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Defining Judicial Accountability Post Political Transition in Indonesia

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ABSTRACT

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, closing dark memories in the past. Besides, in Art 24 (2) of the 1945 Constitution decide 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 some problem which remains, such as (i) the absence of a permanent format regarding the institutional relationship between the Supreme Court, the Constitutional Court, and Judicial Commission, and (ii) still many efforts to weaken judiciary through many ways such criminalization of judge. Referring to the problem above, then there are gaps between what "is" and what "ought", among others, First, by changes political configuration that tend to be more democratic, the judiciary should be more autonomous. 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 reviews and describes in-depth about how to implement constitutional guarantees of judicial independence after the political transition and conceptualize its order to strengthening rule of law in Indonesia

Keywords: *judicial independence, judicial accountability, political transition*

1. INTRODUCTION

After the fall of the New Order, the 1945 Constitution secure 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 on medio 1999-2002. 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." However, eventhough on constitutional stage has guaranteed independence of judiciary, but many legislation and regulations relating to judiciary still remais contains several problems such as (i) some legislation not syncronized 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 court 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,[1] but it still often received pressure and resistance especially through judicial review on those act. For example, several supreme judges submitted a petition for judicial review on Judicial Commision 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 watched 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. [2] Therefore, another court reform law package such as Supreme Court Act on 2009, Judiary Act on 2009 and Judicial Commission Act on 2011 and Constitutional Court Act on 2011 are existed to rearrange the relationship between judiciary and judicial commision after Constitutional Cort Decision No. 005/PUU-IV/2006.[3] However, on the other hand another court reform law package such as Constitutional Court Act on 2011, Juvenile Justice System Act on 2012, and the Supreme Court Bill in 2011 brought legal policy which has direction to restrain their independecy especially in decisional powers. Through Constitutional Court Act on 2011, Juvenile Justice System Act on 2012, and the Supreme Court Bill in 2011, judge prohibit to made court decision which exceed the limit (ultra petita). If court make decision that can cause chaos situation, then the judge can be punish by through criminal sanction. 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 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 legislator, and c) creating of norms as a substitute for the norms of laws that are declared contrary to the 1945 Constitution. In addition, criminalization of judges strictly appears in Juvenile Justice System Act on 2012, by provided 2 (two) years imprisonment or a maximum of Rp200,000,000.00 (two hundred million rupiah) as criminal sanction if judge does not use diversion. 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 2 (two) years imprisonment or a maximum fine IDR 200,000,000.00 (two hundred million rupiah)." [4]

Referring 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 will be more autonomous.[5] 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 constitutional guarantee of independence of judiciary, there will be no legislation which reduced constitutional guarantee. But in reality, many legislation or regulations that still not in line with constitutional guarantee concerning judicial independence. This paper has intent to reviews and describes in depth about how to implement constitutional guarantees of judicial independence and conceptualize ideas to strengthening rule of law in Indonesia.

2. JUDICIAL ACCOUNTABILITY

Accountability is the same as the judicial independence, both of which are important foundations for the rule of law. 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."[6] On a sociological level, the court obtains public trust rather than because of its independence guaranteed through legal norms. Lorne Neudorf argues when the judiciary is either con-sumed or subject to inuence or intimidation by corrupt oficials, 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."[7] Accountability makes the judicial authority's ruling becomes more respected. 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. "[6] 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.[8] 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 "do the right thing" for a judge even though the phrase " the right thing " cannot be measured normatively.[8] Ferejohn and Kramer explained, No one really believes that law is wholly indeterminate, but virtually everyone recognizes that modem jurisprudential tools create a range of legitimate choices in almost any given case. And even those who believe 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.[9]

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).[8] 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.[8]

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.[8] Accountability that is born from within a judge is due to the integrity that is already inherent and "maintained" to remain inherent in him.[8] 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 Judge s 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.[8] 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.

3. DEFINING JUDICIAL ACCOUNTABILITY POST POLITICAL TRANSITION

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 wasconsidered 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. 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’)14 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" [10] Copies of court decisions and other information are not 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. This mistreatment behavior of judicial officials is very obvious in ignorig 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.[11] 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. 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. [12] In addition, the refusal to provide other public information makes the judiciary a bunker of the meaning of "secrecy".[13] 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 free 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 from the clerks himself. 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. [14] 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.[15] 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.[16] 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. [13] 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 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.[17]

After Amendment 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. 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. [18] The next step was taken through Blueprint Book of 2003 on Supreme Court Reform Agenda. In the Blueprint there was a recommendation for DPR, President, and the Supreme Court shall make a rule that grants easier access court information, including court decisions.[19] This was also recommended by Bagir Manan as Chief of Supreme Court; Toton Suprapto and Marianna Sutadi as Junior Chief Justice; and Supreme Court Judge, Abdul Rahman Saleh.[17] One main indicator of success on the Blueprint is forming "rules grant people to have easier access on court decisions."[19] 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 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 haved access to obtain the Constitutional Court Decisions. But, 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".[15]

As a form of follow-up, the Chief Justice formed a Framer Team for the Chief Justice Decree concerning implemented open justice principles, which then resulted in Chief Justice Supreme Court Decree No. 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.[20] Furthermore, there is a paradigm that the publication of court decisions is an additional criminal sanction which stipulated in Art 10 Criminal Code.

In the end, the Chief Justice Supreme Court Decree has set new standards for managing information and public services. the Chief Justice 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.[20] 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, Art 2 Chief Justice of Supreme Court Decree No. 144/KMA/SK/VIII/2007 concerning Information disclosure in the Court : 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.

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.

After establishment Public Service Act of 2009, the Chief Justice Supreme Court issued another Decree No. 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 acountability in Indonesia.

4. CONCLUSION

As a consequence 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. whereas, Accountability of judicial power 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.

However, as a recommendation, that the legislators need to make comprehensive changes relating to the Law relating to Judicial Power such as the Judicial Power Law, the Supreme Court Law, the Constitutional Court Law, the Judicial Law under the Supreme Court, including the Judicial Commission Law. These changes are intended to organize the upstream and downstream sides of the judicial power. The upstream side as intended is related to the filling and structuring of jurisdiction especially with regard to special courts. Meanwhile, the downstream side is related to supervision and dismissal mechanism

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