

RESEARCH ARTICLE

A COMPARISON OF APPOINTMENT OF  
SUPREME COURT JUSTICES IN INDONESIA  
AND MALAYSIA

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## ABSTRACT

The purpose of the study is to evaluate model of the appointment of Supreme Court justices in Indonesia and Malaysia and to find out a better model of judicial appointment in producing better quality of justices. By using normative and empirical research, it concludes that first, the appointment of Supreme Court justices in Indonesia uses two methods namely career paths and professional paths (non-career paths). This system is built after political reform where one of the agenda is the reform of law enforcement. While the appointment of justices in Malaysia demonstrates the dominance of executive power in the decision to appoint justices who finally appointed by the Yang Dipertuan Agong. Therefore, there is a pressure to make the process of appointing justices more transparent to produce more credible and independent justices. In 2009, the Judicial Appointments Commission was established in Malaysia to ensure unbiased selection of judicial candidates for the consideration of the Prime Minister. Second, the requirements for selecting Supreme Court justices in Indonesia are more detailed and longer process than in Malaysia because the process of selecting Supreme Court justices is done by the Judicial Commission and there is confirmation hearings process in the House of Representative. In fact, the selection process affects the independence, impartiality, and integrity of the Supreme Court justices. Although Malaysia does not have any judicially determined cases on the lack of integrity of Supreme Court Justices, there were allegations of impropriety.

**Keywords:** Judicial Appointment, Qualification of Candidate, Selection Mechanism

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## INTRODUCTION

LOOKING AT the cases in several countries, it shows that the independence of the judiciary is always under threat from political power (executive and legislative) because these two organs must also ensure that their power does not face interference from the judiciary power which may legally counterattack the reigning regime.<sup>1</sup> In the case of Indonesia, for example, it is believed that during Soeharto Era (New Order), the judiciary could not be considered as an independent institution due to the appointment of the Supreme Court justices dominated by the involvement of executive organ from the beginning of nomination of candidates.<sup>2</sup> In addition, the composition of members of the House of Representative (the DPR) was also dominated absolutely by the ruling party. In fact, in post reform and modern democracy era, September 2022, Anti-Corruption Commission of Indonesia arrested one of the Supreme Court Justices due to bribery.<sup>3</sup> It shows that, the justices are not only influenced by the power, but also by money. Therefore, the quality of justices depends on capacity and integrity. Thus, it is actually very difficult to find ideal checks and balances that are effective from judicial institutions on executive and legislative powers if the justices without capacity and integrity. The same happen in Malaysia where the executive organ also dominates the process of appointment of the Supreme Court Justices.<sup>4</sup>

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<sup>1</sup> Stefanus Hendrianto, "The Rise and Fall of Heroic Chief Justices, Constitutional Politics and Judicial Leadership in Indonesia," *Washington International Law Journal* 25, no. 3 (2016): 1–3.

<sup>2</sup> Andi Muhammad Asrun, "Political Effects on Justice in Indonesia: A Case Study of the Suharto Era, 1966–1998," *International Journal of Multicultural and Multireligious Understanding* 7, no. 6 (2020): 274–90, <http://dx.doi.org/10.18415/ijmmu.v7i6.1766>.

<sup>3</sup> Muhammad Aulia, "KPK Arrests Supreme Court Justice," 2022, <https://www.beritasatu.com/pages/widget/beritasatu/>.

<sup>4</sup> Molly Madden, "A Taxonomy on Constitutional Court Appointment Mechanisms in Federal Countries," *Indiana Journal of Constitutional Design* 8, no. 1 (2021): 1–26, <https://www.repository.law.indiana.edu/ijcd/vol8/iss1/1>.

Accordingly, to ensure fair selection of justices for the Prime Minister's consideration, Malaysia formed the Judicial Appointments Commission in 2009.<sup>5</sup> This action taken by Malaysia in order to produce independent and impartial justices. This is an interesting phenomenon to be studied using a comparative study approach on the issue of what are the qualification and how is selection mechanism of the Supreme Court justices in Indonesia and Malaysia. Whether the current qualifications and selection mechanism of the Supreme Court Justices in the countries can guarantee the working of judiciary as an independent institution which may uphold justice and exercise checks and balances mechanism. The specific objective of this research is to conduct a more in-depth study of the strengths and weaknesses of the model for appointment of Supreme Court justices in both countries. The analysis focuses on two issues, namely the qualification of candidates and selection mechanism of the candidates. The research also formulates an ideal model for the appointment of Supreme Court justices to create an independent and impartial judiciary.

Theoretically, the existence of an independent judiciary in a country is very urgent because the judiciary plays a vital role in maintaining the balance of power relations between the executive, legislative, and citizens.<sup>6</sup> This means that if the judiciary can act independently, the consolidation of democracy in the country will run well because the working of the checks and balances mechanism. This research is valuable applied research because it evaluates legal practices that occur and assesses how the legal concept is implemented in the field. Based on the results of the evaluation of the implementation of legal practice, an ideal policy model will be formulated in the appointment of the Supreme Court justices. The recommendation of the ideal model for the appointment of the

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<sup>5</sup> Björn Dressel and Tomoo Inoue, "Politics and the Federal Court of Malaysia, 1960–2018: An Empirical Investigation," *Asian Journal of Law and Society* 9, no. 1 (2022): 26–58, <https://doi.org/doi:10.1017/als.2020.18>.

<sup>6</sup> Saket, "Role of Judiciary for Upholding Constitutionalism," *International Journal of Law Management & Humanities* 4, no. 2 (2021).

Supreme Court Justices will be useful for the development of judicial institutions in both Indonesia and Malaysia as the main partners in conducting the research.

Some published research explains classifying judicial selection institutions and focus on the USA scope.<sup>7</sup> The article discusses the search and classification categories into problems from theoretical arguments, arrangements regarding the merit system, and problems in mixed systems.

In the other research, the selection mechanism can shape the quality of the selected justices, but the scope of this research is only focus on the judge of the USA states. This article also discusses on how mechanisms for selecting political officials determine the types of officials who hold positions of power, but selection procedures do not always yield the desired results. In the context of the judiciary, many anticipated that "merit" selection procedures would facilitate the appointment of women to the bench; however, this expectation has not been met. Applying theories of procedural fairness to judicial selection procedures, this article beliefs that merit selection procedures are more "fair" (relative to unilateral selection procedures) makes them more tolerant of all-male benches. A priori, experimental survey data indicates that respondents perceive merit selection procedures to be more equitable than gubernatorial selection procedures. In turn, when justices are selected based on merit, respondents are less critical of all-male courts. These findings contribute to our understanding of (1) how selection institutions influence the likelihood of gender diversity, (2) how institutional design can have unintended effects, and (3) how procedural fairness can obscure accountability for suboptimal outcomes.<sup>8</sup>

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<sup>7</sup> Greg Goelzhauser, "Classifying Judicial Selection Institutions," *State Politics & Policy Quarterly* 18, no. 2 (2018): 174–92, <https://doi.org/10.1177/1065912920971712>.

<sup>8</sup> Nancy B. Arrington, "Judicial Merit Selection: Beliefs about Fairness and the Undermining of Gender Diversity on the Bench," *Political Research Quarterly* 74, no. 4 (2021): 1152–67, <https://doi.org/10.1177/1065912920971712>.

The other article explains the blended system between merit and governor system are the best feature to elect justices. However, this article only focuses on the context of American Judiciary of the states. This paper uses an objective measure of judicial performance to evaluate justices by their means of selection. Finally, this paper concluded that elected justices have a lower reversal rate than merit-selected justices. The findings showed that the conventional wisdom in the state courts literature in favour of merit selection and against judicial elections and encourage further work on the effects of justices' means of selection beyond state supreme courts to include state appellate and trial courts.<sup>9</sup>

In the context of Indonesian, some published articles also explain, for instance, stating that the recruitment of Supreme Court justices by the Judicial Commission is not only governed by the Judicial Commission's regulations, but also by the Constitutional Court's decision No. 53/PUU-XIV/2016, which allows the Supreme Court to determine the proportion of non-career justices. Thus, there are multiple ideal patterns in the recruitment process for Supreme Court justices in Indonesia, specifically, the recruitment process follows the pattern of Candidates for Civil Servants while still being guided by the needs of the Supreme Court as the user of the Supreme Court Justices.<sup>10</sup>

In other articles, the paper discusses the recruitment of Supreme Court justices from non-career mechanism.<sup>11</sup> The article focuses on the debate of Constitutional Court decision to recruit the Supreme Court justices from career and non-career justices. The Judicial Commission did not consider the Constitutional Court decision to select the Supreme Court justices since the Judicial

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<sup>9</sup> Mona Vakilifathi and Thad Kousser, "Does Judicial Selection Affect Judicial Performance? Evidence from a Natural Experiment," *Forum-A Journal of Applied Research in Contemporary Politics* 18, no. 1 (2020): 25–50, <https://escholarship.org/content/qt8231p477/qt8231p477.pdf>.

<sup>10</sup> Nurhalimatuz Zahro, "Pola Ideal Rekrutmen Hakim Agung Oleh Komisi Yudisial Ke Depan," *JURNAL USM LAW REVIEW* 4, no. 1 (2021): 82–104, <http://dx.doi.org/10.26623/julr.v4i1.3097>.

<sup>11</sup> Tabah Sulisty, "Eksistensi Jalur Non Karier Dalam Seleksi Hakim Agung," *Jurnal Yudisial* 14, no. 2 (2022): 139–61, <http://dx.doi.org/10.29123/jy.v14i2.478>.

Commission is not tied to the Constitutional Court decision, therefore, they still open for everyone who is interested to be the Supreme Court justices.

Therefore, our articles have significant differences to the other articles, for instance, the articles compare the model of recruitment of Indonesia and Malaysia to find the best formula to recruit the most qualified Supreme Court Justices. The article took a difference angle in terms of research method by using empirical method instead of normative to obtain the exact and accuracy of data to this paper.

The type of this research is normative-empirical legal research which use a statutory, comparative and case approach. The method of collecting data in the research be through library research by literature study and interview people related to the issues (respondents). The research used primary data for the empirical which directly obtained from first-hand. The primary data conducted through interviews with respondent such as Commissioner of the Judicial Commission of the Republic of Indonesia, Former Commissioner of the Judicial Commission of the Republic of Indonesia, Staff of the Judicial Commission of the Republic of Indonesia, the Head and the Member of Research and Development Centre for Law and Justices of the Supreme Court of the Republic of Indonesia. In addition, the research also interview some expert to deepen the analysis. They are Faridah Jalil, Professor of Law, Universiti Kebangsaan Malaysia and Dian Rosita, Lecturer of Jentera, College of Law Jakarta. The data were analysed systematically through a qualitative juridical approach.

## INDEPENDENT AND IMPARTIAL JUDICIARY

The judiciary is an important factor in improving governance practices, especially for those who believe that it is part of the rights of the people, which is regulated by the government.<sup>12</sup> The essence of

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<sup>12</sup> Anwar Usman, *Independensi Kekuasaan Kehakiman: Bentuk-Bentuk Dan Relevansinya Bagi Penegak Hukum Dan Keadilan di Indonesia* (Jakarta: Rajawali Pers, 2020), 34.



the judiciary is that justices play a central role in the judicial process so that only good justices can decide cases that reflect a sense of community justice, that is, in accordance with the law.<sup>13</sup> Judges are the last hope of *justiabelen* (seekers of justice) and therefore the position and quality of the judiciary is important.<sup>14</sup> Thus, they must digest the value contained in legal texts as popularized by Ronald Dworkin (moral reading of law) to find out decisions which upholding justice.<sup>15</sup> The International Convention on Civil and Political Rights (ICCPR) requires the existence of a judiciary that is independent, impartial, and competent in guaranteeing the civil and political rights of citizens.<sup>16</sup> Judicial institutions must be independent in carrying out their obligations in order to ensure the justices are able to act fairly and independently in carrying out their obligations in order to guarantee freedom and individual rights from the threat of tyranny of power.<sup>17</sup> For society, having an impartial judiciary is very crucial since it is the hope for the hopeless and voiceless.<sup>18</sup>

The purpose of judicial independence coincides with the purpose of the rule of law, which gave rise to judicial power, because the rule of law is distinguished by the existence of an institution of judicial power. Affirmed that the concept of a state's judicial power is an independent judicial power.<sup>19</sup> Judicial independence is a result of

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<sup>13</sup> Rifqi Sjarief Assegaf, "Hanya Hakim Yang Bersih Dan Kompeten Yang Layak Adili Koruptor!," *Indonesian Journal of Criminology* 2, no. 1 (2002), <https://media.neliti.com/media/publications/4215-ID-hanya-hakim-yang-bersih-dan-kompeten-yang-layak-adili-koruptor.pdf>.

<sup>14</sup> Lydia Brashear Tiede, "Judicial Independence: Often Cited, Rarely Understood," *Journal of Contemporary Legal Issues* 15 (2006).

<sup>15</sup> Feri Amsari, "Satjipto Rahardjo Dalam Jagat Ketertiban Hukum Progresif," *Jurnal Konstitusi* 6, no. 2 (2009): 165–85.

<sup>16</sup> Farid Suffian Shuaib, "Malaysian Judicial Appointment Process: An Overview of Reform," *Journal of Applied Sciences Research* 7, no. 13 (2011): 2273–78.

<sup>17</sup> Graham Gee and Erika Rackley, *Debating Judicial Appointments in an Age of Diversity* (London: Routledge, Taylor & Francis Group, 2018), 31.

<sup>18</sup> *Ibid.*

<sup>19</sup> David Boies, "Judicial Independence and the Rule of Law," *Washington University Journal of Law & Policy* 22 (2006): 56–57, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/wajlp22&div=7&id=&page=>.

the rule of law, specifically the separation of powers.<sup>20</sup> Montesquieu's principle of independent separation of power stipulates that all government institutions, including the judiciary, are free from intervention by other institutions.<sup>21</sup> Because if the institution of judicial power is joined with the institution of legislative power, then the legislative body would exercise social control and produce laws that do not adhere to the legal ideals of society, and if the institution of judicial power is joined with the institution of executive power, then there will be arbitrary and repressive action.

Immanuel Kant argued that justice is a fundamental right of human morality, and that justice can only be obtained from an institution-free power.<sup>22</sup> Additionally, Mia Swart reaffirms that the only independent judicial power is the institutionally independent judicial power and the individual justices.<sup>23</sup>

The Montreal Universal Declaration on the Independence of Justice (1983) declares that "A judge must be free, and it is his duty to decide the case faced impartially, based on his assessment of the facts and his understanding of the law without limitation, influence, persuasion, pressure, threats or direct intervention, from any party or for any reason."<sup>24</sup> The UN Basic Principles of the Independence of Judiciary (1985) provides an interpretation of the independence of the judiciary that "the judicial power must decide the cases it faces impartially, based on facts and according to law, without limitation,

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<sup>20</sup> Anashri Pillay, "Protecting Judicial Independence through Appointments Process: A Review of the Indian and South African Experiences," *Indian Law Review* 1, no. 3 (2018): 283–311, <https://doi.org/10.1080/24730580.2018.1443692>.

<sup>21</sup> Felix Petersen, "Montesquieu and the Concept of the Non-Arbitrary State," *The European Legacy*, 2022, 1–36.

<sup>22</sup> Paul Guyer, "Principles of Justice, Primary Goods and Categories of Right: Rawls and Kant," *Kantian Review* 23, no. 4 (2018): 581–613, <https://doi.org/10.1017/S1369415418000419>.

<sup>23</sup> Mia Swart, *Independence of the Judiciary* (Oxford: Oxford University Press, 2019), <https://doi.org/10.1093/law-mpeccol/e339.013.339>.

<sup>24</sup> Mohammad Saiful Islam, "Independent Judiciary: Nature and Facets from the International Context," *International Journal of Ethics in Social Sciences* 6, no. 2 (2018): 15–32, <https://papers.ssrn.com/abstract=3411510>.

influence, persuasion, pressure, threats, or direct intervention. or indirectly, from any party or for any reason."

The Bangalore Principles of Judicial Conduct (2002) provides an interpretation of the independence of the judiciary that; "The independence of the judiciary is a matter which is obliged to uphold the rule of law and a fundamental guarantee for an honest trial. A judge must defend and demonstrate the independence of the judicial power both individually and institutionally."<sup>25</sup> To embody the independence and impartiality, the judiciary, first, must part of the checks and balances circle.<sup>26</sup> Here, Supreme Court has already considered to select the Justices and supervise the Court by the Judicial Commission as a third-independence party.

In its development, the judiciary and justices must meet at least several requirements: independence, impartiality, and integrity. *First*, the independence of the Supreme Court Justices and the constitution serves as a basic prerequisite for the realization of the ideals of the rule of law, and also a guarantee for the upholding of law and justice.<sup>27</sup> This principle is deeply embedded and must be reflected in the process of examining and making decisions on every case and is closely related to the independence of the Supreme Court as an authoritative, dignified and trustworthy judicial institution. The independence of justices and courts is manifested in the independence of justices<sup>28</sup>, both individually and as an institution from various influences, originating from outside the judge in the form of interventions that affect directly or indirectly in the form of persuasion, pressure, coercion, threats, or actions due to certain political or economic interests of the government or political power in power, certain groups or groups, with rewards or promises of

<sup>25</sup> Mitchel Lasser, *Judicial Dis-Appointments* (Oxford: Oxford University Press, 2020), 187.

<sup>26</sup> Imam Anshori, *Konsep Pengawasan Kehakiman: Upaya Memperkuat Kewenangan Konstitusional Komisi Yudisial Dalam Pengawasan Peradilan* (Malang: Setara Press, 2014), 23–24.

<sup>27</sup> Komisi Yudisial RI, *Meluruskan Arah Manajemen Kekuasaan Kehakiman* (Jakarta: Komisi Yudisial RI, 2018), 67.

<sup>28</sup> Petra 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): 353–65, <https://doi.org/10.1177/20322844188015>.

rewards in the form of office gains, economic benefits, or other forms.<sup>29</sup> Those type could called as the Institutional-type Definition of Judicial Independence that tends to ensure the strengthen the institution, and Performance-based Definition of Judicial Independence talks about justices' behaviour.<sup>30</sup> Judicial independence is an important factor of legal effectiveness and the reason of being an advanced world.<sup>31</sup> If it specifically addresses which type is more important, then the answer is justices' behavior because the Judge itself is the image of the institution, and it is also the factor to affect judicial independence.<sup>32</sup> Institution is just a place and tool, nevertheless the justices is the actor who run the court.

*Second*, the impartiality includes a neutral attitude<sup>33</sup>, accompanied by a deep appreciation of the importance of a balance between the interests of the case. This principle is inherent and must be reflected in the stages of the case examination process to the decision-making stage, so that the Supreme decisions can be truly accepted as a fair legal solution for all litigants and by the public.

*Third*, integrity is an inner attitude that reflects the wholeness and balance of the personality of each constitutional judge as an individual and as a state official in carrying out his / her duties.<sup>34</sup> The integrity of the personality includes being honest, loyal, and sincere

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<sup>29</sup> Ikhsan Azhar, "Inkonsistensi Penerapan Prinsip Independensi Kekuasaan Kehakiman Dalam Pelaksanaan Seleksi Calon Hakim," *Veritas et Justitia* 4, no. 2 (2018): 426, <https://doi.org/10.25123/vej.v4i2.3070>.

<sup>30</sup> Brian K. Landsberg, "The Role of Judicial Independence," *Pacific McGeorge Global Business & Development Law Journal* 19, no. 2 (2006): 331–32, <https://scholarlycommons.pacific.edu/globe/vol19/iss2/2>.

<sup>31</sup> Daniel M. Klerman, "Legal Infrastructure, Judicial Independence, and Economic Development," *Pacific McGeorge Global Business & Development Law Journal* 19 (2006): 428, <https://heinonline.org/HOL/Page?handle=hein.journals/tranl19&id=431&div=&collection=>

<sup>32</sup> Terri Peretti, "A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence," *Ohio State Law Journal* 64 (2003): 325.

<sup>33</sup> Danilo Vuković and Marko Mrakovčić, "Legitimacy, Independence and Impartiality: How Do Serbian and Croatian Legal Professionals Assess Their Judiciaries?," *Europe-Asia Studies*, 2022, 1–23, <https://doi.org/10.1080/09668136.2021.2019195>.

<sup>34</sup> Nuria Siswi Enggarani, "Independensi Peradilan Dan Negara Hukum," *Law and Justice* 3, no. 2 (2019): 328.

in carrying out his professional duties, accompanied by the inner toughness to ward off and reject all persuasion, temptations for position, wealth, popularity, or other temptations.<sup>35</sup> Meanwhile, personality balance includes spiritual and physical balance, or mental and physical, as well as the balance between spiritual intelligence, emotional intelligence, and intellectual intelligence in carrying out their duties.

Former Justice of US Supreme Court argued that political affiliations, religious consideration, race, judicial experience should not significantly be considered in appointment of the Justices. It tends to choose a philosopher, historian, and most honoured.<sup>36</sup> Thus, there are several legal culture differences, that perhaps, Asian context on the Judiciary is not liberal as what US does and the maturity of people on integrity. That Indonesia and Malaysia still need several basic requirements to ensure the integrity and independence of the Justices.

## QUALIFICATION AND SELECTION MECHANISM OF THE SUPREME COURT JUSTICE IN INDONESIA

The position of judge, on the one hand, is very noble. Despite that, on the other hand, it can be degrading because of the many temptations that may drag them to the bottom. As it is well known, the position of Judge can be said to be very close to worldly temptations. For example, in the hands of a judge, a person's fate and the future may be determined. People who were once rich and generous in their neighbourhoods can suddenly fall from grace when they go to prison as a result of the judge's decision. Therefore, it has become a general view that the person dealing with the Court will do

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<sup>35</sup> Joe McIntyre, *Principles of Judicial Integrity and Accountability* (Singapore: Springer, 2019).

<sup>36</sup> Henry J. Abraham, *Justices, Presidents, and Senators: A History of the US Supreme Court Appointments from Washington to Bush II* (Maryland: Rowman & Littlefield Publishers, 2007), 40.

everything possible (read justifies all means) to bring the judge's decision in his favour.<sup>37</sup>

## I. Qualifications of Candidates

Supreme Court justices act as the holders of the blade of justice wherein their hands the justice can be realized or be destroyed.<sup>38</sup> Besides, justices are law and justice enforcers in the midst of distrust of many Indonesian people towards the performance of judicial power. The protracted cases and overbearing dispute resolution become obstacles for the judicial authorities to position themselves as the agents of change,<sup>39</sup> and it is further exacerbated by the existence of rooted and systemic judicial corruption (judicial mafia) played by many actors, one of whom is the judge.<sup>40</sup>

In case of Indonesia, to correct various problems with the recruitment system and the low integrity of several justices, a review of the requirements for justices and the selection system is needed. The requirements for Supreme Court Justices are contained in Article 24A Paragraph (2) of the 1945 Constitution states that "Supreme Court justices must have integrity and impeccable personality, be fair, professional, and have experience in the field of law."

Judicial Commission Regulation Number 2 of 2016 on Supreme Court justices Selection, the selection is divided into 2 (two) background, career-judge and non-career judge. There are several requirements related to independence, impartiality, and integrity for the career-judge can be explained as follows:

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<sup>37</sup> Taufiqurrohman Syahuri, "Problematika Tugas Konstitusional Komisi Yudisial," *Jurnal Konstitusi* 7, no. 4 (2016): 49, <https://doi.org/10.31078/jk743>.

<sup>38</sup> Rizqa Ananda Hanapi, "Rekonstruksi Mekanisme Rekrutmen Hakim Dalam Rangka Penguatan Lembaga Peradilan Di Indonesia," *Jurnal Legislatif* 2, no. 2 (2019): 72, <https://doi.org/10.20956/JL.V2I2.10225>.

<sup>39</sup> Puguh Windrawan, "Pergeseran Kekuasaan Tipologi Ketiga; Fenomena Kekuasaan Ke Arah Konstitusional Heavy," *Jurnal Konstitusi* 9, no. 4 (2016): 625, <https://doi.org/10.31078/jk942>.

<sup>40</sup> Chatamarrasjid Ais, "Korupsi Di Kalangan Penegak Hukum Dan Seleksi Hakim Sebuah Pendekatan Sejarah," *ADIL: Jurnal Hukum* 2, no. 3 (2011): 269, <https://doi.org/10.33476/ajl.v2i3.842>.

- a. Indonesian. The candidate must be from Indonesian citizen to sit on the Supreme Court bench;
- b. Fully submitted to God Almighty. The requirement to be obedient to God Almighty for Supreme Court is a multi-faceted requirement in the state of Indonesia as a religious nation-state which in practice does not separate values, principles, norms/rules, and attitudes that are not rooted in religion and the existence of the state. Being obedient means carrying out the teachings of religion as a true, Pancasila human being. The precepts of the One Absolute God in relation to legal order implies that laws and regulations must contain the values contained in religion as the material values, and all positive laws must be measured according to the rules that come from God;
- c. Minimum master's degree in law to apply for being a supreme court judge, or another degree that relevant with law field;
- d. At least 45 years old;
- e. Mentally and spiritually healthy;
- f. Having 20 years' experience in legal profession and 3 years' experience of being high court judge; and
- g. Never been sentenced to a temporary suspension for violating the code of ethics and/or the judge's code of conduct.

Besides having the requirements for the internal requirements, the Judicial Commission also open for the external candidate or non-career for being a Supreme Court Justices, as follows:

- a. Indonesian. The candidate must be from Indonesian citizen to sit on the Supreme Court bench;
- b. Fully submitted to God Almighty. The requirement to be obedient to God Almighty for Supreme Court is a multi-faceted requirement in the state of Indonesia as a religious nation-state which in practice does not separate values, principles, norms/rules and attitudes that are not rooted in religion and the existence of the state. Being obedient means carrying out the teachings of religion as a true, Pancasila human being. The

precepts of the One Absolute God in relation to legal order implies that laws and regulations must contain the values contained in religion as the material values, and all positive laws must be measured according to the rules that come from God;

- c. At least 45 years old;
- d. Mentally and spiritually healthy;
- e. Having Experience in the Legal Profession and/or legal academics for at least 20 (twenty) years;
- f. Have a doctoral and master's degree in the field of law on the basis of a Bachelor of Law or other scholars who have expertise in the field of law;
- g. Have never been sentenced to imprisonment based on a court decision that has obtained permanent legal force for committing a criminal offense that is threatened with imprisonment of 5 (five) years or more; and
- h. Have never been sanctioned for disciplinary violations.

It should also be noted that the terms Career and Non-career Judges are only known during the nomination process for Supreme Court Justices. After the Supreme Court Justice Candidate is appointed as a Supreme Court Justice, there is no longer a difference in position between the Supreme Court Judges who come from within the Judicial Agency (career judge path), and those who come from outside the Judicial Agency environment (non-judicial path).<sup>41</sup>

Observing the requirements of being the Supreme Court in Indonesia, it may be highlighted that the requirements are pretty much regulated which become a good standard to select justices. According to Head of Research and Development, the Supreme Court, Andi Akram<sup>42</sup>, firstly, regarding capacity of candidate, there is

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<sup>41</sup> Komisi Yudisial RI, *Mencari Sosok Ideal Hakim Agung Indonesia* (Jakarta: Biro Rekrutmen, Advokasi dan Peningkatan Kapasitas Hakim Komisi Yudisial RI, 2017), 13.

<sup>42</sup> Interview with Dr. H. Andi Akram, S.H., M.H. Kepala Pusat Penelitian dan Pengembangan Mahkamah Agung RI (the Head of Research and Development Center for Law and Justices of the Supreme Court of the Republic of Indonesia), November 4, 2021.



a better trend of qualification of justices where most candidate have doctoral degree (show the table of appointed justices in the last few years) and the use of chamber system. Although there are no specific requirements for justices from career to have doctoral degree, in fact, most candidates are doctoral degree. Siti Nurjannah<sup>43</sup>, the member of Judicial Commission, states that having doctoral degree would influence the confidence of the justices in handling cases.

Budi Suhariyanto<sup>44</sup>, researcher of the Research and Development, the Supreme Court highlights that after the political reform, the Supreme Court uses chamber system which means the justices will be put in the chamber which is in line with their expertise or specialization. For example, if the justices have educational or professional background in criminal law/cases, they will be put in Criminal Chamber. This model is expected to produce more qualified decision of justices. Some scholars' express expectations that judicial selection institutions can generate the quality and characteristics of justices selected to the bench.

Judicial power can be justified as independent if it meets 3 (three) following criteria, namely institutionally independent, independent of the judicial process, and independent of justices.<sup>45</sup> In the context of judicial power in Indonesia, the benchmark for the independence of judicial power from an institutional perspective is independent. Referring to the norms of Article 24 (1) of the 1945 Constitution, which affirms the independence of judicial power. In addition, it is reaffirmed in Article 3 of Law Number 48 of 2009 concerning Judicial Power which reiterates the independence of judicial power.

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<sup>43</sup> Interview with Dr. Hj. Siti Nurdjanah, S.H., M.H, Anggota Komisi Yudisial dan Ketua Bidang Rekrutmen Hakim, Komisi Yudisial RI (Member of the Judicial Commission and Head of Judge Recruitment, Judicial Commission of the Republic Indonesia), November 5, 2021.

<sup>44</sup> Interview with Dr. Budi Suhariyanto, S.H., M.H, Ahli Peneliti Madya Pusat Penelitian dan Pengembangan Hukum dan Peradilan Mahkamah Agung RI (Associate Research Expert of Research and Development Center for Law and Justices of the Supreme Court of the Republic Indonesia), November 4, 2021.

<sup>45</sup> John A. Ferejohn and Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint," *New York University Law Review* 77 (2002): 1007.

The independence benchmark is based on several parameters, including the fact that the judicial power in Indonesia is no longer dependent on other institutions, i.e., the institutions of the judicial power in Indonesia can manage and administer their institutions independently. The next criterion is that the judiciary in Indonesia is distinct from other institutions and has no hierarchical ties to other authorities (legislative and executive). Therefore, Indonesia's judiciary is institutionally independent.

In addition, the next criterion is an independent judicial process that is free from external interference during both the judicial process and the decision-making and implementation processes. Essentially, every institution has the capacity to receive intervention from other institutions. Nevertheless, it must be determined whether the intervention can affect the judicial process and its decisions. Meanwhile, existing laws ensure the independence of Indonesia's judicial system. In addition, it adheres to the principles of equality before the law, impartiality, *audi et alteram partem*, and a free and fair trial, as outlined by the procedural law governing the judicial process.

The final criterion for evaluating the independence of the judiciary is the quality of the justices themselves. The independence of justices is measured by two factors: their honesty and fairness, and their refusal to pick and choose cases based on their personal preferences. Regarding honesty and fairness, justices must possess a character that adheres to applicable legal standards and enables them to maintain their judicial dignity. Because if the judge does not follow the rules in carrying out his responsibilities and authorities, he has violated the principle of justice, which is the *raison d'être* of the law itself. Moreover, justices must be objective when reviewing, deciding, and adjudicating cases. Because justices are objective in examining, deciding, and adjudicating, they must always base their examinations, decisions, and rulings on the law and never on the subjectivity of the case, which could lead to an unjust resolution.

Therefore, the fundamental of the problems is not the institution or the judicial system, but rather the individual and the quality of the judges. To enforce the law and establish justice, the

judicial power must be institutionally autonomous, as must the judicial process and individual judges. Thus, the procedure for selecting justices is essential to ensure that they are competent. Hence, criticizing the current recruitment process is essential to find the best formula to obtain the best and qualified justices to strengthen role of the judicial power in implementing rule of law.

## II. Selection Process

The requirements are pretty much regulated which become a good standard to select justices. However, those requirements can be applicable and produce better justices if the selection mechanism and method of verification of candidate are qualified, transparent, and accountable. The issue of appointing Supreme Court Justices, in this case, is very important to continue to be evaluated because the judges in the organs are judges at the highest level in the judicial system. Appointments of justices are broadly defined as the way in which justices are recruited, whether through the career system or professional system, or it can also be a combination of the two models.<sup>46</sup> The appointment of Supreme Court Justices in Indonesia is through the career path and the professional path (non-career). This system was developed after political reform, which one of the agendas of law reform. The keyway out of the selection is in the process of tracking the background and competency of the candidate. In addition, the process of the selection must be transparent and accountable.<sup>47</sup>

The selection mechanism of Supreme Court Justices involved an external and independent organ, the Judicial Commission. The emergence of the Judicial Commission is part of the result of judicial reform agenda after the amendment of the 1945 Constitution. The

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<sup>46</sup> Samuel Spáč, "Recruiting of European Judges in the Age of Judicial Self-Government," *German Law Journal* 19, no. 7 (2018): 2077–2104, <https://doi.org/10.1017/S2071832200023336>.

<sup>47</sup> Gee and Rackley, *Debating Judicial Appointments in an Age of Diversity*, (London: Routledge, 2018), 85.

previous selection mechanism is much dominated by the executive power since the justices proposed by the executive power and therefore the justices become part of the executive control which resulted the failure of the judiciary to exercise checks and balances mechanism well. Practically, in the era of Soeharto regime, the judiciary is considered as more the attribute of the regime rather than functioning as the checks and balances mechanism.<sup>48</sup> In other words, judicial organ in Soeharto regime is not independent due to interference the executive organ.

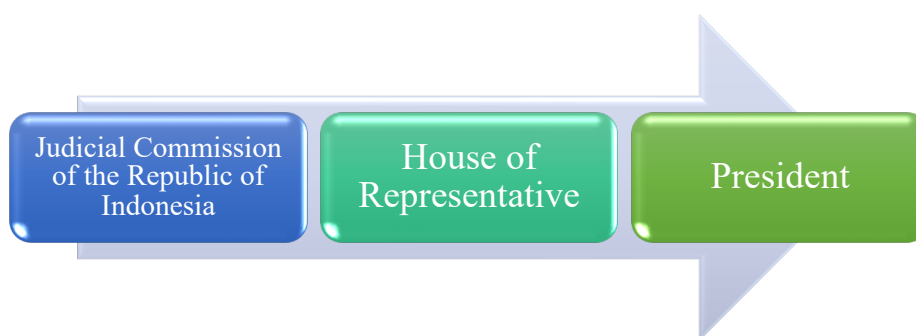


Figure 1 Selection process of the Supreme Court Justices in Indonesia

Involving the Judicial Commission in the process of selection has made a better process of selection of justices of the Supreme Court. Dian Rosita argues that this is because there are checks and balances mechanism between the Judicial Commission and the DPR exercised in the process of selection.<sup>49</sup> If the Judicial Commission is qualified, it will nominate a more qualified justice. If the nominees are qualified, whatever the result in the DPR, there will be good candidates. Aidul Fitriadi, a former commissioner of the Judicial Commission states that the selection of justices in the Judicial Commission and the DPR is open and accordingly it is better than the previous mechanism

<sup>48</sup> Farid Wajdi and Muhammad Ilham Hasanuddin, *Pengawasan Hakim Dan Penegakan Kode Etik Di Komisi Yudisial* (Jakarta: Sinar Grafika, 2022), 7–8.

<sup>49</sup> Conversation with Dr. Dian Rosita, Lecturer of Jentera, College of Law, September 23, 2020.

before the political reform.<sup>50</sup> The new model of Supreme Court Justices selection has ended the involvement of executive organ in the process of selection.



Figure 2 Process of Recruitment of Supreme Court Justice by the Judicial Commission

In selecting Supreme Court Justices, which is held by the Judicial Commission, every process is divided into some stages. Within administrative process, the Judicial Commission will receive a letter of vacancy, arrange the schedule for selection, verify the application, and announce the admitted candidate. Administrative Selection is intended to assess the completeness and suitability of the administrative files of candidates for Supreme Court Justices based on predetermined administrative requirements. Administrative Selection is carried out through verification and research of administrative requirements for Supreme Court Justice Candidates. The results of the research Administrative Requirements are decided through a Plenary Meeting, which is a meeting attended by Members of the Judicial Commission which is a tool for the Judicial Commission to take decisions related to the Selection of Supreme Court Justice Candidates. The decision to pass the Administrative Selection is announced to the Public within a period of no more than

<sup>50</sup> Interview with Prof. Aidul Fitriadi, Chairman of the Judicial Commission of the Republic of Indonesia 2016-2018, September 18, 2020.

15 (fifteen) days from the end of the submission period for supreme court justice candidates, supreme court justice candidates who are declared to have passed the Administrative Selection are entitled to take part in the Quality Selection in the Due Diligence. The decision to pass the Administrative Selection cannot be contested. The Judicial Commission shall announce requests for information or Public Opinion against Candidates for Supreme Court Justices who are declared to have passed the Selection. The announcement of the request for Information or Public Opinion is carried out in conjunction with the announcement of the Administrative Selection within a period of 30 (thirty) days from the time it is announced.

After that, the candidates will undergo the quality process which is arranged by the committee. The quality process shall be carried out no later than 20 (twenty) days after the announcement of the Administrative Selection. In carrying out the quality process, the Judicial Commission may form a Technical Team consisting of a Quality Selection Technical Team, a Health Examiner Technical Team, and a Personality and Competency Assessment Technical Team. The Technical Team is tasked with assisting the implementation of the Supreme Court Candidate Selection in compiling instruments, testing and / or assessing the results of the Feasibility Test based on the Competency Standards of Supreme Court Justice Candidates according to their respective expertise. Quality process is carried out to measure and assess the level of scientific capacity and expertise of Supreme Court Justice Candidates based on the Competency Standards of Supreme Court Justice Candidates.

The quality process is including thematic paper presentation, legal knowledge, focus group discussion, medical check-up, ensure the track record of the candidate by way of the empirical data collection and validate the collected data through the designated persons, and the last process within quality process in an interview with the Commissioners of the Judicial Commission. The interview process conducted by the Commissioners of Judicial Commission is to ensure the quality of candidates based on the competence collected from the previous process and confront between the collected data

and result to the candidate.<sup>51</sup> After that, the Judicial Commission announces the result of second stages.

The last process is hearing process that will be conducted by the Parliament. After the Judicial Commission has some nominees that passed the administrative and quality process, those names will be brought to the Parliament to the last step before the President inaugurates the candidates. The parliament will conduct fit and proper test to the candidates, and after that they will decide and vote for the selected candidates.

Observing the process of selection made by the Judicial Commission, it may highlight that the formulation of selection mechanism is quite good in terms of assessment and tracking of the candidates because Judicial Commission has made the standard of selection mechanism of justices.

Despite the rigor with which the Judicial Commission recruits chief justices, there are still deficiencies in the recruitment system for Supreme Court justices that could make them more accountable. Multiple cases involving minor to severe violations committed by Supreme Court justices demonstrate that the current recruitment system still has flaws. Moreover, the latest case which involve justice Sudrajad Dimiyati indicates that there must be a serious evaluation on the assessment and tracking of the candidates.

In the future, there must be some reformulation of the selection mechanism of the Supreme Court Justices. The discrepancy of model shows that, in the previous model, the process does not have the same perspective in assessing the candidate that eventually will result different quality of the candidate.<sup>52</sup>

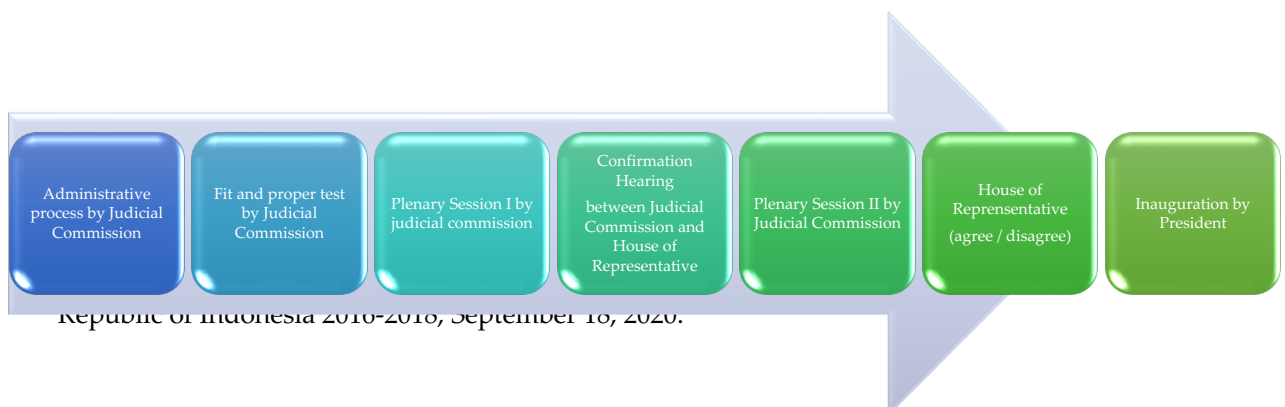


Figure 3 Future Model of Selection

The model above shows that, the selection mechanism is unified between Judicial Commission and House of Representative in the public hearing process. This stage must be merged to obtain the same point and quality in assessing the candidates. The current process cannot create the best candidate since in the mechanism itself still has a different standard in recruiting the justices. The Judicial Commission has done a strict stage to recruit the candidate yet when the list of the selected candidate proposed by the Judicial Commission, is sometimes, rejected by the House of Representative which tends to be more political. Therefore, the new model of selection mechanism must emphasize on the quality of two steps i.e., the quality of tracking and assessment in Judicial Commission and the quality of confirmation hearing in the House of Representatives. In relating to this issue, Judicial Commission must evaluate the quality of tracking and assessment of the justices and at the same time the quality of confirmation hearing in the House of Representatives must be reformulated as well.

### III. Major Cases in Indonesia

In the case of the Supreme Court Justice in Indonesia, the Honorary Panel of Judges (MKH) sentenced Ahmad Yamani to the sanction of the dishonourable discharge as the first Supreme Court



judge in Indonesia because he was proven to change the verdict of a drug convict. Chief Judge Ahmad Yamani was officially fired for falsifying the verdict on the cancellation of Hengky Gunawan's death sentence. Supposedly, the death sentence for drug dealer Hengky Gunawan was annulled to 15 years in prison. But by Ahmad Yamani, the sentence was faked to 12 years in prison. In the verdict, Yamani was proven to have faked the verdict at the Judicial Review (PK) level. Also, in 2021, there are some Supreme Court Justices have violated the code of ethics and have been given some ethical punishments, from minor, medium, and serious punishment.<sup>53</sup> The latest one is in end of September 2022, the Corruption Eradication Commission (KPK) has arrested a Supreme Court Justices, Sudrajad Dimiyati, for his alleged involvement in a bribery scandal, one of the most high-profile magistrates to face investigation for graft.<sup>54</sup> The cases show that there are variety of problems involving the quality of justices, the judicial process, and the institution of the Supreme Court itself. In case of justice Sudrajad Dimiyati, he was one of the results of selection mechanism proposed by Judicial Commission. Accordingly, the Judicial Commission must take this case into consideration seriously. There is a serious question why such kind of justice is selected. Why the assessment of selection in Judicial Commission could not detect the character and behaviour of the justice in the process of selection. The arrests of Supreme Court justices in alleged bribery have scarred the country's highest court's integrity. The Corruption Eradication Commission (KPK) detained Supreme Court Justice Gazalba Saleh for alleged involvement in a bribery, following the arrest of Civil Chamber Justice Sudrajad Dimiyati in September in an alleged bribery to secure favorable ruling.<sup>55</sup>

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<sup>53</sup> Conversation with the representative of Judicial Commission of the Republic of Indonesia, March 20, 2021.

<sup>54</sup> The Jakarta Post, "KPK Arrests Supreme Court Judge over Bribery Scandal," The Jakarta Post, accessed September 25, 2022, <https://www.thejakartapost.com/indonesia/2022/09/25/kpk-arrests-supreme-court-judge-over-bribery-scandal.html>.

<sup>55</sup> The Jakarta Post, "Graft Arrests of Supreme Court Justices Mar Judicial Integrity, Say Experts," The Jakarta Post, accessed December 15, 2022,

Below is the detail of the judge's violation within Supreme Court of Indonesia.

**TABLE 1.** Data on Supreme Court Judges Violations<sup>56</sup>

No	Year	Report	Processed	Unproven	Proven	Under Process	Sanction
1	2014	12	10	5	5	0	Written warning
2	2015	4	3	3	0	0	0
3	2016	7	7	4	3	0	Written warning
4	2017	55	55	51	4	0	Written warning
5	2018	51	46	40	6	0	Written warning
6	2019	17	17	17	0	0	0
7	2020	3	2	0	1	1	Written warning
8	2021	7	7	0	0	7	0

<https://www.thejakartapost.com/paper/2022/12/16/supreme-court-justices-bribery-arrest-mar-judicial-integrity-experts.html>.

<sup>56</sup> Conversation with The Commissioner of the Judicial Commission of the Republic of Indonesia, November 7, 2021.

Those cases and data showed that, there are still Supreme Court Justices that involve in any violation of laws and ethics. It means that Judicial Commission still have responsibility to improve the quality of the selection of the Justices. In other words, it comes off with an argument that the current selection mechanism has not met the criteria and scheme that may result the best Supreme Court Justices.

## MALAYSIAN EXPERIENCE

### I. Qualifications and Selection Process

The appointment of Supreme Court justices in Malaysia also shared the same paths as in Indonesia, although for the Federal Court Judges, in practice, the appointment is mostly from the existing pool of judges in the lower courts.<sup>57</sup> However, since the appointment of judges are executive centric where the Prime Minister as the Head of Government advising the Yang di-Pertuan Agong, the Head of State in the appointment of judges, there are calls for the appointment process to be more diversified to provide additional safeguard in appointing credible and independent judges.<sup>58</sup> In this respect, a "judicial appointment commission" is established to recommend candidates for the Prime Minister to consider.<sup>59</sup>



Figure 4 Selection process of the Supreme Court Justices in Malaysia

<sup>57</sup> Judicial Appointments Commission Malaysia, "Judicial Appointments Commission," accessed April 27, 2022, <https://www.jac.gov.my/spk/en/component/tags/tag/judicial-appointments-commission.html>.

<sup>58</sup> Farid Suffian Shuaib, "Malaysian Judicial Appointment Process," *Journal of Applied Sciences Research* 7, no. 13, 2274.

<sup>59</sup> M. Ershadul Bari and et al, "The Establishment of Judicial Appointment Commission in Malaysia to Improve the Constitutional Method of Appointing Judges of the Superior Courts: A Critical Study," *Commonwealth Law Bulletin* 41, no. 2 (2015): 231, <https://doi.org/10.1080/03050718.2015.1049634>.

In Malaysia, it is found also that the requirements of being the Supreme Court Justices are good as well. The requirements for a superior court judge are first provided by Article 123 of the Federal Constitution. It requires that the person to be a citizen and had the experience as an advocate or a member of the judicial and legal service.<sup>60</sup> In addition, section 23 of the Judicial Appointment Commission Act 2009 requires the Judicial Appointment to consider:

- a. integrity, competency, and experience;
- b. objective, impartial, fair, and good moral character;
- c. decisiveness, ability to make timely judgments and good legal writing skills;
- d. industriousness and ability to manage cases well; and
- e. physical and mental health.

The above requirements have close characteristic with the Indonesian requirement of being Supreme Court Justices. What makes different is the mechanism to select the judge. Both between Indonesia and Malaysia still hold the principle that the requirement for being judge must have good health, and the ability and knowledge of law field with good integrity and competency.

The same question is also addressed to this point that how good the selection mechanism of the Supreme Court Justices in Malaysia and whether the selection mechanism may produce qualified justices. Therefore, the quality of selection mechanism of the justice would influence the independence and integrity of justices.

The problem of appointing judges in Indonesia and Malaysia adequately illustrates that the process of appointment is always marked by attempts to dominate the appointment by the executive in power since there are many disputes between institutions and cases

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<sup>60</sup> Conversation with Prof. Datin Dr. Faridah Jalil, Professor of Law, Universiti Kebangsaan Malaysia, December 4, 2021.

involving government agencies that lead to the top executive power itself. Therefore, how to build a better model for appointing judges that guarantees the independent and competent Supreme Court justices is very crucial. In case of Indonesia, even though, the selection mechanism of the Supreme Court justice is now much better, Aidul Fitriadi notes that there are still some weaknesses as the selection mechanism doesn't have a specific tools to examine the quality of competency and it is also not easy to find candidates with specific qualification needed.<sup>61</sup> In Malaysia some argue that the membership of the Judicial Appointment Commission is largely confined to the members of the judiciary and thus remain limited in its view. Thus, there may be a need to consider expanding the membership of the Judicial Appointment Commission from other sections of the community.

## II. Major Cases in Malaysia

It could be said that the issue of appointment and security of tenure of Supreme Court judges came into the picture with the removal of the Lord President, Tun Salleh Abbas in 1988. The political power struggle in the ruling political party - United Malay National Union (UMNO), caused havoc in the independence of the judiciary.<sup>62</sup> The independence, including the machination in the appointment and promotion of judges again was in the unsavoury limelight during another power struggle in UMNO in 1997 between the then Prime Minister Tun Mahathir Mohamad with his heir apparent Anwar Ibrahim. During this time, pictures of questionable conduct of judges were put online. The senior most judge was pictured with a prominent lawyer allegedly holidaying together in New Zealand and together with it a video clip purported to show behind the scenes dealing to fix appointment of judges.

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<sup>61</sup> Interview with Prof. Aidul Fitriadi, Chairman of the Judicial Commission of the Republic of Indonesia 2016-2018, December 11, 2021.

<sup>62</sup> Hoong Phun Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford: Oxford University Press, 2017).

With the advice of the then Prime Minister Dato' Seri Abdullah Badawi, the Yang di-Pertuan Agong established a Commission of Enquiry in 2007 to look at the issues arising from the video clip. The Commission submitted its report in 2008 and found that there were elements of political patronage in the appointment of judges.<sup>63</sup> The Commission recommended the establishment of a judicial commission, and the Judicial Appointment Commission 2009 was enacted.

## A COMPARISON BETWEEN INDONESIA AND MALAYSIA AND ITS IMPLICATIONS ON JUDICIAL INDEPENDENCE

To formulate the ideal model for the appointment of Supreme Court Justices, a comprehensive comparative study is needed to find the strengths and weaknesses of the model for the appointment of the judges in a more established country with a tradition of progressive, independent, and impartial justice.<sup>64</sup> This research conducted a comparative study on the selection mechanism of justices and its implication to the independence of judiciary in Indonesia and Malaysia. Indonesia and Malaysia represent “emerging democracies,” which are almost similar in character, although they have inherited different legal traditions.

### I. Similarities

The appointment of Supreme Court justices in Malaysia and Indonesia has some similarities. First, both countries have a body that

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<sup>63</sup> Prime Minister's Department of Malaysia, *Commission of Enquiry on the Video Clip Recording of Images of a Person Purported to Be an Advocate and Solicitor Speaking on the Telephone on Matters Regarding the Appointment of Judges*, vol. 1 (Kuala Lumpur: Percetakan Nasional Malaysia, 2008).

<sup>64</sup> Dwi Andayani Budisetyowati, “Hakim Agung Indonesia Yang Diidealkan Oleh Pencari Keadilan,” *Al-Qisth Law Review* 1, no. 1 (2018): 41, <https://jurnal.umj.ac.id/index.php/al-qisth-old/article/view/3248/pdf>.

consider and make recommendation of candidates to the organ that appoint the Supreme Court Justices. The recommending body Indonesia is the Judicial Commission while in Malaysia is Judicial Appointment Commission.

Second, legislation in Indonesia and Malaysia provide for qualification of the candidates of the Supreme Court Justices such as integrity, competency, experience, objective, impartial, fair, good moral character, decisiveness, ability to make timely judgments, good legal writing skills, industriousness, ability to manage cases well, and physical and mental health. To assess the qualification, both Judicial Commission and Judicial Appointment Commission conduct fit and proper test.

Third, in both countries, career and non-career candidates form the pool of selection. Thus, subordinate court judges, public and private lawyers, and law professors could be the candidates.

## II. Differences

Besides having some similarities there are also some differences of appointment of the Supreme Court Justices between the two countries. First, in Indonesia, after the candidates given by the Judicial Commission to the House of Representatives (DPR) there is a process of public hearing. Public hearing is an important step of appointment because it will give more transparency and accountability of the appointment. While in Malaysia, there is no public hearing that conducted by the Prime Minister.

Second, in Indonesia, the process of appointment of the Supreme Court Justices lies in hand of two bodies i.e Judicial Commission and the House of Representatives. This model emphasizes two stages, that is, fit and proper test in Judicial Commission and Public Hearing in the House of Representatives (legislative). In contrast, Malaysia put the process on Judicial Appointment Commission and Prime Minister (executive) without having public hearing.

Third, the final decision of the appointment Supreme Court Justices in Indonesia is the hand of DPR. Meanwhile Malaysia the final decision of the appointment Supreme Court Justices in the hand of Yang di-Pertuan Agong.

Fourth, in terms of inaugurating body, the candidates of the Supreme Court Justices in Indonesia are inaugurated by the President as the head of the state. Whereas, in Malaysia, the inaugurating body is the Yang di-Pertuan Agong.

The selection process affects the independence, impartiality, and integrity of the Supreme Court Justices. In Malaysia there were no cases relating to the integrity of justices, while in Indonesia there are several cases. Although Malaysia does not have any judicially determined cases on the lack of integrity of Supreme Court Justices, in contrast to Indonesia which has several cases, there were allegations of impropriety.

**TABLE 2.** Table of Comparison

No	Item	Indonesia	Malaysia
<b>Similarities</b>			
1	Recommending body	Judicial Commission (JC)	Judicial Appointment Commission (JAC)
2	Qualification	Fit and Proper Test in JC	Fit and Proper Test in JAC
3	Pool of Candidate	Career and Non-career	Career and Non-career
<b>Differences</b>			
1	Public Hearing	The House of Representatives (DPR)	None
2	Stages	JC → DPR	JAC → Prime Minister
3	Appointing body	DPR	Yang di-Pertuan Agong
4	Inaugurating body	President	Yang di-Pertuan Agong



### III. Implications of the Selection System on Judicial Independence

According to Erhard Blankenburg, judicial independence can be tested through two things, namely impartiality and political insularity. Impartiality is seen in the idea that the judge will base the law and facts at the trial, not based on a relationship with one of the parties in the case. The impartiality of the judicial process can only be carried out if the judge can escape from conflicts of interest or collegial spirit factors with the litigant. Therefore, the judge must resign from the trial process if he sees the potential for impartiality. Meanwhile, the severance of relations with the political world is essential for a judge so that he does not become a means of realizing political goals.<sup>65</sup>

Meanwhile, the reputation of judiciary is very important (individual or collective as a whole) to ensure the quality of judiciary. The problem is, when the individual reputation is bad due to the conduct of justice, in institution will be stamped as a bad institution because the function of judiciary in making decision a collective production.<sup>66</sup> In the Supreme Court Justices selection mechanism is too much interest including politician which would make the curbing of the court<sup>67</sup> as Supreme Court Justices in Indonesia cases happened. Therefore, in ensuring the Judicial Independence, all is started from the selection process. How far the selection process will result the best candidate of being Supreme Court Justices. If the process is full of political agenda, and without integrity, the cause that will be happened is the collapse of judiciary. Once the judiciary is collapse, then there will be oligarchy.

In case of Indonesia, the emergence of Judicial Commission in 2001 has made significant changes in the selection mechanism of Supreme

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<sup>65</sup> Andi M. Asrun, *Krisis Peradilan: Mahkamah Agung di Bawah Soeharto* (Jakarta: Elsam, 2004), 307, <http://library.stik-ptik.ac.id/detail?id=19748&lokasi=lokal>.

<sup>66</sup> Garoupa Nuno and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (Chicago: The University of Chicago Press, 2015), 22–23.

<sup>67</sup> Brandon L. Bartels and Christopher D. Johnston, *Curbing the Court: Why the Public Constrains Judicial Independence* (Cambridge: Cambridge University Press, 2020), 4.

Court Justices. The role of Judicial Commission has replaced the dominance of executive organ in appointment of Supreme Court Justices. Logically, the Supreme Court Justices must be more independent and impartial in facing the executive power. But another threat to judiciary still exists, that is, the influences of money. The cases happened in Indonesia shows that the integrity of the justices is another agenda that should be overcome by Judicial Commission and the House of Representatives. In the hands of both organs, justices with integrity are expected to produce.

## CONCLUSION

The above discussion shows that the model of selection mechanism affects the independence, impartiality, and integrity of Supreme Court Justices. Both in Indonesia and Malaysia indicates that the process of selection of Supreme Court Justices, although not wholly, is also much influenced by the power struggle among the political actors. Therefore, there is a need to reformulate a more transparent, strengthen the track record, checks and balances for obtaining accountable model of selection mechanism. After the amendment of the 1945 Constitution, Indonesia has formulated the involvement of a Judicial Commission which has authority to conduct independently the selection process of Supreme Court Justices. Malaysia also established a Judicial Appointment Commission which has an important role in making the process of selection of the Supreme Court Justices better. However, the impact of the emergence of Judicial Commission in both countries still needs a serious evaluation on how far the selection mechanism is effective in producing justices with integrity.

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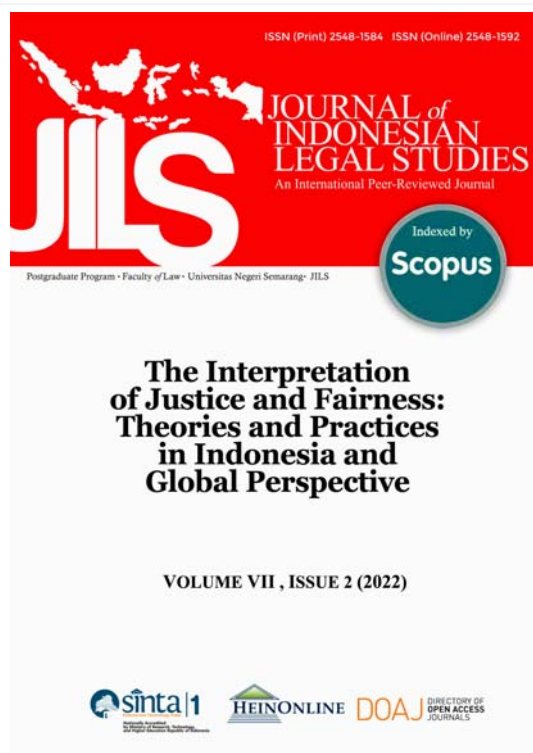
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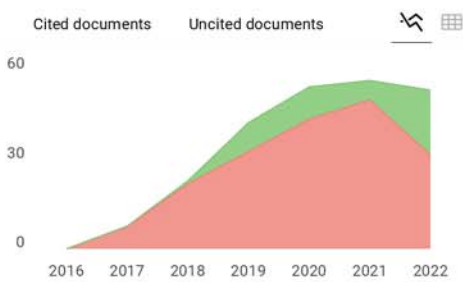
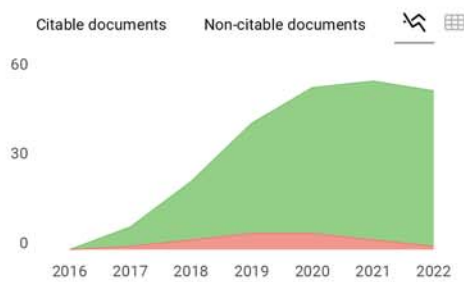
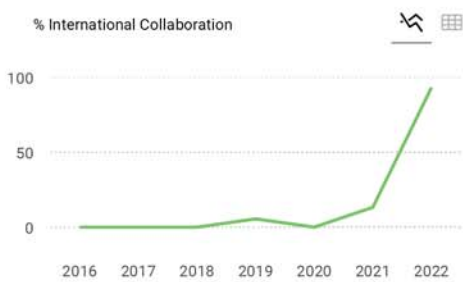
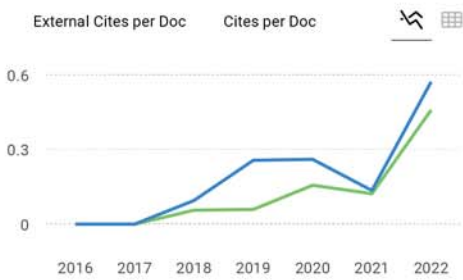
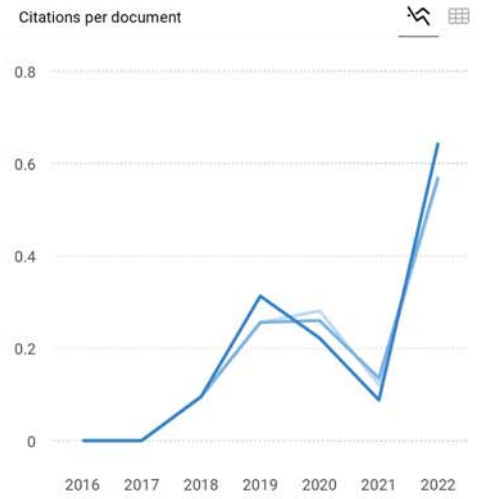
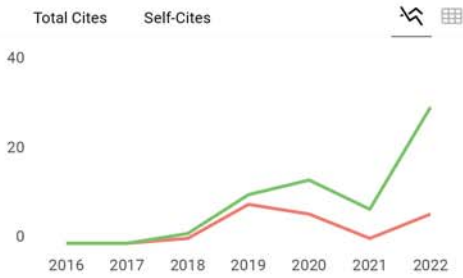
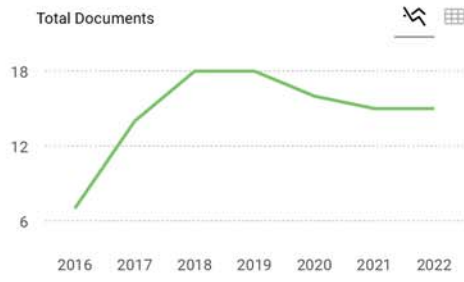
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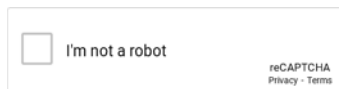
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