

## CHAPTER ONE

### INTRODUCTION

#### A. BACKGROUND OF STUDY

In the course of Indonesia, especially relating to the conduct of judicial power is always interesting to study. It is not independent of the position of authority that is fundamental to state law, especially in any constitution ever force in the Republic of Indonesia, always put the judiciary as an independent power, meaning that regardless of the power of the government and other powers.<sup>1</sup>

But beside that, more fundamentally that the judicial system in Indonesia is a Dutch colonial heritage a little more difficult in practice.<sup>2</sup> The attitude of the colonial system heir is in line with the meaning of classic colonial, colonial occupation and deprivation of liberty and sovereignty of a nation or state, including the exploitation of human and natural resources.<sup>3</sup>

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<sup>1</sup> Muhammad Fauzan, "Eksistensi Komisi Yudisial Dalam Struktur Ketatanegaraan Republik Indonesia dan yang Seharusnya diatur dalam Peraturan Perundang-Undangan", *Jurnal Dinamika Hukum* Vol. 8 No. 1 January 2008, p. 1.

<sup>2</sup> Sunarni, *Membangun Sistem Peradilan di Indonesia*, Fakultas Hukum Universitas Sumatra Utara, article unpublished , p. 5.

<sup>3</sup> Hamid explain the shift of the meaning of the above definition to colonial; mastery in specific areas strategically including political interference, control of the economic system and trade liberalization, etc. See: Hamid Fahmy Zarkasyi, *Liberalisasi Pemikiran Islam Gerakan bersama Missionaris, Orientalis dan Kolonialis*, (Ponorogo: Centre for Islamic and Occidental Studies [CIOS], 2008), p. 65.

History records that the Indonesian justice system continues to change until the judicial reform, but still adjusting to the system of government and the applicable national law. This has an impact on the existing judiciary so its authority also change either extends or retracts.

Indonesian justice system can be defined as an arrangement of regular and mutually interconnected, related to inspection activities and termination of cases conducted by the court, both the courts located in the general environment, religious courts, military courts, and state administrative courts, which based on the views, theories, and principles in the field of justice in Indonesia. Besides, there are special judicial institutions such as the Supreme Court, Constitutional Court and the Judicial Commission as implementing or supporting law enforcement.

Associated with the judiciary, the third amendment 1945 chapter 24 explains the nature and character of the judiciary that "*Judicial power is the power of the State to conduct an independent judiciary to uphold the law and justice*".<sup>4</sup> In addition, the rules are explained in detail on justice in the Act.<sup>5</sup>

In the Indonesian constitutional system, judicial power is the exercise of judicial functions, in addition to the other executive and legislative powers.

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<sup>4</sup> Pasal 24 ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

<sup>5</sup> UU RI No. 5 Tahun 2004 tentang Perubahan Atas UU No. 14 Tahun 1985 Mahkamah Agung, UU RI No. 18 Tahun 2011 tentang Perubahan Atas UU Nomor 22 Tahun 2004 Komisi Yudisial, UU RI No. 51 Tahun 2009 tentang Perubahan Kedua Atas UU No. 5 Tahun 1986 tentang Peradilan Tata Usaha Negara, UU RI No. 24 Tahun 2003 tentang Mahkamah Konstitusi, UU RI No. 3 Tahun 2009 tentang Perubahan Kedua Atas UU No. 14 Tahun 1985 tentang Mahkamah Agung, UU RI No. 49 Tahun 2009 tentang Perubahan Kedua Atas UU No. 2 Tahun 1986 tentang Peradilan Umum.

In the context of *checks and balances*, judicial powers and functions to monitor the implementation of legislative and executive authority and vice versa.

As mentioned above, independent judiciary is one of the pillars of a country based on democracy and the rule of law system. However, reports Global Corruption Report 2007 shows Indonesian judicial system is so corrupt and dilapidated.<sup>6</sup> Thus, it needs its own judicial institutions to deal with these problems, then a Judicial Commission aims to improve the image of the Indonesian justice back.

Judicial Commission in the presence of judicial power circle that is typical of *state auxiliary* instrumental in the enforcement of law and justice. Judicial Commission against the background of the need to establish a regulatory system that is more effective judges and constructive.<sup>7</sup> While the authority of the Judicial Commission has been regulated in Law No. 4 grains. In 2011, Article 13.<sup>8</sup>

In history of Islam, Abbasid period known as glory period in Islam, from this dynasty emerging government bureaus which is important hallmark

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<sup>6</sup> Transparency International, *Global Corruption Report 2007*, (Cambridge: Cambridge University Press, 2007), p. 13.

<sup>7</sup> Firmansyah Arifin, "Komisi Yudisial Pengawal Reformasi Peradilan Mendayung Diantara Simpati dan Resistensi", in *Bunga Rampai Komisi Yudisial dan Reformasi Peradilan*, 2007, p. 50.

<sup>8</sup> The Judicial Commission has authority; a) propose appointment for chief justice and judge ad hoc in the Supreme Court to Parliament for approval, b) maintain and uphold the honor, dignity and behavior of judge, c) establishment the Code and/or Code of Conduct together with Supreme Court, and d) maintain and enforce the implementation of the Code of Ethic and/or Code of Conduct Judge.

of dynasty Abbasids. However, the administration became more complicated than ever before, especially in taxation and judicial system.<sup>9</sup>

In the administration of judiciary, appeared positions *Qadhi al-Qudha* who became the leader among all the judge, with be located in Baghdad.<sup>10</sup> In her authority is determining of judge to some area, also gave up his position if harm. It's also, to test those who become candidates for judge. As did Yahya bin Akstam during the caliph al-Ma'mun.<sup>11</sup>

Thus, the researcher will analysis judicial authority, especially that Judicial Commission in Islamic Political System view.

## B. PROBLEM FORMULATION

Based on the background of study above, could be found the problem formulation below:

1. What is the concept of Judicial Commission?
2. What is the Judicial Commission position in Islamic Political System?

## C. PURPOSE OF STUDY

This research has a main purpose:

1. To know the Judicial Commission concept.

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<sup>9</sup> Philip K. Hitti, *History of Arabs*, terj. History of Arabs; From the Earliest Times to the Present, (Jakarta: Serambi, 2010), p. 398.

<sup>10</sup> Ishom Muhammad Syabārū, *Qadhi al-Qudhah fi al-Islām*, (Beirut: Dar al-Nahdhoh al-Arabiyah, 1992), p. 10.

<sup>11</sup> Ibn Qutaibah, *Uyūn al-Akhbar*, Juz. 1, (Beirut: Dar al-Kitab al-'Arabi, tt), p. 65.

2. To explore the Judicial Commission position in Islamic political system.

#### **D. THE SIGNIFICANCE OF STUDY**

The significance of study in this thesis is divided into both theoretical and practical aspect.

##### **1. Theoretical Significance**

- a. To contribute the study of Islamic political especially about the concept of Judicial Commission in judiciary system.
- b. To give a broad view to the moslem society in case of
- c. To give the more idea to whom concerning in islamization about politics.

##### **2. Practical Significance**

- a. To give a brief guidance to whom concerning in judiciary system.
- b. To give input to the government when issued the policy related to the judiciary system.
- c. To reinforce the way of islamization of judiciary in the real aspect

#### **E. LITERATURE REVIEW**

In this research, the writer reviews and shows some researches concerning the title, which is studying. The aims of this review are to clarify the researcher's position in this research, which it will be clear after this review. For example;

*Komisi Yudisial dan Reformasi Peradilan*, which is the thesis A. Ahsin Thohari. In depth thesis nature elaborative analytics.<sup>12</sup> Specialized research on judicial power in the constitutional structure, because these institutions, especially in countries that do not have an established democratic culture, has always been the target of outside intervention other powers, both legislative power, executive power, and society.<sup>13</sup> Therefore, the study is limited to state structure Indonesia [red; positive law].

*Sengketa Kewenangan Pengawasan antara Mahkamah Agung dan Komisi Yudisial*<sup>14</sup>, which is the thesis written by Firm Fahrur Razi. According to him, authorities possessed by Judicial Commission give ambiguous perception in the justice system, especially there already the Supreme Court. More profound when there is a *judicial review* of that rule Judicial Commission impressed begin to shrink in order to enforce the law and justice.

*A Critical Study of Constitutional and Judicial Development in Kuwait*, works Majid Salman Hussain. The study examine the judicial power and concentrates on independence of the judiciary, the right of defense, the

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<sup>12</sup> Hamid Fahmy Zarkasyi, *Proses Penulisan Karya Ilmiah*, article unpublished, p. 9.

<sup>13</sup> A.Ahsin Thohari, *Komisi Yudisial dan Reformasi Peradilan*, tesis Progam Pascasarjana Fakultas Hukum Universitas Indonesia, (Jakarta: Lembaga Studi dan Advokasi Masyarakat [ELSAM], 2004), p. 8.

<sup>14</sup> Frim Fahrur Razi, SH. *Sengketa Kewenangan Pengawasan Antara Mahkamah Agung dan Komisi Yudisial*, Tesis Progam Pasca Sarjana Universitas Diponegoro, Semarang, 2007, p. 1.

court system and jurisdiction and structure of the court system and its types.<sup>15</sup> Even if not discussed in the implicitly Judicial Commission about, but study the relationship between the authorities in Kuwait offend separation of function and institutions, separation of personnel and check and balances.

*Eksistensi Komisi Yudisial dalam Mewujudkan Kekuasaan yang Merdeka*, this article write by Nurul Chotidjah.<sup>16</sup> She talk about Judicial Commission is an independent state institution created to carry out the judicial body reform. And explain existence of Judicial Commission to maintain and uphold the honor, dignity and behavior of judges can be realized, cause according to her too urgent in law and ethic perspective for Indonesia state.

*Politik Hukum Kewenangan Komisi Yudisial*<sup>17</sup>, is works Mahfud, M.D. he argument judicial power in the first order is consider improper judicial management handle some executive agencies so that their interests can be included in the judicial practice. In line with the dissertation shows, that law enforcement never reached glory period in the 1950. This indicates the

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<sup>15</sup> Majid Salman Hussain, *A Critical Study of Constitutional and Judicial Development in Kuwait*, thesis submitted for the Degree of PhD in the School of Law University of Newcastle upon Tyne, p. 2.

<sup>16</sup> Nurul Chotidjah, "Eksistensi Komisi Yudisial dalam Mewujudkan Kekuasaan Kehakiman yang Merdeka", in *Jurnal Ilmu Hukum Syiar Hukum*, FH. UNISBA, Vol. XII, No. 2 Juli 2010, p. 1.

<sup>17</sup> Moh. Mahfud MD, "Politik Hukum Kewenangan Komisi Yudisial", in *Bunga Rampai Refleksi Satu Tahun Komisi Yudisial Republik Indonesia*, p. 451. See too; Moh. Mahfud MD, *Perkembangan Politik Hukum, Studi tentang Pengaruh Konfigurasi Politik terhadap Karakter Produk Hukum di Indonesia*, it's his thesis [distertasi] at UGM, Yogyakarta, 1993.

integrity and rigor of law enforcement agencies appear base existent of judicial.

*Komisi Yudisial dalam Mengawasi Hakim Perspektif Peradilan Islam*<sup>18</sup>, thesis which written by Nur Ahsan Saifurrizal. Whole his view function and duties of Judicial Commission just classified to *Hisbah* institution, whereas its Islam institution another literature more functioning to economic, like Muhammad Akram Khan write in prolog for book *Public Duties in Islam, The Institution of Hisba*.<sup>19</sup>

However, these studies clearly are important reference source for researcher, especially as a consideration in the research. However, the record of these studies above is partial discussion, either by topic that only concentrated in mind, or gives one of them a more substantial portion. So what will be discussed in this study specially aims to discover how good understand the important concepts in the judiciary.

## **F. THEORETICAL FRAMEWORK**

The research will use the political theories as his theoretical framework and more specifically the judiciary theories. The theories are:

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<sup>18</sup> Nur Ahsan Saifurrizal, *Komisi Yudisial Dalam Mengawasi Hakim Perspektif Peradilan Islam*, Skripsi Fakultas Syariah dan Hukum, Jinayah Siyarah, Universitas Islam Negeri Sunan Kalijaga, Yogyakarta, 2013, p. 1.

<sup>19</sup> Ibnu Taimiyah, *Public Duties in Islam, The Institution of the Hisba*, translated to Tugas Negara Menurut Islam by Arif Maftuhin Dzohir, (Yogyakarta: Pustaka Pelajar, 2004), p. xviii-xxviii.



## 1. The Concept of Judicial Commission

Judicial Commission is an institution that serves as an intermediary for the government and the judiciary. Its aim is to ensure the independence of the judiciary in some respects.<sup>20</sup> In some literature, judicial commission also knows an independent statutory corporation is part of the judicial arm of government.<sup>21</sup>

Which judicial commission which one of the judicial commission as the spearhead eradication judicial mafia.<sup>22</sup> As a final judicial institution that claimed to be smart, twist the facts justice, judge also immoral and unethical. Then the form of supervision of the trial judge to be urgent and the main agenda in the fight against injustice in the judiciary

## 2. Some Judiciary's Concerning on It

There are so many judiciary in some countries explain about the concept of judicial commission. In this research, the writer shall pick some of them, such *Conseil Superieur De La Magistrature, Consiglio Superiore*

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<sup>20</sup> Dr. Wim Voermans, *Komisi Yudisial di Beberapa Negara Uni Eropa*, terj. Raden voor de rechtspraak in landen van de Europese Unie (Councils For The Judiciary In EU Countries), translated by Adi et al. (Lembaga Kajian dan Advokasi Untuk Independensi Peradilan [LeIP], 2002), p. 3.

<sup>21</sup> <http://www.judcom.nsw.gov.au>, accessed Saturday, July 6, 2013. 11:31 am.

<sup>22</sup> Bambang Sutiyo, SH. M.Hum, "Penguatan Peranan Komisi Yudisial Dalam Penegakan Hukum di Indonesia" paper presented in Seminar Nasional Empat Pilar Kehidupan Bernegara (Pancasila, UUD NRI Tahun 1945, NKRI dan Bhineka Tunggal Ika) Urgensi Penguatan Komisi Yudisial dalam Penegakan Hukum di Indonesia, kerjasam Majelis Permusyawaratan Rakyat (MPR) Republik Indonesia dengan Pusat Studi Hukum & Konstitusi (PSHK) Fakultas Hukum Universitas Islam Sultan Agung (UNISSULA), Semarang, 23 November 2010, p. 1.

*Della Magistratura, Domstolsverket, Court Service, Domstolsstyrelsen,* and Judicial Commission of New South Wales.

*Conseil Supérieur De La Magistrature* is to ensure the independence of the judiciary in relation to the executive. Whereas its role is appointment of judges, discipline of judges and ensuring the independence of the judiciary.<sup>23</sup>

*Consiglio Superiore Della Magistratura* is an organ of a constitutional ordering Italian. It is the self-governing body of the judiciary meeting, or civil and criminal law. It aims to ensure the autonomy and independence of the judiciary from the other power of the state, in particular from the executive.<sup>24</sup>

*Domstolsverket*, is a Swedish state administrative authority, which comes under the Ministry of Justice and is responsible for providing administrative support and service to the general court. In this work, the work comply with the court independence under the Constitution.<sup>25</sup>

Court Service does not have authority in the field of judicial appointments, is also not involved in the disciplinary jurisdiction, but the

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<sup>23</sup>[http://fr.wikipedia.org/wiki/Conseil\\_sup%C3%A9rieur\\_de\\_la\\_magistrature\\_\(France\)#Nominations\\_des\\_magistrats](http://fr.wikipedia.org/wiki/Conseil_sup%C3%A9rieur_de_la_magistrature_(France)#Nominations_des_magistrats), accessed Saturday, July 6, 2013. 11:52 am.

<sup>24</sup>[http://it.wikipedia.org/wiki/Consiglio\\_superiore\\_della\\_magistratura](http://it.wikipedia.org/wiki/Consiglio_superiore_della_magistratura), accessed Saturday, July 6, 2013. 11:59 am.

<sup>25</sup>[http://sv.wikipedia.org/wiki/Domstolsverket#cite\\_note-1](http://sv.wikipedia.org/wiki/Domstolsverket#cite_note-1), accessed Saturday, July 6, 2013. 12:15 pm.

*Court Service* to give attention to the career development and personal judges judge.<sup>26</sup> Which its Ireland judicial.

*Domstolsstyrelsen* it's were at Denmark, which is the European Judicial Commission most recently, in some ways a clone of the Judicial Commission of Sweden (*Domstolsverket*).<sup>27</sup> So which reflect on the Swedish structure, the authority also will not authority variance especially in terms of policy.

Judicial Commission of New South Wales is an independent statutory corporation established under the *Judicial Officer Act* 1986. Which it's developed a high level of expertise in judicial education, sentencing research. Also examine complaints made about a judicial officer's ability or behavior.<sup>28</sup>

## G. RESEARCH METHOD

In this thesis, the researcher tries to reveal the research objects by using these methods:

### 1. Kind of research

This research is a library research.

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<sup>26</sup> Wim Voermans, *ibid*, p.45.

<sup>27</sup> *Ibid*, p. 55. See too official website <http://www.domstol.dk/om/organisation/domstolsstyrelsen/Pages/default.aspx>

<sup>28</sup> *Annual Report 2011-12 Judicial Commission of New South Wales*, p. 2. Refers to official website <http://www.judcom.nsw.gov.au>

## 2. Data Sources

Data in this research classified into three groups:

Primary Data, considering Indonesia, former Dutch colony, as well as continental European countries and other former colony, Indonesia is an adherent *civil law system*. For primary legal materials is legislation. Such, *constitution* (Undang-Undang Dasar), *law* (Undang-undang), *regional regulation, government regulations, presidential regulation, a regulations bodies* or *Staatsblad* (Lembaran Negara Republik Indonesia)<sup>29</sup> especially in this study, all the laws of justice and the Judicial Commission. While *Qadhi al Qudha*, 'ulama works related to the research and direct to *Qadhi al Qudha* are; *Qadhi al Qudha fi al Islam*, *'Uyun al-akhbar*, and *al-Bidayah wa al-Nihayah*.

Secondary Data, are the works written by the experts, either explanatory, commentary, critique or the comparison about Judicial Commission and *Qadhi al Qudha* in any cases related to the research.

Tertiary Data, are the data used to support the primary and secondary data, such dictionary, research result, internet, news in newspaper etc.<sup>30</sup>

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<sup>29</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2010), p. 142

<sup>30</sup> Suharsimin Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktik*, (Jakarta: Rineka Cipta, 2002), Cet. II, p. 107.

### 3. The Method of Collecting Data

To collect the data from the sources, the writer shall uses at least a primary method, it is

#### a. Documentation method

Documentation method is a method to look for any data from expert writings, transcripts, decisions, newspaper, magazines etc. This method used for collecting the ideas and the thought about judiciary to be a fundamental of this research

### 4. Method of Data Analysis

To support the writer in writing this thesis, the writer uses a number of analysis method, they are:

#### a. Inductive Method

Inductive manner usually begin by observing in detail the research objectives toward generalization and abstract ideas. It is said also that the inductive method originated from a fact and reality instead of assumptions or hypotheses.<sup>31</sup> The writer uses this method to explain about the concept of Judicial Commission and *Qadhi al Qudha*.

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<sup>31</sup> J.R. Raco, *Metode Penelitian Kualitatif Jenis, Karakteristik dan Keunggulannya*, (Grasindo), p. 59

b. Deductive Method

If the deduction process of moving from the general to the particular is a deduction or deductive process<sup>32</sup> or another its methods from *mayor premise to minor premise*. The writer uses this method to describe the general concept of *Qadhi al Qudha* or in Islamic judicial.

c. Analysis Descriptive Method

This method is to solve the gathered essence of research, and to look for the scientific research which follows the role of writing and analyzing.<sup>33</sup> The writer uses this method to analysis in development political system with judicial, both Judicial Commission with Indonesia government also *Qadhi al-Qudha* with Islamic political system.

## H. SYSTEM OF STUDY

This research consists of four chapters, they are; one is introduction, chapter two is general view and the chapter three is the main subject of research, and one chapter is closing.

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<sup>32</sup> Tim Pengembang Ilmu Pendidikan FIP-UPI, *Ilmu & Aplikasi Pendidikan Bag 1 Ilmu Pendidikan Teoritis*, (IMTIMA, 2007), p. 333

<sup>33</sup> Lisa Harrison, *Metodologi Penelitian Politik*, terj. Political Research an Introduction, (Jakarta: Kencana, 2009), Cet. II, p. 37.

## **Chapter I Introduction**

Which consists of problem issue, the focus of problem, purpose of study, significance of study, literature review, theoretical framework, research method and system of study.

## **Chapter II The General Concept of Judicial Commission**

In this chapter, give the general view of the concept Judicial Commission in the judicial system of Indonesia and short profile some kind of court that is in some countries, with regard to the judicial commission also talk about Islamic Political System. Part one; will talk about the Judicial Commission in Indonesia, including its definition, its historical background and development, its structure in Indonesia government and judiciary, its functions and duties. Addition discussion talk about other type of judicial in some countries concerning to Judicial Commission. Part two will speak Islamic Political System, including an understanding about Islamic political system, scope of Islamic political system, the leadership, constitutional issues, and judicial authority

## **Chapter III Judicial Commission in Islamic Political System**

Chapter three is the essential of study. It will explain about Islamic political system. Researcher will talk about the concept of Judicial Commission in Islamic political system, are; While containing from three discussion, the concept of Judicial System in Islam, the function and duties Judicial Commission, and the concept of Judicial Commission in Islamic Political System.

#### **Chapter IV Closing**

Chapter fourth is closing which consist of the conclusion of the research and then suggestion for the next researches in order to make this research more complete and perfect than before.