

## **Amendment to Term of Office of Constitutional Court Judges in Indonesia: Reasons, Implications, and Improvement**

**Idul Rishan<sup>1</sup>, Sri Hastuti Puspitasari<sup>2</sup>, Siti Ruhama Mardhatillah<sup>3\*</sup>**

<sup>12</sup>Faculty of Law, Universitas Islam Indonesia, Indonesia

<sup>3</sup>Faculty of Law, University of Groningen, Netherlands

\*email: s.ruhama.mardhatillah@rug.nl

DOI: <https://doi.org/10.31603/variajusticia.v18i1.7236>

*Submitted: May 2022*

*Revised: July 2022*

*Accepted: August 2022*

---

### **ABSTRACT**

**Keywords:**

*Term of Office;  
Constitutional  
Court Judges;  
Judicial  
Independence*

*After the amendment to the Constitutional Court Law, constitutional court judges would be dismissed honorably when they attain the age of 70 (seventy) years old. Problem arises, where the transitional provisions of the third amendment to the Constitutional Court Law are not applicable prospectively but retroactively. Hence, the implementation of the amendment to the term of office of constitutional court judges also brings an impact on the incumbent constitutional judges in the Constitutional Court. This study had three objectives. First, to identify the underlying reasons (ratio-legis) for the amendment to the term of office of constitutional court judges to the maximum age limit of 70 years. Second, to analyze the implications of arranging a maximum age limit of 70 years for the position of constitutional court judges. Third, to recommend alternative arrangements for the term of office of constitutional court judges in Indonesia. This was a legal doctrinal research with a qualitative analysis. The results showed that (1) the reasons for the amendment to the term of office of constitutional court judges are due to the open legal policy, globalization and efforts to build the pro-majoritarian power in the Constitutional Court. (2) This amendment brings implications, i.e., the distortion of judicial independence, conflicts of interest and a declined public trust. (3) Improvements can be made by revising the transitional provisions and trying other alternatives by arranging the term of office of the judges through the constitution.*

---

### **1. INTRODUCTION**

The results of Law Number 7 of 2020 on the Third Amendment to Law Number 24 of 2003 on the Constitutional Court (UU-MK), which had been approved by the President and the House of Representatives (DPR), has resulted in various speculations over the performance and future of the court as the guardian of the constitution. Various criticisms have emerged since this bill was initiated by DPR, leading to controversy because the amendment substance approved was considered not substantive or far from what the court needs. Based on previous research conducted by Chandranegara, one of

the strategic issues that should be taken into account in the amendment to the Law of Constitutional Court is the appointment mechanism of constitutional court judges.<sup>1</sup> Moreover, the results of a study conducted by Faiz showed the selection of constitutional court judges has never been definitive.<sup>2</sup>

At the very least, the amendment material that has caused controversy is the abolition of term of office which was previously regulated in the Constitutional Court Law Number 24 of 2003. In the Constitutional Court Law before the amendment, the term of office of constitutional court judges was determined to be five years and could be re-elected only for the next 1 (one) term.<sup>3</sup> After the amendment to the Constitutional Court Law, constitutional court judges should be dismissed honorably when they attain the age of 70 (seventy) years old.<sup>4</sup>

In the Constitution after the amendment, the arrangement for the term of office of leaders in state institutions with constitutional importance is generally categorized into two forms. It is briefly mentioned in the constitution,<sup>5</sup> and more comprehensively regulated by law through an open legal policy. By referring to such conceptual approach, the term of office of constitutional judges is an open legal policy for legislators.<sup>6</sup> Even if the term of office of constitutional judges belongs to an open legal policy, the arrangement for the term of office of constitutional judges shall be measured by considering the prudence principle. This regards the fact that at the same time, the political process of government legislation shall always guarantee that its arrangement does not directly influence judicial independence and the position of judges.<sup>7</sup>

However, a problem arises, where the transitional provisions of the third amendment to the Constitutional Court Law are not applicable prospectively but retroactively. That is, the implementation of the amendment to the term of office of constitutional court judges also brings an impact on the incumbent constitutional judges in the Constitutional Court. Constitutional judges who are under 70 years old will

---

<sup>1</sup> Ibnu Sina Chandranegara, *Kemerdekaan Kekuasaan Kehakiman Pasca Transisi Politik: Dinamika Penuangan Dan Implementasinya* (Jakarta: UM Jakarta Press, 2018).

<sup>2</sup> Pan Mohamad Faiz, "A Critical Analysis of Judicial Appointment Process and Tenure of Constitutional Justice in Indonesia," *Hasanuddin Law Review* 2, no. 2 (2016): 161, <https://doi.org/http://dx.doi.org/10.20956/halrev.v1i2.301>.

<sup>3</sup> Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill NV, 2015), 35.

<sup>4</sup> Republik Indonesia, "Article 23 Letter (c) of Law No 7 of 2020 on the Third Amendment to Law No. 24 of 2003 Concerning the Constitutional Court".

<sup>5</sup> The authors used an approach of using the results of a study conducted by Anggono 2016. Bayu Dwi Anggono, "The Tenure Arrangement of Primary Constitutional Organ Leaders in Indonesian Constitutional System," *Constitutional Review* 2, no. 1 (2016): 51, <https://doi.org/10.31078/consrev212>.

<sup>6</sup> Appointment and dismissal of constitutional court judges, procedural law, and other conditions concerning the Constitutional Court are regulated by law. Republik Indonesia, "Article 24C Paragraph (6) of the 1945 Constitution".

<sup>7</sup> Kristy Richardson, "A Definition of Judicial Independence," *The University of New England Law Journal* 2, no. 1 (2005): 84, <https://hdl.handle.net/1959.11/1126>.

certainly benefit from the amendment to the Constitutional Court Law. However, such legal politics cannot be interpreted as a normal legislation-making process because this could be a negative precedent for the independence of the Constitutional Court as a judicial institution. It is, in fact, crucial to address the above-mentioned phenomena, especially because at the same time, the Constitutional Court was making judicial review of very popular laws among the community. For example, the KPK (Indonesian Corruption Eradication Commission) Law, the Mineral and Coal Law, and the Omnibus Law on Job Creation. Not to mention when the Constitutional Court hears a case for a judicial review of the Constitutional Court Law, constitutional judges will be involved in conflicts of interests where the judges will hear a case involving their own position-related interests. This concern is very reasonable because the amendment to the Constitutional Court Law potentially becomes a negotiating point for strategic cases in the Constitutional Court which then disturbs both the judges' independence and judicial independence.

This study had three objectives. First, to identify the underlying reasons (*ratio-legis*) for the amendment to the term of office of constitutional court judges to the maximum age limit of 70 years. Second, to analyze the implications of arranging a maximum age limit of 70 years for the position of constitutional court judges. Third, to recommend alternative arrangements for the term of office of constitutional court judges in Indonesia.

## **2. RESEARCH METHOD**

This study uses doctrinal legal research with primary and secondary databases. This study used a historical approach, a statute approach, and a conceptual approach. The data presentation and analysis were carried out qualitatively.

## **3. RESULTS AND DISCUSSION**

### **3.1. Amendment to Term of Office of Constitutional Court Judges**

#### ***3.1.1. Open Legal Policy***

The formulation of Article 24C of the Indonesian Constitution historically did not consider the term of office of constitutional court judges as a part of the intensive and extensive discussion during the political transition period. At the beginning of the first amendment discussion, a provision related to the term of office was only mentioned once by one of the political parties in Indonesia, namely *Partai Demokrasi Indonesia-Perjuangan* (PDI-P) faction represented by I Dewa Gede Palguna, mentioning that "members of the Constitutional Court have a term of office of five years and can be reappointed". This clause was once also an alternative amendment substance as outlined

in the first amendment to Article 24 paragraph (7) of the Constitution.<sup>8</sup> In the third amendment, the provision related to term of office of constitutional court judges was not included as a part of the legal political construction of the amendment to the Constitution.

Another member of the PDI-P faction, Hardjono, mentioned that at that time, there was a proposed idea that the term of office of constitutional court judges should be made longer than the term of office of the President, but again, this idea was not intensively discussed by those responsible for the amendment. Thus, the legal politics at that time stipulated that anything related to the procedures for the appointment, dismissal, and term of office of constitutional court judges should be regulated later through legislators.<sup>9</sup> That is, the arrangement for the term of office of constitutional court judges is an open legal policy for legislators.<sup>10</sup>

The term ‘open legal policy’ can be interpreted as freedom for legislators to make legal policies (laws).<sup>11</sup> An open legal policy or norm under the Constitution allows legislators to interpret and put into a certain law. However, there are two opposite sides of the freedom given by the 1945 Constitution to the legislators. On the one hand, it allows for a broad or flexible opportunity to regulate the state. On the other hand, it has adverse consequences if the legislators act arbitrarily in determining what and how a matter will be regulated.<sup>12</sup>

Nevertheless, the ‘open’ policy should not be interpreted as freedom without limits. In fact, in its interpretations, the Constitutional Court has set some limitations that the legislators should consider in responding to law formation that belongs to an open legal policy. **Table 1** below presents the interpretation pattern of the Constitutional Court to the open legal policy concerning law formation.

**Table 1.** Constitutional Court Interpretations to Open Legal Policy

No	Decision	Constitutional Limits
1	Constitutional Court Decision Number 6/PUU-III/2005	As long as it is neither an arbitrary action ( <i>willekeur</i> ) nor abuse of power ( <i>detournement de pouvoir</i> )

<sup>8</sup> The Constitutional Court of the Republic of Indonesia, *Naskah Komprehensif Buku (VI) Perubahan UUD 1945* (Jakarta: MKRI, 2010), 460.

<sup>9</sup> The Constitutional Court of the Republic of Indonesia, 537–538.

<sup>10</sup> Appointment and dismissal of constitutional court judges, procedural law, and other conditions concerning the Constitutional Court are regulated by law. Republik Indonesia, Article 24C paragraph (6) of the 1945 Constitution.

<sup>11</sup> Mahrus Ali, “Mahkamah Konstitusi Dan Penafsiran Hukum Yang Progresif,” *Jurnal Konstitusi* 7, no. 1 (2010): 75, <https://doi.org/10.31078/jk%25x>.

<sup>12</sup> Iwan Satriawan and Tanto Lailam, “Open Legal Policy in the Decision of the Constitutional Court and Law Formation,” *Jurnal Konstitusi* 16, no. 3 (2019): 573, <https://doi.org/10.31078/jk1636>.

No	Decision			Constitutional Limits
2	Constitutional	Court	Decision	As long as the provisions cause neither institutional problems nor "deadlocks" because it is impossible to implement these provisions, resulting in a constitutional loss for citizens
	Number 7/PUU-XI/2013			
3	Constitutional	Court	Decision	As long as it does not conflict with the Constitution
	Number 30,74/PUU-XII/2014			
4	Constitutional	Court	Decision	As long as it does not violate morality, rationality and justice intolerably
	Number 26/PUU-VII/2009			

**Source:** Data processed by the authors.<sup>13</sup>

Based on the interpretation mentioned above pattern of the Constitutional Court, the implementation of an open legal policy can be limited through four indicators, namely: (1) it does not violate morality, rationality, and justice intolerably (2) it is not impossible to be implemented, thus not causing any legal deadlock (3) it does not exceed the power of the legislators (4) it does not conflict with the Constitution. This way, based on the consideration of the concept above, the amendment to the term of office of a constitutional court judge from five years to a maximum of fifteen years is justified as long as it meets the four principles above.

### 3.1.2. Globalization

Another reason that has the potential to influence the amendment to the term of office of constitutional court judges is globalization. A number of countries that have a constitutional court have arranged for a relatively long term of office of the constitution. Two factors cause this. First, to revitalize the principle of separation of powers where the term of office of judges does not follow the pattern in government positions. Second, to save the state budget because the government does not have to spend budget for appointment and dismissal of court judges in every government period. **Table 2** presents the arrangement for the terms of office of constitutional court judges in various parts of the world.

**Table 2.** Term of Office of Constitutional Court Judges in Several Countries

Constitutional Judge Position	Country	Legal Basis	Arrangement	Term of Office
Europe	Spain	Article 159 of the Constitution	The members of the Constitutional Court shall be appointed for a period of nine years and shall be renewed by thirds every three years.	9 years

<sup>13</sup> Data processed by the author, Republik Indonesia, "Decision of the Constitutional Court Number 6/PUU-III/2005, Decision of the Constitutional Court Number 7/PUU-XI/2013, Decision of the Constitutional Court Number 30, 74/PUU-XII/2014, and Decision of the Constitutional Court Number 26/PUU-VII/2009".

<b>Constitutional Judge Position</b>	<b>Country</b>	<b>Legal Basis</b>	<b>Arrangement</b>	<b>Term of Office</b>
	Italy	Article 135 of the Constitution	The judges of the Constitutional Court are appointed for a period of nine years, as from the date upon which each shall be sworn and they may not be reappointed to this office.	9 years
	Turkey	Article 147 of the Constitution	The members of the Constitutional Court shall be elected for a term of twelve years.	12 years
	Germany	Law (Act on Federal Constitutional Court)	The term of office of the Justices shall be twelve years, though it shall not extend beyond retirement age.	12 years
	Russia	Law (Article 12 Act on Federal Constitutional Court of The Russian Federation)	The age limit for the office of the Judge of the Constitutional Court of the Russian Federation shall be seventy years. The Judge of the Constitutional Court of the Russian Federation shall be considered to have assumed his office from the moment he took the oath. His powers shall terminate on the last day of the month in which he is to attain the age of seventy	12 years
<b>Africa</b>	South Africa	Article 176 of the Constitution	A Constitutional Court judge holds office for a non-renewable term of 12 years, or until they attain the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.	12 years
	Morocco	Article 130 of the Constitution	The Constitutional Court is composed of twelve members appointed for a mandate of nine years non-renewable	9 years
<b>Latin America</b>	Colombia	Article 233 of the Constitution	The judges of the Constitutional Court, the Supreme Court of Justice, and of the Council of State will be elected for eight (8) years. They cannot be reelected and will remain in office as long as they display good behavior, perform satisfactorily, and have not reached mandatory retirement age.	8 years
<b>Asia</b>	South Korea	Article 112 of the Constitution	The term office of the Justices of the Constitutional Courts shall be six years and they may be re-appointed under the conditions as prescribed by act.	6 years

Constitutional Judge Position	Country	Legal Basis	Arrangement	Term of Office
	Mongolia	Article 65 of the Constitution	The Constitutional Tsets (Court) shall be comprised of nine members. The Members of the Constitutional Tsets shall be appointed by the State Great Hural (Parliament) for a term of six years, upon the nomination proposals of three of them by the State Great Hural (Parliament), other three by the President, and another three by the Supreme Court.	6 years
	Thailand	Section 207 of the Constitution	A judge of the Constitutional Court shall hold office for a term of seven years as from the date of appointment by the King and shall hold office for only one term.	7 years

**Source:** Processed by the author<sup>14</sup>

Based on the above data, each of these countries has different patterns of the arrangement for term of office. Some countries have an arrangement at the constitutional level; some others at the statutory level (law). Arrangements at the constitutional level allow for better judicial independence than those at the statutory level (law). Arrangements at the constitutional level will protect the position of judges, preventing the legislators from making amendment any time. It is important, especially for the interests of judges, to limit access from political parties to the position of judges, so judges are not used as a tool to realize certain interests.<sup>15</sup> On the other hand, arrangements through the law are slightly more dynamic. Provisions can be changed any time as deemed necessary, potentially harming judicial independence.

This is related to the extent of the judicial independence in various countries,<sup>16</sup> which are affected by social and political factors as well as judicial history in these countries.<sup>17</sup> However, they actually have the same objective, for instance preventing the court from being controlled when deciding a case.<sup>18</sup> This is the reason that Indonesia has

<sup>14</sup> Processed by the author by referring to several conditions related to the terms of office of constitutional court judges in various countries. comparisons were done using a random sampling method that represented the arrangement of court in several parts of Europe, Africa, Latin America and Asia.

<sup>15</sup> Christopher M Larkins, "Judicial Independence and Democratization; A Theoretical and Conceptual Analysis," *The American Journal of Comparative Law* XLIV, no. 4 (1996): 609, <https://doi.org/10.2307/840623>.

<sup>16</sup> Nuno Garoupa and Tom Ginsburg, "The Comparative Law and Economics of Judicial Councils," *Barkeley Journal of International Law* 27, no. 3 (2009): 3, <https://ssrn.com/abstract=1299887>.

<sup>17</sup> Lorne Neudorf, *The Dynamics of Judicial Independence, A Comparative Study of Courts in Malaysia and Pakistan* (Canada: Springer International Publishing, 2017), 27.

<sup>18</sup> Jed Handelsman Shugerman, *The People's Courts; Pursuing Judicial Independence in America* (United States of America: Harvard University Press, 2012), 7.

a similar arrangement to Germany and Russia, but different from several other countries which regulate the terms of office of constitutional court judges through their constitutions. South Korea is the most moderate example where it regulates the term of office of its judges through the constitution, but the term of office can be extended according to the provisions stipulated by law.

### **3.1.3. Efforts to Develop “Pro Majoritarian”**

Another negative factor is the presence of conflicting interests from the government power behind the amendment of the Constitutional Court Law. Retroactive application of incumbent judges in the Constitutional Court confirms that the government makes efforts to build a "pro majoritarian" power within the Constitutional Court. Spitzer and Genovese's theorization is quite relevant in this context.<sup>19</sup> That is, there are generally two patterns of relationship between the government and the court. First, a confrontational relationship, where the incumbent judges in the court belong to an anti-majoritarian group established based on the selection results during the previous regime. As a consequence, the judges' interpretation in deciding a case often conflicts with the government because the court often plays a role as the antithesis of the majority group.

Meanwhile, the second pattern is the opposite. The government and the court have a cooperative relationship, where the incumbent judges in the court are selected in a way that they belong to the pro-majoritarian group or at least to be a part of a presidential coalition. This can be done by appointing and extending the term of office of the constitutional court judges with the same political preferences as the government. As a consequence, the judges' interpretation tends to be judicial restraint on important cases involving the interests of the government.

In brief, the government tries to obtain as much support from the court as possible when making strategic policies through law formation. Ginsburg and Mustofa revealed that authoritarian rulers often use the court to counter anything that may disrupt their regimes. Courts help regimes maintain social control, attract investors, maintain bureaucratic discipline, adopt unpopular policies, and increase regime legitimacy.<sup>20</sup>

### **3.2. Impact of Amendment to Term of Office of Constitutional Court Judges**

The amendment to the Constitutional Court Law was initially expected to bring positive impacts on the independence of the Constitutional Court. However, the formulation of Article 87 which regulates the transitional provisions, has brought negative impacts on both the Constitutional Court and judicial independence. The authors found three consequences of the amendment to the Constitutional Court Law. First,

---

<sup>19</sup> Robert J. Spitzer and Michael A. Genovese, *The Presidency and the Constitution: Cases and Controversies* (New York: Palgrave Mac Millan, 2005), 12.

<sup>20</sup> Tom Ginsburg and Tamir Moustafa, *Rule by Law, The Politics of Courts in Authoritarian Regimes* (U.K.: Cambridge University Press, 2008), 21.



distortion of judicial independence, second, conflict of interests, and third, decline in public trust in the Constitutional Court.

### ***3.2.1. Distortion of Judicial Independence***

A constitutional problem arises when the legislators stipulate a transitional provision that incumbent constitutional court judges are eligible to end their term of office until they attain the age of 70 years as long as their total term of office does not exceed 15 years. Article 87 letter (b) of the Amendment to the Constitutional Court Law has distorted judicial independence. Fohr studied the pattern of guaranteeing judicial independence which is institutionalized in the political transition period. The results of his research are in line with those of Redish, Feld, and Shetreet, that the turning point of judicial reform always brings an impact on three things, for instance institutional independence, position, and financial administration.<sup>21</sup> Constitutional institutional guarantees the separation of powers with other branches of power.<sup>22</sup> Position is in terms of protection for the appointment, dismissal, and term of office of judges.<sup>23</sup> Financial administration is the presence of autonomy over the governance of the judicial institutions.<sup>24</sup>

The objective is simply to ensure the rule of law and the protection of human rights.<sup>25</sup> Similarly in Indonesia, about 20 years ago during the political transition, the guarantee for judicial independence in Article 24 paragraph (1) of the Constitution brought an impact on institutions and positions as well as a slight impact on financial administration. In terms of judicial independence, it certainly has a consequence on the protection and guarantee of legal certainty for a definitive term of office. That is, even if it is regulated as an open legal policy, the arrangement should not negate the principle of legal certainty and the principle of judicial independence.

The term of office of an incumbent judge cannot be changed, reduced, or extended through law formation or amendment. The transitional provisions as regulated by Article 87 letter (b) are a clear contradiction to Article 24 paragraph (1) of the Indonesian Constitution. This way, this article is a problem in the amendment to the term of office of constitutional judges which is regulated through the amendment to the Constitutional

---

<sup>21</sup> Anja Seibert-Fohr, ed., *Judicial Independence in Transition* (Berlin: Springer-Verlag, 2012), 1279.

<sup>22</sup> Lars P Feld and Stefan Voigt, "Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators," *European Journal of Political Economy* 19 (2003): 497, <https://doi.org/10.1016/j.ejpoleco.2015.01.004>.

<sup>23</sup> Martin Redish, *Judicial Independence and the American Constitution; A Democratic Paradox* (California: Stanford Law Books, 2017), 54.

<sup>24</sup> Shimon Shetreet, *Judges on Trial; The Independence and Accountability of the English Judiciary* (U.K.: Cambridge University Press, 2013), 4–6.

<sup>25</sup> Elin Skaar, *Judicial Independence and Human Rights in Latin America; Violations, Politics, and Prosecution* (New York: Palgrave Macmillan, 2011), 202.

Court Law. This provision has distorted judicial independence and interfered with the enforcement and reform of the court that have been running since the reform era.<sup>26</sup> Thus, even if the arrangement for the term of office of constitutional judges is an open legal policy, the impact of the arrangement is not to be applied to incumbent judges but to be applied prospectively without reducing the independence of the incumbent constitutional court judges until their term of office ends.

### ***3.2.2. Conflict of Interests***

Another impact of the transitional provisions of Article 87 letter (b) of the Amendment to the Constitutional Court Law is on the independence of judges in examining and deciding a case. This is not surprising because incumbent constitutional judges also examine and decide a case on the judicial review of the Constitutional Court Law. As a consequence, constitutional judges, as ones who are directly affected by the amendment to the Constitutional Court Law, will be involved in a conflict of interest. In reviewing the amendment to the Constitutional Court Law, constitutional judges will examine and decide a case involving their own interests.

The third amendment to the Constitutional Court Law is actually similar to the practice found in Hungary and Poland. Government interventions on the role of the court are manifested in a political process of amending the law that regulates the provisions for the appointment of judges. For example, Kosar and Sipulova found that the Orban government in Hungary made an amendment to the regulation by adding more constitutional court judges from eight to fifteen and allowing the ruling party to make direct appointments of new judges.<sup>27</sup> This is similar to Poland, where Wyrzykowski mentioned that the winning party in the election rejected the candidates for judges proposed by the party supporting the previous government. Then the winning party appointed five new constitutional judges to delegitimize the old candidates. The purpose is to help the government have influence on judges when they examine and decide a case involving the interests of the government.<sup>28</sup>

Decline in constitutional democracy always affects the independence of judges and judicial institutions.<sup>29</sup> As one of the efforts to maintain constitutional democracy, an independent court is a key to preventing a decline in democracy. The regime always

---

<sup>26</sup> Melissa Crouch, "The Challenges for Court Reform after Authoritarian Rule: The Role of Specialized Courts in Indonesia," *Constitutional Review* 7, no. 1 (2021): 18, <https://doi.org/10.31078/consrev711>.

<sup>27</sup> David Kosar and Katarina Sipulova, "The Strasbourg Court Meets Abusive Constitutionalism: *Baka v. Hungary and the Rule of Law*," *Hague Journal on the Rule of Law* 10, no. 1 (2018): 83, <https://doi.org/10.1007/s40803-017-0065-y>.

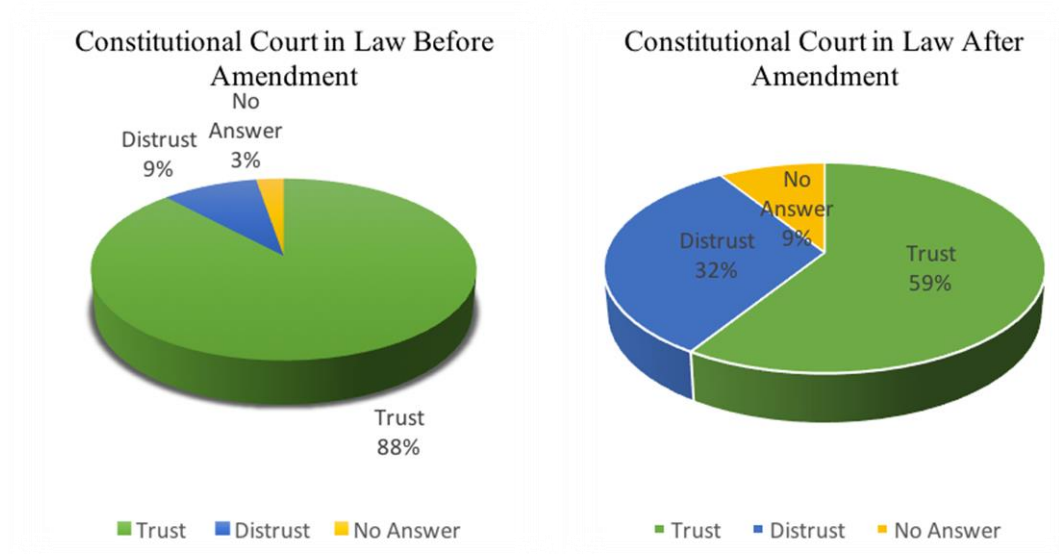
<sup>28</sup> Miroslav Wyrzykowski, "Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland," *Hague Journal on the Rule of Law* 11, no. 2 (2019): 417, <https://doi.org/10.1007/s40803-019-00124-z>.

<sup>29</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (United States of America: Crown Publishing, 2018), 138.

places the court as one of the variables with an ability to legitimize the government's controversial policies.<sup>30</sup> Therefore, to maintain the resilience of democracy and judicial independence, the legal politics of the amendment to the Constitutional Court Law should be able to guarantee that the amendment substances do not affect the independence of judges in examining and deciding on cases.

### 3.2.3. Public Trust

Far from the initial expectations, the results of the amendment to the Constitutional Court Law affected the level of public trust in the Constitutional Court. A survey conducted by the author on the level of public trust showed a decline in the level of public trust by 29% after the enactment of the third amendment Constitutional Court Law. The results of the survey are as follows **Figure 1**.



**Figure 1.** Results of Survey of Public Trust of Constitutional Court<sup>31</sup>

One of the reasons for the decline in the level of public trust in the Constitutional Court after the amendment to the Constitutional Court Law is due to the transitional provisions that benefit the incumbent constitutional judges. Public perception showed that the provisions of Article 87 letter (b) in the Constitutional Court Law are assumed to be a negotiating point for strategic cases that are currently and will be examined by the Constitutional Court. Some of them are the KPK Law, the Omnibus Law on Job Creation as well as the Mineral and Coal Law. It is necessary to note that independence can

<sup>30</sup> Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (United States of America: University of Chicago Press, 2018), 240.

<sup>31</sup> The survey was conducted by the author to determine the level of public trust in the constitutional court before and after the law amendment. the respondents were selected by a random sampling technique. there were a total of 300 respondents, consisting of university students and lecturers in the Faculty of Law of various universities in the Special Region of Yogyakarta. The level of public trust of the respondents was 95% with a margin of error of 2.8%.

enhance the reputation of the government in general. This then answers why various regimes are willing to hand over autonomy to the court.<sup>32</sup> Further, judicial independence is related to greater freedom and economic growth, as the court allows for a mechanism through which investors and citizens can ensure legal certainty and justice through court decisions.<sup>33</sup> This way, the broader construction of judicial independence put emphasis on maintaining public trust in the judicial system and, more broadly, public trust in the government system.<sup>34</sup>

### 3.3. Road Map for Improvement

The above data presentation and analysis show that the transitional provisions of Article 87 letter (b) of the Amendment to the Constitutional Court Law have become a source of problems in relation to the arrangement for the term of office of constitutional court judges. The improvement road map to maintain and restore the Constitutional Court can be carried out in two ways, i.e., short-term improvements and long-term improvements. In the short-term improvement, amendment to the transitional provisions can be made through a legislative review by making these provisions applicable prospectively. It means the amendment to the term of office of constitutional court judges do not affect the term of office of the incumbent judges. Another alternative can be done through a judicial review at the constitutional court. By doing this, it is expected that the Constitutional Court declares Article 87 letter b of the Amendment to the Constitutional Court Law to be clear contradiction to Article 24 paragraph (1) of the Constitution. It is then expected that the provisions are declared to have no binding legal force unless interpreted prospectively.

Meanwhile, the long-term improvements can be made through amendment to the constitution. As explained above, the arrangement through the constitution provides better guarantees and protection for the position of judges, including the appointment, dismissal, and term of office.<sup>35</sup> The guarantee for judicial independence is formulated so as to limit the space for the legislators to the provisions concerning the term of office of constitutional court judges, which could disrupt the independence of judges in examining and deciding a case. By reflecting on the last amendment to the Constitutional Court Law, the results of which are said to be far from strengthening the independence of the Constitutional Court.

---

<sup>32</sup> Randall Peerenboom, ed., *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (U.K.: Cambridge University Press, 2010), 249.

<sup>33</sup> Tom S. Clark, *The Limits of Judicial Independence* (New York: Cambridge University Press, 2011), 264.

<sup>34</sup> Roger Masterman, *The Separation of Powers in the Contemporary Constitution; Judicial Competence and Independence in the United Kingdom* (U.K.: Cambridge University Press, 2011), 212.

<sup>35</sup> Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence," *John M. Olin Law and Economic Working Paper No. 444, Public Law and Legal Theory Working Paper No. 250* (Chicago, 2008), 2.

#### 4. CONCLUSION

The amendment to the Constitutional Court Law especially in relation to the terms of office of constitutional court judges has shown the arrogance of the power of the legislators. Although the provision concerning the terms of office of constitutional court judges are an open legal policy, the implementation should be formulated carefully by considering rationality, morality, and the principle of judicial independence. The result of the amendment to the Constitutional Court Law is initially expected to strengthen judicial independence, but it turns out that the amendment weakens the independence of the Constitutional Court. The problem lies in the transitional provisions that legitimize the incumbent constitutional judges to benefit from the results of the amendment. This makes it evident that the legal politics of the amendment to the Constitutional Court Law is very compromising among the President, the House of Representative (DPR) and the Constitutional Court. It is crucial to make improvements by making amendment to the transitional provisions through legislation or through a judicial review of relevant articles in the Constitutional Court. In the future, it is also crucial to consider the arrangement for the terms of office of constitutional court judges through the Indonesian Constitution to provide better protection for judicial independence.

#### REFERENCES

- Ali, Mahrus. "Mahkamah Konstitusi Dan Penafsiran Hukum Yang Progresif." *Jurnal Konstitusi* 7, no. 1 (2010). <https://doi.org/https://doi.org/10.31078/jk%25x>.
- Anggono, Bayu Dwi. "The Tenure Arrangement of Primary Constitutional Organ Leaders in Indonesian Constitutional System." *Constitutional Review* 2, no. 1 (2016). <https://doi.org/DOI:https://doi.org/10.31078/consrev212>.
- Butt, Simon. *The Constitutional Court and Democracy in Indonesia*. Leiden: Brill NV, 2015.
- Clark, Tom S. *The Limits of Judicial Independence*. New York: Cambridge University Press, 2011.
- Crouch, Melissa. "The Challenges for Court Reform after Authoritarian Rule: The Role of Specialized Courts in Indonesia." *Constitutional Review* 7, no. 1 (2021). <https://doi.org/https://doi.org/10.31078/consrev711>.
- Feld, Lars P, and Stefan Voigt. "Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators." *European Journal of Political Economy* 9 (2003). <https://doi.org/https://doi.org/10.1016/j.ejpoleco.2015.01.004>.
- Garoupa, Nuno, and Tom Ginsburg. "Guarding the Guardians: Judicial Councils and Judicial Independence." *John M. Olin Law and Economic Working Paper No. 444, Public Law and Legal Theory Working Paper No. 250*. Chicago, 2008.
- Garoupa, Nuno, and Tom Ginsburg. "The Comparative Law and Economics of Judicial Councils." *Barkeley Journal of International Law* 27, no. 3 (2009). <https://doi.org/https://ssrn.com/abstract=1299887>.
- Ginsburg, Tom, and Aziz Z. Huq. *How to Save a Constitutional Democracy*. United States of America: University of Chicago Press, 2018.
- Ginsburg, Tom, and Tamir Moustafa. *Rule by Law, The Politics of Courts in*

- Authoritarian Regimes*. U.K.: Cambridge University Press, 2008.
- Ibnu Sina Chandranegara. *Kemerdekaan Kekuasaan Kehakiman Pasca Transisi Politik: Dinamika Penuangan Dan Implementasinya*. Jakarta: UM Jakarta Press, 2018.
- Kosar, David, and Katarina Sipulova. "The Strasbourg Court Meets Abusive Constitutionalism: *Baka v. Hungary and the Rule of Law*." *Hague Journal on the Rule of Law* 10, no. 1 (2018). [https://doi.org/DOI 10.1007/s40803-017-0065-y](https://doi.org/DOI%2010.1007/s40803-017-0065-y).
- Larkins, Christopher M. "Judicial Independence and Democratization; A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law* XLIV, no. 4 (1996). <https://doi.org/https://doi.org/10.2307/840623>.
- Levitsky, Steven, and Daniel Ziblatt. *How Democracies Die*. United States of America: Crown Publishing, 2018.
- Masterman, Roger. *The Separation of Powers in the Contemporary Constitution; Judicial Competence and Independence in the United Kingdom*. U.K.: Cambridge University Press, 2011.
- Neudorf, Lorne. *The Dynamics of Judicial Independence, A Comparative Study of Courts in Malaysia and Pakistan*. Canada: Springer International Publishing, 2017.
- Pan Mohamad Faiz. "A Critical Analysis of Judicial Appointment Process and Tenure of Constitutional Justice in Indonesia." *Hasanuddin Law Review* 2, no. 2 (2016): 161. <https://doi.org/http://dx.doi.org/10.20956/halrev.v1i2.301>.
- Peerenboom, Randall, ed. *Judicial Independence in China: Lessons for Global Rule of Law Promotion*. U.K.: Cambridge University Press, 2010.
- "Processed by the Author by Referring to Several Conditions Related to the Terms of Office of Constitutional Court Judges in Various Countries. Comparisons Were Done Using a Random Sampling Method That Represented the Arrangement of Court in Several Parts ," n.d.
- Redish, Martin. *Judicial Independence and the American Constitution; A Democratic Paradox*. California: Stanford Law Books, 2017.
- Republik Indonesia. Article 23 letter (c) of Law No 7 of 2020 on the Third Amendment to Law No. 24 of 2003 concerning the Constitutional Court (n.d.).
- Republik Indonesia. Article 24C paragraph (6) of the 1945 Constitution (n.d.).
- Republik Indonesia. Decision of the Constitutional Court Number 6/PUU-III/2005, Decision of the Constitutional Court Number 7/PUU-XI/2013, Decision of the Constitutional Court Number 30, 74/PUU-XII/2014, and Decision of the Constitutional Court Number 26/PUU-VII/2009 (n.d.).
- Richardson, Kristy. "A Definition of Judicial Independence." *The University of New England Law Journal* 2, no. 1 (2005). <https://doi.org/https://hdl.handle.net/1959.11/1126>.
- Satriawan, Iwan, and Tanto Lailam. "Open Legal Policy in the Decision of the Constitutional Court and Law Formation." *Jurnal Konstitusi* 16, no. 3 (2019). <https://doi.org/https://doi.org/10.31078/jk1636>.
- Seibert-Fohr, Anja, ed. *Judicial Independence in Transition*. Berlin: Springer-Verlag, 2012.
- Shetreet, Shimon. *Judges on Trial; The Independence and Accountability of the English Judiciary*. U.K.: Cambridge University Press, 2013.
- Shugerman, Jed Handelsman. *The People's Courts; Pursuing Judicial Independence in America*. United States of America: Harvard University Press, 2012.
- Skaar, Elin. *Judicial Independence and Human Rights in Latin America; Violations, Politics, and Prosecution*. New York: Palgrave Macmillan, 2011.

Spitzer, Robert J., and Michael A. Genovese. *The Presidency and the Constitution; Cases and Controversies*. New York: Palgrave Mac Millan, 2005.

The Constitutional Court of the Republic of Indonesia. *Naskah Komprehensif Buku (VI) Perubahan UUD 1945*. Jakarta: MKRI, 2010.

“The Survey Was Conducted by the Author to Determine the Level of Public Trust in the Constitutional Court before and after the Law Amendment. The Respondents Were Selected by a Random Sampling Technique. There Were a Total of 300 Respondents, Consisting O,” n.d.

Wyrzykowski, Miroslav. “Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland.” *Hague Journal on the Rule of Law* 11, no. 2 (2019). <https://doi.org/https://doi.org/10.1007/s40803-019-00124-z>.



This work is licensed under a Creative Commons Attribution 4.0 International License

---