

An Evaluation of the Selection Mechanism of Constitutional Judges in Indonesia and South Korea

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Abstract

This paper evaluates the appointment process of Constitutional Court Judges in Indonesia. A guarantee of judiciary independence is a foundation of a modern democratic state because a judge's appointment depends on a selection process. Using normative and empirical legal studies, the study shows that Indonesia does not have a standardized selection process among the proposing organs regarding assessment and procedure. The selection mechanism is decentralized. It relies on the proposed organs respectively. On the other hand, South Korea has a more standardized selection process, especially on confirmation hearings organized by the National Assembly. The Korean model, which emphasizes the National Assembly confirmation hearing, has enormously contributed to the selection process because it ensures transparency and accountability. The study suggests that Indonesia should consider establishing a confirmation hearing system for justices like South Korea. A more transparent selection will reduce the number of corrupt public officials (justices). Unfortunately, the current Korean system also needs improvements. The suggestions include (1) separation of the ethical and professional competence evaluation phase, (2) extension of the confirmation hearing duration, (3) enhancing the requirement for witness attendance and submission of data, and (4) prohibition of the use of personal hearing data.

Keywords: confirmation hearings, constitutional justices, selection mechanism.

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A. Introduction

In the last few years, Indonesia's rule of law has been under pressure due to criminal and moral cases in the judiciary system. It has led to people's distrust of the judiciary institutions, particularly the Constitutional Court. Some cases happened in the Constitutional Court, including a breach of the Code of Conduct by Justice Arsyad Sanusi in 2011.¹ Sanusi was found guilty.² Subsequently, the Constitutional Court's Board of Ethics issued a warning letter to him because he ignored the fact that his daughter, his sister-in-law, and a clerk of the Constitutional Court met one of the parties in the local Constitutional Court election dispute.³ In 2013, the Indonesian Commission for Anti-Corruption arrested Akil Mochtar, a Constitutional Justice, for bribery. The case heated political tension, societal regret, distrust, and delegitimize the Constitutional Court.⁴ In 2016, another violation of the Code of Ethics involved Arief Hidayat, the Chairman of the Constitutional Court, at that juncture. He sent a note to a junior public prosecutor to treat his friend exclusively.

In 2017, there was another bribery case involving Constitutional Justice Patrialis Akbar. The Commission for Anti-Corruption charged him after he accepted a gift from a party (plaintiff) in the Constitutional Court's judicial review case that he handled.⁵ Justice Arief Hidayat allegedly breached the Code of Ethics multiple times in 2018 after he held a hotel meeting with members of Commission III of the House of Representatives. He allegedly led political lobbying to be re-elected for the second time. The Ethics Board determined that he was guilty and issued a warning letter.⁶

In addition, in 2023, the Constitutional Court's Ethics Council issued a guilty verdict for Constitutional Justice Guntur Hamzah. It sanctioned a written reprimand for his actions in changing the substance of the Constitutional Court decision Number 103/PUU-XX/2022. Constitutional Court's Ethics Council ruled that Guntur Hamzah had violated the principle of integrity in the constitutional justice's code of

¹ La Husen (et.al.), "The Enforcement of Ethics of State Officials in the Indonesian Legal System," *Imperial Journal of Interdisciplinary Research (IJIR)* 3, no. 5 (2017): 1687.

² Tanto Lailam, "Membangun Constitutional Morality Hakim Konstitusi di Indonesia," *Jurnal Penelitian Hukum De Jure* 20, no. 4 (2020): 512, <http://dx.doi.org/10.30641/dejure.2020.V20.511-530>.

³ Harmoko M. Said, "Menggagas Peradilan Etik Penyelenggara Negara di Indonesia," *SASI* 27, no. 1 (2021): 28, <https://doi.org/10.47268/sasi.v27i1.266>.

⁴ Ni'matul Huda, "Problematisasi Substantif Perppu Nomor 1 Tahun 2013 Tentang Mahkamah Konstitusi," *Jurnal Konstitusi* 10, no. 4 (2013): 557-558, <https://doi.org/10.31078/jk1041>.

⁵ Farida Kaplele (et.al.), "Barriers to the Implementation of the Articles of Continuing Acts in the Law of Criminal Acts of Corruption in Indonesia," *International Journal of Criminology and Sociology* 10 (2021): 1190-1195, <https://doi.org/10.6000/1929-4409.2021.10.138>.

⁶ Fajlurrahman Jurdi, Rizqa Ananda Hanapi, and Taufik Hidayat, "Optimalisasi Fungsi Pengawasan Dewan Etik Mahkamah Konstitusi," *Jurnal Hukum & Pembangunan* 50, no. 3 (2021): 689-700, <http://dx.doi.org/10.21143/jhp.vol50.no3.2763>.

ethics and conduct. Guntur Hamzah committed the offense on his first day as a Constitutional Justice.

Table 1. Cases of Constitutional Justices

No	Year	Justice	Cases
1	2010	Arsyad Sanusi	Violation of the Code of Ethics
2	2013	Akil Mochtar	Bribery
3	2016	Arief Hidayat	Violation of the Code of Ethics
4	2017	Patrialis Akbar	Bribery
5	2018	Arief Hidayat	Violation of the Code of Ethics
6	2023	M. Guntur Hamzah	Violation of the Code of Ethics

The cases demonstrate that Indonesia's Constitutional Court cannot be classified as a credible institution. The cases diminished public confidence in the competence and dignity of the Justices of the Constitutional Court. It also disturbs the citizen's expectation that the Constitutional Court will be one of the foundations of democracy following the 1999 reform. The philosophical reason for establishing the Constitutional Court is the guardian of the Constitution and Democracy. One of the goals of establishing the Court is to serve as a trusted court and re-creating the judicial stereotype from a dependent to an independent, impartial Court.⁷

The condition shows that Justice's integrity is the main problem. One way to overcome it is by reformulating the Constitutional Court Justice's selection process. If the selection process is not transparent and unaccountable, the result is a lack of integrity. Moreover, the function of the external institution to supervise the Judicial branch is constantly breaching the law and ethics. This situation made the Constitutional Court is getting worse. Based on the previous background, this study evaluated the selection mechanism for Constitutional Court Justices in Indonesia. To enrich the analysis, it used a comparative approach by using South Korea's setting in selecting Constitutional Justices.

The experience of South Korea is essential as a comparison because the selection mechanism in South Korea uses the centralized model of a confirmation hearing in Parliament, which guarantees more transparency and accountability. Therefore, there have been no criminal cases involving the justices of the Korean Constitutional Court. The study also proposes recommendations to improve the selection mechanism model of the Constitutional Court Justices in both countries.

⁷ Ahmad Fadlil Sumadi, "Independensi Mahkamah Konstitusi," *Jurnal Konstitusi* 8, no. 5 (2011): 464, <https://doi.org/10.31078/jk851>.

B. Theoretical Approach to Judicial Independence

Judicial independence must settle the case of criminal law, civil law, and administrative law justly.⁸ Justice must be the people who have strong integrity to avoid the interest of the parties they are handling.⁹ The Justices also must reasonably manage the number of cases following existing laws and they cannot be interfered with by external factors (independence).¹⁰ The independence of the justices or judges is the absolute principle that should be preserved in the rule of law state.¹¹ Judicial independence is the formal legality that must be guaranteed in every settling case, and they are free from intervention.¹² As the exercise of judicial power, the judiciary must function as a justice dispenser following the principles of transparency, fairness, impartiality, independence, and accountability to become an authoritative law enforcement institution.¹³

The independence principle states the judicial branch must be free from intervention by other branches (i.e., the executive and legislative).¹⁴ In addition to intervention from governmental institutions, the judicial branch must also be free of political interests from political parties.¹⁵ One condition that the judge/justice is not independent is due to economic and social factors.¹⁶ Justice/judge must be committed to being independent to avoid criminal cases that can destroy their integrity.¹⁷ An independent court must be free from governmental and political

⁸ Richard P. Caldarone, Brandice Canes-Wrone, and Tom S. Clark, "Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions," *The Journal of Politics* 71, no. 2 (2009): 564–565, <https://doi.org/10.1017/S002238160909046X>.

⁹ Brandice Canes-Wrone, Tom S. Clark, and Jason P. Kelly, "Judicial Selection and Death Penalty Decisions," *American Political Science Review* 108, no. 1 (2014): 24, <https://doi.org/10.1017/S0003055413000622>.

¹⁰ European Network of Councils for the Judiciary (ENCJ), "Independence and Accountability of the Judiciary and of the Prosecution," last modified on 3 June 2016, https://www.encj.eu/images/stories/pdf/workinggroups/encj_report_ia_2015_2016_adopied_ga.pdf.

¹¹ Theodore Konstadinides, "Judicial Independence and the Rule of Law in the Context of Non-Execution of a European Arrest Warrant," *Common Market Law Review* 56, no. 3 (2019): 26, <https://doi.org/10.54648/cola2019054>. See also Aaron-Andrew P. Bruhl and Ethan J. Leib, "Elected Judges and Statutory Interpretation," *The University of Chicago Law Review* 79, no. 4 (2012): 1250.

¹² Niclas Berggren and Jerg Gutmann, "Securing Personal Freedom Through Institutions: The Role of Electoral Democracy and Judicial Independence," *European Journal of Law and Economics* 49, no. 2 (2020): 168, <https://doi.org/10.1007/s10657-020-09643-9>.

¹³ Zainal Arifin Hoesein, "Lembaga Peradilan dalam Perspektif Pembaruan Hukum," *Jurnal Media Hukum* 20, no. 1 (2013): 25, <https://doi.org/10.18196/jmh.v20i1.1375>.

¹⁴ Mitchel Lasser, *Judicial Dis-Appointments: Judicial Appointments Reform and the Rise of European Judicial Independence* (United Kingdom: Oxford University Press, 2020), 187.

¹⁵ Juan A. Mayoral and Marlene Wind, "Unleashed Dialogue or Captured by Politics? The Impact of Judicial Independence on National Higher Court's Cooperation with the CJEU," *Journal of European Public Policy* 29, no. 9 (2022): 1430, <https://doi.org/10.1080/13501763.2021.1974925>.

¹⁶ C. H. Powell, "Judicial Independence and the Office of the Chief Justice," *Constitutional Court Review* 9, no. 1 (2019): 502, <https://doi.org/10.2989/CCR.2019.0019>.

¹⁷ Muhammad Asrun, "The Crisis of Judicial Independence in Indonesia Under Soeharto Era," *Scientific Research Journal* 3, no. 8 (2015): 7-9.

institutions' interests.¹⁸ Thus, justices must be independent of the pressure and influence of people.¹⁹ In generating decisions, judges/justices must comply with existing laws; they are not influenced by the executive and legislature branches or the people's voice.²⁰ Generally, judicial independence is preserving the separation of power to avoid the interests of other institutions that tend to corrupt the judicial organ's authority unjustly.²¹

The current study re-emphasizes the importance of the independent judicial organ not only within democratic states but all states of the world because the judicial organ's independence plays a fundamental role in society. In giving justice and legal certainty to the disputes that come from society, the judicial branch must possess (1) independency to give court decisions, (2) independent from intervention (from both executive and legislative branches). One of the main threats to realizing a judicial organ is the threat of external power becoming involved in the selection process of justices. This marks the rise of external power capable of influencing the judicial organ, and it may have future political interests toward chosen justices or judges.²² The Universal Declaration on the Independence of Justice stresses that judges and courts shall be independent to ensure that the rule of law is observed and not obstructed.²³

Several works from the literature explain the numerous factors necessary to determine whether the judicial organ is independent, namely, *de jure* and *de facto* aspects.²⁴ *De jure* can be measured from the formal law aspect.²⁵ The formal law aspect means to what extent the Constitution and existing laws protect and guarantee the Justice's roles as independent. On the other hand, *de facto* can be

¹⁸ Agus Nurudin, "Upholding the Impartiality of Judges in Judicial Systems", *Hasanuddin Law Review* 6, no. 1 (2020): 83, <http://dx.doi.org/10.20956/halrev.v6i1.2268>.

¹⁹ Jeffrey M. Sharman, *Judicial Ethics: Independency, Impartiality, and Integrity* (Washington, D.C.: Inter-American Development Bank - Sustainable Development Department State, Governance, and Civil Society Division Judicial Reform Roundtable II, 1996), 87.

²⁰ P. Bárd and Wouter Van Ballegooij, "Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM," *New Journal of European Criminal Law* 9, no. 3 (2018): 358, <https://doi.org/10.1177/2032284418801569>.

²¹ Johannes Chan, "A Storm of Unprecedented Ferocity: The Shrinking Space of the Right to Political Participation, Peaceful Demonstration, and Judicial Independence in Hong Kong," *International Journal of Constitutional Law* 16, no. 2 (2018): 375, <https://doi.org/10.1093/icon/moy053>.

²² Kentaro Fukumoto and Mikitaka Masuyama, "Measuring Judicial Independence Reconsidered: Survival Analysis, Matching, and Average Treatment Effects," *Japanese Journal of Political Science* 16, no. 1 (2015): 34, <https://doi.org/10.1017/S1468109914000371>.

²³ J. Mark Ramseyer and Eric B. Rasmusen, "The Case for Managed Judges: Learning from Japan After the Political Upheaval of 1993," *University of Pennsylvania Law Review* 154, no. 6 (2006): 1895, <https://doi.org/10.2307/40041354>.

²⁴ Julio Ríos-Figueroa and Jeffrey K. Staton, "An Evaluation of Cross National Measures of Judicial Independence," *The Journal of Law, Economics, & Organization* 30, no. 1 (2014): 106-107, <https://doi.org/10.1093/jleo/ews029>.

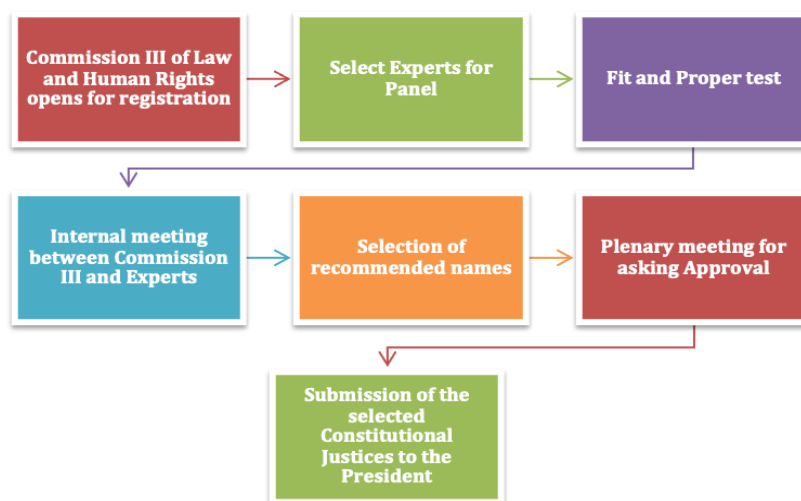
²⁵ James Melton and Tom Ginsburg, "Does De Jure Judicial Independence Really Matter? A Re-Evaluation of Explanations for Judicial Independence," *Journal of Law and Courts* 2, no. 2 (2014): 188.

conceptualized as behaviour and attitude from the judge/justice, whether they abide by the law and cannot be interfered with for any reason.²⁶ The relationship between the two factors mentioned above (de jure and de facto) cannot be separated.²⁷ Essentially, the de jure concept aims to directly control the behaviour of the judges/justices in the Judiciary.²⁸

C. Selection Mechanism of Constitutional Justices in Indonesia

Based on Article 24C of the 1945 Constitution in conjunction with Article 18 paragraph (1) of the Law Number 24 of 2003 on the Constitutional Court, the court must have nine justices. This composition is made by three organs appointing three names to serve for five-year terms. The organs are the House of Representatives, the President, and the Supreme Court.²⁹ Initially, each organ has different stages in the justice selection process. The following figure explains the stages of the selection process in each organ.

Figure 1. Constitutional Justice Selection Stages in the House of Representatives



²⁶ Linda Camp Keith, "Constitutional Provisions for Individual Human Rights: Are They More Than Mere Window Dressing," *Political Research Quarterly* 55, no. 1 (2002): 111–143, <https://doi.org/10.1177/106591290205500105>.

²⁷ Bernd Hayo and Stefan Voigt, "Explaining De Facto Judicial Independence," *International Review of Law and Economics* 27, no. 3 (2007): 284, <https://doi.org/10.1016/j.irl.2007.07.004>.

²⁸ Jerg Gutmann and Stefan Voigt, "Judicial Independence in the EU: A Puzzle," *European Journal of Law and Economics* 49, no. 1 (2020): 88, <https://doi.org/10.1007/s10657-018-9577-8>.

²⁹ Jamaludin Ghafur, "Pengaturan Desain Ideal Seleksi Calon Hakim Mahkamah Konstitusi Republik Indonesia," *Jurnal Majelis* 4 (2018): 50.

In the House of Representatives, Commission III holds the initial stage of the constitutional justice appointment process. It will then establish a panel team of experts while waiting for the prospective candidate's registration.³⁰ The candidates will undergo a fit and proper test by the panel team. The team will bring the result into an internal meeting with the officials of Commission III to discuss recommended names. After the list is shortlisted into three names, it goes into a plenary meeting for approval. In the last stage, the House of Representatives will submit the three selected names to the President to be appointed.³¹ There are two comments on the selection mechanism in the House of Representatives. First, the selection in the House does not use a merit system. It is more political because the House member's final decision is ultimately based on the member's interests, not the assessment tools. In some cases, the House of Representatives put aside the mechanism and directly nominated the candidates.³² In the case of Justice Akil Mochtar³³, the former Chairman of the Constitutional Court, the House of Representatives did not conduct a proper mechanism for him due to his strong political support in the House.³⁴

Another controversial case is the nomination of Justice Aswanto. The House of Representatives also needed to conduct proper confirmation hearings. Therefore, the public assumed that the House had executed the agenda, ignoring the public's right to be involved in the hearing process. The same case happened in the selection of Justice Arief Hidayat for his second appointment. The House of Representatives members ignored any petition from law experts and NGO activists who rejected his nomination due to two cases of violating the code of ethics.³⁵ It affirmed that House of Representatives members' decision-making is not based on a proper candidate assessment, it is a somewhat political decision.³⁶ Furthermore,

³⁰ Fence Wantu (et.al.), "Proses Seleksi Hakim Konstitusi: Problematika dan Model ke Depan," *Jurnal Konstitusi* 18, no. 2 (2021): 246, <https://doi.org/10.31078/jk1820>.

³¹ Indramayu, Jayus, and Indrayanti, "Rekonseptualisasi Seleksi Hakim Konstitusi Sebagai Upaya Mewujudkan Hakim Konstitusi Yang Berkualifikasi," *Lentera Hukum* 4, no. 1 (2017): 8, <https://doi.org/10.19184/ejlh.v4i1.5267>.

³² Constitutional Court of the Republic of Indonesia and Faculty of Law-Universitas Negeri Gorontalo, "Studi Efektivitas Sistem Rekrutmen dan Seleksi Hakim Konstitusi Republik Indonesia," (Research Report of Secretariat General of the Constitutional Court-2017): 53–58.

³³ Abdul Ghoffar, "Mewujudkan Mahkamah Konstitusi Sebagai Peradilan yang Akuntabel dan Terpercaya," *Pandecta Research Law Journal* 13, no. 2 (2018): 77-78, <https://doi.org/10.15294/pandecta.v13i2.16727>.

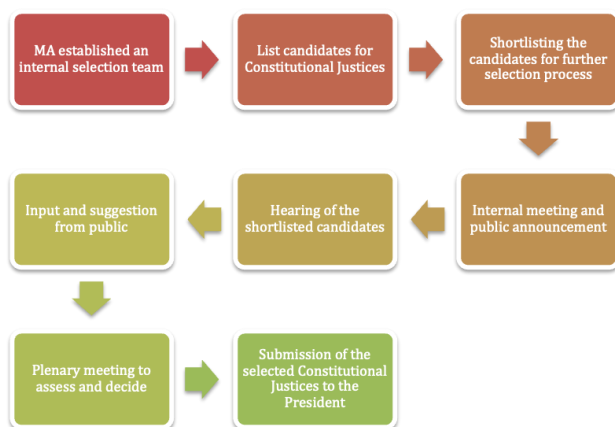
³⁴ Winda Wijayanti and Nuzul Quraini, "Transparansi dan Partisipasi Publik Dalam Rekrutmen Calon Hakim Konstitusi," *Jurnal Konstitusi* 12, no. 4 (2016): 673–674, <https://doi.org/10.31078/jk1241>.

³⁵ Sri Hastuti Puspitasari, "Pelibatan Dewan Perwakilan Rakyat dalam Pengisian Jabatan Hakim Agung dan Hakim Konstitusi," *Jurnal Hukum Ius Quia Iustum* 25, no. 3 (2019): 438-439, <https://doi.org/10.20885/iustum.vol25.iss3.art1>.

³⁶ Interview with Dr. Refly Harun, Constitutional Law Expert and Former Candidate of the Constitutional Justices, May 14, 2019.

the selection mechanism in the House of Representatives is essentially open.³⁷ To some extent, it seems reasonable that the mechanism is very open. However, it appears more embarrassing for the candidates when personal issues are questioned in the hearings. Compared to the selection of Constitutional Justices in Korea, the selection mechanism is essentially open to the public.³⁸

Figure 2. Constitutional Justice Selection Stages in the Supreme Court (MA)



In the Supreme Court, the process begins with establishing an internal selection team. The team then lists some names of prospective justices. After these names are listed, the team shortlists them for further selection and holds an internal meeting. The list of candidates is published on the Indonesian Supreme Court website. The candidates then go through a hearing with internal officials. At this stage, the audience may voice their inputs and suggestions to the selection committee before it goes to the plenary meeting for final assessment and decision. Finally, a list of three selected names is submitted to the President for appointment.

The selection mechanism In the Supreme Court is closed. It differs from the transparent selection in the House of Representatives and the President. The internal selection committee only announces internally on the website of the Supreme Court for registration. To check the candidate's records, the Committee, led by the Chief Justice, asks the Supervisory Body of the Supreme Court. The candidate's interview confirms their understanding of constitutional law,

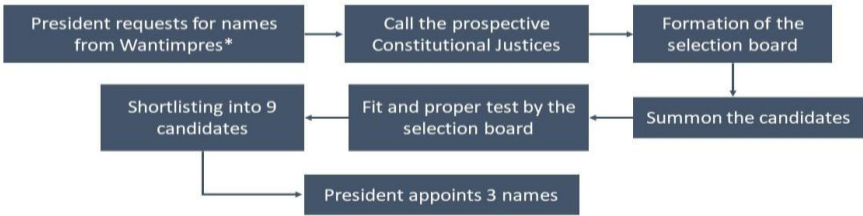
³⁷ Mira Fajriyah, "Refraksi dan Alinasi Pengangkatan Hakim Konstitusi," *Jurnal Konstitusi* 12, no. 2 (2016): 245, <https://doi.org/10.31078/jk1223>.

³⁸ Interview with Prof. Byun, Hae-Cheol, a Professor of Law from the Law School, Hankuk University of Foreign Studies in Hankuk University of Foreign Studies, October 1, 2019.

procedural law, and code of ethics. In decision-making, the Chief Justice is dominant in determining the nominated candidate, although the decision mechanism is essential and collegial. It is important to note that no specific assessment is used to determine the candidate nominated by the Supreme Court. The weakness of the Supreme Court mechanism lies in the absence of public involvement in the selection process. Therefore, it is hard to accept that this closed mechanism is accountable; for instance, in terms of the nomination of Justice Suhartoyo and Justice Manahan MP Sitompul in 2014. The Judicial Commission criticized the nomination as it went with less public participation, which caused the public absence of knowledge regarding the nomination.³⁹

Figure 3. Constitutional Justice Selection Stages by the President

Stages of the Constitutional Justices Selection by President



Wantimpres = Dewan Pertimbangan Presiden (*President’s Advisory Board*)

President will initiate the selection process by requesting names from the President's Advisory Board. Next, the candidates will be contacted to ask about their willingness to be Constitutional Justice. The President will form an entire board for the selection process and summon the candidates. The board will conduct a fit and proper test before it goes into nine shortlisted names. Ultimately, the President will select three names to be appointed as the constitutional justices.

The nomination of Constitutional Justices by the President has ever been questioned in the case of Justice Maria Farida and Justice Patrialis Akbar, who was appointed as Justices without a fit and proper test. Unfortunately, Justice Patrialis Akbar was later arrested by the Eradication Corruption Commission (*Komisi Pemberantasan Korupsi-KPK*). The appointment of constitutional justices without

³⁹ Indramayu, Jayus, and Indrayanti, “Rekonseptualisasi Seleksi Hakim Konstitusi Sebagai Upaya Mewujudkan Hakim Konstitusi yang Berkualifikasi,” 4.

open fit and the proper test has brought about criticism due to the lack of integrity of the constitutional justices cannot be guaranteed to have this experience, in the subsequent appointment, President Susilo Bambang Yudhoyono (SBY) appointed a selection committee for the appointment of the constitutional he nominated. This policy has given credit to the President since he tried to be more transparent in selecting constitutional justices. It is believed that transparency would affect a more accountable selection.

In the new cases in 2023, the Constitutional Court's Ethics Council has issued a guilty verdict for Constitutional Justice Guntur Hamzah and sanctioned a written reprimand for his actions in changing the substance of the Constitutional Court decision Number 103/PUU-XX/2022. Constitutional Court's Ethics Council ruled that Guntur Hamzah had violated the principle of integrity in the Constitutional Justice's Code of Ethics and Conduct. Guntur Hamzah committed the offence on his first day as a Constitutional Justice. The research highlights three issues from the above selection mechanism of constitutional justices. First, if the selection mechanism is not transparent, the appointment of the Constitutional Justices produces unqualified justices in terms of integrity. During the Constitutional Court Justice selection process, there was a political accident due to the lack of transparency and accountability.

As such, a more effective mechanism guaranteeing the integrity of the candidates is needed. From a broader perspective, justice's quality will influence the judiciary's quality in functioning checks and balances mechanisms. Without qualified justices, the judiciary cannot work the concept of separation of power effectively. The separation of powers is a fundamental element of good governance and the rule of law. At the same time, the balance of powers between the judiciary and other branches of government is inherently delicate.⁴⁰

Second, regarding the academic competence test, there is still a question of whether the selection mechanism has produced more competent Constitutional Justices. In truth, there are questions regarding the selection mechanism, particularly in the Supreme Court, which decided to nominate a candidate without a strong background in constitutional law.⁴¹ Third, the selection mechanism distribution among the three state organs has resulted in the Constitutional Justices being nominated by each organ being influenced by the other state organs. From Supreme Court (*Mahkamah Agung-MA*) for example, the Supreme Court

⁴⁰ International Development Law Organization, "Checks and Balances: Independence of Judiciary and Parliaments", accessed on April 13, 2023, <https://www.idlo.int/news/highlights/checks-and-balances-independence-judiciary-and-parliaments>.

⁴¹ Interview with a Justice of the Supreme Court Republic of Indonesia, October 24, 2019. The Justice informed that most of the justices nominated from the Supreme Court do not have strong background in constitutional law. The decision of the Supreme Court was also influenced by the issue of whether the candidates will protect the interest of the Supreme Court or not in the decision.

tends to drive the candidates to have loyalty to the Supreme Court. The nomination of constitutional justices from the House of Representatives and the President is also being suspicious and questioned. Each state organ has an opportunity to disturb the independence and integrity of the constitutional justices.

As explained above, there is no standard for selecting the Justices. Under the President and Supreme Court authority, the selection process does not implement the principle of transparency and accountability. Fortunately, still in the recent nomination, the President first chose a nominating committee to select the Constitutional Court Justice candidates. The Parliament has also conducted the open nomination process, but the Supreme Court is still closed.

D. Lesson Learned from South Korea

In the last 30 years, the Constitutional Court of Korea has expanded and stabilized its role in the Korean Constitutional system. It has become a significant institution, securing South Korea's place among the world's most respected democracies. Of the five designated and well-known Constitutional Courts (Korea, Indonesia, Taiwan, Thailand, and Mongolia) in Asia, the Constitutional Court of Korea is arguably the most important and influential. It deserves scrutiny as a case study in the judicialization of constitutional politics in Asia. Under Korea's current laws, all nine Constitutional Court Justices are the subject of confirmation hearings by the parliament (National Assembly-NA).⁴²

1. Confirmation Hearing

A confirmation hearing is a meeting to gather information to decide whether a high-level governmental position should be given to someone who has been suggested for it. Since 2000, Korea has adopted the US style of confirmation hearings under the context of the Presidential System.⁴³ In Korea, if the Constitution requires the NA's consent for the position, the President of Korea cannot appoint candidates who have not obtained the consent of the Legislative (NA) branch. However, other positions, subject to personnel hearings only under the "Personnel Hearing Act," can be appointed by the President even if the

⁴² The six judges who did not require the consent of the National Assembly are also the subject of confirmation hearings, like the three judges who require consent (more precisely, who are nominated by the National Assembly). This will be explained later in this article.

⁴³ In the US model (because of Article II, Section 2, Clause 2 of the US constitution), if the Senate refuses to give 'consent', the President cannot appoint the official, whereas in the Korean model, in some cases, the President can appoint the official without the consent of the parliament (NA). This is due to the difference between the constitutions and laws of the two countries. In other words, the US Senate votes on candidates for office nominated by the President according to the Federal Constitution and a candidate rejected in the Senate cannot be appointed.

candidate has not obtained the NA's consent. The appointment is under the Constitution. The President holds the authority to exercise without the NA's consent, for example, the six constitutional justices.

However, if the NA's consent is not obtained, it creates a political burden on the President and forces him to consider withdrawing his nomination or the candidate to step down. Therefore, the confirmation hearing in Korea still has functional significance, even concerning that category of candidates. The appointment process of a Constitutional Justice in Indonesia is very similar to that of Korea but different from that of the United States (In the United States, all nine Supreme Court Justices are nominated by the President and confirmed by the United States Senate as stated in the Constitution). Therefore, the Korean model, as described above, is a more direct comparison to Indonesia's system.

In 2000, in its 16th term, the NA introduced the confirmation hearing process first and officially, with an amendment (February 6, 2000) of the NA Act. Previously, there had been a voting process regarding consent, but there had been no designated committee for the hearings process. The appointment of public officials requires the consent of the NA or nomination by the NA according to the Constitution (the Chief Justice of the Supreme Court, the President of the Constitutional Court, the Prime Minister, the auditor, the Supreme Court Justices, 'three constitutional court justices nominated by the NA', members of the Central Election Commission, etc.). Article 65-2 of the NA Act was established, and it made the grounds for establishing a Special Committee for Personnel Hearing.

In addition, separate provisions regarding the organization and operation of the Special Committee for Personnel Hearing and procedures for confirmation hearings were necessary to be legislated. Therefore, as procedural law, the NA established the Personnel Hearing Act soon after that (Act Number 6271, June 23, 2000). Regarding the Constitutional Court Justices, for example, in September 2000, the Special Committee for Personnel Hearing was formed to query Yun Young-Chul as the nominee for President of the Court and two other candidates for justices, Kwon Seong and Kim Hyo-Jong, nominated by the NA.⁴⁴

After that, based on the intense demands of the opposition party and public opinion, the NA expanded the scope of personnel hearings via another amendment of the NA Act (February 4, 2003). In other words, it began to include public officials who did not require the consent of the NA for their appointment, namely the head of the National Intelligence Service, the Prosecutor General and the Commissioner of the National Police Agency (Article 65-2 of the NA Act). On July 28, 2005, the NA revised Article 65- 2 of the NA Act again to include all cabinet members (all justices

⁴⁴ Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea* (South Korea: Constitutional Court, 2018), 76.

of the Constitutional Court and National Election Commission members as the subject of confirmation hearings). This is important to the constitutional justice's selection because since then, three justices to be appointed by the President of the nation and three nominated by the Chief Justice of the Supreme Court are to undergo confirmation hearings. By now, NA has occasionally expanded the scope of personnel hearings.⁴⁵

So, at least two differences between the Korean and Indonesian models can be found. First, although the nomination of the constitutional justices also comes with three state organs (the President, the NA, and the Supreme Court), all confirmation hearings of candidates are conducted in the NA. This is how Korea understands the concept of representativeness: the Parliament (NA) is assumed to represent the people's will. Second, this confirmation hearing process in the NA is essentially open; transparency guarantees accountability.

2. Functions of the Confirmation Hearing

Promote the legitimacy of a democracy which a civil government derives from an agreement among the autonomous constituent institutions, especially the parliament.⁴⁶ Once the parliament holds the confirmation hearing, there is a legitimization process. Next, to put the principle of power separation into practice, is based on the *Trias Politica's* characteristics that distinguish each governmental power, such as the legislative, executive, and judicial. In addition to strengthening the legitimacy, the hearing confirmation through the parliament also ensures the separation of power and balances system.

After that, to ensure the nominee's job suitability and integrity through the confirmation hearing within the Parliament, every member of parliament would hear and check whether the candidate can be a Justice. This step is very important

⁴⁵ Geon-Bo Kwon, *Comparative Legal Analysis on Confirmation Hearing* (South Korea: Korea Legislation Research Institute, 2012), (권건보, 인사청문회제도에 대한 비교법적 고찰, 한국법제연구원, 2012, (In Korean, official report). As briefly mentioned above, the NA Act was amended in 16 February 2000 to newly insert Article 46-3 (regarding Special Committee on Personnel Hearing) and Article 65-2 (regarding hearings), thereby introducing the proceeding of confirmation hearing to Korea. With subsequent amendments in the NA Act, a large number of nominees for office underwent confirmation hearings: candidates for the Prime Minister, for heads of the National Intelligence Service and the National Tax Service, for the Attorney General, for the National Police Agency Commissioner at the request of the President Select (February 24, 2003); candidates for a Constitutional Court Justice, for the National Election Commission's members, for the State Council's Members at the request of the President and the Chief Justice of Supreme Court (July 28, 2005); Army General (December 30, 2006); the President Select's nominee for Members of the State Council (December 14, 2007); Korea Communications Commission's Chairman (February 29, 2008), Fair Trade Commission's Chairman, Financial Services Commission's Chairman, National Human Rights Commission's Chairman, Bank of Korea's Governor (March 21, 2012).

⁴⁶ Fred Dews, "A Primer on Gerrymandering and Political Polarization," last modified on 6 July 2017, <https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/>.

since the justices, especially constitutional justices, play an important role in the development of law and democracy.

Satisfy the public's right to be informed that the confirmation hearing process is open to the public, enabling them to know the selection process and the justice's quality. This fundamental experience can also be a tool to supervise the justices while sitting in their court positions since the public follows the selection process and the last function is to facilitate harmony and cooperation in the organization of state agencies. There could be no doubt that for performing a modern, democratic country smoothly fulfilling people's aspirations, all three organs of the state (legislative, executive, and judicial) must perform their functions in cooperation with each other. One of the manifestations of that goal is the parliamentary election of justices within the confirmation hearing, as the committee, parliament gathers to find the ideal candidates to sit as Justices in the Constitutional Court.

3. Advantages of the Current Korean System

The function of a confirmation hearing has been essential in verifying high-level candidate's qualifications (i.e., ethics, etc.) and job skills. A confirmation hearing guarantees transparency and accountability of the constitutional justice's appointment process where people are involved. Theoretically, judicial independence and power thus place citizens in front and center.⁴⁷ Therefore, public participation is important in judicial appointments to guarantee judicial independence. In this process, the members of the National Assembly can examine the candidate's quality in understanding the Constitutional Court's function. In addition, since the confirmation hearing is open, the public also has a chance to give information on the capacity and integrity of the candidates. In other words, the confirmation hearing can ensure better the qualification of the candidates.

4. Disadvantages of the Current Korean System

However, many problems were revealed during the current confirmation hearing system, such as the problem with the political structure of the ruling party's relationship with the President versus the NA's opposing political party in Korea. Politically driven questions often resulted mainly in attacking or humiliating the candidate. Second, the confirmation hearing system is too short of verifying candidate qualifications. The lack of sanctions to prevent false statements prevents the efficient operation of the personnel hearing system.

⁴⁷ Brandon L. Bartels and Christopher D. Johnston, *Curbing the Court: Why the Public Constrains Judicial Independence* (Cambridge: Cambridge University Press, 2020), 12.

5. Objects of the Confirmation Hearing in Korea

Table 2. Objects of the Confirmation Hearing in Korea

	Committee in Charge	Classification	Offices	Sum
1	Special Committee for Personnel Hearing (SCPH)	The object of the consent of the National Assembly. ⁴⁸ ①	Chief Justice of the Supreme Court (SC) ⁴⁹ (all) Justices of the SC ⁵⁰ President of the Constitutional Court (CC) ⁵¹ Prime Minister ⁵² Chairman of the Board of Audit and Inspection (BAI) ⁵³	17
①	Special Committee for Personnel Hearing (SCPH)	The object of the nomination of the NA. ⁵⁴ ①	(three) Justices of CC (to be nominated by NA) ⁵⁵ (three) Member of the National Election Commission (NEC) selected by the National Assembly ⁵⁶	6
①	Special Committee for Personnel Hearing (SCPH)	Subtotal		23
2	Standing Committees	Neither Object of 'Consent.'	[Chief of Major State Organs] Attorney General (Prosecutor), National Intelligence Service, National Tax Service, Commissioner General (Police)	11

⁴⁸ By the Constitution of South Korea.
⁴⁹ Article 104 of Constitution of South Korea.
⁵⁰ Article 104 of Constitution of South Korea.
⁵¹ Article 111 of Constitution of South Korea.
⁵² Article 86 of Constitution of South Korea.
⁵³ Article 98 of Constitution of South Korea.
⁵⁴ By the Constitution of South Korea.
⁵⁵ Article 111 (3) of Constitution of South Korea.
⁵⁶ Article 114 (2) of Constitution of South Korea.

		or 'Nomination' of the NA ㉞	Joint Chief of Staff (JCS: Military), Korea Communications Commission (KCC) Fair Trade Commission (Anti-trust) National Human Rights Commission Bank of Korea and so, on	
㉞	Standing Committees		Three Justices of CC, by President Three Justices of CC nominated by the Chief Justice of SC	6
㉞	Standing Committees		Three Members of the NEC, by President Three Members of the NEC Nominated by Chief Justice of SC	6
㉞	Standing Committees		All members of the State Council (Cabinet: all Ministers)	18
㉞	Standing Committees		Subtotal	
Total				64

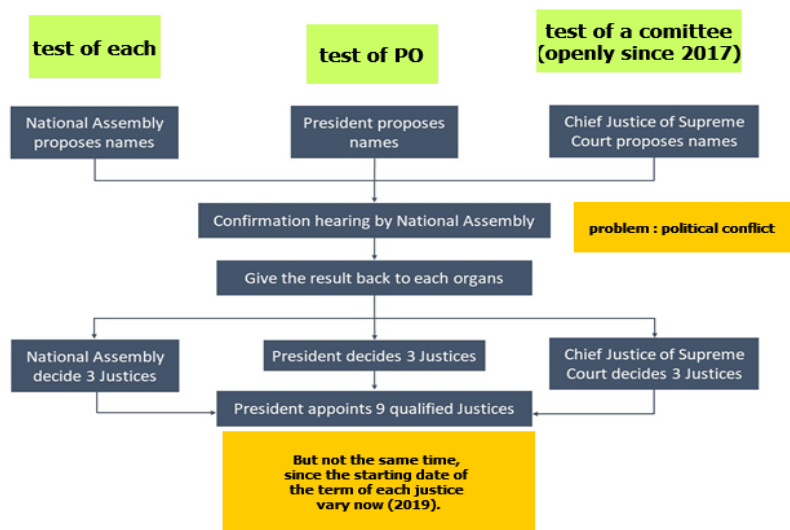
Source: Updated from the Table of Hyunchool Lee (2010) (as of November 2020)⁵⁷

The offices of '⑥' must obtain consent or nomination from the National Assembly (according to the Constitution) after the hearing; they go through a hearing by the Special Committee for Personnel Hearing (SCPH). If they are found ineligible by this committee, they cannot be appointed by the National Assembly and eventually become officials. Some candidates ('⑥') do not need the National Assembly's consent after the hearing - but still shall attend a hearing by the Personnel Hearing

⁵⁷ Hyunchool Le (et.al.), *How to Improve the Confirmation Hearing in the National Assembly* (South Korea: National Assembly Research Service, 2010), (이현출 외, 국회 인사청문제도 개선방안, 국회입법조사처, 2010), 4.

Act (PHA). In this case, the candidates shall attend a hearing conducted by the relevant standing committees of the National Assembly (e.g., the standing committee for Constitutional Court and Supreme Court matters is the Legislation and Judiciary Committee (LJC)). The standing committee later produces a report on the candidate’s eligibility for public office but the President has no legal obligation to comply with the report’s result. Thus, if the result of the report is negative, the President may eventually appoint a candidate despite those results. Alternatively, the President may decide not to appoint a candidate due to the report’s results. In practice, if the candidate’s defect is discovered through the hearing, which is often also heavily dealt with by the media, and NA opposition party, and becomes a significant political burden on the President or ruling party, it usually ends in resignation (stepping down) by the candidate. Therefore, as discussed above, even these non-binding confirmation hearing processes and the Korean system’s report have a measure of influence and effect.

Figure 4. Constitutional Justice Appointment Process in South Korea



6. Future Korean System (Amendment Proposals (Bills) in the Recent National Assembly)

a. Significance

According to the National Assembly's "Bill Information" system, 55 amendments bills to the Personnel Hearing Act proposed by the 20th National Assembly are pending.⁵⁸ The amendment bills currently being proposed focus mainly on: (1) separation of ethics and professional competence test process, (2) extension of personnel hearing period, (3) strengthening demand for witness attendance and data submission, (4) prohibited use of personnel hearing data, and (5) disable the appointment of non-adoption of personnel hearing progress report. These have already been pointed out in the academic world. Especially, first, the Separation of ethics and professional competence test process, second, extending the period of personnel hearing, and third, disabling the appointment of non-adoption of personnel hearing progress report. The third can potentially violate the President's power in the Constitution, so the first and the second are the focus.

However, the discussion of these amendments turned out to be sluggish. This is primarily due to frequent deadlocks in the NA (parliament) caused by political conflict. This is additionally since the opposition parties can enjoy the current system's political benefits, which attracts media attention by publicly attacking the ethics or personal matters regarding the candidate (politically driven questions mainly resulted in attacking/humiliating the candidate).⁵⁹

b. Examples of Legislation for Separation of Ethics and Competence Test

Table 3. Ethics and Competency Test

Bill Number	Date of proposal	Proponents
2005799	2017-02-24	12 members of NA, including Han-Hong Yoon

⁵⁸ National Assembly, "의안정보시스템 (Bill Information)," accessed on December 18, 2021, <http://likms.assembly.go.kr/bill/main.do>.

⁵⁹ Dong-Chun Park, "Many Personnel Hearings, Will the US System Be Addressed?," last modified on May 13, 2019, <https://www.pressian.com/pages/articles/240560> (박동천, 말 많은 인사청문, 미국 제도 도입하면 해결된다?, 프레시안, 13 May 2019) (In Korean).

In the above bill, the confirmation hearing consists of two test steps (ethics and professional competence) with the ethics test step of the confirmation hearing being an essentially closed meeting.

c. Examples of Extension of Hearing Period

Table 4. Hearing Period

Bill Number	Date of proposal	Proponents
2004242	2016-12-08	12 members of the NA including Kyung-Min Shin

They are extending the current 20 days HR hearing period to 30 days (Articles 6 (2) and 9 (1)) and increasing the committee’s power for demand for witness attendance and data submission.

E. A Comparison between Indonesia and South Korea

After describing the selection mechanism of constitutional justices in both countries, some differences and similarities can be highlighted:

1. Differences

Table 5. Differences in the Selection Mechanism

Contents	Indonesia	South Korea
Appointment Mechanism	1. No Confirmation Hearing for the Candidates from Supreme Court or President. The House of Representatives only conducts confirmation hearings.	1. The confirmation hearing is centralized at the National Assembly
	2. Nature of Mechanism <ul style="list-style-type: none">▪ President: open▪ House of Representatives: open▪ Supreme Court = close	2. Nature of Mechanism <ul style="list-style-type: none">▪ President: close▪ National Assembly: open▪ Supreme Court: open since 2017

	<p>3. Assessment:</p> <ul style="list-style-type: none"> ▪ Unstandardized because each organ has its own model of assessment 	<p>3. Assessment:</p> <p>Dual</p> <ol style="list-style-type: none"> 1) Each organ has its model of nomination 2) However, partly standardized because the confirmation hearing process of the NA universally applies to all nine justices.
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Based on the table, three main differences exist in the selection mechanism for constitutional court justices between Indonesia and South Korea. First, not all proposing organs use confirmation hearings in Indonesia. The only proposing organ which uses “confirmation hearing” is the process of the selection of justices from the House of Representatives.⁶⁰ On the other hand, in terms of hearings, South Korea uses a centralized confirmation hearing model for all nine justices, it is a selection mechanism in the National Assembly.

Second, regarding the nature of the mechanism, Indonesia has no standard mechanism among the proposing organs. Therefore, during certain periods, they utilize different natures of the mechanism. The Supreme Court initially did not use an open selection mechanism, and thus the appointment results were questioned regarding capacity. Third, in terms of assessment, Indonesia has no standard of selection assessment among the proposing organs. Hence, the House of Representatives member’s subjective opinion is dominant compared to the objective-based assessment they use for electing candidates. It was evidenced that a house member did not elect some competent candidates despite possessing top-ranked assessments.⁶¹ President SBY, during his term, also appointed Patrialis Akbar without a clear assessment and confirmation hearing. Patrialis Akbar's appointment was merely due to political compensation after being replaced as the Minister of Law and Human Rights. The selection process in the Supreme Court has a similar problem in that the selection is a closed model, which means there is no public involvement. Therefore, the standard is being questioned.

⁶⁰ In term of selection mechanism, Indonesia uses term “fit and proper test” which is like “confirmation hearing in the National Assembly of South Korea. However, it is only hearing for 3 candidates from the House of Representative. On the other hand, there is no fit and proper test for other candidates from the President and the Supreme Court. Therefore, it is called that Indonesia uses decentralized model of selection mechanism.

⁶¹ Interview with Dr. Refly Harun, a Constitutional Law Expert and a former candidate of the Constitutional Justices, May 14, 2019.

2. Similarities

Table 6. Similarities of Selection Mechanism

Contents	Indonesia	South Korea
Involved Parties	<ul style="list-style-type: none"> • President • House of Representatives Supreme Court 	<ul style="list-style-type: none"> • President • National Assembly • Supreme Court
Appointment Mechanism	1. Proposing organs: <ul style="list-style-type: none"> • President : 3 Justices • House of Representatives: 3 Justices • Supreme Court : 3 Justices 	1. Proposing organs: <ul style="list-style-type: none"> • President : 3 Justices • National Assembly : 3 Justices • Supreme Court : 3 Justices
	2. Decision <ul style="list-style-type: none"> • President: final decision lies on the President to choose three justices. • House of Representatives: final decision lies on the plenary meeting result to propose three justices. • MA: final decision is on the consensus of Supreme Court justices to propose three names. 	2. Decision <ul style="list-style-type: none"> • President: final decision lies on the President themself to decide on three justices • NA : final decision lies on the plenary meeting result to propose three justices. • SC : Final decision is on the Chief Justice⁶² themself to propose three names

Indonesia and South Korea have similarities in the proposing organs, which involve (1) President, (2) Parliament, and (3) Supreme Court. These three institutions can nominate three candidates for constitutional court justices. This mechanism holds that no organ will dominate the composition of the Constitutional Court's justice appointments. This is also a part of the check and balances mechanism among the three organs.

⁶² Article 111 Paragraph 3 of "Constitution of South Korea": "Among the Justices ... three appointed from persons nominated by the Chief Justice of the Supreme Court."

F. Conclusion

Based on the discussion, this study concludes several points. First, Indonesia does not have a standardized selection mechanism of evaluation and procedure since it is decentralized. Therefore, it relies on each of the proposing bodies. On the other hand, South Korea has a more standardized selection mechanism since a single entity, the National Assembly, centralizes the selection procedure. The Korean model selection system emphasizes the National Assembly confirmation hearing. It strongly contributes to the selection process because it ensures transparency and accountability. On the other hand, Indonesia has a problem with the transparency and accountability of the selection process because the Supreme Court still uses a closed selection process. Therefore, Indonesia can adopt a centralized confirmation hearing model in South Korea. Since 2000, Korea's confirmation hearing (in other words, personnel hearing) system has demonstrated many good public official verification functions.

There is no doubt about this when checking the Korean system, official reports, news media, and facts. However, several problems have also emerged so far in the process of doing it. Many bills are being proposed to the National Assembly to solve such problems and improve the current system. Second, using this as a lesson, Indonesia needs to seriously consider implementing a confirmation hearing system for justices as practiced in the Korean system. If so, it will reduce the appointment of public officials (the justices) vulnerable to corruption, as in Korea. However, the current Korean system is imperfect, so it is necessary to consider the suggestions proposed for improving it. These suggestions include (1) separation of ethics and professional competence test process, (2) extension of personnel hearing period, (3) strengthening demand for witness attendance and data submission, and (4) prohibited use of personnel hearing data. An uncorrupted court leads to the confidence of people and the rule of law. Citizens' faith and the rule of law are the cornerstones of the democratic entity's future success. Consequently, the comparative consideration of this research to solve the current Indonesian problem has its meaning.

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