

## CHAPTER IV

### RESULT AND DISCUSSION

#### A. The Development of Indonesian Constitutional Court

The 1945 Constitution was amended in four times, firstly on October 19, 1999, secondly on August 18, 2000, then the Third on November 19, 2001 and finally on August 10, 2002. All of the amendments of 1945 Constitution of course have an implication for the Indonesian government and constitutional system, including elimination particular institution and establishment of new state institutions. The state institution that was eliminated is Supreme Advisory Council (*Dewan Pertimbangan Agung*, hereafter DPA). The new state organs are Local Council (*Dewan Perwakilan Daerah*, hereafter DPD), Constitutional Court, Judicial Commission, Indonesian Bank (*Bank Indonesia*, hereafter BI), Election Commission (*Komisi Pemilihan Umum*, hereafter KPU), and Indonesian National Army (*Tentara Nasional Indonesia*, hereafter TNI).<sup>35</sup>

Before amendment of 1945 Constitution, the judicial power was based on Chapter IX Article 24 and 25 of 1945 Constitution, as follows:

#### Article 24:

- 1) Judicial power implemented by Supreme Court and other court according to laws.
- 2) The structure and the authority of judicial bodies regulated by laws.

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<sup>35</sup>Simanungkalut, 2012, 16-17. and K. Simanungkalut, *Sistem Ketatanegaraan Indonesia*, Yogyakarta:

### Article 25:

The appointment and dismissal of judges shall be regulated by law.

In its Third Amendment of 1945 Constitution amended the Chapter IX about Judicial Power. Before amendment, it was only consisting of two Articles that Articles 24 and Article 25. Then, it amended into five Articles, which are: Article 24, Article 24A, Article 24B, Article 24C and Article 25. The amendment has been incorporated into the provisions of the independence of judicial power that was only stated in Law No. 14 of 1970. Article 24 stated that,<sup>36</sup>

- 1) The judicial power is an independent power to conduct judiciary in order to uphold the law and justice.
- 2) Judicial power exercised by a Supreme Court and judicial agencies under the Supreme Court also the Constitutional Court. The judicial agencies under the Supreme Court consist of general courts, religious courts, military courts, state administrative courts.
- 3) Other agencies whose function is related to the judicial power regulated by the law.

The amendment indicates that the constitutional guarantees regarding on the independence principle of the judicial power which is getting stronger than before the amendment. The existence of judicial agencies under the Supreme Court has also got the constitutional guarantee. The amendment of Article 24 is also no longer placed the Supreme Court as a single top authority in judicial power, but

<sup>36</sup> See Article 25 of 1945 Constitution of Republic Indonesia

the Constitutional Court with constitutional authority also regulated in Article 24C as a one of judicial power institution. The provisions of Article 24 Paragraph 3 further regulated through Article 41 of Law No. 4 of 2004 on Judicial Power. The other agencies whose function is related to the judicial power includes the Indonesian National Police, Attorney of the Republic of Indonesia, and other agencies that regulated by law.

One of the new institutions as the result of the amendment is the Constitutional Court institution. The history of the establishment of Constitutional Court was started in the third amendment of 1945 Constitution by the People's Consultative Assembly (MPR) in 2001.<sup>37</sup>

The idea of the establishment of the Constitutional Court is a development of modern constitutional law of thought that emerged in the 20<sup>th</sup> Century. The idea is the developments of the principles of democracy were political rights and human rights are a basic theme in the constitutional law politics. The basic rights are constitutionally guaranteed in a constitutional right of society and institutionally manifested through state institutions that protect the constitutional rights of society. State agencies are constructed to guarantee the constitutional right of every citizen is the Constitutional Court. This is a fundamental need of reform efforts which arrives to the realization of the constitutional democracy

In the study of constitutional law, the existence of Constitutional Court is a guardian of the 1945 Constitution and also as an interpreter of the 1945 Constitution. According to Jimly Asshiddiqie, the Constitutional Court as adopted in the 1945 Constitution has two ideal functions:<sup>39</sup>

1. *First*, the Constitutional Court for constructed is a guardian of the 1945 Constitution. As the guardian of the 1945 Constitution its function as for guarantee, encourage, direct, guide and ensure that the 1945 Constitution run as well as possible by the state organizer and other subjects of constitution such as citizens. It is expected that the values of 1945 Constitution could be implemented properly and responsible.
2. *Second*, Constitutional Court also as interpreter, because the Constitutional Court is constructed as the highest institution which has official interpretation of the 1945 Constitution. By this function of Constitutional Court is intended to cover up any weakness and deficiencies that contained in the 1945 Constitution.

Constitutional law experts, Mahfud MD explained that the history of the Constitutional Court of the reform era began in 1998. At the time there was not institution of which could invalidate a law that is against 1945 Constitution. Moreover, the President authority in Indonesia can be impeachment only on

dispute. Cause of that, in 2003 the Constitutional Court established as a mandated of 1945 Constitution.<sup>40</sup>

The presence of the Constitutional Court is to perform of checks and balances system in the constitution construction. As a supervisor body and guard of constitution and also as a part of judicial power, Constitutional Court expected to be the guardian and manage of all state institutions including Constitutional Court itself to run the state on Constitutionalism paradigm in performing duties, powers, obligation, position and role and function based on the competence of each state agency itself. Thus, the establishment of the Constitutional Court is not only a new institution without function but is expected to created mechanisms that is protect of citizens from deviation act of state administration which are authoritarian and centralistic. So the Constitutional Court is able to keep of constitution from abuse of the state power.<sup>41</sup>

In line with the constitutional principle of modern democracy, it is one of the important substances related to amendment of 1945 Constitution was the existence of the Constitutional Court as a state institution that functions to handle certain cases, especially in the field of constitutional interpretation and guarantee the implementation of 1945 Constitution. Its aim to guarantee the constitution is really becoming the basis for the implementation of state law responsibility in accordance with the societies as a holder of sovereign and democratic dream as the goal of state. It also to create the implementation of stable and just

governance, it is also as a correction of constitutional experience in the past caused by the interpretation of the 1945 Constitution which is done by the government for their own interest.<sup>42</sup>

The establishment of Constitutional Court which is characterized by the appointment of nine Constitutional Court judges on August 16, 2003 by the Presidential Decree No. 147/M of 2003. The Constitutional Court of Indonesia is the 78<sup>th</sup> of Constitutional Court all of over the word and the first state in the 21<sup>st</sup> Century. Moreover, by support from all of state components in order to strengthen the democracy through a relationship with the mutual control between the branches and state power will created the check and balances mechanism is provide.

Furthermore, after the existence of the Constitutional Court decided in a Third Amendment of 1945 Constitution. Before the establishment of the Constitutional Court institution, People's Consultative Assembly (MPR) determine of Supreme Court (MA) to perform the function of the Constitutional Court for temporary.<sup>43</sup>

The decision was taken since the enactment of the Article III of transitional rules of 1945 Constitution. It was a result of Four Amendment of 1945 Constitution on August 10, 2002. At this time, the duties of the Constitutional Court as mandated by the 1945 Constitution would be temporarily implemented

on the Constitutional Court, the House of Representatives and the Government discussed the draft of bill (Rancangan Undang Undang, hereafter RUU) on the Constitutional Court. After having deep discussion, the House of Representatives and Government approved the Law No. 24 of 2003 on Constitutional Court in August 13, 2003. It was signed by the President of Indonesia Megawati Soekarno Putri.<sup>44</sup>

Based on Article 18 Paragraph 1 Law No. 24 of 2003, the House of Representatives, President and Supreme Court conducted the recruitment of the Constitutional Court judge's candidate. For each state institutions would appointment three candidates that would be approved through the presidential decree. In addition, the procedural process of the selection of Constitutional Court judge's candidate was regulated by each authorized institutions.

The mechanism of the appointment of the Constitutional Court judge's candidate reflects the checks and balances system among the three institutions namely DPR, President and MA. Furthermore, the first appointment of Constitutional Court judges in the history of Indonesia was established on August 15, 2003 based on the Presidential Decree No. 147 / M of 2003. Based on the Article 21 Paragraph 1 of Law No. 24 of 2003, the Constitutional Court judges should take the oath in accordance with his religion before taking up the position

The oath of Constitutional Court judges is:

“Demi Allah saya bersumpah bahwa saya akan memenuhi kewajiban Hakim Konstitusi dengan sebaik-baiknya dan seadil-adilnya, memegang teguh Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, dan menjalankan segala peraturan perundang-undangan dengan selurus-lurusnya menurut Undang-Undang Dasar Republik Indonesia Tahun 1945, serta berbakti kepada nusa dan bangsa”

The Promise of Constitutional Court judges is:

“Saya berjanji bahwa saya sengan sungguh-sungguh akan memenuhi kewajiban Hakim Konstitusi dengan sebaik-baiknya dan seadil-adilnya, memegang teguh Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, dan menjalankan segala peraturan perundang-undangan dengan selurus-lurusnya menurut Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, serta berbakti kepada nusa dan bangsa”

Furthermore, responsibilities and authority of what is mandated by Law No. 24 of 2003 become responsibility and authority of the Constitutional Court. Thus, besides of complementing the institutional system, the Constitutional Court must also continue the duties of institutional function what is transferred from the Supreme Court. On November 4, 2003 is the first time for Constitutional Court to hold a session of court of preliminary of law toward 1945 Constitution in the Nusantara IV building, the complex of MPR/DPR, Senayan Jakarta. The Constitutional Court used the MPR/DPR building is because there is no court building yet.

Honestly, it must be recognized that the presence of Constitutional Court has given much contribution to the life of the Indonesian state administration to be



in the presence of a comparatively young institution. It shows that this court is indeed very necessary, especially to overcome the contents of the law which is more colored by political purposes that contradict to 1945 Constitution. Therefore, the existence of these institutions must be fully supported for the future development of the constitutional state affairs.<sup>45</sup>

Even though, the performance of Constitutional Court and also about its decision must be critical to make sure that the Constitutional Court is appropriate with the law and 1945 Constitution. Among legal activists, there is a worry feeling about this institution. Because of Constitutional Court has become potentially abuse of power as a super body with having big authority and without supervision.<sup>46</sup>

Since the establishment of Constitutional Court until nowadays, it is true that there is a still limited case which abuse of the authority and defile the judicial power. But to establish and create a good and trustable court in the Constitutional Court, it is important to have supervision. Akil Mochtar case is one of the examples, it is expected that there would be no more similar case. In other words, although there is method of selection of judges very hard, but if without supervision the judges would also potentially involve in abuse of power. Therefore, it is important to propose again the supervisory institution of Constitutional Court. The Constitutional Court judges cannot say that they are representative of God and they rejected the supervision institution.

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<sup>45</sup> Mohfid MD, 2011. *Perdebatan Hukum Tata Negara Pasca Amendemen Konstitusi*. Jakarta.

## B. The Supervision and Concept of Constitutional Court Judges

### 1. The Supervision Based on the 1945 Constitution

Based on the 1945 Constitution, the system and format of judicial power in Indonesia is a democratic state based on rule of law which has limitation of power. Furthermore, the authority was designed to be separated in implementing its function, but it also concerned checks and balances mechanism.<sup>47</sup> Therefore, after the amendment of the 1945 Constitution, the separation of power among the state bodies are meant to give the limitation of power in order to avoid the suppression and abuse of power.<sup>48</sup>

In the scope of the supervision of the Judges, based on Article 23B Paragraph 1 of 1945 Constitution, Judicial Commission is an institution which is given the mandate to supervise the Judges in District Court, High Court, moreover Supreme Court Judges. Law No. 22 of 2004 on Judicial Commission is the continuation provision of Article 23B 1945 Constitution. Law No. 22 of 2004 has regulated in the provision on the attitude of judges in the Article 13 Paragraph (b), Article 20, Article 21, 22 and 23. All those five Articles are the basic provision of the Judicial

<sup>47</sup>Jimly Asshiddiqie, 2005. *Konstitusi dan Konstitualisme di Indonesia*, Jakarta. Konstitusi Press. p. 156

<sup>48</sup>Bambang Wijdojanto, 2009. *Komisi Yudisial: Check and Balances dan Urgensi Kewenangan*

Commission to perform its external function to control in order to enforce the honor and nobleness of Judges.<sup>49</sup>

The supervision authority was considered as external functional supervision towards the attitude of judges which conducted independently and objectively. The supervision authority of the Judicial Commission as mandated on Article 13 Paragraph (b) was the important function in order to support the independency of court, while the strengthening of internal supervision conducted by Supreme Court and the Constitutional Court.

The implication of this provision is the obligation of the chairman of Supreme Court and Constitutional Court to conduct the internal supervision as a result of external supervision. So every chairman of judicial power which implements the internal supervision has a duty to determine whether or not the judges get the punishment.<sup>50</sup>

To support the supervision mechanism in implementing the external supervision by Judicial Commission, Article 22 explains that the duties of Judicial Commission, namely:<sup>51</sup>

- a) Receive tip-offs from the public about the attitudes of judges.
- b) Ask for periodic reports from court bodies about the attitudes of judges.

<sup>49</sup> Idul Rishan, 2013. *Komisi Yudisial Suatu Upaya Mewujudkan Wibawa Peradilan*, Yogyakarta. Rajawali Gedongan Baru. p. 90

<sup>50</sup> *Ibid.*, p. 91

<sup>51</sup> Law No. 22 of 2004 on Judicial Commission, Article 22.

- c) Examine alleged violations of codes of ethic by judges.
- d) Summon and ask for information from judges who have allegedly violated codes of ethic; and
- e) Make reports on the result of examination in the form of recommendations to the supreme court and/or Constitutional Court, with copies addressed to the president and the DPR.

If we discuss more about the object of supervision of Judicial Commission, it includes the Constitutional Court judges, Supreme Court judges and under Supreme Court judges. The external supervision is urgent in judicial power, because the supervision is exercised by external organ, systematic, intensive and conducted by independent institution. The existence of Judicial Commission as an external supervision because the internal supervision was conducted by Supreme Court and Constitutional Court does not work well.

The idea of establishment of Judicial Commission is to support the internal supervision in that court, in order to establish the good behavior of judges, authoritative and independent. The reasons why the internal supervision which is implemented by Supreme Court and Constitutional Court does not work well, as follows:<sup>52</sup>

- a) The insufficiency of quality and integrity the supervisory.
- b) The investigation process is not transparent.

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<sup>52</sup> Idul Rishan, *Op.cit.*, p. 101

- c) There is no easy way for the citizens who are disadvantages to propose their complaint and monitor the process and result.
- d) The corps solidarity among the apparatus (*ekprit de corps*) that consequences is the penalties among them is not appropriate with their action.
- e) There is no strong willingness from the chairman of the court to follow up the results of supervision.

Based on Article 23 Law No. 22 of 2004 on Judicial Commission explains the mechanism to give sanctions for judges who violates the ethics code and behavior of judges. The Judicial Commission was given the authority to propose the sanctions to the chairman of Supreme Court and Constitutional Court, regarding on the judges who violated ethic code which is accordance with their offense.<sup>53</sup> Namely; written reprimand, dismissal from a judge for several time, and dismissal for a long time.

The external supervision which is conducted by Judicial Commission for the whole of judges, including Supreme Court and Constitutional Court judges, have made a conflict between the Supreme Court and Judicial Commission. Hence, some judges of Supreme Court filed petition to the Constitutional Court to review the supervision

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<sup>53</sup> Before 2006, all of judges are the object supervision of Judicial Commission. But in 2006, the Constitutional Court nullified the law regarding on the object of supervision of Judicial

authority of Judicial Commission. Based on the Constitutional Court Decision No. 005/PUU-IV/2006, Law No. 22 of 2004 on Judicial Commission and Law No. 4 of 2004 on Judicial Power were considered against the 1945 Constitution as long as related to the extension of the definition of Supreme Court and Constitutional Court judges.

The reason of Constitutional Court judges in the nullification of supervision authority of Judicial Commission is because Article 13B juncto Article 20 Law No. 22 of 2004 on Judicial Commission has prompted the legal uncertainty (*rechsonzekerheid*). Both Articles do not regulate specifically the subject, object, instruments and procedure of supervision.<sup>54</sup>

The Constitutional Court Decision No. 005 / PUU-IV/2006 have extremely affected the function of supervision of Judicial Commission. The Constitutional Court Decision was nullified the authority of Judicial Commission in supervising the judges in judiciary institution. Based on this Constitutional Court Decision, at least there were seven crucial Articles in the Law No. 22 of 2004 on Judicial Commission against to 1945 Constitution, namely:<sup>55</sup>

1. Article 20 stated that “the Judicial Commission authority to supervise upon the behavior of judges in order to uphold the honor and dignity of judges”.

<sup>54</sup> Idul Rishan, *Op.cit.*, p. 96-97.

<sup>55</sup> Constitutional Court Decision No. 005/PUU-IV/2006, p. 202.

2. Article 21 stated that "the Judicial Commission obliged to filed the petition on the sanction upon judges to Supreme Court and Constitutional Court.
3. Article 22 Paragraph 1 e stated that "the Judicial Commission issued the recommendation and submitted to the Supreme Court, Constitutional Court, President and DPR".
4. Article 22 Paragraph 5 stated that "Supreme Court and Constitutional Court obliged to force the judiciary institution or judges to provide the information and data in case of judiciary institution or judges not fulfilled the obligation".
5. Article 23 Paragraph 2 stated that "the recommendation to impose sanction and reasons mentioned on the Article 1A is delivered by Judicial Commission to Supreme Court and Constitutional Court".
6. Article 23 Paragraph 3 stated that "the recommendation to impose sanction mentioned in Article 1B and 1C is delivered by Judicial Commission to Supreme Court and Constitutional Court".
7. Article 23 Paragraph 5 stated that "in case of defense is rejected, the Supreme Court and Constitutional Court shall propose the dismissal of the judges to the President in no more than 14

(6 months) if the Honorary Council of Judges rejected"

The effect of Constitutional Court decision, the supervision of judges is back to only thought internal supervision. In fact, in long time before it is proved that the internal supervision is not effective due to the practices of abuse of power in court institution. It shows that still more difficult to realize a clean and trustable court in Indonesia.

The amendment of Law No. 22 of 2004 on Judicial Commission becomes Law No. 18 of 2011 on Judicial Commission by DPR and Government. It is actually an important momentum in order to establish the judicial power in Indonesia which is independent, transparency, professional and accountable.

The main purpose of the strengthening of Judicial Commission by Law No. 18 of 2011 on Judicial Commission, it is not only to make the better condition in the future, but the more important thing is to create the Judicial Commission becomes state organs which is independent organs on keeping and maintaining the honor of judges. Furthermore, by the implementation of planned duties and sustainable duties of Judicial Commission it is expected to be able to realize a good and



## 2. The Concept of Constitutional Court Judges

### a. The Concept of Constitutional Court Judges Based on the 1945 Constitution

Article 24B Paragraph 1 of 1945 Constitution explained that the Judicial Commission is independent organ which is authorized to proposed the appointment of judges. It also has another authority to keep and uphold the honorary, dignity and behavior of judges.

There is no interpretation in the constitutional level which is related to definition of judges in the term of *"In order to keep and uphold the judge honorary, dignity and also behavior of judges"*. In other words, the 1945 Constitution did not explain the meaning of judges including as mentioned in the Article 24B Paragraph 1. But the Constitutional Court in it decision interpreted that the judges on that provision is excluded the Constitutional Court judges. There are several considerations, namely:<sup>57</sup>

- a. *First*, systematically the provision of Judicial Commission does not relate to the provision of the Constitutional Court.
- b. *Second*, the supervision of Constitutional Court judges is conducted by honorary council.
- c. *Third*, the definition of Constitutional Court judges is different with the other judges. The Constitutional Court judges are not a

<sup>57</sup> Constitutional Court Decision No. 005/PUU-IV/2006 about Judicial Review of Law No. 22 of

profession persistently, but the judges because of his/her position.

- d. *Fourth*, all of procedure in election mechanism and appointment of Constitutional Court Judges as like as regulated in the 1945 Constitution, does not involve the Judicial Commission.
- e. *Fifth*, substantively, if the Constitutional Court Judges is the object of supervision of Judicial Commission, it will disturb of the Constitutional Court Judges in settling the dispute among the state organs.

If we discuss more about the Constitutional Court opinion regarding on the definition of judges above, there is inconsistencies and weaknesses of that opinion, because the 1945 Constitution clearly mentions that the judicial power are conducted by the Supreme Court and Constitutional Court. Therefore, as the consequence is the Constitutional Court judges cannot come out from the judges definition based on the Article 24B Paragraph 1 of 1945 Constitution.

#### b. The Concept of Constitutional Court Judges in Legislation

The laws regarding on the judicial power in Indonesia consist of Law No. 19 of 1948 on Arrangement and Judicial Power Bodies and Prosecutor, Law No. 19 of 1964 on the Basic Provision of Judicial Power as well as second amended by the Law No. 14 of 1970 on the

Basic Provision of Judicial Power, Law No. 4 of 2004 on Judicial Power and the last is Law No. 48 of 2009 on Judicial Power.

The definition of judges if we see from the laws regarding the judicial power except Law No. 48 of 2009 on Judicial Power, it shows that there is no different definition regarding judges. In other words, the definition of judges is all of judges starting from the under level until the highest level, including the Constitutional Court Judges.

The concept of Constitutional Court judges only include in the Law No. 22 of 2003 on Judicial Commission which is regulated in Article 1 Paragraph 5 stated that the judges is the Supreme Court Judges, under the Supreme Court Judges and also Constitutional Court judges. The extension of the definition of Constitutional Court Judges in Article 1 Paragraph 5 of Law No. 22 of 2004 on Judicial Commission is basically the interpretation of Article 24B Paragraph 1 of 1945 Constitution. It is based document of Ad Hoc Committee of MPR (Panitia Ad Hoc Badan Pekerja MPR here after PAH BP MPR). In line with the Fajrul Falaakh opinion:

“The problem regarding on the definition of judges in the 1945 Constitution is because there is no official interpretation on 1945 Constitution. Two main sources may be used for help us to interpret are the document of MPR and materials of

Based on the document of MPR, it show that there is willingness of them to give the competent supervision of Judicial Commission include all of judges. The provision was stipulated in Article 1 Paragraph 5 of Law No. 22 of 2004 on Judicial Commission. In that article stated that the judges are Supreme Court judges, under Supreme Court judges and also Constitutional Court judges.

### **C. The Analysis of Urgency of Supervision of Indonesian Constitutional Court Judges**

#### **1. The Independent and Impartiality Principle of Judiciary**

The 1945 Constitution emphasizes that Indonesia is a state based on rule of law. One of the important principles is to guarantee the implementation of judicial power independently without intervention of other institution.<sup>58</sup> Article 4 of 1945 Constitution states that Supreme Court and Constitutional Court are in hold the judicial power independently to implementing judiciary process in order to enforce law and justice. In Law No. 18 of 2011 on Judicial Commission states that:<sup>59</sup>

“The judicial power shall be independent and shall posses the power to organize the judicature in order to enforce law and justice based on Pancasila, for the implementation of rule of law in Indonesia”

<sup>58</sup> The General Explanation of Law No. 4 of 2004 on Judicial Power.

<sup>59</sup> Article 1 of Law No. 4 of 2004 on Judicial Power.

In general, the characteristics of independence of judicial power, at least include:<sup>60</sup>

- a. *First*, it is impartial. Judicial decision is not influenced by the judge's personal interest in the outcome of the case. Some analyst incorporate into "impartiality" the idea that judges are not selected primarily because of their political view but on merit.
- b. *Second*, judicial decisions, once rendered, are respected. Either the parties to the case must comply voluntarily with the decision, or those with the power to coerce compliance must be willing to use this power if compliance is not forthcoming.
- c. *Third*, free from interference. Parties to a case, or other with an interest in its outcome, cannot influence the judge's decision. In practice, protecting judges from private persons with an interest in the case means preventing judicial corruption and coercion".

The essence of freedom of judges as an official of judicial power on civil or common law has a similar principles that the judges only obey the law and justice. In line with Soedikno Mertokusumo's opinion that "the freedom of judges is not absolutely, but limited by macro and micro aspect. The macro aspects are limited by system of government,

<sup>60</sup>Yuliandri, 2009. *Pembagian Wewenang dan Pertanggungjawaban Kekuasaan Kehakiman Pasca*

system of politic, system of economic etc. Then the Micro aspects are limited by Pancasila, 1945 Constitution, Laws, Morals and etc".<sup>61</sup>

The independent of judges in judiciary institution is essentially the basic prerequisite in realization the purpose of rule of law to enforce law and justice. This principle should be reflected in the judiciary process on every case. The independent principle of judge by some judges understood as a freedom freely without limitation. Furthermore, the meaning of freedom understood as arbitrariness. In this situation freedom also understood in spite from all of obligations and duties.

Based on the Constitutional Court, the freedom of judges reflected free from intervention outside of court directly or indirectly, politic and economic interest could like influence, persuasion, force, pressure and threat. Independence of judges is closely related to an impartial attitude in the examination and decision making process in the judiciary. The judges, who are not independent, cannot be expected to be neutral or impartial in implementing their duties. Moreover, it is similar situation if the judiciary institutions depend to other institutions and cannot manage themselves independently. The functional independence of judges is a prohibition for other institution to intervene judicial power in performing their duties.<sup>62</sup>

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<sup>61</sup> *Ibid.*, p. 60

<sup>62</sup> P. Wignosumarto, 2006. Peran Hakim Agung dalam Penemuan Hukum dan Penciptaan Hukum

The independence of judges is also defined the judges free to decide the decision appropriate with the values what their believed through interpretation of law. Even though the decision is contradict to the parties who are hold the political power.<sup>63</sup> Furthermore, if the decision of judges is not appropriate to the parties, it is cannot be used for the parties as a reasons to conduct retaliatory action to the judges individually or institutionally.

The independence of judiciary institution in its development must be side by side with the other concept of public accountability harmoniously. The concept actually can keep the judges and judiciary institution from the practices abuse of power, personally and institutionally interests. Then, through this concept, it will uphold the independent principle itself.<sup>64</sup> International Bar Association Code of Minimum Standards of Judicial Independence in article 33 stated that:<sup>65</sup>

“It should be recognized that judicial independence does not render the judges free from public accountability, however the press other institutions should be aware of the potential conflict between judicial independent and excessive pressure on judges”.

Based on the provisions above, the independence of judicial power cannot be defined absolutely. One of the important formulations International Conference Commission of Jurists is “independent does

<sup>63</sup>The principle of *Asa Resjudicata Facit Jus*.

<sup>64</sup>Aminuddin Ilmar, ---. *Pasca Amandemnt UUD 1945 Sudahkan Menciptakan Independensi Dan Akuntabilitas Kekuasaan Kehakiman*, Jakarta. Komisi Hukum Nasional RI. p. 98

<sup>65</sup> International Bar Association Code of Minimum Standards Judicial Independence, 22<sup>nd</sup> October 1985, H. 11.

not mean that the judges is entitled to act in an arbitrary manner. Therefore, since the beginning of the idea to amendment of 1945 Constitution has emerged the awareness, as a balance the independent principle and to keep the authority of judicial power. It should be held external supervision effectively in the field of ethic code of judges as like as in several countries by establishment of Judicial Commission.

The form of public accountability on supervision reflected although the judges as a holder of judicial authority must be independent. But the independence of judges should not be making the judges without supervision. In fact, the existence of external supervision is absolutely necessary, which is independent and free from intervention in order to uphold the honor, dignity and maintain the behavior of judges.

## 2. The Urgency of Supervision of Constitutional Court Judges

The judge profession is a noble profession with aims to uphold the truth and justice. As a profession, the judge is not only a job that has economic value, but also the values of goodness, truth, justice, safety, comfort, and welfare. All those values owned by the whole of people

that regardless of the racial background, skin color, ethnicity



culture, social status, economic, educational, politics and religious backgrounds.<sup>66</sup>

Otherwise, the judge would face million obstacles and temptations in realizing the values. Indeed, every litigant would always expect the victory and success over their case. Yet, there must be several evidences to be proved before the judge, either the written evidence or witnesses. Nevertheless, it is not a few people who use the illegitimate ways, such as bribery and performing the collusion with the law enforcers. On other hand, there are also the law enforces who took the advantages by utilizing the momentum by committing the coercion and extortion upon the litigants in order to pay the amount of the material.<sup>67</sup>

The factor of political power also worsens the image of the court. The independence of judges is powerless when there are a lot of interferences and have to deal with the power. Furthermore, there are various cases which are surrounded with political nuances that have strong relations with the political parties such as general election that cannot be separated from corruption issue. In particular case, the corruption involves either in the legislative body, executive body, even the judicial body.<sup>68</sup>

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<sup>66</sup>Amin Abdullah, 2009. *Komisi Yudisial Sebagai Pengawal Hakim Dalam Penegakan Hukum dan*

With respect to the external factors of judges, there are also the internal factors of judges which strongly influenced the law enforcement. The numbers of bribery cases, collusions and judicial mafia which occurred are caused by the opportunities of offences which occasionally provided by the judges. Nonetheless, those temptations would be meaningless unless the judges have embedded the values of kindness, honesty, trust, and responsibility in carrying out the mandate.

Although the judge has a good moral, faith, and knowledge, yet the judge was ordinary person who was not immune from the mistakes in handling a case. Based on that assumption, therefore when the court made a mistake in the first level, then the decision can still be reviewed and appealed at the appeal court level. However, when the judge in the appeal court level is still made a mistake, then it still can be filed further in the level of cassation in the Supreme Court which lead by the senior judge in order to stipulate the decision in accordance with the truth and justice.<sup>69</sup>

The nullification of Law No. 4 of 2014 on the second amendment of Law no. 24 of 2003 on the Constitutional Court is strongly emphasized that the supervision of Constitutional Court would be conducted only by the Honorary Council of Constitutional Court. Yet the internal supervision was considered as an effective way to supervise the Constitutional Court.

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<sup>69</sup> Amin Abdullah, *Op.cit.*, p. 163

The Constitutional Court does not want to be supervised by an external supervision. This is proven when the Constitutional Court reviewed the Law No. 22 Year 2004 on Judicial Commission. The Constitutional Court nullified the authority of Judicial Commission to conduct the supervision upon the Constitutional Court. Moreover, the Constitutional Court became a powerful institution. The powerful of Constitutional Court was even proven when the authority to settle the regional election dispute was diverted to Constitutional Court which previously authorized by the Supreme Court. It could be imagined that the fate of hundreds dispute of regional election throughout Indonesia will be decided only by nine Constitutional Court judges.<sup>70</sup>

Furthermore, when MK is very powerful and there is no supervision body which conduct the checks and balances, then there is no agency that supervise the conduct of judges, the judges are potentially abuse power. The arrest of Akil Mochtar by the Corruption Eradication Commission is a proof of abuse of power. Thus, the Constitutional Court should be supervised by internal and external supervision institution.

According to Ni'matul Huda as a constitutional experts said that presenting an independent institution like MKHK which together formed the Constitutional Court and the Judicial Commission to

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<sup>70</sup>The settlement of regional election result is the authority of Constitutional Court before nullification by Constitutional Court itself in 2014.

supervise the behavior of constitutional justice is right way, because the Constitutional Court judges should be supervised internally and externally. In the future, it should have the 1945 Constitution amendment to examine and reconstruct the institution of judicial power, ranging from the recruitment of candidates for judges to the supervision of all judges.<sup>71</sup>

The crime happen is not only cause of the intention of the offender but also there is opportunity to commit the crime. In line with the Constitutional Court judges who has not the intention to commit a crime or abuse power but when there is opportunity, as a human being it's difficult to avoid. It could be said that although the selection process to be a Constitutional Court judges is definitely hard, but if it is running without any supervision then the possibility abuse of power could emerge. Thus, the establishment of institution whose authority to supervise the Constitutional Court judges is urgently needed regarding on the reason that every individual is being vulnerable to breach the law.

As a human being the judges have to always remember their weaknesses. Judicial Commission is the representative of society to

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<sup>71</sup>Ni'matul Huda, Problematika Substantif Perppu Nomor 1 Tahun 2013 tentang Mahkamah Konstitusi, *Jurnal Konstitusi*. Nomor: 412/AU/P2MI-LIPI/04/2012. Jakarta. Kepaniteraan dan

supervise the judges with their witnesses.<sup>72</sup> The duty and authority to supervise the judges implemented by Judicial Commission, namely: examine, research, and do the verification for the behavior of judges. Moreover, by that supervision the honor and prestige of judges in judicial institution would always exist.<sup>73</sup>

There are some important things regarding supervision, namely:<sup>74</sup>

- 1) *First*, philosophically the meaning of supervision intended to uphold the accountability of judicial power by supervising them.
- 2) *Second*, a least, there is a focus in the process on supervision for the technique of judiciary process, administrative and also the behavior of judges.

The judges have a strategic function in effort to enforce law and justice, its as a consequence of rule of law which is used in Indonesia. However, it needs supervision of judges behaviour in court session or outside session. There are some object of judges supervision, namely:<sup>75</sup>

- a. The supervision in the judicial technique. It concerns about judges duties, namely: receive, examine, adjudicate and settle

<sup>72</sup>Mardjono Reksodiputro, 2009. *Komisi Yudisial Dalam Rangka Menegakkan Kehormatan dan Keluhuran Martabat Serta Menjaga Perilaku Hakim di Indonesia*, Jakarta. Bunga Rampai Refleksi Satu Tahun Komisi Yudisial RI. p. 47

<sup>73</sup>Arbijoto, 2009. *Pengawasan Hakim dan Pengaturannya Dalam Perspektif Independensi Hakim*, Jakarta. Bunga Rampai Refleksi Satu Tahun Komisi Yudisial RI. p. 57

<sup>74</sup>Bambang Wijdojanto, 2009. *Komisi Yudisial: Check and Balances dan Urgensi Kewenangan Pengawasan*, Jakarta. Bunga Rampai Refleksi Satu Tahun Komisi Yudisial RI. p. 122

<sup>75</sup>Rishan Idul, *Op.cit.*, p. 75-76

the dispute which proposed to them. In this context, it also includes the implementation of the decision. So the purpose of supervision in this context is to improve the quality of judge's decision.

- b. The supervision in the judicial administrative. It concerns on the duties of clerk in the judicial institution. The administrative must be separated with general administrative which has no relation with the case within the court session. The decision of court would not produce best decision when the administrative court was ignored.
- c. The supervision upon the ethic and behaviour of judges either inside and outside the court session in order to keep the honor and prestige the judicial institution.
- d. The supervision upon the activity of the official of judicial institution. It concerns on the supervision upon the official in judicial institution including the clerk of court.

With respect to Akil Mochtar case on the bribery offence in settling the dispute of general election in 2013 ago, it shows that there is no guarantee of good personality of judges even in the level of Constitutional Court judges. The legal apparatus often commit professional crimes. The profesional crime is the crime which is committed by someone who possess the profession by abusing their

their authority as a judge in settling the dispute with receiving money from the suspect.<sup>76</sup>

If we discuss about the law enforcement in this state, only one word we can say that is judicial mafia. The word of judicial mafia has becoming the crucial problem in the society for a long time. Ironically, the law enforcers always use many reasons to proof that there is no practice of judicial mafia in judicial institution. Moreover, they argued that the judicial mafia was not committed by the whole of judicial official, but only the particular person.<sup>77</sup>

In fact, from long time ago, the public has been worried to the big authority of the Constitutional Court. Therefore it was becoming the reason why the Constitutional Court is totally urgent to be supervised, namely:

- *First*, the Constitutional Court is a state institution that has big authority, and its decision is final and binding. Nevertheless it established without supervision by external institution and as a result is the Constitutional Court became a super body.
- *Second*, there are some decisions of Constitutional Court which are considered as "*Ultra Petita*" that it seem the judges intervention the legislative making power.

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<sup>76</sup>Jeremies Lemek, 2007. *Mencari Keadilan Pandangan Kritis Terhadap Penegakkan Hukum di Indonesia*, Jakarta. Galang Press. p. 114

<sup>77</sup>*Ibid.*, p. 117

- *Third*, there are some decisions of Constitutional Court which are not suitable with the principle of "*nemo judex in causa sua*". It means that the prohibition for Constitutional Court to decide the matter which has relation to Constitutional Court.
- *Fourth*, the behaviour of Constitutional Court Judges often againsts the ethic code of Judges. As like as bribery, coercion etc. Indeed, the behaviour of Constitutional Court judges should have good integrity and good personality, fair, and considered as the statesmen who is master of Constitution.

In the context of supremacy of law, the supervision is essentially needed in order to realize the trustable court. Hence, all of state officials including judges should not refuse to be supervised by other institutions. The aim of supervision is to control the act of official's state in order to avoid the abuse of power.

In 2006, the Constitutional Court nullified the function of Judicial Commission to supervise the Constitutional Court judges as mentioned in Law No. 22 of 2004 on Judicial Commission. Furthermore, after Akil Mochtar case, DPR and Government signed the Law No. 4 of 2014 on Constitutional Court which regulates the supervision of Constitutional Court, yet it has been nullified by Constitutional Court. It means that the Constitutional Court tends to be a super body.



### 3. The Supervision of Constitutional Court by Judicial Commission

Nowadays, the judicial power did not implement the checks and balances system. The consequence is the emergence of the judicial corruption. The existence of Judicial Commission is to supervise and balance the bodies in judicial institution, namely Supreme Court, the court bodies under Supreme Court and Constitutional Court. The existence of Judicial Commission is considered as a “supporting element” in order to guarantee the objectivity of judicial function to achieve clean and trustable judicial institution.<sup>78</sup>

In order to Judicial Commission have an authority to supervise Constitutional Court Judges, Article 24b of the 1945 Constitution should be amended which emphasizes that the object of Judicial supervision covers all judges, including Constitutional Court judges.<sup>79</sup> Therefore, if still only mentioned in some act it will be nullified again by Constitutional Court.<sup>80</sup>

The realization of the concept of supervision, it is stated on Article 24B of 1945 Constitution. It is stated that:<sup>81</sup>

<sup>78</sup>Mustafa Abdullah, 2009. *Kewenangan Mengusulkan Calon Hakim Agung dan Kontribusinya Dalam Menciptakan Hakim Agung Yang Progresif*, Jakarta. Bunga Rampai Refleksi Satu Tahun Komisi Yudisial RI. p. 29

<sup>79</sup>*Ibid.*,

<sup>80</sup>Mustafa Abdullah, 2009. *Kewenangan Mengusulkan Calon Hakim Agung dan Kontribusinya Dalam Menciptakan Hakim Agung Yang Progresif*, Jakarta. Bunga Rampai Refleksi Satu Tahun Komisi Yudisial RI. p. 29

“There shall be an independent Judicial Commission which shall possess the authority to propose candidates for appointment as justices of the Supreme Court and shall possess further authority to maintain and ensure the honour, dignity and behaviour of judges”

Judicial Commission is regulated on 1945 Constitution in Article 24B that include fourth Paragraph, namely:<sup>82</sup>

- a. There shall be an independent Judicial Commission which shall possess the authority to propose candidates for appointment of justices of the Supreme Court and shall possess further authority to maintain and ensure the honour, dignity and behaviour of judges.
- b. The members of the Judicial Commission shall possess legal knowledge and experience and shall be persons of integrity with a personality that is not dishonourable.
- c. The members of the Judicial Commission shall be appointment and dismissed by the President with the approval of the DPR.
- d. The structure, composition and membership of the Judicial Commission shall be regulated by law.

<sup>82</sup>Taufik Sri Soemantri, 2009. *Kedudukan, dan Wewenang dan Fungsi Komisi Yudisial Dalam Sistem Ketatanegaraan Indonesia*, Jakarta. Bunga Rampai Refleksi Satu Tahun Komisi Yudisial RI. p. 26

The supervision is conducted in order to keep the honor of judges. In the implementation of the supervision, the Judicial Commission must:<sup>83</sup>

- a. Receive tip-offs from the public about the attitudes of judges;
- b. Ask for periodic reports from court bodies about the attitudes of judges;
- c. Examine alleged violations of codes of ethic by judges;
- d. Summon and ask for information from judges who have allegedly violated codes of ethic; and
- e. Make reports on the result of examination in the form of recommendations to the Supreme Court and/or Constitutional Court, with copies addressed to the President and the DPR.

The fundamental reason of the establishment of Judicial Commission is to improve the quality of the performance of the judicial institution. Hopefully, it will be more effective in carrying out the duties and authorities. In the Indonesian context, there are several reasons on the establishment of the Judicial Commission, namely:<sup>84</sup>

- 1) *First*, Indonesia is a democratic state. In a democratic state, the state must ensure the independent judicial power to run the judiciary in order to uphold law and justice.

<sup>83</sup> Taufik Sri Soemantri, *Op.cit.*, p. 29

<sup>84</sup> Bambang Wijdojanto, *Op.cit.*, p. 112-113

- 2) *Second*, in order to realize the establishment of an independent judicial authority, the Supreme Court and Constitutional Court should establish several efforts with aims to uphold the honorary of judges, dignity and maintain the behavior of judges.
- 3) *Third*, the institution of judicial power has the limitation and faces various problems in implementing its duties.

With respect to the position of Judicial Commission as the external supervision of Constitutional Court judges, Jimly Asshiddiqie states:<sup>85</sup>

“From the provisions of the Judicial Commission, it can be understood that the position of judge in the conception of 1945 Constitution is the honorary positions that needs to be maintained and upheld its honor by an institution that is also independent, that is Judicial Commission which is also the advance development of the idea of establishment of the Supreme Court Honorary Council. Therefore, the existence of this institution is formed outside the Supreme Court. Hence, the subject of supervision can be extended to all judges, including the Constitutional Court and judges throughout Indonesia.”

Furthermore Jimly Asshiddiqie also states:<sup>86</sup>

“Based on the literal interpretation, the Constitutional Court is also incorporated into the definition of judges who are supervised according to the provisions in Article 24B Paragraph 1 of 1945 Constitution. Therefore the Judicial Commission interprets the word of “Judge” in Article 24B Paragraph 1 of the 1945

<sup>85</sup>Jimly Asshiddiqie, 2005. *Kedudukan Mahkamah Konstitusi dalam Struktur Ketatanegaraan Indonesia*, Jakarta. Bunga Rampai Mahkamah Konstitusi RI, Setjen dan Kepaniteraan Mahkamah Konstitusi RI. p. 35

<sup>86</sup>Jimly Asshiddiqie, *Op.cit.*, p. 38

Constitution in broad view to cover all judges in the Supreme Court and all the judges on the Constitutional Court. Therefore, the Judicial Commission has a function to supervise the Constitutional Court Judges through its authority to maintain and uphold the honor, dignity, and the behavior of the Constitutional Court”.

This opinion is emphasized by M. Laica Marzuki opinion:<sup>87</sup>

“The 1945 Constitution provides the authority to the Judicial Commission to maintain and uphold the honor, dignity and behavior of judges. It is related to the authority of commission to supervise the behavior of judges. The supervision also applies to the behavior of the Constitutional Court Judges”.

In order to uphold the supremacy of law, the Constitutional Court is expected not trapped into subjective arguments in making decision process. The 1945 Constitution explicitly regulates the authority of Judicial Commission to supervise all of judges. Article 24 of 1945 Constitution Paragraph 1 and 2 mentioned that “Judicial power shall be independent and shall possess the power to organise the judicature in order to enforce law and justice. In paragraph 2, it is mentioned that “Judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court.”<sup>88</sup>

<sup>87</sup>M. Laica Marzuki, 2006. Komisi Yudisial dan relevansinya dengan Kekuasaan Kehakiman. Jakarta. *Jurnal Konstitusi*. Vol. VI No. 2. p. 86

When we look at carefully the provisions of the 1945 Constitution explicitly states that judicial power is conducted by the Supreme Court and court bodies under the Supreme Court and also Constitutional Court. Thus, as the part of judicial authority, the Constitutional Court judges can not be excluded from the definition of a judge in Article 24B Paragraph 1 of 1945 Constitution. Article 24 Paragraph 2 is clearly mentioned and emphasized the judge is all of judges.

The presence of Judicial Commission in judicial institution is not just law enforcement reform. But also as political consequence of the amendment of 1945 Constitution which is purpose to building a system check and balances in judicial institution. The existence of the Judicial Commission has legal power strongly after the Judicial Commission is incorporated into 1945 Constitution.<sup>89</sup>

The existence of the Judicial Commission has a strategic function to establish checks and balances system in judicial institution. Through supervision authority, the Judicial Commission is expected not only to maintain the uphold of honor, dignity and behavior of judges, but also could be improvement the image of the judicial power, court quality, impartial and transparent in judicial process to establish a good and trustable court.<sup>90</sup>

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<sup>89</sup> Bambang Wijdojanto, *Op.cit.*, p. 111

<sup>90</sup> *Ibid.*, p. 127