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Indonesian Judicial Commission in Appointment *Ad Hoc* Judges: In Search of Constitutional Modality

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Abstract:

In Indonesian Constitution, Judicial Commission had the authority to nominate the candidate Supreme Court Justice. This study aims to find the constitutional model for the authority of the Judicial Commission to propose the appointment of the Supreme Court ad hoc judges. It is doctrinal legal research using the qualitative analysis. The constitutional model was analyzed using the approach of six modalities of constitutional argument suggested by Philipp Bobbit. This study has found that, despite no explicit authority stipulated in the Indonesian Constitution, Bobbit's interpretation methods offer a constitutional perspective that from the textual, historical, doctrinal, structural, prudential, and ethical arguments, the Judicial Commission has the constitutional legitimacy of proposing the candidates for the Supreme Court ad hoc judges.

Keywords: judicial commission; judicial appointment; ad hoc judges

Introduction

In many countries, especially the developing countries, the Judicial Commission exists generally within the judicial and law enforcement agencies and other government institutions. Judicial Commission is a product of the cultural development of a legal system as well as an integral part of the welfare state.¹ The

¹ Zainal Arifin Hoesein, Strengthening the Role and Function of Judicial Commission in Building Clean and Respectable Justice in Indonesia, *Scientific Research Journal (SCIRJ)*, Volume IV, Issue III, March 2016, p.1

presence of the Judicial Commission in the Indonesian constitutional system after the amendment of the Constitution of the Republic of Indonesia from 1945 brings a new direction in the nation's journey, especially in the field of judicial appointment and enforces dignity of Indonesian judges.² Based on the prior studies, the appointment of judges has become a strategic issue in the field of law and politics in the post-amendment period of the Constitution.

Faiz study's examined that the selection of the judges of the constitutional court has never been in the conformable standard.³ Likewise, the studies on the appointment of Supreme Court Judges conducted by Chandranegara⁴ and Puspitasari⁵ after the reform era. Each study showed that the House of Representatives took on the role in politicizing the approval of the Supreme Court Judges proposed by the judicial commission. Rishan stated⁶ that after the political and constitutional reforms in Indonesia, the appointment of judges at the Supreme Court and the Constitutional Court tends to have no definitive pattern. Furthermore, the Judicial Commission, as an independent state commission, seemed to have no major role in appointing judges in Indonesia. Despite its presence as one of the turning points for Indonesian judicial reform, the Judicial Commission's authority has frequently encountered resistance from the actors of the judicial power itself.

Due to the resistance to the role of the Judicial Commission in realizing independent and accountable judiciary, its constitutional authority requires to be investigated further. Article 24B paragraph (1) of the Indonesian Constitution provides that the Judicial Commission is independent and has the authority to propose candidates for the Supreme Court justices and other authorities to preserve and uphold the honor, dignity, and conduct of judges. In fact, those in the judiciary have frequently opposed the Judicial Commission authority. Looking at its history, the Judicial Commission is a product of democratization, but its authority has often been invalidated by the judicial branch.⁷ Recently, Burhanudin, a nominee for ad hoc

² Imran, Huala Adolf *et.all*, Strengthening The Position and Function of The Judicial Commission in Constitutional System of Republic Indonesia, "*Journal of Liberty and International Affairs / Vol. 4, No. 3, 2018*". p.99

³ Pan Mohamad Faiz, "A Critical Analysis of Judicial Appointment Process and Tenure of Constitutional Justice in Indonesia", *Hasanuddin Law Review, Vol. 2 Issue 2, August (2016)*, hlm. 161.

⁴ Lihat Ibnu Sina Chandranegara, 2018, *Kemerdekaan Kekuasaan Kehakiman Pasca Transisi Politik: Dinamika Penuangan dan Implementasinya*, UM Jakarta Press, Jakarta, hlm. 351.

⁵ Sri Hastuti Puspitasari, *Pelibatan Dewan Perwakilan Rakyat Dalam Pengisian Jabatan Hakim Agung & Hakim Konstitusi Menurut Sistem Ketatanegaraan Indonesia Pasca Perubahan UUDN RI Tahun 1945*, Ringkasan Disertasi Program Doktor Ilmu Hukum Universitas Gadjah Mada, 2020, Yogyakarta, hlm 69.

⁶ Idul Rishan, "Pelaksanaan Kebijakan Reformasi Peradilan Terhadap Pengelolaan Jabatan Hakim Setelah Perubahan Undang Undang Dasar 1945", *Jurnal Hukum Ius Quia Iustum No. 2 Vol. 26 Mei 2019*, hlm. 271

⁷ The attempt to strengthen the functions and authorities of the commission through legislation has often been undone in judicial review. For instance, it cannot supervise constitutional justices after Article 21 of Law Number 22 of 2004 on the Judicial Commission was invalidated. This authority is no longer legally binding according to MK Decision Number 005/PUU/IV/2006. It was also involved in the recruitment of career judges at the Supreme Court. The involvement was stipulated in the amendment to the law on the



judges at the Anti-Corruption Court in 2016, filed judicial review of its authority in the appointment of ad hoc judges.⁸ He feels aggrieved at Article 13 point a of the Judicial Commission Law on the commission authority in the appointment of the Supreme Court justices and ad hoc judges.⁹ According to him, the ad hoc judges are different from the Supreme Court justices in terms of status, functions, as well as authority. The selection of ad hoc judges, particularly at the Anti-Corruption Court, by the Supreme Court regulated in the Anti-Corruption Court Law, prior to the enactment of the Judicial Commission Law, guaranteed legal certainty better and accommodated the competence of an ad hoc judge in specific fields as required by the Supreme Court.

The logic is that Article 24B paragraph (1) of the Indonesian Constitution limits the Judicial Commission authority to “propose candidates for the Supreme Court justices and other authorities to preserve and uphold the honor, dignity, and conduct of judges”. The selection method of *ad hoc* judges, including the ad hoc judges at the Anti-Corruption Court, by the Supreme Court as stipulated in Law Number 46 of 2009 on the Anti-Corruption Court (hereinafter referred to as the Anti-Corruption Court Law) before the Judicial Commission Law was passed, guaranteed legal certainty better and accommodated the competence of a judge, conforming to Article 13 paragraph (2) of the Anti-Corruption Court Law, as it did not need a lengthy process. The Judicial Commission authority in Article 24B paragraph (1) of the Indonesian Constitution is only related to the nomination for the Supreme Court justices, instead of ad hoc judges.

The phrase “*and ad hoc judges*” in Article 13 point a of the Judicial Commission Law is deemed unconstitutional as Article 24B paragraph (1) of the Indonesian Constitution does not stipulate its role in the selection of the ad hoc judges at Supreme Court. It expands and even adds the authority from the appointment of the Supreme Court justices to the nomination for the ad hoc judges at the Court. From the background above, this study aims to find the constitutional model for the Judicial Commission in the appointment of ad hoc judges at the Supreme Court. The search was introduced by Bobbit in *Constitutional Fate, Theory of Constitution* In this method, he combines six approaches, i.e. textual, historical, structural, doctrinal, prudential, and ethical methods. It is known as a purposive approach to reveal a broader meaning and objective of constitutional interpretation.¹⁰ This is doctrinal legal research using secondary data. It employed historical, statutory, and conceptual approaches. The data was analyzed qualitatively.

judiciary. Nevertheless, MK annulled it in its Decision Number 43/PUU-XI/2015. In addition, the Judicial Commission authority was strengthened by Government Regulation in Lieu of Law Number 1 of 2013. The regulation stipulated the involvement the Judicial Commission in the nomination and supervision of constitutional justices. However, the authority was invalidated by MK Decision Number 1,2/PUU/XII/2014.

⁸ According to Article 1 paragraph (3) of Law Number 46 of 2009 on the Anti-Corruption Court, ad hoc judges are temporarily appointed to hear corruption cases and shall have special expertise and experience and their appointment shall be regulated by law. [SEP]

⁹ See: Law Number 22 of 2004 on the Judicial Commission as amended by Law Number 18 of 2011.

¹⁰ See: Philip Bobbitt, 1982, *Constitutional Fate, Theory of Constitution*, Oxford University Press, New York, p. 3.



Result and Discussion

The approach of *constitutional arguments* in the interpretation coined Philip Bobbitt consists of 6 *constitutional interpretation methods*. The first constitutional interpretation is textual argument. In this method, constitutions are interpreted based on the words they contain. Second, historical argument, or originalism. This method is used to reveal the original intent of the constitutions when they were adopted. The third argument is doctrinal one. This argument interprets a constitutional provision by understanding theories and applications based on relevant studies. Fourth, the constitutions can be interpreted using prudential argument by cost-benefit calculations of the constitutional applications from the perspectives of politics and economy. Fifth, structural argument. This method is considered the prudential argument at the macro level interpreting laws and regulations from constitutional points of view. Lastly, Bobbitt puts forward ethical, or moral, argument developed from the moral and ethical principles in the constitutions. His argument is interesting in terms of constitutional interpretation as it offers the perspectives of *constitutional importance* dan *constitutional morality*.

Textual Argument

The textualist approach can be interpreted as: “*An originalist who gives primary weight to the text and structure of the Constitution*”.¹¹ In the context of this textual argument, several points can be discussed. **First**, it is related to the "appointment of "the Supreme Court justices". The Indonesian Constitution explicitly stipulates the role of the Judicial Commission in the nomination of the judges. It should be interpreted that the word "judges" encompasses all judges and the Supreme Court is the highest court according to the Judiciary Law that "*Judges are the Supreme Court justices and judges of its subordinated judicial bodies, i.e. general courts, religious courts, military courts, administrative courts, and special courts within their jurisdiction*"¹²

Textually speaking, the judges are the Supreme Court justices and the judges of the special courts within the jurisdiction. It is crystal clear that the ad hoc judges have the same levels and jurisdiction as those of the existing judicial bodies. The different provisions in Law Number 46 of 2009 on the Anti-Corruption Court and Law Number 18 of 2011 stem from the shift in legal policy. It is impossible to consider them unconstitutional due to the shift in the selection of the ad hoc judges at the Supreme Court and the Anti-Corruption Court Law.

Second, interpreting Articles 24, 24A, and 24B of the Indonesian Constitution is not sufficient. The most important thing is to look at Article 25 of the Indonesian Constitution, which says that "*the requirements of the appointment and discharge of a judge are stipulated by law*". Hence, the existing law is the result of the legal policy of the requirements of the judicial appointments. The difference of the existing law is the interpretation of the legal policy of how the ad hoc judges at the Supreme Court are selected. In this concept, Article 25 mandates the lawmakers to stipulate the

¹¹ See Research Pusat Studi Konstitusi FH Andalas, 2010, “*Perkembangan Pengujian Perundang-undangan di Mahkamah Konstitusi*”, Kerjasama PUSAKO-MKRI, Padang, p. 59.

¹² See: Article 1 paragraph (5) of Law Number 48 of 2009 on the Judiciary.



requirements of the appointment and discharge of judges further. The policy shall conform to the law¹³

Third, Article 24B in particular should comprehensively be interpreted that the authority to propose the candidates for the Supreme Court justices and the other authorities to preserve and uphold the honor, dignity, and conduct of judges are interrelated and cannot be separated. In other words, the authority in the nomination is closely related to the other authorities. The Judicial Commission can be involved in proposing the nominees for the ad hoc Supreme Court justices according to the interpretation of the phrases "to propose the candidates for the Supreme Court justices" and "the other authorities to preserve and uphold the honor, dignity, and conduct of judges". Therefore, the dichotomy between the Supreme Court justices and their ad hoc fellows does not rule out the involvement of the Judicial Commission as it is granted other constitutional authorities

Historical Argument

Historical Argument can be used by examining the original intent of the Indonesian Constitution and relevant law. First, it is related to the existence of the Judicial Commission. The historical design for the Judicial Commission was conceived prior to the constitutional amendment. The notion of the Judicial Commission manifested as *Majelis Pertimbangan Penelitian Hakim* (MPPH/Advisory Assembly of Judges) in 1968. MPPH gave advice and made decisions on the appointment, promotion, transfer, and disciplinary measures against judges, even though the problems of independence and its provisions remained. Nevertheless, the design of MPPH was inspired by such a body in France. In 1946, France established the High Council for the Magistrature. Similar to MPPH, it dealt with the bureaucracy and management of the judiciary. This notion was then gone and reappeared during the constitutional amendment, leading to the establishment of the Judicial Commission.¹⁴

Buku V Naskah Komprehensif Perubahan UUD 1945 explains why the Judicial Commission exists and it is categorized into the chapter of the judiciary despite the fact that it plays no role in adjudication. From opinions and proposals, the Judicial Commission was established to supervise the Supreme Court and its subordinated judicial bodies. Hence, the Judicial Commission was conceived of having regional representatives, being involved in all judicial selections, etc.¹⁵

Tabel 1: Originalism Overview of the Judicial Commission

No	Name	Fraction	Original Intent
1	Ali Masykur	National	"...the national Judicial Commission should

¹³ See: Iwan Satriawan and Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang", *Jurnal Konstitusi*, Volume 16, Number 3, September 2019, p. 573.

¹⁴ Risalah Komisi Yudisial RI, *Cikal Bakal, Pelembagaan, dan Dinamika Wewenang*, Sekretariat Jenderal KY RI, Jakarta, p. iii and iv.

¹⁵ The framers of the constitution, such as Ali Masykur Musa, I Dewa Gede Palguna, Pataniari Siahaan, Hardjono, Soewarno, and Jakob Tobing, argued that the Judicial Commission should be involved in the entire process of the judicial selection. Several fractions debated this issue to avoid exhaustion considering the limited authorities of the Judicial Commission. Consequently, its authorities were interpreted more widely by the lawmakers as long as they were not in conflict with the Indonesian Constitution. See: Mahkamah Konstitusi Republik Indonesia, 2010, *Naskah Komprehensif Buku (VI) Perubahan UUD 1945*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta, p. 196, 611, 621, 645, 655, and 657.



	Musa	Awakening Party	<i>have authorities in the appointment, promotion, and transfer of the Supreme Court justices...”</i>
2	Pataniari Siahhaan	Indonesian Democratic Party of Struggle	<i>“..Chapter IX should stipulate the Supreme Court, including the selections of “the Supreme Court justices and judges”. Now we are all of the opinion that the quality of our judges is still questioned. A more proper and right institution should have authority to deal with it”</i>
3	Harjono	Indonesian Democratic Party of Struggle	<i>“...In terms of the judicial recruitment, the Judicial Commission will only conduct the selection of the candidates for the Supreme Court justices. What about the non-career Supreme Court justices? Why should the commission not be involved in the recruitment of high court judges dan district court judges? What are the differences? I think that the most fundamental problem lays not at the Supreme Court, but in high courts and district courts. Therefore, let’s start to imagine whether we will change the recruitment of our judges by means of the Judicial Commission or not...”</i>
4	Jakob Tobing	Functional Group Party	<i>“...the Judicial Commission should have authority over not only the Supreme Court justices, but also high court judges and district court judges. They are all judges who cannot be held accountable to MPR. Thus, the recruitment plays a critical role in determining the qualification of the judges...”</i>
5	Zain Badjeber	United Development Party	<i>“...the institutionalization of the Judicial Commission in the Constitution is related to not only the recruitment of the Supreme Court justices, but also its other authorities stipulated further by the lawmakers...”</i>

In spite of the provisions of Article 24B of the Indonesian Constitution, the Judicial Commission authorities still may be interpreted more widely by the lawmakers as long as the interpretation is not in conflict the Indonesia Constitution. Almost all fractions had the same political will that the Judicial Commission was vital to judicial independence and accountability after the long encroachment by the executive branch.¹⁶ The long debate during the constitutional amendment led to the

¹⁶ Daniel S.Lev, 1990, *Hukum dan Politik di Indonesia Kesenambungan dan Perubahan*, Third Edition, LP3ES, Jakarta, p. 363.



Judicial Commission functions of controlling and recruiting judges. Thus, it is undeniable that the Judicial Commission is the state agency designed to deal with *judicial recruitment* which was problematic.¹⁷

It is in line with what Paul Gilligan says that “*the most widely recognised power of a judicial council is its role in the appointment of judges*”.¹⁸ It can be referred as, comparatively speaking, one of the main characteristics of the Judicial Commission in a number of countries is the involvement in judicial selection and appointment. In European Union countries, namely Italy,¹⁹ France²⁰, and the Netherlands²¹, the Judicial Commission has the authority in the selection, promotion, and transfer of judges. In Iraq, the judicial selection was conducted by the Higher Judicial Council.²² The best practices in some countries demonstrate the key role the Judicial Commission plays in the judicial recruitment. The Judicial Commission is involved totally in all the judicial selections of those countries.

Therefore, from the historical perspective, the lawmakers had the political will to change the legal policy of the nomination for the ad hoc Supreme Court justices by amending the Judicial Commission to conform to its authority in proposing the candidates for the Supreme Court justices. Prior to passing a law, the lawmakers shall harmonize and synchronize the law with other regulations, while disseminating the constitution as required by the society. Thus, historically speaking, they endeavoured to adapt the existing regulations to the Indonesian Constitution, particularly in terms of the Judicial Commission authorities, and the society's need for the recruitment of the ad hoc Supreme Court justices based on competence and competitiveness, instead of the monopoly by an institution.

Doctrinal Argument

This interpretation can be seen in several Constitutional Court decisions on the Judicial Commission and its authorities, particularly in the judicial review of the provisions considered open legal policy. The term "open legal policy" means the lawmakers discretion in making legal policy (adopting legislation).²³ Judicial reasoning point 3.19 of Decision No. 32/PUU-XII/2014 states that; “*The categorization of judges , i.e. ad hoc judges, whether they are state officials or not, is open legal policy, which can be changed at any time by the lawmakers to meet the needs and development*

¹⁷ According to Pompe, the politicization of the judiciary reached its peak in 1992 when Madame S. Soegondo was installed as a director general of the Department of Justice. She was the first director general having no background in the judiciary and recruited from the Department of Justice. It is the apex of the government interventions on the compromise with IKAHI in 1968. See: Sebastiaan Pompe, 2012, *Runtuhnya Institusi Mahkamah Agung*, Lembaga Kajian dan Advokasi untuk Independensi Peradilan, Jakarta, p.168.

¹⁸ Paul Giligan, in ENCJ Project Team, “Council for the Judiciary Report 2010-2011”, with the support of the European Union, 2011, p. 6.

¹⁹ John Adenitire, *Judicial Independence in Europe : The Swedish, Italian, and German Perspective*, Intern-Judicial Independence Project, Cambridge, 2012, p. 9.

²⁰ Wim Voermans, 2002, *Komisi Yudisial di Beberapa Negara Uni Eropa (Council for the Judiciary in EU Countries)*, Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP), Jakarta, p. 6.

²¹ R. de Lange dan P.A.M. Mevis, “*Constitutional Guarantees for the Independence of the Judiciary*”, *Electronic Journal of Comparative Law (EJCL)*, Volume 11.1, May 2007, p. 1.

²² Alina Christova, “Seven Years of Eujust Lex: The Challenge of Rule of Law in Iraq”, *Journal of Contemporary European Research*, Volume 9, Issue 3, 2013, p. 427.

²³ Mahrus Ali, in “Mahkamah Konstitusi dan Penafsiran Hukum yang Progresif”, *Jurnal Konstitusi*, Volume 7, Number 1, February 2010, p. 75.



as required by the types and specifications and qualifications of the office. Thus, the lawmakers can exclude the ad hoc judges from the categorization of the state officials".²⁴ Furthermore, Decision No. 56/PUU-XII/2012 reads "According to the Court, the Indonesian Constitution does not specify the age limits for all judges. They are a part of open legal policy which can be changed any time by the lawmakers as required by the types and specifications and qualifications of the office. Therefore, the age limits shall be specified by the lawmakers".²⁵

Although the cases are not alike, the MK considers them open legal policy of the qualifications of the ad hoc judges dan judicial selections, particularly in terms of the age limits. Hence, the judicial selections shall conform to Article 25 of the Indonesian Constitution. In other words, the doctrinal basis of this provision is open legal policy. In several decisions, MK rules in favor of open legal policy.

Moreover, in the theoretical framework, the Judicial Commission was established to reconcile the needs of the judicial bodies and the government interests. In countries undergoing democratization, the Judicial Commission is an integral part of the judicial reform. It has a direct impact on the management of judiciary, including the office of judges. In this aspect, the reform is undertaken through the reform of the appointment, supervision, promotion, transfer, monitoring, and dismissal of judges. Furthermore, this policy has its consequences on the human resources of the judiciary and its independence in managerial organization and budgetary autonomy.²⁶

From the perspective of the Transition Wave Theory, the institutionalization of judicial councils stems from the judicial reform undertaken by European countries. Generally, they take over the role of the governments in safeguarding judicial independence.²⁷ This trend can also be found in Latin American countries, such as Argentina, Peru, dan Mexico, where the judicial reform was begun in the 1990s, leading to the establishment of the Judicial Commission as a pillar in the judicial appointments.²⁸ Nuno Garoupa and Tom Ginsburg says that the proliferation of the *judicial councils* as an agenda of the judicial reform is also inspired by an economic theory known as "principal-agent". Garoupa and Ginsburg state that: "*a theory of judicial councils drawn from the economic concept of principals and agents. Judicial councils are monitoring devices designed to maintain the relationship between the principal, society, and its agents, and the judges. we develop a principal- agent model of judicial councils. We treat judges as the agents and society as the principal, on whose behalf the judges exercise power.*"²⁹

²⁴ See: Constitutional Court Decision No. 32/PUU-XII/2014, p. 112.

²⁵ See: Constitutional Court Decision No. 56/PUU-XII/2012, p. 35.

²⁶ Linn Hamergren, 2007, *Envisioning Reform; Conceptual and Practical Obstacles to Improving Judicial Performances in Latin America*, The pennsylvania state university press, Pennsylvania, h. 25. See also, Elin Skar, Ingrid Sasmed & Siri Glopen, 2004, *Aid to Judicial Reform: Norwegian and International Experiences*, Michelsen Institute Development Studies and Human Rights, Bergen- Norway, p. 7.

²⁷ Daniela Piana in David Kosar, "The Least Accountable Branch", *International Journal of Constitutional Law*, Volume 11 Issue 1, 2013, New York University School of Law, New York, p. 237.

²⁸ Jodi Finkel, 2008, *Judicial Reform as Political Insurance: Argentina, Peru, Mexico, in the 1990's*, University of Notre Dame Press, Indiana, p. 9.

²⁹ Nuno Garoupa and Tom Ginsburg, "The Comparative Law and Economics of Judicial Councils", *Barkeley Journal of International Law*, Volume 27, Issue 1, Article 3, 2009, California, p. 9-10.



Nuno Garoupa and Tom Ginsburg explicitly says that one of the main characteristics of the Judicial Commission is its involvement in the judicial appointment. They assert that the role of the Judicial Commission in the judicial selections is a step toward more selective and competitive judicial selections. *They state that the selection of judges is a central factor in most theories of judicial independences. Judges who are dependet in some way upon the person who appoints them cannot be relied upon the deliver natural, legitimate, and high quality decisions.*³⁰ Research conducted by Rishan in 2018 shows that there are four models for the Judicial Commission in 22 states.³¹ *First*, the Judicial Commission serves as the sole inisiator of judicial appointment (judicial appointment body). All judges, from the Supreme Court justices and judges in its subordinate judicial bodies to constitutional justices, are screened and selected by the Judicial Commission, then shall be approved by the parliament, and inaugurated by the President.

As the judicial appointment body, the relations between the Judicial Commission and the judiciary reflects those of the principal and agent. The Judicial Commission is the principal, and judges are the social agents upholding justice values. Thus, the Judicial Commission perform the functions of checks and balances among state agencies. Generally, the judicial appointment involving the judicial council is always designed stratifiedly among those agencies, involving the Judicial Commission as a state auxiliary agency, the judiciary, the parliament, and the President.

Second, the Judicial Commission discharges the function of a watchdog body supervising judges' ethics and professionalism. Hence, it only has authorities to supervise the judges, Supreme Court justices, and constitutional justices. The Judicial Commission is no more than an ethics council. It investigates and adjudicates pelanggaran etika dan professional ethics violations committed by the judges. As a consequence, the Judicial Commission has no relations with the judiciary in terms of *checks and balances*. As an ethics council, it supervises individual judges, instead of their institution. The supervision has nothing to do with court decisions and has no impact on their legitimacy. It supervises the ethics, conduct, dignity, and professionalism of judges under judicial conduct.

Third, the Judicial Commission is the administer legal career body (hybrid model). This model combines the features of the judicial appointment body and the watchdog body. It carries out the functions of appointing judges and supervising their ethics and professionalism. The difference from the characteristics of the hybrid model lays in the Judicial Commission authorities in fostering dan promoting the capacity of the judges. In other words, it determines the levels of the judges' career, from their appointment, supervision, promotion, transfer, and dismissal

³⁰ 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, p. 5.

³¹ The study employed the comparative approach and the object was measured by *stratified sampling* with four indicators: the guarantee of the judicial independence in the constitution, the constitutional provision of the Judicial Commission, the relatively same historical driving factors, and its role as a pillar of the judicial reform. See: Idul Rishan, 2019, *Kebijakan Reformasi Peradilan; Pertarungan Politik, Realitas Hukum, dan Egosentrisme Kekuasaan*, FH UII Press, Yogyakarta, p. 49.

(impeachment of judges). With the characteristics of the hybrid model, the Judicial Commission has more extensive and integrated authorities. By institutionalizing the Judicial Commission as the administrator legal career body, the management of the judiciary is no longer based on the one roof system, but the shared responsibility. As the administrator legal career body, it also exercises checks and balances among state agencies, particularly in terms of the judicial appointment.

Fourth, as a self-governing body, the Judicial Commission has supreme authorities (strong judicial council) due to its role as the independent administrator dealing with all needs and management of the judiciary. After the full transition of the administrative authority over the judges and judiciary to the Judicial Commission, the judiciary only has authorities of adjudication. Likewise, the Supreme Court and the Constitutional Court do not deal with the management of the judges and judiciary any longer. All matters related to the judiciary, from the management of the judges, registrars, other personnels, to infrastructure are handed over to the Judicial Commission.³² Furthermore, as a self-governing body, it can propose the budget for the judiciary to the governments. In other words, the Judicial Commission is the buffer between the judiciary and governments. It has a direct impact on the relations between the Judicial Commission and the judiciary, forging partnership between them. In Indonesia, the Judicial Commission is much closer to the hybrid model of the judicial appointment body and watchdog. On one hand, it nominates the candidates for judges. On the other hand, the Judicial Commission has authorities to preserve and uphold the judges' honor. Therefore, its involvement in the appointment of the Supreme Court ad hoc justices is the interpretation of its role as the judicial appointment body.

Prudential Argument

This interpretation can be used to estimate the costs and benefits of the Judicial Commission authority in the nomination for the Supreme Court ad hoc justices. **First**, all Supreme Court justices are to be treated equally. Furthermore, they have the same authority to adjudicate. The absence of this dualism will guarantee legal certainty in its rulings, involving the Supreme Court ad hoc justices. **Second**, the ideal construction of the Judicial Commission enables the recruitment of better qualified judges. **Third**, the involvement of the Judicial Commission in the appointment leads to the transparency and accountability of the selection process (at least in the nomination), prior to the political process at the DPR.

Those are the constitutional importance of involving the Judicial Commission in strengthening the principles of the appointment of the Supreme Court justices and the other authorities to preserve the dignity of the judges. Hence, the Judicial Commission should be granted authority to assure the quality of the ad hoc judges. Furthermore, the Judicial Commission was designed to ease the workloads of the Supreme Court in its human resources management. It is interesting to see what Autheman and Elena say *“the Supreme Court is perceived to have excessive control over lower court judges. Some countries are primarily concerned with the amount of time judges*

³² *Ibid.*, p.421



spend on administrative matters and want to improve the effectiveness and efficiency of the courts by transferring the managerial function to another body”.³³

Therefore, the most enormous benefit is that the elements, system, and mechanisms at the Judicial Commission can directly work to nominate the candidates, instead of making new mechanisms or leave it to old institutions, such as the Supreme Court. The Judicial Commission can play a critical role in strengthening judicial independence and accountability, improving access to justice, law enforcement, accountable judicial governance, and reducing judicial corruption.

Structural Argument

In relation to the provisions of state agencies in laws and regulations and constitutions, there is a new perspective on the concepts of main organs and supporting organs. Thus, the relation of the state agencies should be examined beyond the classical concept of three branches: executive, legislative, and judicial. Those branches have been considered the "main organs" and the other agencies have been deemed the "supporting organs". The agencies, i.e. state auxiliary agencies, deserve closer examination as they are established not only under laws, but also constitutions. This new perspective becomes more complex and specific. According to Baer, the state auxiliary agencies³⁴ constitute the new evolution of the separation of power. The independent regulatory commissions constitute the new evolution of the separation of power. They are the headless fourth branch.³⁵

Arjomand says that the state auxiliary agencies are an integral part of political reconstruction and constitutionalism.³⁶ Furthermore, Ackerman states that the existence of those agencies is "the new separation of powers".³⁷ They demonstrate that the branches become more specific than the classical "main" and "supporting" organs. The approach can be adopted in the relation between the Judicial Commission and the Supreme Court. As the state agencies whose authorities are stipulated in the constitution, the Supreme Court is the main organ of the judiciary, while the Judicial Commission is the supporting organ. However, in the judicial appointment and ethics, the Judicial Commission is the main organ, and the Supreme Court is the supporting organ. Therefore, the Judicial Commission plays the main role in nominating the candidates for the Supreme Court justices and preserving the dignity and conduct of judges

In *Reducing Corruption in the Judiciary* (2009), USAID states that "judicial selection should involve independent screening of the qualifications of candidates for judicial appointment. Some countries have established judicial councils that perform this function along with other duties of court administration. Other countries have established commissions with

³³ Violaine Autheman and Sandra Elena, 2004, *Global Best Practices; Judicial Councils Lesson Learned From Europe and Latin America*, IFES Rule of Law White Paper Series-USAID, United State of America, p. 2.

³⁴ Susan D. Baer, "The Public Trust Doctrine: A Tool to Make Federal Administrative Agencies Increase Protection of Public Law and Its Resources", *Boston College Environmental Affairs Law Review*, Volume 15, 1988, p. 382.

³⁵ Yves Many and Andrew Knapp, 1998, *Government and Politics in Western Europe*, Oxford University Press, New York, p. 281.

³⁶ Said Amir Arjomand, "Law, Political Reconstruction and Constitutional Politics", *Journal International Sociology*, Volume 18 Issue 1, March, 2003, p. 9.

³⁷ Bruce Ackerman, "The New Separation of Power", *The Harvard Law Review*, Volume 113, HVL 633, January 2000, p. 728.



the sole function of producing slates of qualified candidates to fill vacancies."³⁸ Hence, by delegating the responsibility for selecting judges to numerous actors, a constitution can mitigate the risk that any one individual will exert too much influence over the development of the law. Such a system may also weed out the most ideologically extreme judges, as most candidates will represent a compromise reached through political negotiation. The constitutions of both Ethiopia and South Africa, for example, involve the Judicial Council in the process of appointing Constitutional Court judges.³⁹ In Indonesian post-transition, recruitment methods involving the role of the Judicial Commission, Parliament and the President are called the multi-voter model because they involve many parties in Supreme Court Judges selection process. The consequence is the role in making decisions that are much more independent and accountable.⁴⁰

Ethical Argument

From the perspective of the constitutional morals and ethics, the *constitutional morality* of the provision is crystal clear.⁴¹ Constitutions should be interpreted based on not only their texts, but also the principles of moral philosophy in the society.⁴² The constitutional morals are; **First**, the integration of the judicial nomination, including that of the Supreme Court ad hoc justices. The dual process may result in different and unequal treatment which may contradict the constitutional morality in terms of equality. **Second**, from the ethical point of view, the Judicial Commission was designed to conduct the selection of the Supreme Court justices. Hence, the constitutional morality shall conform to the intent. **Third**, the Supreme Court justices are general, encompassing their ad hoc fellows, ethically speaking, to affirm the equality among the Supreme Court justices by outlawing discrimination. In addition, the Judicial Commission was established by adopting the perspective of the civil society with various selection processes, including judges' track record and community input. To be sure, the Judicial Commission is expected to be the best choice, so that it nominates the best candidates to be approved by DPR.

Conclusions

From the data and analysis abovementioned, the results of this investigation show that the Judicial Commission has the strong constitutional model for proposing the appointment of the Supreme Court ad hoc judges. Even though the Indonesian Constitution does not explicitly stipulate it, the Judicial Commission has the

³⁸ United States Agency International Development, 2009, *Reducing Corruption in the Judiciary*, Office of Democracy of Governance, USAID, p. 9.

³⁹ Nora Hedling, *A Practical Guide to Constitution Building: The Design of the Judicial Branch*, International IDEA resources on Constitution Building Chapter 6, 2011, p.18

⁴⁰ Ibnu Sina Chandranegara, *Defining Judicial Independence and Accountability Post Political Transition*, *Constitutional Review*, Volume 5, Number 2, December 2019, p.310.

⁴¹ Ronald Dworkin, 1997, *Freedoms Law; The Moral Reading of American Constitution*, Oxford University Press, New York, p. 72.

⁴² James Fowkes, 2016, *Building the Constitution; The Practice of Constitutional Interpretation in Post-Apartheid South Africa*, Cambridge University Press, UK, p. 42



legitimacy of the role according to the textual, historical, doctrinal, structural, prudential, and ethical arguments in Bobbit's interpretation methods. Further, this research highlights two points. First, according to the historical, textual, and structural arguments, the Indonesian Constitution allows the lawmakers to stipulate other authorities to preserve and uphold the honor, dignity, and conduct of judges. Therefore, the "**other authorities**" can be interpreted as, among others, the constitutional authority to propose candidates for the Supreme Court ad hoc judges regulated by laws. This effort is merely to strengthen the judicial independence and accountability to build a merit selection system. Second, according to the doctrinal, prudential, and ethical arguments, it is quite hard to ignore the role of the Judicial Commission in the acceleration of the judicial reform. Several research reasserts that the Judicial Commission plays a key role in developing a transparent, objective, and competitive judicial selection. The Supreme Court even benefits from the authority of the Judicial Commission to propose the appointment of its ad hoc judges. In the concept of modern judiciary, the Judicial Commission is designed to reduce the workload of the Supreme Court in the judicial selection.

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