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The Implementation of Non-Career Justice Recruitment for the Supreme Court in Indonesia

Dr. A. Muhammad Asrun
Head of Legal Graduate Study of
Pakuan University of Bogor
dutalaw@gmail.com

***Abstract*- It is undeniable that the presence of the non-career justices has been filled with intellectual treasures in the decisions of the Supreme Court. Their capabilities of legal knowledge have strengthened Supreme Court verdicts in the past. That's one side of the presence of the non-career justices. However, the situation today has changed over the presence of the non-career justices. The candidate of non-career justices from universities have been questioned their working capability as well as their understanding on procedural law. Justices recruited from universities admitted that they need time to learn to read files quickly and their practice in making a decision. The exercise takes about three to six months. The problem really should not be happening when the non-career justices had legal practice experiences such as a lawyer or as a legal consultant at a law firm.**

***Index Terms*— Non-career justice, working capabilities, procedural law, Supreme Court.**

I. Introduction

The participation of legal practitioners and academicians in the selection of justice is one result of the political reforms post the New Order regime of President Suharto after 32 years in power.[1] The amendment of the 1945 was one of fundamental result of the country's political reform started in 1999 ended in 2002. Even the participation of nominees of non-career justice has brought a university professor becoming first Chief Justice of the non-career background in the Indonesian court history. Professor Bagir Manan is a professor of constitutional law at the Law Faculty of the State-run University of Padjadjaran Bandung. Candidate justice of the career path was picked up from judges of the appeal courts across the country. The Supreme Court first selected the judges of appeal court to be submitted to the Judicial Commission as the nominees of justices. The 1945 Constitution post amendment took place a year after the collapsed of Suharto's administration, with one important change is the judicial power is not only carried out by the Supreme Court and the courts below, but also carried out by the Constitutional Court.[2]Following amendment of the 1945 Constitution justices recruitment system has also changed dramatically from originally dominated by the president to selection mechanism done by the Judicial Commission and later Parliament gave approval for the Judicial Commission nominations.[3]

The Indonesian history noted that the practice of independency of judiciary never as smooth as dreamed by the judges. The practices of judiciary independency was blocked by Indonesia's first President Sukarno by introducing Law Number 19 of 1964 on Basic Provisions on Judicial Power. Under article 19 of the Law Number 19 of 1964, the government was given a change to interfere the court session if "the revolution interest was in danger". During that time, "revolutionary interest" was a popular political slogan following Sukarno's politically confrontation against the western countries, especially United States and United Kingdom. Coinciding his anti-western policy in the early of 1960s, Sukarno initiated to set up "Non-alignment Movement" together with Yugoslavian President Yosef Broz Tito and Indian Prime Minister Jawaharlal Nehru and Egypt President Gamel Abdel Nasser as well. Once, a court session of a lower-ranked navy officer accused of injuring a youth-civilian following a brawl for a woman was ordered to halt for a reason "endangering revolution interest."

This handicraft of implementing independency of judiciary was copied by Suharto's administration. Soeharto also introduced Law No. 14 of 1970 on Basic Provisions on Judicial Power, which under article 11 of Law No. 14 of 1970 placing the finance and administration matters under authority of the Department of Justice and the technical aspects of judicial was supervised by Supreme Court. Such condition was popularly known as the dualism of judicial power. The dualism arrangement was then followed by other regulation under article 5 (2) of Law No. 2 Year 1986 of the General Courts, article 7 of Law No. 5 of 1986 of the State Administrative Court, and article 5 of Law No. 7 of 1989 on Religious Courts.[4]Political reform post Suharto[5]has led to the birth of Law No. 39 of 1999 which annulled the provisions of Article 11 of Law No. 14 of 1970, which is then amplified again by Act No. 4 of 2004 on Judicial Power.[6]

Judiciary power supposedly independent of the other powers outside the judicial institutions. However, under Suharto's regime partly of judicial power was controlled by the government's Department of Justice for "financial and

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[1]Suharto announced his resignation as the countries second president on 21 May 1998 following months of anti-government demonstration in several big cities of Indonesia and economic crisis hit the world fourth-populous country since mid of 1997. Supported by military, Suharto ruled the 250 million population a year after the abortive coup in 1965 blamed to the Indonesian Communist Party.

[2]*Vide* article 24 paragraph 2 the 1945 Constitution.

[3]Jimly Asshiddiqie, "Public Official Recruitment," paper presented at the "National Conference on Constitutional Law 2nd," organized by Center for Constitutional Studies Faculty of Law University of Andalas Padang, 10-12 September 2015.

[4]*See*J. Djohansjah,*page*. 239.

[5]Henry P. Panggabean,*Supreme Court's Function in Daily Practices.* Jakarta: Pustaka Sinar Harapan, 2001, page Ix.

[6]Article 13 Law Number 13 of 2004 on Judiciary Power.

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organizations matters". Recruitment justices and lower judges were in the hands of the Department of Justice despite the Supreme Court was also asked for feedback regarding candidates' track recordwho will be selected. Political reform shortly after the fall of Suharto, justices' nominees was also opened for legal practitioners and academicians to be participating in the nominees' selection. Indeed, judicial independence is a universal principle as demonstrated in "The Bangalore Principles" and "The Beijing Statement of Principles of the Independence".

Recruitment of justices with participation of the non-career track was a success story of the struggle of independence of the judiciary in Indonesia. Of judicial power can be implemented by judges of career paths as well as non - career path through the mechanism of selection organized by the Judicial Commission. In the Suharto government era (1966-1998) the selection of Supreme Court justices to include academics and legal practitioners are not allowed by Act No. 14 of 1970 on the Principles of Judicial Power. Even the administration of President Suharto hamper the implementation of an independent judicial authority through Act No. 14 of 1970. The power of independent judiciary could not be implemented in full, because the setting of recruitment and promotion of judges and judicial financially implemented by the Government under the Ministry of Justice via Article 11 Law Number 14 Year 1970.The provisions of Article 11 has causedthe dualism of the power of authority items, namely the technical side of justice is under the Supreme Court and the administrative side is under the Ministry of Justice. The Law No. 14 of 1970 is none other than the Defeat of the reformists in the Suharto era when it was working hard to prevent a recurrence of castration of judicial power in the regime under President Sukarno's Guided Democracy.[7]

Government intervention in the implementation of judicial power in the past was contradict to the theory of separation of powers adopted by country universally. Legal thinkers argued that the independence of the judicial power is a necessity in a state of law. Montesquieu, one of the leading thinkers in the middle, advocating the application of the theory of separation of powers as stipulated in the *TriasPolitica*. Montesquieu argued that the executive power, judicial power and the legislative power separately either on duty or on organs running for the run state power.[8]

Independence of judicial power is not only manifested in the Montesquieu's doctrine mentioned above, but should be elaborated into operational concepts, namely:[9]

1. (a) Participation in judicial appointments and promotions by the Executive or Legislature is not inconsistent with judicial independence, provided that appointments and promotions of judges are vested in a judicial body, in which members of judiciary and the legal profession form a majority.

(b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operated by the Executive.

2. (a) The Executive may participate in the discipline of judges, only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power of discipline or removing a judge must be vested in an institution which is independent of the Executive.

(b) The power of removal of a judge should preferably be vested in a judicial tribunal.

(c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.

(3) The Executive shall not have control over judicial functions.

(4) Rules of procedures and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliament approval.

Separation of powers over the branches of state power intended to ensure the independence of judicial authorities.[10]The guarantee of an independent judiciary is an essential element of the concept of state law.[11]There should be boundary lines between judiciary, executive and the legislature, but the three state organs power has also relationship within the frame work of check-and-balance between the three branches of state power.[12]Selection of nominees is made by the Judicial Commission as an independent quasi-state institution-judicial and subsequently endorsed by the House of Representatives and later the President in his position as head of state making a decision letter of appointment of the new justices.

According to the Chairman of Judicial Commission Marzuki Suparman,[13] the involvement of the Judicial Commission and the selection process of nominees for later presented to Parliament is "a political choice of law to maintain the balance of legislative and executive powers on the one hand, and ensuring the two branches of power was 'clear' of the potential of leaving a trace of interest or influence in this branch of the judiciary."Ensuring no trace branches of power outside the judiciary in the justice candidate's selection is very important. If a justice got political support from the parliament during the selection's nominees then the justice could find difficulties to avoid an intervention from the member of parliament while he examines a legal case at the supreme court. Such condition will lead to conflict of interest for the justice that got political support from the parliament. In a country with a long-democratic tradition has been rooted, like the United States, which suspicions toward the Supreme Court justices'

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[7]Kami Ilyas, Legal Notes. Jakarta: Yayasan Karyawan Forum, 1996, page xv.

[8]Ismail Sunny, Shifting Executive Power, sixth edition, (Jakarta: Aksara Baru, 1986), page15.

[9]*Ibid*

[10]Melvin A. Arquillo, "A Case Survey of the 1970 Supreme Court, Decision on Political Law," University of Santo Tomas Law Review (Aug.-Sept. 1971), page22.

[11]The concept of state law negara is translation for "the rule of law".

[12]Dieter C. Umbach, "*Basic Elements of the Rule of Law in a Democratic Society*," Beatrice Gorawantschy, et.al, Rule of Law and Democracy in the Philippines (Diliman: University of Philippine, 1985), page24.

[13]Suparman Marzuki, "Recruitment of New Justices," paper presented at the "National Conference on Constitutional Law 2nd," organized by Center for Constitutional Studies Faculty of Law University of Andalas, Padang, 10-12 September 2015.

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appointment are viewed as the result of the president's conspiracy .[14]

II. NON CARRER JUSTICE

The presence of nominees of non-career track are expected to improve the quality of the Supreme Court ruling. However, further can be said to provide an opportunity to the supreme judge of non - career path is an implementation of the principle of equality "before the law and government" as guaranteed in Article 27 of the 1945 Constitution.

The assertion that the appointment and promotion of judges to be a measurement of how much independence of judicial authorities apply the values universally uphold.[15] The history of the US Supreme Court also noted that the appointment of justices sometimes laden with consideration of political interests of a president.[16]The appointment of Chief Justice John Marshall[17]was shadowed with political interests of President John Adams. The president has previously rejected other candidates because he want to pick up a chief justice with federalist as political background.[18]Marshall was a federalist. Marshall has laid down the foundation for the exercise of judicial review in the Supreme Court over the case of Marbury v. Madison. Marshall's appointment as the Chief Justice was only a few moments before transferring administration to the presidency of Thomas Jefferson, who was later a political rival Marshall in an effort to strengthen the position of judicial authority. Adams refusal to choose Supreme Judge Peterson, because of the rejection of the Hamilton faction in the Senate where Peterson is considered affiliated, has paved the way for Marshall became chief justice. However, the real political parties on all sides, including Adams's political camps, agreed with the selection of Peterson.

Nominations justices in America is also associated with the president's interest, mainly related to efforts to raise the number of voters with certain characteristics in the general election.[19]For example, Sandra Day O'Connor was nominated by Ronald Reagan intending to attract more women voters in the 1981 General Election.[20]A similar strategy was used by Richard Nixon to nominate Clement Hynsworth in 1969, G. Harold Powell in 1970 and Lewis Powell in 1971 as justices, with the intention as a strategy to attract more voters from the southern region of America in the elections.[21]In line with the nominated justices and Chief Justice in consideration of the political interests of the president, American history record three nominations of Chief Justice reflected a political influence from the president, namely the nomination of John Marshall in 1801, Earl Warren on 1953 and Abe Fortas in 1968.[22]

Providing academics and legal practitioners the opportunity to participate in the selection of new justices is a need for legal practices presence in specific legal areas at some time in the Supreme Court. However, the chance of academics and legal practitioners participate in the selection of nominees reflected as the implementation of the principle of equality before the law and government as guaranteed in the 1945 Constitution. The principle of equality before the law is the enforcement of the rights of citizens in a democratic state. In simple terms, in the state of law no citizen is above the law and therefore all citizens must abide by the law.[23]Equality before the law is one of the elements of the state in the tradition of Anglo-Saxon law as a universal values adopted by most countries.[24]The values of equality and justice are intimately related to the process of law enforcement, which is nothing but an instrument in practical terms the concept of a constitutional state. Law enforcement in accordance with the sense of justice with regard to legal certainty in every individual citizen is an expression of democratic values in a democratic state. Because of the relationship between the values of supporting democracy and elements of state law, it is often used as a breather to mention the ideal form of state laws that protect the rights of citizens in a democratic constitutional state term.[25]

The presence of non-career path candidate is expected to be a discussion partner for the justices career at the supreme court. During this time quite loud criticism of the Supreme Court ruling that shallow and deemed not in. In the past, several justices and chief of justice were also prominent professor of law at the respected state University of Indonesia, namely Omar Seno Adji and Asikin Kusuma Atmadja. Seno Adjiwas a professor of criminal law at the Faculty of Law of the University of Indonesia and the former Chairman of the Supreme Court and former Minister of Justice in the era of President Suharto. Kusuma Atmadjawas a professor of civil law and former Vice Chairman of the Supreme Court in late 1980s.

It's no doubt that the presence of nominees of non-career could cut career quota of justices, but also not every reception session justices should be filled with non-career candidates. The presence of non-career justice was in line with the needs to fill in certain knowledge background of justice candidates. Referring to article 7 paragraph (1) and (2) of Law No. 5 of 2004 on the Supreme Court in conjunction with Law No. 3 Year 2009 on the Second Amendment to Law Number 14 Year 1985 regarding the Supreme Court. It is said that "the system of recruitment of Chief Justice is a career system with the

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[14]*Ibid*.

[15]F. Andrew Hanssen, "The effect of judicial institutions on Uncertainty and the rate of litigation: the election versus appointment of states judges," inThe Journal of Legal Studies, Vol. XXVIII, January 1999, page211.

[16]See Bernard Schwartz, A History of the Supreme Court (New York, Oxford: Oxford University Press, 1993), page 3-13.

[17]*See*Marbury v. Madison case.

[18]Ibid., page. 32-34.

[19]Christipher E. Smith, Critical Judicial Nominations and Political Change, the Impact of Clarence Thomas (Westpoint: Preager Publisher, 1993), page 12.

[20]Ibid.,page13.

[21]Ibid.,

[22]Ibid., page. 17.

[23]Teofisto T. Guingona, "*Rule of Law and Democracy in the Phillipines*," Beatrice Gorawantschy, et.al.,Op.Cit., page. 15.

[24]*T*he rule of law concept not so much different from the concept of rechstaats. See Muhammad Tahir Azhary, Negara Hukum, Studi tentang Prinsip-prinsipnya Dilihat dari Segi Hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini(Jakarta: Bulan Bintang, 1992), page73.

See AlsoTodung Mulya Lubis, In Search of Human Rights, Op. Cit., page88.

[25]Arbi Sanit, Politics Representation in Indonesia(Jakarta: Penerbit CV Rajawali, 1985), page. 25.

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exception, that is, in principle, nominees must come from career judges who are qualified, but under certain conditions can also be recruited from among non- judges." The position of non- career justice also reinforced by the provisions of Article 15 paragraph (1) and (2) of Law Number 22 Year 2004 concerning Judicial Commission.[26]

Background of non-career nominees can be vary, ranging from academics to lawyers, public notaries and retired police officers, former prosecutors and ex-lower judge.[27]The entry of nominees of non-career should be seen as a devotion to the state, not in order to seek employment or job seekers. By contributing to the state through the Supreme Court should be seen as an honor given by the state to the person concerned. Non-career justices, such as a legal scholar background, for example, are expected to contribute experience and knowledge to the Supreme Court. Terms experience and knowledge of the law are qualified also was coupled with high integrity requirements. Integrity factor is important, because people quite sometimes experiencing distrust of the credibility of judges.[28]

Therefore, in the process of netting the nominees, the Judicial Commission should not be solely devoted to quality of legal knowledge, but the nominees' integrity was on top priority for the justice selection. The track record of nominees path of non - career also must be "noble, is beyond reproach." Parameter simple, among other things, are "never sentenced to prison the criminal threat over the next five years". It's just that the judicial process against the concerned should be in corridors legal process "honest, impartial, and not making criminalization," because at the present time the legal process could become an "magic arena," which is "a case could be sought and the application of article stayed sought to comply with the event" or "civil case transformed into criminal cases of civil disputes so that the object can escape into the hands of the claimant." It should be excluded from the "track record ever punished" were those who were imprisoned for criticizing the government or jailed due to negligence.

The experience and knowledge of the law that qualified the basis for candidate recruitment of non-career justices. In addition to the "integrity", nominees of non-career legal knowledge required to have a qualified and legal practice experience, which of course should be in line with the needs of justices based on the room in the Supreme Court. Advocate, former prosecutor and former police are assumed having law practice experience relatively better than academicians assuming only teach academics on campus and did not become a legal consultant or practice in "Legal Aid Campus". If the assumption is true, then it would be difficult for the nominees of non-career of these academics to work quickly after being appointed as the chief justice, because he needs time to make adjustments with the rhythm of work as a judge, like read files quickly and let alone to make a decision.

This paper does not intend to humiliate academics. Supreme Court justices need to work quickly in deciding the case, because the accumulation of cases is still a problem for the highest judicial institution. The scientific work in the form of books and the opinion article in the "Journal of Law" is also a reference rate the nominees of non-career. Thus, the experience of handling cases - and of course a qualified legal knowledge - a prerequisite for prospective justices non-career track. The criteria that have been requested to prospective justices are educated non-career "doctorate in law" and 20 years of experience in the legal field. The demands of legal practice capabilities include the ability to read files quickly, to do library research related case material, to create a resume of the case, to make a legal opinion, and the draft decision.

III. SELECTION MECHANISM

The 1945 Constitution post amendment introducing the Judicial Commission as a state organ that is authorized, among other things, to make selection of justices candidates both from career paths and non-career.[29]Other Judicial Commission's duties in more detail are stipulated in Article 24 B of paragraph (1) of the 1945 Constitution, namely: "The judicial commission is independent authorized to propose the appointment of justices and have other authorities in order to preserve and uphold the honor, generous nature dignity, as well as the behavior of the judge."

Further arrangements regarding the Judicial Commission is regulated in Law Number 18 Year 2011. Law No. 18 of 2011set more on the Judicial Commission's duties. Article 13 of Law No. 18 of 2011 states that the Judicial Commission has the authority as follows:

a. proposing nomination of justices and ad hoc judges in the Supreme Court and ad hoc judges in the Supreme Court to the House of Representatives for approval ;

b. maintaining the honor , dignity, and the behavior of judges ;

c. setting Code of Conduct and / or the Code of Conduct of Judges together with the Supreme Court ; and

d. maintai and enforce the implementation of the Code of Conduct and / or the Judicial Code of Conduct .

Related to the exercise of powers of the Judicial Commission to propose the appointment of Chief Justice to the House of Representatives,[30]the Judicial Commission was given the task of following:[31]

a. registering candidates for Supreme Court Justice;

b. make the selection of candidates for Supreme Court Justice;

c. determine the candidates for Supreme Court Justices ; and

d. propose Supreme Judge candidates to the House of Representatives .

Prior to the selection of justice candidates, the Supreme Court first notify to the Judicial Commission about the need of new justices.[32]The justice nominees then is submitted to the

[26]*See*http://leip.or.id/id/seleksi-hakim-agung-2007-dan-perubahan-paket-uu-peradilan/Home\Opini\Seleksi Hakim Agung 2007 dan Perubahan Paket UU Peradilan.

[27]National Consortium on Legal Reform and Center for Studies and Advocacy for Independency of Judiciary. *Working Report*. Jakarta: LeIP, 1999, page 41.

[28]www.RepublikaOnline.com, Saturday, 26 Mei 2012 , 08:25:00 WIB, "Crisis on Human Resources at the Indonesian Court**"**.

[29]*Vide*Article 24B of The 1945 Constitution.

[30]*Vide*article 13 paragraph (1) of Law No. 22 of 2004 *juncto*Law No. 18 of 2011.

[31]*Vide*article14 paragraph (1) of Law No. 18 of 2011.

[32]*Vide* article14 paragraph (2) of Law No. 18 of 2011.

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Parliament for approval and later the President would issue the presidential decree of justices.[33]Later in the position as Head of State, the President took the oath of the new justices. When the selection process of nominees to the House of Representatives, it must be prevented by all effort “surrogate candidates of political parties” to avoid obstacles implementation of the principle of independence of the judges.[34]

IV. SELECTION WITH MAXIMUM PREREQUITES

The 1945 Constitution requires that Justice must meet the prerequisites, namely:[35]1). integrity, 2). good personality, 3). fair, 4). professional, and 5). legal experience.

Measuring the terms of “professional” and “legal experience” are relatively easy compared with the meaning of the terms of “integrity, character beyond reproach, fair”. Parameter of “professional” is traceable to the ability of prospective justices, for example, ability to write a paper on the legal or making analyzes and comments on the judge's decision. The size of the relatively more can be held is tenure nominees, such as high court judges have worked three years for the nominees of the career path, as well as having experience in the legal field for 20 years and Doctoral in law. The prerequisites are objective can be measured from the “affidavits and certificates submitted nominees.”

Recruitment of justices’ candidates could only take place as the Supreme Court told the Judicial Commission that a number of justices will retire in the near future, and later the Judicial Commission will be able to carry out the selection process.

However, the Judicial Commission will not easily to answers such question that “how and who determines the needs of justices of non- career”. The Supreme Court did not also determine “how much non-career justices needed”. The issue of “quota of non-career justice” becomes even more serious when the Judicial Commission for the past four years had never passed the nominees of the path of the proposed community. The Judicial Commission never explained why it always failed to have candidate for non-career judges in the selection of Supreme Court justices. In fact, at least, justices with non-career background was needed. Testing regulations under this law has not been implemented optimally and transparently, so the influx of non-career justices with a legal academic background was actually one solution to this problem.[36]

According to the former Commissioner of the Judicial Commission Taufiqurrahman Sahuri, [37]the ability to make a decision was also taken into consideration for the Judicial Commission for the selection of nominees. Unfortunately, justices’ candidate from non-career failed to do the test exercising a Supreme Court’s verdict.

Process of candidate selection for the justices is organized by a selection committee that set up by the Judicial Commission. The presence of the justice’s candidate selection committee was very important position to determine that the recruitment of new justices would meet criteria of integrity and quality. Therefore, the selection committee is to be filled with people who did not question the integrity and quality. They were sitting in the selection committee should work impartially and transparently, with the participation of the public to know the track record of nominees. Public participation in connection with the search for “traces of nominees” proved relatively assist the selection committee to get the justices of quality and integrity.

However, the result of the selection was submitted first to the Judicial Commission and the House of Representatives further will give final approval. Later history will prove whether the selection of candidates for justices in the House of Representatives gave birth to the great judges of integrity and quality.

V. CONCLUSION

It is undeniable that the presence of the non-career justices has colored the decisions of the Supreme Court. They brought academic atmosphere into the process of making decision in the Supreme Court. However, the non-career justice also found difficulties at the beginning of their work, such as difficulties to speedily drafting court decision and speedily read court documents. They need time three to six month before everything gets into business as usual in the supreme court. Such a problem for adaptation at work theoretically could be tacked if the non-career justice once had experiences working as s lawyer or a legal consultant at a law firm. It would be helpful if the independent selection committee could find new justices with a well-legal knowledge and good and no-question of integrity personal background among others nominees of justices.

Other conclusions is it is important that the Supreme Court could determine how many justices are required for each room in the each selection period, so that the nominees of non-career can be more flexible in following the selection of nominees and also to determine the direction of a choice of rooms in the Supreme Court.

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[33]*Vide*article24A paragraph (3) of the 1945 Constitution.
[34]*Ibid.*
[35]*Vide*article 24A paragraph (2) of The 1945 Constitution.
[36]http://leip.or.id/id/seleksi-hakim-agung-2007-dan-perubahan-paket-uu-peradilan/Home\Opini\Se-leksi hakim Agung 2007 dan Perubahan Paket UU Peradilan
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