

# Phenomena in the Indonesia Supreme Court Justices Appointments in consideration of the Indonesia Government System

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**Abstract:** - *this work is a study on the pattern of the Indonesia Supreme Court Justices appointments in consideration of government politic reform and democratization movement toward a new paradigm in official appointments process which is more democratic. Normative legal research is used as the method for this work. Secondary data used in this work are primary, secondary, and tertiary sources of legal materials. Findings show that the pattern of Justice Appointments should be maintained and processed with respect to the character of Indonesia government inter-agency relations. In view of expectation that such appointments should reflect the implementation of principles of democracy by a constitutional state or representative government under the rule of law, it is necessary that the constitutional construction under the applicable articles on Supreme Court Justices appointments be amended.*

**Keywords:** - *Justice, government, politic*

## INTRODUCTION

Following the reform in government politic and democratization movement in Indonesia, a new paradigm in official appointments is developing toward a more democratic process. The Indonesia constitution has established a democracy-based model and system of official appointments, including executive and legislative appointments.

Such a paradigm gives rise to new ideas and expectations that it should apply to Supreme Court Justices appointments, to select competent Justices who are committed to integrity. At das sollen level such appointments have been better developed, among others is the provisions which stated that candidates for the Supreme Court Justices may be sought from career and non-career judges. [1]. The pattern and mechanism of Supreme Court Justices which reflect the principles of democracy and a wider range of candidates is a common practice in many countries.

In the United States, the general election not only elected the President, Parliament members but also elected judges. For local courts, each state has its own ways of selecting their judges. At least, there

Are 3 (three) ways of state judge's selection, firstly by the general election. Secondly, appointed by the Governor or local Parliament. Thirdly, by a Commission comprised of legal experts who recommend several judges to be appointed by the governor or parliament.

Judges selection system by the general election would make judges decisions are more favourable to the people. In the event of the judges "failed" to follow the people then they will not be elected again in future elections. This made the judges more responsive to the people's concerns of a case [2].

The practice of Supreme Court Justices appointments in Indonesia has a long history; it begins as of the establishment of a government institution namely the Supreme Court following the declaration of Indonesia. The Supreme Court Justices are appointed by the procedure and mechanism which applies by each government order in Indonesia since the Independence Day until today. In early Indonesia, the Supreme Court Justices are appointed by the presidential institution as the state symbol at that time. In the previous order, the

Supreme Court Justices are appointed by the president as the executive. Whereas in the new government order, the Supreme Court Justices is a career path.

As an implementation of constitutional construction on the Supreme Court Justices appointments as stated above, current practices show its empirical realities. At the early phase of the Supreme Court Justices appointments in the post-reform era in 2011 which reflect a phenomenon. Finding shows that the Judicial Commission [3] set up a selection over 45 (forty-five) candidates for the Supreme Court Justices and the process containing weakness and suspected as unfair.

The existence of the Judicial Commission, initially it was proposed as an ad-hoc institution or a working group (commission). However, in the amendment to the Indonesia Constitution 1945, it is agreed and decided as a permanent institution. Notwithstanding to article 24B Paragraph (1) of the UUD 1945 which stated that the Judicial Commission is authorized to nominate candidates for the Supreme Court Justices, in reality, such mandatory authority under constitution is not a full authority. The Judicial Commission authority is limited to receive application, selection, shortlisting, and recommendation of candidates to the House of Representatives. The Judicial Commission is positioned to support the court of justice, however in practice; the legislative institution is the one that has the full authority to appoint the Supreme Court Justices as the last defend of justice. [4]. Judicial Commission is independent and authorized to nominate the Supreme Court Justices candidates and other authorities to guard and enforce the dignity, status, and the code of conduct of the justices. [5].

Indonesia can be compared to Puerto Rico, which implements control function over judicial power by vested power to the President to accept and appoint the Supreme Court Justices. To perform the supervision function of the judicial power over the Executive power, the Supreme Court is authorized to examine any implementing provisions which are a subject the applicable laws and regulations. [6]. this

perspective is used in the context of relationships between government agencies in correlation to the system of the Supreme Court Justices appointments. This focus is the focal point of this work. The basic assumption is that the Judicial Power which shall be free of any political power (as represented by the House of Representatives), in reality it is a subject to and governed by the constitution (UUD 1945). The Supreme Court Justices appointments nota bene is selected by the Judicial Commission, approved by the House of Representatives, and appointed by the President; it will affect the Indonesia government system.

The Judicial Commission is independent and authorized to nominate the Supreme Court Justices candidates and other authorities to guard and enforce the dignity, status, and the code of conduct of the justices. The roles of the Judicial Commission are to ensure that the Judicial Power is independent including the Supreme Court Justices appointments and transparent and participative supervision over the Justices to guard and enforce the dignity, status, and the code of conduct of the justices.

Judicial Commission is an independent institution and its authority is free of interference or control of others. The Judicial Commission is authorized to nominate the Supreme Court Justices candidates to the House of Representatives, and to guard and enforce the dignity, status, and the code of conduct of the justices. In consideration of the details on the function of such institutions finding shows that the relationship between the President, House of Representatives, and the Supreme Court, is developed to achieve the best balance by the 'checks and balances' mechanism. Through 'checks and balances' mechanism, the three branches of legislative power, executive power, and judicial power which reflect on the 3 (three) institution will check and balance each other, to prevent any branch from dominating the others.

This work focuses on the Supreme Court Justices appointments. Under the constitution, the formulation of such appointments is stated and implied in the UUD 1945, that the candidates for the

Supreme Court Justices are “nominated” by the Judicial Commission to the House of Representatives to obtain “approval” and then “appointed” as Justices by the President [7]. Those stated can be directly understood as normative subject and require interpretation, however. Whereas those essential meanings and implied, would require in-depth research and analysis.

## **METHODS**

The method used in this work is juridical normative. With several approaches, including statute approach, conceptual approach, historical approach, and case approach on the Supreme Court Justices appointments, and the roles and responsibilities of the Constitutional Court in the legal system of the Indonesia government. The specification of this work is descriptive analysis, which expected to provide a detailed, systematic and full description on the topic, in correlation of the Indonesia government system.

## **DISCUSSION**

The pattern of the Supreme Court Justices appointments in the framework of government inter-agency relationship is derived from the basic assumption that there are institutional multi-dimensions in the process. The etymology of pattern is varied and in normative sense it is a standard, guidelines, or boundary which applied and effective as an example to be followed. In relation to thinking, the thinking pattern is the bases and thinking process. To perceive government, which the government pattern is interpreted as a system used to run the government. Whereas in-game, such pattern is the ways to be followed during the game (process).

The Supreme Court Justices appointments are the entire process which divided into stages, schedules, and planned activities. In practice it is not only involved one or more specific institution, but also several institutions. This is important to be analyzed further in this relation, in view of that the institutions involved in the Supreme Court Justices appointments are those from different legal authority

or jurisdiction. According to the theory on Trias-Politica, the Supreme Court Justices appointments as the highest authority in the legal system (Judicial), involved and even determined by the president (Executive) and representatives (Legislative). Such model to fill a vacancy or recruitment for the Supreme Court Justices known as multi-voters.

The purpose of discussion in this section or sub-chapter on “the context of government inter-agency relationship” is to examine, review, and analyse on how or to what extent such context is found in practice to recruit or to fill any vacant position in the Supreme Court Justices. Such government inter-agency relationship may be structural, in standard meaning, or in functional definition. From the theory of the government system, the relationship between government agencies such as those from different fields according to the Trias-Politica is the essence of government system.

In theory, the pattern or model of the Supreme Court Justices appointments in general directly selected by a special committee. Committee defined as a group of people (with authority) to perform a certain function (duty). Whereas selection is a process to select a person for a seat or position. The general election is held to shows that a country is a democratic country, in which the leaders are elected by majority votes. A selection committee is a group of people that have been appointed and granted with authority to hold a selection process for the Supreme Court Justices directly by the people.

The selection committee is established by the President as the head of state. The members of such selection committee comprised of those from the Supreme Court and Judicial Commission. It is expected that the committee is established with independency to guard the process against any political interest. The committee members serve the term until the selection process is completed. The selection committee in this matter shall be granted authority to select and verify the candidates for the Supreme Court Justices. This to ensure that the candidates are having the competence and integrity as required by the law.

The purpose of the Supreme Court Justices appointments by general election is to select legal experts or practitioners and Career judges deemed by the people as capable to become the Supreme Court Justices. Therefore, the people shall really play their roles to create better justice world. In the end, each opinion by the Justices will affect the people, direct or indirectly.

The importance to establish a direct method to select the Supreme Court Justices in order to select the Supreme Court Justices from quality candidates will create independent justice institution. The right selection method according to the Author is by general election. The fact that current process of the Supreme Court Justices appointments is imbued with political interests where the legislative and executive branch is involved without involving the judicial branch itself in the process. This is the reason why the Supreme Court Justices appointments method by executive appointment with legislative approval is no longer used by several countries. It is the participation of political institution which harmed the independence of judicial power and affects the Judicial Power's independency by the interference of group or class.

The Supreme Court Justices appointments by general election are expected will create a great justice institution, by selecting the best people to become the Supreme Court Justices and deliver justice without any political interest. The Supreme Court Justices selected by general election is expected to be trustworthy, impartial, assertive and fearless, which hold the scale of justice strongly, which according to their opinion, only serve nothing but the truth and justice.

The reason of the Supreme Court Justices appointments by general election based on the people's choice is to abandon the traditional selection method, that it is agreed by voting after political lobbying which might affect the process of the Supreme Court Justices appointments by the House of Representatives. The Supreme Court Justices appointments by general election are a

democratic system, and vested such mandatory to select the Supreme Court Justices to the people.

Political power has considerable energy to intervene in the Judicial Power. Such political power can be proved from each nomination of the Supreme Court Justices must be related to political calculation. The Supreme Court Justices appointments process is prone to be politicized. The importance of the Supreme Court Justices appointments mechanism in the context to guard justice independence is related to preventive measures against any other interests and politicization in the Supreme Court Justices appointments. This can be understood from the strategic position of a Justice, both legal and political, therefore many political powers have a lot of interests with the position. [8].

The Judicial Commission which checks and balances the Judicial Branch is expected to guarantee the selection of credible the Supreme Court Justices appointments and guard the continuity of the Supreme Court Justice's commitment to the moral values as a Justice with integrity and impeccable personality, trustworthy, impartial, and adherence to their professional code of conduct [9].

This authority should prevent any politicization in the Supreme Court Justices appointments. Empirically, the political power of the President and the parliament always try to put their people as the Supreme Court Justices. If not elimination, the Judicial Commission shall be able to minimize such politicization. As acknowledged, the selection and nomination of the Supreme Court Justices are vested to the House of Representatives which is a political institution.

Such the Supreme Court Justices appointments will not be able to free it from any political interests and powers. The expected consequence is that the appointed Justices much or less will have to return any favour they received during their appointments.

This condition would make the Supreme Court Justices prone to be intervened relative to any other independence element in the legal justice system.



However, on the Supreme Court Justices appointments, even though the constitution and the applicable laws and regulations stated the mechanism, it is inevitable to prevent politicization.

According to the doctrine, it is expressly stated that such appointments are political. There is three politicization, firstly, the government or the parliament appointed the Supreme Court Justices who have the same political stance with them. Secondly, the Supreme Court Justices candidate itself is a parliament member and actively involved in political party. Thirdly, such appointment is based on the political return. These three politicizations which disturb the independence of justice and the court. The justice and the court exist to serve political interest, therefore the independence and the impartiality of justice in a case is compromised. Therefore, to empower the independence of Judicial Power, the Supreme Court Justices appointments mechanism shall be designed to minimize any politicization. [10].

The Supreme Court Justices selection is also prone to politicization; this is in relation to the strategic position of a Justice as viewed from the political interest. Thereby, many political powers having an interest in the position. The Supreme Court Justices nomination process will always be followed by political interest contestation. The stakeholders, such as the government, parliament, and the Supreme Court, have their own political agenda in candidate nomination.

Recommendation: there are three ways of prevention. Firstly, the appointment mechanism shall be sterile from any politicization. Involving independent commission such as Judicial Commission is a method recommended by international instrument to guarantee DE politicization in the Supreme Court Justices appointments. Currently, the Judicial Commission played the role to prevent the Supreme Court Justices appointments from any politicization through a quite transparent and accountable selection process.

Secondly, minimize the parliament roles. The House of Representatives credibility in the Supreme Court Justices should be reviewed. On the ground, the due diligence process by the House of Representatives deemed as only space for political transaction. Often, the House of Representatives selected the candidates with low quality and integrity. Lastly, the Supreme Court Justices candidates from any political party shall be rejected. The reason is that any candidate from political party will be difficult to be independent and impartial and will drag the Supreme Court to their political interests [11].

The Political Aspects of the Government (executive). The Supreme Court Justices is a position in Judicial Power which to guarantee the checks and balances principles is elected and dismissed with the intervention of Legislative and Executive. Administrative and qualitative selection is performed by one independent commission which is Judicial Commission. Whereas the selection and the determination of the status are performed by the House of Representatives, and their administrative appointment is performed by the Executive.

The Supreme Court Justices candidates are nominated by the Judicial Commission to be appointed as the Supreme Court Justices with Presidential decision after obtaining approval of the House of Representatives. Thereby, the Judicial Commission has the right to nominate, the House of Representative has the right to confirm, the President has the right to appoint. The Supreme Court Justices appointment ceremony is the right of the Chief Justice [12]. The President, as referred to in Article 24A paragraph (3) stated: The Supreme Court Justices candidates are nominated by the Judicial Commission to the House of Representatives to obtain approval and then appointed as the Supreme Court Justices by the President. That the Supreme Court Justices is appointed by the President as the head of state of the candidates as recommended by the House of Representatives to become the Supreme Court Justices.

Such mechanism deemed as providing no guarantee to the Supreme Court Justices independency, on the ground that the Supreme Court Justices appointments is appointed by the President and recommended by the House of Representatives, both are a political institution. In various countries, the Supreme Court Justices recruitment always invite political power to be involved in the process. Executive Power which is the President and the Legislative Power which is the House of Representatives always competing to be involved in the Supreme Court Justices recruitment to put their people as the Supreme Court Justices and then serves their political interests.

Such political power influence is proved by the relation between the political calculation of the President and the Supreme Court Justices nomination. It is stated that All Supreme Court Nominations are determined by the president's political calculations [13]. The candidate's name from the selection process and approved by the House of Representatives is given to the President, as the head of state to be appointed as the Supreme Court Justices [14].

The government political action in the Supreme Court Justices appointments is a subject to the provisions under Article 24B paragraph (3) UUD 1945, which stated that the Judicial Commission Members is appointed and dismissed by the President which is a subject to the House of Representatives approval. It is through the Judicial Commission the Government convey their political interest. In the Supreme Court Justices recruitment, the relation of the Judicial Commission is as a party which authorized to nominate the Supreme Court Justices candidates, and then selected by the House of Representatives and then appointed by the President. The Author deemed that the Judicial Commission which is nominated and appointed by the President will accommodate the government political interest. This will express the government political action in the Supreme Court Justices appointments.

The political return from the Legislative point of view. The House of Representative's involvement in the Supreme Court Justices candidate's selection is highlighted by the Author. On the ground, the Supreme Court Justices screened by the Judicial Commission who is not affiliated to any political party often failed in the fit and proper test by the House of Representatives. As a result, the Supreme Court Justices candidates from academic background is "frustrated" to re-apply. The Supreme Court Justices selection which involves the Legislative, which should be vested in the Judicial, however currently it is determined by the House of Representatives. The subject matter is of Judicial, but the determination is by political party.

Such fit and proper test by the House of Representatives is thick with political nuance because the House of Representatives is a political institution. The process of candidate nomination depends on lobbying. In practice, a candidate will visit the Head of Political Party Head Office, the fraction head in the House of Representatives or commission member in the House of Representatives to ask support. For commission member, they will obey the party and fraction instruction. When a candidate is given unanimous vote, that would mean considerable commitment from the Head Office to the committee member. Such is the power of lobbying; it can cause the fit and proper test results of a candidate is not a priority. But, sometimes such approach to the party and fraction had happened long before the nomination. Thus, when a candidate is passed the selection by the Judicial Commission, lobbying had already been completed [15].

There is a difference between any positions which involves the House of Representatives in its appointment. Firstly, the position under Executive branch. Secondly, the position under Judicial branch, and Thirdly, State Auxiliary Organ or other government institution. The problems which are tried to be addressed by the UUD 1945 is executive heavy. The UUD 1945 deemed as failure to establish the institution for checks and balances, therefore,

place the House of Representatives a democratic institution which is merely as an instrument of power legitimacy. Therefore, the amendment to the UUD 1945 is prepared in view of the checks and balances system. One manifestation of such system is an authority granted to the House of Representatives to “consider” a member of foreign mission; “select” State Auditor; “approve” the Supreme Court Justices and the Judicial Commission member; and “nominate” 3 (three) constitutional court judges. Such authority is also vested in the House of Representatives.

The selection process or mechanism of the House of Representatives is a subject to the House of Representatives Regulation on Code of Conduct. The Code of Conduct stated that if any provisions require the House of Representatives to nominate, approve, or consider a candidate for a position, the House of Representatives shall assign the House of Representatives Assembly to schedule and assign the hearing to the commission in charge of the issue. The procedure of such selection and hearing is established by the commission in charge of the issue including administrative examination, vision and mission presentation, fit and proper test; candidate list, and/or public announcement, both in printed and electronic media. Such fit and proper test are excluded by the law for any position which only requires approval.

It is proposed that the House of Representatives should change the mechanism of the Supreme Court Justices selection which currently tend to be political because only candidates with political connection will pass. Thus, the Supreme Court Justices selection mechanism through fit and proper test by the House of Representatives is also highlighted as a concern. It is expected that all political party gives their promise to avoid any interference with the Supreme Court Justices selection [16]. It is proposed that the House of Representatives should involve experts in the mechanism of fit and proper test as it does in the mechanism of Constitution Judges selection. Therefore, experts will create balance and

anticipate any political interest of the House of Representatives members.

The exercise of Government power based on the separation of power is a crucial issue for the development of democracy in Indonesia. In consideration of the foregoing, the amendment to the UUD 1945 tried to create a balance of power to prevent any branch from dominating the others. In practice, it can be seen in official appointments. The House of Representative's involvement in the context of such official appointment known as the right to confirm. The right to confirm is vested and exercised in any official appointment by political appointment [17].

The Supreme Court Justices selection based on political return is when a candidate is passed or approved by the House of Representatives. The candidate will think that their position is given as a result of political rights as vested to the House of Representatives members. The Supreme Court Justices who have obtained political approval by the House of Representatives will think that they are “indebted” to the members who have voted them. Such approval process which is laden with political interest will be used by those who approved the candidate when they are in office.

The Supreme Court Justices candidates and the judges is a determinant figure in law and justice. However, any political interest in addition to it is harmful against the justice independency it affects the Supreme Court Justices Candidate in deciding a case.

## **CONCLUSION**

From the findings, the Author's conclusion is that the Pattern of Supreme Court Justices Appointments can be maintained to be processed in the framework of government inter-agency relationship which reflects the character of Indonesia government system. To reflect the representative government under the rule of law, it is necessary to change the constitution construction such as articles on Supreme Court Justices Appointment. The Supreme Court shall be authorized to nominate the best

candidates for the Justices and guaranteed that the candidates will be approved. The Judicial Commission shall be more professional, free of political intervention, free of political return to the government and the House of Representatives, involve experts in the selection process, and increase the parameters of priority. The House of Representatives shall be assertive and exercise the right to confirm, but without any right to select, to elect, and to refuse..

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