



# PROCEEDINGS

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Business and Social Sciences

December 4<sup>th</sup> to 5<sup>th</sup>, 2017

Bangkok, Thailand

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# Implementation of the Authorities of the Judicial Commission Based On Law No. 22, 2004: A Case Study Of 201432

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## Abstract:

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This research was conducted to know and analyse reasons why Judicial Commission (JC) has been given authorities to propose the nomination of judge candidates of the Supreme Court (SC) to the Parliament and to keep respect and the glory of prestige and the attitude of judges. Besides, it aimed at knowing and analysing the implementation of the authorities of JC in practical level. This research used normative legal research method and juridical normative approach. The analysis was carried out by using qualitative method. The research results indicated that there are three reasons why JC has been given authorities to propose the nomination of judge candidates of SC to the Parliament and to keep respect and the glory of prestige and the attitude of judges. First, JC was formed as the consequence of legal policy. Second, the existence of JC has been a strong reaction to the failure of fair judicial system. Third, the existence of JC as an external auditor toward judges can be the balance for managers of the judicial power in order to improve the failure of the control system which has not fully been overcome by SC. Whereas in the practical level JC has guaranteed that every phase of the selection of judge candidates of SC should be carried out transparently, objectively, and accountably by involving both the academicians and legal experts who are suitable to be SC judges. The existence of the control system which balances the judicial power is hoped to stimulate the realization of better judiciary.

**Keywords:** Implementation, Authority, Judicial Commission, Legal Policy, External Auditor.

## 1.Introduction

In the foreword of a book compiled by JC team<sup>33</sup>, it is said that the 3rd amendment of the 1945 Constitution in 2001 gave birth a new institution called JC, as written in Article 24B. Referring to that article, Law No. 22, 2004 on JC was enacted based on 3 (three) considerations as follows:

- a.The Unitary State of The Republic of Indonesia is a legal state which guarantees free judicial power to carry out justice to enforce law and fairness based on The 1945 Constitution.
- b.JC has an important role to realize free judicial power through the nomination of SC judges and transparent and partisipative control to judges to keep respect and the glory of prestige and the attitude of judges.
- c.Based on Article 24B paragraph (4) of The 1945 Constitution, arrangement, status, and membership of JC will be provided by law.

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<sup>33</sup> Tim Penyusun Komisi Yudisial, 2009. *Menegakkan Wibawa Hakim; Kerja Komisi Yudisial Mewujudkan Peradilan Bersih dan Bermartabat*, Nur Agus Susanto (ed), Komisi Yudisial RI, Jakarta, pages i-ii.

From those three considerations above, the first and the second ones should be discussed. According to Taufik Sri Soemantri<sup>34</sup>, the first consideration mentions that Indonesia is a legal state. In a legal state free judicial power is guaranteed. The sub clause in that consideration is in fact “derived” from Article 24 paragraph (1) of The 1945 Constitution which determines: “Judicial power is a free power to carry out justice to enforce law and fairness”.

The first consideration stresses that Indonesia is a legal state which guarantees free judicial power to carry out justice to enforce law and fairness based on The 1945 Constitution. Legal state in Dutch is known as *rechtsstaat*. According to Muhammad Tahir Azhary<sup>35</sup>, the term *rechtsstaat* is usually used in Dutch to refer to legal state which is applied in continental Europe. The other terms are rule of law used in common law countries and socialist legality used in socialist countries and Soviet Union. Whereas rule of law, according to Henry Campbell Black, et. al.,<sup>36</sup> is:

“A legal principle, of general application sanctioned by the recognition of authorities and usually expressed in the form of a maxim or logical proposition. Called a “rule,” because in doubtful and unforeseen cases it is a guide or norm for their decisions. The rule of law sometimes called “the supremacy of law”, provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application.”

According to Idul Rishan<sup>37</sup>, legal state concept is an idea which appears to oppose absolutism that gave birth of power state. In analysing legal state philosophically, Franz Magnis-Suseno as quoted by John Pieris and Wiwik Sri Widiarty<sup>38</sup>, states that legal state means the power of the state should be tied to law. Therefore the concept of legal state must be understood in the perspective of the provision on the limits of power which are owned by the executive, legislative and judicative institutions. Therefore beside the limitation of power which should be provided with clear legal norms, it should also be associated with the relationship between the separation of power and the association between the branches of power. It is clear that the limitation of power should be accompanied by the separation of power.

Whereas the second consideration contains some authorities of JC, that are realizing the free judicial power must be carried out through the transparent and partisipative nomination and control of judge candidates of SC in order to keep respect and the glory of prestige and the attitude of judges. Theoretically, the recruitment of SC judges can be carried out in two ways or double track system, the closed and open one. In closed system the recruitment is carried out based on career meaning to say that only those who have career as judges could be nominated as candidates of SC judges. Whereas in open system the nomination of judge candidates of SC can be taken from academicians and other experts in law field. Further the duty and power

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<sup>34</sup> Ibid, pages 7-8.

<sup>35</sup> Muhammad Tahir Azhary, 2007. *Negara Hukum Suatu Studi tentang Prinsip-prinsipnya Dilihat dari Segi Hukum Islam, Implementasinya pada periode Negara Madinah dan Masa Kini*, Ed. 2, Cet. 3, Kencana, Jakarta, page 3.

<sup>36</sup> Henry Campbell Black, et. al. 1990. *Black's Law Dictionary*, Sixth ed., West Publishing Co, St. Paul Minn, page 1332.

<sup>37</sup> Idul Rishan, 2013. *Komisi Yudisial: Suatu Upaya Mewujudkan Wibawa Peradilan*, Cetakan pertama, Bill Nope (ed), Genta, Yogyakarta, pages 9-10.

<sup>38</sup> John Pieris dan Wiwik Sri Widiarty, 2007. *Negara Hukum dan Perlindungan Konsumen Terhadap Produk Pangan Kedaluwarsa*, Pelangi Cendekia, Jakarta, pages 25-26.



of JC to execute the control toward judges, according to Artijoto<sup>39</sup>, can be done by doing research, examination and verification toward the attitude of judges in such a way that the respect and the glory of prestige and the attitude of judges can be kept. Through good control teleologically judges are hoped to become not only homo faber, but also homo juridicus and homo ethicus.

Since the publication of The Constitution Court (CC) decision No. 005/PUU-IV/2006 which stated that the legal umbrella of the authority of JC to control the judges as written in Articles 20, 21, 23, 24, 25 of Law No. 22, 2004 is unconstitutional, this authority could not be implemented again. CC stated that all provisions about control should be determined as against The 1945 Constitution and do not have legal binding because it was proved to result in legal uncertainty (*rechtsonzekerheid*)<sup>40</sup>. Therefore JC cannot use this authority to control CC judges.

Based on the above description, it seems that the independence of judges is one of the important factors to keep respect and the glory of prestige and the attitude of judges. According to J. Djohansjah<sup>41</sup>, the term “the independence of judges” is a term which is known publicly in daily speaking by the society through writings and discussions in mass media derived from Article 24 paragraph (1) of The 1945 Constitution. Those two authorities of JC are further provided in some articles of Law No. 22, 2014 on JC. The authority to propose the nomination of judge candidates of SC to the Parliament is arranged in Articles 13 point a up to Article 19, whereas the authority to keep respect and the glory of prestige and the attitude of judges is provided in some articles such as Article 13 point b which is further arranged in Articles 20 up to 25. Therefore in this article the author would like to answer two problems as follows:

- a. Why has JC been given authorities to propose the nomination of judge candidates of SC to the Parliament and to keep respect and the glory of prestige and the attitude of judges?
- b. How is the implementation of these authorities in practical level, especially in 2014?

## 2. Research Methods

This was a normative legal research based on the secondary data involving both primary legal material and secondary legal material. The approach used was juridical normative approach. Whereas analysis was carried out by using qualitative approach which according to F. Sugeng Istanto<sup>42</sup>, is the analysis of Jurisprudence about the content of positive law provisions. The truth found out from the analysis of this legal research is mostly the qualitative one, that is the truth which is in accordance with the norm that determines certain prerequisite which should be fulfilled.

## 3. Discussion and Analysis

### 3.1. Reasons why JC has been Given Authorities to Propose the Nomination of Judge Candidates of SC to the Parliament and to Keep Respect and the Glory of Prestige and the Attitude of Judges

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<sup>39</sup> Artijoto, 2006. “Pengawasan Hakim dan Pengaturannya dalam Perspektif Independensi Hakim” dalam *Bunga Rampai Refleksi Satu Tahun Komisi Yudisial Republik Indonesia*, Komisi Yudisial, Jakarta, page 57.

<sup>40</sup> *Ibid.*, page 7.

<sup>41</sup> J. Djohansjah, 2010. “Independensi Hakim di Tengah Benturan Politik dan Kekuasaan” dalam *Komisi Yudisial Republik Indonesia, 2010, Reformasi Peradilan dan Tanggung Jawab Negara*, Program Penyusunan Bunga Rampai Komisi Yudisial, Jakarta, pages 63-64.

<sup>42</sup> F. Sugeng Istanto, 2007. *Penelitian Hukum*, CV Ganda, Yogyakarta, pages 59-60.

From various literatures studied there are some reasons why JC has been given authorities to propose the nomination of judge candidates of SC to the Parliament and to keep the glory of prestige and the attitude of judges, as follows:

a. JC was formed as the consequence of legal policy

Zainal Arifin as quoted by H. Imam Anshori Saleh<sup>43</sup>, JC was formed as the consequence to create check and balances in the structure of judicial power. In accordance with its functions JC has missions to increase the accountability of independent judicial power and is hoped to have important roles in realizing democracy by using basic capital as a constitutional body. Article 24B of The 1945 Constitution states that, JC is independent and has the authority to propose the nomination of SC judges and has other authorities in the effort to keep the glory of prestige and the attitude of judges.

b. Formation of JC was a strong reaction toward the failure of fair justice system

According to H. Imam Anshori Saleh<sup>44</sup>, the background of the formation of JC was a strong reaction toward the failure of fair justice system. Indonesian justice was full of legal and judicial malpractices. Such issues have developed in various mass media added by the reality that appeal cases at the SC level are in piles and have become serious problems discussed by people who are not satisfied with the service of justice system in this country. Ahsin Thohari as quoted by H. Imam Anshori Saleh<sup>45</sup> stated that the court has become an institute which is very corrupt (judicial corruption) and full of malpractices which are not in accordance with justice values, such as systematic cases “trading” which is called “mafia of court”.

Mardjono Reksodiputro as quoted by H. Imam Anshori Saleh<sup>46</sup> mentioned that the authority given to JC by the amendment of The 1945 Constitution and then by Law No. 22, 2004 is the response of the society to correct Indonesian judicial system from various “internal problems” faced by SC and all structures under it (after the enforcement of “one roof” system). Dissatisfaction of the society toward the court can be seen from the research result conducted in some cities in Indonesia in 1996. The research toward 1.424 respondents concluded that disrespect feelings toward the justice system among others are the court is regarded as influenced by the political force and is also corrupt.

H. Imam Anshori Saleh<sup>47</sup> also mentioned that the failure of justice system dealt with many aspects, such as institutional aspects, substancial aspects and legal culture aspects. Institutional aspects among others include some sub-aspects such as, the control sub-aspect both administrative control, judicial techniques and the attitudes of judges. The formation of JC was based on the ineffectiveness of internal control by SC caused by various factors as follows:

- 1) The quality and integrity of controllers which are not appropriate;
- 2) The process of discipline investigation which is not transparent;
- 3) There is no access for the damaged society to complain, to observe the process and its result;

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<sup>43</sup> H. Imam Anshori Saleh, 2014. *Konsep Pengawasan Kehakiman; “Upaya Memperkuat Kewenangan Konstitusional Komisi Yudisial dalam Pengawasan Peradilan”*, Setara Press, Malang, pages 1-2.

<sup>44</sup> *Ibid*, pages 3-4.

<sup>45</sup> *Ibid*, page 4.

<sup>46</sup> *Ibid*, page 4.

<sup>47</sup> *Ibid*, pages 4-5.



4) The spirit to defend the corps (esprit de corps) which has resulted in the punishment given by SC is not balanced with the act carried out; and

5) There has been no strong will from the lowest up to the highest management of court institutions to follow up the control result.

c. The failure of the control system has not fully been overcome by SC. But at the same time one roof justice concept has been carried out which can result in anxiety that there will be power monopoly at SC, because the justice system will not be touched by the other institutions. The anxiety toward the power monopoly stimulated the birth of an idea to form independent institution outside SC. That idea was realized by the formation of such an institution as “external auditor” toward judges, which can equalize the executor of judicial power. The existence of control system which equalize the judicial power is hoped to stimulate the creation of better justice system.

### 3.2. Implementation of the Authorities of JC in 2014

Dealing with the authority to propose judge candidates of SC, Buitendam as quoted by Mustafa Abdullah<sup>48</sup> said that “Good judges are not born but made”, meaning to say that a good judge is the one who has professionalism, integrity and quality, but he was not born by himself but he was made. Therefore it can be concluded temporarily that the change toward the creation of better judicial system can only be formed if we are successful to make and place good judges at judiciary bodies.

In the practical level, JC<sup>49</sup> assured that every phase of the selection of judge candidates of SC was carried out transparently, objectively and accountably. About 62 of judge candidates of SC followed Quality Selection of judge candidates of SC at the First Period in 2014 on Saturday - Sunday (5-6 April 2014 in Bogor, West Java). The selection of judge candidates of SC at the First Period of 2014 was aimed to fill 10 (ten) posts of SC judges and the lack of the selection result in 2013, consisting of: 2 (two) SC judges of religion room, 3 (three) SC judges of private law room, 3 (three) SC judges of Administrative law room, and 2 (two) SC judges of criminal law room. The second phase of selection consisted of: spontaneous paper writing, Code of Ethics and Guidance of Judge case analysis, legal cases analysis and self assessment writing.

In that occasion, Head of Judge Recruitment Field, Taufiqurrohman Syahuri gave some guidances to the participants that: “I really appreciate the participants who followed the selection. I hope that the participants would like to keep their health because this selection needs full energies and positive thinkings”. Further he explained that in doing written papers the participants were given facilities such as laptops on each of their tables. But the participants were given freedom either to use laptops or handwriting.<sup>50</sup>

The experience of the selection of judge candidates of SC in 2013 in which 3 (three) names of judge candidates of SC from JC were refused by the Parliament because they were regarded as not having fulfilled the criteria. That experience would become a learning for JC, so that in the future JC will defend

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<sup>48</sup> Mustafa Abdullah, 2006. “Kewenangan Mengusulkan Calon Hakim Agung dan Kontribusinya Dalam Menciptakan Hakim Agung yang Progresif” dalam *Bunga Rampai Refleksi Satu Tahun Komisi Yudisial Republik Indonesia*, Komisi Yudisial, Jakarta, pages 97-98.

<sup>49</sup> Komisi Yudial, 2014. “KY Pastikan Seleksi CHA Berlangsung Transparan dan Objektif”, *Majalah Media Informasi Hukum dan Peradilan*, Edisi Mei-Juni 2014, page 47.

<sup>50</sup> *Ibid.*, page 4.

the names proposed to the Parliament by giving explanation and reasons to the Parliament. Through this way the Parliament will consider those names and pass judge candidates of SC proposed.

#### **4. Conclusions and Recommendations**

It can be concluded that JC has been given authorities to propose the nomination of judge candidates of SC to the Parliament and to keep respect and the glory of prestige and the attitude of judges because of three reasons. First, JC was formed as the consequence of legal policy. Second, the existence of JC has been a strong reaction to the failure of fair judicial system. Third, the existence of JC as an external auditor toward judges can be the balance for managers of the judiciary power in order to improve the failure of the control system which has not fully been overcome by SC. Whereas in the practical level JC has guaranteed that every phase of the selection of judge candidates of SC, especially in 2014 was carried out transparently, objectively, and accountably by involving both the academicians and legal experts who were suitable to be SC judges by using open system. Therefore, it is hoped that the existence of the control system which balances the judicial power could stimulate the realization of better judiciary in the future.

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