

## PROBLEMATICS OF THE OVERSIGHT OF THE CODE OF CONDUCT AND THE CODE OF JUDGMENT BETWEEN THE JUDICIAL COMMISSION AND THE SUPREME COURT

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Received 25 May 2023 • Revised 30 May 2023 • Accepted 30 May 2023

### Abstract

The research objective is to capture the joint examination mechanism which is the control between the Judicial Commission and the Supreme Court. This research uses a doctrinal approach which is based on the existence of a problem that is examined in the laws and regulations, the Code of Ethics and Code of Conduct of Judges, the problems of monitoring the Code of Ethics and the Code of Conduct of Judges in the context of the current joint examination, it is necessary to remove them, as concrete steps taken to improve a supervisory system for the Code of Ethics and Code of Conduct for Judges in the future. Thus the contituendum of supervision between KY and MA as a new formulation of the KY Bill. This method uses a doctrinal (normative) approach because it has a research target in the form of a set of norms. Approach in statutory research, and concept approach. The result is legal implications of the presence of joint examinations in the supervision of the Code of Ethics and the Code of Conduct of Judges between the Judicial Commission and the Supreme Court.

**Keywords:** Joint Examination, Judicial Commission, Supreme Court

## INTRODUCTION

After the third amendment of the 1945 Constitution of the Republic of Indonesia, judicial reform gave birth to the Judicial Commission (KY) institution. KY aims to provide a balance in supervising the behavior of judges which has been carried out by the Supreme Court (MA) itself.

This supervision is essentially maintaining and upholding the honor, nobility, and behavior of judges as KY external supervisors from court institutions. KY and MA are 2 (two) institutions for monitoring the behavior of judges based on the Code of Ethics and the Code of Conduct for Judges (KEPPH). KEPPH supervision, between KY and MA, takes the form of a joint inspection mechanism.

The joint examination of KY and MA, in practice, creates problems during the examination in imposing light, moderate and heavy sanctions on the actions/behavior of judges. An example of the KY's proposal being rejected at the time of the proposal for light sanctions against the judges examining the Antasari case.

In this position, it becomes an anomaly when the Supreme Court rejects the proposal. The Supreme Court rejected the proposed imposition of sanctions from KY, because they considered it involved in technical judicial issues. Differences in judicial technical interpretations are an obstacle in the joint examination of KY and MA.

KY data for 2020, joint examinations between KY and MA have been implemented from 2016 to 2018, there are 34 (thirty-four) reports proposed for joint inspection. However, the fact is that this is only a suggestion, because the implementation of a joint inspection has never been carried out so far. The problem in this is the debate over the technical interpretation of the judiciary or the behavior of judges (violations of the KEPPH) in cases handled in the joint examination of KY and MA.

Judicial technical based on MK Decision No 05/PUU-IV/2006, is a sterile area that is given to a judge to be free to make any decisions and is protected by the principle of independence. The legal construction is interpreted as the area of supervision by the Supreme Court and outside of that it becomes the domain of the KY and MA to supervise the behavior of judges. The interpretation is clear, however, since the issuance of the KEPPH, the form of a joint examination has never been carried out between the KY and the MA.

The first obstacle is related to the composition of the inspection team between KY and MA. Specifically, the joint examination is regulated in the Joint Regulations of the Chairman of the Supreme Court of the Republic of Indonesia and the Judicial Commission of the Republic of Indonesia Number 03/PB/MA/IX/2012 and 03/PB/P.KY/09/2012 concerning Procedures for Joint Examination. In this regulation, a joint inspection is carried out by an examining team consisting of 4 (four) people, namely 2 (two) KY and 2 (two) people from the Supreme Court. In its implementation, the formula for who is the representative of the KY and who is the representative of the Supreme Court has not yet been found. In this context, the two institutions have their respective opinions on this matter.

The two sectoral interests that occurred between KY and MA, in the implementation of joint inspections. Joint examination was born to resolve the interests between KY and MA in the context of joint examination, becoming a new unresolved sectoral ego. This resulted in unfinished sectoral ego that existed before regarding judicial techniques and the behavior of judges. Thus hampering the authority of KY and MA in conducting KEPPH supervision.

These problems, which are based on empirical facts, are the basis and reason for improving the KEPPH monitoring system in the future by eliminating joint inspections. So that the implementation of the objectives of KEPPH supervision, namely to maintain and uphold the honor, nobility, and behavior of judges can be realized.

The purpose of this study is to answer and analyze 2 (two) things, namely, first, the legal implications of the presence of joint examinations in the supervision of the Code of Ethics and the Code of Conduct for Judges between the Judicial Commission and the Supreme Court. Second, *ius constituendum* oversight of the Code of Ethics and the Code of Conduct for Judges between the Judicial Commission and the Supreme Court.

## METHOD

This study uses a doctrinal (normative) approach because it has a research target in the form of a set of norms. Approach in statutory research, and concept approach.

The type of data analysis used is a qualitative approach with literature studies which are then systematically and analyzed to find clarity of the problem (Soekanto, 1986). This type of data analysis is described as analyzing and processing data with reference to the data or information obtained after which it is narrated to obtain research conclusions. The type of data needed in this research is secondary data obtained through literature search or literature study (Mamudji & dkk, 2005). It aims to understand the conceptualization of law in legal texts or sources. The results of this research are

analytical descriptive, which focuses on solving problems and implementing descriptive methods not limited to the stages of collecting and compiling data which includes analysis to find answers to the problems posed.

## RESULTS AND DISCUSSION

### Code of Ethics and Code of Conduct for Judges

Currently, the oversight of the Code of Ethics and the Code of Conduct for Judges (KEPPH) is under the jurisdiction of the Judicial Commission (KY) and the Supreme Court. This authority is to maintain and uphold the honor, dignity and behavior of judges. It is actually important, before going further in normatively assigning this authority, to know the essence of KEPPH itself.

As part of KEPPH, ethics can be interpreted as a collection of principles or values relating to morals regarding right or wrong that is adhered to by one group of people. Furthermore, the professional code of ethics (code of ethics) is a combination of the words code of ethics and profession. The code of ethics can be interpreted as an effort to uphold and guarantee ethics, as well as a profession which is a job that requires high, special knowledge and special training. Meanwhile, the code of conduct in the Indonesian Dictionary defines guidelines as a set of basic provisions that give direction on how something should be done. Behavior is defined as an individual response or reaction to stimuli or the environment. In the context of this study, judges who are the object of supervision can be understood as determinants of decisions on cases that have been disputed by the disputing parties. If a case that is decided is wrong and, in the end, it becomes a jurisprudence, then what happens is that justice is not created.

From some of the meanings above, it can be interpreted that the judge as a profession that has extraordinary authority must maintain ethics and behavior in order to maintain the dignity of the profession. This is then embodied in the Code of Ethics and Code of Conduct for Judges (KEPPH).

### The Judicial Commission as an Institution

One of the authorities in supervising KEPPH lies with KY. But of course, KY is not made and given this authority without reason. KY as an institution was present after the 3rd (three) amendments to the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia). But before that, there were some problems that occurred. This is the reason and basis for the presence of KY at this time.

Concrete discussions regarding KY actually existed in 1968. At that time, it was proposed to form an institution called the Judge Research Consideration Council (MPPH). Furthermore, in the amendments to the 1945 Constitution of the Republic of Indonesia there was discussion regarding external supervision of judicial power in order to safeguard the integrity, dignity and behavior of judges but has not used the nomenclature "Judicial Commission," but "Honorary Council of Judges".

The position of KY in the constitutional system in Indonesia itself is an institution that is outside the power of the judiciary. Although it is undeniable that its authority indirectly intersects with the judiciary power institution. KY in its function is a supporting state institution (auxiliary state's organ) to judicial power. The task of this commission is internal within the jurisdiction of the judiciary, but in order for the supervision it carries out to be effective, it is ensured that its position is independent outside and equal to the Supreme Court and the Constitutional Court. There is a fundamental difference, KY is not a law enforcement agency (code of law), but an ethics enforcement agency (code of ethics).

Then, its independent nature brings KY as an independent state institution in Indonesia. Funk and Semon said that there are at least 2 (two) main problems in placing independent state institutions in the concept of separation of power. First, basically several independent state institutions themselves combine several characteristics of the executive, legislative, and judicial branches of power. Second, in fact, these independent state institutions, not only mix up the authority of other branches of power, but certain things can be called "absolutely" separate from presidential control.

Currently, KY in Law Number 18-year 2011 concerning Amendments to Law Number 22-year 2004 has several authorities, namely:

1. Propose the appointment of supreme justices and ad hoc judges at the Supreme Court to the DPR for approval;
2. Maintain and uphold the honor, nobility, dignity, and behavior of judges;
3. Establish a Code of Ethics and/or Code of Conduct for Judges together with the Supreme Court;  
And
4. Maintain and enforce the implementation of the Code of Ethics and/or Code of Conduct for Judges.

### **Supreme Court (MA) as an Institution**

The existence of the Supreme Court as an institution for judicial power in Indonesia actually existed during the Dutch East Indies government. Even in the first BPUPK meeting, Susanto Tirtoparjo on May 29, 1945 conveyed 4 (four) ideas which he called the pillars of an Independent Indonesia, one of which was a Judicial Body that was one for the entire population and free from the influence of government agencies.

Developments in the state administration system in Indonesia also affect the position of the Supreme Court. Currently, structurally, MA is equal to other state institutions. This is in line with the fact that the Supreme Court as an institution of judicial power has several general principles that must be applied, namely the principle of judicial independence and the principle of judicial impartiality. These two principles are recognized as basic prerequisites for a system in all countries which are called modern law or modern constitutional states.

The principle of judicial independence is the principle of independence itself, which is manifested in the attitude of the judges in examining and deciding the cases they face. Meanwhile, the principle of impartiality is the second very important principle regarding impartiality. In practice, impartiality itself implies the need for a judge who does not only work impartially (to be impartial), but also appears to be working impartially (to appear to be impartial).

In the 1945 Constitution of the Republic of Indonesia Article 24 paragraph (1) states, "Judicial power is an independent power to administer justice to uphold law and justice" and paragraph (2) states, "Judicial power is exercised by a Supreme Court and judicial bodies in subordinates within the Supreme Court court environment, the religious court environment, the military court environment, the state administrative court environment, and a Constitutional Court".

### **Legal Implications of the Presence of a Joint Examination in KEPPH Supervision between KY and MA**

One of the mutually agreed upon principles in carrying out KEPPH supervision is that KY and MA are partners. "The partnership principle means that the Supreme Court and the Judicial Commission work together and support each other in monitoring and handling alleged violations of the Code of Ethics and the Code of Conduct for Judges."

The joint examination is based on Article 22 E verse (2) of Law Number 18 year 2011 concerning Amendments to Law Number 22 year 2004 concerning the Judicial Commission. It is specifically regulated further in the Joint Regulations of the Chief Justice of the Supreme Court of the Republic of Indonesia and the Judicial Commission of the Republic of Indonesia Number 03/PB/MA/IX/2012 and 03/PB/P.KY/09/2012 concerning Joint Examination Procedures.

The joint examination was carried out by a team of joint examiners consisting of 4 (four) people, 2 (two) from the Judicial Commission and 2 (two) people from the Supreme Court. In carrying out their duties the examining team first conducts research and reviews the report on the results of the examination made by the Judicial Commission examining team. The results of these inspections met the existing requirements, then they became the basis for the joint examining team to draw conclusions and recommendations through deliberation and consensus. Deliberation and consensus in terms of voting were not reached and a balance occurred, so the decision that was most beneficial to the reported was taken. This recommendation is carried out by the Supreme Court no later than 30 (thirty) days after the report is received. The joint examination has several legal implications for KEPPH supervision between KY and MA, including:

1. The joint examination weakened the KY's proposed sanctions to the Supreme Court. Even though juridically within 60 (sixty) days the Supreme Court has not imposed sanctions on the KY proposal, it will be applied automatically. But before that, a joint examination can be carried out. The joint examination presented an open legal policy for the Supreme Court to differ in opinion on the KY sanction proposal. Even though in carrying out its authority, KY did not necessarily carry out the proposed sanctions. There are stages carried out by KY in conducting supervision. These stages reflect, in carrying out proposed sanctions, KY has a strong basis and reasons. This illustrates that the presence of a joint examination has legal implications for the external oversight carried out by the KY. This is not in line with the intention of establishing KY in the constitutional system in Indonesia.
2. The empirical facts show that in the context of a joint examination that has never been carried out so far. The problem in hindering the joint examination was due to the composition of the joint examination team, which until now had never been found by the two of them to have a formula. KY and MA have different views regarding who will make up the composition of the 4 (four) examining team. Joint examination as a mechanism or stage in KEPPH supervision is not ready

to be implemented. Apart from that, the presence of the joint examination added a new regional ego regarding the relationship between the KY and the MA.

3. Referring to the empirical facts in point 2 (two) also illustrates the unresolved debate between the KY and the Supreme Court regarding judicial techniques and the Supreme Court. The joint examination which was constructed as a stage or mechanism bridging the settlement of technical judicial disputes and the behavior of judges has never been implemented until now. So that results in no solution for resolving the debate between the KY and the Supreme Court in the technical context of the judiciary and the behavior of judges that can be done now. As in 2019, out of 58 (fifty-eight) KY decisions and proposals for imposing sanctions, the Supreme Court only followed up KY's proposals against 3 (three) judges, the three of whom were submitted to the Honorary Council of Judges (MKH). As for the 25 (twenty-five) KY decisions on the imposition of sanctions against Judges, until now there has been no response from the Supreme Court regarding the real implementation of these sanctions. While regarding the 8 (eight) proposed sanctions, the Supreme Court decided that they could not be followed up on technical judicial reasons. This means that the debate between judicial techniques and judge behavior is still going on between KY and MA. This has implications for the external implementation of KY authority in the context of KEPPH supervision.

The three points above are the legal implications of the presence of a joint examination under KEPPH supervision in Indonesia. The legal implications of this joint examination have become a problem in current KEPPH supervision. So that based on the legal implications, it is the basis and reason for this research to do the elimination of joint examinations. This is a form of improving the KEPPH supervision system in Indonesia. Apart from that, concrete steps are also taken to maximize the authority of external supervision carried out by the KY.

### ***Ius Constituendum* Supervision of The Code of Ethics and Guidelines for The Conduct of Judge Between the Judicial Commission and the Supreme Court**

The legal implications of the presence of joint inspections in the KEPPH oversight system in Indonesia, as explained in the previous chapter, are the basis for making improvements regarding KEPPH supervision between KY and MA. The goal of improving the KEPPH supervisory system is to maintain and uphold the honor, dignity, and behavior of judges. Several things that must be considered in the solution that will be required, that the debate between the KY and the Supreme Court which have their respective views in the context of supervision is still happening today. The formulation presented later must be in line with the institutional history of the two institutions, current conditions, existing authorities, theory, and be able to imitate the Supreme Court institutions and in other countries both adhering to the civil law legal system (United States) and Common Law (France), especially in the context of differences between judicial techniques and the behavior of judges as a reference for improving the KEPPH supervisory system in Indonesia. Some of these things are references to create *ius constituendum* in KEPPH supervision between KY and MA. According to Soerjono Soekanto, *ius constituendum* is the law that is aspired to in the social life of the country, but has not yet been formed into laws or other provisions. Following are the *ius constituendum* under KEPPH supervision between KY and MA, namely:

1. Strengthening Boundaries Between Judicial Techniques and Judge Behavior

As 2 (two) institutions that have a role in supervising judges, MA and KY also sometimes intersect with each other such as rejection. The Supreme Court has more authority in supervising judges. The Supreme Court has the authority to carry out the highest supervision of the administration of justice in all courts under the Supreme Court and oversight of the behavior of judges. Whereas KY only has the authority to supervise the behavior of judges. Apart from that, Article 40 of Law Number 48-year 2009 *juncto*. Article 20A of Law 18-year 2011 has stated 4 (four) things that must be considered by the Supreme Court as an internal supervisor and KY as an external institution in supervising judges, these four things, namely:

- a. to comply with the norms and laws and regulations;
- b. to be guided by the code of ethics and code of conduct of judges;
- c. to maintain the confidentiality of information and information obtained; and
- d. may not reduce the freedom of judges in examining and deciding cases.

The Constitutional Court's decision No. 05/PUU-IV/2006 explains that judicial techniques are a sterile area given to a judge to be free to determine whatever decision he makes and is protected by the principle of independence. Maruar Siahaan said that, independence must be interpreted within the limits determined by law in order to apply the law fairly, with which independence goes hand in hand with accountability which is manifested in supervision. So outside of that it can be interpreted as the behavior of judges. This supervision can only be carried out by the Supreme Court, so that if the KY

cannot justify examining the technical implementation of judges' judgments including their decisions on the grounds of supervising the behavior of judges. If this happens, KY has exceeded the permitted limits and raises accusations of interference and threats to the freedom of judges. In addition, the assessment of the judge's decision which is intended as supervision outside the available procedural law mechanism is contrary to the principle of *res judicata pro veritate habetur* which means that what the judge has decided is deemed correct (*de inhoud van het vonni geld als weard*).

In its development, there have been several attempts to limit the decisions and regulations related to judicial techniques and the behavior of this Judge, as follows:

- a. In the Constitutional Court Decision Number 005/PUU-IV/2006 is prohibited from evaluating decisions.
- b. In Law Number 48-year 2009 in conjunction with Law Number 3-year 2009 supervision should not reduce the freedom of judges.
- c. In Law Number 19-year 2011 the duties of the KY are obliged to maintain the independence and freedom of judges.
- d. In Supreme Court Decision Number 26 P/HUM/2011 if there are indications, evidence, and intentional inquiries.
- e. In PERBA MA-KY Number 2/2012 may not assess the juridical considerations and the substance of the decision.

Referring to the International Symposium on The line Between Legal Error an Misconduct in Jakarta by James D. Gingerich which explains the judicial power in Arkansas-United States of America. KY in Arkansas itself has a formula that is not all the actions of judges which at first glance are considered as judicial technicalities are simply handed over to the appeal mechanism. The formula in question is if an act of a Judge has value, background, other causes or other factors then the act enters the domain of KY to handle it. Some of the other factors in question are:

- a. Egregious (outrageous)
- b. Pattern or practice (form patterns, repeated)
- c. Bad faith/intentional (intention/bad faith)
- d. Other misconduct (other forms of behavior violations).

Furthermore, from some of the explanations above regarding the international symposium, there are 7 classifications that can be used as a reference in strengthening judicial technical limitations and the behavior of judges, namely:

- a. Bad faith
- b. Egregious (fatal/terrible)
- c. Violation of basic rights
- e. Patterns
- f. Administrative failure
- g. Failure to manage courtroom
- h. Independent interpretation (stand-alone interpretation/mistake).

Of course, in the end, the two institutions must also lower their respective sectoral egos and sit together to find a formula that is mutually agreed upon and set forth in KEPPH. The partnership principle presented must be properly implemented by both. Of course, this is an *ius constituendum* related to the debate between the KY and the Supreme Court regarding judicial techniques and the behavior of judges. Because previously, joint inspections that were constructed as a solution to solving this did not work at all. This is a concrete form to achieve the objectives under KEPPH supervision. This *ius continuendum* can be stated in the KEPPH which is jointly determined between the KY and the MA.

## 2. Giving Judges the Right to Defense in the Honorary Panel of Judges (MKH)

In carrying out their own supervision, KY and MA already have their respective stages and authorities. KY after carrying out the existing stages, then proposed sanctions to the Supreme Court. Whereas the Supreme Court carries out the existing stages, and then imposes sanctions according to what has been violated. This is a brief description of the oversight mechanism carried out by KY and MA. However, there are differences when it comes to severe sanctions for the type of dismissal. Because KY and MA after carrying out the existing stages must submit the proposed sanctions to the Honorary Council of Judges (MKH).

This is further strengthened by a joint regulation which states that decisions imposing sanctions on violations of the code of ethics and code of conduct of judges cannot be objected to. In fact, in relation to cases with mild, moderate and severe sanctions (except dismissal) there were those who disagreed with the sanctions given to them. This is important because it does not rule out the possibility that the judge can prove himself innocent by presenting new evidence or other possibilities.

In this regard, it will actually have an impact on the future career path of a judge. Don't let mistakes in sentencing have a negative impact on judges in the future. Because we know that if a Judge becomes a Supreme Court Justice in the future, he must meet the requirements not to be subject to disciplinary punishment/sanctions.

Based on this, the research seeks to provide solution by presenting the right of defense against sanctions other than dismissal to the reported party with several important points as follows:

- a. Whereas the presence of the right to defense in the KEPPH supervision mechanism is a form of implementation of supervision based on balance. So that accountability and independence can go hand in hand together.
- b. That the right of defense is only for cases with mild, moderate and serious sanctions other than dismissal.
- c. Whereas the right of defense is facultative, that is, if the reported person feels that he disagrees with the proposal from KY and/or MA against him. With a note that it must be able to present new evidence that did not exist before as material for consideration
- d. That the right of defense can be submitted by the reported party to the MKH after 14 days after the KY and/or MA proposal has been given to the reported party
- e. Whereas MKH is the last forum for the reported party regarding the defense of the proposed sanctions aimed at him.
- f. That after the MKH has heard and/or read the defense made by the reported party, the MKH can reject the defense and impose sanctions in accordance with the recommendations from the KY and/or the Supreme Court.
- g. That MKH can also accept the defense of the reported party and give a decision regarding the sanctions that will be given next.

Concretely this formulation can be stated both in the Judicial Powers Act. In addition, more specifically the mechanisms and other things that are deemed necessary can be included in the Law on KY or MA and the laws and regulations under it.

The second, *ius contetuendum* presented are concrete steps to be taken in improving the KEPPH monitoring system in Indonesia. The unresolved debate between KY and MA regarding judicial techniques and the behavior of judges needs to be resolved. Related to this, this study provides *ius constituendum* to reinforce the boundaries between the two. So that in the future it will be clear where the authority of the KY and MA is in supervising the behavior of judges and supervising the Supreme Court in a technical judicial context. Furthermore, the *ius constituendum* that is presented by giving the right of defense to the judge is to give them space to defend themselves. The right of defense constructed for the proposed mild, moderate and severe sanctions (except dismissal) is a step taken to protect the dignity and future of the Judge himself.

It is very important that the implementation of the *ius constituendum* that is presented must be carried out in accordance with the principles of KY and MA as partners. The balance of authority possessed by the two in the context of KEPPH supervision must be maintained. So as to foster a sense of mutual respect for each authority they have. This is to realize the objectives of both supervisions, namely to maintain and uphold the honor, dignity, and behavior of judges.

## CONCLUSION

The legal implications of the presence of joint examinations in the supervision of the Code of Ethics and the Code of Conduct of Judges between the Judicial Commission and the Supreme Court are:

- a. Not optimal external supervision carried out by KY. This is actually not in line with the intention of establishing KY in the constitutional system in Indonesia.
- b. Joint examination as a mechanism or stage in KEPPH supervision is not ready to be implemented. Apart from that, the presence of the joint examination added a new regional ego regarding the relationship between the KY and the MA.
- c. Obstacles in implementing KY's authority externally in the context of KEPPH supervision. The *ius constituendum* of oversight of the Code of Ethics and the Code of Conduct for Judges (KEPPH) between KY and MA are as follows:
- d. Reinforcing the boundaries between judicial technical behavior of judges
- e. Giving the Judge the right of defense in the Honorary Panel of Judges.

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