



## The Model of Appointing Judges of the Constitutional Court in a Constitutional Democracy

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### ABSTRACT

The very existence of the Constitutional Court is interpreted as a constitutional tribunal, which then becomes a new branch of power included in the judicial power. The model for appointing judges to the Constitutional Court may affect the independence and impartiality of the judiciary. In order to implement changes and improvements in the appointment of judges in Indonesia, we need to look at the model of appointment of constitutional judges in other countries. The aim of this research is to analyse the model of constitutional judges' appointment in Indonesia and compare it with the models of constitutional judges' appointment in other countries. The research method used is normative legal research by examining primary and secondary legal materials related to the appointment of constitutional judges. The research results show that there are several models of constitutional judge appointments in different countries, namely models involving the executive and legislative branches, models involving only the legislative branch, models involving all three branches of government, and models conducted by special institutions. Indonesia itself uses a model involving all three branches of government. This research also compares the system for appointing constitutional judges in Indonesia with other countries such as Germany, Austria and South Korea. The conclusion of this research is that the mechanism for appointing constitutional judges must be carried out in a transparent, independent and accountable manner in order to guarantee the independence of the Constitutional Court.

## **INTRODUCTION**

The amendment to the 1945 Constitution brought about a change with the establishment of a new institution, namely the Constitutional Court. The birth of the Constitutional Court after the amendment is a response to the demand for strengthening the mechanisms of checks and balances in the state governance system. In Indonesia's constitutional system, the positions of the Constitutional Court and the Supreme Court are considered equal. The establishment of the Constitutional Court is deemed urgent because there is a desire to reform or improve the constitutional legal system to be more ideal and perfect, especially in terms of conducting constitutional reviews of laws that contradict the Constitution or the highest legal basis of the State. The Constitutional Court is one of the institutions in the judiciary whose independence needs to be guaranteed, as explained in Article 24 paragraph 1 of the 1945 Constitution. Judicial independence is one of the characteristics of the concept of a constitutional state, as described in Article 1 paragraph 3 of the Constitution.

The Constitutional Court is a new institution in Indonesia's judiciary system since the amendment of the Constitution of the Republic of Indonesia in 1945 in 2001. This institution was established based on the need to uphold the supremacy of the constitution as the foundation of state governance and institutionalization. The existence of the Constitutional Court is expected to serve as the guardian of the constitution and ensure a high commitment to democratic and legal values in Indonesia.

The formation of the Constitutional Court is designed as the guardian of the constitution, protecting human rights and the constitutional rights of citizens, serving as the ultimate interpreter of the constitution, and safeguarding democracy. It acts as a protector of citizens' constitutional rights and human rights. The authority of the Constitutional Court is outlined in Article 24 C paragraphs 1 and 2 of the 1945 Constitution, which states:

- The Constitutional Court has the authority to adjudicate at the first and final instance, with its decisions being final, to review the Constitution,
- Decide disputes over the authority of state institutions granted by the Constitution,
- Decide on the dissolution of political parties,
- Decide on disputes regarding the results of general elections,
- The Constitutional Court is obligated to provide decisions or views to the People's Representative Council regarding allegations of violations by the President or Vice President according to the Constitution.

With the significant authority and functions of the Constitutional Court, the mechanism for appointing Constitutional Court judges must prioritize integrity, good character, fairness, and statesmanship, along with a thorough understanding of the constitution. The main factor influencing the Constitutional Court's ability to carry out its duties is determined by the quality of its judges. Therefore, the competence and capacity of Constitutional Court judges are essential requirements, given the Court's substantial authority in testing the constitutionality of laws, both formally and substantively.

The integrity of Constitutional Court judges is a crucial aspect because the Court's decisions are final and binding, potentially leading parties involved in a case to attempt to influence the Court's decisions, for example, through gratification or other models.

As a new institution in the constitutional system, the model for appointing judges is crucial and needs to be well-regulated to maintain the credibility and independence of the institution. While Law No. 7 of 2020 concerning the Constitutional Court regulates the procedure for nominating Constitutional Court judge candidates involving three state institutions, the detailed recruitment procedures and selection mechanisms have not been clearly defined.

In Indonesia, the mechanism for the selection process of Constitutional Court judges is regulated in Article 20 paragraph 1 of Law No. 7 of 2020 concerning the Constitutional Court. Paragraph 20 paragraph 1 grants broad authority, impacting the selection, election, and appointment mechanisms for Constitutional Court judges, which differ between each institution, such as the Supreme Court, DPR, and the President. These three institutions authorized to appoint Constitutional Court judges do not yet have regulations regarding the selection, election, and appointment procedures for judges. Article 20 paragraph 2 of Law No. 7 of 2020 concerning the Constitutional Court states that the procedure for proposing Constitutional Court judges submitted through the three authorized state institutions must be carried out through a selection process that is objective, accountable, transparent, and open by the relevant state institution proposing it. The mechanism for appointing judges is an effort to find judges with integrity, good character, professionalism, and experience in the field of law. Therefore, the mechanism for appointing judges must undergo a fit and proper test in the DPR.

The mechanism for selecting, electing, and nominating constitutional court judges, carried out by the Supreme Court, DPR, and President, often undergoes changes in its mechanisms, some through selection and others through appointment. In the Constitutional Court Law, it is mentioned that the selection of constitutional court judges is to be conducted transparently and accountably; however, this phrase can be interpreted differently by each state institution in selecting constitutional court judges. During the selection process, it is not uncommon for it to be conducted internally and solely by the proposing institution, but the selection process can also be carried out by a selection committee team with diverse models, which may be an integral part of the proposing institution. Additionally, there are institutions that form selection teams comprising external parties, whether from academic backgrounds, the public, or former constitutional court judges.

In constitutional democracies, the existence of a constitutional court plays a crucial role in upholding constitutional supremacy, interpreting constitutional laws, and protecting human rights. Therefore, the model for appointing constitutional court judges is of utmost importance as it will influence the independence, integrity, and quality of decisions made by the constitutional court. The model for appointing constitutional court judges in a democratic society is heavily influenced by several factors:

First, the principle of democracy: In constitutional democracies, public participation and accountability are key principles in appointing important positions such as constitutional court judges. A democratic appointment model ensures public involvement in the judge selection process, thereby enhancing the legitimacy and trust in the judiciary.

Second, Constitutional Supremacy: The constitutional court plays a role in upholding constitutional supremacy. Therefore, in appointing judges, it must ensure that the candidates chosen have deep knowledge of constitutional law and unquestionable integrity to carry out their duties fairly and based on the law.

Third, Balance of Power: In constitutional democracies, it is crucial to maintain a balance of power among the executive, legislative, and judicial branches. Therefore, in the process of appointing constitutional court judges, it is essential to ensure the independence and freedom of judges from political pressure or personal interests.

Fourth, Local Legal and Political Context: Each country has a unique legal, political, and cultural context that influences the model for appointing constitutional court judges. The appointment model must be tailored to the values, traditions, and specific needs of the community and local legal system.

The existence of the Constitutional Court itself is construed as a constitutional tribunal, which subsequently evolved into a new branch of power within the judicial authority. The model for appointing judges to the Constitutional Court can influence the independence and autonomy of the judiciary. In practice, the process of appointing judges to the Constitutional Court still shows weaknesses. It is often carried out internally by the proposing institution without involving independent parties. This has the potential to threaten the independence and neutrality of the constitutional judiciary. Additionally, the lack of clear qualification standards can affect the competence of appointed judges.

To implement changes and improvements to the appointment of judges in Indonesia, it is necessary to look at the models of appointing constitutional court judges in other countries. This is important to gain a clearer understanding of the appointment models for constitutional court judges in various countries and the appointment model for judges of the Constitutional Court in Indonesia. Therefore, there is a need for a study on the appointment model of constitutional court judges in other countries to refine the system in Indonesia. Research findings are expected to provide input to ensure a transparent and accountable process for appointing judges to the Constitutional Court.

To be able to implement and make improvements to the process of appointing constitutional court judges in Indonesia, it is necessary to look at the models of appointing constitutional court judges in other countries. Therefore, this paper will discuss: What are the models of appointing constitutional court judges in several countries? And, What is the system for recruiting constitutional court judges in Austria, Germany, South Korea, and Indonesia?

## LITERATURE REVIEW

The appointment model of constitutional judges varies significantly across different countries, reflecting their unique legal systems, political structures, and cultural values. In understanding the concept of the rule of law within each nation, it's essential to delve into the historical and philosophical underpinnings that shape it. For instance, in Indonesia, the concept of "negara hukum" and "the rule of law" draws from both Continental European and Anglo-Saxon legal traditions, highlighting the importance of human rights, separation of powers, and government bound by legal provisions. Similarly, experts like Julius Stahl and Albert Venn Dicey provide insights into the elements and characteristics of the rule of law, emphasizing principles such as equality before the law and constitutional supremacy.

The mechanisms for appointing constitutional judges, whether through executive appointment, legislative selection, or specialized commissions, are crucial in upholding the independence and integrity of the judiciary. Models like the Hamilton Model and the Ginsburg Model offer diverse approaches to judicial selection, reflecting the complexities of balancing accountability, independence, and public trust. Moreover, examining the recruitment systems of countries like Germany, Austria, and South Korea reveals the intricate interplay between different branches of government in ensuring a fair and transparent process. Ultimately, the diversity of appointment models underscores the need for each nation to tailor its approach based on its legal system, political landscape, and societal values, while prioritizing the principles of justice, impartiality, and the rule of law.

## METHODOLOGY

This research employs normative legal research by conducting literature review or secondary data research. In this study, secondary data such as primary legal materials, namely the 1945 Constitution, Law No. 48 of 2009 on Judicial Authority, and Law No. 7 of 2020 on the Constitutional Court, are used. Secondary legal materials include law books or legal literature, while tertiary law sources include legal dictionaries and legal encyclopedias.

The aim of this research is to analyze and compare the model of filling judges in the Constitutional Court of Indonesia with several other countries to obtain a more comprehensive understanding. Findings from the research are expected to provide input for improving the system of filling constitutional judges in Indonesia in accordance with the principles of the rule of law and constitutional democracy.

The research is descriptive in nature, gathering information about the status of a theme, phenomenon, or situation at the time the research is conducted. The data analysis technique utilized in this study is qualitative data analysis. The steps of data analysis include identification, classification, and interpretation of data to uncover and explain research problems. Analysis is carried out by examining and comparing legal provisions and literature related to the model of filling constitutional judges in Indonesia with models applied in other countries.

## **RESEARCH RESULT AND DISCUSSION**

### **The Appointment Model of Constitutional Judges in Several Countries**

The concept of the rule of law cannot be separated from the history of each country because the formulation or understanding of the rule of law develops following the historical development of human society. To understand the concept of the rule of law, one must first understand the political and legal thoughts that drive and shape the concept of the rule of law. The concept of the rule of law in Indonesia is often translated into the concepts of "negara hukum rechtsstaat" and "negara hukum the rule of law." The concept of "rechtsstaat" refers to the Continental European legal system developed by Immanuel Kant and Friedrich Julius Stahl. Meanwhile, the concept of "the rule of law" became known after Dicey published a book titled "Introduction to the Study of the Law of the Constitution" in 1885. The concept of "the rule of law" is based on the Anglo-Saxon or Common Law System. Friedrich Stahl's view explains that the understanding of the rule of law is that the state must be a legal state. Friedrich Stahl explains that the elements of "rechtsstaat" in the classical sense consist of four elements:

- a. Human rights,
- b. The division or separation of powers to ensure those rights (in Continental European countries, usually referred to as the separation of powers),
- c. Government based on legal provisions,
- d. The existence of administrative courts.

In contrast to Friedrich Stahl's opinion, Von Munch explains that the elements of the rule of law consist of:

- a. Guaranteeing human rights,
- b. The division of powers,
- c. The connection of all state organs to the Constitution and the relationship between the judiciary and laws,
- d. Rules regarding proportionality,
- e. Judicial oversight of decisions stemming from public authority,
- f. Assurance of justice and basic rights in the judicial process,
- g. Limitations on the retroactive application of a law.

Julius Stahl explains that the concept of the rule of law (rechtsstaat) is distinguished into four:

- a. Protection of human rights,
- b. Division of powers,
- c. Government based on laws,
- d. Administrative judiciary.

Meanwhile, Albert Venn Dicey in his book "Introduction to the Study Of The Constitution" explains that the characteristics of the rule of law are:

- a. Absolute supremacy to resist the influence of arbitrary power and abolish wide-ranging discretion or prerogative authority of the government,

- b. Equality before the law, meaning that officials and ordinary citizens alike are obligated to obey the same laws, and there is no administrative judiciary,
- c. The constitution is the result of the ordinary law of the land; constitutional law is not a source but rather a consequence of individual rights formulated and enforced by the judiciary or can also be interpreted as a principle of private law through judicial and parliamentary actions, which are so extended as to limit the position of the Crown and its officials.

Based on the insights provided by the experts above, it can be concluded that a good concept of the rule of law, whether in the concept of "rechtsstaat" or "the rule of law," must include guarantees of human rights, equality before the law, and the principle of separation of powers within the state. The concepts outlined above represent classical concepts of the rule of law. Additionally, the rule of law ("rechtsstaat" or "the rule of law") entails that the state provides legal protection to its citizens through the establishment of impartial and nonpartisan judiciary institutions and ensures human rights.

The concept of the rule of law adopted by each country is influenced by the legal system used in each country. As a legal state, Hans Kelsen, in his theory of the "stufenbau theory," explains that there is a unified hierarchical legal system structure culminating in the constitution as the highest law. Within a constitution lie democratic values; therefore, democracy can be considered the fundamental idea underlying the constitution. The relationship between democracy and the constitution can give rise to a constitutional democratic governance system.

One characteristic of a democracy based on law is the clear limitation of power as regulated in the constitution. Therefore, a constitutional democracy desires and upholds constitutional supremacy. This means that the rules contained within the constitution form the basis for the administration of the state and society, typically implemented through the establishment of rules as the foundation for state administration, including in the filling or recruitment of constitutional judge positions.

Recruitment itself can be defined as the human resource management planning decision regarding the number of employees needed, when they will be needed, and what criteria are required in an organization. Recruitment is an effort to fill vacant positions within an organization. Employee recruitment is a process or action undertaken by an organization to acquire additional employees through several stages, including identifying and evaluating sources of labor, determining labor needs, selection processes, placement, and employee orientation. In the judicial recruitment system itself, judges must determine aspects related to who selects, who will be selected, and how the selection process will be carried out. The selection mechanism must be determined by parties with experience in selecting constitutional judge candidates.

Additionally, the candidates or prospective judges participating in the recruitment process must meet the assessment standards established by the selection committee to pass the judge selection process. The aim of this judge recruitment mechanism is to obtain judges who meet the established criteria. The

recruitment or appointment process of judges can be seen as an effort by the judiciary to create a good reputation for the judiciary and adhere to the regulations established within the judicial framework. Therefore, if recruitment is conducted while considering the three aforementioned components, it will result in judges who can create a sense of justice for society through their decisions. There are several models known in the judicial appointment mechanism, namely:

- The Hamilton Model

Alexander Hamilton outlined parameters to achieve an independent and autonomous judiciary through: the mode of appointing judges, the tenure by which they are to hold their places, the partition of judiciary between different courts, and their relations to each other. Hamilton himself explained that there are two models in the mechanism of appointing judges: appointment and election. Based on these two models, a third model emerged. It started with the American constitution granting the executive branch the authority to appoint judges. Then, in 1983, the general concept of judicial selection was established for the first time in Mississippi. However, this general election model did not work well, leading to the emergence of the third model, which combines the appointment and election models, known as the merit selection model. This third model begins by allowing politicians to participate in the judge selection process, after which the selected judge candidates are scrutinized by a special commission to determine the chosen judge candidates. In this case, the judge selection mechanism is conducted comprehensively and transparently, aiming to enhance public trust in the judiciary.

- The Ginsburg Model

Tom Ginsburg's perspective distinguishes the models of judicial appointment used by modern nations into four categories:

- Through political institutions: Ginsburg explains that the mechanism of appointing judges through political institutions is quite diverse. This model may involve one or more political institutions in determining the selected judges. Supporters of this model believe that the principle of accountability is superior to the principle of judicial independence. Countries like Korea, Italy, and several Eastern European nations implement this model, prioritizing institutional accountability in the selection process over judicial independence. However, Ginsburg's view contradicts that of Harold W. Chase, who believes that the involvement of other institutions is a form of depoliticization. The concern is that judges appointed through political mechanisms may be used as tools to advance political interests.
- Through judicial power institutions: The Appointment by judiciary itself model is applied in India, Iraq, and Japan. For example, in India, the president appoints judges after receiving input from the Supreme Court. Additionally, the Iraqi Supreme Court is more involved in the mechanism of appointing all judges in Iraq.



- Through specialized institutions: This model gives authority to the judicial council to select judges. According to Ginsburg, the purpose of this specialized institution is to limit political involvement in the appointment, promotion, and discipline of judges, thereby preserving the accountability and independence of judges. This model is subsequently implemented in Indonesia by placing the judicial commission as an inherent institution of authority.
- Through general elections: This model is considered outdated. Its purpose is to distance judges from elitism and bring them closer to the people. Through this model, the people as voters truly participate in determining who is fit to be a judge.

The appointment of constitutional judges varies between countries, influenced by their respective legal systems. Differences in the appointment process are also shaped by the legal systems of each country, which can be compared to find the desired system for each nation. The purpose of comparing legal systems is to identify a suitable legal framework that aligns with the legal system of a given country. Additionally, the models for appointing constitutional judges in different countries are influenced by several factors, including:

- Political system: The political system affects how constitutional judges are appointed. Countries with a presidential system may tend to involve the executive directly, while those with a parliamentary system may involve the legislative branch more.
- Legal system: The legal system of a country plays a crucial role in determining the model for appointing constitutional judges. Countries using the Continental European legal system will have a different approach compared to those with customary law-based legal systems.
- Constitutional history: The history of constitution-making and the development of constitutional courts influence the model for appointing constitutional judges. Countries with a long tradition of constitution-making and judicial power may have different appointment models from those with different historical backgrounds.
- Culture and political values: The cultural and political values in society affect the model for appointing constitutional judges. For example, countries with strong democratic cultures may have more open appointment models.
- Experience and learning: Experience and learning from other countries also influence the model for appointing constitutional judges. Countries often observe and study practices from other nations in changing mechanisms for appointing constitutional judges.

Taking these factors into account, each country will choose the model that is most suitable for appointing constitutional judges, considering the conditions of each respective institution. In appointing constitutional judges, each country has its own procedures and mechanisms for selecting judges. Therefore, the selection of constitutional judges needs to be based on clear criteria.

The models used in appointing constitutional judges can influence the independence and autonomy of the judiciary. The models of recruiting constitutional judges worldwide are categorized into 4 selection models and 1 appointment model, namely:

- The first model is selection conducted by both the executive and legislative institution.
- The second model is selection performed solely by the legislative institution.
- The third model is selection carried out by the executive institution.
- The fourth model is selection by a specialized institution.
- The last model is appointment directly by the executive institution

Among the various models available, each country has different provisions for implementing which model will be used, considering the differences in the legal systems of each country. Each model has its advantages in determining the composition of each representative institution, be it the executive, legislative institution, judicial, or special commission formed to select constitutional judges.

The first model involves both the executive and legislative institutions. This model is the most commonly used, involving the executive and legislative institutions in the selection process. Essentially, such nomination models involve the presidential institution, but its appointment mechanism requires approval from the legislative institution. This approval is marked by voting and various types of examinations to find judges with real potential. This model is also present in the United States, where the President dominates the Supreme Court justices, and their nominations must be approved by the Senate. Such models are often associated with political implications if the president's background differs from the political party dominating the parliamentary seats.

The second model involves only the legislative institution. This approach only involves the legislative institution in the selection process. This method can open up significant opportunities to produce judges from the ruling political party that dominates the legislative positions in a country. In some countries like Germany and Spain, selection models like this are done with the approval of a supermajority. In Germany, it must be approved by two-thirds, and in Spain, it must be approved by three-fifths. This is intended to ensure that the opposition party also has a voice in the election.

The third model involves all three branches of government: executive, legislative, and judicial. Indonesia employs such a model, as do Italy and the Republic of Korea. The drawback of this model is that judge candidates may be biased towards the proposing institution. Thus, the independence of the judiciary can be questioned.

The fourth model involves a special commission used in countries like South Africa and Thailand. By adopting this model, countries such as South Africa and Thailand must have a special commission formed to conduct the selection and execution process of appointing judges in a professional manner without any intervention from any institution in determining constitutional

judges. Members of this special commission should reflect the balance between the opposition party and the coalition.

The fifth model is the appointment model carried out by the executive branch. The drawback of this model is that it may create a misconception that constitutional judges can be controlled by the executive branch. By not involving other institutions, it implies that the control of judicial authority is held by the executive. Such a model is not recommended in democratic countries.

Each model of appointing constitutional judges has its own advantages and disadvantages depending on the political, legal, and cultural contexts of each country. What needs to be ensured is that the process of appointing constitutional judges must be conducted transparently, fairly, and independently, while guaranteeing the quality and integrity of the selected constitutional judges. James J. Spigelman, the Chief Justice of New South Wales, explains that there is no single model for appointing judges that applies to each judicial system. From the various models of recruiting Constitutional Judges mentioned above, the practice carried out in Indonesia uses a pattern where each is proposed through selection from the three branches of state power (legislative, executive, and judicial).

### **The System of Recruiting Constitutional Judges in Austria, Germany, South Korea, and Indonesia**

In addition to understanding the models of appointing constitutional judges, the recruitment systems from several countries are also known and can be taken into consideration. The first pattern is in Germany, known as the Federal Constitutional Court, which stands alongside the Supreme Court. There are several differences between this pattern and the one adopted in Indonesia. In this case, Germany represents one of the countries that embodies its constitutional review practices in federal states. The German Federal Constitutional Court only adjudicates constitutional disputes, unlike in Indonesia, where it also has jurisdiction over election disputes and disputes between state institutions in the Constitutional Court of Indonesia. Additionally, the Federal Constitutional Court in Germany is separate from the general judiciary and is more independent.

The functions of the Federal Constitutional Court include:

- Constitutional review to resolve disputes faced by high state institutions, including the authority to settle jurisdictional disputes between the Federal government and the states or disputes involving high-level organs within the federal government alone.
- Concrete review of legal norms or when the institution conducts a general law review.
- Constitutional complaint applications.
- Resolving disputes over general elections.

The Federal Constitutional Court is a judicial and constitutional body consisting of two senates, each with eight constitutional judges. In this case, the president and vice president serve as the chairs of the senates. Therefore, there are 16 constitutional judges in Germany, with 8 filling the first panel tasked with

fundamental rights and another 8 filling the second panel, known as the political panel.

Although divided into two panels, decisions are made and pronounced by all 16 judges in a plenary session. This is aimed at maintaining consistency and minimizing external influences on the decisions of the Federal Constitutional Court. In the system of the Federal Constitutional Court in Germany, the position of the court and the mechanism for selecting constitutional judges are the primary reference points. This is because they impact the judiciary's authority.

Article 2 BVerfGG specifies the composition of constitutional judges, which must include two senates. Judges of the Federal Constitutional Court, as well as 8 judges selected by each senate, and 3 members chosen by the senate, must come from the Federal Supreme Court. To become a constitutional judge, candidates must serve for at least 3 years in the Supreme Court, be at least 40 years old, meet the requirements for Bundestag elections, fulfill the written requirement of willingness to serve as a judge on the Federal Constitutional Court, and cannot be a member of the Bundestag.

The judges of the Constitutional Court consist of federal judges and other members of society. Eight of the constitutional judges come from the Bundestag, and another eight are chosen by the Bundesrat. Judges selected by the Bundestag are nominated by the selection committee and elected by secret ballot. To be selected as a judge, they must receive a two-thirds majority vote from Bundestag members. Similarly, judges chosen by the Bundesrat must also be elected with a two-thirds majority vote from the Bundesrat. The selection system of the Federal Constitutional Court is carried out by the legislative institutions, namely the Bundestag and the Bundesrat. The parliamentary selection mechanism for constitutional judges is a manifestation of the principle of checks and balances.

Secondly, Austria, is a country in the world that first formed the Constitutional Court. The idea of forming the Constitutional Court was adopted into the 1920 Constitution. The composition of the members of the Austrian Constitutional Court (Verfassungsgericht) consists of the President, Vice President, twelve members, and six substitute members. So, the total number of constitutional judges in Austria is 20. All Austrian constitutional judges are formally appointed based on the recommendation of the Federal President. The President and Vice President of the Verfassungsgericht, and seven members, plus three additional substitute judges, are appointed after receiving recommendations from the Federal Government. However, the other seven members or three substitute members are appointed based on recommendations from two members in parliament. Three prospective judges are prepared to fill vacant judge positions if necessary.

The supervision system applied to judges of the Austrian Constitutional Court is a supervision system conducted by the President of the Constitutional Court, who will be held accountable by the judges in carrying out their duties and authorities. Regarding the selection process, it is carried out through three branches of government, namely the executive, legislative, and judiciary. The system of selecting constitutional judges in Austria is similar to that in South Korea and South Africa. However, the recruitment system for constitutional

judges in Austria remains in the hands of the federal president, involving other branches of power.

The Austrian Constitutional Court has significant authority, including:

- Constitutional testing of laws: The laws subject to constitutional testing can include federal laws or state laws. Constitutional testing can be conducted using the preventive review method, which involves testing a draft law before it is enacted, or using the ex post facto review method, which entails testing a law that has already been enacted by public authorities. However, the Austrian Constitutional Court can also initiate testing of the constitutionality of a law on its own initiative if deemed necessary, without waiting for requests from specific parties.
- Testing the legality of regulations subordinate to laws, such as government regulations, can only be done by the Constitutional Court if it has received a request from a court. Ex officio, the Constitutional Court has the authority to temporarily suspend the implementation of a government regulation, with requests possible from the federal government. Additionally, individuals can file a judicial review against a government regulation if it is deemed to directly violate rights, but their request can only be examined after a lawsuit has been filed in a general court.
- Testing of international agreements.
- Disputes over general elections.
- Impeachment proceedings.
- Authority as a special administrative court related to individual constitutional complaints from citizens.
- Disputes over authority and financial revenue between states or between states and the federal government.
- Disputes over authority between state institutions.
- Authority to interpret the Constitution (the interpreter of the constitution): Besides being the interpreter of the Constitution, the Constitutional Court also has the authority to assess changes to the constitution approved through procedures established in the constitution.

Regarding decisions issued by the Austrian Constitutional Court, which are final and binding, the court can annul the provisions of legislation either entirely (total annulment) or partially (partial annulment). The difference from the Constitutional Court in Indonesia is that in Indonesia, the Constitutional Court's decision can take effect once it is announced by the panel, whereas in Austria, the Constitutional Court's decision only becomes binding after it is announced in the official gazette.

Thirdly, South Korea. Both South Korea and Indonesia are unitary states with administrative judiciary and a Constitutional Court. The Constitutional Court of South Korea was established based on the constitution in 1987, with its authority regulated in 1988 as a sign of its formation. The establishment of the

Constitutional Court of South Korea embodies the development of a more democratic political order.

The number of judges in the Constitutional Court of South Korea is 9, similar to Indonesia. In the process of appointing constitutional judges in South Korea, three state institutions are involved: the President of South Korea, the National Assembly, and the Supreme Court, each nominating three constitutional judges. Constitutional judges serve a term of nine years and can be re-elected. The President of the Constitutional Court of South Korea is appointed by the President and has obtained approval from the National Assembly. Although constitutional judges in South Korea are proposed by three state institutions, the determination of Constitutional Court judges is still made collectively. Article 65 paragraph 1 of the South Korean Constitution states that oversight of constitutional judges is divided into internal oversight conducted by the Department of Court Administration and external oversight conducted by the National Assembly.

Based on Article 111 paragraph 1 of the South Korean Constitution, the Constitutional Court of South Korea has authority in:

- Adjudicating the constitutionality of a law upon request from the court,
- Impeachment, deciding on the dissolution of political parties,
- Resolving disputes over authority between state institutions,
- Deciding on individual requests.

What should be noted from the constitutional testing model in South Korea is the division of testing objects between the Constitutional Court and the Supreme Court. The Constitutional Court has the authority to test legislation in general, while the Supreme Court explicitly has jurisdiction to adjudicate the constitutionality of government actions. Regarding the mechanism of constitutional testing of legislation, the Constitutional Court can only accept requests from general judiciary judges handling cases related to constitutional rights. This provision can be bypassed if the general judiciary refuses to refer a case to the Constitutional Court, but individuals who feel aggrieved can directly file a petition with the Constitutional Court. However, petitioners must be aware that they cannot use the same arguments as those presented in previous court proceedings. The Constitutional Court also lacks the power to test legislation in the abstract. In this regard, the South Korean Constitutional Court can only review legislation that involves concrete factual cases.

Regarding the binding nature of its decisions, the Constitutional Court can impose cooperative sanctions on specific cases. To prevent legal vacuums, the Constitutional Court can direct legislators to amend problematic provisions. The increasing number of cases and decisions issued by the South Korean Constitutional Court each year places it as an active judiciary (judicial activism). Therefore, in appointing constitutional judges, candidates must have approximately 15 years of experience as prosecutors, judges, or lawyers who have dealt with legal matters in state institutions, state-owned enterprises, public companies, and public institutions, as well as individuals who have served as assessors at universities. Additionally, the South Korean Constitutional Court

law specifies that individuals cannot be selected as constitutional judges if they have been sentenced to prison or a greater punishment, or have been dismissed due to impeachment within the last five years.

By comparing the mechanisms of appointing constitutional judge positions in three countries – Austria, Germany, and South Korea – which have differences and similarities in appointing constitutional judges, the comparisons are as follows:

- Austria has twenty constitutional judges, consisting of fourteen regular judges and six substitute judges. The mechanism for appointing constitutional judges in Austria involves several steps. Firstly, constitutional judges are appointed by the Federal President based on recommendations submitted by the federal parliament. Secondly, the process begins with the formation of a special committee comprising members of parliament. Thirdly, the committee conducts selection and assessment of potential constitutional judges. Fourthly, the committee provides recommendations to the Federal President, who holds the final authority in appointing constitutional judges. The appointment of constitutional judges in Austria involves state institutions such as the President, the National Council, and the Federal Council.
- Germany has sixteen constitutional judges divided into two panels, each consisting of eight judges. The mechanism for appointing constitutional judges in Germany also involves several steps. Firstly, constitutional judges in Germany are appointed by two legislative bodies, the Bundestag (Federal Diet) and the Bundesrat (Federal Council). Secondly, the process involves a selection committee comprising members of the Bundestag and Bundesrat. Thirdly, the committee selects potential constitutional judges and submits a list of candidates to the Bundestag and Bundesrat for approval. Fourthly, after obtaining approval from both legislative bodies, the Federal President signs the appointment of constitutional judges. Germany's mechanism for appointing constitutional judges involves the Federal Parliament (Bundestag) and the State Parliament (Bundesrat).
- South Korea has nine constitutional judges. The mechanism for appointing constitutional judges in South Korea includes several steps as well. Firstly, constitutional judges in South Korea are selected by the President, the National Assembly, and the Supreme Court based on recommendations from the Constitutional Judge Selection Committee. Secondly, the selection committee comprises members from diverse backgrounds, not only judges but also academics and legal practitioners. Thirdly, the selection process involves a series of tests, interviews, and evaluations of the candidates' track records. Fourthly, after receiving recommendations from the selection committee, the President signs the appointment of constitutional judges. South Korea's mechanism for appointing constitutional judges involves three state institutions: the President, the National Assembly, and the Supreme Court.

The appointment of constitutional judges varies from country to country. These differences can be seen in the comparison of the three countries above. The emergence of these differences can be attributed to the level of political and legal maturity in each country. Although there are differences in the process of appointing constitutional judges, they all share a common goal: to establish an independent judiciary capable of safeguarding societal justice. The Constitutional Court is part of an independent judiciary free from interference by any party. Therefore, the Constitutional Courts in Austria, Germany, and South Korea have various different models for appointing constitutional judges.

The differences in appointing constitutional judges are also influenced by institutional factors, mechanisms for appointing constitutional judges, and supporting organizations that assist constitutional court institutions in carrying out their powers and responsibilities. This is because the constitutional court serves as an organization tasked with safeguarding the constitution. As an organization, the constitutional court has an organizational structure to fulfill its core duties and functions. The organizational structure or institution within the constitutional court can be classified into common models held by constitutional courts worldwide based on other components.

The mechanisms for appointing constitutional judges in Austria, Germany, and South Korea have differences and similarities in appointing constitutional judges, including the composition of constitutional judges.

- The number of constitutional judges, the mechanisms governing the nomination and appointment of constitutional judges, and the determination of parties authorized to nominate candidates for constitutional judges,
- The term of office for constitutional judges, whether there are differences between the chief justice and the members of the Constitutional Court or not,
- The qualifications to become a constitutional judge, which can also be influenced by other variables.

The qualifications for constitutional judges required by each country have specific criteria and additional requirements provided by the authorities responsible for proposing and conducting the selection and appointment of constitutional judges.

Tom Ginsburg, as quoted in the research by Saldi Isra regarding the appointment of constitutional judges, distinguishes three mechanisms:

- Single body appointment: In this case, the executive appoints all members of the constitutional court without further oversight from the legislative body. This model is considered less effective because even though it involves parliamentary approval, the parliament is typically dominated by the president's party, making the resulting approval less effective.
- Cooperative appointments mechanisms: This provides an option with cooperation between two institutions in determining judges. This appointment model emphasizes the objective requirements of a parliamentary majority to support judges with the main task of



interpreting the constitution. However, the weakness of this system lies in the occurrence of "deadlock" because it requires the approval of two institutions with differing political processes. Given the complex political situation, the appointment of judges may not occur.

- Representative appointment: This is a model of appointment that involves several branches of state power, including the legislative, executive, and judicial branches. This model can prevent political maneuvering in the process of recruiting judges.

Based on the three models for filling judicial positions mentioned above, the appointment of constitutional judges in Austria, Germany, and South Korea is predominantly carried out using the third model, namely the representative appointment model. In the appointment of constitutional judges in Austria, Germany, and South Korea, the mechanisms may vary, but the main goal is to ensure the independence and autonomy of the Constitutional Court. This can be seen from the open mechanisms for appointing constitutional judges, which emphasize the integrity of the candidates.

In the mechanism for appointing constitutional judges, Indonesia and South Korea share many similarities, including:

- Constitutional Judge Selection Committee: In South Korea, there is a Constitutional Judge Selection Committee responsible for selecting potential constitutional judges. Similar to Indonesia, there is a similar committee called the Judicial Commission, which is responsible for the selection process of constitutional judges.
- Evaluation of Quality and Integrity: Both in South Korea and Indonesia, the process of selecting constitutional judges involves evaluating the qualifications, integrity, and legal capabilities of the candidates. Both countries prioritize high legal competence in selecting constitutional judges.
- Transparency and Accountability: Both countries emphasize transparency and accountability in the process of selecting constitutional judges. In South Korea, the selection process for potential constitutional judges is conducted openly and transparently, involving public participation in several stages of the selection process. Similarly, in Indonesia, there are efforts to enhance transparency and accountability in the process of selecting constitutional judges.
- Goal to select independent constitutional judges: Both in South Korea and Indonesia, the ultimate goal of the process of selecting constitutional judges is to choose judges who are independent, have integrity, and are highly qualified to fulfill their duties in upholding constitutional supremacy.

Despite the similarities, there are differences in the recruitment system for constitutional judges between the two countries, such as the structure and mechanisms of the institutions responsible for the selection process. However, by observing these similarities, Indonesia can learn from the processes deemed

effective in South Korea to improve the system of recruiting constitutional judges according to the needs and context of the country. The appointment of constitutional judges is closely related to the evolving constitutional consciousness in many countries that recognize that the selection process and mechanisms for appointing constitutional judges are closely related to the idea of the balance of power.

## **CONCLUSIONS AND RECOMMENDATIONS**

Based on the discussion above, it can be concluded that there are several models for appointing constitutional judges through selection conducted among state institutions or through direct appointment by the executive. Each country will choose and apply a model that suits its legal system and national conditions. Indonesia itself refers to a model of appointment involving three state institutions: the executive, legislative, or judicial. However, the still general provisions result in different interpretations of the selection process among each institution. Therefore, it is necessary to establish a more detailed and objective mechanism. Comparisons with other countries such as Austria, Germany, and South Korea show similarities and lessons that Indonesia can learn to improve the appointment system, such as emphasizing independent and transparent selection commissions and assessing candidate competencies. A well-regulated appointment of constitutional judges needs to consider factors such as the legal system, political system, constitutional history, culture, and the goal of selecting independent and competent judges. This is important to ensure the independence of the judiciary. Therefore, there is a need for more detailed revisions regarding the procedures for selection, election, and appointment of constitutional judges in Indonesia by studying various best practices in other countries according to the domestic legal and political context.

## **ADVANCED RESEARCH**

For further research, it is recommended to conduct a more in-depth comparative study on the mechanisms of appointing constitutional judges in Indonesia, focusing on the implementation of best practices from other countries such as Austria, Germany, and South Korea. This research can delve into how the selection and appointment processes of constitutional judges are carried out within the legal and political contexts of each country, as well as how these mechanisms accommodate principles of independence, transparency, and the assessment of candidate competence. Additionally, the research can consider the impacts of factors such as culture, constitutional history, and political dynamics on the arrangement of the constitutional judge appointment system. Thus, this study is expected to provide deeper insights and more concrete solutions to enhance the effectiveness and fairness of the constitutional judge appointment system in Indonesia.

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