



Judicial Appointment of German *Bundesverfassungsgericht*: Lesson for Indonesia

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Abstract. The appointment of constitutional court justice is the main stage to creating qualified justices. Notably, Indonesia still faces plenty of problems within the Constitutional Court, including the lack of integrity since many codes of ethics are violated by the Justices. Meanwhile, many scholars agreed that the German Constitutional Court is one of the most prestigious and influential courts in the world. Therefore, the experiences of the German Constitutional Court are necessary to be studied. This research aims to evaluate the judicial appointment of constitutional court justice in Indonesia and Germany and formulate a better model of judicial appointment of justice of the Constitutional Court. The method used in this research was doctrinal legal research with the comparative and conceptual approach in order to seek lesson learned and to adopt a better model of appointment of constitutional court justice. This research concludes that there are some differences in the recruitment process of Constitutional Court Justice between Indonesia and Germany. The Germany experiences shows that the process is more comprehensive to select the Justice of the Constitutional Court because they have strict qualification for being a Justice, in terms of experience and education, and the most important is considering the reputation of the candidates a lot. In addition, the selection mechanism of justice in German also involves parliament which ensure transparency and accountability of the process. In contrast, Indonesia does not engage the parliament in every appointment to the Constitutional Court, including those made by the President and justices of the Supreme Court.

Keywords: Appointment of Constitutional Court Justice · Independent Judiciary · Integrity of Justice

1 Introduction

Some countries show that the independence of the judiciary is constantly under threat from political power (executive and legislative) because both organs must also guarantee that their power does not face interference from the judiciary that can legally counter attack the ruling authorities [1]. In the case of Indonesia, for example, 6 out of 9 Constitutional Court (MK) judges are proposals from the President (3 people) and three come from DPR proposals [2]. With such a composition, the executive tends to place more

people in the ranks of constitutional court judges. At least with a composition of 5:4 or 6:3 if the ruling regime controls the composition in the House of Representatives. Thus, it is complicated to find adequate checks and balances of judicial institutions such as the Constitutional Court against the executive and legislative power using the model of appointment of constitutional justices.

Meanwhile, the Federal Constitutional Court of Germany reflects the lessons from the Nazi era (1933–1945), when the federal government's power was unrestrained, and was included into the German Constitution following World War II [3]. The celebrations reflected the current consensus regarding the German Constitutional Court, which is frequently cited as one of the most prestigious and influential courts in the world [4]. Many foreign countries now export the Basic Law and many of the Court's jurisprudential advances. The German Constitutional Court has even come to be defined as the constructive counter-model to the US Supreme Court by some liberal American experts.

The German Court's success is seen as the logical response to the Nazi regime's heinous violations of human rights, which came to power with the approval of the German people [5]. The German Court's strength can best be explained as a synthesis between a hierarchical culture of legal power and a (although feeble) sort of transformational (or active) constitutionalism [6]. The FCC is one of the most important and powerful courts in the world [7]. Both the political and legal systems of Germany, as well as the European Union are impacted by its judgments [8]. These characteristics, along with its powerful political and judicial authority, have principally helped high courts all over the world to replicate its institutional form.

It's an interesting phenomenon to study using a comparative study approach. Therefore, this study needs to be evaluated how the model of appointment of constitutional judges on the independence of judicial institutions in the relevant country. The purpose of the study is to conduct a more in-depth review of the advantages and disadvantages of appointing constitutional judges in Indonesia and Germany and formulating a more ideal model for the appointment of Indonesian constitutional judges to realize an independent judicial institution.

Theoretically, an independent judiciary in a state is essential because the judiciary plays a vital role in maintaining the balance of executive, legislative, and citizen power relations [9]. It means that if the judiciary can be independent, then the consolidation of democracy in the country will work well because of the running of the checks and balances mechanism [10]. Based on the evaluation results of the implementation of legal practices, an ideal policy model will be formulated for the appointment of constitutional judges. The perfect model recommendation for the appointment of constitutional judges and chief justices would benefit the development of judicial institutions in country like Indonesia.

The judiciary is an important actor in improving the practice of government, especially for those who believe that it is part of the rights of the people who are regulated by the government. The essence of the judiciary is that judges play a central role in the judicial process, so that only good judges can be expected to decide cases that reflect the community's sense of justice, namely those in accordance with the law. Judges are the last hope of justices (seekers for justice). Therefore, they must read the soul contained

in legal texts as popularized by Ronald Dworkin (moral reading of law). The international charter on civil and political rights (ICCPR) requires an independent, impartial and competent judiciary to guarantee the civil and political rights of citizens. Judicial institutions must be independent in carrying out their obligations in order to ensure that judges must be able to act fairly and independently in carrying out their obligations in order to guarantee individual freedoms and rights from the threat of tyranny of power [11]. For society, having an impartial judiciary is very important because justice is the hope of a hopeless and voiceless society.

Therefore, the issue of appointing constitutional judges becomes very important to continue to be evaluated because the judges in these two organs are judges at the highest level in the judicial system. Appointment of judges is usually broadly defined as the way in which judges are recruited, whether through a career system or a professional system or it can be a combination of the two models.

The problem of appointing constitutional judges in Indonesia is enough to illustrate that the process of appointing judges is always coloured by the dominance of the appointment of judges by the executive side of their power when there is a dispute between institutions, cases involving government institutions that lead to the power of the executive itself. Therefore, how to build a model of appointing constitutional judges that guarantees the birth of independent and competent constitutional judges becomes crucial.

Formulating an ideal model of the appointment of constitutional judges requires a comprehensive comparative review to find the advantages and disadvantages of appointing constitutional judges and chief justices in a more established country and having a progressive, independent, and impartial judicial tradition. The research conducts a comparative study between Indonesia and Germany.

Judges play a central role in the judicial process, so only good judges can be expected to decide cases that reflect the community's sense of justice, that is, those that are in accordance with the law [12]. Judges are the last hope of the *justiabelen* (seekers of justice) [13]. Hence, the issue of the quality of constitutional judges is crucial and how they are appointed is also important. Based on the previous paragraph, it is necessary to learn from Germany's experience as one of the best and most established Constitutional Courts in the world.

2 Research Method

The legal research on building the constitutional morality of Justices in Indonesia contributes to scientific development and improvement of legal practice in the midst of society. This development is a means to create the construction of truth and legal justice from the perspective of legal and moral values, constitutional norms, and constitutional ethics - morality. To answer some of these problems, normative legal research was used by prioritizing secondary data. The approach was carried out by (1) a statutory approach and (2) the comparative approach. The data was collected through library research, examining primary legal materials, secondary legal materials, and tertiary legal materials. The data analysis in this research uses descriptive qualitative, which is intended so that researchers can construct the perspective of constitutional law norms and constitutional morality on the object of study. The qualitative descriptive analysis approach was

selected to process the data obtained through the statutory and comparative approaches. The result of data selection was data classification based on legal material categories. The legal materials that have been systematized were then analyzed comprehensively based on the focus of the study.

3 Results and Discussion

3.1 Constitutional Court

In the global wave of constitution-making that has fuelled the discipline of comparative constitutional law, the establishment of constitutional courts has been almost universal, a vital part of the standard model of constitutional transition, especially from authoritarianism regime to democracy [14]. Tom Ginsburg, one of the most distinguished scholars of comparative constitutional law, first published his work “Judicial Review in New Democracies in 2003” Ginsburg put Indonesia in the footnote of the list of the Third Wave of Democracies that adopted constitutional review, the footnote says “a constitutional court was proposed for Indonesia in 2001 [15]. Several explanations have been advanced for this seemingly inexorable growth of judicial review among new democracies. Among these are: (1) it facilitates the transition to democracy by providing political insurance to existing power holders in the face of uncertain future electoral or political fortunes; (2) it stabilizes democracy by helping to hedge against one-party consolidation of power; (3) it enables constitutional drafters to make their commitments credible; and (4) more broadly, by limiting politics, it guards against democratic excesses. In short, the general mood has been bullish on constitutional courts [16].

Alex Stone Sweet describes a constitutional court as a constitutionally established, independent organ of the State whose central purpose is to defend the normative superiority of the constitutional law within the juridical order [17]. In broad terms, Walter Cairns defines a constitutional court as a judicial body, or organization of bodies, which has the power of constitutional review [18]. The powers granted to constitutional courts from one country to another vary. This difference is driven by the differing social and political histories in each country and the need for a comparative study conducted during its establishment. Some of the powers of the constitutional courts are too political or constitutionally important to be given to ordinary courts, such as resolving electoral disputes, banning political parties, or handling impeachment cases of elected officials [19].

In Germany, The Federal Constitutional Court’s (*Bundesverfassungsgericht*) duty is to ensure that the *Grundgesetz*/Basic Law is obeyed [20]. Since its founding in 1951, the Court has helped secure respect for and effectiveness of Germany’s free and democratic basic order. This applies particularly to the enforcement of fundamental rights. All government bodies are obliged to respect the Basic Law. If any conflict arise in this respect, the jurisdiction of the Federal Constitutional Court may be invoked. Its decisions are final. Its case law binds all other government institutions. The work of the Federal Constitutional Court also has a political effect. This becomes particularly clear when the Court declares a law to be unconstitutional. However, the Court is not a political body. Its sole standard of review is the Basic Law. Questions of political expediency may not be considered by the Court. It merely determines the constitutional framework within which

politics may develop. The delimitation of state power is a feature of modern democratic constitutional states. The main task of the Bundesverfassungsgericht as guardian of the constitution (Hüter der Verfassung) is on the one hand, the judicial review of legislative acts, and on the other hand to be the arbiter in disputes between the Federation and the Länder. Also, it disposes of several additional powers, especially the prohibition of a political party [21]. Regarding human rights, the Bundesverfassungsgericht constantly fills these rights with new life, and it has always paid special attention to guaranteeing adequate protection of fundamental rights [22].

In Indonesia, establishing the Constitutional Court emerged during the 1999 political reform. The Constitutional Court was established at the same level as the Supreme Court. The political and legal reasons for the founding of the Constitutional Court can be summed up in two words: consensus. Politically the Constitutional Court is one of the checks and balances systems established to control the state organs [23]. Legally, the Constitutional Court has two leading powers: first, the power to review the constitutionality of laws and the second power to settle disputes relating to the authority of state institutions. In the effort to realize a constitutional democratic country [24], the implementations of four authorities and one Constitutional Court's obligation have a strategic role and contribution. The Constitutional Court's role in achieving constitutional democracy through authorities and constitutional obligations was explained as follows: a constitutional review of laws against the 1945 Constitution, resolving constitutional disputes among state institutions, the decision to dissolve a political party, the decision on the outcome of electoral disputes, and decision on the House of Representatives' opinion regarding possible violations committed by the President and/or Vice President. The Constitutional Court's role in achieving constitutional democracy through authorities and constitutional obligations was explained as follows: a constitutional review of laws against the 1945 Constitution, resolving constitutional disputes among state institutions, decision to dissolve a political party, the decision on the outcome of electoral disputes, and decision on the House of Representatives opinion regarding possible violations committed by the President and/or Vice President [25]. Another study conducted by Petra Stockman concluded that the MKRI had improved the rule of law in Indonesia by strengthening the democratic electoral system, strengthening the certainty through its rulings on judicial review, and strengthening human rights protections [26].

3.2 Selection Model of Constitutional Justice in the World

Open Model – Centralistic

In this model, all candidates for constitutional judges will go through the stages of fit and proper tests carried out by the DPR as a legislative body after being proposed by each proposing institution. Furthermore, the fit and proper test results will be returned to each institution for the final stage of the election. Moreover, each institution proposes the three names to the President to be appointed as a constitutional judge by presidential decree. South Korea has applied this model in recruiting Judges of the Constitutional Court. The advantages of this model are that all MK judge candidates proposed by the President, DPR, and MA will go through a centralistic fit and proper test process conducted by the DPR openly to the public so that public participation to know and

dig information and quality will be more transparent and open. This makes the spirit of democracy and check and balances clearly visible in this model because all candidates must go through the hearings process in the House of Representatives. All candidates will indirectly show their quality of themselves and the clean people who will perform. This hearing process will ensure the integrity and capacity of prospective judges. However, this process still has weaknesses; namely, there is no emphasis on actively smoothing candidates through silent tracking because the recruitment of future judges is passive by open announcements [27].

Open-Decentralization Model

This proposed model uses the principle of open and decentralized. Each institution will carry out its fit and proper test to select candidates for constitutional judges in this model. The problem with this model is the need for standard standards of election mechanisms and rules governed by law. In Indonesia, the DPR and the President conduct fit and proper tests openly, but the Supreme Court carries them out with a closed mechanism. Therefore, both the President, DPR, and prominent recruiting constitutional judges must be done openly on this model. But the disadvantage of this model is that it is not efficient in the fit and proper test process because each institution organizes the fit and proper test process separately [28].

Active-Passive-Open-Centralistic Model

There is a combination of ways of smoothing prospective judges in this model, namely actively and passively. Actively means that each proposing institution can choose candidates they consider to have qualifications. While passive means that the proposing institution still opens the open announcement of the nomination of constitutional judges. After the proposing institution uses the smoothing model, the nominated names are then searched (silent tracking) secretly to ensure the integrity of the candidate. After the proposing agency has secured the candidates' integrity, the list of candidates' names is submitted to the House to undergo the Confirmation Hearings process openly in the House. Confirmation Hearings aims to ensure the scientific capacity of candidates as needed to become a constitutional judge. In addition, the process also provides the public to provide input on the integrity of the candidates. After the Confirmation Hearings process, the names of the special judicial candidates from the Supreme Court and the President are submitted back to the relevant institutions to decide which candidates will be proposed to be constitutional judges. Then, the names offered are submitted to the President to be appointed as constitutional judges. The advantages of this system are. First, it can maximize the search for the best judicial candidates and further ensure the integrity of prospective constitutional judges because there is a factual verification process against the integrity of the candidates. Second, this system also has the advantage that the public can provide maximum input on the integrity and capacity of prospective judges. However, this model has a disadvantage because it depends on the quality of leadership of each proposed institution.

3.3 Selection Mechanism of Justices in German *Bundesverfassungsgericht*

Germany regulates the requirements of Constitutional Judges in the Law of the Constitutional Court which also refers to the Law on Judicial Power. As for the qualification to become a judge, it points to the Judicial Power Law which sets very strict requirements. Although all legal professions in Germany depart from the same qualifications, the requirements of becoming a judge are usually more difficult. Only those who get good grades on the stage 2 state exam can become judges. Another condition, expressing his willingness to become a Constitutional Judge and during his time as a Constitutional Judge should not concurrently have other professions, except to become a law professor at German universities. This last requirement indicates the existence of respect for the role of the scientist in the performance of the functions of the Constitutional Court. The Federal Constitutional Court Act in the version of August 11, 1993 (Federal Law Gazette I p. 1473), last amended by Article 2 of the Act of October 8, 2017 (Federal Law Gazette I p. 3546) explains that The Federal Constitutional Court shall be a federal court of justice autonomous and independent of all other constitutional organs [29].

Article 3 paragraph (1) of the Federal Constitutional Court Act explains that the Justices must have reached the age of forty, be eligible for election to the Bundestag, and must have declared in writing that they are willing to become a member of the Federal Constitutional Court. Article 3 paragraph (2) states that they must be qualified to hold judicial office under the German Judiciary Act or must be the holder of the Diploma jurist degree awarded before October 3, 1990, in the territory referred to in Article 3 of the Unification Treaty and must be allowed to take up a regulated legal profession following the provisions of the Unification Treaty. Article 3 paragraph (3) further explain that the justices may be members of neither of the Bundestag, the Bundesrat, the Federal Government, nor any of the corresponding organs. Upon their appointment, the justices shall cease to be members of such organs. The judicial office shall be incompatible with any professional occupation other than that of a law professor at a German higher education institution. The office of Justice of the Federal Constitutional Court shall take precedence over the service as a professor based on Article 3 paragraph (4).

Article 4 paragraphs (1 - 4) explains about the term of office of justices. The justices served for twelve years though it shall not extend beyond retirement age. Immediate or subsequent re-election of Justices shall not be possible. When a justice reaches age 68, they must retire at the end of the next month. The Justices will continue doing their official duties after their term is up until a replacement is chosen.

Furthermore, Article 5 paragraph (1) elucidate each half of the Justices will be chosen by the Bundestag and the Bundesrat. One Justice will be elected to the Senate by one electoral organ, two by the other, and the remaining three Justices will come from one electoral organ and two from the other. These Justices will be chosen from among the judges at the supreme federal courts. Based on Article 5 paragraph (2) Justices must be chosen no sooner than three months before the term of their predecessors' predecessor expires, or within one month of the first meeting of the Bundestag if the Bundestag is dissolved at the time. Meanwhile, based on Article 5 paragraph (3) if a Justice leaves office early, a replacement must be chosen by the same federal body that chose the Justice who left office within a month.

Article 6 paragraph (1) states that without a debate and using a secret ballot, the Bundestag shall elect the Justices on a proposal made by the Selection Committee in accordance with subsection 2. If they receive a two-thirds majority of the total votes cast and at least the majority of votes from Bundestag members, they will be chosen as Justices. Article 6 paragraph (2) mentioned the Bundestag should elect a committee for the appointment of the Justices of the Federal Constitutional Court, which shall be composed of twelve Members of the Bundestag, in accordance with the principles of proportional representation. Each parliamentary faction is allowed to put out a candidate list. The total number of votes cast for each list using the *d'Hondt* method will be used to determine how many candidates from each list will be elected. In the order that their names appear on the list, the members shall be chosen. The person who was suggested next on the same list shall take the place of any member of the Selection Committee who ceases to be a member or is incapable of performing their duties. Article 6 paragraph (3) further mentioned that the oldest selection committee member will promptly convene a meeting, with a one-week notice requirement, and will preside over it. The meeting will last until all nominations for the Justices who will be elected have been approved. Article 6 paragraph (4) states that the members of the selection committee are required to maintain confidentiality regarding the personal information of the candidates that they learn about throughout the course of their service on the committee, as well as regarding conversations and votes on this matter. Further, according to Article 6 paragraph (5), for a proposal to be approved by the Selection Committee, it must receive at least eight votes.

Based on Article 7, the Justices to be elected by the Bundesrat shall be elected by two-thirds of the votes of the Bundesrat. When no successor has been elected in accordance with § 6 within two months of the expiry of a Justice's term of office or premature departure, the eldest member of the Selection Committee shall without delay request the Federal Constitutional Court to propose candidates for election according to Article 7a paragraph (1). Further, Article 7a paragraph (2) until (4) explained that the Federal Constitutional Court's Plenary would elect a candidate with a simple majority vote. The Federal Constitutional Court must suggest three candidates if only one Justice is to be chosen. If multiple Justices are to be elected at once, the Federal Constitutional Court must submit twice as many candidates. Thus, 16(2) is applicable. Assume that the Bundesrat will elect the Justice. In that case, subsections 1 and 2 will still apply with the sole exception that the Bundesrat President or the President's deputy will serve as the oldest member of the selection committee. The electoral body's discretion to choose a candidate that the Federal Constitutional Court did not recommend is unaffected.

In addition, Article 8 paragraph (1) explains that all federal judges who meet the criteria of Section 3(1) and Section 3(2) shall be listed by the Federal Ministry of Justice and Consumer Protection (2). Further, Article 8 paragraph (2) states that the Federal Ministry of Justice and Consumer Protection shall maintain a separate list in which the names of all candidates who are proposed for the position of Justice of the Federal Constitutional Court by a parliamentary group in the Bundestag, the Federal Government, or a Land government and who satisfy the requirements of 3(1) and (2). Moreover, based on article 8 paragraph (3) the lists must be updated regularly and sent to the presidents of the Bundestag and Bundesrat at least one week before an election.

Qualifications

The Federal Constitutional Court is composed of 16 Justices who sit in two divisions or senates. Half of them are elected by the lower chamber (the *Bundestag*) and half by the upper chamber of Parliament (the *Bundesrat*). A two-thirds majority is required in both electoral bodies [30]. Constitutional Court judges are judges or professors qualified for judicial office. The Federal Minister of Justice draws up two lists of eligible candidates: judges from the highest federal courts and the second consisting of persons suggested by the parties in the Federal Parliament or the various Lander governments. Constitutional Court judges are appointed for a fixed term of 12 years, so there is no career; judges and professors return to their old posts [31]. The methods used to select Constitutional Court judges differ between the two chambers of Parliament. To qualify for a seat on the Constitutional Court, appointees must be forty years of age, eligible for election to the Bundestag, and possess the qualifications for a judicial office specified in the *Deutsches Richtergesetz* (German Judges Act) [32]. This means that prospective Justices must have successfully passed the first and second major state bar examinations. Additionally, Justices may not simultaneously hold office in the legislative or executive branch of the federal or state government. Finally, the FCC Act provides that the 'functions of a Justice shall preclude any other professional occupation save that of a professor of law at a German institution of higher education. Justice's judicial functions must take precedence over all professorial duties. Justices enjoy single 12-year terms with no possibility of re-election. Three of the eight Justices serving in each Senate must be elected from the federal judiciary. All Justices must retire at age 68, even if they have not completed their 12-year term.

Selection System

The Basic Law provides that the Bundestag and half election the Court's members by the Bundesrat¹ (Federal Council of States).

Bundestag (House of Representatives)

The participation of the *Bundestag* in the selection of the Court's Justices underscores the significant role the Court plays in reviewing the content and democratic quality of the decisions of the popularly elected federal parliament [33]. It seems appropriate, then, that the Bundestag plays some role in staffing the Court. Similarly, the participation of the Bundesrat in the selection of the Court's Justices was meant to ensure that the Court was, at least concerning its staffing, steeped in Germany's federalism.

Under the FCC Act (Federal Constitutional Court Act, 1961), the Bundestag elects its eight Justices indirectly through a twelve-person (12) Judicial Selection Committee (JSC) known as the *Wahlmännnerausschuss* comprised of members of parties represented in the chamber. Party representation on the JSC is proportional to each party's strength in the *Bundestag*; eight votes—a two-thirds super-majority—must elect. The Bundesrat

¹ Bundesrat, the legislature consists of state representatives whose number is based on the number of residents of the state concerned. The Bundesrat participates in the law-making and administration of the federal state. Members of the Bundesrat are state government officials or persons authorized by that government. According to the population, each state has three, four, five or six votes. In voting, each state can only vote as a unit.

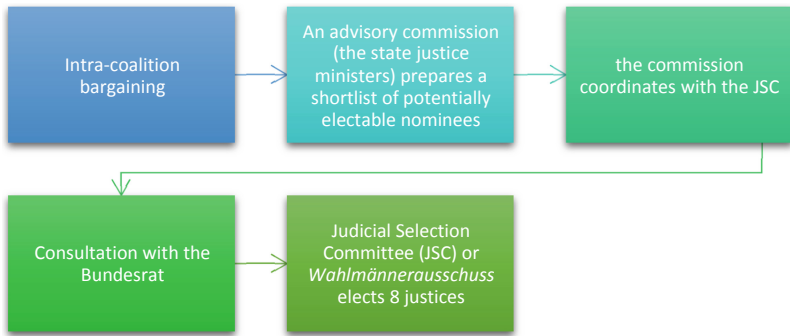


Fig. 1. Constitutional Court Judge Selection Mechanism in the Bundestag (the House of Representatives)

votes for its eight Justices, with a two-thirds vote, also required to elect. The two chambers alternate in selecting the Court's President and vice president [34]. The process of judicial selection is highly politicized. The JSC, which consists of senior party officials and the top legal experts of each parliamentary party, conducts its proceedings behind closed doors and after extensive consultation with the Bundesrat.

The two-thirds majority required to elect a Justice endows opposition parties in the JSC with considerable leverage over appointments to the Constitutional Court. Social and Christian Democrats are able to veto each other's, judicial nominees. The Free Democratic and Green parties, when in coalition with one of the larger parties, have won seats for their nominees through intra-coalition bargaining. Compromise is a practical necessity. Compromise among contending interests and candidacies is equally necessary for the Bundesrat, where the interests of the various states, often independent of party affiliation, play a paramount role in selecting the Justices. An advisory commission consisting of the state justice ministers prepares a shortlist of potentially electable nominees. The justice ministers on the commission, like certain state governors (*Ministerpräsidenten*) and members of the *Bundestag's* JSC, are often themselves leading candidates for seats on the Constitutional Court. Informal agreements emerge from the commission's proceedings, specifying which states shall choose prospective Justices and in what order. Throughout this process, the commission coordinates its work with the JSC. It is essential to avoid duplicate judicial selections. The two chambers need to agree on the particular senate seats each will fill, and which seats will be filled with Justices recruited from the federal high courts [35].

For all its opacity, the German process, mainly due to the super-majority required for election, has consistently produced a Court reflective of Germany's most prominent political parties, regional divisions, and confessions. In one respect, however, the Court has been less than representative of German society. The recently concluded Constitutional Court Presidency of Jutta Limbach, the first woman to hold the position, draws attention to the fact that the Court continues to be dominated by men. In 1951 the remarkable Erna Scheffler, who participated in the Parliamentary Council, was elected as one of the Court's first Justices. In the subsequent half-century, only ten other women have found their way onto the Court (Fig. 1).

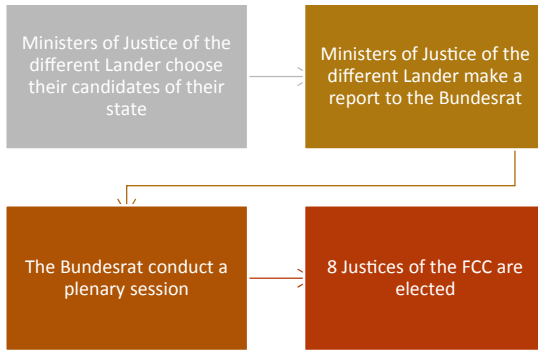


Fig. 2. Constitutional Court Judge Selection Mechanism in the Bundesrat

Bundesrat (Federal Council of States)

The Bundesrat formally elects candidates in plenary sessions based on preparatory work done by a committee of Ministers of Justice of the different Lander. The Court consists of two Senates, each of them with eight Justices. Currently, the President presides over the First Senate and the Vice-President over the Second Senate. Both Senates form Chambers with three members each (Fig. 2).

Each of the 16 Justices is assisted by four judicial clerks who have gained relevant professional **experience** at ordinary courts, public authorities, law firms, or universities.

3.4 Selection Mechanism of Indonesia Constitutional Court Justice

Article 24C paragraph (1) of the 1945 Constitution states that the Constitutional Court has nine members of the constitutional judges set by the President, which is submitted to three people each by the Supreme Court, three people by the House of Representatives, and three people by the President [36]. The article does not provide details on whether the candidate of constitutional judges submitted is to be determined by the President, whether there is a transparent election mechanism or only appointed by the proposed institution (President, DPR, and MA), for example, the prerogative of the President. Suppose the selection is done, how the process or mechanism is carried out. In addition, the Constitutional Law also does not clearly regulate clearly regarding the appointment of constitutional judges, thus providing opportunities for the Supreme Court, DPR, and the President as the institution of proposing constitutional judges to carry out the selection with their perceptions.

The requirements for Justices are regulated in the 1945 Constitution and the Constitutional Court Law 24/2003. Article 24C paragraph (5) of the 1945 Constitution: “Constitutional Justices must have integrity and personality beyond reproach, be just, statesmen who control the Constitution and state administration, and not hold concurrent positions as state officials. Apart from these conditions, Article 17 Constitutional Court Law No. 24/2003 states that constitutional Justices are prohibited from concurrently serving as other state officials, political party members, entrepreneurs, advocates, or civil servants. Law No.8/2011 on Amendments to the Constitutional Court Law 24/2003, Article 15

states paragraph (1) “Constitutional Justices must meet the following requirements: a. have integrity and impeccable personality; b. fair; and c. the statesman who controls the constitution and state administration.” Paragraph (2) “To be appointed as a Justices, apart from fulfilling the requirements as meant in paragraph (1), a candidate for Justices must meet the following criteria:

1. Indonesian citizens;
2. hold doctoral with a bachelor’s degree in law;
3. being obedient to God Almighty and having noble character by practicing religious teachings.
4. at least 55 (fifty-five) years old at the time of appointment;
5. physically and mentally capable of carrying out the duties and obligations;
6. has never been sentenced to imprisonment based on a court decision that has obtained permanent legal force;
7. currently not being declared bankrupt based on a court decision; and
8. having work experience in the field of law for at least 15 (fifteen) years and/or have been a state official

Based on the above principles, several requirements with the dimensions of morality/constitutional are as follows:

a. Submitting oneself to God Almighty

Being obedient to God Almighty for Justices is a multi-faceted requirement in Indonesia as a religious nation-state, which in practice does not distinguish between non-religious values, principles, norms/rules, and attitudes and the existence of the state—being obedient means carrying out religious teachings as a true Pancasila being [37]. This requirement is rooted in the Believe in the one supreme God precepts as the basis of spirituality, the moral basis for the Indonesian nation, and the implementation of state and community life. So in exercising judicial power, Justices are obliged to pay attention to and respect God’s instructions/God’s verses. It is not justified to deviate from the provisions outlined by God.

The belief in the one supreme God’s Precepts in legal life has implications for transforming religious values into laws and regulations and various court decisions. Even court decisions must be based on law and justice and formed in the name of God. Article 29 paragraph (1) of the 1945 Constitution implies that the Divine Principle mandated in the 1945 Constitution embodies religious recognition. As a country based on the one supreme God, the actions taken by citizens have a close relationship with religion. This requirement requires that Justices must have a religious understanding and must be able to integrate spiritual and legal values into law enforcement practices. Candidates for Justices who do not meet these requirements should not be passed. For example, some prospective Justices doubt the truth of a religion or support the free sex movement on the grounds of human rights or whose thoughts contradict/deviate from the existing beliefs in Indonesia

b. Justice’s integrity

Integrity is a physical and spiritual attitude that cannot be shaken, cannot be bought, and at the same time reflects wholeness and balance in the context of the

person and position that is held. Integrity cannot stand alone since the conditions that must exist are conditions of independence and impartiality. These three conditions are integrative and mutually reinforcing. If we refer to the code of ethics for Justices, what has been done by Justices Akil Mochtar and Patrialis Akbar is an act that does not have integrity because the two Justices used their power to accept bribes in their favor.

This requirement of integrity is essential and must be integrated with the requirements of independence and impartiality. To prove this problem, the recruitment process must be wide open so that the public can witness and oversee the recruitment process. To reveal the integrity, independence, and impartiality of a candidate for the Justices only require courage. For example, it indicates that a Justices candidate has had an affair or, if he was previously a politician, it is necessary to reveal it in publicly. One of the causes of the collapse of Akil Mochtar's integrity is his close relationship with the political parties that raised his popularity.

c. Having noble characters

People with noble characters can integrate their relationship with God and society (with their whole soul and body). If the worship is good, then the *muamalah* must also be good. It indicates that Justices who have noble character are Justices who can translate aspects of honor into people's lives (become role models for society). This means that if Justices decide on problems in society (for example, judging laws related to religion/morality), they must also pay attention to the afterlife's impact and the impact on people's lives. Justices must make decisions based on religious values (in the language of Justice Arief Hidayat, it is called Divine Light) and societal values. The starting morals must be able to interpret these two values. Noble morals are reflected in his thoughts and actions. This requirement can be proven by tracing the activities of a candidate's Justices.

d. Impeccable characters

This requirement is multi-interpretative, where it is not reprehensible and does not have a clear standard. For example, is sexual harassment an act that is not blameless? The personality is not offensive not only in the form of legal action/attitude but also in legal thinking that deviates from the values of Pancasila and the 1945 Constitution. The opinion of legal experts who support free sex, gay, lesbian, etc., is against the human rights guaranteed by Pancasila. A Justices candidate who has thoughts and attitudes like this should not be passed because it will endanger the Pancasila system and the 1945 Constitution. Candidates for Justices must be proven for their honesty, loyalty, and sincerity to become a statesman. Candidates for Justices must prove that before running as Justices, they have never committed disgraceful acts, such as: have never committed acts that are contrary to religious norms, moral norms, and customary norms, such as gambling, drunk, narcotics, and adultery.

e. Fair character as a Justices

The dimension of morality, the condition of being fair, means putting something in its place and giving what is due based on the principle that all people are equal before the law. Thus, the most basic demand of justice is to provide treatment and provide equal opportunities (equality and fairness) to everyone. Therefore, a person carrying out a task or profession in the justice field who bears the responsibility of enforcing a fair and correct law must always act fairly without discriminating

against people. Article 24 paragraph (1) regulates the provision that “Judicial power is an independent power to administer the judiciary to uphold law and justice,” the meaning of law can be found in texts/articles in statutory regulations. In contrast, the definition of justice can be found in text and values/principles/norms in the community. Considerations of law and justice in the Court decisions must be applied fairly, and law can be found in statutory regulations. Meanwhile, justice can be found in the deep recesses of the nation’s soul and the outcry of the citizens.

f. Being a statesman

A statesman is a person who has fully submitted to devoting his body and soul to the state and nation and is no longer trying to use his position for personal and group interests. Jimly Asshiddiqie said that a statesman is not a politician; Mahfud MD and Akil Mochtar resigned from politicians/ members of political parties before nominating and finally passed to become Justices. It implies that they hadn’t had the quality of a statesman when elected but were still politicians. In relation, ideally, there should be a gap in the involvement of Justices candidates in political parties in at least five years. This context is to ensure the morality of political party influences. However, because the provisions of the Court Law stipulate that politicians can become candidates for Justices, the previous provisions have resigned. To study and examine the requirements of being a statesman, it is necessary to learn the track record of candidates from wherever they come from (politicians, academics, practitioners). For example, a politician who supports the amputation of the Corruption Eradication Commission’s authority is not a statesman. Another example, Justices candidates should not be passed if they support the communism movement, become administrators of community organizations/political parties that have been dissolved because they are contrary to Pancasila and the 1945 Constitution, including groups that aim to replace Pancasila for religious and other reasons.

g. Constitutional Experts

This context must be understood in an integrative way, which means understanding Pancasila, the Constitution, and the constitutional system. Because the foundation of Indonesia’s constitution and state administration is Pancasila, the Constitution and state administration can run adequately if they are in accordance with the values of Pancasila. At the time of the previous selection of candidates for Justices, Justices candidates were unfamiliar with Pancasila, clearly not meeting the requirements as Justices. On the other hand, Justices must also understand the 1945 Constitution in the context of the overall spirit contained in it to build a more appropriate state life to achieve the ideals of the state (*stateside*) by realizing a democratic law state and a democratic state based on the law which is an elaboration from the main ideas contained in Pancasila and the Preamble of the 1945 Constitution. Candidates for Justices master not only the text of the 1945 constitution but also the development of constitutional values that are in accordance with Pancasila and the living Constitution.

h. Spiritually capable

Spiritually capable refers to a healthy soul, healthy morale, and good behavior in society. This spiritual health is based not only on mental health tests but also on a mental health track record for the candidate Justices in the community. For example, a candidate with an arrogant attitude and belittling others is not spiritually healthy.

The Justice has never been sentenced to imprisonment or criminal acts based on a court decision with permanent legal force.

- i. Do not have concurrent positions as a civil servant, political party member, entrepreneur, advocate, or civil servants

First, the requirement is not to double as a state official. Candidates for Justices may not hold concurrent positions. Of course, this departs from the reason that it will create a conflict of interest between classes. In the context of democratic morality, it is not good to be a public official in two institutions simultaneously. This context shows democratic greed in public office. Because in a democratic country, it is not merely talking about the protection/fulfilment of individual rights but is also supported by values and morality, including values of decency, piusness, fairness, reasonableness, and justice. Second, the requirement is not to be a political party member. This is, of course, based on the existence of a conflict of interest and opens the tap for misuse of authority because being a member of a political party means having to contribute thoughts to the party.

When talking about ideal laws, Justices should not come from political parties. Two serious cases that undermined the morale of the Court were Justices with political backgrounds. Third, there is no concurrent position as an entrepreneur and not being declared bankrupt based on a court decision, and these two conditions are interrelated. The prohibition on being an entrepreneur or having a bankruptcy status aims to ensure that in carrying out their functions as a Justices of the Court, they must “not think about” or use their “power” to expand their business, benefit their family businesses, and so on. Fourth, the requirement not to double as an advocate and civil servant, of course, is also based on the existence of a conflict of interest that will lead to the collapse of law enforcement. The recruitment system must have a standard application of morality according to the conditions guaranteed by the Constitution. Building constitutional morality is the personal responsibility of Justices candidates and state institutions that recruit Justices and the community. Candidates for Justices need to be seen on their track record of morality.

In the Supreme Court, it is easier for constitutional candidates to see their track record of morality from their decisions and behaviour during their time as Justices. For example, the selection process in the DPR and the President, the candidate Justices from academia, can certainly see whether the lecturers have thoughts that deviate from Pancasila and the 1945 Constitution. Suppose a candidate for the Justices is a politician, of course. In that case, it must also be seen whether he has ever committed/been involved in corruption during his time as a politician or supported behavioural liberalism (for example, free sex). Ideally, there will be a common perception of morality in the recruitment process”. The following below is the mechanism for the selection of Constitutional Court judges in three state institutions (Figs. 3, 4 and 5).

4 Conclusion

After the analysis, some differences between the recruitment process of Constitutional Court Justice between Indonesia and Germany can be found. First, the Germany process is more comprehensive in selecting the Justice of the Constitutional Court because they

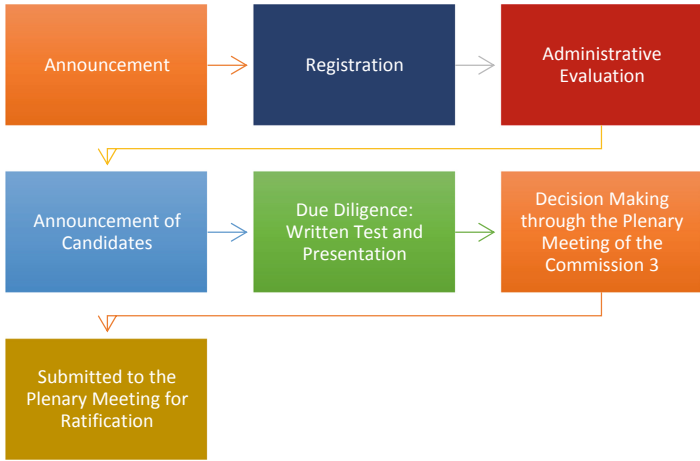


Fig. 3. Constitutional Court Judge Selection Mechanism in the DPR (House of Representatives)

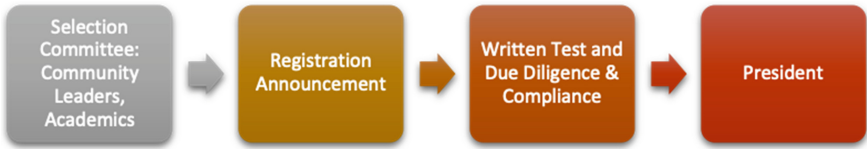


Fig. 4. Constitutional Court Judge Selection Mechanism by the President

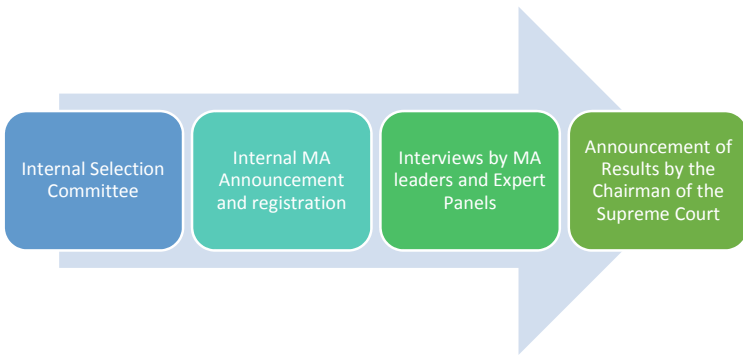


Fig. 5. Constitutional Court Judge Selection Mechanism by the Supreme Court

have strict qualifications for being a Justice, in terms of experience and education, and the most important one is reputation. Second, the selection mechanism of justices in German involves parliament both in Lander and Federal. In comparison, Indonesia doesn't involve the parliament in every nomination of justices of the Constitutional Court such as the nomination of justices from the Supreme Court and the President. Indonesia can learn from Germany that the recruitment process of Justice in Indonesia must be strengthened

in terms of educational qualification that all candidates must possess professor status to sit as a Justice, and the reputation is the important point to consider the candidate's record of integrity, professionalism, and responsibility of their job. Involving parliament in the process of justice selection is also important to guarantee transparency and accountability of the selection.

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