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## Contradictory Impartiality Principle in the Supervisory System of Constitutional Court Judges

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### Abstrak

Mahkamah Konstitusi (MK) melalui Putusan No. 1-2/ PUU- XII/ 2014 secara substansial mengakibatkan terjadinya kekosongan hukum (*rechtsvacum*) yang berfungsi sebagai dasar pijakan lembaga pengawas eksternal hakim konstitusi. Selain itu dengan berlakunya sistem pengawasan hakim MK melalui Dewan Etik dan Majelis Kehormatan Mahkamah Konstitusi (MKMK) dipandang telah menyimpangi asas *nemo judex idoneus in propria causa* karena salah satu anggota MKMK merupakan hakim konstitusi sehingga berakibat mengadili perkaranya sendiri. Metodologi penelitian yang digunakan dalam karya tulis ini yaitu metodologi penelitian hukum normatif dengan pendekatan peraturan perundang-undangan (*statue approach*) dan pendekatan konseptual (*conseptual approach*). Pengawasan hakim MK memerlukan *Reinventing* (pembaharuan hukum) dalam sistem pengawasan hakim MK yaitu memasukkan MA dan DPR sebagai salah satu anggota Dewan Etik, anggota MKMK tidak boleh merangkap jabatan tertentu dan mengganti satu orang Hakim Konstitusi dengan satu orang mantan Hakim Agung. Perubahan yang terjadi dalam pengawasan hakim MK semoga tetap dapat meningkatkan kewibawaan MK dan tetap memegang prinsip imparsialitas.

### Abstract

The Constitutional Court (MK) through Its Verdict No. 1-2 / PUU-XII / 2014 substantially causes a legal vacuum (*rechtsvacum*) serving as the basis for the con-

*stitutional judge's external supervisory body. Besides that, with the application of the Constitutional Court's supervisory system through the Ethics Council and the Constitutional Court Honorary Council (MKMK) is considered to have deviated the principle of nemo judex idoneus in propria causa because one of the members of the MKMK was a constitutional judge, means hearing his own case. The research method used is the normative legal research method with the statue approach and conceptual approach. Supervision of Constitutional Court judges requires Reinventing (legal reform) by involving members of the Supreme Court and members of the House of Representatives as members of the Ethics Council and replacing one Constitutional Judge with one former Supreme Court Judge. The supervision change of the Constitutional Court judges is aimed to increase the authority of the Constitutional Court and to hold the principle of impartiality.*

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## 1. Introduction

The judges have the authority stated in the regulations, such as revoking the freedom of citizens, declaring government arbitrary acts against the community is illegal, able to transfer someone's ownership rights, and to revoke someone's right to live. The judge authority has dual functions, i. e. vertical and horizontal functions, that is, vertically the verdict of a judge will be accounted to the God Almighty while horizontally a judge's decision will be confronted and accounted for humans (Machmudin, 2006).

To carry out all their duties effectively, the judges require the trust of the justice-seeking community to be able to resolve legal cases appropriately and efficiently (Simabura, 2009). The trust given by the judiciary is obtained through the verification that the judges sincerely have upheld the law, the truth and justice correctly and consistently (Muchlis, 2008). Therefore, in upholding law and justice, judges who are at the forefront are expected to have integrity, determination, commitment and enthusiasm to handle the judiciary due to abuse of authority. The public concerns on the behavior of the judge in carrying out his duties and his life in the community.

One of the authority or power abuse that occurs in the judiciary is caused by ineffective internal supervision of judges behavior due to the quality and integrity of the supervisor, closed disciplined examination of judges, and difficult complaint system (Santosa, 2007). In addition, the ineffectiveness of internal supervision was also caused by enthusiasm in defending fellow corps which resulted in the improper punishment. Any efforts to fix bad conditions will be responded by those who take advantages of the condition. In addition, the leadership of law enforcement agencies do not have a strong will to follow up the results of internal supervision of judges, thus it provides opportunities for judges who are proven to have violated the law and code of ethics to get a second chance from the head of the relevant judicial body (Muhtadi, 2015).

The failure of the internal supervision system has not been able to be handled by the environment of the judiciary, although at the same time the concept of one-roof justice or PTSP has been carried out. This condition actually may rise a monopoly of power, thus encouraging the birth of ideas of the establishment of an independent institution outside the Supreme Court, which can

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compensate to avoid monopoly of power in the institution. In order to realize this idea, a Judicial Commission (KY) was formed which was expected to become an external supervisor capable of balancing the exercise of judicial power (Ashar, 2009).

According to the Constitutional Court (MK), the role of KY is supervising individual functionaries of judges within the scope of the judiciary, but is not included in the supervision of MK judges. In practice, the Constitutional Court often face some cases that require a comprehensive legal thinking in answering legal cases submitted to them, which in the end the Constitutional Court sometimes issues decisions that rise pros and cons in the community, as the case in late 2013, the head of the Constitutional Court, Akil Mochtar, committed the code of ethics including overseas trips without the permission of the General Secretary which was held by Janedjri M. Gaffar. In fact, every abroad trips should be reported to the General Secretary. He also owns several luxury cars on behalf of his driver to avoid progressive taxes. And He pointed the clerk to send a letter to the Minister of Home Affairs to postpone the inauguration of the Regent and Deputy Regent of Banyuasin. These act are considered to have violated the Constitutional Court's internal regulations because He did not first consolidate with other judges. Holding a meeting with DPR member CHN (Chairun Nisa) in his office on 9 July 2013 allegedly related to bribery of the case he was handling (Ihsanuddin, 2013).

The pressure on the Constitutional Court against violations of the code of ethics committed by the head of the Constitutional Court made the Constitutional Court immediately establish an Ethics Council. Ethics Board Membership Structure In accordance with Article 6 of PMK No.2 / 2013 consists of 1 (one) former Constitutional Justice, 1 (one) academic and 1 (one) community leader. Furthermore Article 9 paragraph (1) states that the Ethics Board Membership is elected by an inde-

pendent Selection Committee whose membership is elected at the Plenary Meeting of Constitutional Justices. Furthermore, Article 10 states that the Secretariat of the Ethics Council is determined by the Secretary General of the Court.

The existence of the Constitutional Court Ethics Council is clearly inseparable from the structure and actions of the Constitutional Court, especially the Constitutional Justice. It certainly contradicts the independence of the a quo which turns out to be the existence of a Constitutional Justice Ethics Board related to its structure with the Constitutional Court. It proves that the existence of the Constitutional Judges Ethics Council is still an internal part of the Constitutional Court structure based on the regulations, namely the Constitutional Court Regulation and its existence that should be formed with the mechanism of the Constitutional Court, thus Constitutional Justice Ethics Council is classified as the internal supervisor of Ethics Code and Behavior of Constitutional judges.

Internal supervision conducted by the Constitutional Court can degrade the principle of impartiality within the body of the Constitutional Court. As a result of the weak internal supervision, it can lead to various code of ethics violations, which in its enforcements, the judges who are suspected of violating the code of ethics still have the spirit to protect their colleagues. Some examples of code violations cases committed by MK judges include: in 2016 the head of the Constitutional Court, Arief Hidayat, was suspected of violating the code of ethics by making a letter of safekeeping or katebelece to the Deputy Attorney General for Supervision (Jamwas) Widyo Pramono to foster or give a position to his relative. He received a sanction in the form of an oral reprimand from the Ethics Council of the Constitutional Court as written in the Minutes of the Audit Board Ethics Audit Result Number: 13 / Info-III / BAP / DE / 2016. Another case is that the head of the Con-

stitutional Court, Arief Hidayat, is suspected of politics lobbying with the House of Representatives (DPR) in order to be a single candidate for a constitutional judge, but the case was not proven. As stated at the Minutes of Investigation Results of the Constitutional Court Ethics Board Number: 18 / Lap V / BAP / DE / 2018 (Fitri, 2018).

The weak internal supervision carried out by the Ethics Board has led the president to issue Laws and Regulations (PERPPU). The PERPPU Number 1 of 2013 jo. Act Number 4 of 2014 concerning Establishment of PERPPU No. 1 of 2013 concerning the Second Amendment to Act No. 24 of 2003 concerning the Constitutional Court is an effort to save and restore the authority and trust of the public in the Constitutional Court. Considering that the Constitutional Court is a state institution that uphold the Basic Law. One of the legal reforms carried out through the PERPPU is the supervision system in which the Judicial Commission is involved in the formation of a permanent Honorary Council of the Constitutional Court (MKMK).

The Laws and Regulations issued by the president is considered to have intervened the Constitutional Court, for The Constitutional Court on February 14, 2014 through the Constitutional Court Verdict No. 1-2 / PUU-XII / 2014 for judicial review of Act No. 4 of 2014 stated that the provisions contained in the Act No. 4 of 2014 does not have binding legal force. The Constitutional Court Verdict No. 1-2 / PUU-XII / 2014 substantially causes the occurrence of a legal vacuum (*rechtsvacuum*) which functions as a basis for the constitutional judge's external supervisory body to carry out supervision, thus the formation of legal rules relating to the supervision function of the constitutional judge is required. Besides that, with the application of the Constitutional Court supervisory system through the Ethics Council and the MKMK is considered to have deviated the principle of *nemo judex idoneus in propria causa*, because one of the MKMK officials is a constitutional judge,

which means that he is hearing his own case. Therefore, a renewal in the Constitutional Court Judge supervision system is needed, because there is no institution is able to guarantee its management to remain clean without the existence of a proper system or supervision mechanism.

Based on the above elaboration, the problems formulated in this study are What is the correlation between the use of the *Nemo judex idoneus in propria causa* Principle of Law on the Supervision of Constitutional Court Judges, and what is the legal reform in Supervising Constitutional Court Judges to maintain the independence of judicial power after Constitutional Court Verdict No. 1-2 / PUU-XII / 2014.

This study is aimed to find out and analyze the relationship between the principle of *Nemo judex idoneus in propria causa* in the supervision of Constitutional Judges and to find out and analyze new forms of supervision of constitutional Judges in maintaining its independence after the Constitutional Court Verdict No. 1-2 / PUU-XII / 2014.

Previously, Zihan Syahayani in 2014 conducted similar issues which generally has almost the same object, namely the supervision of constitutional judges, but it focuses on the legal reform of the selection system of constitutional judges and supervision of constitutional judges.

## 2. Method

The method used is the normative legal research with the statue approach and conceptual approach. The primary legal material is used in the form of legislation relating to the Constitutional Court, including the 1945 Constitution of the Republic of Indonesia, Act No. 8 of 2011 concerning Amendments to Act No. 24 of 2003 concerning the Constitutional Court, Act No. 48 of 2009 concerning Judicial Power, Constitutional Court Verdict No. 1-2 / PUU-XII / 2014 concerning the Honorary Council of the Constitutional Court (MKMK). The secondary legal material in-

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cludes legal theories from experts in the form of books and legal journals that relate to the concepts and principles of justice, constitutional judges and the supervisory system of judges. The writing begins with the determination of the framework, determination of ideas, collecting relevant literature materials in accordance with the topics raised and collecting legal material. Then the materials collected are reviewed and analyzed to be related into research discussions to draw conclusions (Marzuki, 2012).

### 3. Results and Discussion

#### 3.1. Legal Considerations in the Constitutional Court Verdict Number 1-2/ PUU-XII/ 2014 on the Supervision of Constitutional Court Judges

In principle, Petitioners I and Petitioner II, the case No. 1-2 / PUU-XII / 2014 a quo postulate that: (a) arrangements regarding additional requirements to become constitutional judges; (b) mechanism of the selection and submission process for constitutional judges; (c) constitutional judge supervision system; (d) composition and qualifications of members of the Expert Panel; (e) the formation of an Honorary Council of Constitutional Judges; stipulated in Act No. 4 of 2014 a quo and Judicial Commission authority to participate in supervising Constitutional Court judges is contrary to the 1945 Constitution. The verdict on the case is that the Constitutional Court granted the whole Petitioners' petition.

The role of the Judicial Commission specified in the Act No. 4 of 2014 is an institution authorized to form a Panel of Experts and together with the Constitutional Court to form MKHK. The Court's considerations of this case include: (1) provisions in PERPPU regarding the Judicial Commission involvement in the process of submitting and supervising constitutional judges is very ambiguous; (2) judicial power is an independent power where there is no provision that limits its free-

dom; (3) that the principle of checks and balances is a mechanism applied to regulate the relationship between legislative and executive power which is not aimed at the judicial power.

The above legal considerations of Judges have also been used as judges' legal considerations in the Verdict No. 005 / PUU-IV / 2006, August 23, 2006. In regarding with the Judicial Commission, the Court has decided that the Constitutional Judges is not related to the Judicial Commission authority in Article 24B of the 1945 Constitution. The Judicial Commission is not a supervisory body of the Constitutional Court, which have no an authority to judge whether or not the Court's verdict is a judicial institution's decision.

Meanwhile, addressing the role of Judicial Commission (KY) in the formation of Honorary Council of the Constitutional Judges, the Court considered that the involvement of KY as stipulated in Article 27A paragraph (4) of Act no. 4 of 2014 is a form of legal smuggling. Because, it contradicts Court Verdict Number 005 / PUU-IV / 2006, dated August 23, 2006. The decision confirmed constitutionally that the Constitutional Court Judge was not related to the Judicial Commission which obtained the authority under Article 24B of the 1945 Constitution. Legal Smuggling and other unconstitutional actions must be corrected by the Court through the judicial review to maintain the establishment of the constitution.

#### 3.2. Use of the *Nemo judex idoneus in propria causa* Principle and Its Correlation with the Supervision of Constitutional Court Judges

The principle of *nemo judex idoneus in propria causa* which is also referred to as the principle of *nemo judex in re sua* is a Latin term that means "no one can judge for his own case." In the field of law, *nemo judex in causa* is a principle stating that a person may not be the judge in a case of his own interest. It is one of the principles of the constitutional court proceeding law used in every judicial

process in Indonesia, this principle is an embodiment of the principle of impartiality. According to Act Number 48 of 2009 article 17 paragraph (5) concerning Judicial Power, a judge or registrar is required to resign from a trial if he has a direct or indirect interest in the case being examined, both of his own free will or by the request of the party litigate (Jailani, 2012).

According to Luther's there are 4 reasons stating the importance of the principle of *nemo judex idoneus in propria causa* in law enforcement "The law cannot justify because 1) it is a mere outward framework, insensitive to persons qua persons, and justifications necessarily concerns the self because 2) for the very same reason it is powerless to do away with humans' manipulative self-concern. Neither can it justify because, 3) if used for this purpose, it actually fuels sinners' manipulative self-concern and simultaneously encloses them more and more within themselves and indicts them of acting as judges on their own behalf. Finally, 4) the law cannot justify because, even if it were possible for it not to increase self-seeking, other humans actually use it not with a view to justifying another but to justifying themselves (Malysz, 2007)."

These 4 reasons mean: 1) The law is only an outer framework that is vulnerable to people and justifications for themselves; 2) For the same reason, the law cannot deny the manipulative human egos; 3) In the same case, the law can be used for irresponsible people and act judge his own cases; 4) The law cannot justify, even though it is not aimed to see its owns elf, people may and often use it for the purpose of justifying themselves.

In Luther's point of view, in the principle of *nemo judex idoneus in propria causa* there contained relationship between people (law enforcers) and the laws, which means that everyone cannot be separated from their selfish ego and justification that can interfere one of the objectives of the law to provide justice, as well as judges, even though judges' verdicts judging are considered to be the most correct and fair (the principle of *res judicata*

*pro veritate habetur*) also cannot escape from obfuscation of justice if it gives a decision for its own case.

The principle of *nemo judex idoneus in propria causa* is one of the principles of the constitutional court proceeding used in every judicial process in Indonesia because this principle is a manifestation of the impartiality of the judge as the justice provider. This principle is inherent in the nature of the function, in this case the Constitutional Justice as the party expected to provide a solution to the constitutional case submitted to him. The principle of impartiality is inherent and must be reflected in the stages of the case inspection process to the decision making stage, so that the court's verdict can truly be accepted as a fair legal solution for all litigants and by the wider community in general.

The Judges impartiality indicate that the judges will base their decisions on the law and facts at the trial, or it is not on the basis of association with one of the parties to the litigation, and it is not even the case breakers. The impartiality of constitutional judges has been regulated in Act No.48 of 2009, Act No.24 of 2003 and also in the judge's code of ethics. Impartiality of the judicial process can only be done if the judge can escape from any conflicts of interest or factors of collegial spirit with the litigants, therefore the judge should resign from the trial process when the potential for impartiality occurs. This argument confirms that the judge must not deviate from the principle of *nemo judex idoneus in propria causa* (Maladi, 2010).

The provisions of Article 24C paragraph (1) of the 1945 Constitution authorize the Constitutional Court to examine the Law, but based on the principle of *nemo judex idoneus in propria causa* the Constitutional Court should not examine the material regarding the requirements of being Constitutional Judges and supervision of a constitutional judge (Constitutional Court Decision) No. 1-2 / PUU-XII / 2014, February 13, 2014). Therefore, the examination of Act Number 22 of 2004 concerning the Judicial Commission concerning the

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authority of the Judicial Commission Supervising the Constitutional Court Judgment (Decision of the Constitutional Court No. 005 / PUU-IV / 2006, August 23, 2006) should not be repeated. Thus this argument confirms that the judges must not deviate from the principle of *nemo iudex idoneus in propria causa* in the supervision of Constitutional Court Judges (MK). Therefore reinventing of the supervision of the Constitutional Court (MK) Judge is needed.

### 3.3. Establishment of Law (Reinventing) in the Constitutional Court Judge Supervision System

Reinventing which is called the formation of (new) law by the court or judge must be carried out to fill the legal vacuum because the written law is unclear or does not exist. This functioned is very important to be performed by judges by interpreting, constructing, and refining the law (Kusumaatmadja dkk, 2000).

The paradigm of the constitutional judges supervision system has so far used a repressive internal supervision system with the establishment of the MKMK, whose position is still within the scope of the Constitutional Court organization and is ad hoc. Besides MKMK, in 2013 the Constitutional Court established an Ethics Board which is one of the body established by the Constitutional

Court to maintain and uphold the honor, dignity and code of ethics of constitutional judges. Unlike the ad hoc MKMK, the Ethics Council is permanent (Tutik, 2012).

There are 3 (three) weaknesses in the constitutional judges Supervisory system including: 1). there is no supervision handled by institutions outside the structure to guarantee the independence of the supervisory institution. Although the MKMK and the Ethics Council consists of people outside the structure, but institutionally it remains within the structure. Whereas internal supervision is not effective enough to maintain and uphold the honor, dignity and the Code of Ethics of constitutional Judges. 2). The Ethics Council does not have the authority to conduct training and guidance for constitutional judges as a preventative measure. 3). there is no provision governing the prohibition of concurrent positions for the Ethics Council as a supervisory body for constitutional judges which in fact must also be maintained for independence (Syahayani, 2014).

Relating to the surveillance system. The concept of an ideal supervision is part of an effort to create an ideal concept of justice. To realize the independence of judges, every independence must be balanced with responsibilities in the form of accountability and transparency (Sutiyoso, 2011).

There are 3 (three) substances of legal renewal displayed in the following table:

**Tabel 1.** Reinventing Sistem Pengawasan Hakim MK

	Pasal 5 Keanggotaan Majelis Kehormatan Mahkamah Konstitusi (MKMK).	Pasal 15 Keanggotaan Dewan Etik.
PMK No.2 Tahun 2014 tentang MKMK	(1) satu orang Hakim Konstitusi; (2) satu orang anggota Komisi Yudisial; (3) satu orang mantan Hakim Konstitusi; (4) satu orang Guru Besar dalam bidang hukum; (5) satu orang tokoh masyarakat.	(1) satu orang mantan Hakim Konstitusi; (2) satu orang Guru Besar dalam bidang hukum; (3) satu orang tokoh masyarakat.
Reinventing Sistem Pengawasan Hakim MK	(1) satu orang mantan Hakim Konstitusi; (2) satu orang anggota Komisi Yudisial; (3) satu orang mantan Hakim Agung; (4) satu orang Guru Besar dalam bidang hukum; (5) satu orang tokoh masyarakat.	(1) satu orang mantan hakim konstitusi; (2) satu orang mantan hakim agung; (3) satu orang mantan anggota DPR; (4) satu orang Guru Besar dalam bidang hukum; (5) satu orang tokoh masyarakat.

The above table shows some changes of the supervisory members both from the Ethics Council and the MKMK including the involvement of the Supreme Court and the Parliament elements as one of the Ethics Council members. Thus there are five elements of the Ethics Council Official Members, namely: (1) one former constitutional judge; (2) one former Supreme Court Judge; (3) one former member of the Parliament; (4) one Professor in the field of law; (5) one community leader.

Without the existence of supervisors, the Constitutional Court Judges are trapped in the behavior of power tends to corrupt, and absolute power corrupt absolutely. However, supervisors with inappropriate member composition may harm the principle of impartiality. There were none of the Ethics Council member comes from the Constitutional Court, because the Court has decided that the Constitutional Judge is not related to the authority of the Judicial Commission in Article 24B of the 1945 Constitution. The Verdict number 005 / PUU-IV / 2006, dated August 23, 2006 confirms that Judicial Commission has no right to supervise the Constitutional Court judges, because they are not involved in the selection process of the Constitutional Court Judge candidates.

The appointment of constitutional judges is constitutionally based on Article 24C of the 1945 Constitution of the Republic of Indonesia. Article 24C paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that the Constitutional Court has nine constitutional judges determined by the President, who are proposed by three people each by the Supreme Court, the Parliament, and the President. For the selection procedure, Article 20 paragraph (1) of the Constitutional Court Law stipulates that the provisions regarding the procedure for selection, election and submission of constitutional judges are regulated by each authorized institution, namely the Supreme Court, the Parliament, and the President.

Therefore, the addition of the Ethics Board official members which includes one former Supreme Court judge and one former member of the Legislative in supervising constitutional judges is in accordance with the principle of Impartiality, because the both Supreme Court and the Legislative have duties and authorities in the selection process and appointment of constitutional judges. It is in line with Gaius Lumbun stated that: "... the obligation of the trustee is to give responsibility, present, report, and disclose all activities under his responsibilities to the trustee..." (Lumbun, 2013). This doctrine demands that every power handed over to an institution or a person should be accounted for the implementation of the power.

The Constitutional Court consideration in the Verdict No. 1-2 / PUU-XII / 2014 finally handed over the supervision of the constitutional judge back to the Ethics Council and the Honorary Council of the Constitutional Court (MKMK). Based on article 5 of PMK No.2 of 2014 concerning MKMK that MKMK membership consists of 5 (five) people including (1) one Constitutional Judge; (2) one member of the Judicial Commission; (3) one former Constitutional Judge; (4) one Professor in the field of law; (5) one community leader.

The existence of the Constitutional Judge as a member of MKMK shows the supervision of constitutional judges deviates from the principle of *nemo judex idoneus in propria causa*, because it means that MKMK will try their own cases both institutionally and individually especially external supervision, because internal supervision carried out within the institution can lead to absolute power, arbitrariness and abuse of authority. The replacement of one Constitutional Justice with one former Supreme Court Judge is needed to obey the a quo principle. Because the Supreme Court is one of the institutions that elect Constitutional Judge candidates, this the Supreme Court plays a role in the supervision of the Constitutional Court members.



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### 4. Conclusion

To prevent impartiality, especially in the ethics council which is a form of internal supervision in the constitutional court, the first principle of *nemo iudex in propria causa* has a relationship with the constitutional court supervision system which means that in this case the Ethics Council and MKMK as one of the form of supervision of the constitutional court must be based on the principle of *nemo iudex idoneus in propria causa* in order to maintain the impartiality of the ethics council, the second is to maintain the independence of the judicial power institutions, especially the Constitutional Court, then the renewal of the monitoring system lies in the overhaul of the composition of the Ethics Council and the MKMK which is actually an internal supervision, and strengthen the impartiality of the Ethics Council and MKMK through 2 (two) things, including the elements of the Supreme Court and the Parliament and change the composition of MKMK members.

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