

CHAPTER FOUR

FINDING AND ANALYSIS

A. The Judges Recruitment System in Indonesia based on Legislations

Judicial power is the power of the state to administer the judiciary. It is based on article 24 paragraph (1) of the 1945 Constitution that "Judicial Power is an independent judicial power to administer justice to uphold law and justice".¹ To realize an independent judiciary power, it requires independence from the judicial authorities. According to Law No. 48 of 2009 on Judicial Power, the perpetrators of judicial powers are held by the Supreme Court and the Constitutional Court. The independence of these two state institutions is greatly influenced by the independence of judges.²

In judicial power, judges occupy an important and central position. This is one of the important reasons why the judge's definition is included in Chapter 1 General Provisions of Law No. 48 Year 2009 on Judicial Power. The role of judges is very important in relation to upholding law and justice. Therefore, from the beginning, the recruitment or filling of court officials (judges) should be noted. Based on Law No. 43 of 1999 to Law No. 8 of 1974 on the Principal of Personnel of judges called state officials. Chairman, Vice Chairman, Chief Justice and Supreme Court Justice to the Supreme Court as well as Chairman, Vice Chairman and Judge at all Courts of Justice are state officials. Thus there are some recruitment of judges that exist in Indonesia, among which are:

1. The Requirements of Being Supreme Court Judge in Indonesia

¹ Article 24(1) the Constitution

² Meylin Sihaloho, 2015, "Seleksi Pengangkatan Hakim Dalam Sistem Peradilan Indonesia, *Jurnal Wawasan Hukum*, Vol. 33, No. 2, (september 2015) ISSN 2549-0753, pages, 207-209.

The system of recruitment of the Supreme Court based on Law No. 14 of 1985 is very different from the system of recruitment of Supreme Court Justices on the basis of Law No. 5 of 2004. Before Law No. 5 of 2004 was applied the Supreme Court Judge screening, at that time, it was more based only on political interests. Proximity to the ruling regime of government and the House of Representatives will further pave the way for sitting as judges.

It was because then the candidate for Supreme Court Justice was submitted by the House of Representatives to the President as Head of State after the House of Representatives heard the opinion of the Supreme Court and the Government. The role of the government to give an opinion to the House of Representatives on candidates for judges is considered too risky to the independence of the Supreme Court itself. With the enactment of Law No. 5 of 2004 which was then revised again with Law No. 3 of 2009, it gave a slight change to a better direction.

Changes and improvements of the system came with the establishment of the Judicial Commission as an institution proposing Supreme Court candidates. The presence of the Judicial Commission is expected to provide meaningful change in order to change the system of recruitment of Supreme Court Justices with KKN practices. However, the existence of the Judicial Commission as a candidate for Supreme Court justices still encounters many obstacles and challenges. Other improvements made by the system of recruitment of Supreme Court Justices through career system and non-career system. The provision is to ensure legal certainty and enhance the professionalism of Supreme Court Justices.³

Basically the candidate for Supreme Court Justices comes from a career judge but in certain cases a Supreme Court candidate may come from a non-career judge.

³ A. Muhammad Nasrun, 2015, "Rekrutmen Hakim Agung Nonkarir Sebagai Implementasi Independensi Kekuasaan Kehakiman Di Indonesia, *Kanun Jurnal Ilmu Hukum*, Vol. 19, No. 76, (Desember 2015) ISSN 0854-5499, pages, 487-491.

The appointment of Supreme Court Justice to non-career in addition to further improve the quality of the decision also of course reduces the accumulation of cases in the Supreme Court. However, but in practice the number of cases is not much reduced.

Supreme Court Justices who are judges of the Supreme Court as the supreme supervisor of the proceedings of the judiciary, in the nuances of reforms have a role as role models for subordinate judges as well as the public, and the judge becomes the final support for the justice and truth seekers community. Therefore, certain conditions are required for those who want to sit as Supreme Court Justices.

Article 24 paragraph 2 of the 1945 Constitution determines the general requirements of the Supreme Court judge:

- a. integrity;
- b. an impeccable personality;
- c. fairness;
- d. professionalism; and
- e. experienced in the field of law.

The requirements of the Supreme Court were determined more specifically in Law No. 3 of 2009 on the Supreme Court, distinguish between the criteria of the Supreme Court's career candidate and not career. For the career path, for example, it takes 20 years to become a judge, including at least 3 (three) years to be a high judge, and aged at least 45 (four five) years with a law degree or other undergraduates with expertise in the field of law. A non-career path requires professional experience or as a legal academic for at least 20 (twenty) years and

holds a doctorate and master of law based on a law degree or other undergraduates who has expertise in law.⁴

Often there are problems related to the composition of the Justices both from the career and non-career. Ideally, the supreme judge is a career judge. Although recruitment of Supreme Court Justices from non-career circles should still exist, the formation to take Supreme Court Judges from non-believers should be limited. If the non-career judges are too many, the prevailing career planning in the internal world of the judiciary becomes distracted and that is fatal as it could lead to jealousy that leads to demoralization among judges. However, to exclude at all the provisions allowing non-career judges to be surely unwarranted, since in practice the existence of non-career judges is indispensable for maintaining the composition of expertise among Supreme Court judges.

Regardless of the career judge or non-career it is clear that every Supreme Court Justice must meet the qualified personal and professional requirements. The Supreme Court Justice is not an ordinary judge. Every Supreme Judge is expected to be finished with the affairs of his family, in the sense that the obligation to educate the children is over, and more ideally if all his sons and daughters have been married and have lived independently. Supreme Court Justices should have a clear track record of the integrity of their behavior, about the achievements and achievements they have made during their career and experience in law development and law enforcement, especially in the field of justice.

2. The Requirement of Being Constitutional Judges in Indonesia

⁴ *Ibid.*

The requirement to be a constitutional justice is regulated in Article 24C paragraph (5) and Article 25 of the 1945 Constitution, in Article 15 of Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 regarding the Constitutional Court. According to Article 24C Paragraph (5) of the 1945 Constitution, "Every Constitutional Justice must have integrity and personality that is honorable, and to be fair, is a person who has a constitutional command and a public institution, and does not hold office as state official". Furthermore, Article 25 of the 1945 Constitution further presupposes, "the appointment and dismissal of judges shall be governed by law". The details of the article are contained in Article 15 of Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 regarding the Constitutional Court, which states that:⁵

- 1) The Constitutional Court must meet the following requirements:
 - a. Having integrity and a respectable personality;
 - b. Must be fair; and
 - c. The statesman who holds the constitution and constitutional system.
- 2) To be appointed as a constitutional judge, in addition to meeting the requirements as referred to in paragraph (1), the candidate must meet the following requirements:⁶
 - a. Citizen of the Republic of Indonesia;
 - b. Certified with doctoral and master degree with legal background;
 - c. Devoted to God Almighty and has good morality;
 - d. Must be at least 47 (forty-seven) years and at most 65 (sixty-five) years old at the time of appointment;

⁵ Article 15 Law No. 24 of 2003 on Constitutional Court.

⁶ Article 16 (1) Law No. 24 of 2003 on Constitutional court.

- e. Physically and spiritually capable of performing duties and obligations;
 - f. Have never been sentenced to prison based on court decisions that have obtained permanent legal force;
 - g. Never declared bankrupt with a court decision; and
 - h. Have at least 15 (fifteen) years of legal experience and/or become a state official.
- 3) In addition to the requirements referred to in paragraph (1) and paragraph (2), the candidate of constitution of judge must also fulfill the administrative requirements by submitting:
- a. A statement of willingness to be a constitutional justice;
 - b. Curriculum Vitae;
 - c. Photocopies of certificates that have been legalized and show the original diploma;
 - d. List of assets and sources of income of candidates accompanied by supporting documents that have been approved and approved by the authorized institution; and
 - e. Taxpayer Identification Number (NPWP).

If we look at Article 15 paragraph Law No. 8 year 2011 above, there is a requirement of that, every judge of the constitution must have integrity and a respectable personality, to be fair, is an Indonesian person having constitutional command and public institution, and devotion to God Almighty and have good morality. In connection with these requirements, there is no definite explanation. If traced back to the debate on the terms, it is usually still unclear. About what and how to interpret it further, it is all submitted to the dynamics of the implementation of the provisions in the field later. In other words, the implied interpretation of

personality requirements is entirely left to the subjective consideration of the parties that determine it in the field. That is, to the President, the House of Representatives (DPR) and the Supreme Court to interpret it when they are asked to determine who will be elected to the constitutional judges.⁷

What should be known is that the trade records are very important in finding the background of a candidate for constitutional justice. The aim is to know the integrity, morality and requirements of constitutional justices deemed not to be obtained by the data.

3. The Requirement of Being A Judge in Islam

In Islam, a judge is someone who is very strategic, indispensable and noble. That is because the judge considers the mandate as a "Chairman of Allah SWT and His Apostle" and also explores the values of Islamic law, especially the law that lives among people. When deciding the case, the judge should be fair and respectful to the man as the servant and Khalifatullah on Earth, not as the object of law. Then the judge should be Uswatun Hasanah (model of just, fair and independent judges) as exemplified by the Prophet Muhammad. The additional image of the Court and the judges' authority can be improved. Legal certainty can increase public trust and countries can continue to run under the law and not on grounds.⁸

The nature of a judge is cautious to Allah, *wara'*, fair, and intelligent. About the legitimate requirement of being a judge, the majority of scholars' say that the

⁷http://rechtsvinding.bphn.go.id/jurnal_online/REFORMULASI%20PROSES%20REKRUITMEN%20HAKIM%20MAHKAMAH%20KONSTITUSI%20INDONESIA.pdf Accessed on 10 march 2018 at 19.37

⁸ Awaludin, "Hakim yang Ideal menurut Kacamata Islam", p. 2, taken from www.komisiyudisial.go.id/download.php%3Ffile%3DHAKIM%2520YANG%2520IDEAL%2520MENURUT%2520KACAMATA%2520ISLAM.pdf+%&cd=1&hl=en&ct=clnk&gl=id, Accessed on Friday 9 march 2018 at 4.15 pm.

legal requirement of being a judge is equal to the legal requirement of being a witness. Who deserves to be a witness is also worthy to be a judge. Who is not a lawful witness is not lawful to be a judge. Automatically who is not legitimate to be a witness, it is also illegitimate to be the judge following the verdict. This has been agreed by the scholars' fiqh about the requirements to be a judge. But there are differences of opinion regarding the number of conditions. Among them there are 15 conditions, 7 conditions, and some 3 conditions. Al-Khatib presents 15 conditions while Al-Mawardi and Ibnu Qudamah suggests 7 terms. Although different, they all require what is required by others. The main difference is how detailed each ones are calculated.⁹

Among the terms are as follows:

- a) Quality of being a male (al-dhukuriyyah): As for being a male, he says that qadis should be a man and not a woman because a woman in her nature is not endowed with complete authority (kamal al wilayat). In addition, the testimony given by a woman alone is not as complete as a man.
- b) Maturity and common sense (al-bulugh wa al'-aql): Regarding the qualities of maturity and a healthy mind, al-Qadi Abu Ya'la argues that if children or slaves are not allowed to take care of their personal affairs, they should not be entrusted with the affairs of society, and moreover both have no discretionary authority on decisive decisions even in common matters;
- c) Freeborn Status (al-huriyyah): Regarding the quality of being a freeborn, al-Qadi Abu Ya'la holds that this quality is important because a slave is not deemed eligible to hold an authoritative position and has no full social status allowing them to testify in court;

⁹ <http://digilib.uinsby.ac.id/8478/4/bab2.pdf> Accessed on 10 March 2018 at 20.12.

- d) Islam: Regarding the quality of being a Muslim, al-Qadi Abu Ya'la holds that if it is not permitted to appoint a fasiq (immoral person) as a qadi, then it is also a requirement that a non-believer should not be raptured;
- e) Truth (al-'adalah): Regarding the quality of truth, al-Qadi Abu Ya'la maintains that if a person can become a faculty in his religious practice, it is more appropriate to say that such a person should not be appointed to serve as qadi because of the act of judgment requires someone to be trusted and have a good character;
- f) The perfection of the sense of hearing and sight (al-salamah fi al-sam 'wa al-basar); and: As for the quality of the perfection of the sense of hearing and sight, al-Qadi Abu Ya'la asserted that this allowed the person to distinguish between the plaintiff and the defendant. Therefore, this ability, maintained by al-Qadi Abu Ya'la will be difficult for the blind or deaf. Al-Qadi Abu Ya'la also holds that the perfection of the limbs is not considered as part of the requirement of qadi's appointment. This is unlike the case of al-Imamah al-kubra (Great Imamate) where it is considered part of the requirement because defects in the limbs will inevitably affect the priest's ability to perform his duties.
- g) Knowledge (al-'ilm): As for knowledge, al-Qadi Abu Ya'la affirms that it is obligatory for a person who is designated as qadi to have knowledge of al-Ahkam al-Shar'iyyah (Rules of Law of Islamic Law). This quality, as mentioned above, is that the person must have knowledge of the four main sources of sharia. This are as follows:
 - i. He must have some knowledge of the Book of Allah (the Qur'an).

- ii. He must have knowledge of the Sunnah (hadith of the Prophet) derived from his actions and speeches.
- iii. He must have knowledge of the opinions of previous scientists (aqawil al-salaf) on what they may have agreed or disagreed with so as to follow the consensus of their opinion by which he should seek to apply his own intellectual reasoning where there are differences of opinion.
- iv. He must have a decent knowledge about Qiyas (analogical deduction).

In addition, wara characteristics are also required by judges. Wara means people who have no orientation to the world anymore. So when a person becomes a judge, he will not focus on the world and is unaffected by worldly problems that can cause judges to not be fair, especially in deciding a case.¹⁰

4. The Problems of Recruitment System of Judges in Indonesia

Minister of Administrative Reform and Bureaucracy Reform has given approval of the formation principle for candidate judge of 2017 as much as 1.684. This is a response to the Chief Justice of the Supreme Court (MA) and Ikatan Hakim Indonesia (IKAHI) who often complain about the lack of resources of judges, both within the District Court (PN), the Religious Courts (PA) and the State Administrative Court (PTUN).

In response to the shortage of judges, the Supreme Court recently issued the Supreme Court Regulation No. 2 of 2017 on the Procurement of Judges. The regulation stipulates the stages of procurement of judges beginning with Planning, Procurement Announcement of Judges, Application, Selection, Announcement of Selection Result, Appointment as CPNS/Prospective Judge, Candidate Judge Education and Appointment as Judge. Meanwhile, the selection process consists

¹⁰ Anonymous, 2017, "Sifat Wara", available at: <http://www.republika.co.id/berita/koran/halaman-1/15/12/07/nyz7gn18-sifat-wara>, Accessed on 11 March 2018, at 11.56.

of Administration Selection, Basic Competence Selection, Selection of Field Competency, Legal Substance Selection, Psychotest, and Interview. Special candidates for Religious Court judges must be able to read the book.¹¹

According to the perspectives and views of Saiful Anam,¹² there are some problems over the legalization of the regulations, which are:

- a. The position of the judge as State Official is not sufficient in the case of arrangements concerning recruitment and procurement shall be governed only by the provisions of laws or regulations of the Supreme Court. Although it is not prohibited, it will certainly be a bad precedent in order to maintain the implementation of the principle of the establishment of legislation. Primarily, it relates to the principle of conformity between the type, hierarchy and the material content of legislation. It is proper that the position of judges as State Officials in respect of their recruitment shall be regulated by law as part of the further regulation concerning the judicial powers contained in the 1945 Constitution.
- b. The Supreme Court positions the candidate for the judge as a candidate for Civil Servants (CPNS) before being appointed as a judge. This formula is considered to be excessive and has reduced the authority and position of judges as State Officials. The judge should not be viewed as a civil servant even though he has not been appointed a judge. However, his position remains as a Candidate of State Officials. That is because the position between CPNS, civil servants and State Officials is very much different in the organizational structure of the State and Government Implementation System in Indonesia.

¹¹ <https://news.detik.com/kolom/d-3530576/sejumlah-problem-dalam-rekrutmen-hakim> Accessed on 8 March 2018 at 16.12.

¹² Saiful Anam, 2017, <https://news.detik.com/kolom/d-3530576/sejumlah-problem-dalam-rekrutmen-hakim> Accessed on 9 March at 17. 10.

- c. Procurement system of judges is very different from the procurement system of CPNS or civil servants in general. Judges who are domiciled as State Officials cannot be equated in terms of recruitment with CPNS or civil servants who have been often done in an effort to attract prospective judges in Indonesia. The Supreme Court perspective is such an old point of view. In the past, the judicial recruitment system followed the CPNS recruitment system in general, because at that time the position of the judge had not been explicitly acknowledged as the State Official.
- d. The Supreme Court on Procurement of Judges has negated the participation and participation of the community in the recruitment of judges. This can be reflected in the provisions regulating the implementation of Procurement of Judges in the Perma that tend to be closed, which is only done by the internal MA. There is no public space for participating efforts to attract prospective judges and judges who are expected to behave fairly, honestly, wisely and wisely, and have a high integrity, responsibility, self-esteem, discipline, humility and professional attitude in accordance with the code of ethics and judicial conduct guidelines.
- e. The provision of judicial procurement by the Supreme Court that can only be implemented if it has got the determination of CPNS requirement by the State Apparatus Empowerment Ministry is part of a dysfunctional position of the Supreme Court as a judicial institution in performing its role and function as the organizer of judicial power. As a judicial organ of the state, the Supreme Court does not need to seek approval let alone ask for the establishment of other relevant agencies or ministries. If necessary, the nature is only limited to

coordination, rather than ask for the stipulation that the MA seems to be under other institutions / ministries.

- f. The problem of a candidate of who is declared to fail to graduate in the education of a prospective judge shall be dismissed with respect as a civil servant. Such an arrangement is certainly not impossible that many would-be judges do not pass the examination of the judges profession. It remembers the position of judges other than as state officials as well as professional officials.

The position of the judge as a professional officer strongly demands the existence of professionalism in a certain field that must be mastered by a prospective judge. This is closely related to the recruitment mechanism that generalizes between recruitment of judges and the recruitment of CPNS in general. Of course it is not impossible that with such a system many civil servants will be dismissed early due to a failure to be a candidate in the education program for judges.

- g. Problems related to the level of maturity of thought and behavior of judges. This is closely related to the age requirement of prospective judges as stipulated in several provisions of the legislation of at least 25 years. Although maturity cannot only be determined by age, it will also affect the emotional level and decision-making in resolving the various legal issues that the judge has to resolve.

As in countries that embrace the common law system, the judge's profession is held by an experienced practitioner or legal academician. Before becoming a judge, they are usually a person with a long experience in the legal profession. So it is not wrong if one of the conditions to be a judge it to be at least 40 years old.

In addition, it is expected that the Supreme Court will also intensively coordinate and communicate well with the Government and the House of Representatives to seek and prioritize the discussion on the Judicial Service Bill to be completed and resolved. Thus, the need for additional resources of judges which are now very important and urgent can be resolved soon with the enactment of the Judicial Office Law. Of course, the Act has been optimally taken into account from all possible solutions to problems related to recruitment of qualified judges and integrity, in accordance with the main duties and functions of judges. So in the end it can really provide justice and benefit for the justice seeker community.

Therefore, the election process of judges should prioritize candidates who have a citizenship spirit so as not in a rush to vote, mature and selective for law enforcement democracy, as well as public trust. In its implementation, the problems occur in the choice of ideal recruitment system to seek candidates for judges.¹³

The moral obligation to provide business opportunities and ensure that all citizens who have more or less equal ability to access such opportunities should be cultivated by the state. The principle of fairness as equality in accessing the business opportunity provided by the state should also be governed by an honest and fair¹⁴ process that can show that there is the DPR truly represents the aspirations of the people.¹⁵

This research is interesting and important because of the public demand for the implementation of transparency and public participation which is getting stronger and stronger supported by law and regulation which is valid as the mandate of Law Number 14 Year 2008 on Public Information Transparency (Law Number 14 Year

¹³ Muslim Mufti, 2013, *Teori-Teori Demokrasi*, Bandung, Pustaka Setia, p. 326.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

2008) which has become a basic requirement in the implementation of a good state to realize that democracy is related to public scrutiny and people's right to get the best judge.

B. The Importance of Reformation of the Court System in Indonesia

In reforming the judicial system in Indonesia in the jurisdiction of judicative power, there are two matters underlying reformulation. First, set the constitutional foundation. Second, merit system of appointment of judges.

1. Organize the Constitutional Foundation

The idea of the fifth amendment of the 1945 Constitution is not a taboo to discuss. Reflection of the constitution for more than a decade has clearly shown so many urgent weaknesses to be addressed. Particularly in the clan of judicative power, rearranging the constitutional foundation is a matter of realizing the stability of the administration of judicial power.

There is some content material that must be reformulated so that the political law of judicial power has a constitutional clarity.

First: to rectify the judicial independence interpretation. Of course the question arises as to what will the independence of the judiciary do to be guaranteed in the constitution?

Textually, the constitution too gives a very minimalist definition of judicial independence but it is interpreted liberally. If analyzing Article 24 Paragraph (1) of the Post-Amendment 1945 Constitution which states:¹⁶ "Judicial Power is an independent power to administer the judiciary to enforce law and justice", the definition of independence of judicial authority becomes a very minimalist concept. This is because the independence of the judiciary becomes vague (vague)

¹⁶ Article 24 (1) the Constitution.

in the sense of justice or the meaning of non-yustisi. This vagueness is then made complicated by the rule of law (further regulation) which states that independence covers all aspects of both yustisi and non-yustisi.

Referring to the international declaration on the exercise of judicial power, there are several instruments that interpret judicial independence. Syracuse Principles 1981 defines that;¹⁷

"Every judge is free to decide a matter in accordance with the facts he finds and his understanding, without undue influence, inducement, or pressure, directly or indirectly, at every level. It further states that the judiciary is independent of the executive and legislative branches. "

The IBA Minimum Standards of Judicial Independence of 1982 provides an understanding that independence is divided into two aspects: personal independence and substantive independence.

"Personal independence is a condition and condition to ensure that individual judges are not under the control of the executive. Substantive independence means in performing its functions as a judge, only bound by its laws and beliefs."

The Montreal Universal Declaration on the Independence of Justice 1983 explains that:

"A judge shall be free, and it is his duty to decide the case impartially, based on his judgment of the facts and his understanding of the law, without limitation, influence, inducement, pressure, threat or direct intervention from any party or for any reason. Independent judicial and executive judicial and legislative powers."

The UN Basic Principles of the Independence of Judiciary 1985 provides an interpretation of judicial independence which states that;

"The judicial power shall decide the case which it faces impartially, on fact and by law, without limitation, influence, inducement, pressure, threat, or intervention, directly or indirectly, from any party or for any reason."

¹⁷ Idul Rishan, 2016, "Redesain Sistem Pengangkatan dan Pemberhentian Hakim di Indonesia, *Jurnal Hukum IUS QUIA IUSTUM*, Vol. 23. No. 2, (April 2016) p, 172-174.

Beijing Principles 1995, provides an interpretation of judicial independence which states that;

"The judicial authority shall decide the case against which it is impartial, on the basis of its judgment of facts and understanding of the law, without any direct or indirect influence on the part of any party."

The Bangalore Principles of Judicial Conduct 2002, provides his interpretation of judicial independence that;

"The independence of judicial power is mandatory for the establishment of the rule of law and a fundamental guarantee of fair trial. A judge must defend and demonstrate the independence of judicial power both on an individual and institutional basis ".

Some of the international declarations above, none of which provide exactly the same definition between each other. However, it can be concluded that judicial independence is more focused on issues of judicial or technical nature. Broadly speaking, it can be formulated that indicators of judicial independence include (1) institutional aspects; as its theoretical position is not part of the executive or legislative powers. (2) functional aspect; in its process of functioning the judicial process, there is no form of pressure or intervention from other branches of power in the case of a technical nature of the judiciary. And (3) personal aspects of judges; an independent judge individually in deciding a case without pressure from colleagues or hierarchy of internal institutions of the judiciary.¹⁸

From the explanation above it can be concluded that the sphere of non judicial justice has no causal relationship with judicial independence. Practice in some countries also shows that the court's non-judicial affairs are handed over to independent organs of a state just like a judicial council that actually exists as a form of judicial accountability. Therefore, the independent judicial power as mentioned in the 1945 Constitution after the amendment is not the interpretation

¹⁸ *Ibib*, p. 176.

of freedom of power as free as possible, in all the joints of the administration of judicial power.

Second: to ensure the existence of the Independent State Commission as the new branch of power. The development of the state administration of Indonesia today can not be separated from the role of independent state organs. The mushrooming of independent state organs post-constitutional amendment requires a separate portion as the fourth branch of government.

America is one of the pilot countries that has acknowledged the existence of independent state organs as the fourth branch of power. Checks and balances are no longer interpreted as a balance of power between the executive, the legislature and the judiciary, but have been developed and balanced by the functioning of independent state organs.¹⁹ What is practiced in America becomes the entrance of the state administration of Indonesia.

The need for the political will to provide its own portion in the constitution is not impossible. The Judicial Commission (KY), the General Election Commission (KPU), the Corruption Eradication Commission (KPK), the Supreme Audit Board (BPK) are among the most likely to receive constitutional importance in the Constitution. Provision of this portion can not be separated from its function to maintain the stability of the balance of power (checks and balances). The will to recognize the existence of independent organs as the new branch of power, is nothing but to reduce resistance to the relation of power to the major state organs. State experience has proven that independent state organs are highly vulnerable to develop conflicts with major organs that are so strong and patterned. KPK versus

¹⁹ Denny Indrayana, 2008, *Negara Antara Ada dan Tiada; Reformasi Hukum Ketatanegaraan*, Jakarta, Kompas, p. 28.

Polri, KY versus MA and MK, are a number of stories that should be minimized and should not even exist in the future.

This fact can not be denied because the organ of an independent state has only a very minimalist juridical legitimacy. The weakness of this theoretical position often makes the independent state organ very difficult to build corporate culture with its partners. Therefore, to strengthen the function of the Judicial Commission in maintaining judicial independence and accountability, institutional repositioning is necessary. This means that KY is no longer part of the judicial power. KY can be positioned specifically on a new power branch which is the power of an independent state organ, on the subject matter of the constitution in the future. For giving the share of KY in Chapter IX Judicial Power has a systemic negative impact on power relations of KY, MA, and even the Court.

Third: unravel the stringy threads of MA-KY and MK. This becomes an important content material to rectify the function of KY to MA and MK. Reformulation of power relations can be pursued by the redistribution of non-judicial power against KY. The Constitution must give a clear will to the authority given by KY without having to dichotomize the status of a judge, a judge or a constitutional judge. This is to give a clear affirmation of the subject of authority of KY.

Therefore, the logical consequence is that the judicial power no longer adopts a one-roof judicial managerial system. This means that both MA and MK in the design go hand in hand with KY in maintaining the stability of independence and judicial accountability. The political will must place KY as the main partner of the

Supreme Court and the Court in carrying out the implementation of judicial power in the field of non-justice.²⁰

The non-judicial power division can be regulated in detail by the law, such as the issue regarding the scope of supervision of the Judicial Commission against all judges of both career judges, Supreme Court judges and constitutional judges. Judicial selection system should involve KY, up to the promotion of judges through promotion and mutation in the Supreme Court.

2. Merit System

If the Constitution has purified the independence of the judiciary and align the relations of the Supreme Court, the Judicial Commission and the Constitutional Court, the time comes for the law to regulate the procedure of appointment of judges which is more based on merit. Admittedly merit system in the judge appointment system is the most popular approach adopted by continental European countries. Even a research report from Global Corruption Report in Judicial System in 2007 stated that to prevent politicization in the system of appointment of judges in a country, at least there are three indicators; (1) involving independent state organs, (2), based on merit-based systems and (3) involving civil society participation. Therefore, merit system formulation needs to be done comprehensively including career judges, Supreme Court justices and constitutional judges.

The pattern of appointment of career judges. After the Constitutional Court Decision Number 43 / PUU-XIII / 2015,²¹ the career judge selection system became the single domain of the Supreme Court. This became one of the fundamental systems that needed to be overhauled because in the selection of

²⁰ Idul Rishan, Loc. Cit.

²¹ Putusan MK Nomor 43/PUU-XIII/2015

career judges it becomes not transparent and not accountable. The question is, who oversees the workings of the Supreme Court in the career judge selection system? To whom the Supreme Court is accountable for? Therefore, it is necessary to formulate a much better merit system.

If former career judges have only become the single domain of the Supreme Court, then the Judicial Commission should be involved to create a better quality of recruitment system. This system is the answer for the career judge recruitment in order to be more participative, transparent and accountable. When the Judicial Commission has the authority to conduct a system of recruitment (judicial recruitment) to the Supreme Court justices, then the career judges should also be the domain of the authority of the Judicial Commission. Involving the Judicial Commission in the selection and appointment of career judges will make the system much more merit. Not only that, the involvement of the Judicial Commission in the system of selection and appointment of career judges is a way of adoption of civil society perspective, as it includes the screening of candidates' track record. This means that through the involvement of the Judicial Commission in the selection process and appointment of career judges, the community is very involved from the selection process of judges to the possibility of the termination of judges.

In the system of selection and appointment of the Supreme Court justices. After the decision of the Court Number 27 PUU / XI / 2013,²² the model of appointment of Supreme Court justice is maintained because the Constitutional Court's decision has straightened out the mistakes that occurred that related to power relations among the Judicial Commission – the House of Representative and

²² Putusan MK Nomor 27 PUU/XI/Tahun 2013

President in appointing Supreme Court Justice. Whereas in the appointment system of justices, the House (DPR) only gives approval to candidates submitted by the Judicial Commission. Approval is exercised as a right to confirm or right of confirmation without the need for any further selection. This means that the House is only entitled to "approve" or "disapprove" the candidate for Supreme Court nominee proposed by the Judicial Commission. This is to prevent the Supreme Court judges from any political interference or other political transactions.

What about the functions of the House and the President, is it merely a rubber stamp? Certainly not. In the context of checks and balances, involving the House and the President is a mandatory requirement in the constellation of appointment of justices as practiced in other countries. The House of Representative represents the public interest in the system of appointment of Supreme Court Justices. It should be noted that both the House of Representatives and the President still have veto power over the nominee of Supreme Court Justices proposed by the Judicial Commission. Under certain circumstances the veto may be used if the proposed supreme nominee is found guilty of unlawful conduct.

When there is a mistake that the Judicial Commission may not be able to touch, the House and/or President may reject the proposed Supreme Court nominee. Recent development of state administration shows the dynamics of the appointment of state officials. For example, in the case of the appointment of the Chief of Police Budi Gunawan, after being proposed by Kompolnas and submitted to the House, the Corruption Eradication Commission (KPK) determined the candidate as a suspect, causing a political turbulence. In this case it can be seen that the President may use a veto right to cancel the inauguration of judges.

From the various appointment systems of judges, there are the difference of procedures and mechanisms for the appointment of judges. That is not a problem, because the system of appointment of judges can not only be uniformed to one another between career judges and Supreme Court judges or constitutional judges (depends on level of court). However, there is a fundamental pattern of the appointment system of career judges, the Supreme Court justice and constitutional judges by involving the Judicial Commission as an independent organ.

Some improvements to the career appointment system of career judges, supreme judges and constitutional judges are essentially ideas for a refinement of existing systems. In the future, this redesign can be the will and spirit to create a better system of judges' selection.