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Revista de Antropología, Ciencias de la Comunicación y de la Información, Filosofía,  
Lingüística y Semiótica, Problemas del Desarrollo, la Ciencia y la Tecnología

Año 35, 2019, Especial N°

# 19

Revista de Ciencias Humanas y Sociales

ISSN 1012-1587/ ISSNe: 2477-9385

Depósito Legal pp 198402ZU45



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# REGULATION AND IMPLEMENTATION OF INDO- NESIAN JUDICIAL INDEPENDENCE

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## Abstrac

The article's objective is to explore and analyze the development of regulation Indonesian independence judiciary in every phase of government since Indonesia gained independence in 1945 until the reform era in 1999. Even though 1945 constitutions was stipulated in article 24 that Indonesian judiciary must be free from any kinds of influences, in every phase of government before reform era, executive directly influenced in regulation or in law enforcement towards independence judiciary. In addition, this paper seeks to analyze whether after reform era Indonesian judges are influenced by Supreme Court when they make decision and how judicial commission role to protect honorable of judges from breach code of judicial conduct. By using descriptive qualitative analysis, the result shows that Indonesia has made regulation to keep independence judicial in 1945 Constitution, Law No 48 of 2009, Law No. 35 of 2009. Indonesia has guarantee Independence Judicial through provision. However, there is a space may undirectly influence when judge in district Court or Appeal Court will make decision which is probably a case close to or by order from one of the heads of judicial or non-judicial in Supreme Court. Judge became becarefull in make decision, keep the activities based on code of conduct and attitude guideline of judges inside and outside of the court because under Supreme Court and Judicial Commision surveillance. Some recommendation that can be take into consideration, such as to revise Law No. 18 of 2011 that judicial commission could involve in selection candidate district judges with deep investigate about background information candidate district judges and revise Law No.48 of 2009 to make judiciary organitation just like in Netherland which is separated from Supreme Court, concern the administration and

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management of the organization of the judiciary and independent body for the recruitment/selection of judges (commission for the selection of members of the judiciary) and another independent body for training of judges.

Keyword : Independence Judiciary, Judges, Supreme Court, Judicial Commission, Code of Judicial Conduct.

## REGULACIÓN E IMPLEMENTACIÓN DE INDONESIOS INDEPENDENCIA JUDICIAL

### Resumen

El objetivo del artículo es explorar y analizar el desarrollo de la regulación del poder judicial de independencia de Indonesia en cada fase del gobierno desde que Indonesia obtuvo su independencia en 1945 hasta la era de la reforma en 1999. A pesar de que las constituciones de 1945 se estipularon en el artículo 24 que el poder judicial de Indonesia debe estar libre de cualquier tipo de influencias, en cada fase del gobierno antes de la era de la reforma, el ejecutivo influyó directamente en la regulación o en la aplicación de la ley hacia el poder judicial de independencia. Además, este documento busca analizar si después de la era de la reforma los jueces indonesios están influenciados por la Corte Suprema cuando toman una decisión y cómo el papel de la comisión judicial para proteger a los jueces honorables del incumplimiento del código de conducta judicial. Mediante el uso de un análisis cualitativo descriptivo, el resultado muestra que Indonesia ha hecho una regulación para mantener la independencia judicial en 1945 Constitución, Ley No 48 de 2009, Ley No. 35 de 2009. Indonesia ha garantizado la Independencia Judicial a través de la disposición. Sin embargo, hay un espacio que puede influir indirectamente cuando el juez en el Tribunal de distrito o el Tribunal de Apelaciones tomará una decisión que probablemente sea un caso cercano o por orden de uno de los jefes judiciales o no judiciales en la Corte Suprema. El juez se volvió

cuidadoso al tomar una decisión, mantener las actividades basadas en el código de conducta y la guía de actitud de los jueces dentro y fuera de la corte porque bajo la supervisión de la Corte Suprema y la Comisión Judicial. Algunas recomendaciones que pueden tomarse en consideración, como revisar la Ley Núm. 18 de 2011 que la comisión judicial podría involucrar en la selección de jueces de distrito candidatos con una investigación profunda sobre los jueces de distrito candidatos de información de antecedentes y revisar la Ley Núm. 48 de 2009 para hacer la organización judicial Al igual que en Holanda, que está separada de la Corte Suprema, se refiere a la administración y gestión de la organización del poder judicial y el organismo independiente para el reclutamiento / selección de jueces (comisión para la selección de miembros del poder judicial) y otro organismo independiente para la capacitación de jueces

Palabra clave: Poder Judicial de la Independencia, Jueces, Tribunal Supremo, Comisión Judicial, Código de Conducta Judicial.

## Introduction

One of the institutions that has a significant role in Indonesian law enforcement is judiciary. Judges assume an important position to enforce the law. People who are looking for justice could get through judge. Therefore, judges must be independent in making decisions. Judiciary independency means that there is not intervention the court process from executive or other powers, either directly or indirectly, except as allowed by law . It is regulated in Indonesian constitution article 24 . Indonesian gained independence in 1945 and since then Indonesia has regulated judges independency in constitution. From Old Era or Orde Lama , to New era or Orde Baru until the Reform Era , each phase has respective regulations. It is interesting when there was a shift from from Orde Baru to the Reform Era in that in New Era or Orde Baru, Ministry of Justice was the responsible institution for Judiciary. Meanwhile in Reform Era, it was quite different. There were significant changes that Supreme Court to be an institution was responsible in judiciary. It is regulated Law number 35 of 1999. These changes have raised optimism for Court institution. Supreme Court responsible of recruitment, promotion and salary of judges. However, there were people worry about this situation. It may raise new problem that independency of judiciary is just shifted from one hand to another hand, because Supreme Court plays a major role in determining recruitment, promotion and salary of judges. Moreover, there were also new development,

Indonesia made judicial commission. It is regulated in 24 B article Indonesian Constitution, and law number 22 of 2004 with amendments law number 18 of 2011 about judicial commission. One of the authorization of this body is to protect, enforce of judges' ethics and attitudes. The problems has arisen is, whether judicial commission may protect judges or influenced the independence judges, because judge will probably is called by judicial commission after they make decision and there is a party who involve a case dissatisfaction about decisions made by judges, afterwards they make report to judicial commission.

## Materials and Methods

The method employed in this research is normative juridical, literature study by looking for relevant legislations towards Indonesian judicial independence and Judicial Commission, and also compares with provision in Netherland particularly about judiciary organization which strengthens Netherland reform in Judicial independence. Materials is taken from references and annual Judicial Commission report from 2010 to 2017. Result and Discussion

### A. Judges Regulation System Under Supreme Court may Guarantee Judicial Independence and influence when judges make decision.

Every phase of Indonesian government has different roles in judicial independence. During the period of old era or orde lama, from 1945 to 1965, Indonesian independence judiciary was intervened by the govern

Syaiful Bakhri, Kebijakan kriminal dalam Perspektif Pembaruan Sistem Peradilan Pidana Indonesia, Total Media P3IH UMJ, Jakarta, 2010, hlm. 137

. Pasal 24 UUD 1945 hasil amandemen :

(1).Kekuasaan Kehakiman merupakan kekuasaan yang merdeka untuk menyelenggarakan peradilan guna menegakkan hukum dan keadilan.

(2) Kekuasaan kehakiman dilakukan oleh sebuah Mahkamah Agung dan badan peradilan yang berada di bawahnya dalam lingkungan peradilan umum, lingkungan peradilan agama, lingkungan peradilan militer, lingkungan peradilan tata usaha negara, dan oleh sebuah Mahkamah Konstitusi.

.Old era or Orde lama, is an Indonesian government era after got independence, from 1945-1965, Ir Soekarno was the president.

. New Era or Orde baru is an Indonesian government era after old era, it was called development era, from 1965-1998, Jenderal Soeharto was the president.

. Reform Era was familiar as changes era, from 1998 until now, it happened when President Soeharto resigned as Indonesian President in 1998 after 32 years lead.

. Pasal 24 B ayat (1) UUD 1945;

1) Komisi Yudisial bersifat mandiri yang berwenang mengusulkan pengangkatan hakim agung dan mempunyai wewenang lain dalam rangka menjaga dan menegakkan kehormatan, keluhuran martabat, serta perilaku hakim

ment, particularly president. It can be seen in Law No. 19 of 1964, President was able to intervene the court, with reasons of revolution interest, honor of the country and urgency interest of the community. Clearly, this situation was a bad phase for Indonesia because the court could be influenced by the executive or president. It is in contrast with the 1945 Indonesian constitution article 24. Meanwhile, it was different in New Era or Orde Baru, the regulation of Indonesian independence of judicial has clearly regulated with Law No. 14 of 1970 about judiciary power. Frankly, in this era has clearly regulated about judiciary independency. There was not any intervention from the president as in the period of old era or orde lama. However, there were regulation in Law No. 14 of 1970, article 11, that every institution held the process court organization, administrative and finance was under each related department. Just like province court, district court in organization, administrative and finance was under Ministry of Justice. It also happened in Military Court under the Ministry of Defense. Definitely, it was also intervened by the executive to independence of Judicial. It happened from 1965 to 1998, almost 32 years. This situation made judges dependable to the Ministry of Justice in administrative, just like to take in high level or promotion, they must be related with the staff of Ministry of Justice. Also, in terms of salary, it was determined by executive. This situation might influence judges in making their decisions. Moreover, Government influenced Court process particularly in related government case.

There were some changes during the Reform Era, it was in 1999 that Indonesian leader realized. It was wrong when in Old Era, Judicial was under the executive, it proved that organization, administrative and finance of judicial under Ministry of Justice and Ministry of Defense. Therefore, in early Reform Era, it was

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. pasal 19 dalam Undang-undang No. 19 tahun 1964, yang memberikan wewenang kepada Presiden untuk dalam "beberapa hal dapat turun atau campur tangan dalam soal-soal Pengadilan"

. Elisabeth Nurhaini butarbutar, Hukum pembuktian( analisis terhadap kemandirian hakim sebagai penegak hukum dalam proses pembuktian), Nuansa aulia, Bandung, 2016, Hlm.43

. Pasal 11 Undang-undang nomor 14 tahun 1970 tentang kekuasaan kehakiman.

1)Badan-badan yang melakukan peradilan tersebut pasal 10 ayat (1) organisatoris, administratif dan finansil ada dibawah kekuasaan masing-masing Departemen yang bersangkutan. (2) Mahkamah Agung mempunyai organisasi, administrasi dan keuangan tersendiri.

. Elisabeth Nurhaini butarbutar, op.cit. Hlm.44

regulated through Law No. 35 of 1999, that all of institution held judicial was united in one institution, it is Supreme Court, include organization, administrative and Finance. It must be done in 5 years since 1999. It is important to make separation between judicial and executive. Geoffrey Marshal make difference of separation of power sharing as follow:

- (1) The differentiation of the concept 'legislative', 'executive', and 'judicial'
  - (2) The legal incompatibility of office-holding as between members of one branch of government and those of another, with or without physical separation of persons.
  - (3) The isolation, immunity, or independence of one branch of government from actions or interference of another.
  - (4) the checking or balancing of one branch of government by the action of another.
  - (5). The co-ordinate status and lack of accountability of one branch to another.
- Therefore, separation of power is to prevent from abuse of power and guarantee independence of judicial.

In 2004, organization, administrative and salary judicial institution was under Supreme Court, including Military Court and Religion Court and all of the Specific Court just like Child Court, Human Right Court, Tax Court, Industrial Relation Court. It is essential that after 2004, all of The Court under the Supreme Court except Constitution Court which is under Constitution Court themselves. Organization, administrative and financial is under one institution, it is supreme court. Absolutely, judicial has been in right place, it is separated from executive or legislative branch. Regulation has clearly protected the Indonesian independence of judiciary from 1945 Constitution, Law No. 48 of 2009 about Judiciary Power, Law No. 35 of 2009 regarding Supreme Court. Supreme Court not only held process court as last process of the case but also must watch all of the Indonesian Court process. However, the surveillance is conducted by Supreme Court to watch the court process, attitude or judge ethics and also administrative and finance is prohibited to influence the indejudicial and non-judicial function.

. Pasal 11 UU nomor 35 tahun 1999 tentang kekuasaan kehakiman .

(1) Badan2 peradilan sebagaimana dimaksud dalam Pasal 10 ayat (1), secara organisatoris, administratif, dan finansial berada di bawah kekuasaan Mahkamah Agung.

Pasal 11 A

(1) Pengalihan organisasi, administrasi, dan finansial sebagaimana dimaksud dalam Pasal 11 ayat (1) dilaksanakan secara bertahap, paling lama 5 (lima) tahun sejak Undang-undang ini mulai berlaku

. Geoffrey Marshal, *Constitutional Theory*, London, Oxford University Press, 1971, page 97.

. Faisal A.Rani, *Konsep Negara Hukum dan Kekuasaan Kehakiman yang Merdeka*, dalam buku *Negara hukum yang Berkeadilan*, kumpulan pemikiran dalam rangka purnabakti Prof.Dr. Bagir Manan,SH.,M.CL, Rosda, Bandung, 2011, hlm.598

. Pasal 39 Undang-undang nomor 48 tahun 2009.

(1) Pengawasan tertinggi terhadap penyelenggaraan peradilan pada semua badan peradilan yang

pendence of judicial in make decision. It is regulated in article 39 Law No. 48 of 2009 . In the Supreme Court there are various bodies which is tackle of Under regulation Supreme Court system make judge is separated from executive. Judge must follow all provision from Supreme Court in organization, financial and administrative just like promotion. Supreme Court made separation between judicial and non-judicial. In judicial bodies is related to tackle court process case, it consists of judges and assistant to write what happens in underway court process. Meanwhile in non-judicial handle administrative and financial court. Currently, in Supreme Court the leader of judicial and non-judicial bodies is filled by judges background. They could be senior judge or judge in Supreme Court, because the head of judicial and non-judicial in Supreme Court is judges who lead in all of Indonesian court could be related to judges promotion may be indirectly influenced when judge in district Court or Appeal Court will make decision which is probably a case close to or by order from one of the head of judicial or non-judicial in Supreme Court, the judges in district Court or Appeal Court may follow what leader supreme court wants include about decision of a case. In promotion process, nowadays is assumed unclearly about criteria, assessment from Supreme Court. Therefore, people assume that judge who has close relationship with the leader of judicial and non-judicial bodies in Supreme Court easier get promotion than others. It is different in Netherland practice, that there was the Dutch Council for the Judiciary through the Judiciary Organization Act of 2001. An important element of the modernization that took place in 2001 was the establishment of a Council for the Administration of Justice (Raad voor de Rechtspraak). Such a body did not previously exist in the Netherlands. The tasks of the Council concern the administration and management of the organization of the judiciary. Article 91 JO Act mentions the preparation of the budget of the courts, the assignment of budgets, the supervision of the implementation of the budget, and the management of the courts, as well as ‘activities at a national level relating to the recruitment, selection, appointment and training of the court’s auxiliary staff’ (Art. 91, first paragraph, sub f, JO Act). As to selection, appointment, promotion and training the Council only develops a general policy for all courts. There is an independent body for the recruitment/selection of judges (the CALR; commission for the selection of members of the judiciary) and another independent body for training of judges (SSR; the Netherlands Judicial Training Centre).

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berada di bawah Mahkamah Agung dalam menyelenggarakan kekuasaan kehakiman dilakukan oleh Mahkamah Agung.

. (2) Selain pengawasan sebagaimana dimaksud pada ayat (1), Mahkamah Agung melakukan pengawasan tertinggi terhadap pelaksanaan tugas administrasi dan keuangan.

. (3) Pengawasan internal atas tingkah laku hakim dilakukan oleh Mahkamah Agung.

. (4) Pengawasan dan kewenangan sebagaimana dimaksud pada ayat (1), ayat (2), dan ayat (3) tidak boleh mengurangi kebebasan Hakim dalam memeriksa dan memutus perkara.

. R. de Lange & P.A.M. Mevis ,Constitutional Guarantees for the Independence of the Judiciary,Electronic Journal of Comparative Law, vol. 11.1 (May 2007), <http://www.ejcl.org>



Appointments of judges are made by Royal Decree on recommendation by the Minister of Justice. Probably, this model could be considered in Indonesia to make better in promotion and judge appointment system.

B. Implementation of judicial independence under regulation system the supreme court and judicial commission.

Two institutions watch code of conducts and attitude of Indonesian judges are Supreme Court and Judicial Commission . Judicial commission was regulated law No. 22 of 2002 then amendments by Law No. 18 of 2011. Judicial commission has function to enforce ethics code of the judges and to protect honorable of judges. However, this surveillance do not influence on judges in make decision, it is regulated in article 39 and 40 Law No. 48 of 2009.

Actually, the surveillance is held by judicial commission, it is new types in Indonesian law system. Judicial Commission classified as external body watches the judge. People who has case in court could report if probably judge breach code of conduct and attitude guideline of judges. There were people reported judges to judicial commission. The data show lot of number of judges has been reported to judicial commission .

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. Pasal 39 UU Nomor 48 tahun 2009 tentang kekuasaan kehakiman

. (3) Pengawasan internal atas tingkah laku hakim dilakukan oleh Mahkamah Agung.

. (4) Pengawasan dan kewenangan sebagaimana dimaksud pada ayat (1), ayat (2), dan ayat (3) tidak boleh mengurangi kebebasan Hakim dalam memeriksa dan memutus perkara.

. Pasal 40

. (1) Dalam rangka menjaga dan menegakkan kehormatan, keluhuran martabat, serta perilaku hakim dilakukan pengawasan eksternal oleh Komisi Yudisial.

(2) Dalam melakukan pengawasan sebagaimana dimaksud pada ayat (1), Komisi Yudisial mempunyai tugas melakukan pengawasan terhadap perilaku hakim berdasarkan Kode Etik dan Pedoman Perilaku Hakim.

.<http://ppid.komisiyudisial.go.id/assets/uploads/berkas/Laporan%20Tahunan/laptah-KY-2014-finall-web.pdf>

.<http://komisiyudisial.go.id/files/Laporan%20Tahunan/Laporan-Tahunan-KY-2015.pdf>

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Num ber	Type of Report	2010	2011	2012	2013	2014	2015	2016	2017	total
1.	Comm unity report	1452	1717	1470	2193	1783	1491	1682	1473	1325 9
2.	As aknowl ege letter	1642	1622	1773	1920	2003	1751	1899	1546	1417 0
	total	3094	3339	3249	4121	3784	3242	3581	3019	2742 9

Annual judicial commission report, 2014, from 2010 to 2014. 2015 -2017.

According to data, from 2010 to 2017 people who has reported to judicial commission through community report ways slightly over 1000 every year. It was indicated that there were lot of judges broke the code of conduct and attitude guideline of judges when judges in court process. However, it was not all of the community report to judicial commission as judges broke the code of conduct and attitude guideline of judges, probably just ask legal opinion or ask some protection or surveillance from judicial commission.

Numbers decision result from panel court of honourable judges, Judicial commission from 2009 to 2014 .

Number	Year of panel of honourable of judge	Position case	total
1.	2009	Bribery	3

2.	2010	1.family problem 2.bribery 3. indisciplinary	1 3 1
3.	2011	1.gratification/ bribery 2.affair	3 1
4.	2012	1.gratification/ bribery 2.affair 3. manipulated of decision	3 1 1
5.	2013	1. 1.gratification/ bribery 2.affair  3. affair and gambler 4.drug	2  3  1 1
	2014	1.affair and gratification 2.affair 3.gratification 4. drug 5.indisciplinary	1 5 3 1 3
	Total		37

procedures of application and answer the questions of student teachers.

3. The supervisor of practical education works to provide his student with the correct theoretical scientific knowledge and methods of teaching in order to qualify them to teach in real educational situations.

4. Help the student - the teacher to avoid deficiencies or weakness and weakness in the performance of teaching positions, which earns the student confidence in himself.

5. Help the student - the teacher to strengthen the relationship between him and his colleagues, and between him and the management of the school, which makhim to the school and its systems, and encourage him to carry out his duties and duties as well as his interest in choosing the teacher - an expert collaborator able to meet the needs

Number	Year of panel of honourable of judge	Position case	total
1.	2009	Bribery	3
2.	2010	1.family problem 2.bribery 3. indiciplinary	1 3 1
3.	2011	1.gratification/ bribery 2.affair	3 1
4.	2012	1.gratification/ bribery	3

		2.affair	1
		3. manipulated of decision	1
5.	2013	1. 1.gratification/ bribery 2.affair  3. affair and gambler 4.drug	2 3 1 1
	2014	1.affair and gratification 2.affair 3.gratification 4. drug 5.indiciplinary	1 5 3 1 3
	Total		37

According to the data that there were trends in broke the code conduct and attitude guideline of judges. There were people reported judges was held in panel court of honourable judges, Judicial commision from 2009 to 2012, the majority is bribery case. At the beginning of 2013 and 2014, it was change that the majority case became affairs. In 2014, affairs case in the first position with 38,46%(5 cases), and gratification in second with 23,07%(3 cases) from 13 cases.

There were various of punishment to judges because has proofed

breach the code of conduct and attitude guideline of judges from lowest level until the heaviest punishment just like fired. For example, In 2017 , 58 judges were punished, with details judicial commission recommended to Supreme Court for 39 judges are recommended get lower punishment (67,24%), 14 judges are recommended get middle punishment (24,14%) and 5 judges are recommended with heaviest punishment (8,62%). However, the last institution to give punishment for judges who are proofed guilty has broken code of conduct and attitude guideline of judges in supreme Court.

The data shows there were number of judges has gotten punishment because breach the code of judicial conduct and attitude guideline of judges. This situation may be indirectly influence to independence of judiciary particularly when they make decision. Judges may be carefully in making decisions, because when they make mistake in decision, the parties will make report to judicial commission and to Supreme court, with automatically judicial commission or Supreme court will call the judges. Definitely, they may not want this happen to them. Not only may influence when they make decision, but also if community report to judicial commission and Supreme Court proofed, it may influence in judges promotion, probably the judge get punishment to cancel the promotion or removed to far away location.

Judicial commission has functions to process selection of judges for Supreme Court and the result must be delivered to house of representative. It is essential if Judicial commission could be involved in selection candidate judge for district court and High Court/appeal court, unfortunately this chance has been closed by constitution court decision. In the Constitution Court decision No. 43/PUU-XIII/2015, it means judicial commission is prohibited involve in selection candidate district judges, it's only Supreme Court who held that process. Actually, the first step to create the judge who has good integrity, highly skill in law is in selecting candidate district judges, because they are the next generation will be a pioneer in next law enforcement, if the selection not right, uncomprehensive, it will make bad output . There was good news that in 2018 selection candidate district judge, Supreme Court has been involved Universities in interview and evaluate the candidate of judge and also using technology in the first step of test, therefore the candidate automatically know their result after a minute follows the test. Hopefully, these situations could make better the Court.

## Conclusion

Based on the elaboration above, it could be concluded that:

1. Indonesia has made regulation to keep independence judicial in 1945 Constitution, Law No. 48 of 2009, Law No.35 of 2009. It is guarantee Indonesian Independence Judicial. However, because the head of judicial and non-judicial in Supreme Court is judges leader in all of Indonesian court might be related to judges promotion may indirectly influence when judge in district Court or Appeal Court will make decision which is probably a case close to or by order from one of the head of judicial or non-judicial in Supreme Court.
2. The surveillance system between Supreme Court and Judicial Commission to watch activities of judges related in the code of judicial conduct and attitude guideline of judges may influence indirectly when judge make Decision. Judge may become becarefull in making decision, keep the activities based on code of judicial conduct and attitude guideline of judges inside and outside of the court.

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Legislation or provision :

1945 Constitution

Law No. 19 of 1964.

Law No. 14 of 1970

Law No. 35 of 1999

Law No. 48 of 2009

Law No. 22 of 2002

Law No. 18 of 2011

Judiciary Organization Act of 2001.

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Revista de Ciencias Humanas y Sociales

Año 35, Especial N° 19, 2019

Esta revista fue editada en formato digital por el personal de la Oficina de Publicaciones Científicas de la Facultad Experimental de Ciencias, Universidad del Zulia.  
Maracaibo - Venezuela

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