

## **CHAPTER FOUR**

### **FINDING AND ANALYSIS**

#### **A. The Requirement of Being Constitutional Judges based on the Legislation**

##### **1. The Requirement of Being Constitutional Judges in Indonesia**

According to Article 24 paragraph (1) of the 1945 Constitution “The judicial power shall be independent and shall possess the power to organize the judicature in order to enforce law and justice”. Furthermore, paragraph (2) of Article 24 of the 1945 Constitution states that, “The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court”. Based on article 24 paragraph (2) of the 1945 Constitution, there are two (2) state institutions that hold judicial power are the Supreme Court and the Constitutional Court. The Supreme Court is equal to the Constitutional Court.<sup>1</sup> Both are the supreme organizers of the judicial powers. So other than the Supreme Court as the final of the judiciary in the jurisdiction under it, there is also a Constitutional Court which also functions as the executor of the power of the judgment, but has no structural relationship to Supreme Court. These both institutions have the

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<sup>1</sup>Khelda Ayunita, 2017, *Pengantar Hukum Kontitusi dan Acara Mahkamah Konstitusi*, Jakarta, Mitra Wacana Media. p. 86.

same function as the executor of judicial power, but distinguished in their jurisdiction or competence.<sup>2</sup>

Indonesia is the 78<sup>th</sup> state that established the Constitutional Court. The establishment of the Constitutional Court itself is a phenomenon in the 20<sup>th</sup> century. The constitutional court did not exist before the 20<sup>th</sup> century. Based on the historical background of the establishment of the Constitutional Court, the existence of the Constitutional Court at first is to implement the authority of judicial review. While the existence of judicial review itself can be assumed as the development of law and politics of modern constitution. From the political aspect, the existence of the Constitutional Court is understood as a part of the effort to realize the check and balances mechanism, among branches of state power based on democratic principles. This is related to two powers that commonly held by the Constitutional Court in various countries, namely to review the laws against the constitution and determining disputes over the authorities of state institutions.

The Constitutional Court is established in article 24C of the third amendment of the 1945 Constitution. Besides reviewing laws against the constitution and determining disputes over the authorities of state institution whose powers are given by the 1945 Constitution, the Constitutional Court also has the authority to decide over the dissolution a

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<sup>2</sup>Abdul Latif, 2009, *Fungsi Mahkamah Konstitusi: Upaya Mewujudkan Negara Hukum Demokrasi*, Yogyakarta, Kreasi Total Media. p.54.

political party, to decide disputes over the general elections and is required to decide the opinion of the House of Representative concerning alleged violations by the President and/or Vice-President. Although the first appellation of the Constitutional Court in Indonesia is in the third amendment of the 1945 Constitution, the Constitutional Court was established along with the establishment of Law Number 24 Year 2003 on the Constitutional Court. On 13 August 2003 where the Law Number 24 Year 2003 was ratified, Indonesia finally has a new organ, the Constitutional Court. The ratification of this Law becomes the moment when Constitutional Court in Indonesia was first established.<sup>3</sup>

After the establishment of the Constitutional Court, the establishment of organizational structure becomes the next step in Indonesia. The Constitutional Court as the new institution in Indonesia has positive responses and support the creation of better law in Indonesia.

Based on Article paragraph (1) Law Number 8 of 2011 on the Amendment of Law Number 24 of 2003 on the Constitutional Court, the Constitutional Court has 9 (nine) members of Constitutional judges who are decided by a Presidential Decree. In terms of the odd number, i.e. only nine people should be selected as the court judges according to the provisions of Article 4 paragraph (1). The aim of this number is that the

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<sup>3</sup>Maria Farida Indrati, "Penguujian Peraturan Perundang-Undangan, Mengenal Keberadaan Mahkamah Konstitusi di Indonesia", p. 10, taken from <http://repository.ut.ac.id/4116/1/HKUM4404-M1.pdf>, downloaded on Friday 25 March 2017, at 2.27pm.

number of judges should not be even. There is no specific reason to determine the odd number of judges. The discussions emerged regarding to this member throughout the article formulations, as well as other discussions regarding to the membership member of other agencies and commissions, have never mentioned the reasons of why the member should be nine. What has been mentioned is only about that the member should be odd. But besides that, a more substantive understanding of the reasons for determining the odd number can be made, as the second reason, i.e. the odd number is related to decision making. Therefore, the determination of the nine figure must be seen in relation to the decision-making mechanism, which if it requires a vote, can certainly result in a decision. If there is an emptiness of position in the constitutional justices for various reasons, then the vacancy should immediately be filled by the institution from which the judge stops, so that the number permanently nine.<sup>4</sup>

Based on Article 24C paragraph (1) the 1945 Constitution stated that, the Constitutional Court shall possess the authority to try a case at the first and final level. Its means that the decision of the Constitutional Court is final and binding. Article 10 Law Number 24 of 2003 on the Constitutional Court also stated that the Constitutional Court shall possess the authority to try a case at the first and final level, and the decision of the

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<sup>4</sup>Jimly Ashiddiqie, 2006, *Hukum Acara Pengujian Undang-Undang*, Jakarta, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, p. 339-340.

Constitutional Court is final. Moreover, Article 47 Law Number 24 and 2003 stated that the Constitutional Court's decision to acquire permanent legal power since its completion was pronounced in a plenary session open to the public. By the nature of the final and binding decision it has also inflicted the perception of the Constitutional Court as a super body. Moreover, there is no institution that oversees the Constitutional Court regardless of the nature of the final and binding decision of the Constitutional Court. Supervision is not on the decision and authority of constitutional judges to conduct the judiciary, but on the behavior of constitutional judges so that the dignity of honor and statehood of the Constitutional Court are always maintained. In addition, the mechanism of the recruitment of constitutional judges should be considered, because the importance of the position of constitutional judges. Therefore, strict requirements are needed for the nomination of constitutional judge in order to produce good judges with the integrity.

The requirement to be a Constitutional Court judge is regulated in Article 24C Paragraph (5) and Article 25 of the 1945 Constitution, in Article 15 of Law Number 8 Year 2011 on Amendment to Law Number 24 Year 2003 on the Constitutional Court. Based on Article 24C paragraph (5) of the 1945 Constitution, "Each constitutional judge must possess integrity and a personality that is not dishonorable, and shall be fair, shall be a statesperson who has a command of the Constitution and the public institutions, and shall not hold any position as a state official".

Furthermore, Article 25 of the 1945 Constitution further requires, “The appointment and dismissal of judges shall be regulated by law”. The details of the article are contained in Article 15 of Law Number 8 Year 2011 on Amendment to Law Number 24 Year 2003 on Constitutional Court, stated that:

- 1) A Constitutional Court Judge must fulfill the following requirements:
  - a. Possess integrity and a honorable personality;
  - b. Shall be fair; and
  - c. Shall be a statesperson who has a command of the Constitution and the public institutions.
- 2) To be appointed a constitutional judge, in addition to fulfilling the requirements as referred to in paragraph (1), a candidate must meet the following requirements:
  - a. A citizen of the Republic of Indonesia;
  - b. Certified with a doctorate and master's degree with a bachelor degree background in law;
  - c. Devoted to God Almighty and have good morality;
  - d. Shall be at least 47 (forty-seven) years old and 65 (sixty-five) years old at the time of appointment;
  - e. Physically and spiritually capable in carrying out duties and obligations;

- f. Has never been sentenced to imprisonment based on a court decision that has obtained permanent legal force;
  - g. Has never been declared bankrupt by a court decision; and
  - h. Has at least 15 (fifteen) years of work experience in the field of law and / or ever become a state official.
- 3) In addition to the requirements referred to in paragraph (1) and paragraph (2), the candidates of constitutional judges must also fulfill the administrative requirements by submitting:
- a. A declaration of willingness to become a constitutional judge;
  - b. Curriculum Vitae;
  - c. Photocopies of diploma that have been legalized as well as showing the original diploma;
  - d. A list of assets and sources of income of candidates accompanied by valid supporting documents and have been approved by authorized institutions; and
  - e. Taxpayer registration number (NPWP).

From the above requirements, the requirement for a person to be appointed as a judge of the Constitutional Court may be detailed as follows:

1. Have integrity and a honorable personality that is not dishonorable.

This can be proved by a personal statement signed on the seal, which

in due time can be used as an evidence if in the future that person is proven to have despicable integrity and personality.<sup>5</sup>

2. Shall be fair. This also can be proved by a personal statement signed on the seal, which in due time can be used as an evidence if in the future that person is proven that to be unfair.<sup>6</sup>
3. A statesperson who has a command of the Constitution and the public institutions. This can also be proved by a personal statement mentioned above.<sup>7</sup>
4. A citizen of the Republic of Indonesia. This can be proven by showing the identity card (KTP) or other proof of citizenship such as passport.<sup>8</sup>
5. Certified with a doctorate and master's degree with a bachelor degree background in law, this can be proved by a copy of the diploma.<sup>9</sup>
6. Devoted to God Almighty and have good morality. To know if the candidate of judge has fulfill this requirement actually is rather difficult. Therefore, it can be known by tracking the record of the candidate.
7. Shall be at least 47 (forty-seven) years old. This also can be proven by showing the identity card (KTP).<sup>10</sup>
8. Physically and spiritually capable. This is evidenced by showing the health ratification letter from the doctor.

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<sup>5</sup>Jimly Ashiddiqie, *ibid*, p. 344.

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid.*

<sup>8</sup>*Ibid.*

<sup>9</sup>*Ibid.*

<sup>10</sup>*Ibid.*

9. Has never been sentenced to imprisonment based on a court decision that has obtained permanent legal force. This statement is sufficiently evidenced by a personal statement that may one day be used as an evidence if the truth is otherwise.<sup>11</sup>
10. Has never been declared bankrupt by a court decision. This is also enough to prove a statement as above.<sup>12</sup>
11. Has at least 15 (fifteen) years work experience in the field of law and / or ever become a state official, Information about work experience can be given from the agency or office premises concerned had worked more than 15 years in law.<sup>13</sup>
12. Willing to be nominated as a constitutional judge. This is sufficiently demonstrated by filling the form of willingness to be a constitutional justice.<sup>14</sup>

The above is a detailed explanation of Article 15 paragraphs (1) and (2), in Article 15 paragraph (3) is an administrative requirement that needs to be completed and submitted by the candidates of constitutional judges. Then, Article 17<sup>15</sup> states, “A constitutional judges is prohibited from concurrently serving as: (a) An official occupying a public office in another state institution; (b) A member of a political party; (c) An

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<sup>11</sup>*Ibid.*

<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid.*

<sup>14</sup>*Ibid.*

<sup>15</sup>Indonesian Constitutional Court Law No. 24 of 2003

entrepreneur; (d) A Lawyer; or (e) A Civil Servant”. From the above quotation it can be detailed as follows:<sup>16</sup>

1. Not concurrently act as an official of another country, or at the time appointed as a constitutional judge has declared a termination from his position as an official of another country. It is quite evidenced by signing an official letter of resignation from the status as a state official on purpose, which is effective if the relevant person has been determined to be a Constitutional Court judge.
2. Not being a member of a political party or upon his appointment as a constitutional judge has declared a resignation from his status as a member of a political party. Just as mentioned above, this is also sufficiently evidenced by a letter of resignation.
3. Not concurrently an employer, or at the time appointed is a constitutional judge has declared a halt from his position as an employer. Just as mentioned above, this is also sufficiently evidenced by a letter of resignation.
4. Not concurrently an advocate, or at the time appointed a constitutional judge has declared a halt from his position as an advocate. Just as mentioned above, this is also sufficiently evidenced by a letter of resignation.
5. Not concurrently a civil servant, or at the time appointed as a constitutional judge has declared a halt from his position as a civil

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<sup>16</sup>Jimly Ashiddiqie, *op. cit.*, p. 346.

servant. This can also be proved by a letter of resignation, valid from the official appointment by the Presidential Decree to constitutional judge.

If we look at Article 15 paragraph of Law No. 8 of 2011 above, there is a requirement regarding that, each constitutional judges must possess integrity and a honorable personality, shall be fair, shall be a statesperson who has a command of the Constitution and the public institutions, and Devoted to God Almighty and have good morality. Regarding to those requirements, there is no fixed explanation. If it is traced back to the debate on the provisions, usually it is still unclear. Meanwhile what and how to interpret it further, left entirely to the dynamics of the implementation of the provisions in the field later. In other words, the interpretation of the implied personality requirement is entirely left to the subjective consideration of the parties that determine it in the field. That is, to the President, the House of Representatives (DPR) and the Supreme Court to interpret it when they are required to determine who will be elected to be constitutional judges.

Then one of the requirements of being constitutional judges' which is being a statesman seems particularly unclear. This requirement is similar to the previous requirement. This requirement is an assessment in a society who may have various contradicting views. There are people who may think that the candidate of judge is a very fair person and statesman, but there may be some responses that say the otherwise. Similar to the previous

requirements, this requirement also does not have a clear statement or explanation set in a legislation.

In a TV show Mata Najwa on a television station themed "Mencari yang Mulia", some of the guest stars are Bapak Mahfud MD the former Chief Judge of the Constitutional Court in the year, Bapak Harjono the Chairman of the Selection Committee of Judge of the Constitutional Court in 2017, Bapak Nasir Jamil the Member of Commission III of the House of Representatives and Bapak Emerson Yuntho the Coordinator of Legal and Judicial Division of ICW. In this event, Bapak Mahfud MD explained that one of the problem of one of the requirements to be a judges of the Constitutional Court is they should be statesmen. He said that, "for the requirements of the statesman, there is no clear explanation. Even until now there is no explanation in a legislation concerning the statesman's clauses. For the requirements of this statesman we can mean with someone's background. Therefore, when a person nominates himself as a constitutional judge, the selection team must know and trace the background of the person concerned. Including his way of life, his environment and the life style and among others who mentioned."

This is reaffirmed by Prof. Dr. Ni'matul Huda SH., M.Hum, that the trade record is very important in figuring the background of the candidates of constitutional judge. The aim is to know the integrity, morality and

requirements of constitutional judge that are deemed not to be obtained with the data.<sup>17</sup>

## 2. The Requirement of Being Constitutional Judges in South Korea

The South Korean Constitutional Court was established on 1<sup>st</sup> September 1988. The Korean Constitution does not expressly state whether the Korean Constitutional Court is a part of the judicial authority or not. However, the provisions of the Constitutional Court are regulated separately, namely in Chapter VI of the Korean Constitution, and separate from the provisions governing the Court, namely in Chapter V. So, the impression that they are indeed separated is inevitable. Similarly, the law on the Constitutional Court of Korea, Law no. 4017 (1988) did not mention the position of the Constitutional Court of Korea.<sup>18</sup> This is in contrast to Indonesia whose constitution expressly states that, the position of the Constitutional Court of Indonesia as part of the judicial power.

However, when considering the history of its formation and the authority delegated by the Constitution,<sup>19</sup> and the exercise of the authority in practice since it was established, now it is no doubt that the position of the Constitutional Court of Korea is an important constitutional organ in

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<sup>17</sup>From interview with Ni'matul Huda an expert of Constitutional Law in Pascasarjana Universitas Islam Indonesia, on Tuesday 8 August 2017 at 13.10pm.

<sup>18</sup>I Dewa Gede Palguna, 2013, *Pengaduan Kostitusional (Constitutional Complaint): Upaya Hukum terhadap Pelanggaran Hak-Hak Kostitusional Warga Negara*, Jakarta, Sinar Grafika. p. 460.

<sup>19</sup>Article 111 paragraph (1) Korean Constitution and Korean Law on Constitutional Court.

the constitutional system of the Republic of Korea (South Korea). Now, with the authority granted by the Constitution to the Constitutional Court of Korea is considered inherent as:<sup>20</sup>

- a) Representative Organs of the People. The Korean Constitutional Court is seen as one of the organs of the People's Representative because it is regarded as the embodiment of popular sovereignty. It is seen from the authority given to him to interpret the constitution and to review the constitutionality of the law, to impose decisions on impeachment cases and the dissolution of political parties, as well as decisions on disputes over the authority of state institutions and constitutional complaints.
- b) Organ for safeguarding the constitution and protecting basic rights. This can be seen from the power of the South Korean Constitutional Court in guarding the Constitution by annulling laws promulgated by the National Assembly which is contradicts the Constitution.
- c) Final Adjudication Organ. This can be seen from the judicial process of the Constitutional Court of South Korea on all issues in which all decisions made are final. The meaning of the final here is that the authority set by the Constitutional Court is not regulated by other court.

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<sup>20</sup>I Dewa Gede Palguna, *op. cit*, p. 460-462.

- d) One of the Organs of the Supreme Constitutional Organs. The Constitutional Court has an equal status with the National Assembly, the Executive Powers and the Supreme Court.

Similar to Indonesia, the number of constitutional judges is 9 (nine), with the term of Justice of the Constitutional Court of Korea is six years. According to Article 7 paragraph (1), "A Justice shall hold office for the term of six years and may be appointed consecutively for further terms". In the election of a Korean Constitutional Court judge, the requirements are governed by the Korean Constitutional Court Law in article 5:

- 1) The Justices shall be appointed from among those who are forty (40) or more years of age and have held any of the following positions for fifteen (15) or more years: *provided*, that any periods of service of the person who has held two or more following positions shall be aggregated:
  - a. A judge, public prosecutor or attorney-at-law;
  - b. A person who is qualified as an attorney, and has been engaged in legal affairs in a state agency, a state or public enterprise, a state-owned or public enterprise, a government-invested institution or other corporation; and
  - c. A person who is qualified as attorney, and has held a position equal to or higher than an assistant professor of jurisprudence in an accredited college or university.

2) No person falling under any of the following shall be appointed

Justice:

- a. Person who is disqualified to serve as a public official under the pertinent laws and regulations:
- b. Person who has been criminally sanctioned with a sentence of imprisonment without forced labor or more severe sentence: or
- c. Person for whom five years have not yet passed since his or her dismissal resulting from impeachment.

According to Constitutional Court Korea, Article 9 stated that, “No Justice shall join a political party or participate in politics”.

The comparison of requirements between Indonesian and South Korean can be seen through the table as follows:

**Table 4.1 List of the Comparison Requirement of Constitutional Court Judges**

No	The Requirements	Indonesian	South Korean
1.	Terms of Judges	Shall be five years and may be renewed for one period.	Shall be six years and may be renewed
2.	Age of the judges	Between 47 years old and 65 years old	40 years old or more
3.	Experience in the field of Law	a) An official occupying a public office in another state institution; b) A member of a political party; c) An entrepreneur; d) A Lawyer; or e) A Civil Servant	Provided, that any periods of service of the person who has held two or more following positions shall be aggregated: a) A judge, public prosecutor or attorney-at-law; b) A person who is qualified as an attorney, and has been engaged in legal affairs in a state agency, a state or public enterprise, a state-owned or public enterprise, a government-invested institution or other corporation; and c) A person who is qualified as attorney, and has held a position equal to or higher than an assistant professor of jurisprudence in an accredited college or university
4.	Long of experience	At least 15 years	At least 15 years
5.	Education	Doctorate	-
6.	Moral requirements	a) Integrity and good morality b) Shall be fair c) Shall be a statesperson d) A person who devote himself to God	-

7.	The person who cannot be appointed as a judge	a) Has been sentenced to imprisonment based on a court decision; b) Has been declared bankrupt by a court decision.	a. Person who is disqualified to serve as a public official under the pertinent laws and regulations; b. Person who has been criminally sanctioned with a sentence of imprisonment without forced labor or more severe sentence; c. Person for whom five years have not yet passed since his or her dismissal resulting from impeachment.
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### 3. The Requirement of Being a Judges in Islam

The judge comes from the Arabic word *ha-kimun* taken from the root of *hakama-yahkumu-hakaman* which means to lead, to govern, and to establish. *Al-hakimu* can be interpreted as a judge of the court. It can also be interpreted as a wise man. It is also defined as a conscientious person, the right person and the perfect person.<sup>21</sup> Whereas in fiqh, the use of the term for a judge is *qadi*.

In Islam, a judge is someone who is very strategic, urgently needed and noble. This is so, because the judge assumes the mandate as "the Speaker of Allah SWT and His Messenger "and also explores the values of Islamic law, in particular, law that lives amongst the people. When deciding the case, the judges should be fair and respectful to men as a servant and Khalifatullah in earth, not as the object of law. Then judges should be *Uswatun Hasanah* (a model of just, fair and independent judges) as exemplified by Rasulullah SAW. Thus additionally, the image of the Court and the authority of judges can be improved. Legal certainty can increase the confidence of the people and the state can continue to run on the basis of law and not on the basis of power.<sup>22</sup>

The judge's profession is a noble and risky position and challenge. It's noble because it aims to achieve tranquility and peace in society. It's

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<sup>21</sup>Munawir, Ahmad Warson, 2002, *al-Munawwir*, Pustaka Progresif, Surabaya. p. 286-287.

<sup>22</sup>Awaludin, "Hakim yang Ideal menurut Kacamata Islam", p. 2, taken from [www.komisiyudisial.go.id/download.php%3Ffile%3DHAKIM%2520YANG%2520IDEAL%2520MENURUT%2520KACAMATA%2520ISLAM.pdf+%&cd=1&hl=en&ct=clnk&gl=id](http://www.komisiyudisial.go.id/download.php%3Ffile%3DHAKIM%2520YANG%2520IDEAL%2520MENURUT%2520KACAMATA%2520ISLAM.pdf+%&cd=1&hl=en&ct=clnk&gl=id), downloaded on Tuesday 6 June 2017 at 1.49 am.

risky because they will be dealing with people who are not satisfied with the verdict, while in the Hereafter they will be condemned to hell if the decision is not in accordance with the truth. The position requires both physical and non-physical requirements.<sup>23</sup> Islam regulates some requirements to be a judge. Al-Qadhi Abu Ya'la asserted that the requirements of a judge are seven, namely:<sup>24</sup>

- i. The Quality of being a male (*al-dhukuriyyah*): as for the quality of being male, he says that a *qadi* must be a man and not woman because a woman in her nature is not bestowed with complete authorities (*kamal al wilayat*). In addition, testimony given by a woman alone is not complete as that of a man;
- ii. Maturity and sound mind (*al-bulugh wa al'-aql*): As for the qualities of maturity and sound mind, al-Qadi Abu Ya'la holds the view that if it is not permitted for either child or slave to administer their private affairs, then it is more appropriate that they should not be entrusted with the affairs of the people, and more so when both are incapable of discretionary power on matters of decisive adjudication even in common matters;
- iii. Freeborn status (*al-huriyyah*): As for the quality of being freeborn, al-Qadi Abu Ya'la is of the view that this quality is essential on the basis that a slave is not considered eligible to hold authoritative posts and does not possess the fullness of social status that enables them to testify in court of law;
- iv. Islam: As for the quality of being a Muslim, al-Qadi Abu Ya'la is of the view that if it is not permitted to appoint a *fasiq* (dissolute) person as *qadi*, then it is also a must that a *kafir* must not be appointed;
- v. Righteousness (*al-'adalah*): As for the quality of righteousness, al-Qadi Abu Ya'la is of the opinion that if a person can become a *fasiq* in the practice of his religion, it is more proper to say that such a person must not be appointed to serve as *qadi* because the act of passing judgment requires that a person must be trustworthy and of sound character;
- vi. Perfection of the senses of hearing and sight (*al-salamah fi al-sam' wa al-basar*); and: as for the quality of perfection of the senses of hearing and sight, al-Qadi Abu Ya'la affirms that this enables such a

<sup>23</sup>ST.Zubaidah, "Hakim (antara Surga dan Neraka), p. 3, taken from [http://www.pamuarateweh.go.id/images/stories/pdf/hakim\\_antara\\_surga\\_dan\\_neraka.pdf](http://www.pamuarateweh.go.id/images/stories/pdf/hakim_antara_surga_dan_neraka.pdf), downloaded on Monday 5 June 2017, at 11.46pm.

<sup>24</sup>Yusuf Abdul Azeez, 2011, Al Qadi Abu Ya'la's Doctrine of The Imamate, A. Ph.D Thesis Unpublished, Malaysia: International Islamic University Malaysia. p. 191-194.

- person to differentiate between the plaintiff and the defendant. Therefore, this ability, as maintained by al-Qadi Abu Ya'la would be difficult for a blind or deaf person. Al-Qadi Abu Ya'la also holds the view that the perfection of the limbs is not considered part of the requirement for the appointment of a *qadi*. This is unlike the case of the post of *al-imamah al-kubra* (the grand imamate) where it is considered part of the requirements because the defects in the limbs will definitely affect the ability of the *imam* to carry out his duties.
- vii. Knowledge (*al-'ilm*): As for the possession of knowledge, al-Qadi Abu Ya'la asserts that it is compulsory for a person appointed as *qadi* to have the knowledge of *al-Ahkam al-Shar'iyah* (the Legal Rules of the Islamic Law). This quality, as mentioned by al-Qadi Abu Ya'la, is that such a person must possess knowledge of the four principal sources of the *Shari'ah*. These are:
- a. He must have some knowledge about *Kitab Allah* (The Qur'an).
  - b. He must have knowledge of the Sunnah (traditions of the Messenger of Allah) that was derived from his actions and sayings and the manner.
  - c. He must have knowledge of the opinion of earlier scholars (*aqawil al-salaf*) regarding to what they might have agreed or disagreed on so as to follow the consensus of their opinion by which he must strive to apply his own intellectual reasoning where there are differences of opinion.
  - d. He must have the essential knowledge of *Qiyas* (analogical deduction).

In addition, the characteristic of *wara* is also needed by a judge.

*Wara* means a person who does not have the orientation to the world anymore. So when a person becomes a judge, he will not focus on the world and not be affected by worldly matters which may cause a judge not to be fair, especially in deciding a case.<sup>25</sup>

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<sup>25</sup>Anonymous, 2017, "Sifat Wara", available at: <http://www.republika.co.id/berita/koran/halaman-1/15/12/07/nyz7gn18-sifat-wara>, accessed on Sunday 6 August 2017, at 11.56am.

## **B. The Issue of Requirements of Constitutional Court Judges.**

The requirements to become a constitutional judge is regulated in Article 24C paragraph (5) and Article 25 of the 1945 Constitution, then it is further governed by Article 15 of Law No. 8 of 2011 on the amendment of Act No. 24 of 2003 on the Constitutional Court. In Article 24C paragraph (5), it is stated, "Each constitutional judge must possess integrity and a personality that is not dishonorable, and shall be fair, shall be a statesperson who has a command of the Constitution and the public institutions, and shall not hold any position as a state official". Article 15 of Law No. 8 of 2011 also states, that the constitutional judges must have integrity and an honorable personality, fair and a statesperson who has a command of the Constitution and the public institutions.

If we see more clearly about the requirements to be a constitutional judge, these requirements are in accordance with the standards of a judge. Article 24C paragraph (5) of the 1945 Constitution has become the nature of a judge, where the article states that a judge is a person with integrity, and personality that is not dishonorable, and shall be fair, shall be a statesperson who has a command of the Constitution and the public institutions. Then, it is added in article 15 of the Constitutional Court Law that the concerned has been certified by a doctorate and master degree with a bachelor of law. At least 15 (fifteen) years of work experience in the field of law and / or ever become a state official. These requirements at least have

represented the conditions of a judge expected. These requirements are sufficient find out whether that the person has a good moral and background, as well as sufficient experience in the field of constitutional judge. These requirements are set up to ensure that the candidate have a good understanding on the condition and the constitutional problems in Indonesia. Public also have a general view that a judge is a person who has a good moral and attach importance to judge.

Various attempts have been made to be the judges who have a standard in accordance with the Constitution. One of them is by making several amendments to the rules about the Constitutional Court, especially on regulatory requirements to become a constitutional judge. The aim is to produce good quality of judges of the Constitutional Court. 2013 is the first time the trust and hope of the people of Indonesia on judicial independence and judge fell down, when the chairman of the Constitutional Court of the Republic of Indonesia, Akil Mochtar was arrested by the Corruption Eradication Commission (KPK) on 2 October 2013 in case of bribery of election dispute in the Constitutional Court. Society has a deep disappointment, considering that the Constitutional Court is an institution that has a high position as well as the Supreme Court. Various attempts were made to restore public trust in the institution.

As a result of Akil Mochtar's case that befallen in this institution, various attempts to restore the good image of the Constitutional Court and to obtain a qualified judge were done. One of the attempts is the second

amendment to the Law number 24 of 2003. This change includes several matters including changes to first amendment of Constitutional Court Law of Law No. 8 of 2011 Article 15 paragraphs (2) and (3):

(2) To be appointed as a constitutional judge, in addition to fulfilling the requirements as referred to in paragraph (1), a candidate must meet the following requirements:

- a. A citizen of the Republic of Indonesia;
- b. Certified by a doctorate and master's degree with a bachelor degree background in law;
- c. Devoted to God Almighty and have good morality;
- d. Shall be at least 47 (forty-seven) years old and 65 (sixty-five) years old at the time of appointment;
- e. Physically and spiritually capable in carrying out duties and obligations
- f. Has never been sentenced to imprisonment based on a court decision that has obtained permanent legal force;
- g. Has never been declared bankrupt by a court decision; and
- h. Has at least 15 (fifteen) years work experience in the field of law and / or ever become a state official.

(3) In addition to the requirements referred to in paragraph (1) and paragraph (2), the candidates of constitutional justices must also fulfill the administrative requirements by submitting:

- a. A declaration of willingness to become a constitutional justice;
- b. Curriculum Vitae;
- c. Photocopies of diploma that have been legalized as well as showing the original diploma;
- d. A list of assets and sources of income of candidates accompanied by valid supporting documents and have been approved by authorized institutions; and
- e. Tax Payer registration number (NPWP).

Then, the above regulation changes in the second amendment of Law Constitutional Court:

(2) To be appointed a constitutional judge, In addition to fulfilling the requirements as referred to in paragraph (1), a candidate must meet the following requirements:

- a. A citizen of the Republic of Indonesia;
- b. Certified undergraduate with a background of legal education;
- c. Devoted to God Almighty and have good morality;
- d. Shall be at least 47 (forty-seven) years old and maximum 65 (sixty-five) years old at the time of appointment;
- e. Physically and spiritually capable in carrying out duties and obligations;
- f. Has never been sentenced to imprisonment based on a court decision that has obtained permanent legal force;

- g. Has never been declared bankrupt by a court decision; and
- h. Have legal work experience of at least 15 (fifteen) years;
- i. Shall not be a member of a political party within a period of at least 7 (seven) years before being nominated as a candidate for constitutional justice.

(3) In addition to the requirements referred to in paragraph (1) and paragraph (2) the candidates of constitutional justices must also fulfill the administrative requirements by submitting:

- a. A declaration of willingness to become a constitutional justice;
- b. Curriculum Vitae;
- c. Submit photocopies of diploma that have been legalized accompanied with showing the original diploma;
- d. A list of assets and sources of income of candidates accompanied by valid supporting documents and has been approved by authorized institutions;
- e. Taxpayer registration number (NPWP); and
- f. A statement that the candidate is not a member of any political party.

The second amendment of the regulation on the Constitutional Court is conducted through Government Regulation in lieu of Law (PERPPU) No. 1 of 2013 concerning second Amendment of Law Number 24 Year 2003

regarding the Constitutional Court.<sup>26</sup> Then the PERPPU is then stipulated to become law through Law Number 4 Year 2014 on Stipulation of Government Regulation in Lieu of Law Number 1 Year 2003 Becoming a Law.<sup>27</sup>

By amending the Law Number 24 Year 2003 regarding the Constitutional Court for the second times, the election procedure and the requirement to become a candidate for constitutional justices have changed. However, the Constitutional Court is even canceled with the reason, that since legalization of the PERPPU about the rescue of the Constitutional Court became the Constitutional Court Law, there has been no new legislation produced as derivatives. In fact, the PERPPU must have prompted immediate effect to solve legal problems. The establishment of the PERPPU was also deemed not to meet whether the constitutional requirement of force crunch.<sup>28</sup>

Not long ago the public trust returned, on Thursday 26 January 2017 constitutional judge Patrialis Akbar was arrested by the Anti-corruption Eradication Commission. Patrialis allegedly accepted a bribe related to the judicial review of Law No. 41 of 2014 on Animal Husbandry and Health.

This event repeats very deep bravery and deep wounds for the society of

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<sup>26</sup>Government Regulation in Lieu of Law (PERPPU) No. 1 of 2013 concerning the second amendment Constitutional Court Law. LN Number 167 of 2013. TLN number 5456.

<sup>27</sup>Law No. 4 of 2014 on Government Regulation in Lieu of Law No. 1 of 2013 concerning Second Amendment of Law Number 24 Year 2003 on Constitutional Court. LN number 5 of 2014. TLN number 5493.

<sup>28</sup>Achmad Fauzi, 2017, "Prahara Suap Mahkamah Konstitusi", available at: <https://www.pressreader.com/indonesia/jawa-pos/20170131/2815823553546>, accessed on Monday 22 May 2017 at 9.49am.

Indonesia.<sup>29</sup> The recurrence of corruption cases in this institution, raises big questions to the integrity and independent nature of the constitutional judges. When we look at the background of the Patrialis, some parties debate the appointment of Patrialis as a constitutional judge. One of the reasons for the disapproval of Patrialis as a constitutional judge is Patrialis's status as the Minister of Law and Human Rights which was dismissed by President Susilo Bambang Yudhoyono (SBY).<sup>30</sup>

This signals a red card for Patrialis himself. In addition, the concern of some parties against Patrialis is against Patrialis's background as a member of a political party. Remember Akil's case, that Akil is also a member of a political party. This is a trauma for the community. When the appointed Patrialis became a judge of the Constitutional Court, he assured his independence as a constitutional judge.<sup>31</sup>

Unfortunately, this is not proven until the end of the Patrialis period. The constitutional judges must have integrity, good moral, just and statesman is not embedded in Patrialis before being a constitutional judges. This is certainly a big problem for the Constitutional Court in the future. Seeking the background of potential judges is necessary, so that the Constitutional Court can produce judges who have the integrity.

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<sup>29</sup>Saldi Isra, 2017, "Upaya Menyelamatkan MK", available at: <https://www.pressreader.com/indonesia/kompas/20170203/281625305034150>, accessed on Tuesday 23 May 2017, at 2.29pm.

<sup>30</sup>Erwin Dariyanto, 2017, "Rapor Merah dan Kontrovensi Patrialis Akbar Jadi Hakim MK", available at: <https://news.detik.com/berita/d-3406122/rapor-merah-dan-kontroversi-patrialis-akbar-jadi-hakim-mk>, accessed on Wednesday 31 May 2017, at 10.45pm.

<sup>31</sup>Anonymous, "Profil Hakim Mahkamah Konstitusi", available at: <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilHakim&id=670>, accessed on Wednesday 31 May 2017, at 10.53pm.

In response to the case of Akil Mochtar and Patrialis Akbar, Prof. Dr. Ni'matul Huda SH., M.Hum states that supposedly the candidates of the constitutional judges are not from political parties. If the judge candidates are members of political parties, they should resign their membership for quite a sometime before signing up as a constitutional judge.<sup>32</sup>

Actually, the candidates of constitutional judge who have a political party background is not a problem, but what must be considered is the morality and also the background of life the candidates of constitutional judge. Therefore, the track record inspection of the candidates should be done more thoroughly.

### **C. Selection Mechanism of Constitutional Court Judges**

#### **1. Selection Mechanism of Constitutional Court judges in Indonesia**

In Article 24C paragraph (3) of the 1945 Constitution, it is stated, “The Constitutional Court shall be composed of nine persons who shall be constitutional judges and who shall be confirmed by the President, and three judges shall be nominated by the Supreme Court, three judges nominated by the House of Representative, and three judges nominated by the President”. In addition, this is also regulated in Article 18 paragraph (1) of Law Number 24 of 2003 on Constitutional Court that stated, “Constitutional judges shall be nominated respectively three judges by the Supreme Court,

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<sup>32</sup>From interview with Ni'matul Huda an expert of Constitutional Law in Pascasarjana Universitas Islam Indonesia, on Tuesday 8 August 2017 at 13.10pm.

three judges by the House of Representative and three judges by the President, to be issued in a Presidential Decree”.

The composition of constitutional judges from the three branches of state organs is to reflect the balance and representation of the three branches of state within the Constitutional Court body as a judicial power executive body that strengthens the checks and balances system between the branches of state organ (executive, legislative and judiciary). Then with the recruitment of the constitutional judges of three institutions, it is can expected that it obtains independent constitutional judges. The level measure of independence is reflected in the application of objective and accountable principles, which is transparent and respects participatory principles.

The objective and accountable principles are set forth in article 20 paragraph (2) which states, “The recruitment of constitutional judges referred to paragraph (1) shall be conducted in an objective and accountable manner”. These principles apply to the procedures for the recruitment system of constitutional judges from each institution that is authorized to recruit the judges.<sup>33</sup> In the selection of constitutional judges for the period 2003-2008, the President directly appointed three candidates for constitutional judge, the Supreme Court also made an internal selection mechanism for the constitutional judges, and the House of Representative

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<sup>33</sup>Article 20 paragraph (1) on Constitutional Court Law.

conducted a fit and proper test before submitting the Candidate for constitutional judges

The recruitment of members of the constitutional judges from three state institutions represents the mechanism of representation of three main branches from different state organs. It means that the representation of each institution will not interfere the Constitutional Court because after being appointed as constitutional judges, every constitutional judge must present himself as a judge of the Constitutional Court which is no longer affected by the state organs which appoint them.<sup>34</sup>

However, in practice, the court must not avoid any interference from the state organ. Therefore, the recruitment of constitutional judges is not only from one state organ. The composition from the three state organs may function the check and balance among the three organs.

If there is a termination of period of constitutional judges, the organs which appointed them will propose new judges. For example, the judge "A" dies or dismissed if the nomination of the judges from the President, the President has authority to appoint new judges. If the nomination previously came from the House of Representatives, then replacement the judges should be submitted by the Parliament. In other words, in the recruitment of constitutional judges, the Constitutional Court is closely connected with 3

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<sup>34</sup>Ahmad Fadlil Sumadi, 2011, "Independensi Mahkamah Konstitusi", *Jurnal Konstitusi*, Vol. 8, No. 2, 2011, Mahkamah Konstitusi Republik Indonesia, p. 639-640.

(three) equivalent state institutions i.e. the President, the House of Representatives and the Supreme Court.<sup>35</sup>

Next is on the principle of transparency. This principle aims to avoid irregularities in the process of recruitment of candidates for constitutional judges that may contain political elements. Considering that constitutional judges hold a very important role, it requires an independent figure. Based on Article 19 of Constitutional Court Law and its explanation, nomination of constitutional judge candidates shall be conducted in a transparent and participatory manner. The article also explains that, the names of the candidates for the positions of constitutional judges will be published in the print as well as in the electronic mass media to give people the opportunity to contribute in the process of recruitment of judges the designated judges.

In order to carry out the task of selecting a candidate of judge, an institution which proposes constitutional judges conducts registration and recruitment openly by involving the participation of the society. The participation of the society can be given by providing feedback on candidates' quality and personality for the institutions and their teams in charge of the candidates' selection process. Recruitment committee also needs correct information which is based on research and public opinion to the recruitment proponent to know the complete track record of the candidate. The implementation of proper recruitment and stages as well as

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<sup>35</sup>Jimly Asshiddiqie, 2017, "Kedudukan Mahkamah Konstitusi Dalam Struktur Ketatanegaraan Indonesia", available at: <http://www.jimlyschool.com/read/analisis/238/kedudukan-mahkamah-konstitusi-dalam-struktur-ketatanegaraan-indonesia/>, was accessed on Wednesday 24 May 2017 at 4.35pm.

the open and transparent recruitment mechanism involving the community is actively supported by guidelines that have been determined and agreed upon, then surely can get the candidates of constitutional judge who has the ability of science, professionalism and integrity that can be responsible for.

The public should be able to obtain information or access the process of recruitment of candidate of judges. The process and rationality of policy making in recruitment must be transparent and accountable to the public. This form of transparency can be done by making it easy for community members to access any decision-making process and creating a more open system of recruitment rules. Before the judges are appointed, the result should be announced to the public, so that the public will know the candidates of judges and at the same time, they can give an opportunity for the members of the community who want to file an objection. The entire process of recruitment of candidate of judges should be accountable to the public, especially the quality of judges and all the expenses required for the recruitment of judges.

It could be concluded that the word "transparent" and "participative" in Article 19 of the Constitutional Court Law should be interpreted as an open effort that allows or opens opportunities for the community to provide input to the parties related to the selection of constitutional judges on the candidates of the constitutional judges who will or are being selected. To ensure the existence of "transparent" and "participatory" efforts, publication

through mass media of both printing and electronic as explained by explanation of Article 19 of the Constitutional Court Law, is required.

The explanation of Paragraph 19 of Constitutional Court Law states, “Based on this provision, the names of the candidates for the positions of constitutional judges will be published in the print as well as in the electronic mass media to give people the opportunity to contribute inputs regarding to the designated judges”. Related matters "published in newspapers, magazines and electronics" are regarded as examples of the "transparent and participatory" nature of the provisions and that there are no alternative measures to implement "transparent and participatory" provisions.

The process of nominating a constitutional judge must at least meet the following two criteria: first, the candidate is publicly known before the election; and secondly, the election criterion is clear. The clarity of the selection criteria must include the certainty of the selection process, and the selection of the constitutional judges is not only followed by a single candidate. Meanwhile, to be called "participative", the process of nominating constitutional judges must accommodate the aspirations of the community by opening the widest to the public about the information about each candidate of constitutional justices, and giving opportunity to the community who intend to give input to the team/selection committee about the candidate constitution judge that nominated.

## **2. Lesson Learned from South Korea**

Similar to Indonesia, Constitutional Judges in South Korea were also elected by three institutions. This is governed by the Korean Constitution Article 111 paragraph (2) stated that, "The Constitution Court shall be composed of nine adjudicators qualified to the court of judges, and they shall be appointed by the President" and also in paragraph (3) stated that, "Among the Justices referred to in Paragraph (2), three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice". In detail, this is set out in Article 6 Korean Law of Constitutional Court about the Appointment of Justices:

- (1) Justices shall be appointed by the President. In such case, from among the Justices, three shall be elected by the National Assembly, and three shall be nominated by the Chief Justice of the Supreme Court.
- (2) Justices shall be appointed, elected or nominated, following personnel hearings of the National Assembly. In such case, the President shall request a personnel hearing before he/she appoints the Justices (excluding those elected by the National Assembly, or nominated by the Chief Justice), and the Chief Justice shall request a personnel hearing before he/she nominates the Justices.
- (3) When the term of office of a Justice expires, or he/she reaches the retirement age, his/her successor shall be appointed until the date of termination of his/her office or the date on which the Justice reaches the retirement age.

But there is a different recruitment system of constitutional judges in Indonesia and South Korea, namely the recruitment mechanism by each institution. In Indonesia, the judges are chosen by the three institutions i.e. the House of Representative, the President and the Supreme Court. They use a closed system within the judicial selection process, except for the House of Representative. Whereas South Korea, uses open systems in all institutions proposing to use the hearing. Hearing is one of the fit and proper test to test the ability of a person.<sup>36</sup>

The comparison of selection mechanism between Indonesian and South Korean can be seen in the table follows:

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<sup>36</sup>Iwan Satriawan, Muhammad Khaeruddin Hamsin, Prima Indah Lestari, 2016, *Pengisian Jabatan Hakim Agung dan Hakim Konstitusi: Seleksi Hakim Konstitusi di Indonesia, Korea Selatan, dan Perspektif Islam*, Jakarta. Rajagrafindo Persada p. 459.

**Table 4.2 List of the Comparison Selection Mechanism of Constitutional Court Judges**

No.	The Selection Mechanism	Indonesian	South Korean
1.	The composition of judges	9 (nine) judges	9 (nine) judges
2.	The Institutions who select the Judges	The President The Supreme Court The House of Representative	The President The Supreme Court The National Assembly
3.	The process to select	a) The President: establish the selection committee, then the results announced to the public. b) The Supreme Court: direct, internal and close. c) The House of Representative: there is a fit and proper test and open to the public.	The three institutions using open systems and proposing to use the hearing.

### 3. Selection Mechanism of Judge in Islam

In appointing a judge, the head of state must know that the judges have fulfilled the requirements. If he does not know whether the candidates fulfill the requirements or not, he should find out whether the candidates are qualified or not. If the information obtained is clear and strong, then the information can be used as a basis to appoint someone to be a judge. But if the head of state does not know the person himself, or does not have any sufficient information about the candidate of judge, the candidates of judge should be assessed by two witness who can explain about the candidates' quality. Afterwards, the head of state would conduct a test to further ensure the candidates's quality.<sup>37</sup> This process of recruitment is like a fit and proper test and tracking the record of candidates of judges in Islam.

From the above explanation, there are several important points in the recruitment mechanism of judges in Islam. First, the recruitment mechanism of judges in Islam is different from the system of judges in current modern state. The system to recruit the judges is a system with registration open to the public, but Islam uses mechanism of head hunting. The head hunting mechanism is done by finding the best people, doing a fit and proper test, tracking the candidate records and asking for testimony or recommendations by trusted witness.<sup>38</sup>

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<sup>37</sup>Zakil Fuad, 2010, "Analisis Hukum Islam dan UU No.3 Tahun 2006 Tentang Peradilan Agama Terhadap Syarat Tinggi Badan Bagi Pendaftar Calon Hakim Pengadilan Agama, Undergraduate Thesis Published", Indonesia: Institut Agama Islam Negeri Sunan Ampel. p. 36.

<sup>38</sup>Iwan Satriawan, Muhammad Khaeruddin Hamsin, Prima Indah Lestari, 2016, *Op. cit.*, p. 467.

Second, the construction of recruitment of judges in Islamic tradition is based on the authority of a strong and pious leader figure and a shura assembly consisting of scholars and pious and learned people. Therefore, the recruitment of judges is entirely the authority of the leader (prophet / sahabah / caliph). Meanwhile, modern state concepts is based on the assumptions that every individual has the potential to be corrupt and abuse power. Therefore, so that power must be shared and mutually compliment one another. Therefore, the principle of checks and balances is necessary for the present system of judges.

Thirdly, in the Islamic tradition, the power rests on two elements of leadership i.e. leaders (prophet / sahabah /caliph) and the shura assembly. These two elements of leadership are the pillars of state power. The quality of these two institutions determines the elements of other state powers such as legislation and ministers, involving in the appointment process of a judge. The quality of leaders will determine the quality of the people who will be elected ministers, state commissioners, as well as judges.<sup>39</sup>

The position of judges in Islam is important and therefore judges have to be very competent. The judge is not a profession. Judges is a position of trusteeship on selected person. At the time of Prophet Muhammad SAW, when a sahabah received a mandate of a position, the word that came out was, "*Innalillah*". However, nowadays when people get a position, especially as a leader, the word that comes out is, "*Alhamdulillah*". In fact,

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<sup>39</sup>*Ibid*, p. 467-468

every leader will be asked about their responsibility. Not only in the world, but also in the hereafter.<sup>40</sup> For today's society, a judge is a profession who then earns a salary. When deciding cases, it is not an easy matter. This is a very heavy mandate which can decide the fate of a person.

In the present era, it's hard to find a judge who has a good moral. In a hadith narrated by Ahmad and Arba'ah and authorized by Ibnu Khusaimah and Ibnu Hibbah, it's mentioned:

*"There are three group of Judge, one group will enter Paradise and the other two will go to Hell. The judges who will enter Heaven are judges who meet the requirements of intellectuality, professionalism and have good moral and decide the case properly and correctly according to the guidance of Allah and His Messenger. While one class of judges who enter Hell is a judge who has knowledge / intellectual and high professionalism, but he did not decide the case with the guidance of Allah and his Messenger but he decided the case with his lust. And one more group of judges who will go to Hell is a foolish judge, not having enough knowledge and no professionalism in the field of duty and deciding cases with his ignorance".<sup>41</sup>*

#### **D. The Problem of Selection Mechanism**

As determined by the 1945 Constitution, to file a constitutional judge, the process is carried out by three institutions (the House of

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<sup>40</sup>Koesmoko, 2013, "Memilih Pemimpin Menurut Islam", available at: <http://www.ldii-sidoarjo.org/2013/12/memilih-pemimpin-menurut-islam.html>, accessed on Wednesday 7 June 2017, at 11.53pm.

<sup>41</sup>Awaludin, "Hakim yang Ideal menurut Kacamata Islam", p. 2, taken from [www.komisiyudisial.go.id/download.php%3Ffile%3DHAKIM%2520YANG%2520IDEAL%2520MENURUT%2520KACAMATA%2520ISLAM.pdf+%cd=1&hl=en&ct=clnk&gl=id](http://www.komisiyudisial.go.id/download.php%3Ffile%3DHAKIM%2520YANG%2520IDEAL%2520MENURUT%2520KACAMATA%2520ISLAM.pdf+%cd=1&hl=en&ct=clnk&gl=id), downloaded on Tuesday 6 June 2017 at 1.40am.

Representative, the President and the Supreme Court). Article 18 Paragraph (1) of the Constitutional Court Law reaffirms this process and then the judges, shall then be stipulated by Presidential Decree. Then how is the selection process of constitutional judges conducted in each institution? The Constitutional Court shall surrender fully to the competent authority to regulate the procedures for the selection, election and submission of constitutional judges.<sup>42</sup> Nevertheless, the Constitutional Court Law also regulate that the process of nominating constitutional judges be conducted in a transparent and participatory manner.<sup>43</sup>

Under this provision, candidates name for constitutional judges are published in public, so that public have the opportunity to participate in providing input on the candidate of judge. The selection process of constitutional judges, should implement the principle of objectivity and accountability.<sup>44</sup> The question is how do the House of Representatives, the President and the Supreme Court conduct the selection of constitutional judge? Is there any procedure that is further regulated and how are the selection principles determine by the Constitutional Court Law applied? In fact, each of these institutions imposed different selection procedures.

The replacement of the constitutional judges from 2003 to 2014 conducted by these three institutions can be seen through the table as follows:

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<sup>42</sup> Article 20 paragraph (1) Law No. 24 of 2003 on Constitutional Court.

<sup>43</sup> Article 19 Law No. 24 of 2003 on Constitutional Court.

<sup>44</sup> Article 20 paragraph (2) UU No 24 of 2003 on Constitutional Court.



Table 4.3 List of Constitutional Court Judges<sup>45</sup>

No.	Constitutional Judge	Proposer Institutions	Active period (Date / month / year)	Replacement		The Way of Recruitment
				Replaced by	Replace	
1.	Prof. Dr. Jimly Asshiddiqie, S.H (Constitutional judge in 1 <sup>st</sup> period.)	The House of Representative	16 August 2003 Up to 16 August 2008	-	-	Stipulated by House of Representatives Commission III. Executed with fit and proper tests.
	Prof. Dr. Jimly Asshiddiqie, S.H (Constitutional judge in 2 <sup>nd</sup> period.)	The House of Representative	16 August 2008 Up to 6 October 2008	Dr. Harjono, S.H., MCL	-	Stipulated by House of Representatives Commission III. Executed with fit and proper tests.
2.	Prof. Dr. H. M. Laica Marzuki, S.H	The Supreme Court	6 August 2003 Up to 16 August 2008	Dr. H.M Arsyad Sanusi, S.H., M.H	-	Direct, internal, never-before-announced process, criteria of the supreme judge or career judge
3.	Soedarsono, S.H	The Supreme Court	16 August 2003 Up to 16 August 2008	Dr. Muhammad Alim, S.H., M.Hum	-	Direct, internal, never-before-announced process, criteria of the supreme judge or career judge
4.	Dr. Maruarar Siahaan, S.H (Constitutional judge in 1 <sup>st</sup> period.)	The Supreme Court	16 August 2003 Up to 16 Agustus 2008	Dr. H. Ahmad Fadlil Sumadi, S.H., M. Hum.	-	Direct, internal, never-before-announced process, criteria of the supreme judge or career judge
	Dr. Maruarar Siahaan, S.H (Constitutional judge in 2 <sup>nd</sup> period.)	The Supreme Court	16 August 2008 Up to 16 August 2013	Dr. H. Ahmad Fadlil Sumadi, S.H., M.Hum	-	Direct, internal, never-before-announced process, criteria of the supreme judge or career judge
5.	Letjen. TNI (Purn)/ H. Achmad Roestandi, S.H	The House of Representative	16 Augusts 2003 Up to 16 August 2008	Prof. Dr. Moh. Mahfud MD, S.H	-	Stipulated by House of Representatives Commission III. Executed with fit and proper tests.
6.	I Dewa Gede Palguna, S.H., M.H	The House of Representative	16 August 2003 Up to 16 August 2008	Dr. H.M. Akil Mochtar, S.H., M.H	-	Stipulated by House of Representatives Commission III. Executed with fit and proper tests.

<sup>45</sup>Winda Wijayanti, Nuzul Quraini M, Siswantana Putri R, 2015, *Op. cit.*, p. 666-669.

7.	Prof. H.A. S. Natabaya, S., LL.M.	The President	16 August 2003 Up to 16 August 2008	Prof. Dr. Achmad Sodiki, S.H	-	The formation of the selection committee, results were announced to the public.
8.	Prof. H. Abdul Mukhtie Fadjar, S.H., M.S.	The President	16 August 2003 Up to 16 August 2008	-	-	The formation of the selection committee, results were announced to the public.
	Prof. H. Abdul Mukhtie Fadjar, S.H., M.S	The President	16 August 2008 Up to 16 August 2013	Dr. Hamdan Zoelva, S.H., M.H	-	The formation of the selection committee, results were announced to the public.
9.	Dr. Harjono, S.H., MCL. (Constitutional judge in 1 <sup>st</sup> period.)	The President	16 August 2003 Up to 16 August 2008	Prof. Dr. Maria Farida Indrati, S.H., M.H	Prof. Dr. Jimly Asshiddiqie, S.H	The formation of the selection committee, results were announced to the public.
	Dr. Harjono, S.H., MCL. (Constitutional judge in 2 <sup>nd</sup> period.)	The House of Representative	24 March 2009 Up to 24 March 2014	Prof. Dr. Aswanto, S.H., M.Si., DFM	-	Stipulated by House of Representatives Commission III. Executed with fit and proper tests.
10.	Dr. H. M. Arsyad Sanusi, S.H., M. Hum	The Supreme Court	29 May 2008 Up to 29 May 2013 (Resigned on 11 February 2011)	Dr. Anwar Usman, S.H., M.H	Prof. Dr. H. M Laica Marzuki, S.H	Direct, internal, never-before-announced process, criteria of the supreme judge or career judge.
11.	Prof. Dr. Moh. Mahfud MD., S.H	The House of Representative	1 April 2008 s/d 1 April 2013	Prof. Dr. Arief Hidayat, S.H., M.S	Letjen TNI (Purn). H. Achmad Rpestandi, S.H	Stipulated by House of Representatives Commission III.
12.	Dr. H. M. Akil Mochtar, S.H., M.H (Constitutional judge in 1 <sup>st</sup> period.)	The House of Representative	16 August 2008 Up to 16 August 2013	-	I Dewa Gede Palguna, S.H., M.H	Stipulated by House of Representatives Commission III. Executed with fit and proper tests.
	Dr. H. M. Akil Mochtar, S.H., M.H (Constitutional judge in 2 <sup>nd</sup> period.)	The House of Representative	13 August 2013 Up to 14 August 2018	Dr. Wahiddudin Adams, S.H., M.A	-	Extension of term of office. Not involving the people.

13.	Prof. Dr. Achmad Sodiki, S.H	The President	16 August 2008 Up to 16 August 2013	Dr. H. Patrialis Akbat, S.H., M.H	Prof. H. Ahmad Syarifudin Natabaya, S.H., LL.M	The formation of the selection committee, chaired Wantimpres Selection by Adnan Buyung Nasution, results were announced to the public.
14.	Dr. Muhammad Alim, S.H., M. Hum (Constitutional judge in 1 <sup>st</sup> period.)	The Supreme Court	1 July 2008 Up to 1 July 2013	-	H. Soedarsono, S.H	Direct, internal, never-before-announced process, criteria of the supreme judge or career judge.
	Dr. Muhammad Alim, S.H., M. Hum (Constitutional judge in 1 <sup>st</sup> period.)	The Supreme Court	1 July 2013 Up to 1 July 2015	-	-	Direct, internal, never-before-announced process, criteria of the supreme judge or career judge.
15.	Dr. Hamdan Zoelva, S.H., M.H.	The President	7 January 2010 Up to 7 January 2015	-	Prof. H. Abdul Mukhtie Fajar, S.H., M.S.	Sending letter of proposal to the President.
16.	Prof. Dr. Maria Farida Indrati, S.H., M.H. (Constitutional judge in 1 <sup>st</sup> period.)	The President	16 August 2008 Up to 16 August 2013	-	Dr. Harjono, S.H., MCL.	The formation of the selection committee, chaired Wantimpres Selection by Adnan Buyung Nasution, results were announced to the public.
	Prof. Dr. Maria Farida Indrati, S.H., M.H. (Constitutional judge in 2 <sup>nd</sup> period.)	The President	13 August 2013 Up to 16 August 2018 -	-	-	Ministry of Justice and Human Rights appealed to the President, the process can be liquid from academics.
17.	Dr. H. Ahmad Fadlil Sumadi, S.H., M. Hum.	The Supreme Court	7 January 2010 Up to 7 January 2015	-	Dr. Maruarar Siahaan, S.H.	Direct, internal, never-before-announced process, criteria of the supreme judge or career judge.
18.	Dr. Anwar Usman, S.H., M.H.	The Supreme Court	6 April 2011 Up to 6 April 2016	-	Dr. M. Arsyad Sanusi, S.H., M.Hum.	Direct, internal, never-before-announced process, criteria of the supreme judge or career judge.

19.	Prof. Dr. Arief Hidayat S.H., M.S.	The House of Representative	1 April 2013 Up to 1 April 2018	-	Prof. Dr. Moh. Mahfud MD, S.H.	Stipulated by Commission III of DPR. Conducted fit and proper test and involve the public.
20.	Dr. H. Patrialis Akbar, S.H., M.H.	The President	22 July 2013 Up to 22 July 2018	-	Prof. Dr. Achmad Sodiki, S.H.	The Ministry of Justice and Human Rights appealed to the President.
21.	Prof. Dr. Aswanto, S.H., M.Si., DFM.	The House of Representative	21 March 2014 Up to 21 March 2019	-	Dr. Harjono, S.H., MCL.	Appears public participation for their public opinion
22.	Dr. Wahiduddin Adams, SH., MA.	The House of Representative	21 March 2014 Up to 21 March 2019	-	Dr. M. Akil Mochtar, S.H., M.H.	Appears public participation for their public opinion

\*) Source: Secondary Material, processed in 2014

The informatin on table above can be a benchmark for comparison in the recruitment system of candidates for constitutional judges, which is the best system of recruiting the candidates of constitutional judges.

The case of corruption that was committed by two constitutional judges i.e. Akil Mochtar and Patrialis Akbar had caused great disappointment among society. This raises the view among the society the position of judges in Indonesia is not as sacred as those in the courts of antiquity.<sup>46</sup> This should not happen to the Constitutional Court, considering that the Constitutional Court is a state institution whose powers and authorities are determined by the 1945 Constitution. Constitutional judges should have integrity, good morals, statesmanship and independence. How can this happen in the Constitutional Court? Then what are the requirements and mechanisms for the selection of constitutional judges? Are there problem in both?

By looking at the track record of the Constitutional Court from the beginning stand and operate over the last 10 years. Before the case of corruption that happened to Akil Mochtar, the Court had become an institution trusted by the public as an institution that became the solution to constitutional problems in this country. If the requirements of judge have been settled, then what need to be done is an improvement to the selection system, because until

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<sup>46</sup>Luhup M.P. Pangaribuan, 2016, *Pengadilan, Hakim, dan Advokat: Catatan Hukum Luhut M.P. Pangaribuan*, Jakarta, Pustaka Kemang Anggota IKAPI. p. 112.

now there have been already two judges who are entangled in corruption case.<sup>47</sup>

Therefore, the author is trying to explore the first selection system of Akil Mochtar and Patrialis Akbar. Akil Mochtar is a judge elected by the House of Representatives. The House of Representatives has elected constitutional judges for six selection periods. The first period (I), namely, the selection of judges Jimly Asshiddiqie, I Dewa Gede Palguna, and Achmad Roestandi. The second period (II) is the selection for the next judges Mahfud MD, Jimly Asshiddiqie, and Akil Mochtar. The third period (III) is an extension of the constitutional position of Judge Akil Mochtar. The fourth period (IV) is the selection of constitutional judge Harjono who replaced Jimly Asshiddiqie. The fifth period (V) is the selection of constitutional judge Arief Hidayat replaced Mahfud MD and sixth period (VI) is a constitutional judge chosen candidate Wahiduddin Adams and Aswanto replaced constitutional judge Akil Mochtar and Harjono.

The selection of constitutional judges conducted by the House of Representatives, so far employs transparent, participatory, objective and accountable principles. The candidates of judges are announced to the public to be given input by the community. Besides, it is also a fit and proper test for

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<sup>47</sup>Christie Stefanie, 2017, "Pemerintah Dukung Seleksi Hakim MK", available at: <http://www.cnnindonesia.com/nasional/20170131202534-12-190396/pemerintah-dukung-perbaikan-seleksi-hakim-mk/>, accessed on 27 May 2017 at 00:28am.

candidates. However, in the second period (II) these principles were not applied due to the narrow time and the absence of candidates in the stretcher by the fraction. Unfortunately, in the third period (III) which is an extension of tenure of Judge Akil Mochtar is not implemented fit and proper test is not implemented. As it is known, Akil served as a constitutional judge since 2008 through a selection in the House of Representative. Akil tenure runs out on 16 August 2013.

However, the term of office was extended by the Commission III of the House of Representative until the year 2018.<sup>48</sup> The process is brief and also closed. In this period, it is only inquiring directly to the person concerned, Akil Mochtar, about his willingness to reoccupy positions as judge of the Constitution. Therefore, in this third (III) period, the House of Representatives does not carry out its obligation to involve the people in giving input to candidates for constitutional judge. According to some experts, the process of extending Akil's term of office in the House of Representative is unclear.<sup>49</sup> Akil was re-selected without a fit and proper test and without hearing public's consideration. This is an omission in the House of Representatives in the selection process, because it can be seen with a selection process that is

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<sup>48</sup>Sabrina Asril, 2013, "Memang ada Kejanggalan dalam Perpanjangan Masa Jabatan Akil Mochtar", available at: <http://nasional.kompas.com/read/2013/10/14/1426485/.Memang.Ada.Kejanggalan.dalam.Perpanjangan.Masa.Jabatan.Akil.Mochtar>, accessed on Saturday 3 June 2017 at 3.38pm.

<sup>49</sup>Iqb/Mad, 2013, "Anggota Komisi III: Perpanjangan Akil Sebagai Hakim MK Memang Janggal", available at: <http://news.detik.com/berita/2385669/anggota-komisi-iii-perpanjangan-akil-sebagai-hakim-mk-memang-janggal>, accessed on Saturday 3 June 2017, at 3.43pm.

not optimal will lead to undesirable events. Although the selection mechanism that carried out by the House of Representative has a fit and proper test and transparent to the public, but the selection mechanism that implement by the House of Representative still contains the political elements.

Then, the selection process conducted by the President. In the selection of the first period (I), the President through the Department of Law and Human Rights conducted a selection of constitutional judges' candidate, which was then investigated and decided jointly by the Minister of Law & Human Rights, the Attorney General and the Coordinating Minister for Political and Security Affairs (Menkopolkam) before being submitted to the President. For the second (II), the President gives his authority mandate to the Presidential Advisory Council (Watimpres).<sup>50</sup>

Patrialis Akbar is a judge elected by the President and elected to replace Judge Achmad Sodiki, with active tenure from 2013 to 2018. Unfortunately, on 26 January 2017 the constitutional judge Patrialis Akbar was arrested by the Anti-corruption Eradication Commission. Patrialis allegedly accepted a bribe related to the judicial review of Law No. 41 of 2014 on Animal

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<sup>50</sup>Tim KRHN, 2008, "Menggapai Keadilan Konstitusi: Suatu Rekomendasi Untuk Revisi Undang-Undang Mahkamah Konstitusi", p. 64, available at: <http://reformasihukum.org/ID/file/buku/Menggapai%20Keadilan%20Konstitusi-Suatu%20Rekomendasi%20Untuk%20Revisi%20UU%20Mahkamah%20Konstitusi.PDF>, downloaded on Sunday, 4 June 2017, at 6.31pm.

Husbandry and Health. This event repeats disappointment and wounds among the people of Indonesia.

The nomination of Patrialis as a constitutional judge, has gained a lot of opposition from the public. According to the Civil Society Coalition Save the Constitutional Court, Patrialis's nomination as a constitutional judge is deemed flawed and was ignore the track record of Patriliias.<sup>51</sup> Patrialis is considered to have a red report card, one of the red report card is the removal of Patrialis position as Minister of Law and Human Rights by President SBY, then the disclosure of luxury cell scandal owned by Artalyta Suryani at Pondok Bambu Detention Center in East Jakarta.<sup>52</sup> So this is a big question for the community itself, why someone who has a red report card should be nominated to constitutional judge.

In 2013, the Civil Society Coalition to save the Constitutional Court sued Patrialis appointment as a constitutional judge based on Presidential Decree No. 87 / P 2013 to State Administrative Tribunal. The essence of the lawsuit is to revoke the Presidential Decree issued by the President on the appointment of Patrialis as a constitutional judge. They argue that some

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<sup>51</sup>No name, "Patrialis Akbar Tidak Layak Menjadi Hakim Konstitusi" available at: <http://www.antikorupsi.org/en/content/patrialis-akbar-tidak-layak-menjadi-hakim-konstitusi>, accessed on Sunday 4 June 2017, at 1.25pm.

<sup>52</sup>Erwin Dariyanto, 2017, "Rapor Merah dan Kontroversi Patrialis Akbar jadi Hakim MK", available at: <https://news.detik.com/berita/d-3406122/rapor-merah-dan-kontroversi-patrialis-akbar-jadi-hakim-mk>, , accessed on Sunday 4 June 2017, at 1.34pm.

violations have been committed during the nomination of Patrialis as constitutional judge are as follows:<sup>53</sup>

**Firstly**, the appointment of Patrialis has violated Article 15 of the Constitutional Court Law concerning integrity, honorable personality, impeccability, and fairness and statesmanship in which the person should be who are experts in constitution and state administration. This norm is violated because in the selection of Patrialis there was no fit and proper test and therefore, there was no enough tracking record of the candidate. As a result, the selection of Patrialis did not guarantee the ability and integrity of the candidate.

**Secondly**, the appointment of Patrialis has violated Article 19 of the Constitutional Court Law concerning transparency and participation in which there was an absence of transparency in the selection of the constitutional judge. In addition, it did not fulfill the principle of transparency which involves public participation in monitory supervision and provide enough input about the candidates.

**Third**, Article 20 Paragraph 2 on Constitutional Court Law about the selection of the constitutional judges that shall be conducted objectively and

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<sup>53</sup>Yustinus Paat. 2017, "Pengangkatan Patrialis Akbar Jadi Hakim Konstitusi Dinilai Langgar UU", available at: <http://www.beritasatu.com/hukum/411552-pengangkatan-patrialis-akbar-jadi-hakim-konstitusi-dinilai-langgar-uu.html>, accessed on Sunday 4 June 2017, at 1.48pm.

accountable because if it is not open for public participation and transparency, it may negate the objectivity and accountability of the nomination of judges.

**Fourth**, the appointment has also violated Article 3 of Law Number 28 Year 1999 concerning the State's Clean Up and Free from Corruption, Collusion and Nepotism (KKN). In this context there is a violation of the principle of orderliness and openness.

**Fifth**, violating Article 9 paragraph (1) sub-paragraph of Law Number 28 Year 1999 concerning Clean State Delivery and Free from KKN. The President is considered to have violated the right of the community to participate in seeking, obtaining, and providing information on the implementation of the state.

Due to the case of Patrialis Akbar. Now the selection mechanism of judge Saldi Isra as the replacement of former judge Patrialis Akbar, that was conducted by the President was used fit and proper test and also open to public in every process.

The selection by the Supreme Court is more closed in comparison to the selection conducted by the House and the President. So far, there is no clear information on how the Supreme Court conducted the selection. The Supreme Court only determines the names of candidates for constitutional judges from the judges (Supreme Court and Judge of the high court / PTUN), then

submitted to the President to be appointed / legalized.<sup>54</sup> Although so far there is no judge from the Supreme Court who are involved in the corruption case. Supposedly, what happened to this Court can be used as a lesson for each institution, to be more transparent and careful in selecting candidates for constitutional judges.

According to Sunaryati Hartono, the development of law includes four (4) points: (1) Improving (make something good); (2) Changing for better; (3) Conducting something that has not yet existed; or (4) Eliminating unnecessary and compatible aspects contained in the old system.<sup>55</sup> Based on the opinion of Sunaryati Hartono, the writer wants to suggest several things for the selection mechanism, such as:

*First*, the selection mechanism of constitutional judges shall be transparent and open to the public. There is no alternative except transparent and open to the public. This is similar to the South Korean mechanism which conducts judicial selection in a transparent and public manner.

*Second*, to regulate in the Law specifically about the selection made by the three institutions namely the House of Representatives, the President and the Supreme Court.

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<sup>54</sup>Tim KRHN, *Lo.cit.*, p. 64

<sup>55</sup>Zihan Syahayani, 2014, *Pembaharuan Hukum Dalam Sistem Seleksi dan Pengawasan Hakim Konstitusi*, scientific articles published, Malang, Ministry of Education and Culture Universitas Brawijaya. p. 15-16.

*Third*, according to Prof. Dr. Ni'matul Huda S.H., M.Hum, the Judicial Commission shall be involved in the selection mechanism of constitutional judges. The purpose of the involvement of the Judicial Commission is to involve a neutral institution in the election of constitutional judges.<sup>56</sup>

The three institutions should be able to coordinate with each other in the selection of candidates. It is very important to know the background of the candidate. Coordination here aims to ensure the absence of political elements in the selection and also each institution can inspect capability of the candidate of judges.

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<sup>56</sup>From interview Ni'matul Huda an expert Constitutional Law in Pascasarjana Universitas Islam Indonesia, on Tuesday 8 August 2017, at 13.10pm.