

Research Article

Holistic Supervision of the Judges of the Indonesian Constitutional Court

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Abstract.

The issuance of the latest Constitutional Court Law, Law Number 7 of 2020 on the Third Amendment to Law Number 24 of 2003 on the Constitutional Court, does not bring significant changes in the mechanism for monitoring constitutional court justices and the enforcement of the Code of Ethics and Conduct of Constitutional Justices. This paper aimed to offer a more holistic means of supervising constitutional court judges. The idea is a triangle of supervision consisting of internal control of individual judges, internal control of the institution, and external supervision.

Keywords: Supervision of Judges/Justices, Constitutional Court, Code of Ethics, Judges Integrity

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1. Introduction

Currently, the Constitutional Court has a Code of Ethics for constitutional justices which is contained within the Regulation of the Constitutional Court Number 09/PMK/2006 on the Enforcement of the Declaration of the Code of Ethics and Conduct of Constitutional Justices. This regulation is a refinement of the Regulation of the Constitutional Court Number 07/PMK/2005 on the Enforcement of the Declaration of the Code of Ethics and Conduct of Constitutional Justices. Even though a code of ethics is already present as guidelines for constitutional justices in carrying out their duties, the fact is that the Constitutional Court's authority has collapsed due to the behavior of its judges who are despicable and have no integrity. The corruption case that befell the Chief Justice of the Constitutional Court, Akil Mochtar in 2013, or the bribery case that ensnared Constitutional Justice Patrialis Akbar, as well as the ethical case carried out by the

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Chief Justice of the Constitutional Court, Arief Hidayat. This fact is enough to build an argument that the Constitutional Court needs to be monitored.

After the Akil Mochtar case, the President issued Government Regulation in lieu of Law (perpu) No. 1 of 2013, which was later ratified into Law no. 4 of 2014 on January 15, 2014. This Perpu was issued to maintain public trust in the Constitutional Court, after the Corruption Eradication Commission (KPK) arrested the top leaders of the Constitutional Court. However, through a judicial review, the Court canceled the enactment of Law no. 4 of 2014 with the Constitutional Court Decision Number 1-2/PUU-XII/2014. The House of Representatives has also revised Law no. 24 of 2003 on the Constitutional Court, but was also annulled by the Constitutional Court. In essence, various regulations have been made to supervise constitutional justices. But unfortunately the laws and regulations that seek to strengthen the supervision of the Constitutional Court have been canceled by the Court itself through a judicial review process.

In 2013 the Constitutional Court established the Ethics Council for Constitutional Justices through the Constitutional Court Regulation No. 2/Year 2013. Then PMK No. 2 of 2013 was replaced by the Constitutional Court with PMK No. 2 of 2014 concerning the Honorary Council of the Constitutional Court (MK). However, the independence of the MKMK is still in doubt because it was formed by the MK itself, and is institutionally under the control of the MK, which is the object of supervision. The latest development, the third revision of the Constitutional Court Law has been carried out, and gave birth to Law Number 7 of 2020 on the Third Amendment to Law Number 24 of 2003 on the Constitutional Court. It turns out that in the latest law there is still no involvement of other state institutions, such as the Judicial Commission for example, to supervise the justices of the Constitutional Court.

The status of the MKMK has not changed in the latest Constitutional Court Law. The authors hence offer a hypothesis that the existence of the MKMK in supervising the justices of the Constitutional Court will not be optimal. For this reason, this research was written in order to propose an idea for a better supervision of constitutional justices.

2. Methods

This is a legal doctrine research that examines the norms in the Constitutional Court Law along with the Code of Ethics and guidelines for the behavior of justices contained

in the regulations of the Constitutional Court. Research data obtained from literature study and processed qualitatively.

3. Results and Discussion

3.1. The Principle of Equity in Continental and Anglo Saxon Legal Systems

The Ethics & Compliance Initiative (ECI) provides a definition of ethics in English, as an area of knowledge relating to “good” and “evil”, related to moral duties and obligations. Ethics is hence concerned with the reflection of our values; a set of moral principles or values; a theory or moral system of values; and/or “philosophical guide”.[1] In Indonesian studies, however, scholars distinguish between the terms *etik* (ethic), *etika* (also translated as ‘ethics’), and *etiket* (etiquette). *Etik* is defined as a collection of principles or values relating to morals or values regarding right and wrong held by a group or society.[2] While *etika* comes from the Greek, namely *ethos*, which means habit. The definition of ethic in general (including the Indonesian studies) comprises of two elements: First, as a value system, namely the values that become the grip of a professional group on what is good and bad according to the values of the profession which are usually formulated in a written norm and called a code of ethics; and Second, the branch of philosophy that deals with human morality.[3] While *etiket* is a procedure or custom, courtesy in society in maintaining good relations between people.[2] Subsequently, it can be seen that the definition of *etik* (in its first content) conforms with the definition of ethics, which are both value systems that serve as guidelines for a group or profession.

If ethics is connected with philosophy, then it must first be ascertained what the position of philosophy is. Philosophy has two dimensions, namely as a science and as a view of life. As a science, philosophy is a continuous process and never finished.[4] As a view of life, philosophy is a product (values or value system) that is believed to be true and can be used as a guide for behavior by an individual or society.[3]

Connecting or viewing ethics can also be done from the perspective of the two philosophical positions. So there is ethics as a value system, and there is ethics as a science (philosophy as a science). Ethics as a value system is limitedly seen as a code of ethics imposed by each profession. While ethics as a science or branch of philosophy

is studied systematically and objectively to find the rationality behind the moral reasons of the chosen value system.[3]

As mentioned earlier, currently the constitutional justices of the Constitutional Court of the Republic of Indonesia have had their own code of ethics as stated in the Regulation of the Constitutional Court Number 09/PMK/2006 on the Enforcement of the Declaration of the Code of Ethics and Behavior of Constitutional Justices. The preparation of the Code of Ethics and Conduct of Constitutional Court Justices refers to “The Bangalore Principles of Judicial Conduct 2002” (“The Bangalore Principles” stipulate the principles of independence, impartiality, integrity, propriety and propriety, equality, and competence and diligence), then adjusted to the Indonesian legal and judicial system and the ethics of national life as contained in People’s Consultative Assembly Decree Number VI/MPR/2001 on the Ethics of the National Life (Regulation of the Constitutional Court Number 09/PMK/2006 concerning the Enforcement of the Declaration of the Code of Ethics and Conduct of Constitutional Judges).

There are seven principles that have been chosen as the Code of Ethics and Conduct of Constitutional Justices, namely: (a) independence, (b) impartiality, (c) integrity, (d) appropriateness and courtesy, (e) equality, (f) skill and thoroughness, and (g) wisdom and wisdom. Of these seven principles, the first six are the adoption of “The Bangalore Principles of Judicial Conduct 2002”. As we know, the principles of wisdom and wisdom are extracted from the values that live in Indonesian society. The main purpose of the establishment of the Code of Ethics and Conduct of Constitutional Justices is to establish and maintain the integrity of constitutional judges. However, it does not mean that the behavior of constitutional justices is only limited to this code of ethics. This code of ethics is intended to complement and not reduce existing legal and behavioral provisions, which are also binding on constitutional justices. With the existence of a code of ethics that complements other legal provisions, the guidelines for constitutional justices are more complete in acting and behaving. Indeed, judges or justices should be the first role models for the community in law enforcement and practice. They are seen as the ‘running law’. Cicero said that: “The law is the official (judge) who is silent, while the official (judge) is the law that speaks.”[5] Thus judges should be the more important element in the law enforcement. If the judges actually violate the law, then they really does not deserve to be called as a judge. And if convicted, the sentence to the judges should be rendered more severely (an example is the case of the Chief Justice of the Constitutional Court, Akil Mochtar, who was sentenced to life in prison for

a corruption case. Akil Mochtar's appeal was also rejected, so his sentence remained lifelong. Among the judges' considerations that rejected Akil Mochtar's appeal was that Akil Mochtar was a judge of the Constitutional Court who should be a true statesman and be sterile from acts of corruption).

To enforce the code of ethics and other legal provisions violated by constitutional justices, the Constitutional Court established the Ethics Council for Constitutional Justices through the Constitutional Court Regulation No. 2/Year 2013. Then PMK No. 2 of 2013 was replaced by the Constitutional Court with PMK No. 2 of 2014 on the Honorary Council of the Constitutional Court. The Honorary Council was formed to maintain and uphold the honor, nobility of dignity and the Code of Ethics of Constitutional Justices in relation to reports of alleged gross violations committed by constitutional justices. The Honorary Council was formed by the Constitutional Court at the recommendation from the Ethics Council (Article 2, Regulation of the Constitutional Court Number 2 of 2014 concerning the Honorary Council of the Constitutional Court).

In Law no. 7 of 2020 on the Third Amendment to Law no. 24 of 2003 on the Constitutional Court, it is explained that in order to enforce the Code of Ethics and Code of Conduct for Constitutional Justices, the Honorary Council of the Constitutional Court is formed whose membership consists of one constitutional justice, one member of the Judicial Commission and one academic background in the field of law (Article 27A, Law no. 7 of 2020 concerning the Third Amendment to Law No. 24 of 2003 concerning the Constitutional Court).

Conclusively, it can be seen that essentially the Honorary Council of the Constitutional Court is not an institution that is outside of the Constitutional Court nor is it an independent institution of the Constitutional Court. Honorary Council of the Constitutional Court is within the structure of the Constitutional Court and one of its elements comes from the justices of the Constitutional Court. This certainly raises doubts about the independence of the Honorary Council in dealing with ethical violations committed by constitutional justices.

3.2. The Idea of Triangle of Supervision

The Discussion about the supervision of judges is often confused with the freedom of judges. The principle of freedom of judges is the main guard of law enforcement and justice seekers. The freedom that produce the principle of independence of judges in

the judiciary is essentially a prerequisite for the realization of the ideals of a state of law and is a guarantee for the enforcement of law and justice. The principle of independence which then gave the independence of judges, must be realized both individually and institutionally. A judge who is not independent cannot be expected to be neutral or impartial in the performance of his duties. Likewise, judicial institutions that depend on other organs or institutions and are unable to regulate themselves independently, will also cause a non-neutral attitude in carrying out their duties.[6]

In fact, the independence of judges and the judiciary must compromise with another principle, namely public accountability. The International Bar Association Code of Minimum Standards of Judicial Independence states that judicial independence does not in itself exempt judges from public accountability. However, pressure and intervention from other institutions has the potential to create a conflict between judicial independence and pressure on judges.[6], [7] From this it can be seen that the independence of judicial power is not absolute. Independence does not mean that judges are free to do something without basis. So this is where the need to balance the independence of judges and judicial institutions, with public accountability.

This logic then becomes chaotic when public accountability and oversight of judges is seen as a threat and has the potential for intervention. This is what the Constitutional Court may have felt when he refused to have his ethical behavior supervised by the Judicial Commission (KY), in its Decision No. 005/PUU/IV-2006. The Judicial Commission's supervision of the Constitutional Court is considered to be disturbing and sterilizing the Constitutional Court as an institution that guards the constitution. Of course, this dilemma must be found a middle way solution. How can the supervision of the judges of the Constitutional Court still be carried out, but does not interfere with the independence of the judges.

This paper offers the idea of three-sided supervision, or the triangle of supervision, namely: (a) the internal control of individual judges; (b) internal supervision of judicial institutions; and (c) external supervision. The internal supervision of individual judges or similar to self-control is a trait possessed by every judge that they are always under the supervision of God Almighty and will be accountable for their decisions to God Almighty. This is a form of internalizing religious values in the development of a code of ethics and behavior of judges. In a study it was shown that low self-control is one of the factors for the occurrence of criminal acts.[8] So it is very relevant for judges to

cultivate self-control and always feel supervised by God Almighty, so that judges are not trapped in actions that are not commendable.

This internal supervision of individual judges also provides an answer to the fear of disturbing the independence of judges. Because the independence of judges will always exist and be maintained, as long as the judges have integrity and are always on the path of truth. Judges who have always maintained their integrity will not be disturbed by anyone's independence in the future. Ibn Jauzy said: "Whoever (his actions) was good in the past, it will be good in the rest of the time (to future)."[9]

In the authors' opinion, the internal supervision of individual judges should be normalized in the Code of Ethics and the Code of Conduct for Constitutional Justices. In this way, it is hoped that the constitutional justices will always remember that they are directly supervised by God Almighty. Institutional internal supervision is supervision carried out by the judicial institution itself. The judicial institution establishes a device that is given the task of supervising the behavior of judges. If the judge commits a violation, then the internal supervisor will be the first to handle the evidence. The existence of this internal supervisor is very important to maintain the authority of a judicial institution. The Honorary Council of the Constitutional Court, which is already in the latest Constitutional Court Law, can play a role in the internal oversight of this institution.

And lastly, external supervision is supervision carried out by the relevant judicial institution, but remains within the corridor of the judicial power institution in accordance with the mandate of the 1945 Constitution. This external supervision needs to be carried out, as an answer to the weakness or ineffectiveness of internal control. The ineffectiveness of internal control is usually caused by several factors, such as: inadequate quality and integrity of supervisors; the process of disciplinary examination that is not carried out in a transparent manner; there is no facility for the public to submit complaints, monitor the process and the results; there is a spirit of defending fellow institutions which results in the imposition of punishments that are not balanced with actions; and the absence of a strong will from the leadership of law enforcement agencies to follow up on the results of internal supervision of judges.[6], [10], [11]

Regarding this external supervision, according to the author, the Judicial Commission can be used as an external supervisor for constitutional judges. The existence of the Judicial Commission which is outside the structure of the Constitutional Court can make the supervision of constitutional justices more independent. Because it is undeniable that a supervisory agency of judges should be independent. The aim is to further

strengthen the independence of the judiciary.[12] Although institutionally there are differences between the Constitutional Court and the Supreme Court, philosophically and substantively, the functions and duties of a justice are the same, namely seeking, finding and deciding justice. Whatever the type of the judge, justice is the main goal. And justice is difficult to come from a judge who does not have integrity. With that being said, this philosophical equation needs to be used as a material for reflection to form an integrated supervision system for all judges, both within the Supreme Court and within the Constitutional Court, which can be carried out by the Judicial Commission.

4. Conclusions

The author offers an idea of the concept of a triangle of supervision to maintain the independence of constitutional justices, by supervising constitutional justices. The three aspects of supervision are: (1) the internal supervision of individual judges; (2) internal supervision of judicial institutions; and (3) external supervision. The internal supervision of individual constitutional justices needs to be strengthened by adding a principle in the code of ethics and the code of conduct for constitutional justices that constitutional judges must have a sense of being supervised by god almighty. Internal supervision of the judiciary is the second layer of supervision of judges that can be carried out by the honorary council of the constitutional court. While external supervision, it is necessary to involve the judicial commission to oversee the behavior of constitutional justices.urgent.

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