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Indonesian Law Journal



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Filling The Position of Constitutional Court Judge and Its Correlation With the Independence of Judges* (Comparative Study of Some Countries)

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Abstract.

This article explains how to fill the position of judges of the Constitutional Court in Indonesia by comparing the mechanism of filling the office of judges of the Constitutional Court in several countries in the world. This study also conducted a study on the correlation of filling the position of judges of the Constitutional Court with the independence of judges of the Constitutional Court in carrying out its functions and authority. This article concludes that there are three ways of recruitment of constitutional judges applicable in some countries. First mentioned, the single body mechanism, the appointment mechanism, the executive may determine all members of the Constitutional Court without further supervision by the legislative branch. Second, cooperative appointment mechanisms model; the appointment of this model calls for cooperation between institutions in determining the composition of a court or similar organ. Third is a representative reproduction model, this model involves a number of state institutions. For example, in Italy three of the nine constitutional justices are filed by the President, three by parliament, and three by the Supreme Court.

Keywords: Filling the Position of Judge of the Constitutional Court, Independence, Comparison in some countries

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Pengisian Jabatan Hakim Mahkamah Konstitusi dan Korelasinya Dengan Independensi Hakim (Studi Perbandingan Beberapa Negara)

Abstrak.

Artikel ini menjelaskan bagaimana pengisian jabatan hakim Mahkamah Konstitusi di Indonesia dengan melakukan perbandingan terhadap mekanisme pengisian jabatan hakim Mahkamah Konstitusi di beberapa negara di dunia. Penelitian ini juga melakukan studi terhadap korelasi pengisian jabatan hakim Mahkamah Konstitusi dengan Independensi hakim Mahkamah Konstitusi dalam menjalankan fungsi dan wewenangnya. Artikel ini menyimpulkan bahwa ada tiga cara rekrutmen hakim konstitusi yang berlaku di beberapa negara. Pertama disebut, *single body mechanism*, mekanisme pengangkatan ini, eksekutif dapat menentukan seluruh anggota Mahkamah Konstitusi tanpa pengawasan lebih lanjut oleh cabang legislatif. Kedua, *model cooperative appointment mechanisms*; pengangkatan model ini menghendaki kerja sama di antara lembaga-lembaga dalam menentukan komposisi mahkamah atau organ sejenisnya. Ketiga, adalah *model pengangkatan representative*, model ini melibatkan sejumlah lembaga negara. Sebagai contoh di Italia tiga dari Sembilan hakim konstitusi diajukan oleh Presiden, tiga oleh parlemen, dan tiga oleh Mahkamah Agung.

Kata kunci: Pengisian Jabatan Hakim MK, Independensi, Perbandingan di beberapa negara

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Introduction

Judicial power is a position that is always present in every state system. Judicial power is an instrument of state completeness that has fundamental functions. The main function is to *resolve disputes* between individuals and other individuals, individuals with *society*, even individuals or communities with countries. The second function is to formulate and form policy.²

The judicial authorities in Indonesia are executed by the Supreme Court, the subordinate judiciary and by a Constitutional Court. The existence of the Constitutional Court in a State is essential for the enactment of the constitution of a country. The duties and functions of the Constitutional Court as in the general explanation of Law Number 24 the Year 2003 regarding the Constitutional Court is to handle certain constitutional or constitutional cases in order to maintain the constitution carried out responsibly in accordance with the will of the people and the ideals of democracy.³

The Constitutional Court was established with the purpose of functioning as an institution having authority in interpreting the Constitution, resolving disputes between state institutions whose source of authority from the constitution and giving a decision on the dismissal of the president and/or vice president. In addition, the Constitutional Court also plays a role in conducting *judicialization of politics*. The existence of the Constitutional Court to guard the occurrence of stable state government, as well as corrective action on the practice of constitutional life in the past caused by multi interpretation of the constitution. Therefore, in addition, to being *the guardian of the constitution*, the Constitutional Court is also the supreme interpreter of the constitution.⁴

The Constitutional Court in performing its functions and duties as a guardian of the constitution, has the authority to handle certain state administration cases as stipulated in Article 24C Paragraph (1) and Paragraph (2) of the 1945 Constitution namely to examine the law against the 1945 Constitution, to decide disputes on the constitutional authority of state institutions, to decide upon the dissolution of political parties, to decide upon disputes on the results of general elections, and to decide upon the opinion of

² Walter F. Murphy, *et. al, Courts, Judges & Politics, An Introduction to the Judicial Process*, Sixth Edition, (Boston, McGraw Hill, 2005), p.45

³ Abdul Mukhtie Fadjar, *Hukum Konstitusi dan Mahkamah Konstitusi*, (Jakarta: Konstitusi Press, 2006), p.6.

⁴ Fatkhurohman, *Memahami Keberadaan Mahkamah Konstitusi di Indonesia*, (Bandung: Citra Aditya Bakti, 2004), p.17.

the DPR (*House of People's Representatives*) on alleged violations by the President and/or Vice President.⁵

However, the Constitutional Court's capability in carrying out its duties and functions as a guardian of the constitution and protector of constitutional rights of citizens is determined by the capacity of the Constitutional Court's organization consisting of Constitutional Justices as a primary element and Registrar's Office and General Secretariat as complementary elements. The increase in the number of cases coming to the Constitutional Court indicates the expectations and great credit from the public against it. If these expectations and beliefs are not followed by improving the quality of the Constitutional Court judges in handling cases and decisions, it will ultimately disturb the Constitutional Court's role in guarding the constitutional supremacy and protecting the constitutional rights of citizens.

Where the trust and expectation of the Indonesian people on the independence of the Constitutional Court and Justices were lost when the arrest of Chief Justice of Akk Mochtar by Corruption Eradication Commission along with 13 other suspects, which is related to the disputes of Election of Head of Gunung Mas District, Central Kalimantan and Lebak Banten.⁶ The arrest made a shock to all levels of Indonesian society including the President of Indonesia Susilo Bambang Yudhoyono who later issued Perppu No. 1 of 2013 which in two substances is to obtain a constitutional judge that are integrity, as well as the refinement of the mechanism of the process of selection and submission of constitutional justices.⁷

This becomes one of the more complicated issues concerning the terms, the mechanism of filling the office of the judges of the Constitutional Court, and the length of time a person becomes a judge of the Constitutional Court. One of the reasons why the selection of judges of the Constitutional Court becomes an important issue because selection will affect, even produce the types of people who served as judges, including decisions taken by them as a judge

The provisions on the terms, the mechanism of filling the position and the duration of the judges of the Constitutional Court's purpose is for the

⁵ Constitution of the Republic of Indonesia 1945, article. 24 (1) (2).

⁶ Didi Purwadi, "Kronologi Penangkapan Akil Mochtar, <http://www.republika.co.id/berita/nasional/hukum/13/10/03/mu3hdy-kronologis-penangkapan-akil-mochtar>, accessed on November 27, 2016.

⁷ Dani Prabowo, Mahfud MD: Perppu MK Baik untuk Jangka Panjang, <http://nasional.kompas.com/read/2013/10/21/1119130/Mahfud.MD.Perppu.MK.Baik.untuk.Jangka.Panjang>., accessed on November 27, 2016.

creation of independent judicial powers and the freedom of judges. The problems posed in this paper, *first*, how is the filling of constitutional justices in Indonesia and its comparisons in some countries? *Second*, how are the correlation of filling the judge position of the Constitutional Court with the independence of constitutional justices?

Filling the Position of Constitutional Justices in Indonesia

As a legal reality, according to Logeman, the state is a form of office organization. The term of office is a fixed work zone created and implemented for the benefit of the state.⁸ The position environment in the state organization is divided into several types: (a) The position of state fittings (state organs) - the position of administrator of the administration of the state; (b) Political office - non-political office; (c) Positions that are directly responsible and under the control or control of the public -positions that are indirectly responsible and under the control or public control, and, (d) Positions that directly perform public services -positions that are indirectly doing public service.⁹ Usep Ranawijaya explicit way of filling states, there are several ways in filling positions are¹⁰ *First*, the determination of autocracy takes the forms in the form of (a) Determination based on offspring; (b) Coops, is the subjection of a ruler by an existing power official; (c) Drawing; (d) Appointment of officials by higher officials of their positions; and, (e) Determination of officials with power struggles.

Second, a democratic determination is represented in several ways, especially through an *election*. Institutions that develop for these needs include, among others, representative institutions, electoral institutions, and party institutions.

Bagir Manan mentions that there are two crucial matters relating to the filling system. *First*, whether charging requires or does not require public participation or support (public). *Second*, whether the filing of positions should be done by collegial or by certain individuals. Furthermore, Bagir Manan mentioned that the difference of the system is important not only related to

⁸ E. Utrecht, *Pengantar Hukum Administrasi Indonesia*, cet ke 8, Adapted by Moh. Saleh Djindang, (Jakarta: Balai Buku Ichtar, 1985), p.187.

⁹ Walter F. Murphy, *et, al, Courts, Judges & Politics, An Introduction to the Judicial Process*, p.142.

¹⁰ Usep Ranawijaya, *Hukum Tata Negara Indonesia: Dasar-Dasarnya*, (Jakarta: Ghalia Indonesia, 1983), p.211. Also see: Nur Rohim Yunus, *Teori Dasar Penelitian Hukum Tata Negara*, Jakarta: Poskolegnas, 2017, p.77.

mechanism or procedure, but also with responsibility and supervision and control of the positions, including the need for limitation of tenure. For example, political positions because they require direct accountability to the people, then generally term limits are applied.¹¹

In connection with the filling position of this judicial power, M.P. Jain in his book "Constitutional Law of India", writes:

"The main purpose underlining the law laid down by the SC in the matter of opportunity Supreme Court judges was to minimize political influence in judicial appointments as well as to minimize individual discretion of the constitutional functionaries invoked in the process of appointment of the Supreme Court. The entire process of making an appointment to high judicial offices is sought to be made more transparent so as to ensure that neither political bias nor personal favoritism nor animosity play any part in the appointment of judges".¹²

The above quote affirms several principles to be considered in connection with the filling of the office of the Judge, including the Constitutional Court Justices. It is important to minimize the political effect of the appointment process and avoid as much as possible the individual discretion of the competent authority in the process. In addition, the whole process is endeavored to be more open to ensure there is no political bias or preference for certain candidates. Or in other words, *merit selection system* should be the main reference.

Regardless of the various contexts, all forms of judicial recruitment have the same elements found in almost all countries; the fundamental principle of *judicial independence* plays a very crucial role in the filling stage. In addition, candidates are usually aware of high standards, both qualification standards and moral standards, which will apply to them

Theoretically there are three patterns of recruitment or filling of constitutional justice positions used in some countries. *First* called, *single body mechanism*, this appointment mechanism; the executive may elect all members of the Constitutional Court without further supervision by the legislative branch. Council of Grand Justice in Taiwan is the most closely approached model of the rapture. In the current system of Taiwan, 15 Members of the Council of Grand Justice are appointed by the President. Parliamentary approval is basically necessary, but because historically the president is

¹¹ Bagir Manan, *Teori dan Politik Konstitusi*, (Yogyakarta: FH UII Press, 2003), p.64.

¹² M.P Jain, *Indian Constitutional Law*, 5th edition, (New Delhi: Wadhwa Publisher Nagpur, 2006) p.195-196

chairman of the largest political party in parliament the approval of parliament has become less effective.¹³

Second, cooperative appointment mechanisms model; filling the post of judges of the Constitutional Court of this model requires cooperation among institutions in determining the composition of the court or similar organs. The countries that embrace this model of cooperation are America, Russia and Hongaria where the President appoints judges after obtaining confirmation from Congress or Parliament. This model of appointment is consistent with the objective requirements of the parliamentary majority to provide support (institutional or political) to judges with the main task of constitutional interpretation.¹⁴

Third, is the model of appointment of *representatives*, this model involves a number of state institutions. For example, in Italy three of the nine constitutional justices are filed by the President, three by parliament, and three by the Supreme Court.¹⁵

The regulation on the filling of the Constitutional Court Justices mentioned in Article 24C Paragraph (3) of the 1945 Constitution stipulates that, "The Constitutional Court has nine members of the constitutional court appointed by the President, each being three people by the Supreme Court, three by the House of Representatives, and three by the President." Article 24C Paragraph (6) of the 1945 Constitution provides, "Appointment and dismissal of Constitutional Justices, procedural law and other provisions concerning the Constitutional Court shall be regulated by law."¹⁶ This is the basis of the birth of Law No. 24 of 2003 and Law No. 8 of 2011 on the Constitutional Court which regulates in detail about the Constitutional Court.

As to the requirements of the Constitutional Court Justices stipulated in the 1945 Constitution Article 24C Paragraph (5) which affirms that Constitutional Justices must have integrity and personality that is not blameworthy, a statesman who controls the constitution and state administration, and not concurrently as state officials.¹⁷

¹³ Ahmad Syahrizal, *Peradilan Konstitusi: Suatu Studi tentang Adjudikasi Konstitusional Sebagai Mekanisme Penyelesaian Sengketa Normatif*, (Jakarta: Pradnya Paramita, 2006), p.265.

¹⁴ Ahmad Syahrizal, *Peradilan Konstitusi: Suatu Studi tentang Adjudikasi Konstitusional Sebagai Mekanisme Penyelesaian Sengketa Normatif*, p.265.

¹⁵ Ahmad Syahrizal, *Peradilan Konstitusi: Suatu Studi tentang Adjudikasi Konstitusional Sebagai Mekanisme Penyelesaian Sengketa Normatif*, p.266.

¹⁶ Constitution of the Republic of Indonesia 1945, article 24C.

¹⁷ Constitution of the Republic of Indonesia 1945, article 24C, section 5.

In addition to the conditions set forth in the 1945 Constitution, there are other conditions provided for in Law 24 of 2003 that a candidate must have at least 10 years of legal experience, at least 40 years of age, and never declared bankrupt. Conditions change through Act No. 8 of 2011, for educational strata, experience, and age. A candidate must be a doctorate and master degree with experience in law for at least 15 years and/or a state official.¹⁸

In order to become a Constitutional Court Justice, a person is at least 47 years old or 65 years old at the time of appointment. The change of re-requirement takes place based on law and regulation Number 1 the Year 2013, which is then ratified into Law Number 4 the Year 2014, although at the end Law Number 4 the Year 2014 is canceled by the Constitutional Court as mentioned above. Requirements of the educational strata from the beginning had a master's and doctoral degrees, changed to only a doctorate degree. The new requirement is the requirement of not being a member of a political party within a period of at least 7 years before being nominated as a candidate for a constitutional judge.¹⁹

The existence of the addition of the Constitutional Justice requirement through law and regulation Number 1 of 2013 which was then ratified as Law Number 4 the Year 2014 was judged by some people to be contradictory to the 1945 Constitution of the State of the Republic of Indonesia, and therefore they filed a petition for judicial review of the Act to the Constitutional Court. Against the terms of releasing the membership of a political party, the President's Expert Maruarar Siahaan argued that it is not contradictory to the provisions of the 1945 Constitution of the State of the Republic of Indonesia, especially the articles that regulate human rights by looking at the Decision of the Constitutional Court. 81/PUU-IX/2011 concerning the judicial review of Law Number 15 the Year 2011 concerning the Implementation of General Election of the 1945 Constitution of the State of the Republic of Indonesia. In the Decision Number 81, the Constitutional Court expressly states 'being a member of the election commission is not a matter contrary to the constitution and human rights, as it is necessary to ensure fairness in elections, which means protecting the rights of other participants in general elections.'²⁰

¹⁸ Court Law of the Republic of Indonesia, No. 8, 2011 LN No. 70, TLN 5226.

¹⁹ Government Ordinance on Court Law Legislation. Number. 1, 2013 LN No. 167, TLN 5456.

²⁰ Court Law of the Republic of Indonesia, Grand Court Decree No. 1-2/PUU-XII/2014, on judicial review of the constitution, number 4, p.60.

Furthermore, the Constitutional Court further stipulates that the stipulation of resignation should be mentioned in the period of time because the absence of time period can be used as a gap by political parties for the inclusion of political party cadre into the electoral commission', and therefore according to the Constitutional Court is appropriate and feasible if determined to be at least 5 (five) years before the person appoints himself as a candidate for election commission'. Based on the opinion of the Constitutional Court, Maruarar states, 'the imposition of a 7 (seven) year time limit is sufficient to guarantee the independence and impartiality of a Constitutional Court Justice in examining and deciding cases in the Constitutional Court, in particular, the Dispute over Election Results (PHPU).'²¹

As for the filling of the post of Constitutional Justice of the Supreme Court, House of Representatives, and President in addition to guiding the 1945 Constitution of the State of the Republic of Indonesia is also guided by the Constitutional Court Law. All three institutions in the implementation of constitutional constitutional filling are required to be done transparently and participatively as regulated in Article 19 of the Constitutional Court Law. While article 20 paragraph (1) states, "The provisions concerning the procedure of selection, election, and submission of constitutional judges are regulated by each authorized institution as referred to in Article 18 paragraph (1)". Article 20 paragraph (2) states, "The election of constitutional judges as referred to in paragraph (1) is implemented objectively and accountable."

Based on both Article 19 and 20 those are understood that in the recruitment stages of candidates for constitutional justices, transparency is required, participation in the public at large in the process of nomination, objectivity and accountability in the constitutional election process. All mechanisms for the selection, election, appointment and stipulation of constitutional judges shall first be regulated by the respective competent institutions, namely the DPR, the Supreme Court, and the President. That is, to elaborate the order of Article 20 paragraph 1 of the Constitutional Court Law, it is necessary to issue a Rules of Procedure by the People's Legislative Assembly, Supreme Court Regulation (PERMA) by Supreme Court (MA), and Presidential Regulation by the President.²²

²¹ Court Law of the Republic of Indonesia, Grand Court Decree No. 1-2/PUU-XII/2014, 4, 2014 on Government Ordinance number 1, 2013 on Court law Legislation, p.60.

²² Jimly Asshiddiqie, Liberalisasi Sistem Pengisian Jabatan Publik" www.jimly.com/makalah/namafile, p.14. Accessed on November 27, 2016.

However, in fact until now, the provisions of the implementation of Article 20 paragraph (1) of the Law on the Constitutional Court is only reflected in the regulations of the House of Representatives insofar as it pertains to the authority of the DPR to elect and propose 3 candidates for constitutional justice to be determined by the President. While the Supreme Court and the President himself has not yet issued a special regulation as instructed by Article 20 paragraph (1) of the Constitutional Court Law. Therefore, every time there will be a replacement of constitutional justices from the source submitted by the President and by the Supreme Court always arise the problem because there is no standard that is used as a reference in conducting the process of recruitment of constitutional justices that must be transparent, participative, objective, and accountable as referred to in Article 19 and Article 20 paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia concerning the Constitutional Court.²³

Filling the Position of Constitutional Justices by the Supreme Court

The Supreme Court in conducting the process of recruitment of constitutional judges has been considered closed and less involving public opinion. Bagir Manan said that the Supreme Court did not plan the *fit and proper test* of the proposed constitutional judges to be proposed.²⁴ The Supreme Court also has not made any written rules on the constitutional filling position of judges. Moreover, based on the history of constitutional judges who came from the Supreme Court's door during this time candidates who submitted to become constitutional justices always come from the judicial environment.

Indeed, the Constitution of the Republic of Indonesia of 1945 and the Constitutional Court Law do not impose restrictions, as long as the candidates of each state institution in recruiting constitutional justices except in the requirements. Judging from the process of appointment of Constitutional Justice Anwar Usman who replaces Arsyad Sanusi who resigned, in this case, the stages of the Supreme Court in 2011 are²⁵ a). Conducting research intended

²³ Court Law of the Republic of Indonesia, Grand Court Decree No. 1-2/PUU-XII/2014, on judicial review of the constitution, number 4, p.60.

²⁴ Phintaka, Fahresi Arya, "Implementasi Pengisian Jabatan Hakim Pada Mahkamah Konstitusi Oleh Tiga Cabang Kekuasaan Negara Dalam Perspektif Kekuasaan Kehakiman Yang Merdeka, (Tesis Magister Universitas Sebelas Maret, Solo, 2015), p.36.

²⁵ Phintaka, Fahresi Arya, "Implementasi Pengisian Jabatan Hakim Pada Mahkamah Konstitusi Oleh Tiga Cabang Kekuasaan Negara Dalam Perspektif Kekuasaan Kehakiman Yang Merdeka, p.36.

to obtain names as candidates for constitutional justices; b). Conducting a meeting of Supreme Court Leaders to decide the names of candidates for constitutional justices who pass to follow the next stage; c). Inform the public through information media; d). Prospective Constitutional Court Candidates submit their vision and mission to be constitutional justices; e). Request opinions from the public on the names that have been decided from the results of leadership meetings addressed to the chairman of the Supreme Court or via email biro_hukumhumas@mahkamahagung.co.id until the deadline has been set; f). Carry out a Leadership Meeting to evaluate and decide on candidates for constitutional judges to be presented to the President to be established as constitutional justices.

In the implementation stages, the Supreme Court guarantees the selection process of constitutional justices also runs with transparency and participatory by involving independent professionals in originating from external MA. According to Suwardi, generally stages of recruitment of constitutional justices in the MA is divided into 3 stages:²⁶ a). *Profile Assessment*; b). Competence test; and c). Interview.

At each stage the MA includes experts from outside the MA, such as in the profile assessment stage, the MA involves doctors and psychologists to assess the personal aspect of the prospective judge. At the competency test and interview stage, MA invites academics from several universities in Indonesia to measure the technical knowledge and skills of prospective constitutional judges. Based on these stages it can be seen that the MA is trying to maintain the principles that must be applied in the selection of constitutional justices.

Filling the Position of Constitutional Justice by Parliament

Practices in the House of Representatives also vary. At the time of Mahfud MD and Akil Mochtar submitted by the House of Representatives (DPR), both of which do not carry out selection mechanism in the form of interviews with Panel of Experts. However, by 2014, the House of Representatives will form an 8-member Expert Panel with the background of former Constitutional Justices, academics, and public figures. Commission III provides flexibility in providing an assessment and then proposes to the DPR

²⁶ Harga Adi Prabawa, "Kewenangan Mahkamah Agung, Dewan Perwakilan Rakyat, Presiden dalam Pengisian Jabatan Hakim Konstitusi dan Kaitannya dengan Idepedensi Hakim Konstitusi," (Skripsi Sarjana Universitas Indonesia, Depok, 2016), p.130.

candidates who meet the requirements. Then, the House of Representatives conducted voting by voting.

The steps taken by the House of Representatives in filling the constitutional justices of 2014 period are as follows:²⁷ a). Opening registration for candidates of constitutional justices informed through mass media; b). Establish a selection committee consisting of national figures and experts who have the authority to ask questions in *fit and proper test*; c). Conducting a fit and proper test to candidate constitution judge conducted by Commission III along with an expert team. At this stage consists of making papers, Questions, and answers and deepening; and D). Conducted a closed meeting which was attended by members of Commission III and Expert Team to choose who would be recommended along with the reason for being a constitutional justice.

However, based on experience in 2014 indicates that the candidates who managed to get the highest score from the Panel of Experts are not automatically selected by the Parliament to become Constitutional Justices. Or by other terms, the candidate with the highest rank must be submitted by the voting of members of the House.

Unfortunately, the expectation of obtaining more qualified and integrity judges does not always materialize due to various obstacles. The election experience of Constitutional Court Justices in 2014 showed the factual fact that the presence of selection committee is not very useful. Members of the House seem to have no desire to use the selection committee results, but rather prioritize personal or political preferences. In addition, the selection committee also can not be released from criticism, among others with regard to the terms of members and their model performs its duties. *The fit and proper test* mechanism is not implemented properly so there is an impression that the selection committee members ask questions that are 'demeaning' candidates. Supposedly, the members of the selection committee should place themselves as the person assigned to elaborate the abilities of the candidates from different perspectives.²⁸

This is symmetrical with what is mentioned by Former Justice MK Lieutenant General (ret.) Ahmad Roestandi who mentioned his experience during the *fit and proper test* in the House of Representatives during the election

²⁷ Phintaka, Fahresi Arya, "Implementasi Pengisian Jabatan Hakim Pada Mahkamah Konstitusi Oleh Tiga Cabang Kekuasaan Negara Dalam Perspektif Kekuasaan Kehakiman Yang Merdeka, p.42.

²⁸ Susi Dwi H, "Pengisian Jabatan Hakim: Kebutuhan Reformasi dan Pengekangan Diri", *Jurnal Hukum IUS Quia Iustum, Vol 4*, (Oktober 2014), p.553.

of the Constitutional Court Judge. Sometimes ministering is slashed into fees and property because the election of state officials in the House is often accused of involvement in bribery. He entered the event with a strong, no burden, and full of confidence. He strolled past the test smoothly. However, then Ahmad Roestandi considers that his graduation is more due to the "known" factor than the required capability factor. Imagine, then he became chairman of the commission that examines candidates Constitutional Justices (Commission II of the House of Representatives in charge of legal issues - now a Commission III).²⁹

Filling the Position of Constitutional Justice by President

At the time Adnan Buyung Nasution became one of the members of the Presidential Advisory Council, charging from the President's line using recruitment mechanisms by forming a selection committee. Some experts with diverse backgrounds act as interviewers. However, this practice is not carried out steadily because there are several Constitutional Justices directly appointed by the President, among others, Constitutional Justice Maria Farida for second term and Constitutional Justice Patrialis Akbar.

In this case, the selection process of constitutional judges of the President has been running quite well, where the President through Advisory Function formed the Selection Board to carry out the technical selection process. The selection board is made up of people who have good competence in their own field so that they are expected to perform quality selection process. In addition, the involvement of NGO during *the fit and proper test* showed that the President's efforts to implement a transparent and participatory selection process.³⁰

The mechanism used by the President in filling the constitutional justices is as follows:³¹ a). The President established a selection team to carry out the selection process of constitutional justices; b). Collection of candidate registration of constitutional judges; c). Collection of administrative registration and selection files; d). an announcement of candidate names of constitutional

²⁹ Zainal A.M. Husein, *Menjaga Denyut Konstitusi*, (Jakarta: Konpress, 2004), p.46.

³⁰ Phintaka, Fahresi Arya, "Implementasi Pengisian Jabatan Hakim Pada Mahkamah Konstitusi Oleh Tiga Cabang Kekuasaan Negara Dalam Perspektif Kekuasaan Kehakiman Yang Merdeka", p.46.

³¹ Asri, Sabrina, "Inilah Tahapan Seleksi Calon Hakim MK Pengganti Hamdan Zoelva," <http://nasional.kompas.com/read/2014/12/10/15150691/Inilah.Tahapan.Seleksi.Calon.Hakim.MK.Penganti.Hamdan.Zoelva>, accessed on November 27, 2016.

judges in mass media; e). Conducting an interview to 1; f). Medical check up; g). Choosing the 10-best people for the second stage selection, which starts with interviews with senior figures; h). The selection team conducts internal discussions; h). The selection team selects candidates to be proposed by the President; and, i). The President elects one person from the candidate given by the selection team.

Filling the Position of Constitutional Justices in Several Countries

Implementation of *judicial review* by judicial power has actually been disseminated to almost all parts of the world through three waves. The first wave came from the United States through a *landmark decision* or a key decision that Judge John Marshall had made on issues involving Marbury and Madison. Furthermore, *judicial review* has been adopted in several European countries, especially after Kelsen by reconceptualizing the constitutionality by establishing a special judicial institution which conducts such tests namely the Constitutional Court.³² The idea of the establishment of the Constitutional Court was then followed by various Asian countries including Indonesia. However, there are various variations in the filling of constitutional justice positions in various countries, the variation can be motivated by various factors of history, state social condition, and law system of the country.

1. Council of Grand Justice of Taiwan

Through the constitutional amendment of 1997, the number of *Grand Justice* Members was 15 people and was entirely appointed by the President with the approval of the Supervisory Board of Yuan. With a term of office for 8 years, and can not be re-elected.³³ The President elects candidates based on candidates who have been approved by the nominating commission. Here are five alternative requirements one of which must be met by constitutional judges. One of the 5 Requirements for a person to be eligible for membership of the Council of Grand Justice:³⁴ 1). 10 years experience as Supreme Court judge; 2). Has experience as a member of Legislative Yuan for 9 Years; 3). He has taught for 10 years at the university level and often writes on legal issues; 4).

³² Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Court in Asian Case*, (Cambridge: University Press, 2003), p.90.

³³ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Court in Asian Case*, p.112.

³⁴ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Court in Asian Case*, p.121.

Has served as a judge at the International Court of Justice or has authored a book concerning public law or comparative law studies; 5). Have legal education or experience and popular in politics.

The *council's* appointment model in Taiwan has been concentrated into the single **organ** of the President. This method is taken to prevent excessive politicization at the appointment stage if others have to be involved in the process of appointing constitutional justices.

2. Hungarian Constitutional Court

Under article 32 A of the Hungarian Constitution 11 (eleven) members of the Constitutional Court are elected by parliament. However, the candidates for the first judge must be proposed by the appointment committee and its members shall be composed of political parties represented in parliament.³⁵

3. Constitutional Review in Mongolia

In the draft initial draft amendment to the Mongolian Constitution, the *Constitutional Review'* members consist of 6 constitutional judges with a term of 9 years. Nevertheless, in the final draft of constitution design, it turns out that provision experienced a reversal, to 9 judges with a term of office for 6 years. Constitutional justices are nominated by three institutions, namely *President, State Great Hural, and Supreme Court*. Each of the institutions can nominate three members. Although nominees can be elected as members of the *Constitutional Tsets* must obtain approval from Parliament.³⁶

4. The Constitutional Court in South Korea

The South Korean Constitutional Court Judge is made up of nine judges. In the applicable provisions of that country, to be nominated as a member of the Constitutional Court each must be qualified as a judge and understand the legal matter. The appointment of members of the tribunal itself involves three state institutions, including the President of South Korea, the National Assembly, and the Chief Justice of the Supreme Court, each of which has nominated three judges. The term of office of a constitutional justice is nine years and thereafter it cannot be re-elected. Furthermore, the Constitutional Court Judge was appointed by the President of South Korea after obtaining confirmation from the National Assembly.³⁷

³⁵ Article 32 A, Hongarian Constitution

³⁶ Article 32 A, Hongarian Constitution 1992

³⁷ Jimly Asshidiqie, *Konstitusi dan Konstitusionalisme Indonesia*, (Jakarta: Konstitusi Press, 2006), p.248.

5. The Constitutional Court in Russia

Under the Constitution of 1977, the composition of the Constitutional Court consists of 15 judges of the constitution. However, at that time the Court was only run by 13 judges, while the other two, for the time being, left not contained.³⁸ After the Constitution of the Russian Federation was adopted in 1993, members of the Constitutional Court increased to 19 judges. Within two years since the Constitutional Court was formed, this organ played an important role in the Russian political map.³⁹

The structure of the Constitutional Court of Russian Federation consists of two chambers. Each room is filled by ten and nine judges. Thus, the total number of members of the Constitutional Court of the Russian Federation consists of nineteen judges. Membership in each room will be determined through the draw. While the procedure for conducting the draw is governed by the rules made by the Constitutional Court of the Russian Federation itself.⁴⁰

Under the provisions of Article 128 of the Russian Federation Constitution, 19 Constitutional Court judges shall be appointed by the Federation Council upon the proposal of the President of Russia. *Federation Council* or commonly referred to as the High Council is to function to consult Russian state affairs. The term of office of the judge is 12 years and can not be re-elected.⁴¹

In academic perspective, appointments involving a number of state institutions are predicted to prevent the occurrence of politicization in recruitment. When examined and compared to cooperative mechanisms that require compromising actions from two state institutions such as the executive and legislative, the ongoing compromise process will lead to politicization at the stage of appointment of the constitutional judges. In contrast, in the mechanism of appointment of representative compromise efforts are not required. So, the way to determine such a judge is predicted to create the institutional and personal independence of judges in performing constitutional duties in the future. Thus, a model of appointment involving a number of state institutions will create legitimacy for judges.

³⁸ Jimly Asshidiqie dan Ahmad Syahrizal, *Peradilan Konstitusi di Sepuluh Negara*, (Jakarta: Konstitusi Press, 2006), p.211.

³⁹ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Court in Asian Case*. p.101.

⁴⁰ Willian Kitchin, Legal Reform and the Expansion of Judicial Power in Rusia, in *The Global Expansion of Judicial Review*, p.445.

⁴¹ Article 5, Russian Federal Constitution

Filling the Position of Constitutional Justices with the Independence of Judges

Basically, a number of terms and mechanisms for filling the position of Judges aim to obtain good judges. Aharon Barok mentions a number of criteria against a good judge.⁴² All these criteria are actually in order to achieve the main functions of judges, namely examining, hearing and deciding cases. In order to achieve this, the judge shall use the appropriate law for the case, either through the application of legislation or through the establishment of a new law.

In forming a new law, the judge should pay attention to two central objectives: *first*, the judge must be able to bridge the gap between social fact and law, in the sense that the judge must be able to adapt the law to meet the changing needs of the community. *Second*, the judge must protect the constitution and the values contained in the constitution. To achieve these two objectives a judge must act objectively, pay attention to social consensus, maintain public trust, and use various means, including the use of interpretation, the development of customary law, the application of 'weighing and balancing theory', and the application of legal comparison methods. Strictly speaking, Baroque states it is important to use legitimate means to achieve the desired result.⁴³

Theoretically, the position of Constitutional Justice is not a political office. However, the recruitment of the Constitutional Justices, while strongly emphasizing the professional qualification aspect, but the practice of political considerations is inevitable. A political dimension is always adorned in the filling position of Constitutional Justices. Practices in the United States, South Korea, Germany, and even Indonesia reinforce this argument because of the participation of the People's Legislative Assembly or Parliament. On the one hand, such involvement has a positive meaning as a form of strengthening the legitimacy of the elected candidates. However, on the other hand, involvement can create problems because there can be political transactions which in turn judge generated only on the basis of political preferences or even personal non-professional.

It is realized that it is not easy or even impossible to produce a perfect judge filling model because a perfect model does not automatically always

⁴² Aharon Barok, *the Judge in A Democracy*, (New Jersey: Princeton University Press, 2006), p.307.

⁴³ Aharon Barok, *the Judge in A Democracy*, p.308.

produce the judge as desired. Finally, the need for reform and the importance of self-restraint becomes inevitable when the filling of Constitutional Justices is placed in the perspective of democracy in order to maintain the reputation of judicial power. Democracy is not only related to the majority vote or formal aspect of democracy (as happened in the election of Indonesian Constitutional Justices through the 2014 House of Representatives). Furthermore, elections should be based on democratic aspects that refer to the fundamental values of democracy (substantive aspects) reflected through the values of morality, justice, reasonableness and good faith.⁴⁴ The whole process of filling should be based on a comprehensive understanding: not just choosing judge, but justice, as well as maintaining the independence and independence of judges in carrying out their duties and functions.

Independence of various circles in deciding cases that are being examined. This is because the power of an independent judge is a mandatory element to ensure the implementation of a government of people's sovereignty and based on the law. The profession of judges within the state of the law is essential since the core of the law state is in the hammer of a judge.⁴⁵ The judge in performing its functions shall be free in giving the verdict, may not obtain any intervention from anyone and in any way.

The judge's freedom in examining, hearing, and deciding upon a case aimed at obtaining fair and acceptable decisions requires the protection of the public so that there is no intervention of power and interests. The ruling on the basis of the rationality of objective law and a strong moral ethical content can be accountable to the community as a seeker of justice.

Legal protection of judges' judicial independence may be addressed by judicial principles, namely *ius Curia Novit* (judge is considered to know), *Res Judicata Pro Veritate Habetur* (Judge's verdict is considered true). According to Bagir Manan, the freedom of the judges in question is limited freedom in terms of performing judicial functions in both case and judicial matters.

Furthermore, Bagir Manan presents six substances in the independent judicial powers:⁴⁶ *First*, independent judicial power is the power in administering a judicial or judicial function which includes the power to examine and decide a case or dispute, and the power to make a statute of law.

⁴⁴ Aharon Barok, *The Judge in A Democracy*, p.24.

⁴⁵ Jimly Asshidiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Konpress, 2005), p.81.

⁴⁶ Bagir Manan, *Kekuasaan Kehakiman Indonesia dalam UUI No. 4 Tahun 2004*, (Yogyakarta: FHUII Press, 2007), p.42.

Power outside the power of examining and deciding cases and making legal provisions, may be interfered with, such as supervision and examination of branches of power outside the judicial power. The involvement of other state institutions related to the Court's non-judicial affairs also includes the selection of judges of the Constitutional Court, where since the first time the Constitutional Court has established the Supreme Court, the House of Representatives, and the President in filling its constitutional justices, cannot be done freely, there are restrictions that must be regulated to ensure the involvement of other state institutions is not to disturb the judicial matters of the Constitutional Court;

Second, an independent judicial power is mandated to secure judges' freedom from fear or fear resulting from a judgment or legal determination, the formation of various rules concerning the Constitutional Court, especially concerning constitutional justices, of course, to ensure that there will be no interference by state institutions in its main judicial affairs;

Third, the independent judiciary powers aim to ensure that judges act, honestly and impartially;

Fourth, the supervision of an independent judicial power is solely through ordinary or extraordinary legal efforts by and within the jurisdiction of the judiciary itself, in Article 1 Sub-Article 4 of Law Number 8 the Year 2011 has been regulated on the Honorary Board of the Constitutional Court which regulates the supervision of constitutional justices.

Fifth, free judicial power prohibits all forms of interference from a power outside the judicial authority, of course there is a limit of non-judicial affairs can still involve other state institutions including the process of filling the constitutional justices;

Sixth, all acts against the judge are solely made under the Act. Similarly, the Constitutional Justice of the Constitutional Court, all matters concerning constitutional justices are set forth in Chapter IX of the 1945 Constitution of the State of the Republic of Indonesia, Law Number 48 the Year 2009 regarding Judicial Power, Law 24 the Year 2003 on the Constitutional Court, Law 8 the Year 2011 on the amendment of Law 24 the Year 2003 on the Constitutional Court, all regulations are regulated all the actions of constitutional justices is begun filling their positions, while serving until cessation.

Seeing the immense contribution of judges to the realization of an ideal legal state, the integrity, and independence of judges should be protected and

maintained. The goal is to keep the judicial power in the right corridor in order to bring about justice in society.

As already mentioned, the constitutional judges in Indonesia in filling their positions are proposed by the President and the House of Representatives. Both are state-affiliated political institutions, President-elected leaders of political parties elected by the majority of the people and the House of Representatives are parliaments with the majority of party affiliations of elected political parties with other political parties, therefore in the filling of constitutional justices through the President and DPR are concerned there are hidden interests in the process of filling the constitutional justices. Whereas the Constitutional Court as set forth in Article 24 of the 1945 Constitution of the State of the Republic of Indonesia is a state institution that exercises the power of an independent judiciary irrespective of any influence.

In the *Universal Declaration on the Independent of Justice*

“Participation in judicial appointment by the Executive or Legislature is consistent with judicial independence, so long as appointment of judges are made in consultation with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate”⁴⁷

This provision requires that judges should be filled with executive and legislative involvement, and then the fill of office should be cleared of politicization by asking for an active role or involving judicial institutions and practitioners in the field of law. The House of Representatives as an institution authorized to nominate candidates for constitutional judges have applied this provision in the implementation, in 2014, the House of Representatives invites law practitioners to participate in the selection in the process of interviewing candidates for constitutional justices, and subsequently asked his opinion by the House of Representatives against the candidates who will be selected.

The President as an executive body also includes legal practitioners in the selection process. In 2014, the President established a selection team from legal practitioners and academics who served the noble task of determining the selection and giving candidates the names of constitutional judges granted to the President. Seeing that the President as the executive body and the House of Representatives as a legislative body has given a positive signal in the process of filling the constitutional justices in Indonesia especially in order to guarantee

⁴⁷ Sarkar Ali Akkas, “Appointment of Judges: A Key Issue of Judicial Independence,” *Bond Law Review* 16, (Januari-2014), p. 4.

independence and freedom of the Judge. The filling of constitutional justice positions involving a number of countries in academic perspective aims to prevent politicization in the process of filling his position. This is because in appointments involving a number of states institutions does not require compromising action when compared with the *cooperative mechanisms model*.⁴⁸

The involvement of the three state institutions that include the branches of executive, legislative and judicial power in the filling of the constitutional justice post by Jimly Ashidiqie can guarantee the balance of power between the branches of state power while ensuring the neutrality and impartiality of the Constitutional Court in the relationship among state institutions.⁴⁹ Furthermore, in carrying out the duties and authorities of the Constitutional Court, moreover in relation to the authority to adjudicate the dispute case of the state institution, the impartial position of the Constitutional Court is absolutely necessary, therefore the constitutional filing of justices involves not only one branch of power but the three branches of power.⁵⁰

Conclusion

There are three ways of recruitment of constitutional judges applicable in some countries. *First* mentioned, the *single body mechanism*, the appointment mechanism, the executive may determine all members of the Constitutional Court without further supervision by the legislative branch. *Second*, *cooperative appointment mechanisms model*; the appointment of this model calls for cooperation between institutions in determining the composition of a court or similar organ. *Third is a representative reproduction model*, this model involves a number of state institutions. For example, in Italy three of the nine constitutional justices are filed by the President, three by parliament, and three by the Supreme Court.

The arrangement of the filling of the Constitutional Justice in Indonesia mentioned in Article 24C Paragraph (3) of the 1945 Constitution of the Republic of Indonesia stipulates that, "The Constitutional Court has nine members of the

⁴⁸ Ahmad Syahrizal, *Peradilan Konstitusi: Suatu Studi tentang Adjudikasi Konstitusional Sebagai Mekanisme Penyelesaian Sengketa Normatif*, p.26.

⁴⁹ Jimly Asshidiqie, "Kedudukan Mahkamah Konstitusi dalam Struktur Ketatanegaraan Indonesia", <http://www.jimlyschool.com/read/analisis/238/mahkamah-konstitusi-dalam-struktur-ketatanegaraan-indonesia/>, p. 3. Accessed on November 27, 2016.

⁵⁰ Jimly Asshidiqie, "Kedudukan Mahkamah Konstitusi dalam Struktur Ketatanegaraan Indonesia", <http://www.jimlyschool.com/read/analisis/238/mahkamah-konstitusi-dalam-struktur-ketatanegaraan-indonesia/>, p. 3. Accessed on November 27, 2016.

constitutional court appointed by the President, each of which is proposed by three persons The Supreme Court, three people by the House of Representatives, and three by the President." Article 24C Paragraph (6) of the 1945 Constitution of the State of the Republic of Indonesia determines, "The appointment and dismissal of Constitutional Justices, procedural laws and other provisions concerning the Constitutional Court shall be regulated by law". This underlies the birth of Law Number 24 Year 2003 and Law Number 8 Year 2011 on the Constitutional Court which regulates in detail about the Constitutional Court.

The process of recruitment of candidates into constitutional judges, requires transparency, participation in this broad community in the process of nomination, the existence of objectivity, and accountability in the process of constitutional election. All mechanisms for the selection, election, appointment and stipulation of constitutional judges shall first be regulated by the respective competent institutions, namely the DPR, the Supreme Court, and the President. That is, to elaborate the order of Article 20 paragraph 1 of the Constitutional Court Law, it is necessary to issue a Rules of Procedure by the People's Legislative Assembly, Supreme Court Regulation (PERMA) by MA, and Presidential Regulation by the President. However, in fact until now, the provisions of the implementation of Article 20 paragraph (1) of the Constitutional Court Law is only reflected in the rules of the House of Representatives insofar as it pertains to the DPR's authority to elect and propose 3 candidates for constitutional justices to be determined by the President. While the Supreme Court and the President himself has not yet issued a special regulation as instructed by Article 20 paragraph (1) of the Constitutional Court Law.

In practice, there are some differences in constitutional court justices in some countries, such as Taiwan, Hungary, Russia, South Korea, and Mongolia. The filling of judges' positions involves the executive and legislative then the filling of office has to be protected from politicization by consulting or involving judicial institutions and practitioners in the field of law. The House of Representatives as an institution authorized to nominate candidates for constitutional judges has applied this provision in its implementation, in 2014, in which the House of Representatives invites law practitioners to participate in the selection in the process of interviewing candidates for constitutional justices, and subsequently asked his views by the House of Representatives to the candidate of judge that will be selected.

The President as an executive body also involves legal practitioners in the selection process, in 2014 the President established a selection team consisting of legal practitioners and also academics who served the noble task of determining the selection and giving candidates the names of constitutional judges granted to the President. Seeing that the President as the executive body and the House of Representatives as a legislative body has given a positive signal in the process of filling the constitutional justices in Indonesia especially in order to guarantee independence and freedom of the Judge.

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 - 4) Article as a part of book (antology). Contoh: Hikmahanto Juwana, "Penegakan Hukum dalam *Kajian Law and Development: Problem dan Fundamen bagi Solusi Indonesia*", in Muhammad Tahir Azhary, *Beberapa Aspek Hukum Tata Negara, Hukum Pidana, dan Hukum Islam*, (Jakarta: Kencana Prenada Media Group, 2012), p.127.
 - 5) Article from internet, example: Ahmad Tholabie Kharlie, "Problem Yuridis RUU Syariah" in <http://ahmadtholabi.com/2008/03/03problem-yuridis-ruu-syariah>, downloaded on March 20, 2012.
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