abstract

Indonesian constitutional reform after the fall of Soeharto's New Order brings favorable direction for the judiciary. Constitutional guarantee of judicial independence as regulated in Art 24 (1) of the 1945 Constitution, has closed dark memories in the past. This article decides that the Judiciary is held by the Supreme Court and the judicial bodies below and a Constitutional Court. Such a strict direction of regulation plus the transformation of the political system in a democratic direction should bring about the implementation of the independent and autonomous judiciary. But in reality, even though in a democratic political system and constitutional arrangement affirms the guarantee of independence, but it doesn't represent the actual situation. There are some problems that remain, such as (i) the absence of a permanent format regarding the institutional relationship between the Supreme Court, the Constitutional Court, and the Judicial Commission, and (ii) still many efforts to weaken judiciary through different ways such criminalization of judge. Referring to the problem above, then there are gaps between what "is" and what "ought", among others. First, by changing political configuration that tends to be more democratic, the judiciary should be more autonomous. In this context, various problems arise such as (i) disharmony in regulating the pattern of relations between judicial power actors, (ii) various attempts to criminalize judges over their decisions, and (iii) judicial corruption. Second, by the constitutional guarantee of the independence of the judiciary, there will be no legislation that that may reduce constitutional guarantee. However, there are many legislation or regulations that still not in line with a constitutional guarantee concerning judicial independence. This paper reviews and describes in-depth about how to implement constitutional guarantees of judicial independence after the political transition and conceptualize its order to strengthen rule of law in Indonesia

**Keyword:** Judicial Accountability, Judicial Independence, Judicial Reform, Political Transition.

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## I. INTRODUCTION

After the fall of the New Order, the 1945 Constitution secure a constitutional guarantee of judicial independence. Judicial Independence was fully emphasized in Art 24 (1) of the 1945 Constitution, which was previously never been as clear as after amendments in mid-1999-2002.<sup>1</sup> However, even though on constitutional stage has guaranteed independence of judiciary, but many legislation and regulations relating to judiciary contains several problems such as (i) some legislation are not synchronized especially on institutional relation between Supreme Court, Constitutional Court and Judicial Commission, and (ii) some legislation and regulation tried to weakening constitutional guarantee on independence of judiciary which was formulated on the 1945 Constitution.

The presence of judicial reform law package such as Judiciary Act on 2004, Law Supreme Court Act on 2004, Constitutional Court Act on 2003, and Judicial Commission Act on 2004 which was compiled under democratic and participatory political structured,<sup>2</sup> but it still often received pressure and resistance especially through the judicial review.<sup>3</sup> Therefore, another court reform law package such as Supreme Court Act in 2009, Judiciary Act on 2009 and Judicial Commission Act on 2011 and Constitutional Court Act in 2011 are existed to rearrange the relationship between the judiciary and judicial commission after Constitutional Court Decision Number 005/PUU-IV/2006.<sup>4</sup> However, on the other hand, another court reform law package such as Constitutional Court

<sup>1</sup> Elucidation of Art 24 and 25 of the 1945 Constitution: "Judiciary is an independent power, meaning that it is independent of the influence of the authority of the Government. In this regard, guarantees must be made in the Law regarding the position of judges."

<sup>2</sup> Saldi Isra, *Kekuasaan Kehakiman dalam Transisi Politik di Indonesia* [Judicial Power Post Political Transition in Indonesia], in Komisi Yudisial, *Problematika Hukum dan Peradilan di Indonesia* [Law and Judiciary Problematics in Indonesia], (Jakarta: Judicial Commission of Republic Indonesia, 2014), 66-69.

<sup>3</sup> For example, several supreme court judges submitted a petition for judicial review on Judicial Commission Act of 2004 and Judiciary Act of 2004 and registered as Case No. 005/PUU-IV/2006. It shows format and institutional disharmony between Supreme Court, Judicial Commission and Constitutional Court. In the case, the Constitutional Court granted part of the petition of the petitioners so that the authority of the Judicial Commission to support the function of creating responsible judiciary became confined. Even in the case, the Constitutional Court ruled itself that it could not be supervised by the Judicial Commission. The Constitutional Court also provides judicial orders for legislators to carry out integral improvements for the harmonization and synchronization of the Law relating to Judiciary. This case shows that there is no permanent format for institutional relations after reformation in 1998. Zainal Arifin Hoesein, *Kemerdekaan Kekuasaan Kehakiman* [Judicial Independence] (Malang: Setara Pers, 2010), 39-40.

<sup>4</sup> Duwi Handoko, *Kekuasaan Kehakiman di Indonesia* [Judicial Power in Indonesia] (Pekanbaru: Hawa dan Ahwa, 2015), 19-22.

Act on 2011, Juvenile Justice System Act on 2012, and the Supreme Court Bill in 2011 brought legal policy which has a direction to restrain their independence, especially in decisional powers.

Through Constitutional Court Act on 2011, Juvenile Justice System Act on 2012, and the Supreme Court Bill in 2011, the judges are prohibited to make a decision that exceeds the limit (*ultra petita*). If the court makes a decision that can cause chaos situation, then the judge can be punished through criminal sanctions.<sup>5</sup> Besides, criminalization of judges strictly appears in Juvenile Justice System Act on 2012, by providing two years imprisonment or a maximum of Rp.200,000,000.00 (two hundred million rupiah) as a criminal sanction if the judge does not use diversion.<sup>6</sup> Referring to some legal problems as described, there are gaps between what “is” and what “ought to”, among others. First, by changes political configuration that tend to be more democratic, the judiciary should be more autonomous.<sup>7</sup> But in reality, various problems arise such as (i) disharmony in regulating the pattern of relations between judicial power actors, (ii) various attempts to criminalize judges over their decisions, (iii) judicial corruption. Second, by the constitutional guarantee of the independence of the judiciary, there will be no legislation that reduced constitutional guarantee. But in reality, many legislation or regulations that still not in line with a constitutional guarantee concerning judicial independence. This paper has the intent to reviews and analyzes in-depth about how to implement constitutional

<sup>5</sup> Art 97 third version of Supreme Court Bill of 2011: The “Supreme Court in the cassation level is prohibited: a. Making a decision that violates the law; b. Making a decision that causes confusion and damage and results in riots; c. Prohibited from making decisions it is impossible to implement because it is contrary to reality in the midst of society, customs, and habits that are hereditary so that it will lead to disputes and commotion, prohibited from changing the joint decision of the Chief Justice of the Supreme Court and Chairperson of the Judicial Commission, and/or Joint Decree on The Code of Ethics and Judicial Guidelines unilaterally” and Art 57 (2a) of Constitutional Court Act of 2011: “The Constitutional Court Decision does not contain: a) Conclusion other than as referred to in paragraph (1) and paragraph (2); b) judicial order to the legislator, and c) creating of norms as a substitute norm that are declared contrary to the 1945 Constitution.”

<sup>6</sup> Art 96 of Juvenile Justice System Act of 2011: “Investigators, Public Prosecutors and Judges who deliberately do not fulfill the obligations referred to in Art 7 (1) shall be sentenced to a maximum of two years imprisonment or a maximum fine IDR 200,000,000.00 (two hundred million rupiah).” Teguh Satya Bakhti, et.al. *RUU Mahkamah Agung: Pengkajian Filosofi, Sejarah, Asas, Norma dalam Dinamika Perkembangan Ketatanegaraan Indonesia* [Supreme Court Bill: Study on Philosophy, History, Principle, Norms in Constitutional Structure Development in Indonesia] (Jakarta: Research and Development Body on Supreme of Court, 2014), 88-90.

<sup>7</sup> Benny K. Harman, *Konfigurasi Politik dan Kekuasaan Kehakiman* [Political Configuration and Judiciary] (Jakarta: Elsam, 1998), 40.

guarantees of judicial independence and judicial accountability and conceptualize ideas to strengthening rule of law.

In order to analyze main problem of this article, the discussion will consist of five parts, namely the I-V parts. Part I is an introduction intended to outline the main reasons why defining judicial independence and judicial accountability is important and explaining some anomaly that occurs in realizing the independence of judicial power and accountability after constitutional changes. Part II delivered a theoretical framework that will be used in this article and become an indicator of defining judicial independence and accountability. Part III describes the results of research and analyzes every stage of defining judicial independence into legislation and regulation and what needs to be done to realizing Art 24 (1) The 1945 Constitution to strengthening the concept rule of law. Part IV describing the results of research and analyze every stage on defining and implement judicial accountability as part judicial reform main agenda into legislation and regulation and what needs to be done to realizing Art 24 (1) The 1945 Constitution to propose transparency and accountability of the judiciary. Part V draws the conclusions that conclude the article.

## II. JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

The nature of judicial independence are divided into two conceptions. The first concept of judicial independence is the personal independence of judges, in this concept, it is often analogous to as the concept of “authors of their own opinions.”<sup>8</sup> The judiciary has realized its independence if the judges can make decisions without fear of internal (vertical) or external (horizontal) pressure to resolve cases with certain conditions. In other words, personal independence can be achieved when the output of the judicial process can reflect its judicial preferences.<sup>9</sup> This conception often spoiled with *core independence* or personal independence (*What judges think is what they produce*).<sup>10</sup> The second concept

<sup>8</sup> Lewis A. Kornhauser, “Is Judicial Independence a Useful Concept?”, in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Stephen B. Burbank and Friedman Barry, (California: Sage, 2002), 42-55.

<sup>9</sup> Theodore Becker, *Comparative Judicial Politics* (Landham: University Press of America, 1970), 1-8.

<sup>10</sup> *Ibid.*

of judicial independence is institutional independence.<sup>11</sup> It appears that judicial independence depends on other branches of power, especially if it is associated with decisions that are routinely ignored or poorly implemented. This concept often interpreted as collective independence of institutional independence, or referred to maxim “what judges think is what they produce and what they produce controls the outcomes of legal conflicts.”<sup>12</sup> The separation between personal (core) and institutional (collective) independence provides what Feld and Voigt said about *de facto* and *de jure* independence. Feld and Voigt define in more detail the component. *De facto* components include: (1) average tenure of judges; (2) deviation of the term of office of the judge; (3) number of judges dismissed; (4) the frequency of the number of judges being replaced in court; (5) salary of real judges; (6) judicial budget allocation; (7) the frequency of changes in basic regulations regarding judicial authority; and (8) the level compliance of other branches with respect to judicial decisions.<sup>13</sup> While the components of the judicial independence in a *de jure* including (1) the ability to maintain constitutional norms; (2) level of complexity in changing the constitution, (3) judge’s selection mechanism; (4) judge’s tenure, (5) judge’s retirement; (6) procedure for dismissal; (7) the possibility of re-elected; (8) judges’ salaries; (9) accessibility to become a Chief Justice; (10) case allocation; (11) judicial review; and (12) accountability and transparency of the judiciary.<sup>14</sup>

<sup>11</sup> The Federalist United States in the Federalist papers 78th argued, lack of financial support and the judicial infrastructure is an “intervention”, the judicial authorities to rely on the help of other branches of power actively to appreciate the existence and leeway in the decision making. James Madison, et al., *The Federalist Papers* (New York: New American Library, 1961), 112.

<sup>12</sup> Charles M. Cameron, “Judicial Independence: How Can You Tell It When You See It? And, Who Cares?” in *Judicial Independence at the Crossroads. An Interdisciplinary Approach*, ed. Stephen B. Burbank and Friedman Barry (California: Sage, 2002), 42-55 and Christopher M. Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,” *American Journal of Comparative Law* 44 no. 4, (1996): 605-626.

<sup>13</sup> The components of *de facto* are: (1) average length of tenure; (2) deviation of average length of tenure from *de jure* prescriptions; (3) number of judges removed from office; (4) frequency of changes in the number of judges in the court; (5) real salary of judges; (6) real court’s budget; (7) number of constitutional changes in relevant articles; and (8) compliance by other branches on court rulings. Lars P Feld and Stefan Voigt, “Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators,” *European Journal of Political Economy* 19, no. 1 (2003): 497-527.

<sup>14</sup> The components of *de jure* are: (1) whether the highest court is anchored in the constitution; (2) how difficult is it to amend the constitution, (3) appointment procedure of judges; (4) their length of tenure, (5) whether there is a fixed retirement age of judges in the court; (6) removal procedures; (7) whether the reelection of judges is possible; (8) protection and adequacy of salary of judges; (9) accessibility to the highest court; (10) procedure for allocation of cases in the court; (11) judicial review ; and (12) transparency of the court. Lars P Feld and Stefan Voigt, “Economic Growth”.

Accountability is the same as the judicial independence, both of which are important foundations for the rule of law.<sup>15</sup> On a sociological level, the court obtains public trust rather than because of its independence guaranteed through legal norms.<sup>16</sup> Accountability makes the judicial authority's ruling becomes more respected.<sup>17</sup> Therefore, the enforcement of a code of ethics for the position of the judge becomes an important foundation as the core of judicial accountability for personal independence, so judicial access becomes a supporting foundation for the achievement of institutional accountability. It appears that there is a separation of meaning which is the foundation of judicial accountability, namely "(1) *the judge who is accountable to the law, to the higher principles of justice, and to her own sense of ethical responsibility, and (2) the judge who is deemed "accountable" only to the extent that he is held accountable by some external force with powers of discipline or retribution.*"<sup>18</sup> According to David Pamintel, some corridors can be understood as a cornerstone is *the "First, we all want judges who will follow the law, respecting and applying proper legislative enactments, setting aside any personal legislative agenda."* In this opinion, David Pamintel expressed his great hope to the judge to be able to do *"the right thing"* for a judge even though the phrase *"the right thing"* cannot be measured normatively.<sup>19</sup> Ferejohn and Kramer explained,

No one really believes that law is wholly indeterminate, but virtually everyone recognizes that modern jurisprudential tools create a range of legitimate choices in almost any given case. And even those who believe

<sup>15</sup> David Pamintel stated "The rule of law further requires that no public official be above the law or exempt from its requirements. While public officials enjoy a measure of immunity while working in their official capacities. The rule of law requires that they are nonetheless be subject to the same laws as every other individual outside the sphere of their official duties." David Pimentel, "Balancing Judicial Independence and Accountability in A Transitional State," *Pacific Basin Law Journal* 33, no. 2 (2016):155-157.

<sup>16</sup> Lorne Neudorf argues *when the judiciary is either consumed or subject to influence or intimidation by corrupt officials, groups, or individuals, the citizens will not trust it, and they will lack confidence that the resort to the judicial process will become a just resolution of their contractions.* Lorne Neudorf, *The Dynamics of Judicial Independence: A Comparative Study of Courts in Malaysia and Pakistan* (Canada: Springer, 2012), 229.

<sup>17</sup> David Pimentel argues that *"Public confidence in the courts is inspired not so much by independence as by accountability: if the public perceives the court to make principled decisions based on the law, and without corrupt motive or influence, they will trust the judiciary and abide by its decisions. A judge may be deemed "accountable," by just about any definition, if he adheres to the normative ethical and legal principles of her culture and society."* David Pimentel, "Balancing Judicial Independence," 159.

<sup>18</sup> David Pimentel, "Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity," *Cleveland State Law Review* 51, no 1 (2015): 13-14.

<sup>19</sup> David Pimentel, "Reframing the Independence".

in objectively “right” answers appreciate that the process by which these answers are generated hinges on arguments and judgments of a kind about reasonable people can (and will) subjectively disagree.<sup>20</sup>

David Pamintel concluded that the meaning of “*the right thing*” was that the judge did not exceed the “*cross the line*” limits, so that the meaning of accountability in the first corridor was how to position the judge as a dignified and dignified position for his actions over not exceeding the limit (law).<sup>21</sup> As for the *second*, David Pamintel stated

The second issue for consensus - and a far easier one to assert - is that the judge is striving to do “a” (if not “the”) right thing should do it for the right reason. Biases, outside pressures, contests of interest, and other self-dealing or self-interested behaviors are all anathema to the proper and ethical exercise of judicial powers. Here the focus is not on the decision itself being wrong-indeed, the judge’s brother-in law may well have deserved to win the case under the law anyway-but with the judges’ improper reasons for rendering that decision. These expectations we have of the judges are tied up in the concept of accountability.<sup>22</sup>

For this matter, David Pamintel gave a classification regarding the accountability of the judiciary into two parts among other “(1) *personal accountability* and (2) *institutional accountability*. Personal accountability is interpreted as *the subjective or personal accountability of the judge that comes from within; one’s internal moral compass is not a function of one’s vulnerability to discipline or other retribution for misdeeds.*”<sup>23</sup> Accountability that is born from within a judge is due to the integrity that is already inherent and “maintained” to remain inherent in him.<sup>24</sup> Such expectations are considered to be maintained if supported by the supervision and enforcement of ethical norms to maintain the nobility of the judge’s position. Therefore, the involvement of the institution in charge of this is a relevant choice for realizing personal accountability. Whereas concerning institutional accountability, it refers to David Pamintel’s opinion that

<sup>20</sup> John A. Ferejohn & Larry D. Kramer, “Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint,” *New York University Law Review* 77, no. 2 (2002): 962-963.

<sup>21</sup> David Pimentel, “Reframing the Independence.”

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, 20.

<sup>24</sup> *Ibid.*

Judges cannot be allowed to run amok and must be held accountable for their own lapses of ethics or other abuses of judicial authority. A disciplinary regime must be in place to police judicial misconduct, and those enforcement mechanisms will be observable, both on paper and-unless it is an entirely confidential process-in operation. When the public is outraged by “Judicial activists” they will call for “more accountability” in terms of enhanced power to rein in the perceived miscreant judges.<sup>25</sup>

Placing institutional accountability hopes that the judicial institution will become the “right thing” because its actions are institutionally correct. For Zainal Arifin Mochtar, the holding of accountable power will further increase public confidence. Accountability of the judiciary is very dependent on the accountability of judges. Decisions produced by judges must be legally justified. The judge only decides based on the evidence at the trial with the consideration to uphold the law and bring justice.

### III. DEFINING INDEPENDENCE

After being appointed as Chief Justice of the Supreme Court in 1996, Sarwata said that the first thing he intends to do was to conduct internal consolidation.<sup>26</sup> Sarwata keeping his promises together with his successors to maintains consolidate even though invisible.<sup>27</sup> Judicial reform itself declared since the amendment to the 1945 Constitution and when Bagir Manan appointed as Chief Justice in 2001.<sup>28</sup> By broad support, especially from newly appointed non-career judges,<sup>29</sup> reformist judges and officials, civil society groups and donor agencies, slowly but surely the first judicial reform agenda has proceeded as it should.

<sup>25</sup> *Ibid.*, 21.

<sup>26</sup> Rifqi S. Assegaf, “Judicial Reform in Indonesia 1998-2006,” in *Reforming Laws and Institutions in Indonesia: An Assessment*, ed. Naoyuki Sakumoto and Hikmahanto Juwana (Tokyo: Institute of Developing Economies Japan External Trade Organization, 2007), 11-12.

<sup>27</sup> Rifqi S. Assegaf said “up until the end of his leadership in 2000, the Supreme Court - and the Indonesian courts in general - were never more solid in maintaining the status quo. The appointment of Ketut Suraputra as acting Chief Justice in 2000, and who was followed by Taufik, brought about almost no discernible changes.” Rifqi S. Assegaf, “Judicial Reform,” 13.

<sup>28</sup> Sebastiaan Pompe, *Judicial Reforms in Indonesia: Transparency, Accountability and Fighting Corruption*, presented during the International Conference and Showcase on Judicial Reforms held at the Shangri-la Hotel, Makati City, Philippines on 28-30 November 2005. 4-5.

<sup>29</sup> Anna Erlyana said “There were 9 noncareer justices appointed in 2000, which constitutes almost 20 % of the total justices in the Supreme Court.” Anna Erlyana, “Administrative Court and Legal Reform Since 1998 In Indonesia,” in *Reforming Laws and Institutions in Indonesia: An Assessment*, ed. Naoyuki Sakumoto and Hikmahanto Juwana (Tokyo: Institute of Developing Economies Japan External Trade Organization, 2007), 83-84.



The first stage of judicial reform agenda to defining constitutional guarantee of judicial independence is a one-roof system policy. The adoption of a one-stop system has a historical connection with the Association of Indonesia's Judges (*Ikatan Hakim Indonesia* or IKAHI) memorandum on "Improvement of Judiciary Position Accordance to the 1945 Constitution" which explained in IKAHI's National Conference at Ujung Pandang in October 23<sup>rd</sup>, 1996. In 1997, Ali Budiarto Secretary-General IKAHI, proposed that the Judiciary Act on 1970 to be reviewed. The proposal was submitted because some articles in Judiciary Act on 1970 were replicas of Judiciary Act on 1964, which provide legality for executive (president or government) intervention on behalf of revolution.<sup>30</sup> After fall of the New Order, this effort finally materialized in Judiciary Act on 1999 which amended Judiciary Act on 1970 by provided Art 11 which turn judicial administration from two roof systems into one roof system.<sup>31</sup> Beside, Judiciary Act on 1999 also regulating the transfer of organizational, administrative and financial affairs of judges from the Ministry of Justice into the Supreme Court, and also regulates General Court's jurisdiction to deal cases involving members of the Army, unless otherwise determined by the Supreme Court. However, at that day, one roof system has not been implemented properly, because the organizational, administrative and financial affairs of Religious Courts and Military Courts Judges are still under the Ministry of Religion and the Ministry of Defense. The transfer of this one roof system completed in 2004 through Judiciary Act 2004 which eliminates Judiciary Act on 1970 and Judiciary Act on 1999.

After one roof system stage, the next stage is the establishment of special courts. For Rikardo Simarmata, there are two main factors underlie formation special courts.<sup>32</sup> *First*, the need to create a debt settlement mechanism and business certainty for investors to implement the Letter of Intent (LoI) agreement

<sup>30</sup> *Ibid.*, 38.

<sup>31</sup> Art 11 Judiciary Act of 1999.

<sup>32</sup> Rikardo Simarmata, "Politik Hukum Peradilan di Indonesia Masa Orde Baru dan Reformasi [Court Legal Policy on New Order and Reformation Era in Indonesia]" in *Putih Hitam Pengadilan Khusus* [Black and White of Special Court], Judicial Commission (Jakarta: Secretariat General of the Judicial Commission, 2013), 145-146.

between the government and the International Monetary Fund (IMF). The LoI requires structural adjustments including in the judicial sector. According to Tim Lindsey, the commercial court is one of the courts made by this framework.<sup>33</sup> Besides establishing a commercial court, the LoI requires another adjustment through minimizing the role of the state (neo-liberal), which results in establishing a labor court as a substitute for the Tripartite. Previously, the settlement of disputes between employers and workers was handled by third parties as the government side, meanwhile, in the labor court, employers and workers were confronted directly without the presence of a government.<sup>34</sup> The second factor is the need to overcome the gap between the judicial reform agenda and external demands (public pressure and markets).<sup>35</sup> As mentioned earlier, the judicial reform process has slow movement until 2004. This condition is connected with the failure of legislation reform which did not necessarily exclude corrupt behavior or increases the professionalism of judges. This situation increase mistrust to the judiciary and forming special courts as a way out.<sup>36</sup> Bagir Manan has a view that the presence of a special court was to guarantee the quality and accuracy of court decisions.<sup>37</sup> For Adriaan Bedner, the special court was intended to improve the performance of judicial services which had

<sup>33</sup> Tim Lindsey, *Legal Infrastructure and Governance Reform in Post-Crisis Asia: The Case of Indonesia*, in *Asian-Pacific Economic Literature* (Sydney: Asia Pacific School of Economics and Government, The Australian National University dan Blackwell Publishing Asia Pty Ltd, 2005), 2.

<sup>34</sup> Herlambang Perdana Wiratraman, "Good Governance and Legal Reform in Indonesia" (Thesis, Faculty of Graduate Studies Mahidol University, 2007), 4.

<sup>35</sup> Rikardo Simarmata, "Politik Hukum Peradilan di Indonesia [Court Legal Policy on New Order and Reformation Era in Indonesia]," 147.

<sup>36</sup> The formation of a new government /state institution in response to existing distrust of government/state institutions is a symptomatic act. This action resulted in the formation of dozens of independent state agencies in the form of state auxiliary organs and executive branch agencies. The independent state institution has collaborative powers of executive, legislative and judicial. Zainal Arifin Mochtar, "Penataan Lembaga Negara Independen di Indonesia [Reorganizing State Auxiliary Organ in Indonesia]" (Dissertation, Faculty at Law University of Gadjah Mada, 2012), 149.

<sup>37</sup> Bagir Manan said there is a growing opinion supporting the formation of special courts to guarantee accuracy and quality of court verdicts. To avoid misunderstandings, many people refer to these as chambers, which means that they still remain under the courts as laid out in current regulations. Forming special courts (Courts/chambers outside the four current divisions), would not be an easy task as it would have to be based on a regulation which would involve the government and legislative assembly, and would also affect the state budget. Lastly it would require specialization of the judges in specific areas of law, all this would entail a lot of time and effort to bring forth. Bagir Manan, *Independence of the Judiciary: Indonesian Experience* (Speech on Celebrating the 50<sup>th</sup> Anniversary of Supreme Court of Pakistan), 3.

a deteriorating image.<sup>38</sup> Therefore, it can be concluded that the establishment special courts is a reflection institutional independence of judiciary.

After the reformation, the idea to establish a special court was developed, especially for fulfilling demands of judicial reform. At the end of New Order, a special court was formed, namely the Juvenile Court based on Child Protection Act on 1997. Besides, the decentralization of government and diversification of function of the and liberalization and democratization is in all areas of life, therefore, a special court are increasingly being established by the Government. Commercial Court is established in 1998, by Emergency Act on 1998 which was later passed into Commercial Court Act on 1998. Subsequently, in 2000 and 2002, followed by the establishment of the Human Rights Court,<sup>39</sup> and the Corruption Court.<sup>40</sup> In addition, Labor Court<sup>41</sup> and Fisheries Court.<sup>42</sup> In the end, until mid-2005, more than 12 types of special courts had been established, among other: (1) Juvenile Court<sup>43</sup> (criminal law); (2) Commercial Court<sup>44</sup> (civil law); (3) Human Rights Court<sup>45</sup> (criminal law); (4) Corruption Court<sup>46</sup> (field of criminal law); (5) Labor Court<sup>47</sup> (civil law); (6) Fisheries Court<sup>48</sup> (criminal law); (7) Tax Court<sup>49</sup> (Administrative Law); (8) Shipping Court (field of civil law); (9) Sharia Court<sup>50</sup> in Aceh (Islamic law); (10) Customary Courts in Papua<sup>51</sup> (execution of decisions related to District court); (11) the Traffic Court<sup>52</sup> (criminal law) and recently,

<sup>38</sup> Adriaan Bedner said the strategy to establish special courts to improve judicial performance has been central to Indonesian policies pertaining to the administration of justice. In combination with attempts to reinforce dispute settlement outside the court system - for instance by regulating and promoting mediation, and by establishing Human Right's Commission and Ombudsman - this should ultimately lead to a complete restructuring of the judiciary. Adriaan Bedner, "Rebuilding the Judiciary in Indonesia: The Special Courts Strategy," *Yuridika* 23, no. 3 (September-December 2008), 230.

<sup>39</sup> Human Rights Court Act of 2000.

<sup>40</sup> Corruption Eradication Commission Act of 2002.

<sup>41</sup> Labor Court Act of 2004.

<sup>42</sup> Fisheries Act of 2004.

<sup>43</sup> Juvenile Court Act of 1997 *juncto* Juvenile Court System Act of 2011.

<sup>44</sup> Bankruptcy Act of 2004.

<sup>45</sup> The Human Rights Court Act of 2000.

<sup>46</sup> Corruption Eradication Commission of 2002.

<sup>47</sup> Labor Court Act of 2004.

<sup>48</sup> Fisheries Act of 2004.

<sup>49</sup> Tax Court Act of 2002.

<sup>50</sup> Presidential Decree Number 11 of 2003 concerning Syariah Court and Syariah Court for Province of Aceh.

<sup>51</sup> Papua Special Autonomy Act of 2001.

<sup>52</sup> Indonesian Republic Police Act of 2002.

(12) regional head election court<sup>53</sup> (constitutional and administrative law). In fact, according to Jimly Asshiddiqie, there were always new ideas to form other special courts which are generally intended to make law enforcement more effective in certain fields, such as forestry court, and so on.<sup>54</sup> Not only special court which explicitly and officially referred to as a court, Jimly Asshiddiqie also notes that many growing and developing institutions which, although not explicitly referred to as courts, have the authority and work mechanism like 'a court'.<sup>55</sup> The institutions which are 'judicial' but not referred to as courts, or known theoretically as quasi-court or semi-court.<sup>56</sup> Some of them are in the form of state commissions, but some others use the term body or even authority. These institutions, besides being judicial, but often mixed functions with regulatory functions and/or administrative functions.<sup>57</sup> Some examples include: (1) Anti-Monopoly Supervisory Commission (*Komisi Pengawasan Persaingan Usaha* or KPPU);<sup>58</sup> (2) Broadcasting Commission (*Komisi Penyiaran Indonesia* or KPI);<sup>59</sup> (3) Central Information Commission (*Komisi Informasi Pusat* or KIP) and Regional Information Commission (*Komisi Informasi Daerah* or KID);<sup>60</sup> (4) Election Supervisory Agency (*Badan Pengawas Pemilu* or Bawaslu);<sup>61</sup> (5) Ombudsman (*Ombudsman Republik Indonesia* or ORI);<sup>62</sup> (6) Financial Service Authority (*Otoritas Jasa Keuangan* or OJK).<sup>63</sup>

<sup>53</sup> Regional Head Election Act of 2016.

<sup>54</sup> According to Jimly Asshiddiqie, sometimes the initiatives come from members of House of Representatives/DPR, but sometimes also come from the Government itself which often not based on the results of integrated studies, mostly because of weak coordination between government agencies themselves. That is why, special courts continue to grow and increase in number after reform. Jimly Asshiddiqie, "Pengadilan Khusus [Special Court]" in *Putih Hitam Pengadilan Khusus* [Black and White of Special Courts], ed. Judicial Commission (Jakarta: Information Center of Secretary General Judicial Commission, 2013), 5-6.

<sup>55</sup> Based on law, such institutions have authority to examine and decide or dispute on legal violation cases, and even certain ethical violations cases with final and binding decisions. The meaning is to provide justice for the parties who have been harmed. Jimly Asshiddiqie, "Pengadilan Khusus [Special Court]," 11.

<sup>56</sup> *Ibid.*

<sup>57</sup> Regulatory functions can be linked to legislative functions according to *trias politica* doctrine, while administrative functions are identical to executive functions. Therefore, state commissions or institutions that have the authority it can be said an institution that has a mixed function. Jimly Asshiddiqie, "Pengadilan Khusus [Special Court]," 13.

<sup>58</sup> This institution was formed based on Anti-Monopoly Act of 1999.

<sup>59</sup> Broadcasting Act of 2002.

<sup>60</sup> Public Information Disclosure Act of 2008.

<sup>61</sup> Election Organizer Act of 2011.

<sup>62</sup> Originally this institution was named the National Ombudsman Commission formed based on Presidential Decree Number 44 of 2000. In 2008, the position of this institution was increased and its name was changed to the Ombudsman of Republic of Indonesia (ORI) based on Ombudsman Act of 2008.

<sup>63</sup> Financial Services Authority Act of 2011.

In the third stage, the judicial reform agenda were institutionalizing the judicial review into the judiciary. The establishment of the Constitutional Court is a purpose to realize constitutional review.<sup>64</sup> On the other hand, the supreme court has authority to legality review. In case of exercise Constitutional Court authority on constitutional review during the transition period, the Supreme Court has issued Supreme Court Regulation Number 2 on 2002 concerning Procedures for Organizing Constitutional Court and the Supreme Court Authority. After then, Supreme Court Regulation No 1 of 2011 which states that to submit application for judicial review is carried out by (1) directly to the Supreme Court and (2) through the District Court in charge of applicant's domicile.<sup>65</sup> Based on this provision, character judicial review at the Supreme Court concerns public law issues so judicial review was handled by the chamber of Administration case. This is similar to the administrative court process in other countries which have authority to review general binding rules including general policy regulations as long as they cause legal consequences, but do not include in judicial review.<sup>66</sup> After the Amendment of the 1945 Constitution and provide Constitutional Court Act on 2003, the Constitutional Court began to operationalize the authority of constitutional review.

<sup>64</sup> Jimly Asshiddiqie stated that constitutional review and judicial review must be distinguished. The distinction is made at least for two reasons. *First*, constitutional reviews other than those carried out by judges but also carried out by institutions other than judges or courts, depending on which institution the Constitution provides the authority to do so. *Second*, the origins concept of judicial review has broader understanding of the object, for example legality review under the regulation against legislation, while the constitutional review only concerns reviewing its constitutionality. Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara* [Comparative Constitutional Review Models] (Jakarta: Konpress, 2006), 2-3.

<sup>65</sup> Art 31A Supreme Court Act of 2009 *Juncto* Art 20 (2) letter c and paragraph (3) Judiciary Act of 2009 compare with Art 2 (3) Supreme Court Regulation of 1993.

<sup>66</sup> Paulus Effendie Lotulung, who once stated administration court have resolved jurisdiction to administration at first instances, high administration courts for the second instance and the supreme court for cassation and judicial reviews. Paulus Efendi Lotulung. *State Administration Courts in Indonesia's Judiciary System* (10<sup>th</sup> Congress International Association of Supreme Administrative Jurisdictions, Sydney, Australia, Sunday 7-Thursaday 11 March, 2010), 1. Imam Soebekhi, the Supreme Court Judge once said that the Supreme Court's authority to review regional regulation would be handed down to the administrative court. However, the idea of the Supreme Court has consequences for the review of the concepts of *regeling* and *beschikking*, because so far administrative court has only resolved disputes in the clusters of administrative decisions (*beschikking*), not regulatory disputes (*regeling*). Besides these two ideas, the plan to amend the Constitutional Court Act was also tried to be groped so that the Constitutional Court would not only review the constitutionality of the legislation, but also be able to review all level laws and regulations, including the Regional Regulation. Enrico Simanjuntak, "Kewenangan Hak Uji Materiil pada Mahkamah Agung [Supreme Court Authority for Judicial Review]," *Jurnal Hukum & Peradilan* 15, no. 3 (2015), 346.

In the fourth stage, judicial reform has focused on minimizing political intervention on the appointment and dismissal process of judges. Art 24A (2) of the 1945 Constitution has determined Supreme Court Judges must have integrity and have good and fair personality, professionalism and experienced at law. Meanwhile, Art 24C (5) of the 1945 Constitution has determined Constitutional Court Judges must have integrity and has good and fair personality, statesmen who are experts at the constitutions, and not concurrently state officials. It is not known exactly why the conditions are made differently, even though still there are similarities between them. Chief Justice is required to be experienced at law, while Constitutional Justices must be expert at the constitution. In addition to the terms and conditions to be Chief Justice, constitutional justices and judges under the Supreme Court, after the amendment to the 1945 Constitution, *ad hoc* judges were introduced. Even though among the six special courts act that regulate *ad hoc* judges, none of them provides a clear enough understanding of what is meant by the *ad hoc* judge. General norms concerning all conditions of Supreme Court Judges which stipulated at The 1945 Constitution are further elaborated in Supreme Court Act on 1985 as amended by Supreme Court Act on 2004 and Supreme Court Act on 2009. On the other hand, terms and condition of the Constitutional Court Judges are stipulated in Constitutional Court Act on 2003 as amended by Constitutional Court Act on 2011 *jo* Constitutional Court Act on 2014. However, in 2014, Constitutional Court Act on 2014 was revoked by the Constitutional Court through Decision Number 1-2/PUU-XII/2014. Regarding terms and conditions of the Supreme Court Judges, Supreme Court on 1985 distinguishes divide the path by separated between career judges and non-career judges. Non-career candidates must have at least 15 years of experienced at law.<sup>67</sup> Later on, experienced condition refined and increased through Supreme Court Act on 2004.<sup>68</sup> Some changes occur through Supreme Court Act on 2009 which reduced experience conditions and add another condition.<sup>69</sup> According Supreme Court Act on 2004 where previously for non-

<sup>67</sup> Art 7 (2) Supreme Court Act of 2004.

<sup>68</sup> Art 7 Supreme Court Act 2004.

<sup>69</sup> Art 7 (3) Supreme Court Act 2009.

career paths must have experienced at least 25 years, now revised to 20 years. Meanwhile, career candidates must have experienced 20 years and have ever at least 3 years have been high judges.<sup>70</sup> Another education level condition for non-career candidates must have a master and doctoral degrees, while career candidates are masters, and both of these pathways require a Bachelor at Law degree. It cannot be known with certainty why the conditions for having a master's degree are applied to candidates from career paths. Therefore, the requirement for Supreme Court Judges can be categorized as follows:

**Table 1. Categorization of Requirements for Supreme Court Judges**

Description	Career Candidates	Non-Career Candidates
Nationality	Indonesian Citizen	
Religious	Faith in God	
Age	Minimum 45 years Maximum 60 years	
Level Education	Masters of law with a Bachelor of law degree or other Bachelor degree which related with law	Doctor of Law or Masters of law with a Bachelor of law degree or other Bachelor degree which related with law
Experienced	At least 20 years become a judge, including at least 3 years as a high court judge	Experience in the legal profession and/or legal academics for at least 20 years
Physical and Psychological	Able to be physical and psychological to carry out duties	
Behavior	Never been imposed temporary termination due to violations code of conduct and/or judges guidelines	Never been sentenced to imprisonment based on a court of law for committing a crime that is threatened with 5 years or more imprisonment
Specific Terms	Must have integrity and has good and fair personality, professionalism and experienced at law.	

<sup>70</sup> Art 7 (3) Supreme Court Act 2009.

On the matter selection of judge mechanism, before the Amendment the 1945 Constitution, there were no clear rules. The law only stipulates that candidates for supreme court judges are proposed by the DPR to the President. Then, the President as head of state appoints by political decision. DPR also has to consult with Supreme Court and the government through the Ministry of Justice.<sup>71</sup> However, after the reformation era, the process of selecting Supreme Court Justice has a different route. DPR took over the role of the government and the Supreme Court at the election process. Since 2000 the selection mechanism for supreme justices has been carried out through a mechanism called fit and proper tests.<sup>72</sup> This model is a new step on finding Supreme Court Justice who is clean and has high moral integrity. The fit and proper test mechanism began with nominations from the Supreme Court and the government. Besides, DPR opens up the possibility of nominating non-career judges which can be submitted either by the government or other parties such as NGOs, Indonesian Judges Association (*Ikatan Hakim Indonesia*) and Indonesian Advocates Association (*Perhimpunan Advokat Indonesia*).<sup>73</sup> From 17 judges which selected in 2009, among them were non-career judges from legal academics and legal practitioners, while the other 8 judges were career judges. The involvement of academics and legal practitioners outside career judges is intended to improve court performance.<sup>74</sup> This process upholds the principle of transparency, which is enough to provide opportunities for a broader community to participate and increase objectivity in the selection process.<sup>75</sup> However, this

<sup>71</sup> Art 8 Supreme Court Act of 1985.

<sup>72</sup> Initially, the fit and proper test were carried out by Central Bank of Indonesia against officials who lead a Bank through the Controlling Shareholders, Managers (Commissioners and Directors), to Executive Officers. The fit and proper test in banks is regulated in Minister of Finance Decree No. 52/KMK.017/1999 and Governor Central bank of Indonesia Decree No 31/12/Kep/GBI, dated February 8<sup>th</sup>, 1999. According to this joint decree, it was determined that every election of directors or leaders in the banking environment must go through a fit and proper test. Zaenal Arifin, *Fit and Proper Test dalam Proses Pemilihan Pejabat Negara* [Fit and Proper Stest Mechanism in State's Official Selection] (Jakarta: Final Report Legal Research Team, 2005), 14-15.

<sup>73</sup> Three things that can be used in the fit and proper test. *First* is moral integrity. *Second*, vision and mission, and *third*, legal understanding. These three things were assessed in the fit and proper test process. This model is expected to minimize the opportunity for bad track record judges. Zainal Arifin Mochtar and Iwan Satriawan, "Efektivitas Sistem Penyeleksian Pejabat Komisi Negara di Indonesia [Effectivity on State's Commissioner Selection in Indonesia]," *Jurnal Konstitusi* 6, no. 3 (September 2009), 151-152.

<sup>74</sup> Konsorsium Reformasi Hukum Nasional (KRHN), *Mahkamah Agung di Masa Transisi* [Supreme Court in Transition Era] (Jakarta; KRHN, 2001), 25.

<sup>75</sup> The Academic Studies on Judicial Commission Bill of 2004, 19.



method also brought some weaknesses. First, transparency has not been fully implemented. There is still a dark room that is far from public monitoring. DPR's assessment has not been done accountably, there are still considerations beyond the objective results of the selection. The public does not know how DPR members provide an assessment of integrity, legal understanding, or vision and mission of candidates. There is a strong suspicion that some members of the DPR have made judgments based on personal or political interests, or even there was bribery in the process.<sup>76</sup> Second, the lack of public participation. The time given to the public to participate in observing and making complaints related to the candidate is still too short and insufficient. Third, the objective parameters used to assess candidates still unclear. Fourth, the qualifications of the selected candidates have not matched to the needs of the Supreme Court. *Fifth*, some DPR members acted or argued in an unethical manner during the fit and proper test process, which disrespect judge candidates.<sup>77</sup>

Finally, the selection process by the DPR puts political interests ahead.<sup>78</sup> Therefore, the establishment of the Judicial Commission which has the authority to propose the appointment of Supreme Judges and has other authorities to maintain and uphold the honor, dignity and behavior of judges implies that the Judicial Commission has taken over functions previously held by the Supreme Court, President and DPR. The Judicial Commission acts as a selection committee for judges who will be elected by the DPR. The Judicial Commission proposes three candidates for each vacancy in the Supreme Court.<sup>79</sup> According to Fajrul Falaakh, recruitment methods involving the role of the Judicial Commission, Parliament and the President called the multi-voter model because involves many parties on Supreme Court Judges selection process.<sup>80</sup>

<sup>76</sup> Mahkamah Agung, *Cetak Biru Pembaharuan Mahkamah Agung Republik Indonesia* [Blue Print Reformation of Supreme Court] (Jakarta: Supreme Court of Republic Indonesia, 2003), 69.

<sup>77</sup> *Ibid.*

<sup>78</sup> One practice that becomes an indicator is the unfolding of the "toilet lobby" scandal which was revealed when the fit and proper test was carried out for the Legal Commission on House of Representatives in 2013. Saldi Isra, "Meluruskan Kuasa DPR [Redirecting the Power of House of Representative]," *Kompas*, October 13, 2013.

<sup>79</sup> Art 18 (5) Judicial Commission Act on 2004.

<sup>80</sup> Fajrul Falaakh, *Transparansi dan Akuntabilitas Yudikatif di Indonesia* [Transparency and Judicial Accountability in Indonesia] (Human Rights Training Materials for the Judicial Commission Network, Denpasar, June 22 – 26<sup>th</sup>, 2010 and Bandung, June 29<sup>th</sup> – July 3<sup>rd</sup>, 2010). Organized by PUSHAM UII in collaboration with the Judicial Commission and Norwegian Centre for Human Rights (NCHR), 19-20.

On the matter of constitutional judge, it has been stipulated in Art 24C of 1945 Constitution. Art 24C (3) of the 1945 Constitution states that the Constitutional Court has nine constitutional judges which selected by President for three judges, DPR for three judges, and Supreme court for the last three judges. Also, Art 24C (5) of the 1945 Constitution stipulates that constitutional Justices must have integrity and personality that is not impeccable, fair, statesmen, and not concurrently as state officials. The constitutional foundation is further regulated in Art 15 and Art 18 (1) of Constitutional Court Law on 2003. Art 19 and Art 20 (2) of the Constitutional Court Law on 2003 also states that the nomination and election of constitutional justices must be carried out transparently and participative, as well as objectively and accountably. In terms of appointment procedures of constitutional justices, Art 20 (1) of the Constitutional Court Law on 2003 stipulates that selection process, election, and submission of constitutional judges are regulated by each institution, namely the Supreme Court, DPR, and President.<sup>81</sup> The conditions changed Constitutional Court Law on 2011, especially on level education, experience, and age. The constitutional judge candidates must be a doctor and master's degree of law with at least 15 years of experience in legal professional and/or has been a state official. To become a constitutional judge is at least 47 years old or at most 65 years of age at the time of appointment.<sup>82</sup> Another revision for constitutional judge requirements re-occurs on Emergency Law on 2013. The requirements for the level of education from having a master and doctor of law degree changed to only a doctor of law degree. Another new requirement is the candidate must have been stopped become a member of a political party for 7 years as a minimum period before being submitted as a constitutional judge candidate.<sup>83</sup> Those new requirements considered contrary to the 1945 Constitution,<sup>84</sup> and therefore some people submitted a petition to review the law to the Constitutional Court.<sup>85</sup> In the end, the constitutional court stated

<sup>81</sup> Art 16 Constitutional Court Act of 2003.

<sup>82</sup> Art 15 Constitutional Court Act of 2011.

<sup>83</sup> Art 15 Government Regulation in Lieu of Law of 2013 concerning Constitutional Court.

<sup>84</sup> Constitutional Court Decisions Number 1-2/PUU-XII/2014, 13.

<sup>85</sup> Constitutional Court Decisions Number 81/PUU-IX/2011, 60.

that those regulations regarding having stopped being a member of a political party was not contrary to the 1945 Constitution.<sup>86</sup> According to the explanation, selection and appointment process contains the *split* and *quota* perspective. Deciphering the juridical concept of the selection and appointment process of constitutional judges is explained in the following table:

**Table 2. Juridical concepts of selection and appointment process of constitutional judges**

The 1945 Constitution	Judiciary Act	Constitutional Court Act
Appointment of 9 constitutional judges determined by the President begins with a submission of 3 constitutional justices by the House of Representatives, the President and the Supreme Court. [Art 24C (3)]	Submission of each of the 3 constitutional judges by the Supreme Court, Parliament and President. [Art 34 (1)]	Determination of the president through a presidential decree to appoint 9 constitutional justices submitted by 3 constitutional justices by the House of Representatives, the President and the Supreme Court no later than 7 working days from the submission of candidates received by the President. (Art 18)
Constitutional judges must have integrity and personality, fair, statesmen, and not state officials [Art 24C (5)]	The requirement to be a constitutional judge is a statesman, integrity, personality and fair. (Art 33)	The requirement to be a constitutional judge is a statesman, integrity, personality and fair. (Art 15)

<sup>86</sup> *Ibid.*

The 1945 Constitution	Judiciary Act	Constitutional Court Act
		<p>Terms of candidates for constitutional judges: Indonesian citizens, doctoral and masters with a bachelor's degree at law, Believe in God Almighty and have a noble character, minimum age of 47 years and a maximum of 65 years at the time of appointment, physically and spiritually capable in carrying out their duties, they have never been sentenced to imprisonment based on court decisions, are not declared bankrupt based on court decisions, have legal work experience of at least 15 years and/or have been state officials. Administrative requirements for candidates for constitutional justices: a statement to become a constitutional judge, curriculum vitae, copy of education certificate that has been legalized, a list of assets and a source of income accompanied by valid supporting documents and approved by the institution authorized person and taxpayer number (Art 15)</p>
		<p>Prohibitions on the position of constitutional judges as other state officials, members of political parties, employers, advocates, civil servants. (Art 17)</p>

The 1945 Constitution	Judiciary Act	Constitutional Court Act
Regarding the appointment of constitutional justices and the conditions stipulated in the law. [Art 24C (6) and Art 25]	The elements of constitutional judge submission consist of the nomination concept which is carried out transparently and participative, and the concept of election carried out in an objective and accountable manner. [Art 34 (2) and (3)]	<p>The nomination of constitutional justices is carried out transparently and participative. (Art19)</p> <p>The constitutional judge in his appointment both as a member and or chairperson/vice chairman pronounces oaths and promises according to his religion before the President. (Art 21)</p>
	Further provisions regarding the terms and procedures for the appointment of constitutional judges are regulated in the law. (Art 35)	Provisions regarding the procedures for selection, selection and submission of constitutional judges are regulated by each authorized institution in the submission of constitutional justices and carried out objectively and accountably.

The fifth stage is strengthening the status of judges. The status of judges as state officials were initially regulated in Art 1 (1) State Official which Clean and Free of Corruption, Collusion and Nepotism Act of 1999. Furthermore, the status of the judge becomes a state official already stipulated in Art 1 (4) on State Civil Apparatus of 2014. The status of state official is explained in Art 11 (1) letter d of the Act, that State Officials, one of which consists of, The Chairperson, Deputy Chairperson, Junior Chairperson and Chief Justice of the Supreme Court, as well

as the Chairperson, Deputy Chairperson and Judges of all Justice Bodies. The status of the judge as a state official is reaffirmed in Art 2 on State Official Law of 1999 states that one of the state administrators is judge.<sup>87</sup> This provision is specifically excluded from *ad hoc* judges.<sup>88</sup> By guaranteed judge status as state official based on the idea that judges are personnel who carry out the power of judiciary and not the executive. By civil servants as judge's status it's very possible to intervene on their independency because the structural, psychological, and character of the corps and bureaucracy carries and demands certainties.<sup>89</sup> The independence of judges in the rule of law (*rechtstaat*) is absolutely terms. This is in accordance with the International Commission of Juris principles on independence of judge.

There are several consequences arising from this description. *First*, on recruitment pattern, education, career, rank, the term of office, and fulfillment of the rights and facilities of judges as state officials. *Second*, state officials have a term of office, for example, five years and can be reelected for one period. However, this term cannot be applied to judges in Indonesia. This is due to the position of the judge not recognizing periodicity, but career and retirement. Besides, state officials also do not recognize rank system. However, like civil servants, judges have ranks or groups. The rank of the judge follows the rank of the civil servant. Similarly, the salary structure.<sup>90</sup> In terms of recruitment and education of judge candidates, there are consequences to becoming more complicated. Typically, state officials are selected through the selection process

<sup>87</sup> The position of the judge as a state official is also stated in Art 19 Judiciary Act of 2009 which states that "Judges and Constitutional Judges are state officials who carry out judicial powers regulated in law." Then in its development the status of this judge is also re-affirmed as stated in Art 122 (e) State Civil Apparatus Act of 2014 which states that State Officials are "Chairperson, vice chairman, young chairman and Supreme Judge and chairman, vice chairman and judge of all judicial bodies except *ad hoc* judges". It should be noted in this latest development that the State Civil Apparatus Law issues *ad hoc* judges from the meaning of "judges" who are categorized as state officials. This of course can be a potential problem in the future, given the notion that the "judge" in the Judiciary Act of 2009 also covers *ad-hoc* judges. Taufiqurrohman Syahuri, *Hakim Pasca UU Aparatur Sipil Negara* [Judges After State Servant Officer Law] Minutes on Public Discussions Organized by Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP) with *Forum Diskusi Hakim Indonesia* (FDHI), 25 January 2014.

<sup>88</sup> Constitutional Court Decision No 32/PUU-XII/2014, 111-112.

<sup>89</sup> Moh. Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi* [Building Legal Policy, Enforcing Constitutionalism] (Jakarta: Radja Grafindo, 2010), 103.

<sup>90</sup> Whereas according to Art 3 (2) Government Regulation No. 94 of 2012 concerning Financial Rights and Facilities of Judges under the Supreme Court, provide amount of the basic salary of judges are the same as civil servants.

of other institutions, general elections, or appointments. So far, the pattern of recruitment of judges is almost similar to civil servants, although it has its procedures, namely through the candidate civil servant selection process and education for judge candidates. As a result, in 2010, the Chief Justice of the Supreme Court issued a Decree of the Chief of the Supreme Court Number 169/KMA/SK/X/2010 concerning Implementation of the Education Program and Integrated Training for Judge Candidates.

#### IV. DEFINING ACCOUNTABILITY

In addition to defining judicial independence and how to incorporated many judicial reform policies, another direction of judicial reform means defining judicial accountability, especially in terms of open justice. Before the reformation era, almost all types of information that existed and managed by the courts were closed. In some cases, the court rejected the request of civil society to access court decisions. The court seemed afraid to show the decision they made. Also, other information which also difficult to access is the judge's track record, court service fees, court budget, and others. It has become a common behavior. This kind of closure can only be opened through "gift" or "insider assistance". You can imagine how access to clogged information contributes to unclean behavior in the judicial administration. in the past, the court was considered do not understand that open justice principles were not only seen from trials that were open to the public but also documents relating to the judicial process or access to justice. The meaning of open court is reduced by Judiciary Act in that era. The conclusion was in the past (new order) the court did not understand the principle of an open justice principle that was universally applicable.<sup>91</sup> Copies of court decisions and other information are not

<sup>91</sup> J. J. Spigelman said that "The principle of open justice is one of the most pervasive axioms of the administration of justice in common law systems. It was from such origins that it became enshrined in the United States Bill of Rights where the Sixth Amendment guarantees a criminal accused the right to a 'speedy and public trial'. More recently, it is incorporated in international human rights instruments such as Art 14 of the International Covenant on Civil and Political Rights ('ICCPR')<sup>14</sup> and Art 6 of the European Convention for the Protection of Human Rights ('European Convention'), as adopted and implemented by the British Human Rights Act 1998 (UK). In both treaties, the right is expressed as an entitlement to 'a fair and public hearing by an independent and impartial tribunal established by law.'" J. J. Spigelman, "The Principle of Open Justice: A Comparative Perspective," *UNSW Law Journal* 29, no 2 (2006), 147.

easy things to obtain at that time. Various stories arise about the difficulty of obtaining a copy of the court's decision. Starting from academic groups such as students, civil society groups, and other community feels the bitterness of the situation. The court argued that a copy of the court decisions could only be given to litigants. Furthermore, the court argued that some decisions were confidential so that they could not be accessed by the public.<sup>92</sup> It is difficult to get a copy of the court decision intertwined with obscurity and even the absence of information about the mechanism of this matter. For those who want a copy of the decisions, they will be faced with a request for money from a court employee so that a copy of the decision can be given or to be given quickly.<sup>93</sup> In addition, the refusal to provide other public information makes the judiciary a bunker of the meaning of "secrecy".<sup>94</sup> The closure of the court has the potential to trigger a variety of other irregularities. For example, the interaction between lawyers and judges in the practice of bribery. For lawyers who have direct contact with judges, the issue can be made easier because lawyers can negotiate the decisions that will be handed down without paying attention to the prosecutor's demands.

Some cases prove that even if the prosecutor demands the maximum, the judge can release the defendant. Unlike the case with a lawyer who does not have direct contact with a judge, a third party is required to contact the judge. Usually, the role of third parties is more practical and safer for the clerks. The initiative came together between the judge and the lawyer, but it can also be

<sup>92</sup> This mistreatment behavior of judicial officials is very obvious in ignoring the rights of court users, or the public in general, to access public documents or documents that are the rights of court users. Things that have become public knowledge are public documents in the form of court decisions, minutes of hearings, court records and other documents that should be accessible to court users that cannot be obtained free of charge. Judicial officials especially the court administration, often charge a fee to people who want to have court documents categorized as public documents, illegally. Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia, *Laporan Penelitian Keterbukaan Informasi Pengadilan (2014)* [Reports on Open Justice] (Jakarta: Mappi-FHU, 2014), 31-32.

<sup>93</sup> Indonesia Corruption Watch (ICW) stated that the closure of the court began to occur from the simplest thing, namely information about the costs of registering cases in court, especially for civil cases. At that time, ICW Researchers had difficulty finding information about court fees at each District Court in Jakarta. Indonesian Corruption Watch, *Menyingkap Tabir Mafia Peradilan* [Investigate the Judicial Corruption] (Jakarta: Indonesia Corruption Watch, 2002), 117.

<sup>94</sup> Rifqi S. Assegaf and Josi Katarina, *Membuka Ketertutupan Pengadilan* [Opening Closed Judiciary] (Jakarta: Lembaga Kajian dan Advokasi untuk Independensi Peradilan, 2005), 23.



from the clerks himself.<sup>95</sup> Another example, the practice of judicial corruption concerns a copy of the court decision on a corruption case. Copies of court decisions on corruption cases that have permanent legal force (*inkracht*) are high economic value. The trick is to slow down (delay) submit the copy to the executor. For corruptors, the late copy not only slows down the execution but also opens the opportunity to escape. It is not impossible, some of the corruptors who escaped were helped by slowing down submitting the process of executor.

The picture of this closure certainly makes people wonder, why courts snatch away public information rights beside provide and protect it. By blocking public access to information is undeniably fertilizing the practice of closed policy-making processes, for example in terms of promotion and transfer of judges.<sup>96</sup> At that time (even to date) it is unknown whether the criteria or requirements of a judge get promotion and transfer. The promotion and mutations at that time were very vulnerable to subjectivity which led to nepotism.<sup>97</sup> Oversight decisions are a form of requesting responsibility to the judge and a means to control probability over the abuse. However, the obstruction of public access to court decisions led to a lack of supervision for the decision. Because of difficulty to access court decisions, it is not surprising the decision-based on the teaching process and legal discourse was difficult.<sup>98</sup> In the end, Liza Fahira concluded several reasons that caused difficulties in accessing information in court, among others: *First*, basically the culture of closure was still strong in the judiciary. In such cultures, even open-minded people tend to be afraid of opening information that should be open to the public; *Second*, there are intentions of

<sup>95</sup> The role of the clerk in a case is so extraordinarily important that it causes lawyers to do not necessarily work hard. For example, the clerk often made answers to the trial process for lawyers. By fully "understanding" the judge - in many cases, clerk of court often drafted the legal considerations - is very easy for the clerk to compile an answer that is acceptable to the judge's logic. In this position, for a lawyer, who "holding" the clerk can not only hold a judge but also hold all the judges who handle the case. Saldi Isra, "Keterbukaan Pengadilan dan Akses terhadap Keadilan [Open Justice and Access to Justice]" (Paper presented at the Seminar *Preparation of Legal Development: Background Study for 2010-2014*, organized by National Planning and Development Agency, Jakarta, December 17<sup>th</sup>, 2008), 9.

<sup>96</sup> Ridwan Mansyur, "Keterbukaan Informasi Di Peradilan Dalam Rangka Implementasi Integritas dan Kepastian Hukum [Court Disclosure Information to Implement Judicial Integrity and Legal Certainty]," *Jurnal Hukum dan Peradilan* 4, no 1 (March 2015), 89.

<sup>97</sup> Rifqi S Assegaf, *Pelatihan Keterbukaan Informasi Pengadilan* [Short Course on Judicial Transparency] (Bandung: USAID-C4J, 2011), 66.

<sup>98</sup> Rifqi S. Assegaf and Josi Katarina, *Membuka Ketertutupan Pengadilan [Opening Closed Judiciary]*, 91.

certain officials in the court, including judges, to cover up information, both to avoid public attention to the mistakes or negative practices they have committed, to be able to extort information requesters or because of other motives; *Third*, there are weaknesses in legislation which led to open interpretation to certain information may not be open to the public.<sup>99</sup>

After Amendment of the 1945 Constitution, the judicial reform agenda desired another movement to defining judicial accountability not only focusing on judicial independence sector. In line with this, openness justice principles were realized by some judges, especially by the Chief of Supreme Court, Bagir Manan. The Chief Justice continuously emphasized openness in the court and called on judges and court officials to uphold openness.<sup>100</sup> The next step was taken through Blueprint Book of 2003 on Supreme Court Reform Agenda. In the Blueprint there was a recommendation that DPR, President, and the Supreme Court shall make a rule that grants easier access court information, including court decisions.<sup>101</sup> This was also recommended by Bagir Manan as Chief Justice of Supreme Court; Toton Suprpto and Marianna Sutadi as Junior Chief Justice; and Supreme Court Judge, Abdul Rahman Saleh.<sup>102</sup> One main indicator of success on the Blueprint is forming “rules grant people to have easier access on court decisions.”<sup>103</sup> Even though Supreme Court Act of 2004 was passed about four months after the ratification of Constitutional Court Act of 2003, but Supreme Court Act of 2004 does not include the responsibility and accountability section in the clause. In Chapter III Part Two Art 12 until Art 14 Constitutional Court Act of 2003 is explicitly determined: *First*, the Constitutional Court is responsible

<sup>99</sup> Liza Fahrihah, "Mendorong Keterbukaan Informasi di Pengadilan [Towards Judicial Transparency]" in *Bunga Rampai Kisah Masyarakat Sipil Melawan Korupsi* [Selective Story on Civil Society fighting against corruption], ed. Liza Fahrihah (Jakarta: LelP, 2014), 35.

<sup>100</sup> Information systems aim to build the transparency of the justice system. Openness is not only meant as a form of public service, but also a creating control system for the judicial process. Public access to every court decision is important for judicial reform. Public access will encourage judges to be careful, qualified and impartial considering that each decision or determination will be a discourse or scientific observation. Bagir Manan, *Sistem Peradilan Berwibawa (Suatu Pencarian)* [Judicial Dignity] (Yogyakarta: FH UII Press, 2005), 11.

<sup>101</sup> Mahkamah Agung Republik Indonesia, *Cetak Biru Pembaruan Mahkamah Agung Republik Indonesia* [Blue Print on Reformation of Supreme Court], 101.

<sup>102</sup> Liza Fahrihah, *Mendorong Keterbukaan Informasi di Pengadilan* [Towards Judicial Transparency], 36.

<sup>103</sup> Mahkamah Agung Republik Indonesia, *Cetak Biru Pembaruan Mahkamah Agung Republik Indonesia* [Blue Print on Reformation of Supreme Court], 102.

for regulating organization, personnel, administration, and finance in accordance with the principles of good and clean governance; *Second*, the Constitutional Court is obliged to publicly announce periodic reports concerning: (a) applications that are registered, inspected and decided; (b) financial management and other administrative tasks. The report is published in periodic news published by the Constitutional Court; and *Third*, people have access to obtain the Constitutional Court. However Supreme Court argues that even without inclusion certain norms in Supreme Court Act on 2003, it doesn't mean there is no effort to improve the performance. For example, the Supreme Court has set vision and mission, namely "Realizing the rule of law through judiciary that is independent, effective, efficient and obtains public trust, professionalism and provides legal services that are quality, ethical, affordable and low cost for the community and able to answer calls public service".<sup>104</sup>

As a form of follow-up, the Chief Justice formed an internal team for the Chief Justice Decree concerning implemented open justice principles, which then resulted in Chief Justice Supreme Court Decree Number 144/KMA/SK/VIII/2007 concerning Information Disclosure in the Court. In the drafting process, the toughest debate occurred was the issue of transparency in court decisions. The Supreme Court, especially the Chief Justice, saw that the court's decision was their livelihood and image, so there was resistance to the proposal which put court decisions have to be Published by the court.<sup>105</sup> Furthermore, there is a paradigm that the publication of court decisions is an additional criminal sanction which stipulated in Art 10 Criminal Code. Also, there is another issue related to Judges Intellectual Property Rights, if it has to be published. Some Supreme Court Judges considered the decision they produced had intellectual property rights so it should not be published. In the end, court decisions remain in the category of "information that the court must announce". The Decree stipulates that the decisions on District Courts and Appellate Courts that have not been

<sup>104</sup> Ridwan Mansyur, *Keterbukaan Informasi di Peradilan* [Openness Information in Court], 89.

<sup>105</sup> Dimas Prasidi, "Akses Publik terhadap Informasi di Pengadilan [Public Access to Information in Court]," *Jurnal Konstitusi* 7, no. 3 (June 2010), 179-180.

legally binding in certain cases are included in that category. Other issues that have been debated are the session agenda, personal information excluded from the verdict, and the method of providing information.

In the end, the Chief Justice of Supreme Court Decree has set new standard for managing information and public services. The Chief Justice of Supreme Court Decree also initiated a fundamental change in the development of the bureaucracy in the judiciary. Meanwhile, the public Information Disclosure Act of 2008 is claimed to be the key to opening the gate towards a significant change for upgrading the performance of public services and aims to facilitate public access and transparency, including bureaucracy in judiciary.<sup>106</sup> The Chief Justice Supreme Court Decree was a breakthrough and meaningful inheritance of the Chief Justice of the Supreme Court, Bagir Manan. This breakthrough is one of the recommendations on Blueprint Book of 2003 on Supreme Court Reform Agenda. The recommendation is that court decisions can be accessed by the public, for the benefit of learning and as a comparison of data for internal court circles. There are many general principles which accommodated on The Decree, among other: <sup>107</sup> First, *Maximum Access Limited Exemption – MALE*, which requires majority information managed by the court to be open and set an exception to cover up information which is only for the greater public interest, privacy, and the commercial interests of a person or legal entity; *Second*, no reason needed if someone requests public or court information. *Third*, Organizing access to information with cheap, fast, accurate and timely; *Forth*, Providing complete and correct information; *Fifth*, proactive to information which related to the court which is important to be known by the public; *Sixth*, provided administrative sanctions for parties that intentionally obstruct or hinder public access to information in court; and *seventh*, provided a simple objections and appeals mechanism for parties who feel their rights to obtain information in the court are not fulfilled.

<sup>106</sup> *Ibid.*, 180

<sup>107</sup> Art 2 Chief Justice of Supreme Court Decree No. 144/KMA/SK/III/2007 concerning Information Disclosure in the Court.

In 2011, The Supreme Court made some adjustments with reforming the decree by forming Chief Justice of Supreme Court Decree No 1-144/KMA/SK/I/2011 concerning the Guidelines of Information Service at the Court. Through the new Decree, coordination of implementation of public services for open justice more optimized. The Decree stated that information service has two procedures, among other (1) general procedures and (2) special procedures. The main difference is if the general procedure start with an application for information is submitted indirectly while the special procedure *vice versa*. The Principal Officers must be at the Supreme Court and the four Courts Chamber for implementation of this service, so the chart of a desk job as follows:

**Tabel 3. Information Service Management at Supreme Court and Below**

Manager	First level court/Appellate Court		Supreme Court
	General/ Administrative Court	Religious/ Military Court	
Manager of Information & Documentation	Court Leaders	Court Leader	Case: Supreme Court Clerks Non Case: Secretary of Supreme Court
Information and Documentation Management Officer	Clerks/ Secretary	Case: Clerks/ Head of Clerks Non Case: Secretary/ Head of Deep Court Administration	Officer at Supreme Court: Head Bureau of Law & Public Relations, Administrative Affairs Agency Work Unit: Every Director General/ Head of Body

Manager	First level court/Appellate Court		Supreme Court
	General/ Administrative Court	Religious/ Military Court	
Information Officer	Junior Clerks/ other employee appointed by the Chief of Court	Junior Clerks/ other employee appointed by the Chief of Court	Administration Body: Subdivision of Data & Services Information Directorate General: Head of Subdivision of Documentation & Information Research, Development and Education Agency: Head of Sub-Department of Administration
Information Person in Charge	Leadership unit at the echelon level IV	Leadership unit at the echelon level IV	Leadership unit at the echelon level IV

After establishment Public Service Act of 2009, the Chief Justice Supreme Court issued another Decree Number 026/KMA/SK/II/2012 concerning Standard Judicial Services as the basis for each work unit in all judicial bodies in providing services to the public. Court Service Standards consist of case and non-court services. Court service standards also mandate establishment of service standards for smaller work units to be adjusted to their respective characteristics, for example, geographical conditions and case characteristics. In general, the Service Standards in the Court include: Court Administrative Services, Legal Aid Services, Complaint Services and Information Request Services. Therefore, the issuance of Public Service Act of 2009 and the Chief Justice of Supreme Court Decree No. 026/KMA/SK/II/2012 establishes regulations regarding efforts to implement open justice principles in another part of defining judicial accountability in Indonesia

## V. CONCLUSION

This article has examined the consequences of constitutional guaranteed on judicial independence in the third amendment, judicial reform agenda carried out with two types policy, among other (1) institutional guarantee of judicial independence and (2) personal guarantee independence of judicial independence. Relating to institutional guarantees are included in several policies, namely (i) one roof system and room system in the Supreme Court, (ii) Establishment of special courts, and (iii) institutionalization of judicial review on perpetrators of judicial power. While personal guarantees are poured on policies (i) reforming the filling and dismissal of judges and (ii) structuring the status of judges. Furthermore, judicial accountability is divided into two patterns, namely (1) institutional accountability and (2) personal accountability. The pouring institutional accountability is reflected in the regulation of information disclosure in the judiciary initiated by the judiciary's own power as well as legislation which indirectly encourages the personal accountability of judges for all their activities in the technical domain of the judiciary.

This article also shows that legal policy concerning judicial independence and justice accountability as goals of judicial reform after the reformation is focused on the institutional development rather than the personal (judges) independence and accountability of judges. Finally, this policy creates an unbalanced situation in achieving the objectives of judicial reform which also creating a gap between institutional development and enhancing the integrity capacity of judges. However, as a recommendation, that the legislators need to make comprehensive changes relating to the Law on Judicial Power such as the Judiciary Act, the Supreme Court Act, the Constitutional Court Act, and including the Judicial Commission Act. These changes are intended to organize the upstream and downstream sides of the judiciary system. The upstream side as intended is related to the filling and structuring of jurisdiction especially concerning special courts. Meanwhile, the downstream side is related to supervision and dismissal mechanism of judges

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