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Strengthening Judicial Reform by a Judicial Commission

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Citation
Voermans, W. J. M. (2010). Strengthening Judicial Reform by a Judicial Commission. In *Buletin Komisi Yudisial* (Vol. IV, pp. 20-23). Jakarta: Komisi Yudisial. Retrieved from https://hdl.handle.net/1887/16140

Version:	Not Applicable (or Unknown)
License:	Leiden University Non-exclusive license
Downloaded from:	https://hdl.handle.net/1887/16140

Note: To cite this publication please use the final published version (if applicable).

ISSN 1978-1458

Vol. IV No. 6. Juni - Juli 2010

BULETIN

MEWUJUDKAN KEKUASAAN KEHAKIMAN YANG MERDEKA DAN BERTANGGUNG JAWAB

KOMISI YUDISIAL

Laporan Utama :
Masa Transisi
& Harapan Publik

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Strengthening
Judicial Reform by a
Judicial Commission

Tahun
Berkarya untuk Indonesia

Edisi
Ulang
Tahun

> "We are not really sure which country can claim the intellectual property to the institution we have come to know as a 'Council for the judiciary'(also labeled 'High Council for the Magistrature', 'Superior Council for the Judiciary', 'Judicial Commission', 'Courts Service')."

Prof. Wim J.M. Voermans

Strengthening Judicial Reform by a Judicial Commission

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1. Councils for the judiciary as a means to an end

We are not really sure which country can claim the intellectual property to the institution we have come to know as a 'Council for the judiciary' (also labeled 'High Council for the Magistrature', 'Superior Council for the Judiciary', 'Judicial Commission', 'Courts Service'). [1] France and Italy were, admittedly, one of the first jurisdictions to enshrine a Council for the Judiciary in their post second world war Constitutions. The Consiglio della Magistratura in Italy featured for the first time in the 1948 Constitution, but was only actually established by the beginning of the nineteen sixties.[2] The French Conseil Supérieur de la Magistrature for the first time appears in the 1958 Constitution of the V[th] French Republic and was established at the same time.

These councils are a very specific reaction to perceived or actual threats to the independence and authority of the judiciary. In Italy at the time this independence was challenged by politics and the authority compromised by the experiences during the fascist administrations in the nineteen thirties and the nineteen forties. In France judicial independence and authority was challenged by the ever dominant administration in France. Councils for the judiciary – booming in Europe over the last decades – are and have always have been dedicated instruments to achieve the goals of independence, authority of the judiciary and the quality of adjudication - be it via the quality of the judge (training, integrity, ethics, discipline, etc.), the quality of the proceedings (accessibility, transparency, motivation, etc.) or the quality of the management of the courts (efficiency, organization, budget management, automation, etc.).

Councils *for* the Judiciary are – and always were - a means to an end, and they have met with success. It reinvigorated the independence and authority of the Italian judiciary, helped the independent position and the quality of judiciary in France and increased the efficiency of Swedish Courts, according to observers and reporters.[3] This is why a lot of Councils – inspired by these positive experiences – have been established in European countries over the last decades (Spain, Portugal, Ireland, Denmark, Belgium, the Netherlands) and why the Consultative Council of European Judges –working under the umbrella of the Council of Europe and advising its Committee of Ministers - has indicated an intermediate body, such as a Council for the Judiciary, is under certain conditions a best practice in democracies societies governed the rule of law. A best practice in order to promote the division of powers, to promote public trust in the judiciary and to improve judicial efficiency.

In this paper we will – on the basis of earlier work – first try to pin down the concept of a Council for the judiciary, elaborate the principles that underpin the establishment of Councils for the Judiciaries, and compare different Councils for the Judiciary in Europe, than discuss the opinion of the Consultative Council of European Judges (CCJE) - including principles, guidelines and standards and finally mirror the findings to the Indonesian situation.

2. The concept of a Council for the Judiciary

Up until now we have not discussed the question of what a Council for the Judiciary is. There are different definitions around. Some embrace a broad concept. Lord Justice Thomas, for instance, defines a Council of the Judiciary as a body elected by or appointed from the judiciary with extensive powers primarily in relation to the career and training of judges and in some cases, the administration of the courts.[4] This includes for instance Courts Services, like they have in the UK or in Lithuania, institutions that perform services to assist the judiciary. Court services are not independent and are not governed by judges, but run by civil servants.

A more common definition – also the one adopted by the Council of Europe's CCJE – of what a Council for the judiciary reads as follows:

I. is a self-governing judicial organization,

II. functions independently from the government and parliament,

III. acts as an intermediate institution (a 'buffer') between the legislative-executive branch of government and the judiciary, and

IV. does not administer justice as such, but typically performs 'meta-judicial' tasks such as disciplinary action, career decisions by judges, the recruitment and professional training of judges, coordination between courts, general policies, courts' service-related activities (budget, housing, automation, finances and accounting, etc.), etc. as regards judges and courts. 5

This latter definition stresses that Councils for the judiciary are independent from the other branches of government and are governed by judges (self governing). This paper will adopt this more narrow and more accurate definition to compare these Councils in Europe. These councils come – as we already indicated in the first paragraph - in different types, sorts and sizes, under different labels and with different responsibilities and competences. Notwithstanding all of their differences, Councils for the Judiciary in Europe do share a lot of common features. Generally they function as independent intermediates between the government and the judiciary in order to ensure and guarantee the independence of the judiciary in some way or in some respect.

Councils for the Judiciary are booming throughout Europe. A recent survey by the CCJE shows that 27 Countries out of 38 do have a Council for the Judiciary in place in some way or other.[6] Most of them have been established very recently. There seems to be a true European trend to establish Councils for the Judiciary in countries that hitherto relied on ministerial management and budgeting of the Courts and the judiciary. This shift has for instance lead to the establishment of Councils for the Judiciary in Ireland (1998) and

1 *We will stick to this label because it aligns well with the international acknowledged label the Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) (on the Council for the Judiciary at the service of society) adopts. The opinion was adopted by the CCJE at its 8th meeting (Strasbourg, 21-23 November 2007).*

2 *Law of 24 March 1958, no. 195 (modified several times afterwards).*

3 *See P. Albers and W. Voermans, Councils for the Judiciary in EU Countries, Council of Europe, Strasbourg, 2003.*

4 *Lord Justice Thomas, Councils for the Judiciary and States without a High Council, preliminary report delivered to the CCJE-GT CCJE (2007)4, Strasbourg 2007, p.1.*

5 *See W. Voermans, 'Judicial transparency furthering public accountability for new judiciaries', Utrecht Law Review Volume 3, Issue 1 (June) 2007, p. 149.*

6 *See the proceedings of the 3rd European Conference of Judges, dedicated to the theme: Which Council for Justice? Rome (Italy), 26-27 March 2007, http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/meetings/Conferences/Conseils/default_en.asp*

Denmark (1999) and Belgium (1999) to name but a few. The Netherlands - our home country - established – effectively since 1 January 2002 - a Council for the Judiciary (Council for the Administration of Justice) of their own.[7]

In this paragraph we will report on some of the characteristics of various European Councils for the Judiciary. We will especially highlight the issue of public or constitutional responsibility for the management of the judiciary in EU countries that work with a Council for the Judiciary and the countries that are considering to establish one. In most EU countries that do not have a Council for the Judiciary the public responsibility for the management of the judiciary itself was, until recently, mainly expressed via and governed by Ministerial responsibility of a Minister of Justice (or of the Government) to Parliament. A Council for the Judiciary brings about changes in the former pattern of responsibility-arrangements. It causes shifts in the constitutional balance of power.

3. New Councils for the Judiciary based on the North European model

Not only is the advent of independent Council for the Judiciary new, the package of responsibilities that they have is remarkable. In the Netherlands, as well as in Denmark and Ireland, it was decided to entrust the new Council for the Judiciary with managerial and support tasks (varying from training, accommodation, automation, providing information, help with recruitment and assistance to Appointment advisory committees) and competences in the area of budget, apportionment of the budgets and justification of spending. Thus not only are increasingly more Councils for the Judiciary created in Europe, the newcomers are all variants of the North European model. Certainly to some extent this is due to the success of the Swedish Council and the example it presents. Through leaving managerial competences and – certain – budget responsibilities to a judicial organization the self responsibility for the management of judicial bodies can be extended and with it the efficiency. In Sweden it is stated that indeed this self responsibility of the judicial organization in its entirety has increased by the way the Domstolsverket functions within the Swedish system. The cause of this greater self responsibility – as we can see in Sweden – is to be found in the presence of a professional and specific organization responsible for the judicial management and budget affairs that acts as a buffer between the judicial organization and the Government. This buffer is equally an ally and a guard dog.

A second cause of the larger self responsibility in Sweden lies hidden in the combination of independent administration, management and budgeting of the judicial organization by the Domstolsverket together with integral management at the level of the Courts. For their operational management the Courts are very much left to their own devices. The Domstolsverket promotes, coaches and to a certain extent supervises this administrative self responsibility of the Courts. Also in the Netherlands one has opted for this proved – at least in Sweden – combination of remote management and integral management. In any case, in Sweden they are strongly attached to this combination such as Contributions to the quality of the administration of justice, Promotion of the independence, Constitutional basis, Broadly composed boards of the Councils for the Judiciary, 'External' members in the boards of the Councils, and The combined action of public control and the role of the ministerial responsibility.

In 2007, the Committee of Ministers of the Council of Europe entrusted the Consultative Council of European Judges (CCJE) with the task of adopting an Opinion on the structure and role of the (High) council for the judiciary or another equivalent independent body as an essential element in a state governed by the rule of law to achieve a balance between the legislature, the executive and the judiciary. The CCJE picked up on this and adopted its opinion at its 8th meeting (Strasbourg, 21-23 November 2007). Against this background the CCJE considered it necessary:

1. To stress the importance of the existence of a specific body entrusted with the protection of the independence of judges, in the context of respecting the principle of separation of powers;
2. To set guidelines and standards for member States wishing to implement or reform their Council for the Judiciary.

4. Inspiration for the Judicial Commission in Indonesia?

Councils for the Judiciary are the products of cultural developments in a legal system, which in turn are deeply rooted in the historical, cultural and social context of specific countries. This means that every Council for the Judiciary is unique and we cannot see these boards out of their context. Accordingly, the question of whether we can learn something from the Councils for the Judiciary in other legal systems, as we are attempting during this conference on the role of the judicial commission in Indonesia, is a tricky question in more than one respect. In any case, it is a fact that the examples of other countries cannot be followed in any direct sense of the word. Other countries' experiences with Councils for the Judiciary are very much defined by the specific social and constitutional context of these countries and the cultural developments that they have undergone. Every system has found its own balance through specific 'checks and balances'. To assess the value and significance of a system for other countries, a broad knowledge of the situation and history is required. In many respects, the constitutional guarantees for the independent administration of justice and independent courts and the forms of public control of the same system are closely interwoven.

That does not mean, however that no inspiration can be drawn from models and experiences elsewhere in the world. In order not to be to eclectic in the use of sources of inspiration Indonesia's Judicial Commission can draw upon, I will use the Opinion of the Consultative Council of European Judges – discussed in the previous paragraph – as a common frame of reference. The CCJE's recommendations are a result of comprehensive comparative study, well researched and negotiated, and the evidence based best practices. A caveat is due however. The CCJE makes recommendations for European countries. They need to be seen in this context. It is based on European

7 *Wet van 6 december 2001 tot wijziging van de Wet op de rechterlijke organisatie, de Wet rechtspositie rechterlijke ambtenaren en enkele andere wetten in verband met de instelling van de Raad voor de rechtspraak (Wet Raad voor de rechtspraak), (Act establishing the Council for the Judiciary) Stb (Official Journal) 2001, 583.*

Dialog informal Prof. Wim J.M. Voermans (tengah) dengan Anggota KY Prof. Dr. Mustafa Abdullah (kanan)

experiences and for European use.

Having said this, we can observe that the Indonesian Judicial Commission falls well within the scope of the recommendations and aligns well to the principles expressed in it. A dedicated independent body, such as the Judicial Commission, entrusted with the protection of the independence of judges, is, as the CCJE observes, an essential element in a state governed by the rule of law and thus respects the principle of the separation of powers. Independence of the judiciary is vital to a state governed by the rule of law, it is a stepping stone for the public trust in the judiciary, the impartiality of judges, courts and tribunals, the integrity of the judicial system en its personnel, and the eradication of undue influence on the judiciary by other state actors, like government or the legislature. To secure this independence, the CCJE recommends to ensure the position of the Council/Judicial Commission in the Constitution.

Article 24b of the Indonesian Constitution of 1945 (UU 1945) meets with this recommendation. The CCJE does not give any indication as to the level of detail the constitutional provision enshrining the Council/Commission. Practices vary in this respect in European Constitutions, some Councils are even set up extra constitutionally (Netherlands). Most countries have only very general constitutional provisions, like the one Indonesia has (Spain and France for instance. If we look at the sort of commission or council the Indonesian Commission expresses, it is, to our mind, definitely commission that resembles the 'South European' model. The rationale for South European Councils for the judiciary is to improve the authority of the judiciary and its public image by guaranteeing the independence. Southern European councils are very specific reactions to very specific threats to the independence of the judiciary. Basically all of the functions these councils perform are intended to enhanced the public trust in the judiciary. Typically these councils have tasks in the field of training, recruitment, career decisions, ethics, discipline and such. All of these functions are designed to arrive at a high level of professionalism in the judiciary and high standards of professional ethics.

The Indonesian Judicial Commission has tasks and competences in this field as well, largely for the same rationale. Some of the recommendations of the CJJE may however be inspirational for the Indonesian Judicial Commission though. First of all there is the composition of the board. In brief the CCJE recommends to have a board with a mixed composition with a substantial majority of judges (and some task may have to be reserved for an all judge panel). This sort of composition prevents the perception of self-interest, self protection and cronyism. Furthermore the CCJE recommends that prospective members are to be appointed on the basis of their competence, experience understanding of judicial life and culture.

The CCJE is not prone to the idea of active politicians on the board and favors an election of the judicial members on the board by their peers, i.e. other judges, without interference of politicians or judicial hierarchies and through methods guaranteeing the widest representation. This way of board composition and appointment will not only boost public confidence but in time also give the board some sort of legitimacy vis-à-vis the judiciary as well, a problem the Indonesian Judicial Commission (DPR) has faced in the recent past. Obviously a board composed of a majority of judges is not an avenue for the Indonesian Judicial Commission at this moment, given the widespread and serious integrity problems within the Indonesian judiciary. Free elected judge members representing the different levels of the judiciary might obstruct or block the purgation process that is ongoing at this moment. Only after this process is concluded, a majority of judges on the board could be considered. The re-establishment of the Judges Honor Committee (MKH) in 2009 seems a prima facie sensible intermediate step to try to win legitimacy for difficult decision within the judiciary.

The CCJE also stresses that councils or judicial commissions need to be dressed with the necessary funds to allow them to perform their task (they should – within certain margins - not be subject to political fluctuations[8]). There are however councils that are tasked with budget allocation themselves. They have toiled to manage the budget in such a way that improves the efficiency the judiciary. One of these countries is the Netherlands. The budget management method (the so-called Lamicie model) is considered a best practice.

A final observation. The CCJE stresses the need for councils or judicial commissions to act with transparency and be accountable for their activities. Transparency and accountability are vital to the public trust in the judiciary, and hence, even more so for judicial commissions or councils. They should work as transparent as they can. The CCJE advocates the issue of periodical public reports, drawn up by the council or judicial commission, as the case may be. These reports should, if possible, not only analyze and report, but also suggest measures to be taken in order to improve the functioning of the justice system. In this same vein the CCJE recommends that councils or judicial commissions should be consulted (and take a public position) on draft legislation that has an impact on the judiciary at the moment when it is considered by the government or parliament. Maybe this is an inspiration for Indonesia where, from what we gathered, the judicial commission was already working closely with the government on some dossiers.

8 *See point 73 of the 2007 Recommendations, no 10*